The Failure of Justice
Unfair Trial, Arbitrary Detention and Judicial Impropriety in Swaziland

ICJ Trial Observation Report 2015

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Unfair Trial, Arbitrary Detention and Judicial Impropriety in Swaziland
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This report follows observation by the ICJ of the trial before the High Court in Mbabane, Swaziland, in The King v Maseko, Makhubu, The Nation Magazine and Swaziland Independent Publishers (Pty) Ltd.

The report title, 'The Failure of Justice', is taken from the statement of Mr Thulani Maseko to the High Court on 4 June 2014.

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TABLE OF CONTENTS

Executive Summary 4

Acknowledgements 6

1. General Information and Background 7

1.1 Political and human rights background 7
1.2 Criminal justice system 7
1.3 Human rights obligations and standards applicable to Swaziland 8
1.4 Background information on the defendants 9

2. The Trial 11

2.1 Timeline 11
2.1.1 Events pertaining to Mr Bansthana Gwebu and the articles written and published by the accused 11
2.1.2 Events pertaining to the arrest of the accused and other pre-trial matters 11
2.1.3 Events pertaining to the trial of the accused 12
2.1.4 Events following the trial 13

2.2 Venue 14

2.3 The case against the defendants 14
2.3.1 Facts of the case 14
2.3.2 Charges against the defendants 14

2.4 Overview of legal proceedings and procedural issues 16
2.4.1 Initial arrest and detention of Mr Maseko and Mr Makhubu 16
2.4.2 Constitutional challenge to the arrest and detention 17
2.4.3 Application for recusal of trial judge, Judge Simelane 17
2.4.4 Application for bail 18
2.4.5 Trial 19

2.5 Prosecution case 19

2.6 Defence case 19

2.7 Conduct of the trial 20
2.7.1 Defence applications at commencement of trial 20
2.7.2 Defence of *lis pendens* 21
2.7.3 Directions on trial procedure 21
2.7.4 Trial Judge Simelane as witness 21
2.7.5 Prosecution evidence at trial 22
2.7.6 Defence application for dismissal of the case following Crown testimony 22
2.7.7 Defence evidence at trial 26
2.7.8 Closing submissions by the Crown 27
2.7.9 Closing submissions by defence counsel, Advocate Maziya 28
2.7.10 Closing submissions by defence counsel, Advocate Mkhwanazi 30

2.8 Decisions of the trial court 32
2.8.1 Basis of the verdicts 32
2.8.2 Sentences imposed 33
2.9 Appeal proceedings 34

3. Evaluation of the Trial 35
3.1 Legal frameworks used to evaluate the trial 35
3.2 Evaluation of proceedings 35
3.2.1 Initial warrants of arrest against Mr Maseko and Mr Makhubu 35
3.2.2 Remand in custody of Mr Maseko and Mr Makhubu by the Chief Justice 36
3.2.3 Judge Simelane as trial judge 40
3.2.4 Opinion of the UN Working Group on Arbitrary Detention 43
3.3 Application of the law to the charges of contempt of court 44
3.3.1 Laws and standards on the freedom of expression 44
3.3.2 Conviction of the accused 46
3.3.3 Opinion of the UN Working Group on Arbitrary Detention 48
3.4 Evaluation of sentences imposed 48
3.4.1 Laws and standards applicable to sentencing for contempt of court 49
3.4.2 Comparable sentencing provisions and decisions 49
3.4.3 Sentencing of the accused 50
3.4.4 Opinion of the UN Working Group on Arbitrary Detention 51
3.5 Conclusions 51
3.5.1 Unlawful and arbitrary arrest and remand in custody of Mr Maseko and Mr Makhubu 51
3.5.2 Trial not before an impartial tribunal 52
3.5.3 Improper conviction and resulting violation of the freedom of expression 53
3.5.4 Disproportionate sentences 54
3.6 Recommendations 55

Appendices
1. Editorial article written by Mr Maseko and Mr Makhubu, 'Speaking my mind' 57
2. Article written by Mr Maseko, 'Where the law has no place' 60
3. Summaries of evidence adduced at trial 63
4. Written statement of Mr Maseko, read as evidence in the trial on 4 June 2014 81
5. Extracts from national, regional and international law and standards used to evaluate the trial 101

EXECUTIVE SUMMARY

Swaziland is Africa's last absolute monarchy, with King Sobhuza II proclaiming to be the 'supreme power in the Kingdom of Swaziland' and to hold all legislative, executive and judicial power. Although a Constitution, with a bill of rights, was adopted in 2005 as supreme law, constitutional rights are often not respected in practice, or are not interpreted and implemented consistent with regional and international human rights law and standards. For example, while sections 138 and 141 of the Constitution guarantee the independence of the judiciary, in practice judicial independence in Swaziland has not been observed (a matter addressed in a forthcoming Fact Finding Mission report of the ICJ). Swaziland is a party to a number of regional and international human rights treaties, although it has yet to ratify or accede to some key international treaties and it does not recognise the jurisdictional competence of the African Court of Human and Peoples' Rights.

This report follows the ICJ's observation of the trial in 2014 before the High Court in Mbabane, Swaziland, in *The King v The Nation Magazine, Bheki Makhubu, Swaziland Independent Publishers (Pty) Ltd, and Thulani Maseko*. The ICJ chose to observe this trial because it involved charges based on clearly legitimate expressions of opinion on matters of public interest, and because the manner in which two of the defendants, Mr Maseko and Mr Makhubu, were arrested and initially detained at an early stage signalled that they would not be dealt with in an impartial way, such that there were legitimate concerns that the trial of the defendants would not be fair. The ICJ conducted its observation of the trial in line with the ICJ's *Trial Observation Manual for Criminal Proceedings* (ICJ Practitioners Guide No 5).

In February 2014, Mr Maseko and Mr Makhubu wrote an article entitled "Speaking my mind", published in the Nation Magazine, which is owned by Swaziland Independent Publishers (Pty) Ltd. In March 2014, Mr Maseko wrote a second article entitled 'Where the law has no place', also published in the Nation Magazine. The articles criticised the manner in which the former Chief Justice of Swaziland, Justice Michael Ramodibedi, had handled an allegation of contempt of court against Mr Bansthana Vincent Gwebu in January 2014. The charges against the four defendants arose from the fact that the articles were published before the case against Mr Gwebu had been disposed of. The defendants were accused of unlawfully and intentionally issuing statements contemptuous of the court.

The trial involved criminal proceedings before the High Court on two counts, based on the common law offence of contempt of court. The proceedings were governed by the Criminal Procedure and Evidence Act 67/1938. Arrest and other pre-trial issues arose between March and April 2014. The trial was held between April and July 2014, resulting in the conviction of all defendants. Mr Maseko and Mr Makhubu were sentenced to two years' imprisonment, applicable from the time of their arrests. The Nation Magazine and Swaziland Independent Publishers were sentenced to pay fines in the sum of Swazi Emalangeni SZL E50,000.00 (equivalent to approximately 3,800.00 Euros) on each count.

On appeal against convictions and sentences, the Supreme Court of Swaziland quashed the convictions and sentences on 30 June 2015, on the basis that the accused had not received a fair trial, in large part due to the failure of the trial judge, who was one of the persons criticized in the articles written and published by the accused, to recuse himself from acting as trial judge. The decision of the Supreme Court followed the earlier adoption in April 2015 of Opinion 6/2015 by the UN Working Group on Arbitrary Detention, in which the Working Group

concluded that the circumstances involved non-observance by the Kingdom of Swaziland of international norms relating to the right to a fair trial, in this case "of such gravity as to give the deprivation of liberty of Mr Maseko an arbitrary character".

This report concludes that the arrest and detention, trial, conviction and sentencing of the defendants involved multiple violations of the Constitution of the Kingdom of Swaziland, the African Charter on Human and Peoples' Rights, the Principles and Guidelines on the Right to a Fair Trial in Africa and the International Covenant on Civil and Political Rights. Mr Maseko and Mr Makhubu were subjected to unlawful and arbitrary arrest and detention, including violation of their right to legal counsel and their right to a public hearing with respect to their initial appearance before the Chief Justice in his chambers. All aspects of the trial, including pre-trial proceedings before the Chief Justice and the trial judge, involved violation of the right of all defendants to a hearing by an impartial tribunal. The defendants were improperly convicted, in violation of the right to freedom of expression. Even had the convictions been proper, they were sentenced to disproportionately severe sentences, particularly in the case of the sentences of two years' imprisonment of Mr Maseko and Mr Makhubu.

Although the improper convictions and disproportionate sentences have been 'self-corrected', through the Supreme Court of Swaziland's unopposed setting aside of convictions and sentences, it remains the case that Mr Maseko and Mr Makhubu were arbitrarily deprived of their liberty, including because this resulted from the legitimate exercise of their freedom of expression.

This report is divided into three main parts. Part 1 contains basic information on the political and historical background to the trial that was observed, the justice system and the international human rights commitments entered into by Swaziland. Part 2 describes the events that were the subject of the trial as well as the procedures and key issues involved, including pre-trial matters such as those pertaining to the arrest and detention of the accused. Part 3 sets out a detailed examination of the extent to which the trial, including pre-trial matters, complied with national, regional and international laws and standards. This final part of the report identifies recommendations, including that Mr Maseko and Mr Makhubu be provided with prompt and effective remedies and reparation for their unlawful and arbitrary detention between March 2014 and June 2015.

Appearing as Appendices to the report are: the two articles published in The Nation Magazine; summaries of evidence adduced at trial, including a written statement by Mr Maseko; and extracts from national, regional and international law and standards used to evaluate the trial.

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Observation of the contempt of court trial was led by the Director of the Africa Regional Programme (ARP), Arnold Tsunga, and the former Deputy Director of the ARP, Martin Okumu-Masiga. Arnold Tsunga attended nearly all court hearings and has assiduously compiled a comprehensive record of the proceedings. His painstaking efforts have assisted immensely in the drafting of the trial observation report. Arnold Tsunga and Martin Okumu-Masiga were assisted in the observation by their ARP colleagues Otto Saki, Brian Penduka, Lloyd Kuveya and an independent consultant Tarisai Mutangi. Various civil society actors from Zimbabwe, Zambia, Tanzania and South Africa also attended the proceedings and gave moral support to Mr Maseko and Mr Makhubu. Arnold Tsunga was particularly instrumental in raising funds for the social welfare of the families of the incarcerated pair. The funding raised was also used to pay for the escalating legal fees for Mr Maseko's and Mr Makhubu's legal representatives.

The ARP team would like to thank the Secretary-General of ICJ, Wilder Tayler, for his leadership and support in the trial observation. The invaluable comments and suggestions from Jill Heine, Ian Seiderman and Alex Conte are also highly appreciated. Local Swazi lawyers such as Happy Mkhabelah, Sipho Gemedze and Mary Da Silva were extremely helpful in providing useful information and publicity as well as engaging in advocacy on the contempt of court trial. Happy Mkhabelah also contributed to the drafting of the trial observation report.

The ARP team also wish to thank the defence team of Advocate Maziya and Attorney Mkwananzi for their efforts in defending the accused in an environment such as Swaziland where most lawyers shy away from defending cases involving human rights defenders, trade union leaders and political party activists. Last, but not least, the ARP team would like to thank its development partners Freedom House, PAHRDN and OSISA for funding the trial observation as well as attending to the financial needs of the human rights defenders' families. Organisations such as the Southern Africa Litigation Centre, Centre for Human Rights, University of Pretoria, Lawyers for Human Rights, South Africa, SADC Lawyers Association, Zimbabwe Lawyers for Human Rights and Zimbabwe Human Rights NGO Forum have offered tremendous assistance through litigation, trial observation and other advocacy efforts.

1. GENERAL INFORMATION AND BACKGROUND

This part of the report contains basic information on the political and historical background to the trial that was observed, the justice system and the international human rights commitments entered into by Swaziland.

1.1 Political and human rights background

Swaziland is Africa's last absolute monarchy situated between Mozambique and South Africa. King Mswati III and Queen Mother Ntfombi, the King's mother who rules as his co-monarch, possess ultimate authority over all branches of the Swazi Government. Although a Parliament of appointed and elected members exists, as well as a Prime Minister, the King and his traditional advisors retain virtually all political power.

On 12 April 1973, King Sobhuza II made a proclamation in which he "assumed supreme power in the Kingdom of Swaziland" and all legislative, executive and judicial power was vested in him. The proclamation further dissolved and banned all political parties, suspended parliament and dispensed with the bill of rights. Any person who formed a political party was liable to prosecution for violating the King's proclamation.

A new constitution with a bill of rights was adopted in in July 2005. This Constitution is the supreme law of Swaziland. Chapter III of the Constitution of the Kingdom of Swaziland Act 2005 recognizes a number of fundamental rights and freedoms, which according to section 14(2) are to be respected and upheld by the judiciary and are enforceable by the courts. Entitlement to the rights and freedoms is, however, generally "subject to respect for the rights and freedoms of others and for the public interest" (section 14(3)).

Further, in Swaziland constitutional rights are often not respected in practice, or are not interpreted and implemented consistent with regional and international human rights law and standards.[1] For instance, section 86 of the Constitution stipulates that women should form 30% of the members of parliament, and yet there is currently only one female parliamentarian out of 54. A national human rights commission was provided for in the constitution but is neither effective nor independent and has failed to discharge its mandate to promote and protect human rights.

1.2 Criminal justice system

The Criminal Procedure and Evidence Act 67/1938 governs criminal proceedings in the courts. The King of Swaziland is the Commander in Chief of the Police Service and Correctional Services. The police and prison commissioners and their deputies are appointed by the King.

The Director of Public Prosecution (DPP) undertakes prosecutions in the name of the King, as provided in section 162 of the Constitution. The DPP, Mr Nkosinathi Maseko, is employed by the Ministry of Justice. The criminal trial process in Swaziland is adversarial and the presiding judicial officer is not permitted to actively engage in trial matters.

Sections 138 and 141 of the Constitution guarantee the independence of the

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[1] Amnesty International, *Swaziland: Submission to the UN Universal Periodic Review, 12th session of the UPR Working Group* (14 March 2011); Human Rights Watch, Swaziland: Country Summary (January 2012).

judiciary. The judiciary consists of the Supreme Court, High Court, specialised courts such as the Industrial Court and magistrates' courts. In practice judicial independence in Swaziland has not been observed. This is a matter addressed in a forthcoming Fact Finding Mission report of the ICJ.

1.3 Human rights obligations and standards applicable to Swaziland

Swaziland is a State party to the following key international and regional treaties:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Optional Protocol to the ICESCR;
- Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment;
- International Convention on the Elimination of All forms of Discrimination;
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- Convention on the Rights of the Child (CRC);
- Optional Protocol I to the CRC on the involvement of children in armed conflict;
- Optional Protocol II to the CRC on the sale of children, child prostitution and child pornography;
- Convention on the Rights of Persons with Disabilities (CRPD);
- Optional Protocol to the CRPD;
- Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forced in the Field;
- Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- Geneva Convention III relative to the Treatment of Prisoners of War;
- Geneva Convention IV relative to the Protection of Civilian Persons in Time of War;
- Additional Protocol I to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts;
- Additional Protocol II to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts;
- United Nations Convention Against Corruption; and
- African Charter on Human and Peoples' Rights.

Swaziland has signed, but not yet ratified, the International Covenant for the Protection of all Persons from Enforced Disappearances.

Swaziland has neither signed nor ratified or acceded to the following key international treaties:

- Optional Protocol to the ICCPR;
- Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty;
- Optional Protocol to the CAT;
- Optional Protocol to the CEDAW;
- Optional Protocol III to the CRC on a communications procedure;
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and
- Rome Statute of the International Criminal Court.

At the Universal Periodic Review of its human rights record in March 2012, Swaziland accepted recommendations to ratify the International Covenant for the Protection of All Persons from Enforced Disappearance, the International

Convention for the Protection of All Migrant Workers and Members of their Families, the Optional Protocol to the Convention Against Torture and the Rome Statute of the International Criminal Court. It also accepted recommendations to put in place human rights training programmes for members of the judiciary and law enforcement officials, and to take concrete and immediate measures to guarantee the independence and impartiality of the judiciary. None of these recommendations are yet to be complied with. Swaziland's second Universal Periodic Review will be undertaken by the UN Human Rights Council's Working Group on the UPR in April-May 2016.

1.4 Background information on the defendants

1.4.1 The Nation Magazine

The Nation Magazine, listed as the first accused in the trial, is the publication in which the two articles that were the subject of the contempt of court charges were published.

1.4.2 Mr Bheki Makhubu

Mr Bheki Makhubu, listed as the second accused in the trial, is a senior and respected journalist and member of the Swaziland National Association of Journalists. He is the Publisher/Editor of The Nation Magazine, a private publication by a group of Swazis to bring diversity to Swaziland's media industry. He previously worked as Editor of The Times of Swaziland, Sunday achieving a circulation of the newspaper to 20,000 copies a week in the process establishing it as prime Sunday reading in Swaziland. He raised the Nation Magazine to the level where it became self-sustaining, selling over 5,000 copies a week. He has also written for The Star of Johannesburg, The Mail, Guardian and The Sunday Times as their Swaziland correspondent. He has also done commentary for SABC radio and television on events in Swaziland. He has been a media practitioner for a continuous period since 1993 to date.

1.4.3 Swaziland Independent Publishers (Pty) Ltd

Swaziland Independent Publishers (Pty) Ltd, listed as the third accused in the trial, is the media company which owns The Nation Magazine, in which the two articles that were subject to the contempt of court proceedings were published.

1.4.4 Mr Thulani Maseko

Mr Thulani Rudolf Maseko is a Swazi lawyer who advocates for human and political rights in Swaziland, including constitutional reforms in favour of freedom and democracy in Swaziland.

Mr Maseko is one of Swaziland's leading human rights attorneys and activists, having devoted his professional life to fighting for the civil and political rights of Swazi citizens, often challenging the government in court and sacrificing his safety and livelihood in the process. When he was called to the bar of the High Court of Swaziland in 1999, he co-founded an organization called Lawyers for Human Rights (Swaziland) ("LHRS"). LHRS worked to challenge the constitutional review and drafting process in Swaziland, which was entrusted to the government's Constitutional Review Commission ("CRC") without any participation by civil society actors. LHRS drafted a model Bill of Rights that was presented to the CRC, but ultimately rejected.

Later, he co-founded other non-governmental groups dedicated to pursuing further democratization by challenging the validity of the Kingdom of Swaziland's 2005 Constitution. He argued that civil society groups had a right to participate in the constitutional reform, which was denied, therefore rendering the Constitution invalid. Mr Maseko also challenged the constitutionality of the ban on political parties, and brought other cases on behalf of human rights causes such as workers' rights and the right to free public education. Mr Maseko has also represented a number of politically prominent individuals, including the leader of Swaziland's banned opposition party, the People's United Democratic Movement (PUDEMO), in actions involving the government of Swaziland.

In addition to his work as a human rights lawyer, Mr Maseko has pursued journalistic activities, serving as a feature writer for The Nation Magazine since approximately 2012.

Mr Maseko was arrested once before for exercising his right to expression. In June 2009, Mr Maseko was arrested and charged with violating sections 5(1) and (2)(a)(i) of the Sedition and Subversive Activities Act of 1930 for alleged statements that the Lozitha Bridge, bombed in a botched assassination attempt against the Swazi King, should be renamed after the two men who died in the attempt. Mr Maseko was released on bail, but no trial was held. Facing a renewed criminal trial for this offense, which has been currently scheduled for March 2015, Mr Maseko is challenging the constitutionality of the Act under which he was charged.

2. THE TRIAL

This part of the report contains a description of the events that were the subject of the trial as well as the procedures and key issues involved, including pre-trial matters such as those pertaining to the arrest and detention of the accused.

2.1 Timeline

The case against the defendants, including the articles in question and relevant background events, took place according to the following timeline:

2.1.1 Events pertaining to Mr Bansthana Gwebu and the articles written and published by the accused

18 January 2014	Mr Gwebu took action to impound a government vehicle, contrary to a verbal telephone request from Chief Justice Ramodibedi
20 January 2014	Mr Gwebu surrendered himself to police and was arrested on a charge of contempt of court
20 January 2014	Mr Gwebu was remanded by Chief Justice in his chambers (he is yet to be tried on charges of contempt of court)
February 2014	An editorial article concerning the contempt of court case against Mr Gwebu was written by Mr Maseko and Mr Makhubu, entitled 'Speaking my mind', and published in the Nation Magazine (Appendix 1 to this report)
March 2014	A second article written by Mr Maseko, entitled 'Where the law has no place', was published in the Nation Magazine (Appendix 2 to this report)

2.1.2 Events pertaining to the arrest of the accused and other pre-trial matters

17 March 2014	Chief Justice Ramodibedi issued a warrant for the arrest of Mr Maseko and Mr Makhubu
17 March 2014	Mr Maseko was arrested and charged with contempt of court and detained overnight in Mbabane Police Station
18 March 2014	Mr Makhubu was arrested and charged with contempt of court Mr Maseko and Mr Makhubu were brought before Chief Justice Ramodibedi in chambers and were remanded in custody
21 March 2014	Mr Makhubu applied for bail before Judge Simelane; based on an opposition to bail from the Crown, Judge Simelane ordered that supplementary affidavits be prepared by Mr Makhubu; the application for bail was adjourned to 25 March
25 March 2014	Mr Makhubu withdrew his application for bail; based on the Crown's application for continuation of the detention, Mr Maseko and Mr Makhubu were remanded in custody for a further seven days by Judge Simelane
28 March 2014	Mr Makhubu renewed his application for bail
31 March 2014	Mr Maseko filed an application challenging the constitutionality of his arrest and detention

1 April 2014	Counsel for Mr Maseko and Mr Makhubu gave formal notice in open court of their intention to apply for recusal of Judge Simelane as trial judge; Judge Simelane ordered the parties to file papers on the application, which was remanded for hearing on 9 April 2014
	Mr Makhubu's bail application, due to be heard on 2 April 2014, was adjourned pending resolution of the application for recusal
	Judge Simelane remanded Mr Maseko and Mr Makhubu in custody
3 April 2014	Mr Makhubu applied to join Mr Maseko's application challenging the constitutionality of the arrest and detention
4 April 2014	The constitutional challenge to the arrest and detention was heard by Judge Dlamini at the High Court
6 April 2014	Judge Dlamini delivered her judgment on the constitutional challenge, finding the arrest and detention to have been unconstitutional
	Judge Dlamini ordered the release from custody of Mr Maseko and Mr Makhubu
7 April 2014	The Crown lodged an appeal against the decision of Judge Dlamini
7 April 2014	New warrants for the arrest of Mr Maseko and Mr Makhubu were issued by Judge Simelane; the warrants were not executed
9 April 2014	The application for recusal of Judge Simelane as trial judge was adjourned to 14 April 2014
	On the question of whether Mr Maseko and Mr Makhubu were obliged to appear before the court at the hearing, Judge Simelane ruled that Mr Maseko and Mr Makhubu should have been in detention because of the Crown's appeal against Judge Dlamini's decision of 6 April 2014; Judge Simelane ordered the re-arrest of Mr Maseko and Mr Makhubu
9 April 2014	Mr Maseko and Mr Makhubu were re-arrested
10 April 2014	Mr Maseko and Mr Makhubu lodged applications for bail
11 April 2014	The applications for bail were adjourned by Judge Simelane to 14 April 2014; Mr Maseko and Mr Makhubu were remanded in custody to that date
14 April 2014	The application for recusal of Judge Simelane as trial judge was heard by of Judge Simelane; the application was refused
	Judge Simelane adjourned the charges against Mr Maseko and Mr Makhubu for hearing on 22 April 2014; he remanded the accused in custody to that date

2.1.3 Events pertaining to the trial of the accused

22 April 2014	Charges were formally put to Mr Maseko and Mr Makhubu in open court, who both pleaded not guilty and *lis pendens*
	The testimony of Crown witnesses began

6 May 2014	The testimony of Crown witnesses ended, including cross-examination and re-examination
12 May 2014	The defence applied for discharge of the case on the basis that there was no case to answer following the testimony of Crown witnesses
19 May 2014	Judge Simelane issued his judgment on the defence application for discharge of the case, dismissing the application and adjourning the trial to 28 May 2014
28 May 2014	The testimony of defence witnesses began
10 June 2014	The testimony of defence witnesses ended, including cross-examination and re-examination
30 June-1 July	The Crown made its closing submissions in the trial
1 July 2014	The defence made its closing submissions in the trial
17 July 2014	Judgment was delivered, at which time the accused were found guilty on the two counts of contempt of court
25 July 2014	The sentence was handed down

2.1.4 Events following the trial

15 August 2014	Mr Maseko, Mr Makhubu, The Nation Magazine and Swaziland Independence Publishers (Pty) Ltd lodged an appeal against convictions and sentences
3 November 2014	The Crown appeal against Judge Dlamini's decision on the constitutional challenge against initial arrest and detention was first brought before the Supreme Court; it was adjourned for hearing on 3 December 2014
	The defence appeal against Judge Simelane's decision on the application for recusal was first brought before the Supreme Court; it was adjourned for hearing on 3 December 2014
5 November 2014	The application for bail pending appeal against conviction and sentence was brought before Justice Ebrahim in the Supreme Court; the application was referred back to the High Court
5 November 2014	Mr Maseko abandoned his efforts at application for bail pending appeal against conviction and sentence
18 November 2014	Mr Makhubu lodged an application for bail pending appeal against conviction and sentence.
3 December 2014	The Crown appeal against Judge Dlamini's decision was heard and upheld by the Supreme Court, by majority of 2:1
	The defence appeal against Judge Simelane's decision was adjourned *sine die* by the Supreme Court
5 December 2014	Mr Makhubu's application for bail pending appeal against conviction and sentence was heard and dismissed by Judge Simelane in the High Court
17 February 2015	Communication concerning the arrest, detention, trial, conviction and sentencing of Mr Maseko was lodged with the UN Working Group on Arbitrary Detention

20 February 2015	The UN Working Group on Arbitrary Detention requested the Kingdom of Swaziland to provide it with a response to the communication lodges by Mr Maseko
20-29 April 2015	In the absence of a response from the Kingdom of Swaziland, the UN Working Group on Arbitrary Detention considered the matter brought before it and issues its Opinion 6/2015 (see 3.2.4 below)
30 June 2015	The Supreme Court of Swaziland heard the appeal against convictions and sentences. It found in favour of the appellants, setting aside the convictions and sentences entered against them

2.2 Venue

The trial proceedings were held before Justice Simelane Mpendulo at the High Court in Mbabane, Swaziland.

The jurisdiction of the High Court is stipulated in section 151 of the Constitution. The High Court has original jurisdiction in all civil and criminal matters. It has powers to enforce fundamental rights and to hear any matter of a constitutional nature. The High Court also has judicial review powers and appellate powers in matters referred from the magistrates' courts. The High Court in Mbabane was therefore competent to hear the criminal trial against Mr Maseko and Mr Makhubu and make pronouncements on any human rights issues raised.

2.3 The case against the defendants

2.3.1 Facts of the case

In February 2014, Mr Maseko and Mr Makhubu wrote an article entitled "Speaking my mind", published in the Nation Magazine, which is owned by Swaziland Independent Publishers (Pty) Ltd. In March 2014, Mr Maseko wrote a second article entitled 'Where the law has no place', also published in the Nation Magazine. The articles, reproduced in this report in Appendices 1 and 2, criticised the manner in which the Chief Justice of Swaziland, Justice Michael Ramodibedi, had handled the contempt of court allegations against Mr Bansthana Vincent Gwebu in January 2014.

2.3.2 Charges against the defendants

The charges against the four defendants arose from the fact that the articles published in the Nation Magazine in February and March 2014 were published before the allegations against Mr Gwebu had been disposed of. The defendants were accused of unlawfully and intentionally issuing statements contemptuous of the court.

Following a pre-trial conference on 9 April 2014, the charges against the four accused were amended to read as set out below. Accused One is the Nation Magazine, in which the articles were published. Accused Two is Mr Bheki Makhubu, editor of the Nation Magazine. Accused Three is Swaziland Independent Publishers (Pty) Ltd, which owns the Nation Magazine. Accused Four is Mr Thulani Maseko, the lawyer who contributed to the article entitled "Speaking my mind" and who wrote the article entitled "Where the law has no place".

Both counts were based on the common law offence of contempt of court, directly derived from English law. There is no legislation or penal code providing for the

crime of contempt of court in Swaziland. The Crown made reference to the definition of contempt of court in the book, *South African Law and Criminal Procedure* by PMA Hunt and JLR Milton. According to these authors, contempt of court "consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it". The Crown further referred to three South African cases of *S v Mamabolo* (2001(3) SA 409), *In re Mackenzie* (1933 AD 367) and *R v Torch Printing and Publishing Co. Ltd and Others* (1956(1) SA 815 (CPD)).

According to the Crown, the accused's contempt arose from the publication of potentially prejudicial articles concerning a matter that was *sub judice* and went further to scandalise, insult and bring into disrepute the dignity, repute and authority of the Chief Justice in the execution of his official duties, and of the courts in general. It was the Crown's case that the published articles violated the dignity, repute and authority of the court by unfairly and improperly criticising the court in relation to proceedings against Mr Bantshana Vincent Gwebu.

Count one

> "Accused 1, 2 and 3 are guilty of the crime of contempt of court
>
> "In that upon or about the month of February and at or near Mbabane area in the Hhohho Region, the said accused each or all of them acting jointly in furtherance of a common purpose, did write and publish an article entitled "Speaking my mind" about the case which was first dealt with before the Chief Justice His Lordship Justice Ramodibedi of The King versus Bhantshana Vincent Gwebu High Court case no. 25/2014, a contempt of court matter currently pending before the High Court of Swaziland and therefore sub judice, which article's passages are quoted:-
>
> (a) 'Like Caiaphus, Ntate Justice Ramodibedi seems to have chosen to use his higher station in life to bully those in a weaker position as a means to consolidate his power. Like Caiphus, Ntate Justice Ramodibedi seems to be in a path to create his legacy by punishing the small man so that he can sleep easy at night well knowing that he has sent a message to all who dare cross him that they will be put in their right place. Let us not forget that Caiphus was not only the high priest of Judea. He was the chief justice of all Jewish law and had the immense power to pass judgment on anyone among his people who transgressed the law. Ditto Ntate Justice Ramodibedi in Swaziland.
> (b) 'When this lowly public servant from Bulunga appeared before him on the Monday after a warrant for his arrest had been issued, Gwebu was denied the right to legal representation because, Ntate Justice Ramodibedi is reported to have said, the lawyer was not there when the car was impounded at the weekend.'
> (c) 'Like Caiphus, our Chief Justice "massaged" the law to suit his own agenda.'
> (d) 'What is incredible about the similarities between Caiphus and Ntate Justice Ramodibedi is that both men had willing servants to help them break the law.'
>
> "And did thereby unlawfully and intentionally violate the dignity, repute or authority of the said Court before which the matter is pending, and thereby commit the crime of contempt of court."

Count two

> "Accused 1, 2, 3, and 4 are guilty of the crime of contempt of court
>
> "In that upon or about the month of March 2014 and at or near Mbabane area in the Hhohho Region, the said accused each or all of them acting jointly in furtherance of a common purpose, did write and publish an article entitled "Where the law has no place" about the case which was first dealt with before the Chief Justice His Lordship Justice Ramodibedi of the *King versus Bhantshana Vincent Gwebu* High Court case no. 25/2014, a contempt of court matter currently pending before the High Court of Swaziland and therefore *sub judice*, which article's passages are quoted:-
>
> (a) 'The arrest of Bhantshana Gwebu early in the year is a demonstration of how corrupt the power system has become in this country.'
> (b) 'We should be deeply concerned about such conduct displayed by the head of the judiciary in the country. Such conduct deprives the court of its moral authority; it is a demonstration of moral bankruptcy. A judiciary that is morally bankrupt cannot dispense justice without fear or favour as the oath of the office dictates.'
> (c) 'Many will say that what we saw is nothing but a travesty of justice in its highest form.'
> (d) 'In more ways than one, this was a repeat of the Justice Thomas Masuku kangaraoo process where the Chief Justice was the prosecutor, witness and judge in his own cause.'
> (e) 'It would appear as some suggest, that Gwebu had to be "dealt with" for sins he committed in the past, confiscating cars belonging to the powerful, including the Chief Justice himself. It is such perceptions that make people lose faith in institutions of power, when it appears that such institutions are used to settle personal scores at the expense of justice and fairness.'
>
> "And did thereby unlawfully and intentionally violate the dignity, repute or authority of the said Court before which the matter is pending, and thereby commit the crime of contempt of court."

