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PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the independence of judges and lawyers

REFERENCE: UA G/SO 218/2 G/SO 214 (67-17) G/SO 214 (107-9) G/SO 214 (3-3-16)
SWZ 1/2014

2 April 2014

Dear Mr. Mamba,

We have the honour to address you in our capacity as Chair-Rapporteur of the Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the independence of judges and lawyers pursuant to Human Rights Council resolutions 24/7, 16/4, 16/5, and 17/2.

In this connection, we would like to draw the attention of your Government to information we have received regarding the arrest and detention of Messrs. **Thulani Maseko** and **Bheki Makhubu**.

Mr. Thulani Maseko is a prominent lawyer and human rights defender in Swaziland. He runs a law firm trading as TR Maseko Attorneys. He is also a member of the Board of Trustees of Lawyers for Human Rights Swaziland.

Mr. Maseko previously faced charges under Swaziland's Sedition and Subversive Activities Act, brought against him in 2009, for which he has never been brought to trial. In this context, he was the subject of a joint urgent appeal sent by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on the situation of human rights defenders on 12 June 2009. We regret that to this date we did not receive a response from your Government.

Mr. Bheki Makhubu is the editor-in-chief of The Nation magazine, a monthly publication. In 2013, Mr. Makhubu was convicted on two counts of criminal contempt of court in connection with the publication of two articles questioning the independence of Swaziland's judiciary.

According to the information received:

On 17 March 2014, police officers, reportedly executing a warrant issued by the Chief Justice of Swaziland, arrested Mr. Maseko on charges of criminal contempt of court for allegedly writing an article in *The Nation* magazine questioning the circumstances and rationale of a case pending before the High Court *The King v [REDACTED]*. It is alleged that after his arrest police officers refused to disclose Mr. Maseko's whereabouts.

Mr. Makhubu was reportedly arrested on Tuesday 18 March 2014 on charges of criminal contempt of court for allegedly authoring different articles in *The Nation* magazine questioning the arrest of the defendant in the same High Court case.

On Tuesday 18 March, Messrs. Maseko and Makhubu were reportedly brought before the Chief Justice in his chambers for initial remand. It is reported that, according to ordinary domestic judicial procedures, Messrs. Maseko and Makhubu should have appeared before a magistrate's court for initial remand and not the Chief Justice. As a result, the remand process was closed instead of being held in open court as per the ordinary procedure. It is further alleged that Messrs. Maseko and Makhubu's legal representatives were not allowed to make submissions on behalf of their clients, while according to domestic law, Messrs. Maseko and Makhubu should have been given the opportunity to apply for bail.

The Chief Justice reportedly remanded Messrs. Maseko and Makhubu into custody until 25 March 2014 in the absence of evidence that they pose any risk to the public or would not appear in court if summoned, and despite the fact that in domestic law the crime of contempt of the court reportedly does not lead to prison time upon conviction.

Messrs. Maseko and Makhubu are reportedly being charged with two counts of the offence of contempt of court on the grounds that in February and March 2014 they allegedly intentionally violated and undermined "the dignity, repute and authority of the High Court of the Kingdom of Swaziland" by publishing statements in the *Nation* magazine said to be "malicious and contemptuous" about the case pending before the High Court *The King v [REDACTED]*.

According to information, the first count alleges, inter alia, that Messrs. Maseko and Makhubu stated that the judicial officer who issued a warrant of arrest against Mr. [REDACTED] "massaged the law to suit his own agenda" and "collaborated with willing servants to break the law."

The second count reportedly alleges, inter alia, that Messrs. Maseko and Makhubu wrote that the case of Mr. [REDACTED] was "a demonstration of corruption, abuse of authority and lacking in moral authority or was a demonstration of moral bankruptcy." It further alleges that Messrs. Maseko and Makhubu condemned the

proceedings against Mr. [REDACTED] as “a travesty of justice” and meant to settle personal scores.

It is reported that in the articles published in The Nation magazine, Messrs. Maseko and Makhubu had questioned the circumstances surrounding the arrest of the government vehicle inspector, Mr. [REDACTED]. The vehicle inspector had allegedly been arrested and charged with contempt of court after he had arrested the driver of a High Court judge. In the articles, Messrs. Maseko and Makhubu had raised concerns about the lack of judicial accountability, impartiality and independence.

