



GENERAL BRIEFING ON JUDGE THOMAS MASUKU'S CASE

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THE BRIEF

1. On 28th June 2011, the Judicial Service Commission (“JSC”) of Swaziland wrote a letter to Judge Thomas Masuku (“ Justice Masuku”) a senior judge at the High Court of Swaziland advising him that he was the subject of a formal enquiry on whether he “ought to be removed from office...following alleged serious acts of misbehaviour”. The letter signed by the Chief Justice of Swaziland (“CJ”) was delivered to justice Masuku on 29th June 2011. A copy of the letter, which alleged 12 acts of “serious misbehaviour” is attached hereto marked “A”.
2. On 30th June 2011, the JSC of Swaziland wrote another letter to justice Masuku suspending him from working as a judge pending the resolution of the case against him by the JSC. The letter was served on justice Masuku on the same day. The letter also directed justice Masuku not to visit his judicial chambers and not to speak to undisclosed witnesses. A copy of the letter is attached hereto and marked “B”.
3. Justice Masuku advises that the charges against him and his subsequent suspension came from the blue and took him by surprise. In any case he denies all the allegations against him and has undertaken to strenuously defend himself and clear his name. To this end he has engaged a team of 3 lawyers lead by Wim Tengrove of South Africa to defend his case.
4. Justice Masuku advises however that his personal and professional relationship with the CJ who is the chair of the JSC of Swaziland have not been healthy and this may explain why he has been targeted for what he perceives as persecution for the discharge of his mandate as a judicial officer. This will be explained in fuller detail in his defence.
5. A casual look at the JSC letter alleging misbehaviours of 27th June 2011 shows largely that there are no discernible complainants save for the CJ and possibly the King of Swaziland (“the King”).
6. For example the CJ appears to be a complainant in the following allegations *inter alia*:
 - a. Allegation number 2) “Defying the Chief Justice’s directive to prepare and submit monthly schedule of pending judgment”

- b. Allegation number 4) “By touting yourself to be appointed Chief Justice, especially amongst the chiefs”
 - c. Allegations number 7) “ By sending one Gugu Vilakazi, a High Court staff member to a workshop in Hong Kong without the Chief Justice’s approval..”
 - d. Allegation number 9) “By threatening the Chief Justice with resignation...”, and
 - e. Allegation number 10) “By attacking the Chief Justice at a symposium of the International Commission of Jurists (ICJ) held in Lesotho on 29 July 2010 for banning judges from giving interviews to the news media, thus demonstrating insubordination and disloyalty to the Chief Justice”.
7. For example the King appears to be a complainant in the following allegations *inter alia*:
- a. Allegation number 3) “Insulting His Majesty the King by using the words “forked tongue” with reference to him.”, and
 - b. Allegation number 5) “Actively associating with those who want to bring about unlawful change to the regime”
8. The issue of the CJ and the King appearing as the primary complainants against justice Masuku and their central role in charging, trying and deciding on his guilt or otherwise is an issue that is disturbing and at the core of the right to a fair hearing and adherence with principles of natural justice.
9. There seems to be issues as well around whether the allegations are serious enough to warrant suspension and possible removal of justice Masuku from the High Court of Swaziland.
10. Some of the allegations appear to raise administrative issues that are capable of being easily resolved without the need of creating a judicial crisis in Swaziland.
11. Indeed, the decision of the CJ has now created a serious judicial crisis, backlash and potential instability in Swaziland. The decision has been roundly

condemned by many organizations both inside and outside the legal services sector

- a. The Law Society of Swaziland is reported to have called for the suspension, resignation or dismissal of the CJ for bringing the judiciary into disrepute, through inter alia arbitrarily suspension of justice Masuku, issuing practice directives undermining the rule of law, and a number of other embarrassing and sensitive allegations on his personal conduct.¹
- b. Regional and continental legal bodies have condemned the suspension of Swazi High Court Justice, Thomas Masuku, and demanded his immediate reinstatement – as well as urging South Africa to carefully reconsider any financial support for the country in light of this latest assault on the judiciary and the rule of law in Swaziland. They issued a joint press statement on the 7th July 2011, and a copy of the press statement is attached hereto marked “C”.²
- c. On 5th July 2011, some members of civil society in Swaziland³, “concerned about the current uncertainty and turbulence in the judiciary, the breakdown of the rule of law and good governance, in particular the recent charges against and suspension of Mr Justice Thomas Masuku; Concerned further that the judicial crisis occurs at a time when the country is facing a financial and economic crisis;” then called for **“The removal of the Honourable Chief Justice Michael Ramodibedi as the Chief Justice of the Kingdom of Swaziland, based on the following grounds:”**
 - i. Undermining the rule of law and the independence of the judiciary;

¹ Confidential e-mail from a senior lawyer from Swaziland. See also <http://www.news24.com/Africa/News/Swazi-lawyers-call-for-chief-justice-to-go-20110707>; <http://www.whoswhosa.co.za/makhosetive-mswati-iii-5802>

² See combined SADC LA, SALC, ICJ press statement issued on 7th July 2011. www.icj.org, www.sadcla.org and www.salc.org

³ See press statement issued by 9 civil society organizations as follows, Swaziland Federation of Trade Unions (SFTU); Women and the Law in Southern Africa (WLSA-Swaziland); Centre for Human Rights and Development (CHRD); Swaziland National Association of Teachers (SNAT); Swaziland Federation of Labour (SFL); Media Institute of Southern Africa (MISA); Women for Women; Swaziland Coalition of Concerned Civic Organizations (SCCCO) and Swaziland United Democratic Front (SUDF)

- ii. Being the complainant, prosecutor and judge in the same matter;
- iii. Issuance of an unlawful practice directive on 16 June 2011 intended to deny access to justice

A copy of the press statement issued by Swaziland Civil Society is attached hereto and marked “D”.

12. The charges against justice Masuku and the resultant public responses have raised a few more issues about the independence, impartiality and accountability of the judiciary and the general rule of law situation in Swaziland. Of significant concern is the seeming role of the CJ in undermining the rule of law more particularly;

- a. The practice directive NO.4/2011 that the CJ issued on 16 June 2011 barring any domestic litigation against the King directly or indirectly. Specifically the practice directive provided that “the Chief Justice issues the following Practice Directive:-
 - i. Summonses or applications for civil claims against His Majesty the King and Ingwenyama, either directly or indirectly, shall not be accepted in the High Court or any other Court in the country.
 - ii. The Registrar of the High Court and/or all those entrusted with receipt of court processes in this country are hereby directed to refuse to accept any summons or application specified in 2(1) above.”

A copy of the practice directive is attached hereto marked “E”.

- b. Concern about this directive has been raised in so far as it;
 - i. Removes effective protection of the law in Swaziland where the cause of action involves the King;
 - ii. Is an assault on access to justice;
 - iii. Amounts to an ouster of the jurisdiction of the court;
 - iv. Is an attack on independence and impartiality of the court in Swaziland, and
 - v. Undermines the principle of equality before the law.
- c. The registrar of the High Court wrote a letter on 3 June 2011 on the CJ’s letterhead to a legal firm, **Messrs L.R. MAMBA & ASSOCIATES** advising them that their client’s case could not be entertained by the judiciary in Swaziland since it was indirectly against the King or the King’s interests. A copy of the letter is attached hereto marked “F”.
- d. Allegation number 3 “Insulting His Majesty the King by using the words “forked tongue” with reference to him” which arose from the ratio in the judgment that justice Masuku delivered in the case *Mkhondvo Aaron Maseko vs The Commissioner of Police and the Attorney General* HC Case No 1778/09. A copy of the judgment in the

matter by justice Masuku is attached hereto as annexure "G". It is in this judgment at page 30 that justice Masuku referred to the forked tongue, which has now become the subject of a charge by the JSC. Suffice to state that justice Masuku's judgment was appealed to the Supreme Court and the CJ delivered judgment, which overturned justice Masuku's judgment. A copy of the SC judgment in the matter between *The Commissioner of Police and Anor vs Mkhondvo a Maseko* SC Case No 3/2011 is attached hereto marked "H"

13. The case against justice Masuku seems to be symptomatic of a country going through a serious rule of law crisis. The country has of late gone through mass protests that have been responded to by the state in a strong and heavy-handed way with numerous arrests and detentions resulting in a climate of fear. The Swaziland economy has not been performing well and the country has applied for a bail out from South Africa for over a \$1 billion. The CJ's decision and its timing has resulted in further agitation in a country that is already going through a tense atmosphere. It is no wonder that Swaziland civil society has characterized the country as having been thrust into a judicial crisis on top of the current economic and political crisis. This is a situation therefore that warrants some urgent intervention.

DATED at JOHANNESBURG THIS 8TH JULY 2011

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