2.4 Procedural issues

The Criminal Procedure and Evidence Act 67/1938 (CPEA) governed the legal proceedings in this trial, including the pre-trial and investigation phases. The presiding judge, Judge Simelane, conducted the trial largely in accordance with the provisions of the CPEA. Various problematic issues arose, however, both pre-trial (see 2.4.1 to 2.4.4 below) and at trial (see 2.7 below).

2.4.1 Initial arrest and detention of Mr Maseko and Mr Makhubu

On 17 March 2014, the Chief Justice of Swaziland, Justice Michael Ramodibedi, issued a warrant of arrest against the Nation Magazine, Mr Makhubu and Mr Maseko on grounds that they had committed the offence of contempt of court *ex facie curiae* (contempt of court through acts committed outside the court). Mr Maseko was arrested on the same day and held in police custody overnight. Mr Makhubu was arrested the following day, on 18 March 2014.

On 18 March 2014, Mr Maseko and Mr Makhubu were taken to the Chief Justice's chambers. The Chief Justice remanded them in custody in the absence of their lawyer.

2.4.2 Constitutional challenge to the arrest and detention

On 25 March 2014, the accused challenged their unlawful arrest and detention in the High Court by way of an application, in which the Chief Justice and Director of Public Prosecutions (DPP) were cited as the first and second respondents respectively. The accused sought a declaratory order setting aside the warrant to arrest and releasing Mr Maseko and Mr Makhubu from custody. The application was made on the grounds that the warrant of arrest issued by the Chief Justice was unconstitutional, unlawful and irregular.

The application was heard by Judge Mumcy Dlamini of the High Court on 4 April 2014. Judge Dlamini delivered her judgment on 6 April 2014, granting the application and setting aside the warrants of arrest. Judge Dlamini's decision found that the warrants of arrest were unlawful as they violated section 31 of the CPEA. She further found that the Chief Justice should not have issued the warrant of arrest in circumstances where he was the victim of the alleged contemptuous articles. Judge Dlamini also made reference in her decision to assertions by the accused that they had been remanded in custody in the absence of a request for such remand from a prosecutor. She further considered that, in such a contentious matter, the remand proceedings should have been heard in open court and not in the Chief Justice's chambers. The accused were accordingly released from custody.

On 7 April 2014, the Crown lodged an appeal against the decision of Judge Dlamini. The primary basis of the appeal was that Judge Dlamini did not have jurisdiction to overturn an order issued by another High Court judge as this would result in chaos and lack of certainty and finality in litigation; that in any case she did not have review or revisionary powers to overturn a decision of another judge of the High court; and also that Chief Justice Ramodibedi was competent and entitled at law to issue a warrant of arrest against Mr Maseko and Mr Makhubu in terms of the CPEA, and also in terms of common law as contempt of court was *sui generis*.

The appeal was brought before three judges of the Supreme Court of Swaziland on 3 November 2014, Justices Ebrahim, Moore and Levinson. The appeal was adjourned for hearing on 3 December 2014. At that time all three judges upheld the appeal and Judge Dlamini's judgment was set aside. The reasoning of the Supreme Court in overturning the judgment of Judge Dlamini was that "a judge of the High Court has no power to review the judgments, decisions, orders or directions of another judge of the High Court". It was further held that the High Court's powers of review under section 152 of the Constitution are "limited to the exercise of review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority" such jurisdiction not including "review and supervisory jurisdiction over its own decisions".

2.4.3 Application for recusal of trial judge, Judge Simelane

On 1 April 2014, Advocates Maziya and Mkhwananzi, acting on behalf of the accused, notified Judge Simelane, in chambers, of their intention to apply for his recusal from acting as trial judge on the grounds of a real apprehension of bias. The State indicated an intention to oppose such application. Judge Simelane refused to recuse himself when approached in chambers and requested that the defence state their intention to formally apply for his recusal in open court. On 1 April 2014, Advocates Maziya and Mkhwananzi gave formal notice in open court of their intention to apply for Judge Simelane's recusal. The DPP notified the Court that the recusal application would be opposed. Judge Simelane thereupon

ordered the parties to file their papers and adjourned the recusal application for hearing on 9 April 2014. He further remanded Mr Maseko and Mr Makhubu in custody until that time.

Between 14 and 22 April, the court disposed of the application for recusal of the trial judge. The defence application for recusal of the trial judge contended that reasonable grounds existed to consider that Judge Simelane would be prejudiced in the conduct of the criminal trial. The reasons provided for the apprehension of bias concerned both subjective bias (evidence of actual bias against the accused on the part of Judge Simelane) and objective bias (evidence of a conflict of interest on the part of Judge Simelane such that legitimate doubts of impartiality existed). Judge Simelane denied the motion to recuse himself.

On 14 August 2014, an appeal was lodged against the judgment of Judge Simelane convicting and sentencing Mr Maseko, Mr Makhubu, The Nation Magazine and Swaziland Independence Publishers (Pty) Ltd. One of the grounds of the appeal concerned the refusal of judge Simelane to recuse himself. The appeal was initially brought before three judges of the Supreme Court of Swaziland on 3 November 2014, alongside the appeal by the State against the decision of Judge Dlamini concerning the constitutional challenge to the arrest and detention of Mr Maseko and Mr Makhubu. Justices Moore, Ebrahim and Maphalala ruled that the record of proceedings was incomplete, since the judgment of Judge Simelane was missing from the record of proceedings. The appeal was adjourned *sine die*, eventually to be determined on 30 June 2015 when the convictions and sentences were set aside and the Supreme Court ordered the immediate release of Mr Maseko and Mr Makhubu. The Supreme Court made a pronouncement that Judge Simelane ought to have recused himself in the matter. The Supreme Court's judgment is to be released on the final day of its current session, 29 July 2015.

2.4.4 Application for bail

Following further adjournment of the hearing of the recusal application on 9 April 2014 Mr Maseko and Mr Makhubu lodged a bail application on Thursday 10 April 2014. In the normal course of events, hearing of the bail application would have been during the regular Motion Court session on Friday 11 April 2014. The duty judges scheduled to hear bail applications on that day were Judges Mamba and Maphalala.

However, when counsel for the accused arrived at court for the bail hearing, they discovered that the matter was to be heard by Judge Simelane. When enquiries were made as to why Judge Simelane would hear the matter, rather than one of the duty judges scheduled to hear bail applications that day, Judge Simelane stated that he was the one who had been assigned the case and any other ancillary matters that may arise from it.

The bail hearing was adjourned to 14 April 2014, the same date for hearing of the application for recusal of Judge Simelane. This adjournment was based on the fact that the Law Society of Swaziland had made a constitutional application challenging Judge Simelane's appointment to the High Court in Swaziland.

Faced with the prospect of a bail hearing before Judge Simelane, who counsel considered had no inclination to release Mr Maseko and Mr Makhubu on bail, Advocates Maziya and Mkhwanazi instead requested that the warrants for the accused's arrest be discharged and that they be released on their own recognizance. The application was opposed by the Crown on the basis that the warrant of arrest was properly issued and that the proper procedure was to then

apply for bail. Judge Simelane agreed with the Crown, stating that he was now seized with the case and that there was no basis to discharge the warrant of arrest. He directed that the case be adjourned for trial on 14 April 2014. The accused were further remanded in custody to 14 April 2014.

2.4.5 Trial

The trial commenced at the High Court of Swaziland on Tuesday 22 April 2014 before Judge Simelane.

The prosecution and defence cases are summarised in sections 2.5 and 2.6 respectively. Matters concerning the conduct of the trial are set out in section 2.7. Matters concerning the Court's decision, finding the accused guilty on both counts, are set out in section 2.8.1. Matters concerning sentencing are set out in section 2.8.2.

2.5 Prosecution case

The Director of Public Prosecutions, Mr Nkosinathi Maseko, acted for the prosecution.

The prosecution case was that the articles published in common pursuit by the accused: (a) were contemptuous in and of themselves, by criticising the Chief Justice in a manner that undermined the office of the Chief Justice and prejudiced the administration of justice in Swaziland; and (b) were contemptuous by commenting on matters that were *sub judice* in a manner that might prejudice the outcome of on-going proceedings before the court.

The prosecution called two witnesses and produced the articles in question as evidence before the court (see 2.7.5 below). The prosecution opposed the defence application for dismissal of the prosecution at the closing of the Crown case (see 2.7.6 below). It cross-examined defence witnesses, other than Mr Maseko who gave evidence by affirmation rather than under oath. The prosecution made closing arguments following the defence case (see 2.7.8 below).

2.6 Defence case

Accused One, Two and Three (the Nation Magazine, Mr Makhubu and Swaziland Independent Publishers) were represented by Advocate Maziya. Accused Four (Thulani Maseko) was represented by Advocate Mkhwananzi.

After pleas of not guilty were entered, but before Crown witnesses were called, a series of applications were made and directions sought by the defence. The defence argued that the trial could not commence because the validity of the indictment against the accused was a matter *lis pendens*, pending action (see 2.7.2 below). The defence sought directions concerning the procedure to be used at trial (see 2.7.3 below). It also sought directions as to how Judge Simelane was to be called as a witness for the defence in a trial over which he was presiding (see 2.7.4 below).

Following the testimony and cross-examination of Crown witnesses, the defence applied for discharge of the accused (see 2.7.6 below). The defence argued that the Crown had failed to make a *prima facie* case for three main reasons: (a) the articles were not in themselves contemptuous of the court; (b) the articles related to matters that did not concern the substance of the allegations against

Mr Gwebu and therefore not to matters *sub judice*; and (c) the Crown's evidence was insufficient to prove the elements of the offences charged.

The application for discharge of the Crown case was not successful, following which the defence called five witnesses, including defendants Mr Maseko and Mr Makhubu (see 2.7.7 below). Following the Crown's closing arguments, Advocates Maziya and Mkhawanazi made closing arguments for the defence (see 2.7.9 and 2.7.10 respectively below).

During cross examination, the discernable thrust of the defence case was that the articles by Mr Maseko and Mr Makhubu constituted truth, fair comment and were in the public interest given the need to have an independent, impartial and accountable judiciary in Swaziland that administers justice with integrity. The articles were also argued to be in the public interest because Mr Gwebu was seen as having being arrested and subject to contempt of court allegations merely for doing his job, the articles thereby also addressing issues concerning the combating of corruption.

2.7 Conduct of the trial

The trial commenced at the High Court of Swaziland on Tuesday 22 April 2014 before Judge Simelane, at which time he put the charges to Mr Maseko and Mr Makhubu. They both pleaded not guilty. After pleas of not guilty were entered, but before Crown witnesses were called, a series of applications were made and directions sought by the defence (see 2.7.1-2.7.4 below).

Between 22 April and 6 May 2014, prosecution witnesses gave evidence, including under cross-examination and re-examination (see 2.7.5 below). On 12 May 2014, following conclusion of Crown testimony, the defence made an (unsuccessful) application for dismissal of the charges against the accused (see 2.7.6 below). Defence witnesses gave their testimony between 28 May and 4 June 2014 (see 2.7.7 below).

The Crown made its closing arguments on 30 June 2014 (see 2.7.8 below). The defence made its closing arguments on 1 July 2014 (see 2.7.9 and 2.7.10 below).

Judgment was delivered on 17 July 2014, at which time the accused were found guilty on the two counts of contempt of court (see 2.8.1 below). The sentence was handed down on 25 July 2014 (see 2.8.2 below).

2.7.1 Defence applications at commencement of trial

After pleas of not guilty were entered, but before Crown witnesses were called, a series of applications were made and directions sought by the defence:

- The defence argued that the trial could not commence because the validity of the indictment against the accused was a matter *lis pendens*, pending action (see 2.7.2 below);
- The defence sought directions concerning the procedure to be used at trial (see 2.7.3 below); and
- The defence sought directions as to how Judge Simelane was to be called as a witness for the defence in a trial over which he was presiding (see 2.7.4 below).

2.7.2 Defence of *lis pendens*

On the issue of *lis pendens* (notice of pending action), the defence pointed to the fact that the question of the validity of the original indictment and warrant of arrest of 17 March 2014 was pending resolution. On 6 April 2014, Judge Dlamini declared that the arrest warrants and indictment against Mr Maseko and Mr Makhubu were "unconstitutional, irregular and unlawful" and therefore set them aside. The Crown lodged an appeal against Judge Dlamini's decision and the matter was at the time that the trial commenced still pending with the Court of Appeal. Defence counsel therefore argued that Judge Simelane was prevented from proceeding with the trial, since this was the same matter that was pending in another, superior, court.

The Crown argued that the original indictment of 17 March 2014 was not a matter *lis pendens*, because it was amended on 27 March 2014 before Judge Dlamini's decision. The Crown proposed that the setting aside of the original indictment by Judge Dlamini did not amount to the setting aside of the amended indictment.

In response to the Crown's position, Advocate Maziya argued for the defence that once the original indictment, as amended, was set aside by Judge Dlamini, the Crown was obliged to produce a fresh indictment rather than proceed with amendment of an indictment that had been set aside. Advocate Maziya put to the Court that:

> "…in essence what is before court today is the very indictment that was set aside by Dlamini J and what is pending before the Court of Appeal is whether Dlamini J was correct in setting aside that indictment… it is inconceivable that we should come to court today and ask the Accused persons to plead to an indictment that has already collapsed."

Judge Simelane took a five-minute adjournment before he returned to rule that there was no matter that was pending before the court because the appeal concerned the old indictment, whereas the DPP was proceeding on the basis of the amended indictment. He took the view that the amended indictment constituted a "new" indictment and that there was therefore no basis to stop the trial from starting.

2.7.3 Directions on trial procedure

At the commencement of trial, the defence also sought directions concerning the type of procedure to be used at trial, since procedures stipulated under the CPEA had been (separately, and not arising out of the current trial) challenged by the Director of Public Prosecutions and was a matter on appeal before the Supreme Court.

Judge Simelane ruled that the Court was free to use any procedure it deemed suitable. He determined that, even if questions concerning the CPEA were on appeal, he for present purposes would adopt that procedure for these proceedings. Judge Simelane explained that he was at liberty to choose the procedure he needed for contempt of court proceedings that were *sui generis*.

2.7.4 Trial Judge Simelane as a witness

The final matter raised by the defence before commencement of the trial related to the dilemma of Judge Simelane acting as trial judge in the case while simultaneously a competent and compellable witness for the defence. This was a matter raised by the defence in its application for recusal of Judge Simelane as

trial judge (see 2.3.3 above). In light of the fact that the defence had issued subpoenas for Judge Simelane and the Chief Justice to appear as witnesses in the trial, the defence sought clarification as to what procedure would be used in light of the decision of Judge Simelane not to recuse himself.

Advocate Mkhwanazi (representing Mr Maseko) argued as follows:

> "His Lordship is both a compellable and competent witness to testify on behalf of the accused persons. Now Your Lordship the clarity that I am seeking is in respect of procedure. What will happen… when His Lordship's turn to testify comes? I am lost there. I am not sure whether His Lordship would leave his seat to take the witness box and take an oath and testify without a presiding officer or what is actually going to happen? I am in a fix there."

Advocate Maziya (representing Mr Makhubu and the Nation Magazine) argued as follows:

> "This is the problem that we are in now because His Lordship is presiding and it is unheard of for His Lordship to preside, go to the arena, go to the witness stand, take the stand, is subjected to cross examination like any other witness, and at the same time after that, Your Lordship ascends there".

The Crown argued that the subpoena in question was defective and not in accordance with the rules of the court. It therefore contended that there was no question of Judge Simelane becoming a witness in the trial.

Judge Simelane agreed with the Crown and ruled that the subpoena was defective and that the matter must proceed on the merits.

2.7.5 Prosecution evidence at trial

The Crown called two witnesses, Mr Msebe Malinga, the Registrar of companies, and Ms Banele Ngcamphalala, the acting Registrar of the High Court, and Deputy Registrar at the time of the arrest and remand of Mr Gwebu. Summaries of their evidence are set out in Appendix 3 of this report.

1. Mr Malinga gave evidence concerning the legal status of Accused No Three (Swaziland Independent Publishers (Pty) Ltd). He was cross-examined concerning his statement to police.

2. Ms Ngcamphalala gave evidence concerning the earlier trial of Mr Gwebu and the nature of criticisms of that trial in the published articles, as well as concerning her statement to police. She was cross-examined concerning her statement and its timing in relation to the issuing of warrants to arrest by the Chief Justice.

2.7.6 Defence application for dismissal of the case following Crown testimony

Following conclusion of the Crown testimony, the defence applied for discharge of the accused on 12 May 2014 relying on section 174(4) of the Criminal Procedure and Evidence Act. The defence argued that the Crown had failed to make a *prima facie* case because there was insufficient evidence brought before the court to prove the elements of the offence.

The defence argued that the indictments required proof that the articles were contemptuous. While acknowledging that the articles indirectly commented on a matter that was pending before the court (the case against Mr Gwebu), the defence argued that: (a) the articles were not in themselves contemptuous of the

court; (b) the articles related to matters that did not concern the case itself and were therefore not matters *sub judice*; and (c) the Crown's evidence was insufficient to prove the elements of the offences charged.

Articles not contemptuous

On the first point, counsel argued that the articles on their mere reading were not contemptuous since they did not violate the dignity, repute or authority of the Court. Advocate Maziya (representing Mr Makhubu and the Nation Magazine) submitted: "The impression now is they are not contemptuous per se on their mere reading, it is just that they were made whilst Bhantshana Gwebu's matter was still pending in court… matters that are subjudice."

The defence argued that there was nothing wrong with criticising the Chief Justice's handling of the Gwebu case, nor with comparing the Chief Justice with the Biblical character Caiaphus. It was argued that the manner in which the Chief Justice had dealt with the first appearance of Mr Gwebu was contrary to the principles of fair trial and natural justice, and that the Chief Justice had usurped the powers of the DPP. Counsel submitted that Mr Maseko and Mr Makhubu were in their articles making fair and legitimate comments on a matter of significant public interest and this was not unlawful under Swaziland law. The accused's comments were said to be fair, legitimate and in the public interest including because the Chief Justice had: issued warrants of arrest after disagreeing with Mr Gwebu concerning the exercise by Mr Gwebu of his legitimate functions in overseeing the use of government vehicles; remanded Mr Gwebu in custody *mero muto* when he first appeared in the Chief Justice's chambers; refused to allow Mr Gwebu to be represented by legal counsel, and dealt with the matter at a time when where there was no charge sheet. Advocate Maziya argued that the comments were fair and legitimate because the Chief Justice "was effectively making himself a judge in his own cause and that is improper".

Attorney Mkhwanazi argued as follows:

> "Your Lordship if any public servant conducts himself in a manner that is contrary to the Constitution and to the law, that public officer is subject to criticism, is not above the law. He cannot do as he pleases. He is holding public office. Our submission therefore Your Lordship is that these articles other than not constituting contemptuous statements are in fact fair and legitimate criticism of the conduct of the Chief Justice… these articles are not attacking per se the judiciary in Swaziland. They are… specifically complaining about the head of the judiciary… They are complaining of this particular conduct of this particular public officer and there is nothing contemptuous about it. There is nothing wrong about it. Legally and morally there is nothing wrong about it."

Articles not relating to matters sub judice

On the second point, counsel argued that the articles were not contemptuous because they related to events that had already taken place and did not comment on any on-going aspect of the case. The issue of *sub judice* did not therefore arise. Advocate Maziya stated:

> "My Lord the 2nd Accused Bheki Makhubu is actually decrying [in his article] the manner in which His Lordship the Chief Justice dealt with the issue involving Bhantshana Gwebu. In other words he is dealing with past events. There is nothing in this article to show that anything said could have potentially prejudiced the trial of Bhantshana Gwebu"

Counsel argued that the comments were therefore about the manner in which the Chief Justice had conducted himself when dealing with the case against Mr Gwebu, as a historical record. It was submitted to the Court that nothing about documenting and commenting on this historical record, through the articles in question, could prejudice the substantive matters in the Gwebu case.

In response to the Crown's submissions on this point (see below), the defence emphasised that it was not the potential trial, but the events surrounding Mr Gwebu's arrest and appearance before the Chief Justice, that had been commented on in the articles and that these events had passed. Defence counsel submitted that trials and other proceedings were held in court on a daily basis and that reporters regularly wrote articles about them and that it would therefore be an absurdity that such articles would also be said to be contempt of court for reporting on matters which were "*sub judice*".

Crown evidence insufficient

It was further argued that the evidence of the Crown's witnesses did not further the Crown's case.

It was proposed that the first witness. Mr Malinga, only proved the wrongfulness of the accused's arrest by testifying that he had made a statement from his office and after the arrest of the accused. It was therefore argued that Mr Maseko and Mr Makhubu were arrested in order to be investigated because all Crown statements were taken after the arrests had been made, and that the arrests were thus unlawful. Advocate Maziya (representing Mr Makhubu and the Nation Magazine) submitted that: "No lawful trial can flow from an unlawful arrest, we submit Your Lordship". It was further put to the Court that, as such, the accused were unlawfully before the court and should not be called to their defence.

Concerning the second Crown witness, Ms Ngcamphalala, it was put to the Court that she was not and could not have been the complainant because the articles were not about her or the Office of the Registrar. Counsel also pointed to her testimony that she did not initiate the accused's arrest because she too recorded her statement with police after their arrests. Counsel stated that she had been evasive and economic with the truth during her testimony and that, as such, no reliance could be placed on her evidence. Counsel similarly pointed to the fact that her memory failed her at times, especially under cross-examination, and that she was hesitant and unsure of her answers. Reference was made to the admission by the witness that she had no practical experience in criminal law and that, as an admitted attorney, she had practised for only two years. Counsel submitted that, as such, she did not understand the elements of and could not appreciate the offence of contempt of court. Attorney Mkhawanazi stated: "in fact in her evidence in chief [she] does not say that the articles she read on the 17th of March 2014 were contemptuous".

It was further argued that there were key individuals who had not given evidence before the court and in respect of whom most if not all the answers to the remaining issues before court could have been answered. These were said to include the police, but mainly the Chief Justice (whom the articles were about) and the trial judge, Judge Simelane (who was present at all material times when the alleged injustices were committed against Mr Gwebu, in his former capacity as High Court Registrar). Attorney Mkhwanazi argued: "Your Lordship we will submit that the evidence before court is insufficient because not all the role players that were supposed to take part in this trial did so… one of those role players is the complainant… the absence of this one important role player makes it impossible for the Crown to establish a prima facie case against the Accused

persons."

It was also further argued that the State was relying on the doctrine of common purpose to try and secure a conviction against the accused persons. Attorney Mkhwanazi argued that "the evidence of the 2 [State] witnesses before court i.e. one Msebe Malinga and one Benele Ngcamphalala does not disclose this element. In fact there is no evidence before court from either of the Crown's witnesses suggesting that the accused persons acted in concert in publishing these articles."

It was finally argued that it was therefore not necessary for the accused to put their defence to the Court and enter the witness box wherein they could possibly incriminate themselves and thus bolster a very weak Crown case.

Crown response to application for dismissal of charges

The DPP argued that the particulars of the offence were set out in the indictment and that a *prima facie* case had been established by the Crown. The Crown Prosecutor submitted that the manner in which the articles were written was contemptuous. He further argued that even though there was a disclaimer in The Nation Magazine: "We in Prosecution will ignore disclaimers and will indict and will prosecute you".

Concerning the first witness's evidence, the Crown submitted that this was to prove that The Nation Magazine and Swaziland Publishers were duly registered and incorporated in terms of the laws of Swaziland and thereby to establish the common purpose with which the accused were charged.

Concerning defence counsel positions about the second witness, the Crown Prosecutor submitted that the role of the second witness was to produce into evidence the articles written and published by the accused. He stated that she was not the complainant but, rather, that in all criminal matters in Swaziland the State was the complainant and that individual witnesses, such as the second witness, were called to give evidence on its behalf. He further submitted that the second witness was credible as she had maintained her position and was not shaken from it under cross-examination.

The Crown argued that there had been no need for the police to investigate the matter as the articles had been published and were accessible and understandable to everyone such that there was no need to undertake any further investigation. It was further put to the court that the principle of *res ipsa loquitur* applied, which the Crown Prosecutor interpreted as meaning that: "the facts speak for themselves… the contents here My Lord, they speak for themselves. The insults to the Chief Justice and to the administration of justice in this country are all here."

The Crown therefore argued that Mr Maseko and Mr Makhubu should be called to their defence to explain what they meant in their articles as they were, according to the Prosecutor: "poisoning the community into believing that there is no law and no justice in Swaziland". As such, he argued that the accused were attacking the authority and dignity of the court. He submitted that contempt of court proceedings are *sui generis*, since they emanate from the court, and that he had never heard of a case where a judge is called to give evidence in such a matter.

The DPP argued that the publication of statements – including in a newspaper, magazine, radio, television, or film – that are potentially prejudicial to a court case that is *sub judice* requires no proof of intention for it to constitute a crime. The DPP argued that it is contempt to publish, either by written or the spoken

word, information or comment regarding a case which is pending, and which may tend to prejudice the outcome of a case. The DPP contended that the evidence of the High Court Registrar established a prima facie case of contempt of court.

Decision on application for dismissal of charges

After hearing arguments from the defence and the State, Judge Simelane adjourned the matter to Monday 19 May 2014, further remanding the accused in custody until that time.

On 19 May, Judge Simelane handed down a written ruling on the application for dismissal of the Crown case. He read the last portion of his written judgment in open court, stating that the application was dismissed and that the accused were called upon to bring their defence and answer the charges. The matter was at that time adjourned to 28 May for continuation of the trial.

2.7.7 Defence evidence at trial

Defence counsel called five witnesses, including two of the defendants. Summaries of their evidence are included in Appendices 3 and 4 of this report.

1. Mr Bansthana Vincent Gwebu, who was the subject of the contempt of court allegation that was commented on in the publications, gave evidence concerning the facts leading up to the charges against him, as well as concerning his arrest and initial remand in custody.

2. Mr Quentin Dlamini, a member of the trade union representing Swaziland civil servants, gave evidence concerning arrangements made for Mr Gwebu's legal representation, and concerning Mr Gwebu's arrest and initial appearance in court.

3. Mr Macawe Sithole, the lawyer representing Mr Gwebu in the earlier contempt of court case, gave evidence concerning Mr Gwebu's arrest and initial appearance before the Chief Justice.

4. Mr Maseko (Accused Number Four), gave evidence by affirmation, rather than by oath, as provided for in sections 217 and 218 of the CPEA. It is noted here that, a person who takes an affirmation is not subjected to cross-examination, whereas the giving of evidence under oath is subject to cross-examination. As a consequence, the value placed on evidence given through an affirmation is less than that of evidence given under oath.

   Mr Maseko's testimony involved the reading by him of a prepared statement (Appendix 4 to this report), in which he expressed his views that: (a) this and other cases dealt with by the Chief Justice and Judge Simelane were politically motivated; (b) the Chief Justice had in several instances acted in a manner that undermined his integrity as a judge and thereby the public's confidence in the administration of justice in Swaziland; (c) the legal profession in Swaziland had an obligation to defend the rule of law; (d) the contempt of court case concerning Mr Gwebu was a matter of public interest; (e) the defendants in this trial had a real, and reasonably based, apprehension of bias on the part of the court; (f) the current trial was conducted in a manner violating the Swazi Constitution and the right to a fair trial; and (g) the charges against him and the co-accused amounted to a violation of the freedom of expression.

5. Mr Makhubu (Accused Number Two), gave evidence about the circumstances surrounding his arrest and initial detention, and raised a number of issues concerning the relationship between the media and the judiciary in Swaziland, a number of which reflected the matters raised in the evidence of Mr Maseko.

2.7.8. Closing submissions by the Crown

On 30 June 2014, the Crown made its closing submissions.

The Crown quoted the definition of contempt of court from the *South African Law and Criminal Procedure* book written by PMA Hunt and JRL Milton. According to these authors, contempt of court "consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it". The law of contempt, said the Crown, relying on these authors, is not intended to protect the personal character or dignity of a particular judge. The offence is committed only where the written or oral statement has the effect of lowering public esteem in the judicial administration of justice. The Crown also referred to a number of cases that describe the nature of contempt of court, including: *In re Phelan* (1877); *In re Mackenzie* (1933) AD 367; and *R v Torch Printing and Publishing Co. Ltd and Others* (1956) (1) SA 815 (C).

According to the Crown, the accused's contempt arose from the publication of potentially prejudicial articles concerning a matter that was at the time *sub judice* and which scandalized, insulted and brought into disrepute the dignity, reputation and authority of the Chief Justice in the execution of his official duties and of the courts in general. The Crown submitted that the publications violated the dignity, reputation and authority of the court by unfairly and improperly criticizing the court in relation to the proceedings against Mr Bantshana Vincent Gwebu.

The Crown referred to the earlier decision of the Supreme Court of Swaziland in *Swaziland Independent Publishers (Pty) Ltd and Another v King* ((2014) SZSC 25) to explain the purpose of the offence of contempt of court, where the court stated (at para. 30):

> "The cases make it clear however, that the crime of scandalizing the court was not created for the purpose of providing a salve for the wounded feelings of the judicial officer concerned or balm to soothe his bruised ego. Rather it has been designed by our forbears to serve a much nobler purpose. That purpose is the preservation of the moral authority of the judicial process itself. The real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone."

The Crown submitted that contempt of court is intended to protect public confidence in the administration of justice as well as the dignity and moral authority of the judiciary. To be deemed contemptuous, it was said that the publication must be read as a whole and its overall tone and tenor must be examined and the intention of the writer determined for it to be said to scandalize the court.

According to the Crown, the articles written and published by the accused insinuated that the Chief Justice had ulterior and personal motives to issue a warrant of arrest and remand the vehicle inspector into custody, that is that he wanted to flex his power and send a message that those who oppose him will be sent to jail. The article, said the Crown, suggested a serious breach of duty by the Chief Justice, in circumstances calculated to undermine public confidence in the courts. The Crown submitted that the second article, entitled "Where the law

has no place", suggested that the rule of law does not exist in Swaziland. The Crown argued that this article: attacked the judiciary as a whole as having robbed the people of justice; insinuated that a travesty of justice had been committed in a case involving the rich privileged few against the less powerful; and tended to portray the vehicle inspector as an innocent man who was being judicially harassed. The Crown suggested that it was contemptuous to praise the character of an accused person in respect of whom criminal proceedings were pending.

The Crown argued in favour of relying on the offence of 'scandalizing the court' to oppose the defence of fair comment advanced by the accused. The Crown quoted extensively from the case of *S v Mamabolo* ((2001) (3) SA 409), including paragraph 33 of the judgment, in which Justice Kriegler of the Constitutional Court of South Africa concluded that: "the crime of scandalizing is particularly concerned with the publication of comments reflecting adversely on the integrity of the judicial process or its officers". The Crown also referred to paragraph 49 from that case, in which it was stated: "On balance, while recognizing the fundamental importance of freedom of expression in the open and democratic society envisaged by the Constitution, there is a superior countervailing public interest in retaining the tightly circumscribed offence of scandalizing the court".

Crown counsel submitted that the accused's conduct of attacking the judiciary was scurrilous and made with impunity. The Crown characterised the articles as: "downright harmful to the public interest as they undermine the legitimacy of the judicial process". The Crown contended that the prosecution case did not violate the right to freedom of expression as contained in section 24(2) of the Constitution of Swaziland. It argued in favour of the application of the limitation provision in Article 24(3)(b)(iii) of the Constitution, which provides that:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision… that is reasonably required for the purpose of… maintaining the authority and independence of the courts."

The Crown argued that, in setting out this limitation, it was the intention of the legislature that the authority, dignity as well as reputation of the courts in Swaziland must be respected. This meant, according to the Crown, that the freedom of expression is inferior to the authority, dignity and reputation of courts. The Crown submitted that the accused had failed to advance a reasonable explanation for their contemptuous articles.