On 25 March 2014, the High Court reportedly prolonged the detention pending trial of Messrs. Maseko and Makhubu by another 7 days. Messrs. Maseko and Makhubu are allegedly held at the Sidwashini Remand Centre.

It was reported that the decision to extend the custody of Messrs. Maseko and Makhubu was taken by a High Court judge who is allegedly the former High Court Registrar reportedly mentioned in the articles published in The Nation, and may therefore be called to testify in the case of Messrs. Maseko and Makhubu.

On 1 April 2014, the same High Court judge extended the detention of Messrs. Maseko and Makhubu for seven more days.

The arrest and detention of Messrs. Maseko and Makhubu is reported to come in the context of the wider systematic use in Swaziland of drastic domestic legislation against individuals critical of the King and State institutions. It is reported that said legislation includes the Suppression of Terrorism Act of 2008, the Sedition and Subversive Activities Act of 1938, and contempt of the court legislation.

Serious concern is expressed that the arrest and detention of Messrs. Maseko and Makhubu may be directly related to their legitimate exercise of their right to freedom of expression, and in the case of Mr. Maseko his legitimate exercise of his professional functions as a lawyer. Further concern is expressed regarding the physical and psychological integrity of Messrs. Maseko and Makhubu while in detention.

Without expressing at this stage an opinion on the facts of the case and on whether the detention of Messrs. Maseko and Makhubu is arbitrary or not, we would like to appeal to your Government to take all necessary measures to guarantee their right not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR) to which Swaziland acceded in 2004.

We would also like to refer to article 19 of the ICCPR, which provides that “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."

We wish to reiterate that criminal sanctions, in particular imprisonment, for libel and defamation are not deemed proportional with an effective exercise of the right to freedom of opinion and expression. In particular, we would like to refer to the General Comment No. 34 of the Human Rights Committee, which emphasizes that "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. (...) 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." (CCPR/C/GC/34, para.38)

Regarding the case of Mr. Maseko, we would further like to refer your Government to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and in particular principle 23, which states: "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."

Furthermore, we would like to refer your Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that "each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice".

Furthermore, we would like to bring to the attention of your Government the following provisions of the Declaration:

- article 6 point a) which provides that everyone has the right, individually and in association with others to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems.
- article 6 points b) and c) which provide that everyone has the right, individually and in association with others as provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; and to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

Regarding the alleged conflict of interest of the High Court judge who prolonged the pretrial detention of Messrs. Maseko and Makhubu, we would like to refer your Excellency's Government to the Bangalore Principles of Judicial Conduct, adopted in The Hague in 2002 (E/CN.4/2003/65), and in particular the following principles regarding the impartiality and integrity of judges:

- Principle 2.5, which states: "A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where: 2.5.1 The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; [...] Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Government to safeguard the rights and freedoms of Messrs. Maseko and Makhubu in compliance with the above-mentioned international instruments.

Moreover, it is our responsibility under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the above summary of the case accurate?

2. Please provide information concerning the legal grounds for the arrest and detention of Messrs. Maseko and Makhubu and how these measures are compatible with international norms and standards as stated, inter alia, in the UDHR and the ICCPR, in particular article 19 of the UDHR and the ICCPR on the right to freedom of opinion and expression .

3. Please indicate what measures have been taken to protect the right of everyone, including lawyers, to freedom of opinion and expression. Please also indicate what measures have been taken to ensure that human rights defenders, including civil society activists, can operate in a safe and enabling environment and can carry out their legitimate activities without fear of harassment, stigmatization or criminalization of any kind.

We undertake to ensure that your Government's response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

While waiting for your response, we urge your Government to take all necessary measures to guarantee that the rights and freedoms of Messrs. Maseko and Makhubu are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Government adopt effective measures to prevent the recurrence of these acts.

Finally, we kindly request that your Government share this letter with the Chief Justice of Swaziland.

Please accept, Mr. Mamba, the assurances of our highest consideration.

Mads Andenas
Chair-Rapporteur of the Working Group on Arbitrary Detention

Frank La Rue
Special Rapporteur on the promotion and protection of the right to freedom of
opinion and expression

Margaret Sekaggya
Special Rapporteur on the situation of human rights defenders

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers