

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

CASE NO ...

In the matter between

**MARIO THEMBEKA MASUKU**

**1<sup>ST</sup> APPLICANT**

**MAXWELL MANQOBA DLAMINI**

**2<sup>ND</sup> APPLICANT**

and

**THE PRIME MINISTER OF SWAZILAND**

**1<sup>st</sup> Respondent**

**THE MINISTER OF JUSTICE AND**

**CONSTITUTIONAL AFFAIRS**

**2<sup>ND</sup> Respondent**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**3rd Respondent**

**ATTORNEY GENERAL**

**4th Respondent**

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**FOUNDING AFFIDAVIT**

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I, the undersigned

**MARIO THEMBEKA MASUKU**

do hereby make oath and say as follows:-

1. I am the first applicant in these proceedings.

2. The facts contained herein are to the best of my knowledge true and correct and are, unless otherwise stated or indicated by the context, within my personal knowledge. Where I make legal submissions, I do so on the basis of advice that I have received from my legal representatives, which advice I verily believe to be correct.

## **PARTIES' PARTICULARS**

3. I am an adult male Swazi citizen from the Eveni area in Mbabane, in the Hhohho district. I am a retired human resources manager and have a wife and six children.
4. The second applicant is **MAXWELL MANQOBA DLAMINI**. He is an adult male Swazi citizen from the Mantambe area, in the Shiselweni district. He is a student at the University of Swaziland, and is unmarried with no children.
5. I am authorised to depose to this affidavit on behalf of both applicants. The confirmatory affidavit of the Second Applicant is annexed hereto, marked as **Annexure "MTMx"**.
6. The Second Applicant and I were charged with contravening the Suppression of Terrorism Act, 2008 and the Sedition and Subversive Activities, 1938 and therefore we have an obvious interest in the relief sought.
7. The first respondent is the Prime Minister of Swaziland, Mr Barnabus Sibusiso Dlamini. He is cited in his capacity as the head of government.
8. The second respondent is the Minister of Justice and Constitutional Affairs, Mr. Sibusiso Shongwe. The Minister is cited in his capacity as the minister responsible for tabling bills in parliament and the administration of justice in Swaziland.
9. The third respondent is the Director of Public Prosecutions, Mr Nkosinathi Maseko. He is cited in his official capacity, as the government representative responsible for prosecuting criminal activity in the Kingdom of Swaziland, and as he holds ultimate responsibility for the charges brought against the second applicant and me.
10. The fourth respondent is the Attorney General, Mr James Majahenkhamba Dlamini. He is cited in his official capacity, as the Kingdom's official legal representative, and as he holds ultimate responsibility for the charges brought against the second applicant and me.

## **FACTUAL BACKGROUND**

11. On 1 May 2014 the second applicant and I attended the May Day celebrations at the Salesian School sports grounds in Manzini. The celebrations were attended by thousands of Swazi workers who had gathered to commemorate the international workers' day.
  
12. I spoke at the event, and the second applicant participated in the singing of songs and chanting of slogans. In the speeches and songs the second applicant and I sought to draw attention to several issues affecting Swaziland at present. We questioned the legitimacy of the tinkhundla system of governance and of the absolute monarchy. I also called for the government to urgently restore the AGOA agreement with the USA government. I criticized the judiciary and called for those responsible to restore the independence of the judiciary and restoration of the rule of law.
  
13. The speeches and comments were in response to what we perceive as a grave political situation in Swaziland in which citizens' rights are repeatedly infringed. The second applicant and I believe that the Constitution of Swaziland is supreme and must be respected, and that various Swazi officials do not adhere to their constitutional obligations. Our comments aimed to explain why Swazi officials' conduct was inconsistent with the Constitution, and why this entailed that their rule was unconstitutional and invalid.  
  
Our speeches were intended, without using force or violence, to protest against actions of officials that we believe were inconsistent with the constitution of Swaziland and not in the interests of a free and democratic Swazi society.
  
14. As we left the sports ground, the second applicant and I were arrested. We were charged with two contraventions of the Suppression of Terrorism Act, and two contraventions of the Sedition and Subversive Activities Act. All four charges are in connection with statements we made at the May Day celebrations.
  
15. We were not the only participants at the gathering: there were many other speeches and many of the attendees participated in singing and chanting slogans. However, the second applicant and I were the only ones arrested and charged as a result of our participation.