2.7.9. Closing submissions by defence counsel, Advocate Maziya

Acting on behalf of the Nation Magazine and Mr Makhubu, Advocate Maziya argued that the accused were not being charged with that species of contempt of court commonly known as 'scandalizing the court'. He contended that they were facing charges of contempt of court *sub judice* in that they criticized the manner in which the Chief Justice handled the matter against Mr Gwebu. The accused had criticized the issuance of the warrant of arrest against Mr Gwebu and how Mr Gwebu had been dealt with in the Chief Justice's chambers.

Advocate Maziya argued that there was nothing contemptuous about the articles as everything contained within them was factual. Counsel contended that these facts were confirmed in the evidence of Mr Gwebu, who had testified that: he confronted the driver who was going to buy some uniforms; Judge Otta later joined the driver after the vehicle had been impounded; when the Chief Justice ordered the release of the vehicle, Mr Gwebu had refused to obey the instruction, but later agreed to a temporary release of the vehicle after a lawyer had

intervened; Mr Gwebu was later arrested and taken to the Chief Justice's chambers for initial remand; he had at that time informed the Chief Justice that he had a lawyer and that he wished his lawyer to be present, but that the Chief Justice had retorted that the lawyer was not present when the offence had been committed.

Advocate Maziya argued that there was nothing wrong with anyone criticizing the Chief Justice for having acted improperly, in this case for several reasons, Firstly, the Chief Justice had issued a warrant of arrest and caused Mr Gwebu to appear in his chambers for remand. It was put to the court that the Chief Justice was clearly an interested party and should never have been involved in the case against Mr Gwebu. The Chief Justice had telephoned Mr Gwebu and purportedly ordered him to stop interfering with Judge Otta's vehicle. This disqualified him from subsequently handling the matter. Secondly, Mr Gwebu had been denied his right to legal representation and the remand hearing was conducted in the Chief Justice's chambers instead of in open court. Thirdly, the warrant of arrest had been issued by the Chief Justice instead of a magistrate as required in terms of section 31(1) of the CPEA. The issuance of a warrant of arrest on reasonable suspicion that someone has committed an offence is, said defence counsel, the exclusive mandate of a magistrate. The only time that any other judicial officer may cause the arrest of an accused person is when the said judicial officer has witnessed the commission of an offence and proceeds to arrest the offender or orders another person to do so; or when an accused who is required to appear in court defaults.

In the case of Mr Gwebu, defence counsel pointed to the fact that the prosecutor had not even applied for a remand since there was no docket or charge sheet. Mr Gwebu was therefore remanded without a charge being put to him. Despite this and other anomalies, Mr Gwebu had been remanded for seven days in custody. Counsel further argued that section 37 of the Criminal Procedure and Evidence Act demanded that, after the arrest of Mr Gwebu, he ought to have been taken to a magistrate for initial remand on charges laid out in the warrant of arrest. Advocate Maziya argued that the Chief Justice had clearly breached the law and the articles by the accused were therefore fair and legitimate comment. The accused, he argued, could not be prosecuted for criticizing the irregular and unlawful conduct of the head of the judiciary exercising his administrative or judicial functions. Advocate Maziya argued that when the Chief Justice unlawfully issued a warrant of arrest, remanded the accused in custody without a charge and in the absence of his lawyer, he was not exercising a judicial function. There was therefore nothing wrong with the criticism against the Chief Justice as he had acted unlawfully and manipulated the law for his own ends.

Advocate Maziya further argued that there was nothing wrong with the authors likening the Chief Justice to Caiphus who had used Pontius Pilate to deal with Jesus unjustly, because the Chief Justice had acted similarly. He had used the Registrar at the time (who was now the presiding trial judge, Judge Simelane) to have Mr Gwebu appear in his chambers.

Advocate Maziya countered the submission by Crown counsel that the right to freedom of expression should not trump the independence and authority of the judiciary. He argued that the judiciary in Swaziland lacks independence and authority. The appointment process is opaque, with judges being handpicked instead of going through a process of interviews after vacancies are announced. Counsel made reference to Chief Justice Mahomed's address to the International Commission of Jurists in Cape Town in 1998, where he stated that: "the question of judicial independence is a reality that affects ordinary people. What the judiciary is doing should show it is independent." Counsel argued that the people

are the ones who perceive whether or not the judiciary is independent. Judicial independence may be guaranteed through proper appointment procedures and ensuring security of tenure among other measures. Whereas in Swaziland the Law Society has no input into the appointment of judges.

Advocate Maziya further stated that the political system also has a bearing on judicial independence. According to statements in the media, the Chief Justice threatened people who advocated regime change in Swaziland. The Chief Justice had said that he, as someone who understood how the monarchy works, was ready to defend the King. He further stated in the media that he was not going anywhere and that his position as Chief Justice was guaranteed. Advocate Maziya further argued that the Chief Justice had himself been irregularly appointed and hence that the judiciary, and the office of the Chief Justice, cannot be independent. On this point, counsel said that there had been no advertisement of the vacancy of the office of Chief Justice, nor an interview held to fill that office. It was argued that the Chief Justice therefore came into office unlawfully and continued to act unlawfully. Counsel concluded by saying there was therefore no reasonable justification to curtail freedom of expression that criticizes a judiciary that is not independent, accountable and legitimate. He submitted that if the articles aggrieved the Chief Justice, the Chief Justice should have proceeded to sue for defamation in the civil court. Defence counsel argued that fair and legitimate criticism of decisions and actions of judges is not unlawful as justice is not a cloistered virtue that may not be subjected to scrutiny.

2.7.10 Closing submissions by defence counsel, Attorney Mkhwananzi

Acting on behalf of Mr Maseko, Attorney Mkhananzi stated that the offence of contempt exists to protect the administration of justice rather than the feelings of judges and there must be a real risk of undermining public confidence in the administration of justice for the offence to be made out. He argued that justice may be subjected to scrutiny through legitimate criticism and that if the State fails to establish that the accused intended to undermine the judiciary, then their actions were lawful. He argued that the offence that accused faced was not that of 'scandalizing the court' (the objective of which is to protect the judiciary as a whole), but was the type of contempt related to pending judicial proceedings (designed to protect the fairness and administration of proceedings before a court). He quoted PMA Hunt's definition of contempt of court in the following terms:

> "Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it."

Defence counsel argued that the offence of contempt of court does not cover statements that attack the personal conduct of a judge, or that harm the judge's personal reputation. He relied, in support of his argument, on passages from the case of *S v Mamabolo* where Justice Kriegler remarked as follows (at paragraphs 24 and 25):

> "The interest that is served by punishing scandalizing is not the private interest of the member or members of the court concerned… it is important to keep in mind that it is not the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected, but the moral authority of the judicial process…"

> "The crucial point is that the crime of scandalizing is a public injury. The reason behind it being a crime is not to protect the dignity of the individual judicial officer,

> but to protect the integrity of the administration of justice. Unless that is assailed, there can be no valid charge of scandalizing the court."

Counsel argued that if the Chief Justice was unhappy with the articles, he ought to have proceeded to sue in the civil courts for defamation. The articles criticized the conduct of the Chief Justice in his personal capacity and were never intended to be an affront to the integrity of the administration of justice. The Chief Justice, it was argued, was not protected by the criminal offence of contempt of court.

Furthermore, counsel argued that when the Chief Justice ordered the warrant of arrest and handled the initial remand in his chambers, he was not sitting as a court.

In the alternative, it was argued that if the charge against the accused was that they made prejudicial statements in reference to pending judicial proceedings, then the charges could stand because the articles focused on the procedural irregularities of the warrant and remand of Mr Gwebu. The articles were never intended, nor did they tend, to prejudice Mr Gwebu's right to a fair trial, nor to influence judgment on the merits of Mr Gwebu's case. The articles did not pronounce on whether Mr Gwebu was guilty or innocent of the offence of contempt of court. There was no attempt to exonerate Mr Gwebu of any wrongdoing. The focus of the articles was instead on the irregularities in the procedures adopted by the Chief Justice. In cases of contempt of court *sub judice*, defence counsel argued that the test to be applied is whether the matter complained of was calculated to interfere with the course of justice, not whether the authors and printers intended that result. The defence argued that the articles did not tend to interfere with the due administration of justice in the case against Mr Gwebu.

Defence counsel also made reference to a passage cited by Kriegler J in *S v Mamabolo*, from the case of *Ambard v Attorney General of Trinidad and Tobago* ((1936) 1 All ER 704), where Lord Atkin said (at page 709):

> "But where the authority and position of an individual judge on the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the act done in the seat of justice."

Defence counsel argued that the articles amount to legitimate criticism of the conduct of the Chief Justice. Counsel referred to a number of cases explaining the purpose of the offence of contempt of court, including in the case of *Argus Printing and Publishing Company Ltd and Another v Esselem's Estate* (1994 (2) SA 1 (A)), where it was stated at paragraph 44 that: "the criminal remedy of contempt of court is not intended for the benefit of the judicial officer concerned or to enable him to vindicate his reputation or to assuage the wounded feelings."

Defence counsel referred to the freedom of expression as a freedom protected under section 24 of the Constitution of Swaziland, as well as relevant regional and international instruments to which Swaziland was party. Counsel argued that it was through the expression of ideas and criticism of those in power that citizens may learn more about the conduct of those in power and hold them accountable. The judiciary is not above legitimate criticism and accountability. The rights of the judiciary as protected by contempt of court, cannot trump the freedom expression, which is a fundamental right in a constitutional democracy. As stated in the Zimbabwean case of *In Re: Chinamasa* (2001(2) SA 902, at page 915, paragraph F), "the use of colourful, forceful and even disrespectful language may be necessary to capture the attention, interest and concerns of the public to the need to rectify the situation protested against or prevent its recurrence.

People should not have to worry about the manner in which they impart their ideas and information."

Defence counsel made reference to several other authorities supporting the right to freedom of expression when balanced against the need to protect the integrity of the administration of justice. In the Canadian case of *R v Kopyto* ((1987) 47 DLR 213 (Court of Appeal of Ontario)), for example, it was noted that the court stated that: "the prosecution would be required to demonstrate a clear and present danger to the administration of justice". According to cases referenced by counsel, statements made in the public interest, even if they are offensive, intemperate or shocking, do not necessarily amount to contempt of court. Counsel stated that the threshold for a conviction in such cases is quite high and prosecutions are more likely to be instituted only in clear cases of impeachment of judicial integrity. Defence counsel concluded that there were very few instances of criticism of the judiciary that would lead to prosecution on contempt of court charges. Only where the criticism is indecent, unfair, lacking in objectivity, denigrating and scurrilous should charges of contempt of court be proffered.

Defence counsel further argued that if criticisms are based on truthful assertions, there is no reasonable justification for charging the author with contempt of court even if the result is to deprive the court or judge of public confidence. This is more so, counsel argued, where the object of the article is to enable the relevant authorities to take corrective action. The defence further argued that statements made *sub judice* must not endanger a litigant's right to a fair and unprejudiced trial. It was submitted that the articles by the accused did not focus on the merits of the case against Mr Gwebu, but merely commented on the procedural irregularities adopted by the Chief Justice when he issued a warrant of arrest and dealt with the remand proceedings in his chambers.

2.8 Decisions of the trial court

Judgment was delivered on 17 July 2014, at which time all four accused were found guilty on the two counts of contempt of court (see 2.8.1 below). The sentence was handed down on 25 July 2014 (see 2.8.2 below).

2.8.1 Basis of the verdicts

Concerning the circumstances of Mr Gwebu's arrest and remand, which was the subject matter of the two articles, Judge Simelane believed the evidence of the Deputy Registrar of the Supreme Court, Ms Banele Mgcamphalala, who was Acting Registrar of the High Court when Mr Gwebu was arrested and brought before the Chief Justice. Judge Simelane accepted the evidence that Mr Gwebu was never denied access to his lawyer. He accepted that Mr Gwebu's lawyer was waiting in the office of the Registrar when his client appeared in the Chief Justice's chambers. Judge Simelane also took judicial notice of that fact, since he was also in the Chief Justice's chamber during Mr Gwebu's remand proceedings. Judge Simelane did not find anything wrong with the proceedings being held in chambers instead of in open court. Judge Simelane rejected Mr Gwebu's evidence that his right to a lawyer was not explained; that the prosecutor did not have a charge sheet; and that he was denied access to his legal representative.

Judge Simelane stated that the accused had no right to attack the Chief Justice or the courts under the guise of freedom of expression. Journalists, he said, had the misconception that because they had pen and paper they could write whatever they wanted under the disguise of freedom of expression. He concluded that it would be absurd to allow journalists to write scurrilous articles in the manner the

accused persons did. Any right-thinking persons in a democracy such as Swaziland, he concluded, would never condone such conduct.

Judge Simelane ruled that the evidence of Mr Maseko was inadmissible as it was irrelevant. He attacked Mr Maseko for playing to the gallery and addressing the court as if it were a political platform. His unsworn statement was rejected by the judge. He described Mr Maseko's defence as a call for regime change and a campaign of total defiance against all constitutional structures in the country.

In dismissing Mr Makhubu's assertions that their articles were a legitimate and fair criticism of the judiciary, the Judge Simelane stated that freedom of expression was not an absolute right, but its exercise was subject to the rights of others and had to be balanced against the maintenance of the authority and independence of the judiciary. He found that the authors of the articles had not verified their facts. He considered that the allegations in the articles tended to destroy the public's confidence in the judiciary. He concluded that such allegations had the potential of prejudicing Mr Gwebu's criminal case and denigrating the dignity and authority of the courts. He stated that the courts could not allow people to pass judgment on matters still pending in court. It was his finding that the accused "scandalized, insulted and brought into disrepute the dignity and authority of the Chief Justice in the execution of his official duties in connection with Gwebu's case which is still *sub judice*."

It was the finding of Judge Simelane that the accused were of the opinion that there was corruption and no rule of law in the courts. He considered that the articles portrayed Mr Gwebu as an innocent man before his criminal case was even considered. He stated that it was not unusual or unlawful for a judge to conduct court proceedings in chambers instead of a courtroom. Having dismissing the accused's defence and their evidence, he found them guilty as charged.

2.8.2 Sentences imposed

Sentences were handed down on 25 July 2014. Mr Maseko and Mr Makhubu were sentenced to two years' imprisonment on each count, ordered to run concurrently, and taken to run from 17 and 18 March 2014 respectively, when the accused were first taken into custody. The Nation Magazine and Swaziland Independent Publishers (Pty) Ltd were sentenced to pay fines in the sum of Swazi Emalangeni SZL E50,000.00 (equivalent to approximately 3,800.00 Euros) on each count, to be paid within one month of the date of judgment.

Judge Simelane considered the offences to be serious. In the case of Mr Maseko and Mr Makhubu, he concluded that a term of imprisonment was commensurate with the gravity of the offences and would serve as a deterrent to others, particularly like-minded journalists. It was noted that Mr Makhubu and Swaziland Independent Publishers were not first offenders, having been convicted on similar charges before and ordered to pay fines of SZL 30,000.00. Judge Simelane considered that the accused had not shown remorse or contrition. Mr Maseko and Mr Makhubu had verbally attacked the trial judge during court proceedings. Mr Makhubu was said to have disrespected the trial judge during court proceedings by verbally attacking him, considered be an act of misconduct. Mr Maseko was found to have been unrepentant and challenged the authority of the State and the dignity of the court. Mr Maseko was also said to lack ethics and to be a disgrace to the legal profession. He was said to be arrogant, having chanted political slogans when the judgment was being read. Judge Simelane took the view that Mr Maseko was earnestly pursuing regime change at all costs.

Judge Simelane also identified mitigating factors relevant to the sentencing of Maseko and Mr Makhubu. Both were married with children. It was noted that Mr Makhubu has four children and his wife is employed, and that Mr Maseko has one child and his wife is currently unemployed. Both were gainfully employed, and Mr Maseko was a first offender.

2.9 Appeal proceedings

On 15 August 2014, Mr Maseko, Mr Makhubu, The National Magazine and Swaziland Independent Publishers (Pty) Ltd lodged an appeal against their convictions and sentences. The appeal hearing was held at the Supreme Court of Swaziland on 30 June 2015. At the commencement of the appeal hearing, the prosecution conceded that the convictions and sentences could not be sustained. The prosecution further conceded that it was wrong for the trial judge, Judge Simelane, to have refused to recuse himself and to have taken judicial notice of events in respect of which he was a potential witness in the matter.

The Justices of the Supreme Court agreed with the submissions by the prosecution and commended the prosecution for making appropriate concessions. The Supreme Court consequently made an order quashing the convictions and sentences of the defendants and ordered the immediate release from custody of Mr Maseko and Mr Makhubu. The Supreme Court's judgement is due to be released on the final day of the Court's current session, 29 July 2015.

On 5 November 2014, Mr Maseko and Mr Makhubu lodged an application for bail pending the outcome of their appeal against conviction and sentence. The application was lodged in the Supreme Court, since the accused persons had wished to avoid having their bail application heard by Judge Simelane in the High Court. On 5 November 2015, Justice Ebrahim in the Supreme Court declined to hear the application for bail pending appeal against conviction and sentence. He directed that the bail application be heard by the High Court. The bail application was enrolled in the High Court and scheduled to be heard by Judge Simelane. Mr Maseko withdraw his application for bail on 5 December 2014. Judge Simelane heard and dismissed the remaining application for bail pending appeal by Mr Makhubu. That bail application was the last attempt by accused to secure their freedom prior to the Supreme Court appeal hearing.

3. EVALUATION OF THE TRIAL

This final part of the trial observation report sets out a detailed examination of the extent to which the trial, including pre-trial matters, complied with national, regional and international laws and standards.

Concerning pre-trial matters and the conduct of proceedings, this part of the report considers: the legitimacy of the initial warrants of arrest against Mr Maseko and Mr Makhubu (3.2.1 below); the remand in custody of Mr Maseko and Mr Makhubu by the Chief Justice (3.2.2 below); and the presiding over the trial by Judge Simelane (3.2.3 below).

Application of the law to the charges of contempt of court is considered in section 3.3 below, having regard to laws and standards on the freedom of expression. The sentences imposed on Mr Masuku and Mr Makhubu are evaluated in section 3.4 below, having regard to laws and standards applicable to sentencing for contempt of court and comparable provisions and decisions in common law jurisdictions.

3.1 Legal frameworks used to evaluate the trial

Evaluation of the proceedings, the application of law in the proceedings, and the sentences imposed is based on *national* law in Swaziland – including the Constitution of the Kingdom of Swaziland Act 2005 (the Constitution of Swaziland) and the Criminal Procedure and Evidence Act No 67/1938 (the Criminal Procedure and Evidence Act) – as well as *international law and standards* – including the International Covenant on Civil and Political Rights (ICCPR), the Basic Principles on the Role of Lawyers, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles) and the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UN Principles on Legal Aid) – and *regional law and standards* – including the African Charter on Human and Peoples' Rights (the African Charter), the Principles and Guidelines on the Right to a Fair Trial in Africa (the Africa Fair Trial Guidelines) and the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines).

Extracts from these laws and standards, as referred to in this part of the report, are found in Appendix 5 of this report.

3.2 Evaluation of proceedings

This section of the report evaluates whether or not the proceedings satisfied the national, regional and international law and standards referred to in section 3.1 above. Consideration is here given to both: (a) whether or not the legal procedures established under Swazi legislation were observed in the proceedings, including in pre-trial matters such as the issuing of arrest warrants; and (b) also whether international and regional fair trial laws and standards were fully or partially observed during the trial.

3.2.1 Initial warrants of arrest against Mr Maseko and Mr Makhubu

The facts leading to the arrest of Mr Maseko and Mr Makhubu are set out in section 2.4.1 above.

This report concludes that the arrest and detention of Mr Maseko and Mr Makhubu was arbitrary despite the fact that a warrant for their arrest was issued

by the Chief Justice. Arrest warrants are normally issued by magistrates and not judges in Swaziland in terms of the CPEA. It was peculiar that the Chief Justice personally issued the warrants for arrest himself and at all times seemed to direct that all aspects of the matter be handled by Judge Simelane who became a witness, complainant and judge in the matter. It is noted in this regard that the United Nations Working Group on Arbitrary Detention came to the opinion that the arrest was arbitrary. At the subsequent appeal hearing on 30 June 2015, the Supreme Court found that the involvement of Judge Simelane throughout the proceedings, and his failure to recuse himself, was sufficient basis to quash the conviction and sentence and release the accused forthwith.

The irregular arrest was therefore in violation of Principle M(1)(b) of the Africa Fair Trial Guidelines, which provides that an arrest may only be carried out "strictly in accordance with the provisions of the law". The irregular arrest warrant also violates article 6 of the African Charter, which requires any deprivation of liberty to be in accordance with "reasons and conditions previously laid down by law", and article 9(1) of the ICCPR, which provides that no one may be deprived of liberty except in terms of procedures established by law.

Arising from cross-examination at trial by the defence team, it subsequently became apparent that the Deputy Registrar, who portrayed herself as the complainant in the matter, had not filed a complaint before she had heard rumours that the Chief Justice was preparing the warrants of arrests. Another matter of irregularity shown through cross-examination was that the Deputy Registrar only recorded her witness/complainant statement on 26 March 2014, almost a week after the arrest warrants had been issued and the accused persons had been remanded in custody by the Chief Justice. A further irregularity was that the Deputy Registrar was the person who commissioned the oaths of affidavits from police officers whose oaths were purportedly used as the basis for the arrest warrants, but those oaths having been taken after the warrants had already been prepared and in circumstances where the Deputy Registrar had a conflict of interest as alleged complainant.

All in all, despite efforts to make the arrest appear to conform with domestic law, the arrest was arbitrary and an abuse of process designed to achieve an ulterior, punitive and unjust outcome and in the process violated principles of international law.

3.2.2 Remand in custody of Mr Maseko and Mr Makhubu by the Chief Justice

When taken to the chambers of Chief Justice Ramodibedi, Mr Maseko and Mr Makhubu were remanded in custody in the absence of their lawyer. Four issues arise in this instance. First, whether it was lawful for the accused persons to be remanded in custody by the Chief Justice in his chambers, rather than being taken to an open court for remand proceedings. It also raises issues concerning the independence and impartiality of the judiciary, since in this case it was the same judicial officer who issued the warrant of arrest, the Chief Justice, who then remanded the accused in custody. Third, from the time of arrest an accused is entitled to legal representation and at every subsequent stage of the criminal proceedings. Finally, the substantive merits of the decision require consideration, namely whether the accused should have been remanded in custody, or on bail.

For the reasons set out below, the ICJ takes the view that: (a) although not in violation of domestic law, it was not appropriate for the Chief Justice to have himself dealt with the initial appearance of Mr Maseko and Mr Makhubu; (b) dealing with the matter in chambers, rather than in open court, in the circumstances amounted to a violation of the right to a public hearing; (c) the

Chief Justice was in the circumstances obliged to recuse himself from dealing with the remand proceedings and thereby acted in violation of the accused's right to a hearing before an impartial court or tribunal; (d) dealing with matter in the absence of the accused's legal counsel amounted to a violation of the right to legal representation from the time of arrest and in all stages of criminal proceedings; and (e) the remand in custody of Mr Maseko and Mr Makhubu was not in the interests of justice within the meaning of section 96(4) and (10) of the CPEA.

Remand in chambers without presentation to an open court

Dealing with the remand in custody of the accused in the chambers of the Chief Justice raises two questions: (a) whether he, as Chief Justice, had *prima facie* authority to deal with the initial appearance of the accused for the purpose of determining whether or not to remand the accused in custody or on bail; and (b) whether that question should have been dealt with in open court, rather than in chambers.

Section 16(3) of the Constitution of Swaziland provides that a person arrested or detained upon reasonable suspicion of having committed an offence, shall be brought before a court without undue delay. Similarly, article 9(3) of the ICCPR guarantees that anyone who is arrested or detained on a criminal charge "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power". Principle M(3)(a) of the African Fair Trial Guidelines also requires that anyone arrested or detained on a criminal charge be brought before a "judicial officer authorised by law to exercise judicial power".

Concerns have been raised that Mr Maseko and Mr Makhubu were not taken to the magistrate's court for an initial appearance following their arrest, but were instead taken directly to the chambers of the Chief Justice. On the face of it, this appears not to violate the requirements of the law to bring an arrested person promptly before a court without undue delay. However, the concept of bringing a person before a court assumes that the court is independent and impartial. Impartiality by itself means that it is inappropriate and not proper for a person to sit as witness, prosecutor and judge in a matter where he or she has an interest. This applies at every stage of the proceedings, including the initial appearance in response to a warrant of arrest, as in this case. The ICJ takes the view that it was not appropriate and proper for the Chief Justice to have dealt with the initial appearance of Mr Maseko and Mr Makhubu after he had issued the warrants for their arrest in response to their legitimate exercise of the right to freedom of opinion and expression about his own conduct in dealing with the case of Mr Bhatshana Gwebu.

The second question concerns the right to a public hearing and thus requires consideration of whether it was appropriate to bring the accused before a judge in chambers, rather than in an open court, and thus in a manner that allowed for transparency and public scrutiny. The general rule concerning court hearings in criminal cases is that they must be public, as reflected in Article 14(1) of the ICCPR and Principle A(1) of the African Fair Trial Guidelines. Having said that, pre-trial hearings need not necessarily be held in public, unless the particular circumstances call for a public hearing of a pre-trial matter.[2] In the particular situation of Mr Maseko and Mr Makhubu, especially having regard to the questions raised below regarding the impartiality of the Chief Justice, the ICJ takes the view that a public hearing in open court at this stage was indeed

[2] *Reinprecht v Austria*, European Court of Human Rights Application No 67175/01 (judgment of 15 November 2005), para. 41.

warranted. In the circumstances of the particular case, the in-chambers determination to remand the accused in custody ran counter to the principle of transparency and public scrutiny, and did not fully comply with the duty to ensure a public hearing. In the constitutional challenge to the detention, Judge Dlamini of the High Court expressed the view that, in such a contentious matter, the remand proceedings should have been heard in open court and not in the Chief Justice's chambers.

Impartiality of the Chief Justice as the judicial officer issuing the warrant to arrest and then remanding the accused in custody

Article 14(1) of the ICCPR guarantees that all persons must be heard by an independent court or tribunal, as does Article 7(1)(d) of the African Charter and Principle A(1) of the African Fair Trial Guidelines. Impartiality in that regard requires both subjective and objective impartiality, meaning that not only must a court or judicial officer act without bias or prejudice, without harbouring preconceptions about the particular case or the parties, but must also act in a manner that excludes any legitimate doubt of impartiality. The latter requires judges to recuse themselves from matters where there might be an appearance of a conflict of interest. This has been reaffirmed by the UN Human Rights Committee and the European Court of Human Rights.[3] The requirement of impartiality is also guaranteed under section 21(1) of the Swazi Constitution.

It is notable in this regard that, when considering the accused's constitutional challenge to the arrest and detention, Judge Dlamini considered that the Chief Justice should not have issued the warrant of arrest. In circumstances where he was the alleged victim of the purported contempt of court, Judge Dlamini took the view that any warrant of arrest should have been issued, if appropriate, by another judicial officer to avoid any actual or perceived bias. In the circumstances of the case, the Chief Justice should have recused himself from any matter dealing with allegations against, or pre-trial issues concerning, the accused. The ICJ concludes that his dealing with the remand proceedings violated the accused's right to a hearing before an impartial court or tribunal, under national, regional and international law. It is also noteworthy that Judge Dlamini's reasoning on this point was not attacked on appeal. The Supreme Court only found her to have acted improperly in reviewing the decision of another High Court judge as she has no such jurisdiction. The Supreme Court did not address the substance of the reasons why a warrant was issued in the first place and whether this was appropriate.

Right to legal counsel

Everyone who is arrested facing a criminal charge has the right to the assistance of legal counsel, from the time of arrest, at trial, and also in pre-trial proceedings. This is reflected in international and regional law and standards,[4] as well as in section 16(2) of the Constitution. Disposing with the question of the remand of the accused in the absence of their legal representatives amounted to a clear violation of Section 16(2) and 21(2) of the Swaziland Constitution and of applicable international and regional law and standards.

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[3] See, for example: Human Rights Committee, General Comment No 32, para 21; *Piersack v. Belgium* [1982] ECHR 6, para 30; and *Hauschildt v. Denmark* [1989] ECHR 7, para 48.
[4] See, for example: Article 14(3)(b) ICCPR; Principle 1 of the Basic Principles on the Role of Lawyers; Principle 17(1) of the UN Body of Principles; Article 7(1)(c) of the African Charter; Principles G(b), M(2)(e) and M(2)(f) of the African Fair Trial Guidelines; and Rule 20(c) of the Robben Island Guidelines. See also Principle 3 (para. 20) of the UN Principles on Legal Aid.

Merits of the decision to remand in custody

The right to liberty and the presumption of innocence give rise to a presumption in favour of release pending trial ('bail'). This presumption is reflected in Article 9(3) of the ICCPR and Principle M(1)(e) of the African Fair Trial Guidelines. Each of those provisions qualifies the presumption in favour of bail such that a remand on bail may be made subject to certain conditions or guarantees, or a remand in custody may be appropriate if "there is sufficient evidence that deems it necessary to prevent a person… from fleeing, interfering with witnesses or posing a clear and serious risk to others" (as expressed in the African Fair Trial Guidelines). Section 16(7) of the Constitution of Swaziland sets out a presumption in favour of bail, which may be subject to reasonable conditions The CPEA sets out the grounds on which bail may be denied "in the interests of justice", in section 96(4), namely where one or more of the following grounds are established:

> "(a) Where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or
> "(b) Where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;
> "(c) Where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;
> "(d) Where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
> "(e) Where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security."

The CPEA provides further in section 96(10) that the question of whether or not to grant bail is a factor of "weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice the accused is likely to suffer if he or she were to be detained in custody".

The ICJ is of the view that Mr Maseko and Mr Makhubu should not have been detained in custody. They are both Swazi citizens of fixed abode. Both were at the time gainfully employed professionals with families to take care of. The state had all the evidence it required to prosecute the alleged crime, and hence the danger of interfering with any evidence was minimal if not non-existent. There was no danger at all that the accused could possibly interfere with the evidence or state witnesses, especially given that the main witnesses found themselves as complainants and judges in the matter (the Deputy Registrar, Chief Justice Ramodibedi and the trial judge, Judge Simelane). The prosecutor did not request that the accused be remanded in custody. The remand in custody pending trial and conviction was thus *mero motu* at the behest of the Chief Justice. At no time during the proceedings before trial or before conviction and sentence did Chief Justice Ramodibedi or Judge Simelane enquire from the prosecutors or the accused persons their attitude towards the possibility of bail. None of the grounds stated in section 96(4) of the CPEA for denial of bail existed.

The remand in custody of Mr Maseko and Mr Makhubu was therefore not in the interests of justice, but instead appeared to have been solely in the interests of the Chief Justice and Judge Simelane, and was therefore arbitrary in nature. The denial of bail by the CJ violates article M(1)(e) of the Africa Fair Trial Guidelines which provides that an accused is to be kept out of custody, unless there is

sufficient evidence that deems it necessary to prevent the person from fleeing, interfering with witnesses or posing clear or serious harm to others.

3.2.3 Judge Simelane as trial judge

The defence application for recusal of the trial judge contended that reasonable grounds existed to consider that Judge Simelane would be prejudiced in the conduct of the criminal trial. The reasons provided for the apprehension of bias concerned both subjective bias (evidence of actual bias against the accused on the part of Judge Simelane) and objective bias (evidence of a conflict of interest on the part of Judge Simelane such that legitimate doubts of impartiality existed).

