

FACT SHEET: SWAZILAND CONSTITUTIONAL CHALLENGES TO THE SEDITION AND TERRORISM LAWS

On Monday, 8 February 2016, the Mbabane High Court will continue to hear four cases all involving challenges to the constitutionality of two pieces of Swazi legislation: the Sedition and Subversive Activities Act; and the Suppression of Terrorism Act. This case began in September 2015 and oral submissions from all the applicants were heard by the Court. SALC's Court diaries from the two days of hearing can be found [here](#) and [here](#).

The **Sedition and Subversive Activities Act** was enacted in 1938 by the British colonial government. The Act makes it an offence to act, speak, or publish anything with a "seditious intention". A "seditious intention" is defined as an intention to "bring into hatred or contempt or to excite disaffection" against the King, government, or the administration of justice; to "excite His Majesty's subjects or inhabitants of Swaziland to attempt to procure the alteration, otherwise by lawful means, of any matter in Swaziland"; and to "raise discontent of disaffection" or to "promote feelings of ill-will and hostility" amongst Swazis.

The **Suppression of Terrorism Act** was enacted in 2008. In the Memorandum of Objects for the Bill the government explained that the Act would "*provide a legal regime that would prevent, fight and suppress terrorist activities in compliance with the United Nations Security Council Resolution 1373 and the United Nations Conventions against terrorism*". The Act defines and criminalises "terrorist acts", and governs the classification of terrorist organisations. It also makes it an offence to support the commission of terrorist activity or to support a terrorist group.

What is SALC's involvement and why is SALC involved?

SALC is supporting the challenges brought in two of the cases: the first by Maxwell Dlamini, Mfanawenkhosi Mntshali and Derrick Nkambule; and the second by Mario Masuku and Maxwell Dlamini. The cases raise important questions about the right to free expression in Swaziland, and how legislation can be used to suppress dissent. SALC believes that legislation that unreasonably criminalises expression has no place in a democracy. SALC has been monitoring the situation in Swaziland for many years, and is concerned at the ongoing infringements of the right to freedom of expression and association.

What happened in September 2015, and what can we expect on 8 February 2016?

The Court sat for one and a half days in September 2015, and legal representatives for the PUDEMO 7; Dlamini, Mntshali and Nkambule; and Masuku and Dlamini made lengthy and comprehensive oral submissions to the Court. The legal representative for Maseko aligned himself with the arguments made by the other counsel. Due to time constraints, counsel for the Crown indicated that they would not have sufficient time to complete his oral submissions, and so the matter was postponed.

Counsel for the Crown is expected to make their oral submissions, and the applicants' representatives will then be given an opportunity to reply. It is unlikely that the Court will give judgment at this time.

As mentioned above, our Court Diary from the two days of hearing in September can be found [here](#) and [here](#).

Timeline and brief facts of the 4 cases that gave rise to these applications:

1. **Thulani Maseko** was charged with uttering words with a seditious intention after speaking at a May Day Celebration on 1 May 2009.
2. **Maxwell Dlamini, Mfanawenkhosi Mntshali** and **Derrick Nkambule** were arrested and charged with acting with seditious intention for allegedly participating in a rally calling for the boycott of the 2013 national elections. The three men are alleged to have carried a banner and are also charged with possessing a seditious publication.
3. Seven members of the People's United Democratic Movement ("the **PUDEMO 7**") were arrested after taking part in a demonstration at the High Court protesting the contempt of court charges brought against Thulani Maseko and Bheki Makhubu in April 2014. Not all seven were arrested at the High Court; some were identified by their PUDEMO-branded t-shirts later in the day. The group was charged with two counts of contravening the Terrorism Act, one count of sedition, and one count of subversion.
4. **Mario Masuku** and **Maxwell Dlamini** were arrested after speaking at a May Day Celebration on 1 May 2014. The pair were charged with two counts of contravening the Terrorism Act, one count of sedition, and one count of subversion.

