

**26 March 2014**

**Swaziland: Thulani Maseko and Bheki Makhubu ordered to remain in custody**

The ICJ consider that yesterday's order by Justice Mpendulo Simelane to prolong the detention pending trial of Swazi human rights lawyer, Thulani Rudolf Maseko, and The Nation Magazine editor Bheki Makhubu, for 7 more days until 1 April 2014 on suspicion of contempt of court, was inconsistent with the right to liberty.

The ICJ sent a team of lawyers to observe yesterday's court hearing in Mbabane because of concerns that not only was the arrest and detention seemingly arbitrary, but also that the charges for contempt of court may be inconsistent with the enjoyment of the right to freedom of expression.

Concerns about respect for the right to be heard by an independent and impartial court were also raised at the hearing.

At the hearing the prosecution, represented by Crown Counsel A. Matsenjwa and the Director of Public Prosecutions Nkosinathi Maseko, requested that the Court order Thulani Rudolf Maseko and Bheki Makhubu to be detained for a further seven days, until 1st April, to allow the State to complete the Indictment, which would be filed on 26 March. The prosecution also requested that the Court set a trial date.

In protest of the circumstances of his arrest, Thulani Rudolf Maseko had deliberately not made a request for bail. While Bheki Makhubu had initially made a bail application, owing to the serious health condition of his wife, he withdrew it on Monday 24 March 2014 for the same reason as Thulani.

However, in response to the Prosecution's arguments, the lawyers representing Thulani Rudolf Maseko and Bheki Makhubu argued that the Court should order their release so that the State could proceed by way of summons, if interested to pursue them at a date in the future. In support of this claim they argued that:

1. Since the Court had initially remanded the accused persons in custody at a closed hearing in the Chief Justice's Chambers on 18 March 2014 without an application from the State for such action, then the court could still release the accused persons without a bail application.

2. There was no good reason in law to order that Thulani Rudolf Maseko and Bheki Makhubu be further detained. Prolonging their detention would amount to pre-trial punishment without the benefit of a trial, in a straightforward case of alleged contempt of court.

In addition the lawyers representing Thulani Rudolf Maseko and Bheki Makhubu objected to the prosecution's request to set a trial date because the defence intended to request that Judge M. Simelane recuse himself from hearing the case. They indicated the request would be grounded on the basis that the articles published in Nation Magazine, which form the basis for the arrest, are alleged to mention the Judge adversely. They argued that it would make a mockery of the justice system if the judge sat in the same matter where he had a potentially identifiable interest or role.

The court-room was packed with Swazis, some of whom told the ICJ delegates that they felt that this was a case of judicial harassment of human rights defenders. A small group of people in court briefly sang freedom songs. After the court Session, a number of people "toy-toyed" outside of the court.

As a party to both the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights, the authorities in Swaziland must respect and protect the right to freedom of expression. International standards make clear that respect for this right and for the independence of lawyers requires the authorities to ensure that lawyers are able to participate in discussions of the law and the administration of justice, in a manner consistent with recognized standards of the legal profession.

The authorities must also ensure the rights of all people to a fair hearing before an independent and impartial court. Respect for this right requires that the judges presiding over a case are unbiased and seen to be unbiased. Judges must not have or be seen to have an interest in any matter before them for decision.

Furthermore, they must respect and protect the right to liberty; the ICCPR states: "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". In order for an order of remand to be lawful under international human rights law, an independent, impartial and competent court must consider that prosecution has proved that detention is necessary and proportionate because the offence with which an individual is charged is punishable by imprisonment; and there are substantial reasons for believing that if released the particular individual would abscond, interfere with an investigation, commit a serious offence, or pose a serious threat to public order, and furthermore that there is no possibility that alternative measures, such as bail, would address such concerns.

In the light of its concerns in the case, including with regard to the respect for the rights to a fair hearing before an independent and impartial tribunal, the rights to liberty and the rights to freedom of expression, the ICJ intends to continue to monitor the proceedings against Thulani Rudolf Maseko and

Bheki Makhubu, and will send an international observer to the next hearing which is expected to take place on 1 April 2014.

International trial observers who attended the hearing included the following lawyers: Arnold Tsunga, Director, ICJ Africa Regional Programme; Martin Okumu-Masiga, Deputy Director, ICJ Africa Regional Programme; Andrew Makoni, Board member, Zimbabwe Lawyers for Human Rights; Emilia Siwingwa, Deputy Director, SADC Lawyers Association; and Caroline James of the Southern Africa Litigation Centre.

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