Defence case

On the question of actual (subjective) bias, it was contended that Judge Simelane was subjecting the accused to ridiculing treatment during the proceedings, resulting in altercations between the trial judge and the accused in open court. During the recusal hearing, Advocate Mkhwanazi, on behalf of Mr Maseko, stated that:

> "Without justifying the conduct of the fourth accused person, the court had demonstrated its hostility towards the accused persons. They were called upon to stand up, sit down, stand up, sit down until the fourth accused lost his cool… So we are saying, Your Lordship, given that His Lordship has at some point in time acted as prosecutor in the same cause and judge and given the hostility that I have mentioned before court, it will be prudent for His Lordship to recuse himself from this matter… An ordinary man in the street will not see justice being done…"

On the question of the appearance of justice being done (objective impartiality), it was contended that this was not possible since Judge Simelane had too much personal interest in the outcome of this case and that "no man is to be a judge in his own case". The basis for this contention was that Judge Simelane: (a) had a demonstrable interest in the case; and (b) was a potential witness in the case. More specifically:

a) Judge Simelane was mentioned in the first of the two articles forming the basis of the contempt charges (see Appendix 1). As the then-High Court Registrar, the articles implied that he was a willing servant of Chief Justice Ramodibedi in the breaking or at least abuse of the law. The articles directly and sharply criticized the conduct of Judge Simelane in his capacity as the then-Registrar of the High Court, alleging that he had lied for Chief Justice Ramodibedi and was thereafter rewarded with an appointment as a judge. Since Judge Simelane therefore qualified as a potential witness and/or complainant in the matter, it would be inappropriate and a conflict of interest if he was to sit as trial judge in a matter in which he demonstrably had an interest.

b) Counsel for Mr Maseko argued that, although the indictments against the accused did not directly refer to Judge Simelane, "some of the articles or some of the quotations in the articles… make direct and specific reference to His Lordship… it is our humble submission that His Lordship… has now been elevated to a potential witness in this case if not a potential complainant". Indeed, Maseko and Makhubu had, as part of their defence strategy, subpoenaed both Chief Justice Ramodibedi and Judge Simelane "as potential defence witnesses for the defence cases". It was therefore argued that Judge Simelane was "bound to recuse himself from the criminal trial as he cannot legally be expected to sit in judgment of a matter in which he is a witness or party".

Concerning the requirements of both subjective and objective impartiality, counsel for Maseko and Makhubu also pointed to the fact that Judge Simelane: ordered that the accused be remanded in custody without ascertaining "from the accused whether the accused wishes that question [of bail] to be considered by the court", as provided for in section 96(1)(d) of the CPEA, where the prosecutor or accused have not raised the issue of bail; he did so despite the fact that the accused had been released by Judge Dlamini after she had ruled that their arrests were unlawful and after she had set aside the warrants to arrest; and he justified this based on a deliberate distortion of facts in that he knew that the noting of appeal against Judge Dlamini's judgment could not have suspended the judgment, since it was done well after its execution. On this issue, Advocate Maziya commented as follows: "Your Lordship *mero motu* issued a warrant of arrest… Your Lordship was now acting as if (you) are part and parcel of the Crown. We are dealing with a situation where justice must not only be done but must manifestly be done… Accused have every reason to fear that this matter might not be determined with the openness, with that objectivity, with that equanimity of mind that should always characterise a noble discharge of judicial functions."

Counsel also contended that, on the basis of ethics, fairness and equity, Judge Simelane should recuse himself due to the fact that the Law Society of Swaziland had commenced proceedings in the High Court of Swaziland challenging his appointment as a judge as irregular, unlawful and needing to be set aside.

Crown opposition

The Crown opposed the application for recusal on three main grounds, namely that:

1. Mr Maseko and Mr Makhubu had provoked Judge Simelane in open court and the honourable judge took this in his stride and did not respond, resulting in the defence lawyer offering an apology. The apology was accepted by Judge Simelane. The Crown therefore argued that if Judge Simelane was to recuse himself on the basis that he was unfairly provoked by the accused, then this would result in the accused benefitting from their own misconduct and would create a precedent that would be dangerous to the proper administration of justice.
2. Judge Simelane had taken an oath of office to administer justice without fear or favour. Provocations from the accused could therefore not interfere with the Judge's impartiality.
3. Mr Maseko and Mr Makhubu had issued a press release critical of Judge Simelane and the mere allegations that the judge would be biased was not a reasonable ground for recusal.

Decision of Judge Simelane

Judge Simelane denied the motion to recuse himself. He initially announced his ruling *ex tempore*, rather than by a written decision, stating that: "I have considered all submissions. I am of the view that the applications (are without merit). My judgment and reasons will follow… The recusal application is dismissed."

A written decision on the application for recusal was not delivered until 19 May 2014, by which time the Crown had already presented its evidence in the trial. In

his written judgment dismissing the application, Judge Simelane, made the following findings and observations:

- The judge is not a complainant in this matter as alleged by the applicants. The contempt of court charges were not committed *in facie curiae* before the present judge.
- The applicants allege that the judge should recuse himself because the Nation Magazine articles make reference to him. Judge Simelane stated: "It is a bold and bony statement, not substantiated. This is just a blanket statement, not substantiated. No pertinent allegations are adduced, hence the test of double reasonableness is not met. No cogent and convincing evidence has been adduced."
- The applicants further contend that the judge had been listed as a witness in the matter and cannot sit as a judge, prosecutor and complainant in his own matter. Judge Simelane stated: "Consequently, there is no basis for the contention that the Chief Justice and the judge are witnesses in the contempt of court case. This contention is simply made to defeat the ends of justice."
- On the allegation that the judge showed open hostility to Mr Maseko and Mr Makhubu, and concerning the incident of a public altercation inside the courtroom, Judge Simelane ruled that: "the applicants seek recusal of the judge as a result of their own misconduct and to allow this would open doors for any defendant to get rid of an undesired judge by making outbursts and attacking the judge in open court."
- The judge dismissed as "clutching at straws" the contention that he should recuse himself because his appointment as judge of the High Court was being challenged by the Law Society of Swaziland.
- Judge Simelane concluded that the application by Mr Maseko and Mr Makhubu "fails woefully" as they were "clearly forum shopping" and this is an undesirable practice and cannot be allowed. A party should not be allowed to abuse the recusal process in an effort to "judge shop", delay his case, vent his frustration at an unfavourable ruling, or otherwise attempt to gain some perceived strategy."
- The written judgment was also critical about the manner in which the recusal process had been handled by the defence team. It characterised the way in which the recusal matter was first raised as "highly irregular, unethical, embarrassing and discourteous… The motive was to intimidate and embarrass this Court."

ICJ assessment

The ICJ takes the view that Judge Simelane should have recused himself, since the basis for objective bias was quite manifest. Objectively, he was clearly in the position of being a witness/complainant and judge in his own case. He was referred to in the first of the two articles that formed the basis of count 1 in the proceedings (see Appendix 1), in which he was heavily criticised for his role in what Mr Maseko and Mr Makhubu saw as a travesty of justice in the way the Chief Justice had handled the case involving Mr Gwebu. The articles mentioned him as a willing servant in the Chief Justices unfairness and arbitrariness towards Mr Gwebu when he denied him legal representation and remanded him in custody without adhering to the requirements in section 96(1)(d) of the CPEA, which compel a judicial officer to enquire on the question of bail if the accused or the prosecution do not deal with the issue.

Judge Simelane was mentioned in one of the articles as having lied on behalf of the Chief Justice concerning the way the Chief Justice had handled the case against Mr Gwebu and was, in the process, rewarded for his loyalty to the Chief

Justice with an appointment to sit as a High Court judge. He was appointed to the bench in time to sit on the case against Mr Maseko and Mr Makhubu and it was surprising to see that virtually every court process to do with the arrest, detention and trial involving Mr Maseko and Mr Makhubu was placed before Judge Simelane, even in situations where he was not the duty judge. The only aspects about this case that escaped Judge Simelane was the constitutional challenge to their arrest that went before Judge Dlamini, as well as the appeal against conviction and sentence which was dealt with by the Supreme Court.

An inescapable conclusion emerged during the trial observation process that the case allocation system was heavily susceptible to forum shopping and manipulation by the Chief Justice and not objective or transparent. Even though Judge Simelane denied being a complainant/witness in the case he was now a judge, he nevertheless relied, in his decision on conviction, on his own participation in the case against Mr Gwebu, and even took judicial notice of what transpired, as the sole basis for his determination that Mr Maseko's criticism was unfounded.

The involvement of Judge Simelane in the case became the single most important factor leading to the Supreme Court's decision to overturn both the conviction and sentence against the accused on 30 June 2015.

3.2.4 Opinion of the UN Working Group on Arbitrary Detention

It should be noted that the circumstances surrounding the remand in custody of Mr Maseko by the Chief Justice, the non-recusal of Judge Simelane as trial judge and the deprivation of Mr Maseko's right to legal counsel were brought to the attention of the UN Working Group on Arbitrary Detention on 17 February 2015, alongside information concerning the conviction and sentencing of Mr Maseko. The Working Group on this basis sent a communication to the Kingdom of Swaziland on 20 February 2015, in which it set out the information submitted to it. The Kingdom of Swaziland did not respond to the allegations transmitted by the Working Group.

The Working Group on Arbitrary Detention considered the matter brought before it during its 72nd session on 20-29 April 2015. Despite the absence of any information from the Kingdom of Swaziland, the Working Group considered that it was in the position to render its Opinion on the detention on Mr Maseko in conformity with its methods of work.[5]

The Working Group's Opinion No 6/2015 concluded that these circumstances involved non-observance by the Kingdom of Swaziland of the international norms relating to the right to a fair trial, in this case "of such gravity as to give the deprivation of liberty of Mr Maseko an arbitrary character".[6] The Working Group requested the Kingdom of Swaziland to take the necessary steps to remedy the situation of Mr Maseko. It took the view that, in the circumstances, adequate remedy required release of Mr Maseko and the provision to him of an enforceable right to compensation.[7]

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[5] Working Group on Arbitrary Detention, Opinion No 6/2015 (the Kingdom of Swaziland), UN Dox A/HRC/WGAD/2015/xx (2015), para. 25.
[6] Opinion No 6/2015, above, paras. 31-35.
[7] Opinion No 6/2015, above, para. 38.

3.3 Application of the law to the charges of contempt of court

The charges and convictions against the accused relied on the common law doctrine of contempt of court, rather than any specific offence of contempt of court under Swazi legislation.

3.3.1 Laws and standards on the freedom of expression

Article 9(2) of the African Charter on Human and Peoples' Rights guarantees the right of every individual to "express and disseminate his opinions within the law". Article 9(1) provides that "every individual shall have the right to receive information".

In a ground-breaking case, the African Court on Human and Peoples' Rights dealt with a matter filed by a Burkinabe journalist who had been charged with criminal defamation, public insult and contempt of court. The journalist was sentenced to 12 months imprisonment and fined USD $3,000.00. In its judgment, reported as *Lohe Issa Konate v Burkina Faso 4/2013*, the African Court held that the conviction on the criminal charges preferred was invalid as it violated the African Charter guaranteeing freedom of expression. The African Court held that civil sanctions and non-criminal proceedings were adequate to deal with any infractions on the part of journalists.

Article 19(1) of the ICCPR provides that everyone has the right to hold opinions without interference. Article 19(2) guarantees the right of every person to freedom of expression, including the freedom "to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print". Article 19(3) recognizes that the freedom of expression "carries with it special duties and responsibilities" any may therefore be subject to certain restrictions, so long as such restrictions are provided by law and are necessary for either "respect of the rights or reputations of others" or for "the protection of national security or of public order (ordre public), or of public health or morals".

The Universal Declaration of Human Rights similarly affirms in its Article 19 that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The freedom of expression is similarly set out in section 24 of the Swazi Constitution.

In its General Comment on the freedom of expression, the UN Human Rights Committee, the treaty body established under the ICCPR, has recognized the high importance of the ability of individuals and journalists to criticize public officials. It observed that:

> "…in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, desacato, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws

> should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration."[8]

The Committee further recognized that "The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression".[9]

The right of lawyers to express opinions on public affairs and the administration of justice is specifically recognized by the UN Basic Principles on the Role of Lawyers, Principle 23 of which provides as follows:

> "Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession."[10]

With respect to restrictions on freedom of expression under Article 19(3) of the ICCPR, the Human Rights Committee has stated in its General Comment that "the relation between right and restriction and between norm and exception must not be reversed". The Committee emphasized that restrictions may only be imposed if they are "provided by law"; have the purpose of protecting respect for the rights or reputations of others, the protection of national security or of public order (ordre public), or of public health or morals; and conform to strict tests of necessity and proportionality.[11]

With respect to the requirement that any restriction be "provided by law", the Committee's General Comment states as follows:

> "For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."[12]

Thus, even a restriction that might in some circumstances be for a valid ground, or theoretically could be proportionate, will be invalid if any legal provision upon which it is based is not sufficiently precise and predictable to meet the requirements of a "law" within the meaning of Article 19(3) of the ICCPR.

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[8] Human Rights Committee, General Comment No 34, 'Article 19: Freedoms of opinion and expression', UN Doc CCPR/C/GC/34 (2011), para. 38.
[9] Ibid, para. 42.
[10] UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (27 August to 7 September 1990) and welcomed by General Assembly resolution 45/166 (1990).
[11] General Comment 34, above, paras. 21-22.
[12] Ibid, para. 25.

With respect to the element of proportionality under Article 19(3), the Committee has said as follows:

> "[R]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected… The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain."[13]

While the Human Rights Committee has suggested that "contempt of court proceedings relating to forms of expression may be tested against the public order (ordre public) ground" it has emphasized that: "In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings."[14] Any possibility for contempt of court proceedings to comply with Article 19(3) must be read in context of the Human Rights Committee's overarching emphasis that:

> "Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers."[15]

Concerning defamatory statements, the Human Rights Committee has said that:

> "Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence."[16]

3.3.2 Conviction of the accused

In finding the accused in this trial guilty of contempt of court, the trial judge stated that the accused "scandalized, insulted and brought to disrepute the dignity and authority of the Chief Justice".[17]

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[13] Ibid, para. 34.
[14] Ibid, para. 31.
[15] Ibid, para. 23.
[16] Ibid, para. 47.
[17] *Rex v. Nation Magazine et al*, judgment on conviction of 17 July 2014, (2014) SZHC 152, para. 42.

As a matter of domestic law, the accused contested whether "scandalizing the court" was a valid basis for a finding of contempt of court. They argued that the accused should never have been subject to charge or conviction for the criminal offence of "contempt of court" on such grounds, noting that other common law jurisdictions whose courts may formerly have applied a "scandalizing the court" offence have ultimately abolished it as inconsistent with the freedom of expression. The United States, Canada, and even the United Kingdom, the birthplace of the crime of contempt of court, all no longer recognize the variation of contempt of court known as contempt by scandalizing the court. After more than 80 years without a successful prosecution, the United Kingdom finally abolished the offense of scandalizing the court in 2013 on the basis that it was out-dated and infringed upon the European Charter of Human Rights.[18]

In this case, Swazi law on the offense of contempt of court and its interpretation by Swazi courts does not provide sufficient specificity to have allowed the accused to understand how to curtail their speech to conform to its requirements. Accordingly, the legal basis invoked for the charges and convictions cannot be considered to comply with the requirements for a lawful restriction on the right to freedom of expression because it is not "provided by law" within the meaning of Article 19(3) of the ICCPR.

The ICJ takes that the view that, in their writings, Mr Maseko and Mr Makhubu were clearly exercising their freedom to speak on matters of public concern. This kind of expression is amongst the least susceptible to justification of restrictions. As stated by the Human Rights Committee, the foundation of freedom of expression and freedom of the media must include the right to criticize the government, including the judiciary.

Further, the ICJ considers that Mr Maseko and Mr Makhubu had a good faith basis for criticizing the judiciary's handling of Mr Gwebu's case. Judge Simelane nevertheless rejected the defence's evidence that Mr Gwebu was denied assistance of counsel, including the testimony of Mr Gwebu himself, and dismissed it outright as "precarious", "unworthy of belief" and "far-fetched".[19] Instead, Judge Simelane relied on his own participation in the events of Mr Gwebu's case, and even took judicial notice of what transpired, as the sole basis for his determination that Mr Maseko's criticism was unfounded.[20] Beyond the biased approach he took to evaluating the facts, Judge Simelane used contempt of court simply as a guise for suppressing speech critical of the Swazi judiciary, which is not a valid restriction on freedom of expression.

It is also evident that the judgment and sentence against the accused were not directed to the legitimate aims identified in Article 19(3) of the ICCPR, but rather were intended to chill free speech and free expression, particularly with respect to speaking critically about the government and matters of public concern, such as instances of public corruption. This is apparent from Judge Simelane's judgment on sentencing in which he stated that, by imposing the two-year prison sentence for Mr Maseko and Mr Makhubu, this "will serve as a deterrent to others, in particular like minded journalists in this country".[21]

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[18] See: New Zeland Law Commission, *Contempt in Modern New Zealand*, May 2014, at pp. 56, 61-63 http://www.lawcom.govt.nz/sites/default/files/publications/2014/05/nzlc_ip36_contempt_web.pdf.

[19] *Rex v. Nation Magazine et al*, judgment on conviction, above, paras. 22-23.

[20] Ibid.

[21] *Rex v. Nation Magazine et al*, judgment on sentencing of 25 July 2014, (2014) SZHC 170, para. 16.

For the foregoing reasons, the ICJ concludes that the conviction of the accused did not amount to a justified interference with the freedom of expression of the accused, within the terms required of Article 19(3) of the ICCPR. The conviction of the accused therefore amounted to a violation by Swaziland of the right to freedom of expression under Article 19(2) of the ICCPR.

3.3.3 Opinion of the UN Working Group on Arbitrary Detention

As noted earlier (see 3.2.4 above), the UN Working Group on Arbitrary Detention was provided with information concerning the arrest, trial, conviction and sentencing of Mr Maseko. The Working Group's Opinion No 6/2015 concurred with the statement of the Special Rapporteur on the right to freedom of opinion and expression that the detention and trial of Mr Maseko for his exercise of the right to express his opinion on a court case "runs contrary to Swaziland's international human rights obligations, in particular under article 19 of the International Covenant on Civil and Political Rights".[22] It also referred favourably to the statement of Special Rapporteur on the independence of judges and lawyers, noting that, as a lawyer, Mr Maseko "has the right to take part in public discussions of matters concerning the law and the administration of justice".[23]

The Working Group further noted that, as a Commonwealth country, the *Latimer House Guidelines for the Commonwealth* are applicable to the Kingdom of Swaziland.[24] The Working Group drew particular attention to Principles VI.1(b)(ii) and VII(b), which respectively provide that: "The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts"; and that: "The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions".

The Working Group on this basis concluded that Mr Maseko's deprivation of liberty amounted to an arbitrary deprivation of liberty since it resulted from the exercise of certain rights or freedoms, including the freedom of expression.[25]

3.4 Evaluation of sentences imposed

When a judicial officer is imposing a sentence, he or she uses discretion, having duly considered the circumstances of each case and guided by sentencing principles and guidelines as well as precedence. The judicial officer takes into consideration several factors in arriving at an appropriate sentence. These factors include, but are not limited to, the facts of the case, the gravity and prevalence of the offence, the impact of the offence on the community, the public interest, whether the accused has shown remorse or contrition, the accused's motivations, and the personal circumstances of the accused. In common law countries, a judicial officer will also be expected to consider the scale of sentences in cases of a similar nature. The judicial officer must ultimately exercise a reasoned judgment, applying his or her discretion in an impartial and unbiased manner.

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[22] Opinion 6/2015, above, para. 27, in which the Working Group cited the press release entitled "Swaziland: UN experts condemn continued detention and trial of human rights defenders", Geneva, 12 June 2014.
[23] Opinion 6/2015, above, para. 28, in which the Working Group cited the press release entitled "Swaziland: UN experts condemn continued detention and trial of human rights defenders", Geneva, 12 June 2014.
[24] Opinion 6/2015, above, para. 29.
[25] Opinion 6/2015, above, para. 30, in conjunction with para. 2(b).

3.4.1 Laws and standards applicable to sentencing for contempt of court

With respect to the punishment of individuals for expression that allegedly damages the reputation of public officials, the Human Rights Committee has said that:

> "Care should be taken by States parties to avoid excessively punitive measures and penalties… States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."[26] (emphasis added)

In its 2008 decision in *Dissanayake v Sri Lanka*, the Human Rights Committee found a violation of Articles 9 (right to liberty) and 19 (freedom of expression) where criminal contempt of court proceedings were used to imprison an individual for having publicly criticized the judiciary. The Committee concluded in part as follows:

> "The Committee recalls… that courts notably in Common Law jurisdictions have traditionally exercised authority to maintain order and dignity in court proceedings by the exercise of a summary power to impose penalties for "contempt of court." …the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition of "arbitrary" deprivation of liberty, within the meaning of article 9, paragraph 1, of the Covenant. The fact that an act constituting a violation of article 9, paragraph 1, is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole.
>
> "In the current case, the author was sentenced to two years rigorous imprisonment for having stated at a public meeting that he would not accept any "disgraceful decision" of the Supreme Court, in relation to a pending opinion on the exercise of defence powers between the President and the Minister of Defence. As argued by the State party, and confirmed on a review of the judgment itself, it would appear that the word "disgraceful" was considered by the Court as a "mild" translation of the word uttered… The Committee finds that neither the Court nor the State party has provided any reasoned explanation as to why such a severe and summary penalty was warranted, in the exercise of the Court's power to maintain orderly proceedings… Thus, it concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1.
>
> "The Committee concludes that the State party has violated article 19 of the Covenant, as the sentence imposed upon the author was disproportionate to any legitimate aim under article 19, paragraph 3."[27]

3.4.2 Comparable sentencing provisions and decisions

The genesis of the offence of contempt of court in Swaziland is the United Kingdom. Sections 14 and 15 of the UK Contempt of Court Act 1981 provide for a maximum penalty of two years imprisonment or a fine or both. The maximum penalty of two years in the UK is unnecessarily harsh, in the view of the ICJ, but is perhaps explained by its motivation to protect jurors, witnesses and lay judges from any undue influence. This motivation is not applicable in the trial of the accused.

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[26] General Comment 34, above, para. 47.
[27] Human Rights Committee, *Dissanayake v Sri Lanka*, Communication No 1373/2005, UN Doc CCPR/C/93/D/1373/2005 (2008), paras. 8.2 to 8.4.

Section 12 of the Indian Contempt of Court Act 1971 provides that "save as otherwise provided, a contempt of court may be punished with simple imprisonment for a term which may extend to 6 months, or with a fine which may extend to 2000 rupees". The Zambian Contempt of Court Act 1965 also provides for a maximum penalty of six months, as well as the option of a fine of 135,000.00 Kwacha. In Zimbabwe, the maximum penalty for contempt of court at the magistrate's court level, under section 71 of the Magistrates' Court Act, is three months imprisonment or a fine of $300.

The Zambian case of Fred Mmembe and the Post Newspaper is almost similar to the trial of the accused. In that case, the Post Newspaper published an article written by a US-based law professor, Muna Ndulo, entitled 'The Chansa Kabwela Case: A Comedy of Errors'. The article was critical of the manner in which the court had handled the case of former Post News editor, Chansa Mwale. The editor of the Post Newspaper was sentenced to four months imprisonment for publishing the article. On appeal to the High Court, the sentence was reduced to a fine of 135,000.00 Kwacha.

In the Zimbabwean case of *S v Mnguni and Anor*,[28] a sentence of three months imprisonment was reduced to a fine of 25,000.00 Zimbabwe dollars. The High Court judge in that case recognised that there is a temptation for vindictiveness where the sentencing judicial officer is an interested party. In the contempt of court case involving former Zimbabwe Attorney General, Patrick Chinamasa, the trial court had imposed a sentence of three months' imprisonment as a result of the Attorney General's strong criticism of jail sentences given to three Americans for illegally possessing weapons.

In the case of *Communications Authority of Zambia v Vodacom*,[29] the former Zambian Vice President and Chairman of Vodacom, Enoch Kavindele, was convicted for contempt of court because he had stated: "I am particularly upset that the President himself could direct the Supreme Court to rule against me over Vodacom". After pleading guilty and apologising, Mr Kavindele was sentenced to a fine of 5 million Kwacha or a terms of six months imprisonment.

3.4.3 Sentencing of the accused

As noted earlier, Mr Maseko and Mr Makhubu were sentenced to two years' imprisonment, taken to run from their respective dates of arrest on 17 and 18 March 2014 (see 2.8.2 above).

The ICJ has concluded that the convictions against the accused were improper (see 3.3.2 above). Even if that were not the case, the ICJ further concludes that the sentences imposed on Mr Maseko and Mr Makhubu were improper for the following reasons.

First, the accused were imprisoned for political criticism of state institutions and public officials, which is precisely the kind of measure that the Human Rights Committee has said "can never be considered to be a necessary restriction on freedom of expression".

Secondly, the trial judge relied in his written reasons on factors akin to criminal defamation of a public official. As noted above, the Human Rights Committee has affirmed that "imprisonment is never an appropriate form of penalty" for defamation (see 3.4.1 above).

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[28] HB85/05.
[29] SCA 98/2008.

Third, the penalties imposed on Mr Maseko and Mr Makhubu cannot be justified as a proportionate response to the publication of the articles for which they have been punished. In the absence of any statutory provision in Swaziland, the trial judge ought to have been guided by comparable sentencing provisions and decisions from the common law jurisdictions. It has been shown that contempt of court offences in India, Zambia and Zimbabwe attract maximum penalties of six months' imprisonment, while the United Kingdom has a higher maximum penalty of two years' imprisonment but in circumstances where this is aimed to protect jurors, witnesses and lay judges from undue influence. Sentencing in comparable cases in Zambia and Zimbabwe have seen penalties imposed of three months' imprisonment, in some cases reduced on appeal to financial sanctions.

Similar cases of contempt of court, including those relied upon by Judge Simelane in his judgment, have resulted in sentences far less severe than the sanctions imposed on Mr Maseko and Mr Makhubu. For example, in *Gallagher v. Durack*, a 1985 case cited by Judge Simelane, the Federal Court of Australia imposed a three month sentence of imprisonment for contempt of court on an individual who published a statement calling the judiciary's impartiality into question.[30] Judge Simelane considered this case analogous to that concerning Mr Maseko and Mr Makhubu and even mentioned the three month sentence imposed by the Australian court.

The Supreme Court of Swaziland has itself recognized that a two year prison sentence for the crime of contempt of court is excessive. In the previous case against Mr Makhubu (mentioned above), that court set aside the sentence of two years' imprisonment imposed by the trial court and reduced the defendant's sentence to three months, which was suspended on the condition that Mr Makhubu not commit the offense of scandalizing the court for three years.[31]

3.4.4 Opinion of the UN Working Group on Arbitrary Detention

The question of Mr Maseko's sentencing was a matter also considered by the UN Working Group on Arbitrary Detention in its Opinion No 6/2015. The Working Group in this regard concluded that the sentence imposed on Mr Maseko was "disproportionally severe".[32]

3.5 Conclusions

3.5.1 Unlawful and arbitrary arrest and remand in custody of Mr Maseko and Mr Makhubu

On 17 March 2014, Chief Justice Ramodibedi issued a warrant of arrest against the Nation Magazine, Mr Makhubu and Mr Maseko on grounds that they had committed the offence of contempt of court. Mr Maseko was arrested on the same day and held in police custody overnight. Mr Makhubu was arrested the following day. On 18 March 2014, Mr Maseko and Mr Makhubu were taken to the Chief Justice's chambers. The Chief Justice remanded them in custody in the absence of their lawyer.

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[30] *Rex v. Nation Magazine et al*, judgment on sentencing, above, para. 44.
[31] *Swaziland Independent Publishers (Pty) Limited & The Editor of the Nation v. The King* [2014] SZSC 25, at p. 72.
[32] Opinion 6/2015, above, para. 30.

This report concludes that the arrest and detention of Mr Maseko and Mr Makhubu was arbitrary despite the fact that a warrant for their arrest was issued by the Chief Justice. Arrest warrants are normally issued by magistrates and not judges in Swaziland in terms of the Criminal Procedure and Evidence Act (CPEA). The irregular arrests were therefore in violation of Principle M(1)(b) of the Africa Fair Trial Guidelines, which provides that an arrest may only be carried out "strictly in accordance with the provisions of the law". The irregular arrest warrants also violated article 6 of the African Charter, which requires any deprivation of liberty to be in accordance with "reasons and conditions previously laid down by law", and article 9(1) of the ICCPR, which provides that no one may be deprived of liberty except in terms of procedures established by law.

Concerning the remand in custody of Mr Maseko and Mr Makhubu by the Chief Justice, it is further concluded that: (a) although not in violation of domestic law, it was not appropriate for the Chief Justice to have himself dealt with the initial appearance of Mr Maseko and Mr Makhubu, given that the articles in question referred to the Chief Justice; (b) dealing with the matter in chambers, rather than in open court, in the circumstances amounted to a violation of the right to a public hearing; (c) the Chief Justice was in the circumstances obliged to recuse himself from dealing with the remand proceedings and thereby acted in violation of the accused's right to a hearing before an impartial court or tribunal; (d) dealing with matter in the absence of the accused's legal counsel amounted to a violation of the right to legal representation from the time of arrest and in all stages of criminal proceedings; and (e) the remand in custody of Mr Maseko and Mr Makhubu was not in the interests of justice within the meaning of section 96(4) and (10) of the CPEA. These conclusions disclose, at the very least, impropriety on the part of the Chief Justice and give rise to violations of sections 16(2) and (7) and 21(1) and (2) of the Swazi Constitution, article 7(1)(d) of the African Charter, Principles A(1) and M(1)(e) of the African Fair Trial Guidelines and articles 9(3) and 14(1) of the ICCPR.

Subsequent applications for bail by Mr Maseko and Mr Makhubu, or considerations thereof, were in all cases heard or directed to be heard by the trial judge, Judge Simelane, despite the fact that Judge Simelane was explicitly referred to in the articles that formed the basis of the contempt of court charges, and even in circumstances where Judge Simelane was not the 'duty judge' in the High Court. It is concluded that this involved a violation of the right to be heard by an independent tribunal, contrary to section 21(1) of the Swazi Constitution, article 7(1)(d) of the African Charter, Principle A(1) of the African Fair Trial Guidelines and Article 14(1) of the ICCPR. Furthermore, as with the initial remand in custody by the Chief Justice, there is nothing in the facts of the case, or in positions advocated by the prosecution, to suggest that the continued remand in custody of Mr Maseko and Mr Makhubu was in the interests of justice within the meaning of section 96(4) and (10) of the CPEA. It is also concluded that the manner in which this trial was disposed of illustrates the way in which the case allocation system administered by the Chief Justice was susceptible to manipulation by the Chief Justice, a matter considered further in the ICJ's forthcoming Fact Finding Mission report on the independence and impartiality of the judiciary in Swaziland.

3.5.2 Trial not before an impartial tribunal

The trial judge in this matter, Judge Simelane, was in his former capacity as Registrar of the High Court specifically identified in the articles that formed the basis of the contempt of court charges. This prompted the defence to seek recusal of Judge Simelane as trial judge. This application was opposed by the prosecution and ultimately declined by Judge Simelane.

This report concludes that Judge Simelane was obliged to recuse himself on the grounds that the accused were entitled to be heard by an independent and impartial tribunal. The manner in which the trial was dealt with, and the fact that Judge Simelane was a material witness in the matter, constituted both subjective bias (evidence of actual bias against the accused on the part of Judge Simelane) and objective bias (evidence of a conflict of interest on the part of Judge Simelane such that legitimate doubts of impartiality existed). His failure to recuse himself and instead preside as trial judge was therefore in violation of section 21(1) of the Swazi Constitution, article 7(1)(d) of the African Charter, Principle A(1) of the African Fair Trial Guidelines and Article 14(1) of the ICCPR.

It is notable that the involvement of Judge Simelane in the case became the single most important factor leading to the Supreme Court's decision to overturn the convictions and sentences against the accused on 30 June 2015.

3.5.3 Improper conviction and resulting violation of the freedom of expression

The ICJ takes that the view that, in their articles, Mr Maseko and Mr Makhubu were clearly exercising their freedom to speak on matters of public concern. This kind of expression is amongst the least susceptible to justification of restrictions. As stated by the Human Rights Committee, the foundation of freedom of expression and freedom of the media must include the right to criticize the government, including the judiciary.

It is also evident that the judgment and sentence against the accused were not directed to legitimate aims for restricting the freedom of expression, as set out in article 19(3) of the ICCPR, but rather were intended to chill free speech and free expression, particularly with respect to speaking critically about the government and matters of public concern, such as instances of public corruption.

The ICJ concludes that the conviction of the accused did not amount to a justified interference with the freedom of expression of the accused, within the terms required of article 19(3) of the ICCPR. The conviction of the accused amounted to a violation by Swaziland of the right to freedom of expression of the accused under article 19(2) of the ICCPR, article 9 of the African Charter and section 24 of the Swazi Constitution. It is also inconsistent with the right of lawyers to express opinions on public affairs and the administration of justice, as recognised in Principle 23 of the UN Basic Principles on the Role of Lawyers. It is furthermore inconsistent with the decision of the African Court on Human and Peoples' Rights, in *Lohe Issa Konate v Burkina Faso 4/2013*, in which the Court held that the conviction of a Burkinabe journalist (who had been charged with criminal defamation, public insult and contempt of court) violated article 9 of the African Charter.

As noted in this report, the UN Working Group on Arbitrary Detention was provided with information concerning the arrest, trial, conviction and sentencing of Mr Maseko. The Working Group's Opinion No 6/2015 concurred with the statement of the Special Rapporteur on the right to freedom of opinion and expression that the detention and trial of Mr Maseko for his exercise of the right to express his opinion on a court case "runs contrary to Swaziland's international human rights obligations, in particular under article 19 of the International Covenant on Civil and Political Rights". It also referred favourably to the statement of Special Rapporteur on the independence of judges and lawyers, noting that, as a lawyer, Mr Maseko "has the right to take part in public discussions of matters concerning the law and the administration of justice". The Working Group further noted that, as a Commonwealth country, the *Latimer House Guidelines for the Commonwealth* are applicable to the Kingdom of

Swaziland, drawing particular attention to Principles VI.1(b)(ii) and VII(b) of the Guidelines.

3.5.4 Disproportionate sentences

When imposing a sentence, a judicial officer uses discretion, having duly considered the circumstances of each case and guided by sentencing principles and guidelines as well as precedence. The judicial officer takes into consideration several factors in arriving at an appropriate sentence. These factors include, but are not limited to, the facts of the case, the gravity and prevalence of the offence, the impact of the offence on the community, the public interest, whether the accused has shown remorse or contrition, the accused's motivations, and the personal circumstances of the accused. In common law countries, a judicial officer will also be expected to consider the scale of sentences in cases of a similar nature. The judicial officer must ultimately exercise a reasoned judgment, applying his or her discretion in an impartial and unbiased manner.

Even if the convictions against the accused had been sound, the sentences imposed, particularly those of two years' imprisonment of Mr Maseko and Mr Makhubu, were improper for several reasons. First, the accused were imprisoned for political criticism of state institutions and public officials, which is precisely the kind of measure that the Human Rights Committee has said "can never be considered to be a necessary restriction on freedom of expression". Secondly, the trial judge relied in his written reasons on factors akin to criminal defamation of a public official. As noted in this report, the Human Rights Committee has affirmed that "imprisonment is never an appropriate form of penalty" for defamation.

Third, the penalties imposed on Mr Maseko and Mr Makhubu cannot be justified as a proportionate response to the publication of the articles for which they were punished. In the absence of any statutory provision in Swaziland, the trial judge ought to have been guided by comparable sentencing provisions and decisions from the common law jurisdictions. It has been shown in this report that contempt of court offences in India, Zambia and Zimbabwe attract maximum penalties of six months' imprisonment, while the United Kingdom has a higher maximum penalty of two years' imprisonment but in circumstances where this is aimed to protect jurors, witnesses and lay judges from undue influence. Sentencing in comparable cases in Zambia and Zimbabwe have seen penalties imposed of three months' imprisonment, in some cases reduced on appeal to financial sanctions. Similar cases of contempt of court, including those relied upon by Judge Simelane in his judgment, have resulted in sentences far less severe than the sanctions imposed on Mr Maseko and Mr Makhubu. The Supreme Court of Swaziland has itself recognized that a two year prison sentence for the crime of contempt of court is excessive.

The question of Mr Maseko's sentencing was a matter also considered by the UN Working Group on Arbitrary Detention in its Opinion No 6/2015. The Working Group in this regard concluded that the sentence imposed on Mr Maseko was "disproportionally severe".

3.6 Recommendations

Against the background of the conclusions in this report, the ICJ recommends that the judiciary and responsible authorities in Swaziland:

Concerning trial and pre-trial proceedings generally:

3.6.1 Ensure that arrest warrants are issued by magistrates, not judges, in accordance with the terms of the Criminal Procedure and Evidence Act.

3.6.2 Ensure that persons arrested or detained on a criminal charge be brought promptly before an open court.

3.6.3 Ensure that accused persons are at all times afforded the right to legal representation.

3.6.4 Ensure that persons awaiting trial are not detained in custody but are instead released subject to appropriate guarantees to appear for trial, unless the interests of justice call for remand in custody in accordance with the terms of the Criminal Procedure and Evidence Act.

3.6.5 Ensure that judicial officers do not preside over matters in which there is a potential conflict of interest or the potential for a perception of partiality in the proceedings.

Concerning case management and the integrity of the judiciary:

3.6.6 Introduce and implement a case allocation and management system that is impartial and fair, removing direct control by the Chief Justice or the ability of any single judicial officer to influence the allocation and management of cases.

3.6.7 Develop a code of conduct for judges, in line with regional and international standards, including the Bangalore Principles on Judicial Conduct, with a view to strengthening the integrity of the judiciary and improving the accountability of judges.

3.6.8 Conduct a needs assessment on continuous professional education for the judiciary, comprising also lower judicial officers, with a view to improving the understanding of the independence of judges and lawyers and raising awareness of human rights, including the right to fair trial.

Concerning contempt of court proceedings:

3.6.9 Ensure that any charges of contempt of court involve a justified interference with the freedom of expression of an accused, within the terms required of section 24 of the Swazi Constitution, article 9 of the African Charter of Human and Peoples' Rights and article 19(3) of the International Covenant on Civil and Political Rights.

3.6.10 Ensure that the criminal law and contempt of court proceedings are not used to restrict legitimate criticism of the law, the administration of justice and/or the performance of judicial functions.

3.6.11 Ensure that imprisonment is never imposed as a sentence applicable to the defamation of a public official.

3.6.12 Ensure that sentencing is guided by relevant factors to the exercise of judicial discretion, including the need for proportionality and by comparable sentencing provisions and decisions in relevant jurisdictions.

Concerning the situation of Mr Maseko and Mr Makhubu:

3.6.13 Provide prompt and effective remedies and reparations to Mr Maseko and Mr Makhubu, especially with regard to their unlawful and arbitrary detention between March 2014 and June 2015.

APPENDIX 1

EDITORIAL ARTICLE WRITTEN BY MR MASEKO AND MR MAKHUBU 'SPEAKING MY MIND'

(Published in the Nation Magazine in February 2014)

When the Chief Justice, Ntate Michael Ramodibedi, hauled government motor vehicle inspector, Bhantshana Gwebu, to court on what was termed contempt of court charges, I was reminded of that most dramatic event of 2000 years ago in Judea when a very powerful man hauled a lowly young carpenter from Galilee before his won court and had Him crucified simply because this Nazarene saw things differently to His superiors at the time.

There are many similarities between the behaviour of our Chief Justice and Joseph Caiaphus, the Jewish high priest of Judea who is said to have organised the killing of Jesus.

Like Caiaphus, Ntate Justice Ramodibedi seems to have chosen to use his higher station in life to bully those in a weaker position as a means to consolidate his power.

Like Caiaphus, Ntate Justice Ramodibedi seems to be on the path to create his legacy by punishing the small man so that he can sleep easy at night well knowing that he has sent a message to all who dare cross him that they will be put in their place.

Let us not forget that Caiaphus was not only the high priest of Judea. He was the chief justice of all Jewish law and had the immense power to pass judgment on anyone among his people who transgressed the law. Ditto Ntate Justice Ramodibedi in Swaziland.

Perhaps the most significant in drawing parallels between Ntate Justice Ramodibedi and Caiaphus is this: when Caiaphus came to the final decision to have that lowly Nazarene killed he was confronted with a few legal problems.

The first was that because the final events that led to the decision happened on the week of Passover and the Sabbath was very close, he had to have Christ tried and found guilty before Friday evening because Jewish law dictated that trials and punishment could not be carried out during the holy Sabbath.

Second, Jewish law dictated that someone condemned to death could not be executed without having spent at least one night in prison.

Now, that meant Caiaphus had to have the trial settled by Thursday latest to have the execution carried out early Friday morning.

Because he could not do that, time not being on his side, he had to "massage" the law, as some writers have said, to suit his own agenda. That is why we now know that Christ was tried on Friday morning and sent to Golgotha in the afternoon.

Ntate Justice Ramodibedi was confronted with a similar problem with Gwebu. When this lowly public servant from Bulunga appeared before him on the Monday after a warrant for his arrest had been issued, Gwebu was denied the right to legal representation because, Ntate Justice Ramodibedi is reported to have said,

the lawyer was not there when the car was impounded at the weekend.

When a prosecutor sought to have charges filed against Gwebu, Ntate Justice Ramodibedi ordered, instead, that he go spend a week in jail, charges to be preferred against him later. In the process, he denied Gwebu a chance to seek release on bail.

Like Caiaphus, our chief justice "massaged" the law to suit his own agenda.

What is incredible about the similarities between Caiaphus and Ntate Justice Ramodibedi is that both men had willing servants to help them break the law.

Who can forget the Pharisees and, most notably, Judas Iscariot who went to see Caiaphus at his plush residence in the suburbs of Jerusalem with the explicit intention of selling out the revolutionary from Nazareth?

Judas was paid a princely sum of 30 pieces of silver for his efforts.

Did we not see our own Director of Public Prosecution, Nkosinathi Maseko also help Ntate Justice Ramodibedi in his efforts to have Gwebu stay in prison? In a most desperate bid to deny Gwebu bail, the DPP even hired a very expensive South Africa advocate to ensure that this lowly public servant stayed behind bars.

With appointments for judges looming, could that be the DPP's bid to get his own 30 pieces of silver?

The last sermon the Nazarene from Galilee gave was at the Jerusalem Temple. After a tense confrontation with the priests and Pharisees there, He told one of his Disciples that one day the Temple would fall down. He was heard by a Pharisee who promptly reported the statement to Caiaphus.

It was the final straw.

Like a Pharisee eager to impress, the Registrar of the High Court, Mpendulo Simelane, told the public an outright lie when he said that Gwebu should have stated that he needed the services of a lawyer when he appeared in chambers before Ntate Justice Ramodibedi on that fateful Monday morning.

The truth is that the chief justice should have asked Gwebu if he needed the services of a lawyer. He should have asked Gwebu if he wanted to be released on bail.

Gwebu did not have to take the initiative to get these rights. It was the chief justice who had a duty to hand them to him. That is the law.

Ntate Justice Ramodibedi was among the high profile guests who attended the consecration of the new Bishop of the Roman Catholic Church in Manzini in a combined service where they celebrated 100 years on ministry in the country.

It is disheartening to see men of power who claim to follow the Lord do unto others almost everything that was done to the Son of Man to bring his suffering.

Caiaphus, we know, never lived to see the impact of his deeds because the events of Good Friday 2000 years ago only came to be recorded as the Canonical Gospels more than 60 years after they had occurred.

Perhaps, like Caiaphus, Justice Ntate Ramodibedi will never come to appreciate

the damage he is doing to this country.

But, our children will and they will know those Pharisees who are helping him make this country a basket case while we claim to be taking it to first world status.

There is hope yet, though. King Mswati told Christians recently that the devil is a liar, a fallen hero. I couldn’t agree more.

Bheki Makhubu

APPENDIX 2

ARTICLE WRITTEN BY MR THULANI MASEKO 'WHERE THE LAW HAS NO PLACE'

(Published in the Nation Magazine in March 2014)

We read many years ago as children at secondary school a book called 'Cry, the Beloved Country' by Alan Paton. 'Cry the Beloved Country' is as the author tells us a compound of facts and fiction, an imaginary book about life in apartheid South Africa, depicting the suffering of the black majority of the people of South Africa. But this article is not fiction, it is reality as it unfolds as we see it happen in Swaziland, hence we say 'Oh, Cry the Beloved Swaziland' for we are country gone to the dogs. In his introductory notes Paton writes that: 'Cry, the beloved country, for the unborn child that is the inheritor of our fear. Let him not love the earth too deeply. Let him not laugh too gladly when the water runs through his fingers, nor stand too silent when the setting sun makes red the veld fire. Let him not be too moved when the birds of his land are singing, nor give too much of his heart to a mountain or a valley. For fear will rob him of all if he gives too much.' Indeed, fear has cripples the Swazi society, for the powerful have become untouchable. Cry the Beloved Country!

Bhantshana and contempt of Court?

Way before many of us young attorneys were admitted to practice law in this country the practice of an official opening of the High Court had become the norm, a long established practice, a convention to such an extent that it had become a custom. This is no longer the case and its abandonment was unilateral by those who head the judiciary. Members of the legal profession are key stakeholders in the justice delivery system were never consulted, let alone the courtesy to inform them. Such is the arrogance of power in this beloved Kingdom.

This year particularly opened with such a bang. We could not believe and we are still shocked at the arrest of Bhantshana Gwebu, the government chief vehicle inspector, who was arrested during the course and scope of duty, and found himself languishing in gaol for an alleged contempt of court. We call it a bang because it is the judiciary that is alleged to have issued the warrant of apprehension, the Chief Justice himself! Bhantshana's arrest has sent shivers among right thinking members of our society. How could a public officer be arrested for executing his duties as a government employee? What is equally striking is the loud silence by the office of the Ministry of Public Service and the Office of the Attorney General.

From a point of view of an ordinary and innocent Swazi, it does appear that those who hold higher public office are above the law, only the small person is subject to the law. Yet those of us who still believe in the higher principle of the Rule of Law hold on to the doctrine as Francis Neate puts it, that the 'Rule of Law is the only system so far designed by mankind to provide impartial control over the exercise of state power. Rule of Law means that it is the law which ultimately rules, not a monarch, not a president or prime minister, clearly not a dictator, not even a benevolent dictator. Under the Rule of Law no one is above the law. The law is the ruler.' For this purpose, we add, 'not even the Judiciary or the Chief Justice is above the law.' This country has been grappling with Rule of Law issues for a long time now.

Amazingly, we have been told this is the year of success; the question is success in what? We have been told that this government is bent on fighting corruption.

But how come Bhantshana who for a long time has been using his authority to fight corruption has been subjected to all manner of abuse, including physical violation by members of the military. The arrest is the icing on the cake. How is it possible that we are told of a fight against corruption when those who are employed to fight it are harassed, violated and abused? How can we win the fight against corruption when the very institutions which are supposed to be in the forefront of this fight behave in a corrupt manner to fix personal vendetta? It is surely one thing talk about fighting corruption, it is yet another to be seen to be actually fighting it. Bhantshana's case is a clear indication that fighting corruption is nothing but lip-service by those in the higher echelons of power.

Redefining the law of contempt of court

It is alleged that Gwebu committed the criminal offence of contempt of court. We may not know all the facts, but from what has been reported both in the print media and in Bhantshana's court papers, he did not charge the judge, but the driver. The question arises as to how the contempt of court offence arises? This we may not appreciate until the trail when the State leads evidence to prove the crime. What is disturbing about the whole saga is that Bhantshana spent some days in gaol without knowing exactly the nature of the offence he was facing. The Director of Public Prosecutions had not prepared a charge sheet. Even worse, as we understand, is the attitude he got from the Chief Justice when he appeared before him on the first day. Instead of showing concern about having representation which is a right every accused person has in terms of the criminal laws of Swaziland and the Constitution which is said to be the supreme law, he was welcomed with sarcasm. We should deeply be concerned about such conduct displayed by the head of the judiciary in the country. Such conduct deprives the court of its moral authority; it demonstration of moral bankruptcy. A judiciary that is morally bankrupt cannot dispense justice without fear or favour as the oath of office dictates. The old adage says that 'justice must not only be done, it must be seen to be done.'

As we understand the criminal offence of contempt of court, the person facing it must have the willful intention to undermine the authority of the court and must be aware that he is so undermining such authority of the court. In this case, here is a civil servant employed to monitor the abuse of government vehicles, exercises his powers as such and lands himself in trouble for contempt! We are anxiously waiting to hear how the contempt arose in these circumstances. What is a bothering trend though is that the weapon of contempt is being used by the courts to shield itself from being held accountable for the manner in which it goes about in the business of dispensing justice to all manner of people. Of course there is always a conflict between judicial independence and judicial accountability. But this line must not be blurred to enable those who hold judicial office to get away with failure to account. They too, hold public office, and they too are accountable. They too exercise judicial power for the benefit of the public and users of the court. They are not an exception to public scrutiny.

A travesty of justice

Many ask whether justice was done or seen to be done in the Bhantshana drama. Many will say that what we saw is nothing but a travesty of justice in its highest form. Travesty firstly because Bhantsana as an accused was denied the right to representation at the first appearance before the Chief Justice. Second, a travesty because the Chief Justice who had issued the warrant of arrest was also seized with the matter and sent Bhantshana to gaol. In more ways than one, this was a repeat of the Justice Masuku kangaroo process where the Chief Justice stands accused of being the prosecutor, witness and judge in his own cause. Even when the prosecution applied that the matter be stood down so that Bhantshana's legal

representative could be heard, the Chief Justice wanted to hear none of it! So, it may well be that the Chief Justice drafted the charge sheet for the office of the Director of Public Prosecution. It stands to wonder what powers he exercised when he did so! Is this some kind of conspiracy? Wither the judiciary.

The questions must be asked: for how long will the people of Swaziland be robbed of justice by the very institutions that are enjoined by the Constitution to enforce it? What is the value of the constitution if cannot be respected even by those who are called upon to ensure that it is respected and applied? Is the law of any value and meaning to the life of an ordinary person who does not belong to the most powerful and most high in society? It does seem that we are living the law of the jungle where the less powerful are subject to the whims and feelings of the powerful, rich and privileged.

Lip-service to fight against corruption

We should be disturbed that there is so much lip-service paid to the fight against corruption, yet when officials like Bhantshana who seem to take the slogan seriously themselves become victims of fighting corruption! This pretence must stop, and those who speak against corruption must walk the talk. We have said before and we dare repeat it here, that we will speak even at the risk of being labeled critics with no modicum of decency. For, evil strives when those with a conscience choose to be silent for fear of the consequences. And Mandela has taught us that courage is not the absence of fear, but triumph over it. Many are afraid to speak out in this country because the consequences of speaking against the most powerful are dire. But who said the defense of the right to dignity comes without some sacrifice and without a price? Swazis must be prepared to pay a price if we are to win our sense of dignity and self-respect. We have been hard done for so long. It is even more painful when such abuse of dignity occurs time and time again in the presence of constitution that purports to be supreme. We will not stop complaining that this document was not meant to protect and defend the rights of the weak in our society, but to entrench the interests and privileges of the powerful. This is evident from the fact that the institutions created to defend the people, such as the courts, the Judicial Service Commission, the Human Rights Commission to mention but a few seem to be all more executive-bias than playing their rightful oversight role.

Perhaps Bhantshana could have handled the matter differently, but he chose to handle the situation the way he did. The question is whether his conduct warranted the treatment he then got? We think not. It would appear as some suggest, that Gwebu had to be 'dealt with' for sins he committed in the past confiscating cars belonging to the powerful, including the Chief Justice himself. It is such perceptions that make people lose faith in institutions of power, when it appears that such institutions are used to settle personal scores at the expense of justice and fairness.

As Alan Paton wrote in his Cry the Beloved Country, 'The sun tips with light the mountains of Angeli and East Griqualand. The great valley of the Umzimkulu is still in darkness, but the light will come here. Ndotsheni is still in darkness, but the light will come there also. For it is dawn that has come, as it has come for a thousand centuries, never failing. But when that dawn will come, of our emancipation, from the fear of bondage and the bondage of fear, why that is a secret.' Yes, the day will come; dawn and the light are coming to Swaziland. This will be the day when we, the people, will no long be used as pawn, but a people with full citizenship rights to shape our destiny.

So yes, cry the beloved Kingdom of Eswatini.

APPENDIX 3

SUMMARIES OF EVIDENCE ADDUCED AT TRIAL

Evidence in the trial was adduced between 22 April 2014 and 10 June 2014, involving a total of seven witnesses.

The Crown called two witnesses, Mr Msebe Malinga, the Registrar of companies, and Ms Banele Ngcamphalala, the acting Registrar of the High Court.

1. Mr Malinga gave evidence concerning the legal status of Accused No Three (Swaziland Independent Publishers (Pty) Ltd). He was cross-examined concerning his statement to police.

2. Ms Ngcamphalala gave evidence concerning the earlier trial of Mr Gwebu and the nature of criticisms of that trial in the published articles, as well as concerning her statement to police. She was cross-examined concerning her statement and its timing in relation to the issuing of warrants to arrest by the Chief Justice.

Defence counsel called five witnesses, including two of the defendants.

3. Mr Bansthana Vincent Gwebu, who was the subject of the contempt of court case that was commented on in the publications, gave evidence concerning the facts leading up to the charges against him, as well as concerning his arrest and initial remand in custody.

4. Mr Quentin Dlamini, a member of the trade union representing Swaziland civil servants, gave evidence concerning arrangements made for Mr Gwebu's legal representation, and concerning Mr Gwebu's arrest and initial appearance in court.

5. Mr Macawe Sithole, the lawyer representing Mr Gwebu in the earlier contempt of court case, gave evidence concerning Mr Gwebu's arrest and initial appearance before the Chief Justice.

6. Mr Thulani Maseko (Accused Number Four), gave evidence by affirmation, rather than by oath. Mr Maseko's testimony involved the reading by him of a prepared statement, in which he expressed his views that: (a) this and other cases dealt with by the Chief Justice and Judge Simelane were politically motivated; (b) the Chief Justice had in several instances acted in a manner that undermined his integrity as a judge and thereby the public's confidence in the administration of justice in Swaziland; (c) the legal profession in Swaziland had an obligation to defend the rule of law; (d) the contempt of court case concerning Mr Gwebu was a matter of public interest; (e) the defendants in this trial had a real, and reasonably based, apprehension of bias on the part of the court; (f) the current trial was conducted in a manner violating the Swazi Constitution and the right to a fair trial; and (g) the charges against him and the co-accused amounted to a violation of the freedom of expression.

7. Mr Bheki Makhubu (Accused Number Two), gave evidence about the circumstances surrounding his arrest and initial detention, and raised a number of issues concerning the relationship between the media and the judiciary in Swaziland, a number of which reflected the matters raise din the evidence of Mr Maseko.

1. Evidence of Mr Msebe Malinga

Mr Msebe Malinga, the Registrar of companies, was called as a witness for the Crown.

Mr Malinga told the Court that Accused No Three (Swaziland Independent Publishers (Pty) Ltd) is a registered company under the Companies Act and that, among other things, it publishes and distributes magazines.

During cross-examination, it emerged that he recorded his statement with the police in his office and not at the police station and that he did so after the arrest of the accused. The recording of his statement was done as part of the investigation and compilation of a docket after Maseko and Makhubu had already been arrested and remanded in custody.

2. Evidence of Ms Banele Ngcamphalala

Ms Banele Ngcamphalala, acting Registrar of the High Court, and Deputy Registrar at the time of the arrest and remand of Mr Gwebu, was called as a witness for the Crown.

Ms Ngcamphalala gave evidence concerning the earlier trial of Mr Gwebu and the nature of criticisms of that trial in the published articles. She stated that the case of *The King v. Vincent Bhantshana Gwebu*, was *sub judice* since that case had not been fully disposed of when the articles were published.

Ms Ngcamphalala further testified that she had read the two articles in the Nation Magazine and found them to be contemptuous. The thrust of her evidence was that she found the articles to be highly critical of the bench, and in particular of Chief Justice Ramodibedi, in the way that the Gwebu case had been allegedly dealt with. She stated that the articles did not only report on a matter that was pending resolution before the court in that Gwebu is yet to be tried on the charge of contempt of court, but stated that she considered that the articles had touched on the integrity of the court. She expressed the view that the articles were contemptuous of the court when looked at in total and because the Gwebu case remained unresolved. She expressed the view that any reporting about court proceedings must not touch on the integrity of the court, lest they become contemptuous. She read in open court some portions of the articles where she felt that the integrity of the court had been attacked.

Ms Ngcamphalala stated that she recorded a witness statement to the police on 26 March 2014, almost a week after the arrest warrants against Maseko and Makhubu had been issued and executed, and by which time the two were already remanded in custody. She stated that she did not record her statement as complainant. She stated that she recorded her statement on instructions of the police, but did not file a complaint "per se". She said, however, that as acting Registrar of the High Court, she was the custodian of the Gwebu record and to that extent could be considered as the complainant. She stated that her interest in reading the articles was as a result of rumours that the Chief Justice was issuing warrants of arrests.

Under cross-examination, Ms Ngcamphalala confirmed that she commissioned police affidavits (pre-requisites for the issuance of warrants) in the afternoon of the day that the warrants had been issued, in other words *after* the arrest warrants were issued. She also confirmed she was not the appropriate

commissioner of oaths given that she would be a potential complainant or witness.

Also during cross-examination, Ms Ngcamphalala failed to explain exactly why the extracts she had read from the articles were contemptuous. She only generally asserted that the article would have to be read in its entirety for the contempt to be deduced. She stated that the article lowered the integrity of the court due to the fact that Mr Gwebu had been portrayed as a victim of the court through not just an unfair warrant of arrest being issued but also being denied legal representation when he appeared before Chief Justice Ramodibedi. She concluded that the articles were contemptuous in their entirety:

> "Because it was a report (article) on a case that was pending before the court… it is his [Makhubu's] opinion but I am saying that it is wrong for someone to express himself in a way that they attack the integrity of the court. They seem to give an impression that Bantshana Gwebu is a victim of the court. I believe that the article speaks for itself. I believe that I can only say that the paper speaks for itself on the integrity of the court… The article dealt with matters that were pending before the court hence my conclusion that the article was contemptuous… It was wrong to write an article on a matter that was still before court and also deal with or touch on the integrity of the court in the article."

3. Evidence from Mr Bansthana Vincent Gwebu

Mr Gwebu was the subject of the contempt of court case heard by the Chief Justice in January 2014, which was commented upon in the publications in respect of which the accused faced contempt of court charges. He was called as a witness for the defence.

Mr Gwebu stated that he was employed as the Chief Government Vehicle Inspector since 2007. He was first employed as a policeman in 1975, following which he became a Government Vehicle Inspector 1991. In 2007 he was promoted to his current position. He spoke of a distinguished public service career since 1975 before this case.

The evidence of this witness was that on Saturday 18 January 2014, during the course of his employment, he noticed a government vehicle parked at an undesignated place. He decided to inquire. He noted that the driver had no proper documents and that he failed to produce proper documents, allowing the vehicle to be parked where it was, when requested. Mr Gwebu decided to sanction the driver with a fine and impound the vehicle. As he was in the process of doing so, a woman approached him and told him that she was a judge and had been parked at the school to buy her children's uniforms. Mr Gwebu continued to take action. It transpired that the woman who had approached Mr Gwebu was Justice Otta.

A phone was soon after handed to Mr Gwebu by the driver for Mr Gwebu to speak with a person on the phone. That person identified himself as Chief Justice Ramodibedi, who asked Mr Gwebu to release the vehicle. Mr Gwebu said that he could have none of it as he felt that no one was above the law. His testimony was as follows:

> "It was on 18th January 2014 on a Saturday, I was doing my job patrolling to see if government vehicles were not being abused… passing Sifudzane school… I saw a government car GSD 028 JU… I explained to the driver whom I was and explained to him what my duties were and he knew me very well. I asked for the papers that authorized the car to come and park there and he gave me those papers… I then saw an offence… I gave the driver a ticket… He came with a phone… said I must talk to the person on the phone. The one on the phone My Lord, he told me that

> he was the Chief Justice and I must not impound the car… I told him that the law is going to take its course and then he dropped the phone… Before… midnight My Lord, I received a phone call. I answered the phone and the person said he was a police officer, I was supposed to go into custody. I was supposed to be arrested. He said in front of him there was a warrant of arrest for contempt of court… In fact I did my work well… I was surprised My Lord since I had carried out my duties diligently."

Mr Gwebu stated that he felt that he was not answerable to the Chief Justice but to the Permanent Secretary in the Ministry of Public Works and Transport. He only temporarily released the vehicle after a lawyer and friend of Justice Otta had pleaded with him. Mr Gwebu ordered the driver to bring the vehicle to his office on the following Monday. Later on in the evening of the same day he received a telephone call from a police officer phoned. The police officer advised Mr Gwebu that he had a warrant for Mr Gwebu's arrest, issued by Chief Justice Ramodibedi.

The following Monday, 20 January 2014, Mr Gwebu went to the police station with his lawyer and was taken to court by police. Upon his arrival at court, he was taken by the then Registrar of the Court, Mr Mpendulo Simelane (the trial judge in the current case) to the Chief Justice's Chambers, without Mr Gwebu's lawyer. In Chambers, Mr Gwebu advised the Chief Justice that his lawyer was at court and that he wished his lawyer to be present. This request was refused by the Chief Justice who said to him "was your lawyer present when you committed the offence?". Mr Gwebu told the Chief Justice that he considered that he had been arrested for properly doing his job. He was remanded in custody for seven days.

During the proceedings in the Chief Justice's Chambers, there was no court interpreter. The then Registrar acted as interpreter. The prosecution was present in Chambers, but had no charge sheet to produce, and advised the Chief Justice that it was not prepared for the case and needed the matter to be stood down.

During cross-examination by the DPP, the Mr Gwebu remained consistent in his testimony.

4. Evidence from Mr Quentin Dlamini

The second defence witness was Mr Quentin Dlamini, a member of the trade union NAPSAU (also interchangeably known as SNACS), which is the national labour union or association representing Swaziland civil servants.

In representing NAPSAU/SNACS, Mr Dlamini arranged for a lawyer, Mr Macawe Sithole, to represent Mr Gwebu. Mr Dlamini was present with other union members when Mr Gwebu surrendered himself to the police station on the morning of Monday 20 January 2014. Mr Dlamini testified that Mr Sithole and the police agreed that they would meet at the Magistrate's Court where Mr Gwebu's case would be processed. Mr Dlamini testified that Mr Sithole then drove to the Court to wait for the police, who had taken custody of Mr Gwebu in execution of the warrant of arrest issued by the Chief Justice. Mr Dlamini and other NAPSAU/SNACS union members remained at the police station.

Mr Dlamini and other NAPSAU/SNACS union members then followed the police vehicle that was transporting Mr Gwebu to court and kept in telephone contact with Mr Sithole. Mr Dlamini testified that Mr Gwebu was taken to the High Court instead of the Magistrate's Court. Mr Dlamini communicated this to Mr Gwebu's lawyer.

Mr Dlamini testified that, at the High Court, Mr Gwebu was taken by the then Registrar Mr Mpendulo Simelane, the Chief Justice's Chambers. Mr Dlamini stated

that the Registrar had not asked if Mr Gwebu was legally represented. Mr Dlamini advised Mr Gwebu's lawyer by phone that this was happening. Mr Dlamini advised Mr Gwebu to inform the Chief Justice that he had legal representation and that his lawyer was in the High Court premises. Mr Dlamini and other union members were asked to leave the precincts of the Chief Justice's Chambers.

Mr Dlamini testified that Mr Gwebu soon after emerged from the Chief Justice's Chambers was taken to Sidwashini prison. Mr Dlamini expressed that he was surprised at the way the matter had been handled by the Chief Justice, saying:

> "He (Mr Gwebu) told us My Lord that is why he was also shocked that his matter proceeded when he had told the Chief Justice that he had a lawyer… as a person who is familiar with court proceedings I noted that Bhantshana (Mr Gwebu) was not taken to the Magistrate's Court as we were told… and that the matter was not proceeding at the normal court rooms, he went upstairs, he was not given a right to legal representation before he went into the Chief Justice's Chambers. He also told me that he mentioned to the Chief Justice that he had a lawyer, another thing that his lawyer was around the court premises My Lord."

5. Evidence from Mr Macawe Sithole

Mr Macawe Sithole, the lawyer representing Mr Gwebu in the earlier contempt of court case, was next called as a witness for the defence.

Mr Macawe Sithole is a lawyer practicing with Messrs Dunseith Attorneys. He was approached by the civil service union NAPSAU/SNACS with a view to representing Mr Gwebu following the issuance by the Chief Justice of a warrant for Mr Gwebu's arrest after a disagreement arising from how Mr Gwebu was discharging his duties as Chief Government Vehicle Inspector. Mr Sithole accompanied Mr Gwebu to the police station on the morning of 20 January 2014 where he spoke with a police officer, Mr Mkuzeni Kunene. The police officer advised Mr Sithole that there a warrant of arrest had been issued and that the police would take custody of Mr Gwebu and "that the matter would be attended to at the Mbabane Magistrate's Court, and that I can be excused to wait for my client at the Magistrates Court".

Mr Sithole testified that, as he waited for the police to bring Mr Gwebu to the Magistrate's Court, he received a telephone call from one of the union representatives, Mr Quentin Dlamini, advising that Mr Gwebu had in fact been taken to the High Court. Mr Sithole rushed to the High Court and stated that: "I advised [Quentin Dlamini] that he must convey a message to Mr Gwebu that upon arrival at the Chief Justice's Chambers, he must inform the Chief Justice that I was on my way to attend the matter" as Mr Gwebu's lawyer of choice.

Mr Sithole arrived at the High Court before Mr Gwebu had been taken into the Chief Justice's Chambers and spoke with Mr Gwebu by telephone, advising him that he "was at the reception of the then Registrar of the High Court waiting to be called by My Lord in the event the matter will proceed in Chambers". Mr Sithole advised Mr Gwebu that there was a protocol to be observed before he could himself go to the Chief Justice's Chambers and that Mr Gwebu "must just convey the message to the Chief Justice that I [lawyer] is present and also that he should actually request that I [lawyer] be in attendance and be called My Lord to the Chief Justice's Chambers".

His further evidence was that the Chief Justice and the then Registrar proceeded with the matter in the Chief Justice's Chambers without inviting Mr Sithole to be present. Mr Gwebu was remanded in custody to 27 January 2014. He was denied legal representation in the Chambers hearing. Mr Sithole testified that there was at that time no charge sheet against Mr Gwebu. The relevant portion of his

evidence proceeded as follows:

> "My Lord I wish to state that Mr Gwebu told me that he was refused to have his attorney i.e. myself, present at the Chief Justice's Chambers… I asked him and in the presence of the police officer… as to how could such happen and in fact to be honest My Lord, I said to him, this cannot happen, you are joking… Mr Gwebu advised me that when he, in fact when he actually requested that his attorney be present during the deliberations or preliminary or initial stages of what transpired in the chambers My Lord, he was told by the Chief Justice… Why does he need an attorney to be present when the said attorney My Lord was not present when he committed the said offence… My Lord he told me that whilst they were still in the Chief Justice's Chambers My Lord the prosecutor… requested that the matter be stood down whilst he go to prepare a charge sheet."

Mr Sithole further stated that the way in which the case against Mr Gwebu was evolving had traumatised him and given him sleepless nights. Mr Sithole expressed the view that it was a difficult case given the involvement of the Chief Justice and the High Court Registrar in a way that prevented him from effectively representing his client.

6. Evidence from Thulani Maseko (Accused Number Four)

Accused Number Four in the trial, Mr Thulani Maseko, gave evidence through taking an affirmation rather than an oath.

Mr Maseko had prepared a long written statement which he read. In order to allow for the court and the DPP to better follow his statement, he made and distributed copies for everyone. Mr Maseko's written statement appears in this report as Appendix 4 and is referred to here only in relevant portions to this case. The current summary of evidence refers to the following aspects of and views expressed in Mr Maseko's testimony:

a) That this and other cases dealt with by the Chief Justice and Judge Simelane were politically motivated;
b) That the Chief Justice had in several instances acted in a manner that undermined his integrity as a judge and thereby the public's confidence in the administration of justice in Swaziland;
c) That the legal profession in Swaziland had an obligation to defend the rule of law;
d) That the contempt of court case concerning Mr Gwebu was a matter of public interest;
e) That the defendants in this trial had a real, and reasonably based, apprehension of bias on the part of the court;
f) That the current trial was conducted in a manner violating the Swazi Constitution and the right to a fair trial; and
g) That the charges against him and the co-accused amounted to a violation of the freedom of expression.

<u>a) Political motivation</u>

Mr Maseko expressed the view that this case was politically motivated because of the fact that he had been critical of the role played by the Chief Justice in the case against Mr Gwebu. Mr Maseko proposed that the Chief Justice had, in that process, undermined the independence of the judiciary and destroyed public confidence in the administration of justice. He gave the example of the way in which the Chief Justice had earlier dealt with the case of Judge Thomas Masuku, in respect of which he said that the Chief Justice had again worked with Judge Mpendulo Simelane as complainant, prosecutor and judge before dismissing

Judge Masuku from the bench.

Mr Maseko referred to the statement issued on 2 April 2014 by the Swaziland Judicial Services Commission (JSC) which, according to Mr Maseko:

> "…stated that contempt of court in this jurisdiction was one of the most serious offences against the administration of justice. It said that contempt of court is not protected under section 24(3)(b)(iii) of the Constitution… Surprisingly the JSC has not only warned the general public, it went on to attack in particular the progressive democratic movement in Swaziland. It said freedom of speech 'is not absolute as the progressive organizations and other like-minded persons seem to suggest.''

Mr Maseko stated that this statement gave credence to his view that "this case has nothing to do with the alleged contempt of court; it is rather a battle of ideas".

b) Integrity of the Chief Justice

A thrust of Mr Maseko's evidence was that the Chief Justice lacked personal integrity and that he had administered the highest judicial office in a way that had undermined the independence of the judiciary and eroded public confidence in the administration of justice. He stated that he felt that the independence of the judiciary was an issue of public interest. He stated that the Chief Justice, like other judicial officers, was himself a public servant who was accountable for the way he conducted judicial affairs. He stated that judicial officers are subject to the law and are not above the law.

Mr Maseko said that he felt that the way in which the Chief Justice had reacted to his disagreement in January 2014 with Mr Gwebu (over the way that Mr Gwebu was doing his job in impounding the vehicle that Justice Otta was using) showed heavy handedness and abuse of office. Mr Maseko expressed the view that this was a matter of public interest and that, as a responsible and good citizen, he was obliged to defend the rule of law. Parts from his statement that deal with this aspect read as follows:

> "My Lord, I was not surprised when His Lordship the Chief Justice in his interview in The Swazi Mirror said that he would defend the Tinkhundla system of justice, in my view that is sheer politics… My Lord I will stand by the contents of the article that I am accused that it is my view that Chief Justice Ramodibedi is morally bankrupt… He has not only undermined the integrity and dignity of the judiciary in our country; he has also destroyed its independence and accountability, to such an extent that it has lost public trust, without which it cannot function."

Mr Maseko's statement suggested that the Chief Justice was not only abusing his office and undermining the integrity of the courts, with the trial judge Judge Simelane as a willing partner. He argued that there was no room for arrogance on the part of judicial officers when administering justice as a public service. He in this regard cited the Bangalore Principles of Judicial Conduct 2002 which provide in Principle 3, that:

> "3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
> "3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must be seen to be done."

Mr Maseko also referred positively to a statement by Justice Wright of the United States during his confirmation hearing when he said:

> "There may be a place for arrogance. I'm not sure what place that would be, but I am sure that it is not on the bench. The courts do not belong to us. We are holding a public trust. The courts belong to the people. They need to be made to feel welcome, that this place is a place for resolution of their disputes… Our job is to administer the law fairly and impartially. It is not our place to assume a sense of power which we do not possess, a sense of superiority which we simply do not have. We are administering a public service."

Mr Maseko asserted that the Chief Justice had failed to assure key stakeholders in justice delivery that he is a fair minded judicial leader with a strong sense of justice. He gave the example of how his conduct lead to the legal profession boycotting courts for four months in 2010. Mr Maseko stated that, so bad was the conduct of the Chief Justice, that the Law Society filed a case against him with the Judicial Service Commission that had the potential of the Chief Justice facing impeachment proceedings, as had nearly happened in the Chief Justice's country of origin Lesotho where he resigned, according to Mr Maseko, in order to stave off potential impeachment proceedings. The relevant portion of his statement read as follows:

> "Swazi lawyers had been engaged in a boycott of the Courts, having raised serious issues about the failure of the proper and effective administration of justice in the land, and the shameful misconduct of the Chief Justice, Michael Ramodibedi, whose moral authority and reputation remains questionable not only in Swaziland, but also in his native country, the Kingdom of Lesotho. He has unsurprisingly elected to resign as Judge President of the Court of Appeal [Lesotho], in a strategy to avoid the long arm of the law."

Mr Maseko concluded this aspect of his evidence by saying that "I respectfully contend that this court has failed in this regard. My sense of dignity was attacked by the court… in an unprecedented show of abuse of authority."

c) Duty of the legal profession to defend the rule of law

Mr Maseko expressed the view that the legal profession in Swaziland, of which he was a member, had an obligation to defend the rule of law. He referred positively to persons who had stood up against oppressive regimes and environments and had thereby contributed towards building better societies anchored in observance of human dignity and rights through the rule of law. He referred to people such as Nelson Mandela, Barak Obama and Martin Luther King junior. He stated that a higher onus was on lawyers and judges to be at the forefront of defending the rule of law in situations where it is under attack, even as in Swaziland where, in his view, the Chief Justice and a small group of "willing servants" were at the forefront of meting out injustice and undermining the rule of law under the guise of protecting the King. In fighting against injustice, he referred to a statement by Nelson Mandela in which he had said the following in 1962 in a speech entitled "Black man in a white court":

> "I regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law, and to justice for all mankind, to cry out against this discrimination, which is essentially unjust and opposed to the whole basis of the attitude towards justice which is part of the tradition of legal training in this country. I believed that in taking up a stand against this injustice I was upholding the dignity of what should be an honourable profession."

d) Public interest in the contempt of court case concerning Mr Gwebu

Mr Maseko stated that he felt that Mr Gwebu's case and the way in which it had been dealt with was a matter of public interest. He said that he consequently felt obliged to express an opinion about the way in which the case was handled by the Chief Justice because it related to procedural justice and fair trial, natural justice, the fight against corruption and abuse of office by the powerful. He expressed his opinion that because society is intricately and inseparably intertwined, it was important for those in society who could speak out to do so. He gave the following justification in his evidence:

> "I say that we had to comment and write about Bantshana Gwebu's case because; as Martin Luther King Jr tells us from his "Letter from Birmingham Jail" that "We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly." An injury to one is an injury to all. Third, I will respectfully submit that the people of Swaziland are treated with disgusting disregard and utter contempt."

Mr Maseko went further to positively refer to a statement by Sir Francis Gerard Brennan QC, the tenth Chief Justice of Australia, in which he had said:

> "What lawyers do know, however, is that laws, practices and procedures provide safeguards which maintain public confidence in the Rule of Law. When the conventional safeguards of law and the legal process are dismantled or reduced so that the public sense that justice according to law is no longer assured to all people within the jurisdiction, public confidence in the Rule of Law is lost or diminished. That weakens the unity and fabric of society and exposes us to the danger from those who do not share a respect for the Rule of law."

Mr Maseko stated that his publications were a reaction on his part to what he saw as an abuse of office by the Chief Justice and a grave injustice meted out on Mr Gwebu in a matter where he received punishment merely for doing his job to prevent the use of public assets (vehicles) from abuse. Mr Maseko said that he felt that the comments he made were not just true, but necessary, fair, legitimate and in the public interest. He referred to the Bangalore Principles to measure if the Chief Justice had lived up to the expectations of his office and concluded:

> "I do not believe that the conduct of the Chief Justice is consistent with these principles and values. Rather, I have a firm belief that he is a liability and burden to the institution of the judiciary and an embarrassment to his own peers. He has tarnished not only his own image, but that of the judiciary. The manner in which he handled the Bhantshana Gwebu as well as this case demonstrates this. Judge Dlamini vindicated us that the Chief Justice was, and is wrong. We cannot in all good conscience disown our articles; we stand by every word contained therein... If judges of the High Court of Swaziland are unhappy about the way they are treated by the head of the judiciary, why should we, the people shut up? It is absolutely not possible, if we have a conscience as I do."

Mr Maseko therefore contended that Mr Gwebu's case was a matter of such important public interest that he could not be silent in the face of such grave injustice being perpetrated by those who are entrusted to defend the Constitution and protect the people of Swaziland from injustice.

e) Defendants' apprehension of bias

Concerning the current trial, Mr Maseko stated that he and his co-accused had a real apprehension that they, like Mr Gwebu, were not going to receive justice and fairness in the trial process. He stated that they felt that Chief Justice Ramodibedi and Judge Simelane were working together to get a conviction at any cost, and

working with "willing servants". He referred to hostility from both the Chief Justice and Judge Simelane during the preliminary and trial hearings in court. He noted that all decisions on preliminary matters had been made against them.

Mr Maseko also referred to the *mero motu* remand in custody of himself and Mr Makhubu by both the Chief Justice and Judge Simelane, even when the State had not applied for their remand in custody. Mr Maseko asserted that Judge Simelane now had a "marriage of convenience" with their case as all matters initiated around their case always found themselves before Judge Simelane. Mr Maseko also pointed to the fact that, at all material times from the start of the Gwebu case, Judge Simelane was initially involved as High Court Registrar and later as a High Court judge.

Mr Maseko addressed this issue as follows, referring to a statement by Lord Devlin:

> "'The judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augerer who tempers with the entrails'. He goes on to say that "No unsuccessful party should be left with any reasonable apprehension of bias affecting the decision." As accused persons in these proceedings, the feeling that this Court is biased has never left us. From the very first day we appeared before this Court, we entertained a reasonable apprehension that this Court has not brought an impartial and unprejudiced mind to the resolution of the matter. We have been ambushed from day one, right to the end.
>
> "All applications we made before His Lordship have been against us, but found favour with the State. I accordingly agree with the Right Honourable Lord Tom Bingham of the House of Lords, writing on "The Rule of Law-The Sixth Sir David Williams Lecture, Cambridge, 16 November 2006 that "There are countries in the world where all judicial decisions find favour with the government, but they are not places where one would wish to live."

f) Constitution of Swaziland and the right to a fair trial

Mr Maseko maintained a very strong line that the way that the Chief Justice and Judge Simelane had conducted the proceedings in this case amounted to a violation of the Constitution of Swaziland and a breach of the principles of the right to a fair trial. He stated:

> "From the day of our arrest on Monday March 17 and Tuesday 18, 2014 respectively, it has deeply pained our hearts to see this honourable court violate and break every rule of practice in the justice game, as provided for in the Rules of Court and the rules applicable under the criminal justice system. This court has not only breached the normal rules of practice and procedure and the CP&E Act, which have governed the fair administration of the criminal justice for years; this court has blatantly violated and breached the Constitution of Swaziland, which is supposed to be the supreme law of the land. To put this issue beyond any shadow of doubt, section 14(2) of the Constitution provides that:
>
> > "The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforced by the courts as provided for in this Constitution.
>
> "Instead of enforcing the Bill of Rights and the Constitution, I contend that this court has subverted same. We want to say that 'other organs or agencies' of government include the office of the Director of Public Prosecutions (DPP), the Attorney General (AG) and the police. We strongly hold the view that the conduct of the office of the DPP, the AG, the police and the entire State machinery amount

> to the suspension or abrogation of the Constitution as envisaged by section 2(3) (of the Constitution)."

g) Freedom of expression

Mr Maseko's evidence in court also touched on the right to freedom of expression. He argued that the right to freedom of expression is so important to the practice of democracy and defence of the rule of law that it could only be restricted under circumstances that are reasonably justifiable in a democratic society. He argued that contempt of court proceedings were not reasonably justifiable proceedings in a democracy to prevent or undermine the full enjoyment of the right to freedom of expression. The relevant portion of his statement provided as follows;

> "I submit that contempt of court in the circumstances of this case is not a justifiable limitation of the freedom of expression in a democratic society.
>
> "Indeed, I take this from General Comment No. 34 of the Human Rights Committee of the UN (2011) where it interprets Article 19 of the ICCPR. The Human Committee says that, "Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions." The Human Rights Committee proceeds to say that "Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights."

Mr Maseko's statement suggested that he was determined to pay whatever price it took to defend the right to freedom of expression as it was such an important right on which the enjoyment of other fundamental rights lay. He lamented that, if contempt of court proceedings were successfully used to undermine the enjoyment of freedom of expression, it would be a tragedy in Swaziland as other fundamental rights were already in retreat, such as the freedoms of association and assembly with the practical banning or lack of recognition of trade unions and political parties.

7. Evidence from Bheki Makhubu (Accused Number Two)

Mr Bheki Makhubu was the second defendant in this trial and gave evidence in his defence.

Mr Makhubu is a man of 44 years and a very experienced journalist for 26 years, having started journalism in 1988. He was the Editor of The Nation Magazine that is owned and operated by Swaziland Independent Publishers (Pty) Ltd, co-accused in this matter. Mr Makhubu confirmed that Mr Maseko wrote regular opinion pieces for The Nation Magazine. Mr Makhubu stated that he was responsible for reading such opinion pieces and evaluating content, as a journalist, for standards compliance and ethics among other things.

As well as giving evidence about the circumstances surrounding his arrest and initial detention, Mr Makhubu's evidence in chief and under cross-examination raised a number of issues concerning the relationship between the media and the judiciary in Swaziland, including: the defence of truth and fair comment; reporting on matters of public interest that happen in the courts especially on fair trial; breach of the right to legal representation and media reaction to it; allegations of abuse of power by the Chief Justice; the role of the Director of Public Prosecutions in the administration of justice; the role of the Registrar of the Courts in the administration of justice; contempt of court and the right to

freedom of expression; judicial independence, impartiality, integrity and accountability; equality before the law; and detention and bail among others.

a) Mr Makhubu's arrest and initial remand in custody

Mr Makhubu told the court that on 17 March 2014 he was on the South African side of the Swaziland border with South Africa when he received a call to inform him that several policemen had been to his home(s) looking for him in order to effect a warrant of arrest that the Chief Justice had issued against him and Mr Maseko. Mr Makhubu arranged to present himself to the police the following morning in the company of his lawyer. Once he presented himself to the police on 18 March 2014, Mr Maseko was brought to the same office and they "were simply taken straight to the Chief Justice's Chambers".

Mr Makhubu stated that his and Mr Maseko's lawyers "raised the question why we were in his [Chief Justice] Chambers and not in open court… [raising further] the issue of our right to be heard in open court [as] these were Swazi Constitutional Rights". He stated that this question was dismissed by the Chief Justice with a retort "Oh, no, don't worry, they will get their constitutional rights". Mr Makhubu stated that the Chief Justice then immediately remanded them to "Sidwashini [prison] into custody for the week."

Along with Mr Maseko, Mr Makhubu stated that he has since that time remained in custody, other than a short period following their release from custody on 6 April 2014. Mr Makhubu summarised the reasons for his situation as follows:

> "I am now planning going to jail for a long time which means all my life has come to [a stop] because the Chief Justice is upset that I disagreed with him"

b) Defence of truth and fair comment

Mr Makhubu's evidence centred very strongly on the defence of truth and fair comment concerning both his own and Mr Maseko's publications in The Nation Magazine.

c) Reporting on matters of public interest

In his evidence, Mr Makhubu stated that he did not know Mr Gwebu personally but that issues raised in Mr Gwebu's case were of immense public interest. He stated that: "The issue of Bhantshana was one of huge public interest. Everybody was talking about it, the newspapers were reporting about it, it was a rolling stone."

Mr Makhubu stated that daily newspapers reported as breaking news that Mr Gwebu had a warrant of arrest issued against him by the Chief Justice after a disagreement outside court and that, after his arrest on this warrant, he was taken straight to the Chief Justice's Chambers where he was remanded in custody at Sidwashini prison for seven days. He said that it was reported that there was no charge sheet presented at that time and that the State lawyer asked for the matter to be stood down to allow him to draft a charge. Newspapers reported that Mr Gwebu had a lawyer, Mr Macawe Sithole, but that the lawyer was not afforded the opportunity to appear before the Chief Justice and represent Mr Gwebu before Mr Gwebu was remanded in custody. Mr Makhubu stated that reports also linked the issuance of the warrant to an incident where Mr Gwebu came into conflict with Justice Otta and the Chief Justice when Mr Gwebu was executing his duties far away from the courts as a public servant and in order to safeguard government vehicles against abuse. Mr Makhubu said in court: "my

first question in my mind was, what's going on here?"

Mr Makhubu stated that issue became even more curious to him as a journalist when "the statement by the (then) Registrar of the High Court (Judge Simelane)… told The Times newspaper that Bhantshana would have been afforded legal representation had he requested same". Mr Makhubu stated in court that: "I became more confused as to what the judiciary was doing now… I began to imagine in my mind that this was not right, it was wrong that a man should be arrested like that… I decided that this incident was worthy commenting on".

Mr Makhubu stated that journalists function on the basis of what is happening now and they normally feel compelled to report on matters of public interest such as the case concerning Mr Gwebu and how it was handled. He said:

> "I did not see the crime in discussing the things that we do in life particularly if they are of immense public interest and again I can assure you My Lord, no one insulted the Chief Justice… I think from a journalistic point of view when an incident occurs in any society that respects that there are people and people are allowed to think and that thought begets talk… suddenly I do not even understand why I was arrested…"

d) <u>Reporting on the right to legal representation</u>

Mr Makhubu explained that he believed that the right to legal representation was an issue of such importance in Swaziland that it ought to be canvassed by the media in appropriate cases such as that concerning Mr Gwebu. He said that many people from Swaziland were not fully conversant with their rights, especially when they came into conflict with the law. The then Registrar's suggestion that it was Mr Gwebu's fault not to have had a lawyer before the Chief Justice seemed to send a wrong message to the public that needed to be corrected, in the public interest. Mr Makhubu said in his evidence:

> "…My understanding of the law in Swaziland is that a person who appears in court without a lawyer is asked by the court if he needs one and my understanding [is] particularly so because many, many people in this country do not know their right to legal representation. The court would normally assist in that respect. And so when I read in the paper a statement suggesting that Bhantshana had been victim of his own failure to request a lawyer, I found that against the laws. I figured what had happened is illegal…that the whole arrangement of Bhantshana was for the sake of expediency because it was convenient for purposes of sending him to jail which I [believed] was the sole purpose of that…and therefore the Chief Justice massaged the law."

Mr Makhubu referred to the contention by the DPP that he and Mr Maseko had written on a matter when they had not been in court and that they had not sought verification of the facts from the Chief Justice and the Registrar. Mr Makhubu dismissed this contention, stating that the factual basis of their articles had been established as evidence in court. He said the following about the role of Judge Simelane in the Gwebu case, in his former capacity as Registrar:

> "We now know from Bhantshana himself and he said nothing that contradicts the basis of our article, in fact he told us more than what we knew, he told us that his request for a lawyer was actually spoken in two languages… because there was an interpreter there, so there are two languages used… I mean here is a man who speaks of Bhantshana's request for a lawyer in two languages and goes and says Bhantshana did not ask for a lawyer. Is that not being the highest order of dishonesty and we are supposed to keep quiet and say it's okay?"

e) Allegations of abuse of power by the Chief Justice

Concerning his apprehension about how the Chief Justice uses his power, Mr Makhubu stated:

> "The three months now that I have spent in jail and this is me saying now which I could never say from 2001 for the first time I said it, now I am planning going to jail for a long time which means all my life has come to a stop because the Chief Justice is upset that I disagreed with him."

Once Mr Makhubu decided to write and comment on how Mr Gwebu was treated after his disagreement with the Chief Justice, Mr Makhubu stated that he saw similarities in the way the Chief Justice handled the case concerning Mr Gwebu from a procedural view point with the way that Caiphas had handled the case that resulted in "The Killing of Jesus". In both cases, Mr Makhubu took the view that due process had not been complied with by the highest judicial officers of the land. Mr Makhubu said that he used the example merely for comparison as "Caiphas was the High Priest of Judea… Chief Justice of all Jewish law", while Chief Justice Ramodibedi is the highest judicial officer of Swaziland. Mr Makhubu stated that he saw nothing wrong with this comparison.

Mr Makhubu explained that what he considered to be the failure to comply with procedural fairness requirements in Gwebu's case made him conclude that the law was massaged to suit convenience or expediency. He stated that this is what happened with Caiphus too when in the book "The Killing of Jesus" it was noted that "all these [procedural safeguards] details Caiphas knows but can be massaged, the most important thing right now is taking Jesus into custody." Mr Makhubu saw the similarities with the way the Chief Justice had handled the Gwebu matter, where "Mr Matsenjwa… the prosecutor on the day Bhantshana was arrested… wanted to stand down so that he could prepare a charge sheet, but all that could be addressed after".

Mr Makhubu stated that the Chief Justice, as the highest judicial officer, was sworn to uphold and not to undermine the law. In the Gwebu case, like Caiphas did in the trial of Jesus, Mr Makhubu felt that the Chief Justice was subverting justice and making the law work for him instead of him working for and upholding the law. He stated that he felt that the Chief Justice was already an all too powerful person and did not need to do what he did to Mr Gwebu. He felt that the media needed to report on this and also provide some support to Mr Gwebu as a little man since the Chief Justice had support structures including servants who were willing to work for him. Mr Makhubu stated:

> "…I was there when the Chief Justice was sworn in to uphold the rule of law… They are no longer doing their work which is to uphold the rule of law in their constituencies like Michael Ramodibedi in Swaziland and Joseph Caiphas in Judea, but despite their not following the law, they are getting what they want, because they are creating a façade that once they operate outside the law, they are still who they are, because you can't still be Chief Justice if you are not using the law, because your obligation of office is before the law. So the law can never be inconvenient to you. Who then says it is unfair on Bhantshana who went to prison not even with a charge sheet? Who speaks for him? Now that you speak for the Chief Justice… *We are charged here because the Chief Justice was upset with us*" (own emphasis)

Mr Makhubu stated that the way in which the Chief Justice had dealt with Mr Gwebu, who had voluntarily surrendered himself to the police, was in his view heavy handed. He pointed to the fact that the Chief Justice dealt with the matter in chambers and not open court; refused the request for legal representation

even as the lawyer was in the court premises; proceeded with a matter where there was no charge sheet; remanded Mr Gwebu in custody in a matter that recommended itself strongly for bail; and presided over the matter in respect of which he had an interest in order to settle a disagreement that he had had with Mr Gwebu.

f) Role of the Director of Public Prosecutions

In his evidence, Mr Makhubu expressed dismay at the conduct of the Director of Public Prosecutions in Swaziland. He stated that he was of the view that the DPP did not show sufficient independence, impartiality and integrity in the way that he and his office handled the case concerning Mr Gwebu and now the case against himself and Mr Maseko. Mr Makhubu said that he could not understand how the DPP's office could allow a case of immense public interest to have proceeded in Chambers and not open court; without a charge sheet; without affording Mr Gwebu the right to legal representation, especially where Mr Gwebu had expressed such a desire; allowed the Chief Justice and Judge Simelane to *mero motu* remand accused persons in custody without proper justification or giving people an opportunity to apply for bail. Mr Makhubu explained that, all in all, he viewed the DPP as having been a willing servant to help the Chief Justice to break the law including by proceeding with the current trial. Mr Makhubu stated:

> "Lets start with the DPP, I think it is common cause in this country that one has a right to legal representation and that this is the law of this country… it is common cause that people who get arrested are given a charge sheet specific to that…Bhantshana… did indicate to the court that he had the services of a lawyer… once an accused person has indicated that he has a lawyer [he] cannot be denied that chance… [that's] part of the legal order in Swaziland… a person such as the DPP who is an extremely important person in this country, a very powerful person… you are not only an experienced lawyer, you are a lawyer well versed in the laws of the country and understand the law at a very, very deep level, if we accept that too then we have to accept the fact that when the DPP, as I note, in the article sought to frustrate Bhantshana's bid for bail by opposing it with a South African advocate knowing very well that Bhantshana had been arrested illegally… then you have to accept that the DPP… what he was doing is illegal and the whole process that has put Bhantshana in prison was illegal and he sought to keep Bhantshana in jail rather than stand up for the law… he is called to a higher standard than the average legal person because in his office are the lives of people, their rights… the DPP does not win cases, he never goes to court to win cases, he goes to court to get justice for people, to him there is no win that is what the DPP does.
>
> "So the success of the DPP is not measured by how many people he puts in jail, it is measured by how much justice he dispenses for people in general… So in my mind when writing this article informed by the points [above]… I found the DPP's conduct rather shocking because I also know that the DPP's office is independent of everybody including judges… the DPP's office is an extremely important office where pretty much our lives evolve around, it is just that maybe sometimes we do not know. So for him to involve himself with such injustice was quite shocking… I don't think he should have subordinated himself to something that was in my view, blatantly illegal unless he subordinated the office of the DPP to the Chief Justice. The DPP does not answer to the Chief Justice. He is independent in terms of who and why he prosecutes people."

g) Role of the Registrar of the Courts

Mr Makhubu stated in his evidence that he was disappointed with the way in which the then High Court Registrar, now presiding as the trial judge, had behaved. He described his conduct as being complicit with the Chief Justice to mete out injustice on Mr Gwebu. Mr Makhubu pointed to the fact that the

Registrar was the person who took Mr Gwebu to the Chief Justice's Chambers and that he knew that Mr Gwebu had legal representation; that he was present in the Chief Justice's Chambers when Mr Gwebu requested legal representation and advised the Chief Justice that his lawyer was within the court premises; that he was the person who did the translations in Chambers; and that he was present when the Chief Justice responded to Mr Gwebu's request for legal representation by asking whether the lawyer had been present when Mr Gwebu had allegedly committed the offence. Mr Makhubu stated that he was of the view that ordinary people who are not well versed with the law rely on the Registrar's office for advice and directions when they are in contact or in conflict with the law. He stated that he therefore expected the Registrar to act in a way that was beyond reproach and in accordance with real and substantial justice rather than acting as an instrument of injustice and cover up where justice will have failed. Mr Makhubu remarked that the Registrar's office had failed justice in the Gwebu case and was extending that injustice in the current trial, albeit in a different capacity as trial judge. Mr Makhubu stated:

> "Yes the Registrar was quoted in the newspapers as having said that Bhantshana should have asked for a lawyer. The Registrar was responding to an earlier article in which Bhantshana himself had been quoted as having said he was denied a lawyer. Having asked for one and then the Chief Justice had asked about his lawyer, he asked Bhantshana if his lawyer had been there when the incident occurred on the weekend. So the Registrar's office too I understand is not a small office, it is an extremely important office too… And in fact from the little that I may say about it, I do know that people who may perhaps have got no clarity on how the law works for them in various issues in the country from civil matters whatever, it is at the office of the Registrar that you get information. And when I heard the Registrar actually defends the denial of an accused the right to legal representation and tries to rationalize when the law is not on his side is really shocking to say the least. Perhaps My Lord let me finish off the question by saying this, in my mind, the two people, the Registrar and the DPP, the two people who could have saved a terrible situation playing itself out, two men I believe actually had the power to stop what was happening to Bhantshana… instead played a part in what I believe was an illegal detention of a man… they just did because they could."

h) Contempt of court and the right to freedom of expression

A thrust of Mr Makhubu's evidence was that contempt of court proceedings, such as in his case, were incompatible with the role of the media to impart news and information in the 21st Century, especially concerning matters of public interest. He stated that it was difficult for the media to pretend that things of public interest were not happening in the courts simply because they feared arrest on contempt of court charges. Mr Makhubu explained that this was especially so given new forms of media such as social media. He gave the example that even the matters currently taking place in court may already be reported in social media and known as they are happening in far away places such as the USA. He stated that it was therefore inconceivable that the contempt of court proceedings to stop the media from reporting could work and was viable in a modern society such as Swaziland that aspired to achieve a first world status. Mr Makhubu stated:

> "The media generally functions on what is happening now. And the media will tell you anyway that with the advent of social media, twitter and Facebook… newspapers, magazines, radio, television have to improve their own reporting because news is happening each second… To expect the media to pretend nothing is happening and everybody is saying everything about it on social media, what kind of society are we creating where everybody shuts up and nobody knows what is happening?"