Infringements of Freedom of Expression and Association in Swaziland

These cases are all indicative of the crackdown on expression and association in Swaziland in recent months. The case that has received the most attention is one involving Thulani Maseko, a human rights lawyer, and Bheki Makhubu, the editor of The Nation magazine, who were charged with contempt of court after writing articles critical of the judiciary. In July 2014, the pair was convicted and sentenced to two years imprisonment -without the option of a fine.

It was unhappiness with Maseko and Makhubu's case that led to the PUDEMO 7's arrest as the activists were protesting what they saw as an abuse of power and unjustifiable limitation to press freedom in the trial. Although the sedition charges against Maseko were first brought in 2009, the case had been dormant until late last year when the Prosecutors informed Maseko that the criminal trial was due to begin. It had been postponed pending the finalisation of these applications.

Why is it important to protect the Right to Freedom of Expression? How do these laws infringe this fundamental right?

Freedom of expression is inherent to a functioning democracy and a culture of respect for human rights. In the African Commission's Declaration of Principles on Freedom of Expression in Africa the Commission reaffirmed "*the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.*" Freedom of expression is protected in the Swazi Constitution, as well as in the African Charter and the International Covenant on Civil and Political Rights – international instruments that Swaziland is a signatory to.

The Swazi Courts have confirmed the importance of the right: "*The right of freedom of expression and opinion is important in our society in advancing the democratic ideals enshrined in the Bill of Rights; the right allows society to form and express varying opinions constructively with a view to achieve open and accountable governance.*" Judge MCB Maphalala in *The King v Swaziland Independent Publishers and another* 53/2010) [2013] SZHC88 (2013)

In Swaziland, as in many other countries, freedom of expression is limited but any limitations must be both "*reasonably required*" to protect public interests and "*reasonably necessary in a democratic society*". The Court in these applications is required to determine whether the correct balance has been struck between promoting the right to freedom of expression and protecting public interests. The applicants argue that these Acts criminalise peaceful and legitimate political opposition and amount to an unjustifiable limitation to their freedom of expression and association.

The Terrorism Act

The applicants argue that the definition of terrorism in the Swazi legislation does not meet the internationally accepted definition because it includes conduct that is not violent nor motivated by an intent to create fear or compel specific official action. The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has set out three criteria for a terrorist act: the conduct must be deadly, or consist of serious violence; the intent must be to cause fear amongst civilians or to compel the government to take specific action; and it must be motivated by a political or ideological goal.

The applicants also argue that the criminalisation of conduct that “involves prejudice to national security” is far too broad and does not provide enough guidance to citizens on the *type* of conduct which is covered by this offence. In criminal law, the principle of legality requires that all laws be clear and precise so that citizens and law enforcement officials know what conduct is prohibited. This enables citizens to modify their behaviour, and officials to understand what type of conduct is prohibited. Criminal offences must therefore not be formulated vaguely and definitions of crimes should be narrowly interpreted.

The applicants are also arguing that the procedure set out in the legislature to declare certain groups as terrorist is defective and infringes the constitutionally protected rights to administrative justice and to a fair trial. For many of the applicants the charges brought against them are a direct consequence of the designation of PUDEMO as a terrorist entity. The criminalisation of support for organisations is also an infringement on an individual’s right to associate freely.

The Sedition Act

The applicants argue that the definitions of sedition and subversion in the Act are too broad and cover conduct that should be legitimately protected under the right to freedom of expression. As long ago as 1886 the English writer, Sir James Stephen, said that the offence of sedition had to include incitement to violence as one of its components. This was affirmed by the British and New Zealand Law Reform Commissions, as well as the Indian Supreme Court. The importance of this conceptualisation of sedition is that it strikes the balance between protecting public safety and freedom of expression. The applicants argue that the current Swazi law, without the requirement of incitement to violence, and the broad definition, disproportionately infringes the right. The danger of these broad offences in both Acts is that, because there is no concrete definition of prohibited conduct, these laws can be subjectively applied against political opponents to undermine democracy.

For more information, see the case pages on our website <http://bit.ly/1Gmc4in>, <http://bit.ly/1AczPpk> or contact one of our staff members:

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