THE COURT OF APPEAL OF LESOTHO

JUDGMENT

HELD AT MASERU C OF A (CIV) 6/15

CONS/CASE/11/14

In the matter between:

MOTHEJOA METSING	**Appellant**
And	
DIRECTOR GENERAL: DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES	**1st Respondent**
DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES	**2nd Respondent**
MINISTER OF JUSTICE, HUMAN RIGHTS REHABILITATION, LAW AND CONSTITUTIONAL AFFAIRS	**3rd Respondent**
ATTORNEY-GENERAL	**4th Respondent**
STANDARD LESOTHO BANK	**5th Respondent**
NEDBANK LESOTHO	**6th Respondent**

Neutral citation:

Coram : Brand, Mokgoro, Musonda, Chinhengo and Nugent AJJA.

Heard : 19 October 2015

Delivered : 06th November, 2015

Summary

Prevention of Corruption and Economic Offences Act 1999, as amended – sections 7 and 8 – obligation to answer questions – potential that answers might be self-incriminatory – whether obligation to answer excusable on those grounds – whether answers admissible in subsequent criminal proceedings – right to demand statements from a bank – whether breach of constitutional right to privacy.

ORDER

On appeal from: High Court sitting as Constitutional Court (Maluleke AJ, Musi AJ and Potterill AJ). The appeal is dismissed.

JUDGMENT

Nugent AJA (Brand, Mokgoro, Musonda and Chinhengo AJJA concurring)

[1] This appeal concerns the application of certain sections of the Prevention of Corruption and Economic Offences Act 1999, as amended by the Prevention of Corruption and Economic Offences (Amendment) Act 2006. The relevant sections permit the Director-General of the Directorate on Corruption and Economic Offences to require the disclosure of information on pain of criminal sanction for failing to do so. I deal presently with the detail of the sections,

and their application in this case, but at the outset it is convenient to outline certain broad principles.

[2] Legislation of this kind, although intrusive of personal privacy, is not uncommon. Where it is enacted it is generally directed at uncovering financial irregularities that are difficult to detect without access to the knowledge of insiders, such as in the case of bankruptcy, company malfeasance, serious economic crimes, and the like.

[3] In this case the legislation is directed towards uncovering corruption in public life. It has been said so many times that it hardly bears repeating that corruption is an insidious cancer destructive of the well-being of a nation. It was aptly described by a former Secretary-General of the United Nations, quoted by the court below, as

> *'an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism and other threats to human society to flourish.... [It] hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.'*

[4] The investigation of corruption poses particular difficulties that distinguish the crime from most other criminal activity. Most criminality manifests itself outwardly, leaving for investigation only the identity of the culprit. In the case of corruption there is usually

no outward sign that the offence is occurring, while it stealthily and insidiously debilitates society. Without investigative tools of the nature now in issue its detection is seriously hampered and it can be readily accepted that compulsion to disclose information is a necessary measure to counter the offence. Indeed, it is not contested in this case that measures of the kind provided for in the Act compelling disclosure of information are not in themselves legally offensive.

[5] However, it is also a well-accepted principle of the common law, with legislative and constitutional support, that a person may not be compelled to contribute to his or her own conviction of a criminal offence. That principle manifests itself in the right afforded to a person suspected of committing an offence to remain silent in the face of pre-curial questioning. It manifests itself also in the principle that a person charged with an offence may not be compelled to give evidence. And it manifests itself in the principle, reinforced by the provisions of most criminal codes, that evidence not given freely and voluntarily is not admissible at an accused person's trial. Those tenets of the common law, encapsulated in what is sometimes called the right to silence in the face of a criminal accusation, and sometimes called the privilege against self-incrimination,[1] are elements of the right to a fair trial,[2] which is protected by s 12 of the Constitution of Lesotho.

[6] The measures provided for in the Act are not criminal proceedings, and disclosure of self-incriminatory information in

consequence of those measures does not by itself bring about conviction of a criminal offence. There is nonetheless the potential that disclosure of self-incriminatory information in response to those measures could be sought to be used to secure a conviction in a subsequent criminal prosecution, in conflict with those well-established principles.