Mr Makhubu further stated that, in his view, enjoyment of the right to freedom of expression entails the right to freedom to think, to disagree about views and to act differently on matters. He expressed regret that the current use of contempt of court proceedings to inhibit enjoyment of the right to freedom of expression also arrested the right and freedom to think independently and act differently, arguing that: "I do not believe anyone in this world and anyone in Swaziland holds the license to think". He added that:

> "In my understanding of the logic here is that you can't expect newspapers to say nothing just because a matter is pending in court because you never know when the case will finish and therefore there are certain things that are of extreme public interest that occur, that people cannot be stopped from discussing simply because the wheels of justice are taking their time…My Lord to think in the 21st Century in Swaziland, this is an issue, over something that was discussed by others in 1941 and saw not a problem. Is it [not] suggesting to us that we are defeating our own advancement as a people?... I believe we can disagree on how we see things without becoming enemies. Each one of us is entitled to see things differently… I am a strong believer in the concept of marketplace of ideas… King Mswati talked about first world status [for Swaziland]… I say creative thinking and expressing such creativity will get us there… I am telling you this from the bottom of my heart, I just don't understand how people are supposed to think according to the standards of others, you know, I really don't get it… I am not saying this as some kind of activist. I am just saying this as a common Swazi… I sit in Sidwashini [prison] and I just can't find an answer… I am a believer in the constitution and I believe that what the constitution says particularly in the Bill of Rights is the right thing for Swazis. And just for clarity I have never believed that freedom of expression is absolute."

Mr Makhubu stated in his evidence that he did not know Mr Gwebu before, but the way in which his case had played itself out, outside and inside the courts, raised fundamental principles of public interest that needed to find some form of expression. He expressed the view that using the contempt of court procedure by powerful people to control how society thinks and expresses itself on matters of public interest is wrong. His evidence went as follows:

> "I think that it is wrong for a growing society such as ours that a handful of people in positions of power should control how we think and how we express our feelings, so I felt a terrible injustice had happened to Bhantshana. I did not know Bhantshana at all but there was a principle that had gone wrong."

i) Judicial independence and accountability

Mr Makhubu stated in his evidence that because the Chief Justice is a public servant who works for the public and is paid by the public, it is important that his work be brought to public scrutiny as part of accountability.

> "Let us remember this, when a person holds public office such as the Chief Justice, paid for by the tax payer and not cheaply so, his behaviour is subject to public scrutiny, it is not a private matter and the public being the payer of his salary and benefits, everyone has a right to question things he does…and because he deals with matters that affect the public, particularly matters that have an adverse effect on the public, I think he is held to a higher standard of expectation than the common person. Now the question of fairness the problem with it is that, when you take decisions and make pronouncements that affect the public as a public official, a public officer, you have to be, and I would like to think the Chief Justice being as experienced as he is, understands that people will read the same page in different ways and respond in different manners whenever he takes a decision…"

Mr Makhubu stated that the legal system was there to serve the people of Swaziland. It belongs to the people of Swaziland, he said. Mr Makhubu took the view that judges, as key players in the legal system, are there in service of the people and people needed to understand what judges are doing for society in enforcing the legal system and delivering justice. Judges must not remain as objects of mystery to the people that they serve. They are accountable to the people in the way they administer justice and run the legal system. The media plays an important role in this process. Mr Makhubu stated:

> "…in other jurisdictions, one… next door to us [RSA], one of the things that have been said by judges, not least of all the Chief Justice of that country, is that judges should stop being these mysterious men and women that we never get to know of because they are human beings and that they have a responsibility to make themselves available to the public so that the public can understand the legal system they work with, so that young people can ask questions and feel inspired by judges to say, I also want to be a judge, they should no longer be… of mystery…when the media made an application for the screening of Oscar Pistorius trial, one of the things the judge said is "It is time that society got to understand how the legal system works because the legal system is for them, it is about them… As we speak now the Chief Justice of South Africa is involved in a public discussion over his religious faith because he is a born again Christian… and is having debates with the public [on] the separartion between religious view and his constitutional [role] in the country, he has not locked himself up in his office."

Mr Makhubu spoke specifically of the role of the Chief Justice as head of the judiciary in what he saw as an injustice committed against Mr Gwebu. He said that he felt that the independence of the judiciary, while constitutional and important, needed to be backed up by some accountability in the way matters of public interest are handled. In particular, Mr Makhubu argued that the conduct of the Chief Justice, more than that of other judges, had the effect of putting the whole judiciary under public scrutiny.

APPENDIX 4

WRITTEN STATEMENT OF MR THULANI MASEKO, READ AS EVIDENCE IN THE TRIAL ON 4 JUNE 2014

(Reproduced with original emphases)

The failure of leadership in Swaziland: the people are treated with contempt
Statement of Defence

1. Introduction

May it please the Court, I am the fourth accused. I have chosen to make this statement from the dock with the full knowledge that it does not necessarily carry the same legal weight as evidence given in the normal course; that is, testimony given in examination-in-chief and under cross examination. Nevertheless, just as much as His Majesty King Sobhuza II gave careful consideration to the unlawful repeal of the 1968 Independence Constitution on April 12, 1973, I have equally thought long and hard about this. I have come to the conclusion that this has been such an extra-ordinary case. To any mind, it has earned itself of an extra-ordinary approach. This trial, although based on an alleged contempt of Court offence, seems to me to be politically engineered.

Your Lordship, through this statement, I seek to demonstrate at least five issues. First, I will show the failure of justice by and before this very Court. Second, I insist that the Chief Justice, Michael Ramodibedi is morally bankrupt. He has not only undermined the integrity and dignity of the judiciary in our country; he has also destroyed its independence and accountability, to such an extent that it has lost public trust, without which it cannot function. I say that we had to comment and write about Bantshana Gwebu's case because; as Martin Luther King Jr tells us from his *"Letter from Birmingham Jail"* that ***"We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly."*** An injury to one is an injury to all. Third, I will respectfully submit that the people of Swaziland are treated with disgusting disregard and utter contempt. Fourth, I will address a general failure of leadership at all levels in our society. Fifth and lastly, I will cry out for the need to find consensus around a way forward so that, as one people we can face the challenges facing us together, peacefully; in a new spirit of patriotism an abiding faith.

Sir, President Barack Obama, the inspirational leader of our time says ***"We worship an awesome God in the South…"*** Elsewhere he says ***"I am rooted in the Christian faith."*** I do want to say that we also worship an awesome and magnificent God in prison. There in Room D4, where His Lordship has all along remanded me, we worship a great God indeed! And a fellow prisoner read from the Holy Book that:

> ***Put on all the armour that God gives you, so that you will be able to stand up against the Devil's evil tricks. For we are not fighting against human beings but against the wicked spiritual forces in the heavenly world, the rulers, authorities, and cosmic powers of this dark age. So put on God's armour now! Then when the evil day comes, you will be able to resist the enemy's attacks; and after fighting to the end, you will still hold your ground.***

The court will note as it did on Thursday April 10, 2014 that I am an attorney of

this court, having been admitted to practice as such on November 19, 1999. Like many present in Court today, I come from very humble beginnings raised by a single great mother with the help of neighbours; I come from the little valleys and mountains of Ka-Luhleko area. I happen to be a member of the Maseko Royal Household. As I speak, my people have been denied their traditional and customary right of installing a Chief of their own free choice as it happened with the people of Macetjeni and Kamkhweli, and other areas. Chiefs are being forcefully imposed on us so as to serve narrow personal and political interests, at the expense of the people and communities. Those who pretend to be defenders of Swazi Law and Custom are in fact, its greatest purveyors.

During the day of my admission as an attorney I took the oath of practice before the then Registrar of the High Court, Mrs. Thandi Maziya. I said:

> ***I, THULANI RUDOLF MASEKO, do swear that I will truly and honestly demean myself in the practice of an ATTORNEY according to the best of my knowledge and ability. SO HELP ME GOD.***

I believe it is such demeanor that has led to my unlawful arrest and detention. Let me say in advance that like millions around the world, I love and have been greatly influenced by Nelson Rolihlahla Mandela's idealism and pragmatism. In this regard, and as a lawyer himself, Mandela said in 1962, in his speech *"Black man in a white Court,"*

> ***I regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law, and to justice for all mankind, to cry out against this discrimination, which is essentially unjust and opposed to the whole basis of the attitude towards justice which is part of the tradition of legal training in this country. I believed that in taking up a stand against this injustice I was upholding the dignity of what should be an honourable profession.***

I feel likewise. We lawyers are called upon to be ***"doers of the word, not its sayers only,"*** writes His Lordship Tom Bingham in his book, ***The Rule of Law***. Throughout my years as a legal practitioner in this Court I have never seen such anger, hostility and prejudice from a judicial officer. Such anger, hostility and prejudice was demonstrated to us by the Chief Justice in his Chambers on Tuesday March 18, 2014, who told us point blank that contempt of court is a very serious offence and that the procedure the Court adopts in dealing with it is *sui generis*. Not surprisingly, similar sentiments were expressed by this court on our first appearance on Tuesday March 25, 2014. We have now been made to understand that the *sui generis* nature of the crime of contempt of court means that the Court is at liberty to violate, breach and undermine every known rule of practice, including non-compliance with the Criminal Procedure and Evidence Act 67 of 1938, as well as the Constitution in order to arrive at the decision it seeks; a conviction at all costs. This cannot be correct. My sense of justice is reviled by a procedure labelled as *sui generis* but which is uncertain and further excludes due process, fairness, propriety and justice. This Court should not have been complicit in the rape of Lady Justice.

Sir Francis Gerard Brennan QC, the tenth Chief Justice of Australia says these words which are apposite in this case:

> ***What lawyers do know, however, is what laws, practices and procedures provide safeguards which maintain public confidence in the Rule of Law. When the conventional safeguards of law and the legal process are dismantled or reduced so that the public sense that justice according to law is no longer assured to all people within the jurisdiction, public confidence in the Rule of Law is lost or diminished. That weakens the***

> ***unity and fabric of society and exposes us to the danger from those who do not share a respect for the Rule of law.***

This distinguished jurist goes on to quote Lord Devlin who states that ***"the judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augerer who tempers with the entrails."*** He goes on to say that ***"No unsuccessful party should be left with any reasonable apprehension of bias affecting the decision."*** As accused persons in these proceedings, the feeling that this Court is bias has never left us. From the very first day we appeared before this Court, we entertained a reasonable apprehension that this Court has not brought an impartial and unprejudiced mind to the resolution of the matter. We have been ambushed from day one, right to the end.

All applications we made before His Lordship have been against us, but found favour with the State. I accordingly agree with the Right Honourable Lord Tom Bingham of the House of Lords, writing on *"The Rule of Law-The Sixth Sir David Williams Lecture, Cambridge, 16 November 2006* that ***"There are countries in the world where all judicial decisions find favour with the government, but they are not places where one would wish to live."*** It is also on the public record that, at no point in the history of judicial independence in Swaziland has the Government recorded one hundred per cent (100%) victory, except under the stewardship of Chief Justice Michael Ramodibedi!! The judiciary has never been so executive-minded than under the leadership of *Makhulu Baas*.

Sir, from the day of our arrest on Monday March 17 and Tuesday 18, 2014 respectively, it has deeply pained our hearts to see this honourable court violate and break every rule of practice in the justice game, as provided for in the Rules of Court and the rules applicable under the criminal justice system. This court has not only breached the normal rules of practice and procedure and the CP&E Act, which have governed the fair administration of the criminal justice for years; this court has blatantly violated and breached the Constitution of Swaziland, which is supposed to be the supreme law of the land. To put this issue beyond any shadow of doubt, section 14(2) of the Constitution provides that:

> ***The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforced by the courts as provided for in this Constitution.***

Instead of enforcing the Bill of Rights and the Constitution, I contend that this court has subverted same. We want to say that 'other organs or agencies' of government include the office of the Director of Public Prosecutions (DPP), the Attorney General (AG) and the police. We strongly hold the view that the conduct of the office of the DPP, the AG, the police and the entire State machinery amount to the suspension or abrogation of the Constitution as envisaged by section 2(3) (of the Constitution). For the purposes of clarity, this is what the section says:

> ***(3) Any person who-***
>
> ***a) by himself or in concert with others by any violent or other unlawful means suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act; or***
>
> ***b) aids and abets in any manner any person referred to in paragraph (a); commits the offence of treason.***

This Court, in collaboration and in an unprecedented conspiracy with the Chief Justice, the DPP, the police the Swaziland Government and the entire leadership of this country have concerted to suspend the supremacy of the Constitution and the Bill of Rights for egocentric reasons. They have committed the crime of treason. In the words of Scripture; ***"you sit there to judge…according to the law yet you break the law…"*** I dare say so although I am neither a fan nor supporter of the tinkhundla Constitution which itself is inconsistent with the Rule of Law; and is not a true reflection of the genuine aspirations of the people of Swaziland. It was forcefully imposed.

2. Events of Thursday April 10, 2014

Your Lordship, without belaboring this issue more than it has already been done, and with no intention to assail you personally, I simply want to deny that I ***insulted*** the court as it has been alleged. The reverse is true. Every practicing practitioner worth his salt, including the DPP and the AG will agree that judicial officers are expected by law, to treat litigants courteously even if they dislike them. In this regard the Bangalore Principles of Judicial Conduct (2002) (the Bangalore Principles) provides in Value 3, which deals with the INTEGRITY of a judge that:

> ***3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.***
>
> ***3.2 The behavior and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must be seen to be done.***

Justice Wright of the United States of America (USA) during his confirmation hearing said:

> ***"There may be a place for arrogance. I'm not sure what place that would be, but I am sure that it is not on the bench. The courts do not belong to us. We are holding a public trust. The courts belong to the people. They need to be made to feel welcome, that this place is a place for resolution of their disputes... Our job is to administer the law fairly and impartially. It is not our place to assume a sense of power which we do not possess, a sense of superiority which we simply do not have. We are administering a public service."***

I respectfully contend that this court has failed in this regard. My sense of dignity was attacked by the court. The court, in an unprecedented show of abuse of authority was parading us. I strenuously deny that what his Lordship wanted was to call upon us to explain our non-appearance the previous day. I say so because this issue had already been fully addressed by our legal representatives. Had the court wanted us to explain, this would have been the first thing to have been done. In any event, the Court never did seek such explanation from us, but quickly sent us back to jail. I submit with respect that, His Lordship's saying so was an afterthought so as to justify the Court's shameful conduct towards us. There is no truth in this. It only goes to show that we are dealing with an unjust court. Anybody who has a conscience as I do, and who was present in Court would bear us out on this. The Court and the prosecution are at liberty to disagree with me on this.

To close on this issue, let me say that the treatment we received from the court was a violation of section 18 of the Constitution which is taken from Article 5 the Universal Declaration of Human Rights (1948). Articles 5 provides that ***"No one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment."*** Not only did we find human rights, human rights found us.

Section 18 of the Constitution reads:

> ***1) The dignity of every person is inviolable.***
> ***2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.***

Nobody can deny that throughout our appearance before this Court, we have been treated degradingly and inhumanely, including our legal representatives. Thursday April 10, 2014 was the proverbial icing on the cake. I felt that our dignity was under severe attack by a court, which by law, has the responsibility to protect us. I felt completely vulnerable and helpless, I felt oppressed. I rightly lost it, and felt I had to defend and protect whatever dignity remained of us. Indeed Martin Luther King Jr, tells us as he struggled against segregation, oppression and racial supremacy in Montgomery, Alabama, that:

> ***...there comes a time when people get tired of being trampled over by the iron feet of oppression. There comes a time my friends, when people get tired of being plunged across the abyss of humiliation, where they experience the bleakness of nagging despair...***

He proceeds to counsel us ***"to work and fight until justice runs down like waters and righteousness like a mighty stream."*** That time came to me on that morning of April 10, 2014. I simple could not take it any longer. I felt then as I do now, that His Lordship, being driven by anger, hostility and prejudice was not behaving like a judge. I felt duty bound to remind His Lordship to behave accordingly. I do not regret; yes I do not regret because since that morning His Lordship has tried to manage and hide his prejudice, hostility and anger towards us. Let the Court be comforted by the fact that for my conduct, I am willing to pay the severest penalty, even if it means spending more days, or even years in jail. It is well with my soul. I accept the penalty with a clean and a clear conscience that I did no wrong, for we were treated unfairly by and inside the very fountain of justice and fairness. Throughout this ordeal, we have been treated contemptuously.

3. I am not guilty of the offence of contempt of court, I offer the following explanation:

My Lord, during the Southern African Development Community Lawyers Association (SADCLA) Annual General Meeting held at the Royal Convention Centre in August 2012, my President, President of the Law Society of Swaziland, Titus Mlangeni said ***"the taste of the pudding is in the eating."*** He was reacting to the statement made by the then Honourable Speaker of the House of Assembly Prince Guduza Dlamini, who presented a speech for and on behalf of His Majesty, King Mswati III. Let me make it clear Sir that I refer to the statement made by the President because, the highest authority had assured the assembly of the SADC lawyers and the world, that Swaziland was committed to the Rule of Law and the independence of the judiciary. Swazi lawyers had been engaged in a boycott of the Courts, having raised serious issues about the failure of the proper and effective administration of justice in the land, and the shameful misconduct of the Chief Justice Michael Ramodibedi, whose moral authority and reputation remains questionable not only in Swaziland, but also in his native country, the Kingdom of Lesotho. He has unsurprisingly elected to resign as Judge President of the Court of Appeal, in a strategy to avoid the long arm of the law.

What was the response of Government and the leadership of this country to the boycott? Leaders of this country buried their heads in the sand, with the hope that the problems around the Chief Justice and the Rule of Law will go away. But

no, the problems are still here with us today. The Prime Minister is on public record having said that government is proud of the Chief Justice, and that he is not going anywhere! This statement was supported by the Minister for Justice and Constitutional Affairs, Sibusiso Shongwe. My Lord, let me be clear, I may not be perfect but I am a loyal member of the Law Society of Swaziland, which by the way, is established by an Act of Parliament, the Legal Practitioner Act, No. 15 / 1964 (the Act). Every lawyer, is obliged to abide by the Act, otherwise he or she is in contempt of the profession.

We only know of one lawyer in recent times who has flatly refused to subject himself to the requirements of the Act; the Minister of Justice and Constitutional Affairs, Sibusiso Shongwe. He unfairly and without lawful and reasonable justification attacked the Law Society of Swaziland, when invited to appear to redeem himself before the Law Society Disciplinary Tribunal for alleged misconduct as an attorney. The Minister told Parliament that the courts deserve utmost respect. We say no; no institution of State or public officer deserves such respect; rather they must earn it. It is disgusting, to say the least, that the Chief Justice who heads the judiciary and the line Minister responsible for Justice and Constitutional Affairs have consistently refused to subject themselves to the law and the Constitution. They obviously hold the law in contempt. They are the law unto themselves.

True to the lawyer's complaints against the Chief Justice and my contention that the Chief Justice is morally bankrupt, his counterparts in the Court of Appeal of Lesotho indicted him in his own case; ***The President of the Court of Appeal v The Prime Minister and Four Others C of A (Civ) Case No 62/2013.*** This is what the Court said at paragraph 22:

> ***The fact that the adverse effect of the impugned decision will be confined to the appellant's reputation leads me to a further consideration. It is this. At the time of the appointment of the Tribunal most of the allegations of misconduct against the appellant were already in the public domain. I say this in the light of the following:***
>
> ***a) The unseemly incidents flowing from the protracted conflict between the appellant and the Chief Justice had been widely published.***
>
> ***b) Some of the allegations against the appellant had been the subject of formal complaints by Lesotho Law Society while others were raised in a formal publicized memorandum of complaint by the Law Society of Swaziland.***
>
> ***c) Some of the allegations against the appellant were mentioned in the report of the ICJ Committee.***
>
> ***d) There was a petition by a group of concerned citizens to the Prime Minister calling for the ouster of the appellant from judicial office, which also received coverage in local press.***
>
> ***e) Finally there was the litigation between the appellant and the Prime Minister, where virtually all the allegations of misconduct relied upon by the Prime Minister were ventilated in the papers before the high court.***

The Court of Appeal continued to emphatically state at paragraph 23 that:

> ***The upshot of all this, as I see it, is that the appellant's reputation was already tarnished before the request for the appointment of a Tribunal by the Prime Minister. On the face of it, it seems to me that the only way to salvage his reputation is for the appellant to successfully refute the allegations before the Tribunal ... The removal of the uncertainty***

> ***surrounding the Appellant's reputation caused by the wide publication is not in his interest only. It also affects the unconditional public respect for the integrity of the judiciary without which the courts cannot function. The interest of the administration of justice thus required the appointment of the Tribunal as a matter of urgency.***

This statement coming from the Chief Justice's own peers, at his own backyard is surely an indictment on his moral authority, integrity and reputation as the head of judiciary in Swaziland. We have been vindicated, and we should be acquitted and discharged of the charges preferred against us.

What did *Makhulu Baas* do in an attempt to avoid and undermine the impeachment process? He resigned! This is nothing but an antic to claim moral high ground; a futile exercise. His attack on the integrity of the judgment does not help him. At some point he must submit to the law. Period. His cheap accusation of Justice Azhar Cachalia flies in the face of what he himself did to Mr. Justice Masuku. At least the Chief Justice did not have to appear before his accusers who would be witnesses, prosecutors and judges in their own cause. He appeared before a proper and fair court, which he denied Mr. Justice Masuku.

Is it not a shame that in his letter to King Letsie III, the Chief Justice alleges that his impeachment process in Lesotho is intended for personal agendas when he himself used the JSC to settle his personal dislike for Mr. Justice Masuku? It is indeed funny that *Makhulu Baas* claims he has done his best "thus far to defend the Constitution and the independence of the Judiciary in Lesotho against Executive interference" when in Swaziland he has absolutely undermined the Constitution and lowered the independence, integrity and dignity of the judiciary. We contend that it is contemptuous for the Chief Justice to complain that "...the Constitution has been flouted with impunity..." when he himself has flouted the Constitution of Swaziland. The Chief Justice cannot apply double standards. What is good for the goose should be good for the gander. *Makhulu Baas* has obviously and conveniently forgotten the Golden Rule: ***"Treat others as you want them to treat you."***

On this score, I want to submit that this emphatic finding by the Court of Appeal is in line with the Bangalore Principles referred to above. Paragraph 6 of the Preamble states that, ***"WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society."*** Paragraph 7 provides: ***"WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system."*** As if these are not enough, paragraph 8 speaks to the responsibility of the judiciary and reads: ***"WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country."***

I have always viewed the conduct of judicial officers as servants of the people, to be open, to criticism and public scrutiny. In this view I am fortified by Value 4 of the Bangalore Principles which deals with the proprietary of judicial officers. Paragraph 4.2 reads:

> ***As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.***

Without fear of any contradiction, I say that, I do not believe that the conduct of the Chief Justice is consistent with these principles and values. Rather, I have a firm belief that he is a liability and burdensome to the institution of the judiciary and an embarrassment to his own peers. He has tarnished not only his own image, but that of the judiciary. The manner in which he handled the Bhantshana Gwebu as well as this case demonstrates this. Judge Dlamini vindicated us that the Chief Justice was, and is wrong. We cannot in all good conscience disown our articles; we stand by every word contained therein.

If anyone is in doubt, one only needs to have read the Weekend Observer of April 20, 2014, where Her Ladyship Justice Qinisile Mabuza complains about the treatment she has received from the Chief Justice. She feels sidelined. If judges of the High Court of Swaziland are unhappy about the way they are treated by the head of the judiciary, why should we, the people shut up? It is absolutely not possible, if we have a conscience as I do.

4. The people are treated with contempt

The thrust of my defence is that I am not in contempt of court, but that the people of Swaziland are treated with contempt and disgusting disregard. The following factual allegations show such contempt against the people.

4.1 Contempt of the people's resolutions at Sibaya of August 2012

First, in support of this I make the following factual allegations. Your Lordship, the court will recall that, following the lawyers' unprecedented boycott of the courts for a continued period of at least four (4) months in 2011, as well as the *"waya waya"* teachers' strike and other forms of civil strife, His Majesty convened the People's Annual General Meeting at Ludzidzini in August 2012. I am sure the country will know that in terms of section 232(1) of the Constitution, ***"The people through Sibaya constitute the highest policy and advisory council (Libandla) of the nation." Subsection 3 states that: "Sibaya functions as the annual general meeting of the nation but may be convened at any time to present the views of the nation on pressing and controversial issues".*** Significantly, the King is the Chairman of the meeting; he is at the centre of it all, in terms of subsection (2). This means that he bears the ultimate responsibility to ensure that the people's resolutions are executed and implemented.

What were these ***pressing*** and ***controversial*** issues? Sir, there were obviously many such pressing and controversial issues on the agenda but I will limit myself to only three. ***Number one*** was the form of electoral system that Swaziland has to adopt and follow. To the surprise and shock of the leaders of this nation, stalwarts and proponents of the current discredited *Tinkhundla* system as enshrined in section 79 of the Constitution, the overwhelming majority of those who spoke, submitted that in 2013 Swaziland should have had an electoral system based on multiparty politics. I borrow the phrase "overwhelming majority" from Prince Mangaliso Dlamini's Constitutional Review Commission (CRC) Report. The question that arises is whether this recommendation / resolution were implemented, or even worse, whether there are any plans to implement same? The answer, as far as we are concerned, is in the negative. It is our respectful submission that the failure or refusal to give effect and meaning to the people's resolution and aspirations to move towards a **People's Democracy**, as opposed to the much talked about vague **Monarchial Democracy**, is contemptuous to the people of this land.

My Lord, I respectfully state that, the people's call for elections on the basis of a multiparty constitutional dispensation is indeed consistent with section 1 of the Constitution which reads that:

> *Swaziland is a unitary, sovereign **democratic** Kingdom.*

Of course, section 1 must be seen in the light of other supporting provisions of the Constitution intended to consolidate democracy, as opposed to consolidating power and government by a clique, which claims the divine right to rule. Indeed, Article 21 of the Universal Declaration of Human Rights as read together with Article 25 of the International Covenant on Civil and Political Rights (ICCPR, 1966) provides that, **the will of the people shall be the basis of the authority of government**. In this regard Nelson Mandela in his book *The Struggle is My Life* tells us that:

> ***That the will of the people is the basis of the authority of government is a principle universally acknowledged as sacred throughout the civilized world, and constitutes the basic foundations of freedom and justice.***

Let me say it categorically clear that, Swaziland being a member of the community of civilized nations has undertaken certain obligations. These obligations arise from her membership with the United Nations (UN), and with the African Union (AU). Under the auspices of the AU, and it has been emphasized that Africa must find solutions to its own problems; the African Commission on Human and People's Rights (the African Commission) an organ of the AU, has taken at least two policy decisions on Swaziland. In the first one, a decision of 2005 the African Commission found that the ban on political parties under the King's Proclamation to the Nation of April 12, 1973 violates Swaziland's obligations under the African Charter on Human and People's Rights (1986), which Swaziland voluntarily ratified in 1995. By logical extension, the ban on political parties in terms of section 79 of the Constitution is a violation of the rights of the people of Swaziland to freely associate.

In the second decision of April 2013, the African Commission resolved that Swaziland was to respect all fundamental rights and freedoms, including the existence of lawfully recognized political parties to ensure genuine, free and fair democratic elections, including freedom of speech and expression during the 2013 elections. To put this issue beyond any doubt, the New Partnership for Africa's Development (NEPAD) which Swaziland is a State Party to, puts it in clear terms at paragraph 79 that:

> ***Africa undertakes to respect the global standards of democracy, the core components of which include political parties and workes' unions, and fair, open and democratic elections periodically organised to enable people to choose their leaders freely.***

To this, one may add the SADC Principles and Guidelines on Democracy and Elections (2004) as well as the African Charter on Democracy, Elections and Good Governance (Charter on Democracy) (2007). Article 3 paragraph 11 of the Charter on Democracy enjoins State Parties on ***"Strengthening political pluralism and recognizing the role, rights and responsibilities of the legally constituted political parties, which should be given a status under national law."*** The import of this is that, political parties have been institutionalised as indispensable in African democracy. Swaziland is accordingly out of step with developments in Africa, and the rest of the just and democratic world. Contrary to these human rights provisions, political parties and the Trade Union Congress of Swaziland (TUCOSWA) remain banned in Swaziland. It is now generally accepted that no country can be a democracy while political parties are

banned and cannot contest political power. This is the very key function and purpose of political parties. Swaziland is no exception.

His Lordship may wonder of what relevance this is in this trial for alleged contempt of court. The relevance is simple; the people of Swaziland have a right to determine and shape their destiny - the right to self-determination. History tells us, and indeed proponents of the tinkhundla system are proud of the fact that His Majesty, King Sobhuza II was an active and card carrying member of the African National Congress (ANC), Mandela's political party; the governing party in the Republic of South Africa. Many of us are sure that His Majesty King Sobhuza II believed in the prophetic words of the Freedom Charter adopted by his ANC in 1955, which states in one of its emphatic concluding paragraphs that:

> ***The people of the protectorates-Basutoland, Bechuanaland and Swaziland-shall be free to decide for themselves their own future.***

While the people of Lesotho and Botswana do enjoy the right to determine their future by electing a government through multiparty democratic elections, this is not the case with Swaziland where a government is handed down from above. The elections are merely a sham, a window-dressing exercise. While it is said that we are independent; we are not free.

It has already been said however, that ***"There are too many leaders who claim solidarity with Madiba's struggle for freedom, but do not tolerate dissent from their own people."*** Accordingly, I submit that, this trial is not about the allegations of contempt of court. I abide by what I said in the article for which I now stand accused. But if truth be told, this trial is about the prosecution and persecution of the aspirations of the people of this land to determine their own destiny, democratically and freely. As a people we not only call for elections on the basis of political pluralism. In effect, we are calling for and demanding the right to be treated equally and with dignity before the laws of this country. Indeed the UN calls upon Member States in Article 55 (c) ***to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.***

This call is perfectly in line with the words of the Universal Declaration of Human Rights that: ***"All human beings are born free and equal in dignity and in rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."*** Then I read from the Good News Bible that ***"God created human beings, making them to be like himself. He created them male and female."*** The Americans got it right in their Declaration of Independence that, ***"We hold these truths to be self-evident that all men are created equal."*** And I have been told that we are a Christian country? Yet like in Animal Farm, some people are more equal than others. We refuse to be treated as non-entities, as Gentiles in our own land. This is the Exodus. We are crossing the Rubicon in our stride to freedom and democracy.

And a great African leader and icon of the world says, ***"I was not born with a hunger to be free I was born free – free in every way that I could know."*** I can only add that when freedom is taken away, it becomes the onerous and supreme duty of men to reclaim it from the oppressor. For giving up freedom is tantamount to giving away man's right to dignity. One can have no dignity without his or her freedom. Without our freedom we are a people without a soul. For myself, I cannot, and I will not surrender my right to freedom and dignity so as to gain cheap favours with this repressive and barbaric regime.

The denial of the people to form a democratic government through political parties is a denial of their dignity, and freedom to choose; a denial of equality. In this regard the Supreme Court was wrong in *Jan Sithole N.O and Others v. Swaziland Government and Others Civil Appeal No 50/2008* in holding that ***"like beauty, democracy is to be found in the eyes of the beholder."*** Democracy is now generally well defined in Africa; to suggest it lies in the eyes of the beholder finds no support in any law.

Sir, in this regard we are encouraged and motivated by Nelson Mandela for he tells us that;

> ***"...In its proper meaning equality before the law means the right to participate in the making of the laws by which one is governed by a constitution which guarantees democratic rights to all sections of the population, the right to approach the court for protection or relief in the case of the violation of rights granted in the constitution, and the right to take part in the administration of justice as judges, magistrates, Attorneys-General, law advisers and similar positions..."***

Nobody in his or her right mind can deny that these rights are not available to the vast majority of the people of our country. For as long as we are opposed to the *tinkhundla* system, we stand no chance of taking part. Prince Mangaliso minced no words at page 94 of the CRC Report that:

> ***"All those who are appointed by the Ngwenyama to senior positions in government must be people who know the Tinkhundla system and believe in and live according to that system."***

We are still treated as second class subjects whose rights are subject to the whims of Swazi Law and Custom, which we, the people, have no say in its enactment. If anyone is in doubt about the truthfulness of this contention, the judgment of the Supreme Court in *The Commissioner of Police and Another v. Mkhondvo Maseko Case No.3/2011 [2011] SZSC 15* is the authority for this proposition. This is the judgment for which Mr. Justice Thomas Sibusiso Masuku was unlawfully removed from office for defending, and NOT insulting the King. The Supreme Court boldly proclaimed per the Chief Justice Ramodibedi that:

> ***The Constitution is informed by strong traditional values.***

Indeed, such a pronouncement, although absolutely wrong in law, is in line and informed by the Prince Mangaliso CRC Report which says at page 83:

> ***The nation recommends that rights and freedoms which we accept must not conflict with our customs and traditions as the Swazi Nation.***

The problem with such a statement is that Swazi Law and Custom is pronounced by one person, the King, after consulting only his very close advisors who are appointed only by himself. The Prime Mangaliso Report says at page 135:

> ***Pronouncements by the King become Swazi Law when they are made known to the nation, especially at Esibayeni or Royal Cattle Byre. The King is referred to as umlomo longacali manga ("the mouth that never lies"). That is before any pronouncement or/proclamation, the King will have consulted and will have been advised.***

We respectfully submit that such an arrangement is inconsistent with constitutionalism and the Rule of Law which embody democratic governance. For the King is not subject to judicial review, making him above the law. Francis Neate is right when he writes in *"The meaning and importance of the Rule of*

Law" that:

> ***What is the Rule of Law? Some people, even quite intelligent people express confusion about this. It is really not difficult. The Rule of Law is the only system so far devised by mankind to provide impartial control over the exercise of state power. Rule of Law means that it is the law which ultimately rules, not a monarch, not a president or prime minister, clearly not a dictator, not even a benevolent dictator. Under the Rule of Law no one is above or beyond the law. The law is the ruler.***

Let it be said that in just, civilized, progressive and democratic societies, while the constitution respects African traditional practices and values, such values are subject to the full enjoyment and exercise of basic human rights and fundamental freedoms and civil liberties. Human rights are God-given; they are inherent, inalienable, indivisible and inviolable. This is clearly not the case in Swaziland. Sir, in so far as the people have called for a democratic process of forming a government under the Rule of Law, they have been treated contemptuously. We surely need leaders who better understand the Rule of Law.

Number two, the next point I would like to deal with regarding the contempt of the people and the Sibaya process as allegedly the highest policy-making structure, is that of the appointment of the Prime Minister, Dr. Sibusiso Barnabas Dlamini. The Court may have taken judicial notice that the people asked His Majesty King Mswati III and the leadership of this country to give them their right to elect a Prime Minister. Indeed, this is consistent with the call for elections based on a multiparty constitutional order. Under such a system, we will know that the leader of the majority party in parliament becomes the Prime Minister of the country. This was the case under the Independence Constitution of 1968, which was unlawfully, repealed by King Sobhuza II on April 12, 1973. This is the case with many African countries, at least post 1990. Is it not contemptuous that while the people called for the removal from office of the Right Honourable Dr. Sibusiso B. Dlamini in the last term, he was instead, re-appointed without their consent?

My Lord, I love President Barack Obama in his speech *'A New beginning'* when he says:

> ***"But I do have an unyielding belief that all people yearn for certain things: the ability to speak your mind and have a say in how you are governed; confidence in the rule of law and the equal administration of justice; government that is transparent and does not steal from its people; the freedom to live as you please..." He states, "These are not just American ideas, they are human rights."***

Indeed, the great Chief Albert Lutuli in his speech *'Our vision is a democratic society'* said in 1958, that ***"For it is in the nature of man, to yearn and struggle for freedom. The germ of freedom is in every individual, in anyone who is a human being. In fact, the history of mankind is the history of man struggling and striving for freedom. Indeed, the very apex of human achievement is freedom and not slavery. Every human being struggles to reach that apex..."***

I respectfully argue that the failure and refusal by the highest authority of this land to remove the Prime Minister and instead, re-appointing him is highly contemptuous of the people's will and aspirations. In any case, what is the criteria or basis for appointing a Prime Minister? Is it not Royal *Dlaminism* supremacy and superiority? We contend that this is the kind of evil domination of a people by another, which moved and inspired men of conscience and goodwill,

to rise up and challenge such immoral social orders. *Tinkhundla* is our Swaziland version of South Africa's grand Apartheid and racial segregation and discrimination in the United States. It must be dismantled, it is inhumane. Indeed, Article 19 of the ACHPR provides that; ***"All people shall be equal, they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."*** I accept the advice that to overthrow oppression, exploitation and domination has to be sanctioned by all humanity as the highest aspiration of free man. This is why the African Charter stipulates that, ***"freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of African peoples."*** These words were true during the liberation struggle; they are still true; and most relevant for Swaziland today.

This domination has no justification. It is a denial of the freedom to choose, and to form a government of the people, by the people and for the people. It is a denial of dignity.

Number three the next issue that arose at the Sibaya meeting is that relating to the infamous Circular No.1 of 2010. As far as we do recall, the citizens of this land called for the non-implementation and setting aside of this government pay-out policy document. We listened and heard, speaker after speaker, condemn and attack this document as illegitimate in the face of massive poverty and unemployment. The natives of this land saw this, not as intended to eradicate and alleviate poverty, but meant to secure the comfort of self-serving politicians while we the poor, suffer terrible poverty and unemployment. What level of contempt of the masses of the people can we speak of? I insist that I am not guilty, but the leadership of Swaziland, jointly, collectively and severally should be in the dock for contempt of the people.

Significantly and ordinarily, where decisions and resolutions are taken at an AGM as is the case with Sibaya; failure to execute and implement such decesions and resolutions invite and warrant a **vote of no confidence** on the leadership. More than just a **VOTE OF NO CONFIDENCE**, the non-implementation and intransigent refusal to give effect to the People's resolution in the light of section 232 amounts to the suspension and or abrogation of the section. Consequently this is an act of treason.

4.2 Mr. Justice Masuku's Kangaroo trial by the Judicial Service Commission (JSC)

Second, the last issue I want to speak about is the unlawful removal of Mr. Justice Thomas Sibusiso Masuku as a judge of the High Court. Indeed, in the article for which I stand accused, I do say as I repeat here for emphasis, that the arrest and prosecution of Bantshana Gwebu was a ***kangaroo process*** in the same manner and fashion as that which we experienced during Mr. Justice Masuku's hearing before and by the JSC, chaired by the discredited and embattled Chief Justice.

All right-thinking members of the Swazi nation as well as members of the just, democratic, progressive and civilized world are in agreement that Mr. Justice Masuku's accusers were prosecutors, witnesses and judges in their own cause. It is a fundamental principle of our law that no man shall be judge in his own cause. This is not only an old common law legal principle; it is also enshrined in section 21 of the Constitution. The JSC conducted the hearing in a manner inconsistent with the UN Basic Principles on the Independence of the Judiciary. Mr. Justice Masuku's prosecution, persecution and ultimate removal as a Judge of the High Court was a mockery of the fair and equal administration of justice and the Rule

of Law in Swaziland. It enabled the guilty and the corrupt to try an honest and a just man. Today we stand accused by the same people who facilitated, unlawfully and unconstitutionally removed Mr. Justice Masuku from office. How long will it take? Madiba said in 1962:

> ***I have grave fears that this system of justice may enable the guilty to drag the innocent before the courts. It enables the unjust to prosecute and demand vengeance against the just.***

This is true for Swaziland today. We are obviously dealing with the dishonesty of unjust and dishonorable men and women. Indeed, we need to remember that in 2002 the judges of the Court of Appeal of Swaziland (as it then was); confirmed Justice Masuku's judgment committing the Prime Minister Dr. Sibusiso Barnabas Dlamini; the then Commissioner of Police Edgar Hillary, and the then Attorney General Phesheya Dlamini, for thirty (30) days in prison for contempt of court. They blatantly refused to abide by the judgment of the court to allow the people of Macetjeni and Ka-Mkhweli to return to their land unconditionally. Chief Mtfuso II and his family is still languishing in exile in democratic South Africa. Unlike us, they never spent a single day in jail. These are the very people who have the audacity to send us to jail for contempt, when they themselves have no regard for the law unless it is favourable to them. Instead of being punished they were rewarded by being appointed to senior positions within the *tinkhundla* regime. So yes, this is a country where the law has no place; "Oh, Cry the Beloved Swaziland."

Yes, the guilty sit in judgment against the innocent. Justice Thomas Masuku was judged by the unjust; they are unjust because the office of the Registrar of the High Court on the instruction of Chief Justice has refused to accept, receive and issue court process as by law required, on matters alleged to be touching upon the King, thus undermining the Rule of Law and fair administration of justice. They are unjust because the head of the judiciary has refused to subject himself to the law to answer allegations of serious misconduct against him by the Law Societies of Swaziland and Lesotho respectively. In our submission, it is contempt not only of judicial independence, but also judicial accountability that the judiciary today, is headed by an individual who has undermined the fair and proper administration of justice; a man whose reputation is tarnished.

The real truth, therefore, is that there is no equality before the law whatsoever as far as the small weak and vulnerable people are concerned, and statements to the contrary are definitely incorrect and misleading. What is worthy of note is that the greatest purveyors of the law in this this country are always rewarded. Sibusiso Shongwe was appointed Minister of Justice and Constitutional Affairs while Mpendulo Simelane, who attested an affidavit against Mr. Justice Masuku, was purportedly appointed Judge of the High Court. He sits in judgment in this case! Edgar Hillary was appointed to Senate while Phesheya Dlamini is in Foreign Service. Lorraine Hlophe is the Registrar of the Supreme Court as well secretary of the JSC. The argument we make is that Mr. Justice Masuku was not removed as a judge of the High Court because he committed acts of misconduct; rather he was removed because he refused to rubber stamp decisions of the immoral *tinkhundla* regime, as some judges do.

We contend that Mr. Justice Masuku committed no wrong. He acted in defence of the King and the Constitution, and litigants before him without fear or favour as justice demands. He is a judge of impeccable integrity. For this he paid the price. We in Swaziland will live to regret Mr. Justice Masuku's dismissal for as long as we live. There are many other instances where people have been treated contemptuously, but those are issues for another day. We would have addressed

as a fourth issue the SPTC/MTN saga, where the people have been denied reasonable and affordable services but for the rich and powerful. Not to mention the imminent possible loss of the benefits flowing from the American African Growth and Opportunity Act (AGOA), resulting in the massive loss of employment opportunities, thus escalating poverty. Sheer arrogance.

It is our respectful contention that the issue here is not and has never been contempt of court. Rather, the real issue is the failure of leadership in this country at all levels. The issue is the abuse of the courts to silence dissenting voices in order to suppress aspirations for democratic change, and those who supposedly write/or speak "badly" about the *tinkhundla* system. The facts as stated above bear us out on this. I dare say on this score, that the dawn of a new day is coming. The people are yearning for freedom, democracy and justice. The time has come, and the time is now. Indeed, nobody can stop an idea which its time has come.

Let me close this issue by referring to Chief Albert Lutuli after the apartheid government deposed him as Chief of his people for his membership of the ANC. In a statement, *"The road to freedom is via the cross,"* Lutuli said:

> ***"In so far as gaining citizenship rights and opportunities for the unfettered development...who will deny that 30 years of my life have been spent knocking in vain, patiently, moderately and modesty at a closed and barred door? What have been the fruits of my moderation?"***

5. The failure of leadership in Swaziland

In the context of Swaziland, who will deny that the people in the form of political parties, and here one may mention the People's United Democratic Movement (PUDEMO) which in 2008 was arbitrarily listed as a terrorist organization under the oppressive Suppression of Terrorism Act No.3 of 2008 and whose President and members have been arrested and charged under this draconian law; the Ngwane National Laboratory Congress (NNLC) a pre - independence organization which played a significant role in the attainment of independence, whose members were prevented from sitting as elected Members of Parliament after the 1972 general elections; as well as the newly formed Swazi Democratic Party (SWADEPA) whose leader is a lone voice in parliament, have all been peacefully calling for the recognition and lawful registration of political parties to advance, consolidate and give meaning to genuine democracy in Swaziland?

Who will deny that the organized labour movement through the then Swaziland Federation of Trade Unions (SFTU), Swaziland Federation of Labour (SFL) now the Trade Union Congress of Swaziland (TUCOSWA), have for a long period of time been calling for full democratization and full recognition of workers' and people's rights in the country? Sir, who will deny that the organized teachers union, the Swaziland National Association of Teachers (SNAT) and civil society including the Council of Swaziland Churches, the Students Movement and women's groups have long been calling for a peaceful transition to democracy to achieve social justice? I submit that nobody can deny that the organized legal profession and organized business through the Swaziland Coalition of Concerned Civic Organizations (SCCCO) have all been calling for good governance, respect for the Rule of Law, human rights and fiscal discipline. Nobody can deny that these people's organizations and individual members of the Swazi society through the Swaziland United Democratic Front (SUDF) have long been knocking in vain, patiently politely, modesty and moderately calling for a peaceful transition to full democracy. In recent times, the people have called for the release of the Sibaya report so that the decisions and resolutions can be implemented. But nobody

cares to listen.

Sir, if the refusal to show respect for the people's aspirations to respect **People's Democracy** is not contempt of the highest degree against the people, then it absolutely points to failure of leadership. Yet we know as Barack Obama reminds that: ***"Suppressing ideas never succeeds in making them go way."***

Of course, they will never go away even if brutal force, arrests and other forms of suppression and repression are used to silence dissent. It is on record that in the quest for full democratic and citizenship rights we have petitioned; yes we have held peaceful meetings; we have called peaceful protest, all of which have been violently dispersed by the government using the armed and security forces. Even as this trial was going on, this court and the *tinkhundla* government prevented the people from coming in to observe the proceedings; a failure of open justice. His Lordship himself refused to use a bigger courtroom even when asked by our counsel, despite that bigger court rooms were available. Instead the courtroom was packed with members of the security forces to intimidate those present, for expressing their displeasure with the injustice displayed by the court. This is dark injustice. It is such show of force that led Nelson Mandela to say: ***"Government violence can only do one thing, and that it breeds counter violence."***

Indeed the Universal Declaration of Human Rights warns in paragraph 3 of the Preamble that:

> ***"... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law..."***

We make no threat if we warn as Nelson Mandela did in his speech from the dock in 1964 that, ***"there comes a time in a life of a nation when there remain only two choices – submit or fight."*** We hope common sense and reason will prevail on the leadership of this country so that as a people, we are not compelled to make that hard choice; a choice of rebellion. We have not forgotten the bomb explosion under the bridge at Lozitha. I am yet to stand trial for my statements regarding that sad and painful incident in which two of our friends, Musa John Dlamini and Jack Govender died. Swaziland has lost its conscience. We have lost our humanity; our *buntfu* has long left us. Yes we cannot forget the death of Sipho Jele in prison.

6. Public Statement by the Judicial Service Commission issued on April 2, 2014

We already have been found guilty. The JSC in its statement on April 2, 2014 stated that contempt of court in this jurisdiction was one of the most serious offences against the administration of justice. It said that contempt of court is not protected under section 24 (3) (b) (iii) of the Constitution. The JSC has canvassed the case for the prosecution. The question is can His Lordship find against his bosses, the JSC and the Chief Justice? All pointers since this case started show that His Lordship has already made up his mind, and the trial is a mere formality to validate a decision long taken.

Surprisingly the JSC has not only warned the general public, it went on to attack in particular the progressive democratic movement in Swaziland. It said freedom of speech ***"is not absolute as the progressive organizations and other like-minded persons seem to suggest."*** This seems to me to give credence to my view that this case has nothing to do with the alleged contempt of court; it is rather a battle of ideas. I do want to say however, that the JSC's interpretation of

section 24 (3)(b)(iii) is strange. It is strange because it is skewed to suit its narrow reading. The JSC omits to make reference to the paragraph that the limitation of freedom of expression is justified only ***"...except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society."*** I submit that contempt of court in the circumstances of this case is not a justifiable limitation of the freedom of expression in a democratic society.

Indeed, I take this from General Comment No. 34 of the Human Rights Committee of the UN (2011) where it interprets Article 19 of the ICCPR. The Human Committee says that, ***"Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions."*** The Human Rights Committee proceeds to say that ***"Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights."***

What is more is the finding by the Human Rights Committee that, ***"The freedom of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association and the exercise of the right to vote."***

The net effect of these is this, with the prohibition of freedom of expression through the nebulous crime of contempt of court, coupled with the ban on political parties to freely associate and assembly, Swaziland is not, and cannot claim to be a democratic and constitutional state. It lacks the credentials of a democracy and constitutional state, even if it boasts of a written constitution. Swaziland remains a dictatorship without any inhibitions.

Judge William Birtles writing on "The Independence of the Judiciary" is correct when he says:

> ***Judicial independence is a central component of any democracy and is crucial to the separation of powers, the Rule of Law, and human rights ... Constitutions of non- democratic countries also include provisions concerning human rights. These provisions, however, are a dead letter, because there is no independent judiciary to breathe life into them. Judicial independence has a dual goal: to guarantee procedural fairness in the individual judicial process and to guarantee protection of democracy and its values. Without judicial independence, there is no preservation of democracy and its values. The existence of judicial independence depends on the existence of legal arrangements that are actualized in practice and are themselves guaranteed by public confidence in the judiciary.***

Whither Swaziland! If anybody is in contempt in this case, it is nobody other than the JSC-they have issued a public statement with the sole and singular purpose of influencing the decision of this case. We are simply waiting to see if His Lordship will hand down a verdict different from that which *Makhulu Baas* and the JSC, in collaboration with the government and the leadership of Swaziland seek.

7. What is the way forward for Swaziland?

Your Lordship, the last issue would obviously be, having pointed out some and not all the ills of our society, and the contemptuous character of the leadership

towards the people's aspirations, what is the way forward for our country?

1. In the short term, in order to restore the integrity of the judiciary, the people of Swaziland have said it loud and clear that the Chief Justice Michael Ramodibedi be immediately suspended and removed from the office of Chief Justice of the Kingdom of Swaziland. His removal should obviously be after following due process in terms of section 158 (3) as read in light of section 21 of the Constitution. What he refused to afford Mr. Justice Thomas Masuku by law, should be afforded to him by law. In any event section 157 (1) of the *tinkhundla* Constitution stipulates that a "person who is not a citizen of Swaziland shall not be appointed as Justice of a superior court after seven years from the commencement of this Constitution." But the Judicial Service Commission shamefully tells us that Swazis are ill-qualified, ill-equipped and incompetent for the position of Chief Justice. This is an insult to the members of the legal profession and the Swazi Nation.

2. The people's organs of power, that is, political parties together with organized civil society as well as individual natives of this land, have stated without ambiguity that Swaziland must move forward towards a truly democratic state, with multiparty system as a basis for the formation of government. Sir, the modalities and details of how this is to be achieved must be, and will be negotiated by all interested parties, on agreed terms on the basis of full equality, at a National Convention. The SADC-Parliamentary Forum has suggested and recommended such.

3. This obviously calls for a review of the 2005 Constitution as long recommended by the Commonwealth Expert Team on election observation in 2003 and 2008, recently echoed by the African Union through the AU Election Observation Team as well as the SADC Lawyers Association Election Observer Team last year. This will ensure that there is separation of powers and respect of the Rule of Law, an independent judiciary and full respect and enjoyment of all human rights and fundamental freedoms. We deny that the call for a constitutional monarchy is a call to overthrow the monarch in Swaziland. We are calling for a system of government where democratic governance, can and will co-exist with a monarchy whose powers are properly limited by law, under a democratic constitution – so that nobody is above the law, but the law; is the ruler, so as to provide checks and balances.

4. When all is said and done, a democratic Constitution should lead to the holding of free, fair, credible and genuine democratic elections, giving birth to a people's democratic government.

8. I have been honest

I have tried to speak the truth as honestly, as candidly and as best I can about what I see as challenges facing us at this defining moment. I hope I have been able to show how the people's rights and aspirations have been ignored. It is our view that the injustices we have referred to are sowing seeds of an extremely dangerous situation in the country as shown by the alleged threats to the lives of the Chief Justice and Judge Simelane; if newspaper report are anything to go by. As a country we need to talk and act; act rightly, justly, and timely.

As it has been said that, ***"those who cling to power through corruption and deceit and sidelining of dissent know that you are on the wrong side of history... for the world has changed and we must change with it."***

For my part, as a young student activist together with others until now, we have tried to do our duty to the Swazi people. We will continue to do so even in the face of hardship; regardless of the fact that our motives are at present, being deliberately misunderstood. We do not have the slightest doubt in our minds that we are innocent. Posterity will in due time prove us so. Those who brought us before this court together with the leaders of this country are the criminals who should be in the dock.

Let me say that we hate the political arrogance of the *tinkhundla* system; we hate deeply the arrogance of the judicial system under this system and, particularly under *Makhulu Baas*. Above all, we hate with a deep passion the subjugation of the democracy and peace loving people of this country to the status of second class citizens and sub-humans. We do not know how long we will live under this system, but we will never accept it. Mahatma Ghandi said years ago in 1922 from the dock that, ***"Affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection..."*** We have done so in Swaziland, and we will continue doing so until victory for democracy is won.

Martin Luther King Jr is right when he says, ***"the arch of moral universe although long, is bending toward justice."*** Let there be no doubt that like everybody else, I would like to be loved, even to be loved by the highest authority of this land, if that were to be possible, but as Helen Suzzman says ***"I am not prepared to make any concessions"*** on the higher values and noble principles of freedom, justice and democracy for all, which we hold so dear. We are the little people of this land. The people in this court have come from all corners of Swaziland; from the small dusty roads and valleys. They come from my area of birth, at Ka-Luhleko, from the poor townships of Bhunya and Mhlambanyatsi, forced into poverty by the unceremonious and somewhat politically motivated closure of the SAPPI (Usuthu) Company. We come from Luyengo and from the cities and townships of Mbabane and Manzini, from all the four regions of this land. My Lord we all want the same thing, ***full citizenship rights, equal treatment and equal protection under and before the law***. All we are asking for is equal opportunity in the spirit of brotherhood and sisterhood. We have not lost faith in the overall goodwill of man, even in the face of evil. We are little people trying to do what is right; trying to do what is just.

9. Severest price and penalty

In conclusion, let me make it clear that I am not naïve. I have read between the lines and have realized that our fate has long been determined. I do not for one moment, believe that in finding me guilty and imposing a penalty on me for the charge I face, the court should be moved by the belief that penalties deter men from a cause they believe is right. History shows that penalties do not deter men and women when their conscience is aroused. Given that our fate was long decided, I do not wish to waste either your time or mine. Accordingly, I invite His Lordship to impose whatever severest price and penalty this Court deems fit. Somebody tells me that **"somehow unearned suffering is redemptive,"** and somewhere I read **"to be joyful in hope, patient in affliction, faithful in prayer."** The path to freedom goes through prison, but the triumph of justice over evil is inevitable. Nothing this Court can do will shake me from my commitment to simple truth and simple justice and the belief in the noble values of democracy, freedom and human dignity. No moral man can patiently adjust to injustice. I do this knowing fully well the consequences of my decision. As has been said, standing up to powerful interests and injustice carries a price.

Although the writing is on the wall, I give the Court the benefit of the doubt that it will apply its mind to my defense and the points I have raised. Nevertheless the longest, revered political and prisoner of conscience and arguable the greatest leader of our time tells us that:

> ***To go to prison because of your convictions, and be prepared to suffer for what you believe in, is something worthwhile. It is an achievement for a man to do his duty on earth irrespective of the consequences.***

The founding President of the Swaziland Youth Congress (SWAYOCO), the charismatic Bennedict Didiza Tsabedze told us some years ago that the struggle is not a bed of roses.

In closing, may God bless the people of Swaziland and the peoples of the just, democratic and progressive world.

Amandla!! Aluta Continua!!! Embili ngemzabalazo Embili!!! Phansi nge Tinkhundla Phansi!!

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THULANI RUDOLF MASEKO
PRISONER 353; 438/2014
SIDWASHINI CORRECTIONAL INSTITUTION (PRISON)
MBABANE SWAZILAND

APPENDIX 5

EXTRACTS FROM NATIONAL, REGIONAL AND INTERNATIONAL LAW AND STANDARDS USED TO EVALUATE THE TRIAL

Contents

National law

Constitution of the Kingdom of Swaziland Act 2005

Criminal Procedure and Evidence Act No 67/1938

International and regional law and standards

International Covenant on Civil and Political Rights

Basic Principles on the Role of Lawyers

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

Bangalore Principles of Judicial Conduct

African Charter on Human and Peoples' Rights

Principles and Guidelines on the Right to a Fair Trial in Africa

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)

National law

<u>Constitution of the Kingdom of Swaziland Act 2005</u>

Section 14(1):

> "The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely –
> "(a) respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law;
> "(b) freedom of conscience, of expression and of peaceful assembly and association and of movement;
> "(c) protection of the privacy of the home and other property rights of the individual;
> "(d) protection from deprivation of property without compensation;
> "(e) protection from inhuman or degrading treatment, slavery and forced labour, arbitrary search and entry; and
> "(f) respect for rights of the family, women, children, workers and persons with disabilities."

Section 14(2):

> "The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this

Constitution."

Section 14(3):

"A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest."

Section 16(1):

"A person shall not be deprived of personal liberty save as may be authorised by law in any of the following cases -
"(a) in execution of the sentence or order of a court, whether established for Swaziland or another country, or of an international court or tribunal in respect of a conviction of a criminal offence;
"(b) in execution of the order of a court punishing that person for contempt of that court or of another court or tribunal;
"(c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on that person by law;
"(d) for the purpose of bringing that person before a court in execution of the order of a court;
"(e) upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence under the laws of Swaziland;
"(f) in the case of a person who has not attained the age of eighteen years, for the purpose of the education, care or welfare of that person;
"(g) for the purpose of preventing the spread of an infectious or contagious disease;
"(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of the care or treatment of that person or the protection of the community;
"(i) for the purpose of preventing the unlawful entry of that person into Swaziland, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Swaziland or for the purpose of restricting that person while being conveyed through Swaziland in the course of the extradition or removal of that person as a convicted prisoner from one country to another; or
"(j) to such extent as may be necessary in the execution of a lawful order -

> "(i) requiring that person to remain within a specified area within Swaziland or prohibiting that person from being within such an area;
> "(ii) reasonably justifiable for the taking of proceedings against that person relating to the making of any such order; or
> "(iii) reasonably justifiable for restraining that person during any visit, which that person is permitted to make to any part of Swaziland in which, in consequence of that order, the presence of that person would otherwise be unlawful."

Section 16(2):

"A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which that person understands, of the reasons for the arrest or detention and of the right of that person to a legal representative chosen by that person."

Section 16(3):

"(3) A person who is arrested or detained –
"(a) for the purpose of bringing that person before a court in execution of the order of a court; or
"(b) upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence,
"shall, unless sooner released, be brought without undue delay before a court."

Section 16(7):

"If a person is arrested or detained as mentioned in subsection (3) (b) then, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that that person appears at a later date for trial or for proceedings preliminary to trial."

Section 21(1):

"In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law."

Section 21(2):

"A person who is charged with a criminal offence shall be-
"(a) presumed to be innocent until that person is proved or has pleaded guilty;
"(b) informed as soon as reasonably practicable, in a language which that person understands and in sufficient detail, of the nature of the offence or charge;
"(c) entitled to legal representation at the expense of the government in the case of any offence which carries a sentence of death or imprisonment for life;
"(d) given adequate time and facilities for the preparation of the defence;
"(e) permitted to present a defence before the court either directly or through a legal representative chosen by that person;
"(f) afforded facilities to examine in person or by a legal representative the witnesses called by the prosecution and to obtain the attendance of witnesses to testify on behalf of that person on the same conditions as those applying to witnesses called by the prosecution; and
"(g) permitted to have, without payment, the assistance of an interpreter if that person cannot understand the language used at the trial."

Section 24:

"24. Protection of freedom of expression

"(1) A person has a right of freedom of expression and opinion.

"(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say-

"(a) freedom to hold opinions without interference;
"(b) freedom to receive ideas and information without interference;
"(c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and
"(d) freedom from interference with the correspondence of that person.

"(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

"(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
"(b) that is reasonably required for the purpose of –
  "(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
  "(ii) preventing the disclosure of information received in confidence;

"(iii) maintaining the authority and independence of the courts; or

"(iv) regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or

"(c) that imposes reasonable restrictions upon public officers,

"except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society."

Criminal Procedure and Evidence Act No 67/1938

Section 31(1):

"Any magistrate may issue a warrant for the arrest of any person or for the further detention of a person arrested without a warrant on a written application subscribed by the Attorney-General or by the local public prosecutor or any commissioned officer of police setting forth the offence alleged to have been committed and that, from information taken upon oath, there are reasonable grounds of suspicion against such person, or upon information to the like effect of any person made on oath before the magistrate issuing the warrant:

"Provided that no magistrate may issue any such warrant except when the offence charged has been committed within his area of jurisdiction, or except when the person against whom such warrant is issued was, at the time when it was issued, known, or suspected on reasonable grounds, to be within his area of jurisdiction."

Section 37:

"Every warrant issued under this Act shall be to apprehend the person described therein and to bring him before a magistrate as soon as possible and without undue delay, upon a charge of an offence mentioned in such warrant."

Section 96(4):

"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:

"(a) Where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or

"(b) Where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;

"(c) Where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;

"(d) Where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

"(e) Where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security."

Section 96(10):

"In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice the accused is likely to suffer if he or she were to be detained in custody…"

Section 174(4):

> "If at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."

Section 217:

> "(1) Any person other than a person described in section 218 or 219 shall not be examined as a witness except upon oath.
> "(2) The oath to be administered to any witness shall be administered in the form which most clearly conveys to him the meaning of such oath, and which he considers to be binding on his conscience."

Section 218:

> "(1) If any person who is, or may be, required to take an oath objects to do so, he may make an affirmation in the following words: "I do truly affirm and declare that" (here insert the matter to be affirmed or declared).
> "(2) Such affirmation or declaration shall be of the same force and effect as if such person had taken such oath."

International and regional law and standards

International Covenant on Civil and Political Rights

Article 9(1):

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Article 9(3):

> "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

Article 14(1):

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Article 14(3)(b):

> "(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> "(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;"

Article 19:

> "1. Everyone shall have the right to hold opinions without interference.
>
> "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> "3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
>> "(a) For respect of the rights or reputations of others;
>>
>> "(b) For the protection of national security or of public order (ordre public), or of public health or morals."

Basic Principles on the Role of Lawyers

Principle 1:

> "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Principle 17(1):

> "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it."

Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

Principle 3 (para. 20):

> "States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process."

Bangalore Principles of Judicial Conduct

Principle 3

> "3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
>
> "3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must be seen to be done."

African Charter on Human and Peoples' Rights

Article 6:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

Article 7(1):

> "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal."

Principles and Guidelines on the Right to a Fair Trial in Africa

Principle A(1):

> "In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body."

Principle G(b):

> "States shall ensure that an accused person or a party to a civil case is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar."

Principle H(d):

> "An accused person or a party to a civil case has the right to an effective defence or representation and has a right to choose his or her own legal representative at all stages of the case. They may contest the choice of his or her court-appointed lawyer."

Principle M(1)(b):

> "States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause."

Principle M(1)(e):

> "Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail."

Principle M(2)(e):

> "States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor,

family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization."

Principle M(2)(f):

"Any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present."

Principle M(3)(a):

"Anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."

Principle M(3)(b):

"b) The purpose of the review before a judicial or other authority includes to:
- "1. assess whether sufficient legal reason exists for the arrest;
- "2. assess whether detention before trial is necessary;
- "3. determine whether the detainee should be released from custody, and the conditions, if any, for such release;
- "4. safeguard the well-being of the detainee;
- "5. prevent violations of the detainee's fundamental rights;
- "6. give the detainee the opportunity to challenge the lawfulness of his or her detention and to secure release if the arrest or detention violates his or her rights."

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)

Rule 20(c):

"All persons who are deprived of their liberty by public order or authorities should have that detention controlled properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:

…

"c) The right of access to a lawyer;"

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