## **CRIMINAL CHARGES UNDER THE SUPPRESSION OF TERRORISM ACT**

16. The second applicant and I are facing two charges under the Suppression of Terrorism Act.
17. We have been charged with contravening section 11 (1)(a) of the Act in that upon or about the 1<sup>st</sup> May 2014 and at or near Manzini Salesian Sports Club in the Manzini region we each or both of us acting individually and/or jointly in furtherance of a common purpose did knowingly and unlawfully solicit support for and or give support to a terrorist entity, to wit, the Peoples United Democratic Movement (proscribed entity) in the commission of terrorism acts, to wit, chanting terrorist slogans “viva PUDEMO viva, phansi ngetinkhundla phansi”. A copy of the charge sheet is attached hereto as **Annexure “MTMx”**.
18. We wish to state that we intend to plead not guilty to the charges. While we do not seek to have a not-guilty verdict handed down by this Honourable Court, we do seek clarity in the interpretation of the statutes below in order to ensure fairness in the criminal trial which will hereafter ensue, should the Crown wish to proceed with the charges against us.
19. Section 11(1)(a) of the Suppression of Terrorism Act states “*A person who knowingly, and in any manner solicits support for, or gives support to, any terrorist group commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding fifteen (15) years.*”
20. I have been advised that this charges emanates from the designation of PUDEMO as a terrorist group in 2008. A copy of the Legal Notice is attached hereto and marked as **Annexure “MTMx”**. The designation of an organisation as a “terrorist group” is set out in section 28 of the Suppression of Terrorism Act.
21. We have also been charged with contravening section 11(1)(b) of the Suppression of Terrorism Act in that upon or about the 1<sup>st</sup> May 2014 and at or near Manzini Salesian Sport Ground in the Manzini region we each or both of us acting individually and/or jointly in furtherance of a common purpose did knowingly and unlawfully solicit support for and or give support to a terrorist entity, to wit, PUDEMO to the commission of terrorist acts by the said PUDEMO (proscribed entity), to wit, chanting terrorist slogans “viva PUDEMO viva, phansi ngetinkhundla phansi” and further calling and/or demanding for the overthrow of the leadership and government.
22. Section 11(1)(b) of the Suppression of Terrorism Act states “*solicits support for, or gives support to, the commission of a terrorist act, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding fifteen (15) years.*”
23. Section 2 defines “terrorist act”:

*"terrorist act" means -*

- 1) an act or omission which constitutes an offence under this Act or within the scope of a counter-terrorism convention; or*
- 2) an act or threat of action which -*
  - (a) causes-*
    - (i) the death of a person;*
    - (ii) the overthrow, by force or violence, of the lawful Government; or*
    - (iii) by force or violence, the public or a member of the public to be in fear of death or bodily injury;*
  - b) involves serious bodily harm to a person;*
  - c) involves serious damage to property;*
  - d) endangers the life of a person;*
  - e) creates a serious risk to the health or safety of the public or a section of the public;*
  - f) involves the use of firearms or explosives;*
  - g) involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to-*
    - (i) any dangerous, hazardous, radioactive or harmful substance;*
    - (ii) any toxic chemical;*
    - (iii) any microbial or other biological agent or toxin;*
  - h) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;*
  - i) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;*
  - j) involves prejudice to national security or public safety;*  
*and is intended, or by its nature and context, may reasonably be regarded as being intended to -*
  - k) intimidate the public or a section of the public; or*
  - l) compel the Government, a government or an international organisation to do, or refrain from doing, any act.*
- 3) Notwithstanding the provisions of subsection (2), an act which –*
  - a) disrupts any services; and*
  - b) is committed in pursuance of a protest, demonstration or stoppage of work, shall be deemed not to be a terrorist act within the meaning of this definition, so long as the act is not intended to result in any harm referred to in paragraphs, (a), (b), (c), (d) or (e) of subsection (2)*

24. After being charged with the above offences, the Second Applicant and I applied for bail. Our application for bail was refused without reasons before this Honourable Court. We have therefore been in awaiting trial detention since 1 May 2014.

25. I note, however, that the Court ordered that the Second Applicant be allowed to travel from the Manzini Remand Facility to the University of Swaziland campus to allow him to register for studies in the 2015 academic year. Despite this order, he was refused permission to travel.
26. The prolonged detention has had seriously negative effects on my health and my ability to prepare for my trial and the present constitutional challenge. It has also prevented the Second Applicant from applying to continue his studies.

## **THE UNCONSTITUTIONALITY OF THE SUPPRESSION OF TERRORISM ACT PROVISIONS**

27. I have been advised that the overbroad portions of the provisions of the Suppression of Terrorism Act referred to above are unconstitutional and should be declared invalid. The second applicant and I are seeking an order declaring section 11(1)(a) and (b) to be inconsistent with the rights protected by the Swazi Constitution and therefore invalid. We are further seeking an order declaring that the definition of “terrorist act” in section 2 is overbroad and vague and therefore inconsistent with the Constitution and the principle of legality which requires certainty in legislative provisions. In addition we seek an order declaring that the wide discretion conferred on the Attorney General and the Minister in section 28 to declare organisations specified as a terrorist entities as well as the lack of meaningful recourse to organisations so designated is an infringement of the right to administrative justice and therefore unconstitutional and invalid.
28. Section 11(1)(a) criminalises the support for a proscribed entity. There is no requirement that this support must be in relation to the commission of any other illegal act, and so the effect of this provision is to criminalise mere membership of an organisation once that organisation has been declared a specified entity. I have been advised that this unjustifiably limits the right to freedom of association that is protected by section 25 of the Swazi Constitution.
29. Freedom of association is also protected by a number of international instruments that Swaziland is a signatory to. Article 22 of the International Covenant on Civil and Political Rights, article 10 of the African Charter on Human and People’s Rights, and article 20 of the Universal Declaration of Human Rights all protect the right of individuals to associate.
30. Furthermore, I have been advised that section 28, which confers power on the Attorney General and the Minister to declare an organisation a specified entity under the Act, on the basis that the organisation is

involved in terrorist activity is constitutionally invalid. This provision has a bearing on our application as it is the designation of PUDEMO as a specified entity that has led to the second applicant and I being charged under section 11(1)(a) of the Suppression of Terrorism Act.

31. This application is not brought in PUDEMO's name, and I and the second applicant are acting in our personal capacities in initiating this legal action. However, because the designation of PUDEMO as a proscribed entity impacts on us we have a personal interest in its categorisation as a terrorist entity.
32. PUDEMO's constitution and sets out its mission and objectives. PUDEMO was formed to oppose the *tinkundla* regime, and is founded on the principle that "sovereignty, freedom and unity should be based on the will of the people". PUDEMO declares itself a "democratic, non-racial, non-sexist political movement, committed to the creation, protection and promotion of a constitutional multi-party democracy, a transparent and accountable government, an environment conducive for growth and development." A copy of PUDEMO's constitution is attached as Annexure "MTMx .
33. PUDEMO's constitution illustrates that it is a political organisation, and there is nothing in PUDEMO's constitution to support the claim that it has terrorist objectives or that it advocates violence.
34. In addition, section 28 empowers the Attorney General to recommend that an organisation be declared specified solely if he has "reasonable grounds to believe" that the organisation is involved in terrorist activity. There is no requirement that there be solid evidence to support this belief, and so the discretion given to the Attorney General is extremely extensive. This is particularly concerning in light of the serious consequences of a declaration for an organisation and its members.
35. This wide discretion, as well as the overbroad and vague definition of terrorist activity, has enabled the authorities to declare PUDEMO a proscribed entity, despite no evidence in its constitution that it aims to achieve political change through violence or intimidation. That designation has led directly to the second applicant and I being charged under the Suppression of Terrorism Act, as if PUDEMO had not been so designated, our support for the organisation would not constitute an offence under the Act.
36. Section 28 also includes insufficient recourse for the specified entity to challenge the designation, and permits the exclusion of the organisation from the process of revocation of the designation. Section 28(6)(a) permits a High Court judge to hear an application made by the organisation in chambers, and section 28(6)(b) permits the exclusion of the applicant or its legal representative. I have been advised that these provisions are an infringement of the right to administrative justice.

37. I have also been advised that the definition of “terrorist activity” in section 2 is overly broad and vague, and criminalises conduct that does not meet the internationally accepted definition of “terrorism”.
38. The definition includes “prejudice to national security or public safety” as a terrorist act. I have been advised that this provision does not provide objective criteria for the conduct that this covers. The definition therefore does not provide sufficient clarity for citizens as to what conduct is prohibited.
39. In any event, we deny that we have caused any prejudice to national security or endangered the safety of the public in any way by voicing our legitimate opinions during a public rally.
40. The lack of clarity opens up the door to abuse and may result in prosecution of conduct that is protected by the rights to freedom of expression and association.
41. The right to freedom of expression is protected by section 24 of the Swazi Constitution. This right is also protected in various international treaties, including the ICCPR (in article 19), the Universal Declaration of Human Rights (in article 19), and the African Charter (in article 9).
42. I am advised that the Universal Declaration is not binding on any state, but its role as a model for the ICCPR and the International Covenant on Social and Economic Rights, as well as for domestic Bills of Rights, has earned it a position as part of international customary law.
43. However, the ICCPR and African Charter *are* binding on states which have ratified the treaties. Swaziland acceded to the ICCPR in 2004, and the African Charter in 1995. Swaziland is therefore bound to promote and respect the rights contained in these treaties.
44. I have been advised that the right to freedom of expression in the Swazi Constitution, and the ICCPR, is not absolute. The Constitution permits the restriction of this right when it is “reasonably required in the interests of defence, public safety, public order, public morality or public health”, or to protect the rights and reputation of others, prevent the disclosure of confidential information, maintain courts’ authority and independence, or to regulate the administration of telecommunications. The ICCPR is far more restrictive, and allows for the restriction of the right only when a restriction is “necessary” in order to protect the rights and reputations of others, national security, public order, or public health.

45. However, despite the possibility of lawful restriction of the right to freedom of expression, I have been advised that the way in which the right is limited by the Suppression of Terrorism Act does not fall within the narrow parameters set out by the Constitution and ICCPR.

46. Section 11(1)(b) is predicated on the definition of “terrorist act”, and so I have been advised that the unconstitutionality of the definition renders this provision similarly unconstitutional.

## **CRIMINAL CHARGES UNDER THE SEDITION AND SUBVERSIVE ACTIVITIES ACT**

47. We are charged with contravening section 4(1)(b)(c) and (e) read together with section 3(1)(c) and (e) of the Sedition and Subversive Activities Act in that upon or about the 1<sup>st</sup> May 2014 and at or near Manzini Salesian Sports Ground in the Manzini region, we each or both of us acting individually and/or jointly in furtherance of a common purpose did unlawfully do or attempt to do, or make preparation to do, or conspire with other people to do an act with seditious intention, to wit, bring into hatred or contempt or to excite disaffection against the administration of justice in Swaziland and or promote feelings of ill-will and hostility between different classes of the population in Swaziland, by chanting terrorist slogans “viva PUDEMO viva, phansi ngetinkhundla phanis” and uttering seditious words about the leadership of the country.

48. Section 4 of the Act is titled “Offences”, and in terms of section 4(1)(a)(b)(c) and (e):

*Any person who —*

*(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;*

*(b) utters any seditious words;*

*(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or,*

*...*

*(e) without lawful excuse has in his possession any seditious publication;*

*shall be guilty of an offence and liable on conviction to imprisonment not exceeding twenty years or to a fine not exceeding E20,000 and any seditious publication relating to an offence under this section shall be forfeited to the Government.*

49. Section 3 contains the definition of “seditious intention”, and in subsections (c) and (e) it is defined as an intention to “bring into hatred or contempt or to excite disaffection against the administration of justice in

*Swaziland*” and “*promote feelings of ill-will and hostility between different classes of the population of Swaziland*”.

50. We are also charged with contravening section 5(1) read together with section 5(2)(a)(b)(c)(d)(e) and (f) of the Sedition and Subversive Activities Act in that upon or about the 1<sup>st</sup> May 2014 and at or near Manzini Salesian Sports Ground in the Manzini Region, we each or both of us acted individually and/or jointing in furtherance of a common purpose did unlawfully support, propagate or advocate an act or thing prejudicial to public order, the security of Swaziland or the administration of justice, inciting to violence or other disorder or crime, or counselling defiance of or disobedience to any law of lawful authority, intended or likely to support or assist or benefit, in or in relation to acts or intended acts to prejudice public order or the administration of justice, indicating expressly or by implication any connection, association or affiliation with or support for an unlawful society, intended or likely to bring into hatred or contempt or to excite disaffection against a public officer or any class of public officers in the execution of their duties by chanting terrorist slogans “viva PUDEMO viva, phansi ngetinkhundla phansi. Propagating and advocating subversive activities against the leadership of the country.”

51. Section 5(1) states that “*A person who does or attempts to do or makes any preparation to do an act with a subversive intention or who utters any words with a subversive intention shall be guilty of an offence and liable, on conviction, to imprisonment for a term not exceeding twenty years without the option of a fine*”.

52. Section 5(2) defines “subversive” and states

*For the purposes of this section, “subversive” means —*

*(a) supporting, propagating or advocating any act or thing prejudicial to —*

*(i) public order;*

*(ii) the security of Swaziland; or*

*(iii) the administration of justice:*

*Provided that this paragraph shall not extend to any act or thing done in good faith with intent only to point out errors or defects in the government or constitution of Swaziland as by law established or in legislation or in the administration of justice with a view to remedying such errors or defects;*

*(b) inciting to violence or other disorder or crime, or counselling defiance of or disobedience to any law or lawful authority;*

*(c) intended or likely to support or assist or benefit, in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order, the security of Swaziland or the administration of justice, or who incite, intend to incite, or have incited to violence or other disorder or crime, or who counsel, intend to counsel or have counselled defiance of or disobedience to any law or lawful authority;*

*(d) indicating, expressly or by implication, any connection, association or affiliation with or support for an unlawful society;*

*(e) intended or likely to promote feelings of hatred or enmity between different races or communities in Swaziland:*

*Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities;*

*(f) intended or likely to bring into hatred or contempt or to excite disaffection against any public officer or any class of public officers in the execution of his or their duties, or any of His Majesty's armed forces, or any officer or other member of such a force in the execution of his duties:*

*Provided that this paragraph shall not extend to comments or criticisms made in good faith and with a view to remedying or correcting errors, defects or misconduct on the part of such public officer, force or officer or other member thereof and without attempting to bring into hatred or contempt or to excite disaffection against such a person or force;*

## **THE UNCONSTITUTIONALITY OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT**

53. The second applicant and I are seeking an order declaring the definition of “seditious intention” contained in section 3 of the Sedition and Subversive Activities Act unconstitutional and therefore invalid. In addition, as the offences contained in section 4 rely on that definition, we seek an order declaring that section 4 is therefore also unconstitutional.

54. We also seek an order declaring the definition of “subversive” in section 5(2) unconstitutional and invalid. Similarly, the offence in section 5(1) relies on that definition and so we also seek an order declaring section 5(1) unconstitutional.

55. The definition of “seditious intention” in section 3(1) and of “subversive” in section 5(2) are both vague and overbroad.

56. I have been advised that it is a foundational principle of the rule of law that laws must be sufficiently clear and certain so as to indicate to citizens what is required of them and what conduct is prohibited.
57. Legislation must also provide clear guidance to officials enforcing the laws to ensure that those officials understand the conduct that is prohibited by legislation. Without clear descriptions of offences the law is open to abuse and may result in it being selectively applied.
58. This need for clarity and certainty is particularly important in respect of legislation that criminalises conduct, and imposes severe penalties such as twenty-year terms of imprisonment because of the serious consequences of infringing that legislation.
59. The definitions of “seditious intention” and “subversive” include terms such as “disaffection”, “discontent”, “ill-will”, and “hostility”. These terms are vague and incapable of objective definition and clarification. They also do not include criteria to determine the range and kind of conduct that is prohibited by the law and so citizens and law enforcement officials cannot determine exactly what is prohibited under this legislation.
60. Furthermore, both definitions include a wide range of conduct that is not objectively understood as seditious and subversive. Through these overbroad definitions the legislation criminalises various forms of legitimate expression and the exercise of freedom of association and assembly.
61. I have been advised that this criminalisation unjustifiably violates the rights to freedom of expression and association, protected in the Swazi Constitution and the various international instruments Swaziland has ratified.
62. It is on the basis of the foregoing that the second applicant and I submit that the definition of “terrorist act” in section 2, section 11(1)(a) and (b), and section 28 of the Suppression of Terrorism Act, and section 3, section 4, and section 5 of the Sedition and Subversive Activities Act be declared unconstitutional and struck down.

**WHEREFORE**, I pray for an order in terms of the Notice of Motion.

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DEPONENT

THUS DONE AND SWORN BEFORE ME AT MAZNINI ON THIS THE.....DAY OF NOVEMBER, 2014.  
THE DEPONENT HAVING ACKNOWLEDGED ME THAT HE KNOWS AND UNDERSTANDS THE  
CONTENTS HEREIN.

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COMMISSIONER OF OATHS