[7] Counsel for the appellant, Mr Teele KC, was not able to refer us to any decisions, in any jurisdictions, and I know of none, that have held a person entitled to refuse to answer questions or disclose information in circumstances of this kind on the grounds alone that the information might be self-incriminatory. Indeed, there are numerous decisions to the contrary. The decision closest to hand is that of the South African Constitutional Court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,[3] which was arrived at after an extensive, if not exhaustive, review of decisions and literature from comparable jurisdictions.

[8] *Ferreira* concerned s 417(2) of the South African Companies Act 61 of 1973, which permitted the Master or a Court, in the winding-up of a company unable to pay its debts, to summon various persons to appear for examination under oath or affirmation, concerning the affairs of the company, either orally or by written interrogatories. Section 417(2)(b) provided:

> *'Any such person may be required to answer any question put to him [or her] at the examination, notwithstanding that the answer might tend to incriminate him [or her], and any answer given to*

> *any such question may thereafter be used in evidence against him [or her].'*

[9] In that case it was hardly contentious that the compulsion to answer questions as provided for in the Act was not constitutionally offensive. What was contentious was only whether it was constitutionally permissible for self-incriminatory information elicited by compulsion to be used in any subsequent criminal prosecution, as expressly provided for in s 417(2)(b). The subsection was held by all but one[4] of the eleven judges to be unconstitutional, but *to the extent only* (the court's emphasis) that the words 'and any answer given to any such question may thereafter be used in evidence against him [or her]' apply to the use of any such answer against the person who gave such answer, in criminal proceedings against him or her (other than in specific criminal proceedings that are not now relevant). Although the court was divided it was divided only on the identity of the constitutional right that was offended by the subsection, the majority holding that it offended the right to a fair trial entrenched by s 25(3).

[10] Although not binding upon us the decision in that case is overwhelmingly supported by decisions in other jurisdictions and I respectfully adopt it as being equally applicable in this country. Indeed, Mr Teele rightly did not place the findings in dispute. He also readily accepted that the offensiveness of using self-incriminatory statements elicited under compulsion applied only to use of the statements directly, and not to evidence discovered derivatively, a matter upon which there has been a degree of

controversy in some of the decided cases, but which does not arise in the case before us.

[11] It is with those principles and that finding in mind that I turn to the circumstances of the present case.

[12] Before its amendment in 2006 s. 7 of the Act permitted the Director (as he was then called) of the Directorate on Corruption and Economic Offences to

> *'(a) authorise any officer of the Directorate to conduct an inquiry or investigation into any alleged or suspected offence under this Act;*
>
> *(b) require any person , in writing, to produce, within a specified period, all books, records, returns, reports, data stored electronically on computers or otherwise and any other documents in relation to the functions of any public body'.*

[13] Section 9 of the amending Act deleted s 7 and substituting it with ss 7(1) and (2). The effect was to extend the powers that had been conferred upon the Director-General (as he was called after the amendment) in ss 7(a) and (b) by conferring upon him in addition the power to

> *'(c) require a person, within a specified time, to provide any information or to answer any question which the Director-General considers necessary in connection with an inquiry or investigation which the Director-General is empowered to conduct under this Act;*
>
> *(d) require a private person to make a full declaration of his or her assets and [sources] of income in accordance with a prescribed form'.*

[14] Section 7(2) of the amended Act, when read with s 17(2), goes on to provide that a person who fails to provide the requisite information or to answer questions or who provides a false statement in answer to a question commits an offence punishable by a fine up to M2 000, or two years imprisonment, or both.

[15] Further powers are conferred upon the Director-General by s 8 of the Act as amended. That section provides:

> *'(1) If in the course of any investigation into any offence under part IV or V the Director-General is satisfied that it would assist or expedite such investigation, he [or she] may, by notice in writing, require*
>
> *(a) any suspected person to furnish a statement in writing -*
>
> *(i) enumerating all movable or immovable property belonging to or possessed by him [or her] in Lesotho or elsewhere, and specifying the date on which every such property was acquired and the consideration paid therefor, and explaining whether it was acquired by way of purchase, gift, bequest, inheritance or otherwise;*
>
> *(ii) specifying any moneys or other property acquired in Lesotho or elsewhere or sent out of Lesotho by him [or her] or on his [or her] behalf during such period as may be specified in such notice;*
>
> *(b) any other person with whom the Director-General believes that the suspected person has any financial transactions or other business dealing, relating to an offence under Part IV or V, to furnish a statement in writing enumerating all movable or immovable property acquired in Lesotho or elsewhere or belonging to or possessed by such other person at the material time;*

> *(c) any person to furnish, notwithstanding the provisions of any other enactment to the contrary, all information in his [or her] possession relating to the affairs of any suspected person and to produce or furnish any document or a certified true copy of any document relating to such suspected person, which is in the possession or the control of the person required to furnish the information;*
>
> *(d) the manager of any bank, in addition to furnishing any information specified in paragraph (c), to furnish any information of the originals, or certified true copies, or the accounts or the statements of account at the bank of any suspected person.*
>
> *(2) Every person on whom a notice is served by the Director-General under subsection (1), shall, notwithstanding any oath of secrecy, comply with the requirements of the notice within such time as may be specified therein, and any person who, without reasonable excuse, fails to so comply commits an offence and shall be liable to the penalty prescribed under section 17(2).'*

[16] Significantly, unlike the subsection of the Companies Act that was in issue in *Ferreira,* neither s 7 nor s 8 allows expressly for the use of self-incriminatory statements elicited through application of those sections to be used against the person concerned in subsequent criminal proceedings, a matter I return to later in this judgment.

[17] At the time relevant to this case the appellant was the Minister for Local Government, Chieftainship and Parliamentary Affairs in the government of Lesotho. After investigating certain allegations that had been brought to the attention of the Directorate implicating the appellant in corruption, the Directorate secured from the fifth and sixth respondents, banks at which the appellant held accounts, copies of statements of the appellant's accounts. The bank statements revealed a significant number of cash

deposits amounting in total to M416 000, which the Directorate considered to require explanation. As it was put in the replying affidavit deposed to by the Director-General:

> *'If [the appellant] could satisfactorily explain the deposits, that may clear his name and serve to terminate the investigation into his affairs (although not necessarily the investigation as a whole)'.*

[18] To that end the Director-General wrote to the appellant in the following terms:

> *'The Directorate on Corruption and Economic Offences (DCEO) is conducting an investigation under the Prevention of Corruption and Economic Offences Act No. 5 of 1999, as amended by Act No. 8 of 2006 involving the Ministry of Local Government and Senior Government Officials in Lesotho.*
>
> *You are hereby kindly requested in terms of Section 9(c) of the Prevention of Corruption and Economic Offences (Amendment) Act No. 8 of 2006 to explain to the Directorate the origin of the funds deposited into your above mentioned accounts, that is, to provide the office with information relating to the source of funds deposited into your accounts as stated below (then followed enumeration of the deposits concerned).'*

[19] It is common cause that the reference in the notice to section 9(c) of the amending Act of 2006 was intended to refer to s 7(c) of the principal Act as amended, and was understood by the appellant in that way.

[20] Mr Teele, acting on behalf of the appellant, wrote to the Director-General in response to the notice, asking the Director-General, amongst other things, whether the appellant was a suspect in the investigation, which he said was 'relevant to enable us to advise him on his Constitutional right to remain silent.' The

Director-General was also asked, if the appellant was not a suspect, to advise on what basis he was being required to provide information, and on what authority the Directorate had gained access to the appellant's banking transactions.

[21] The Director-General declined to reveal whether or not the appellant was considered to be a suspect, saying no more than that that 'the [Directorate] is at the present moment conducting an inquiry relating to the matter under reference'. Why the Director-General declined to disclose whether the appellant was a suspect is not clear to me and could not be explained by his counsel. It is unfortunate that the Director-General declined to do so, because it has led to unnecessary controversy, which in my view has served only to divert attention from the true issues that arise in this case.

[22] The appellant then launched the application that is the subject of this appeal, in which he sought, amongst others, orders declaring ss 7(1)(c) and 7(2) of the Act unconstitutional; declaring the Directorate's reliance upon s 7(1)(c) to be ultra vires; declaring the Directorate to have violated the appellant's right to respect for his private life, which is guaranteed by s 11(1) of the Constitution, by obtaining his personal banking details; declaring the banks to have violated such right by releasing the information; and related orders. The High Court dismissed the application and this appeal is against that order.

[23] I do not find it necessary to deal at any length with the challenge to the constitutional validity of ss 7(1)(c) and 7(2), which

found no favour with the court below. In that respect I do not think the court below can be faulted. On the contrary, the conclusion it reached falls squarely within the decision in *Ferreira*, the correctness of which was rightly not questioned by Mr Teele, subject only to a reservation he raised relating to the application of that decision to the circumstances of the present case, which I deal with presently.

[24] Indeed, the argument took something of a turn before us, being directed not at the constitutional validity of s 7, which seems to have been where the thrust of the argument was directed in the court below, but instead at the application and implications of s 8 to the present circumstances.

[25] Before dealing with the submissions relating to s 8 it is convenient to dispose at once of the controversy I referred to earlier concerning whether the appellant was considered to be a suspect. Its significance is that much of the appellant's case was founded on a submission that s 8 is exhaustive of the powers of the Director-General so far as suspects are concerned, the powers conferred by s 7 being confined in their application to persons not suspected of having committed an offence.

[26] Although the Director-General made no admission to that effect in his affidavit, I think it is evident from the passage I recited from his affidavit, in so far as he said that if the appellant 'could satisfactorily explain the deposits, that may clear his name and serve to terminate the investigation into his affairs', that he indeed

considered the appellant to be a suspect,. The appellant would hardly have been called upon to 'clear his name' unless he was suspected to have committed an offence. Be that as it may, I have assumed in favour of the appellant, as we were invited to do by Mr Teele, that the appellant was indeed a suspect at the time the Director-General issued his notice. On that basis it was submitted by Mr Teele that so far as the Director-General purported to issue the notice under the powers conferred by s 7, he acted ultra vires, in that his powers so far as suspects are concerned are confined to those provided for in s 8.

[27] In my view the submission that the Director-General had no power under s 7 to issue his notice to a suspect is not correct. In its terms s 7(c) does not, distinguish between suspects and those who are not suspects. It permits the Director-General to require 'a person' to provide the specified information or to answer questions, and I see no reason to construe that as being confined to persons other than suspects. On the assumption that the appellant was indeed a suspect, the Director-General was empowered by s 7(c) to issue the notice, as he purported to do, and I see no basis for finding that his conduct in doing so was ultra vires.

[28] The principal submission advanced before us, however, was that notwithstanding the terms in which his notice was framed, the Director-General, suspecting the appellant of having committed an offence, in truth issued the notice in the exercise of the powers conferred by s 8, and not the powers conferred by s 7. That being the case, so it was submitted, the appellant is expressly absolved

by s 8, unlike s 7, from complying with the notice if he has a 'reasonable excuse' for not doing so. The fact that the answers he might give in response to the notice might incriminate him, and will be admissible in subsequent criminal proceedings, so the submission went, constitutes a 'reasonable excuse' for declining to comply.

[29] I am by no means sure that s 8 authorises the Director-General to require a person to disclose the source of moneys deposited to his or her bank account, which is what the Director-General required of the appellant in this case, but in view of Mr Teele's invitation for us to find that s 8 was the proper source of his powers to issue the notice, I have assumed that to be the case. I am also not sure that the Director-General was in truth exercising the powers conferred by that section when he issued the notice, contrary to the terms in which the notice was framed, but once again I have assumed in favour of Mr Teele's argument that that was indeed the case.

[30] Even then, however, it does not assist the appellant. Whether the notice was issued under the powers conferred by s 7 or under the powers conferred by s 8 the appellant confronts the same hurdle. Once having found, as I do, following the decision in *Ferreira* and the cases from other jurisdictions it relied upon, that it is not legally offensive to require a person to answer questions even if the answers are self-incriminatory, it seems to me to follow inexorably that the potential for self-incrimination does not constitute a 'reasonable excuse' for refusing to do so.

[31] It was submitted by Mr Teele, however, that absent a provision in s 8 to the contrary, self-incriminatory answers would be admissible in subsequent criminal proceedings, which is what has been found to be legally offensive in *Ferreira*, and in those circumstances it would be a 'reasonable excuse' not to answer. He sought support for his submission that self-incriminatory answers would be admissible in criminal proceedings from the decision in *Park Ross v Director: Office for Serious Economic Offences.*[5] In my view the foundation for the submission is unsound.

[32] *Park Ross* concerned the constitutional validity of various investigatory powers conferred by the South African Investigation of Serious Economic Offences Act 117 of 1991 upon the Director: Office for Serious Economic Offences. For present purposes I need deal only with one of its conclusions in relation to the powers of search and seizure provided for by s 6.

[33] The section was silent on whether material seized under that provision would be admissible in subsequent criminal proceedings. In that respect the court found the section to be constitutionally invalid on the following grounds:

> *'Without a section excluding the use of evidence obtained in this manner in any subsequent criminal proceedings, a person's right to a fair trial would, in my view, be violated'.*

[34] Whatever the position might be in relation to evidence obtained by search and seizure,[6] it has no application to self-incriminatory statements elicited by compulsion. It is a general

principle of the common law that compelled self-incriminating statements are not admissible in criminal proceedings. Without legislation to the contrary (such a provision existed under s 417(2)(b) of the Companies Act, which is what was found to be constitutionally impermissible in *Ferreira*) that common law principle remains intact. Neither s 7 nor s 8 purport to alter the common law so as to make self-incriminatory statements admissible in subsequent criminal proceedings and in those circumstances they remain inadmissible. That being so, I see no basis for finding that the potential for self-incriminating statements to be elicited under s 8 constitutes a 'reasonable excuse' for failing to comply with what is required by the Director-General pursuant to that section.

[35] From whichever perspective one views the matter the appellant faces an insurmountable hurdle. Once having been held, as it was held in *Ferreira* and the authorities it relied upon, with which I agree, that it is not legally offensive for a person to be compelled in circumstances like the present to answer questions, even if the answers are self-incriminatory, provided only that the answers are not admissible at a subsequent criminal trial, it matters not whether the appellant has been required to answer in the exercise of the powers conferred upon the Director-General by s 7, or by the powers conferred upon him by s 8. In both cases self-incriminating answers are not admissible in any subsequent criminal trial, and in the circumstances there are no grounds upon which the appellant may decline to answer. On that basis the appellant's challenges to the legality of the Director-General's

notice, whether viewed from the perspective of s 7 or from the perspective of s 8, must fail.

[36] Turning to the bank statements, s 8(1)(d) permits the Director-General to require the manager of a bank to furnish, amongst other things, statements of account of any suspected person, and s 8(2) obliges the bank manager to comply. I pointed out earlier that it is the appellant's own case that he was indeed a suspected person, and there has been no suggestion that the Director-General was not permitted to utilise those powers in relation to the appellant. There has also been no challenge to the validity of s 8(1)(d), nor, indeed to the constitutional validity of any other portion of s 8. What was sought in the notice of motion was only orders declaring the Director-General and the Directorate, and the banks concerned, to have violated the appellant's right to respect for private and family life, guaranteed by s 11 of the Constitution, by having respectively obtained and released his banking information without reference to and authority of the appellant, and related relief.

[37] The submission on behalf of the appellant in support of those claims was that properly construed, in the light of the constitutional protection of privacy, the subsections require the Director-General to seek the authority of the appellant to obtain access to his banking statements as a prerequisite to exercising the power to require the bank to disclose the statements, and correspondingly require the bank to seek his authority before releasing them. The submission has no merit and was rightly not

pressed by Mr Teele. To import such a requirement into the subsections would entirely undermine their purpose. Indeed, it would make the subsections redundant.

[38] In my view it has not been shown that the court below wrongly dismissed the appellant's claims and in those circumstances the appeal against its order must fail. It was agreed between the parties that no costs order should be made.

[39] In the result, the appeal is dismissed.

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R.NUGENT
ACTING JUSTICE OF APPEAL

I agree

_____

F. BRAND
ACTING JUSTICE OF APPEAL

I agree

_____

Y. MOKGORO
ACTING JUSTICE OF APPEAL

I agree

DR P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree

M. CHINHENGO
ACTING JUSTICE OF APPEAL

For the Appellant : Adv. K. Teele KC

For the Respondent : Adv. R. Suhr

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[1] DT Zeffert, AP Paizes and A St Q Skeen *The South African Law of Evidence* 518 ff.
[2] See, for example, *John Murray v United Kingdom* (1996) 22 EHRR 29, para 45.
[3] 1996 (1) SA 984 (CC).
[4] Kriegler J dissented only on the basis that it was premature to decide the issue.
[5] 1995 (2) SA 148 (CPD) at 173 B-E.
[6] The court's conclusion on that issue was found to be incorrect by the Constitutional Court in *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) para 14.