IN THE HIGH COURT OF LESOTHO

HELD IN MASERU

CONSTITUTIONAL CASE: NO/11/14

In the matter between:-

MOTHEJOA METSING	**Applicant**
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**

CORAM: **MALULEKE AJ, MUSI AJ et POTTERIL AJ**

HEARD ON: 22 January 2015

JUDGMENT BY: **CJ MUSI AJ**

DELIVERED ON: **25 February 2015**

SUMMARY

Right to a fair trial – Sections 7 (1) (c) and 7 (2) of the Prevention of Corruption and Economic Offences Act, 1999 as amended not inconsistent with the Constitution. Right against self-incrimination - no one may be compelled to give self-incriminating evidence- such evidence inadmissible at subsequent trial. Derivative evidence – Admissibility - Always subject to the trial court's discretion, Right to privacy – Sections 7 (1) (c) and 8 (1) (d) of the Act are justifiable infringements of the right to privacy.

INTRODUCTION

[1] This application concerns a family of very important rights; the rights to a fair trial, its progeny, the right to silence and the right or privilege against self-incrimination. The right to privacy, which is a related to the right to a fair trial, will also be considered. This matter is not about whether the Deputy Prime Minister, the applicant, committed a corrupt act.

[2] The applicant is the leader of the Lesotho Congress for Democracy, a registered political party in Lesotho. He is also the Deputy Prime Minister in the coalition Government of Lesotho.

[3] The first respondent is the Director General: Directorate on Corruption and Economic Offences (DCEO). The second respondent is the DCEO. The third and fourth respondents are the Ministers of Justice Human Rights, Rehabilitation, Law and Constitutional Affairs and the Attorney-General

respectively. The Minister and the Attorney-General are cited in their official capacities. The fifth respondent is the Standard Lesotho Bank. The sixth respondent is Nedbank Lesotho.

FACTUAL MATRIX

[4] The applicant sought the following order:

"1. Declaring the provisions of section 7(1)(c) and 7 (2) of the Prevention of Corruption and Economic Offences Act 5 of 1999, as amended by Section 9 of Act 8 of 2006 unconstitutional and inconsistence with the provisions of Section 12 of the Constitution of Lesotho and null and void to that extent.

2. Declaring the reliance by the first and second respondents on section 7(1) (c) of the Prevention of Corruption and Economic offences Act 5 of 1999 as amended by section 9 of Act 8 of 2006 in requiring applicant to comply information pursuant to annexure MM1, ultra vires the powers conferred upon them by the Act,

3. Declaring that the first and the second respondents violated applicant's rights to respect (sic) to private and family life guaranteed by section 11 of the Constitution, by obtaining personal banking details of applicant from fifth and sixth respondents without reference to and authority of the applicant.

4. Declaring that fifth and sixth respondent's violated applicant's rights to respect (sic) to private and family life guaranteed by section 11 of the Constitution, by releasing to first and second respondents applicant's banking details without reference to and authority of applicant.

5. Declaring the reliance on section 7(1)(c) of the Prevention of Corruption and Economic offences Act 5 of 1999 as amended by section 9 of the Act 8 of 2006, unconstitutional in that it violates the applicant's right to equality before the law and to the equal protection of the law enshrined in section 19 of the Constitution.

6. Directing the first and second respondents to surrender to applicant and or cause the destruction of all banking information obtained by them from the fifth and sixth respondents.

7. Restraining and interdicting any further violations of applicant's rights to private and family life contained in section 11 of the Constitution.

8. Directing first to fourth respondents to pay costs of this application, fifth to sixth respondents only in the event of opposition of this application."

[5] Between October and November 2013 the second respondent received information from whistle-blowers to the effect that a company, Big Bravo Construction (Pty) Ltd (the company), was undeservingly and illegally awarded a tender to construct roads in Ha Matala and Ha Leqele villages. It was further alleged that the applicant, who at the relevant time was the Minister of Local Government and Chieftainship Affairs, received bribes from the company in order to award the tender to it.

[6] Based on that information the second respondent commenced a discreet and confidential investigation. The

investigation revealed that the applicant appointed the Deputy Principal Secretary as his delegate on the evaluation and adjudication panel, which assessed the tenders. It further revealed that the initial evaluation report had been revised to favour the company.

[7] On 11 February 2014 the second respondent sent similarly worded letters to the fifth and sixth respondents as well as to First National Bank Lesotho. The letters read as follows:

> "**Request for information**
>
> The Directorate on Corruption and Economic Offences (DCEO) is currently investigating the alleged case of corruption under the *Prevention of Corruption and Economic Offences Act No. 5 of 1999*, as amended.
>
> In terms of section 8 (d) (sic) of this above Act, your good office is requested to furnish the office with Bank statements of this individual – covering the period from January, 2013 to date:-
>
> 1. Mothetjoa Metsing.
>
> Your usual cooperation is always highly appreciated.
>
> Yours faithfully
>
> L. Molise
>
> Director-General (a.i)"

[8] The banks complied and on 18 February 2014 provided the second respondent with copies of the applicant's bank statements. The Standard Lesotho Bank statement revealed that various unattributed cash deposits totalling M328 000 were made into the applicant's bank account. The applicant's account held at Nedbank Lesotho revealed that numerous unattributed cash deposits to the amount of M118 000 were made into the account. For the sake of

keeping the chronology of the events coherent, I propose to deal with the First National Bank Lesotho deposits presently.

[9] On 9 July 2014 the first respondent issued the following letter to the applicant:

> "Hon. Deputy Prime Minister,
>
> **<u>Re: Request for information relating to the Deposit of Monies into your Standard Lesotho Bank Account and Nedbank Lesotho</u>**
>
> 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) (sic) of the *Prevention of Corruption and Economic Offences (Amendment) Act No.8 of 2006* to explain to the Directorate the origin of funds deposited into your above mentioned accounts, that is, to provide the office with information relating to the above mentioned funds deposited into your accounts as stated below;
>
> a) Standard Lesotho Bank Account No. 0140002099601
> b) NedBank Lesotho Account No. 0219000018492…..
>
> You are requested to respond to this request within Seven (7) working days of receipt of this letter.
>
> Your usual cooperation will be highly appreciated."

[10] It is common cause that reference to section 9 (c) in the letter is wrong, it should be section 7(1) (c) of the Prevention of Corruption and Economic Offences Act, 1999 as amended

by section 9 of the Prevention of Corruption and Economic Offences (Amended) Act, 2006 (the Act).

[11] The applicant requested a 28 (twenty eight) day extension but was granted an extension until 11 August 2014 to respond to the notice. The applicant, however, did not respond to the notice but sought clarity in respect of the notice. He was not satisfied with the first respondent's response and launched this application.

[12] Subsequent to the application being launched, the second respondent ascertained that further unexplained deposits were made into the First National Bank Platinum account of the applicant. These deposits amounted to M524 964. 86. After this discovery the first respondent, issued another notice to the applicant. This notice was issued in terms of section 8(1) (a) of the Act, based on the applicant's assertion that he was a suspect. It goes without saying that there was also no response to this notice because the first respondent undertook not to take any steps to enforce compliance with this request until this application had been determined.

[13] The Act, which establishes the second respondent, was promulgated to make provision for the prevention of corruption and confer power on the second respondent to investigate suspected cases of corruption and economic crime and matters connected therewith or incidental thereto.

[14] In Glenister v President of South Africa and Others 2011 (3) SA 347 (CC) at para 57 the Constitution Court of South Africa said the following about corruption:

> "Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and deliver on other social and economic rights guaranteed in the Bill of Rights."

[15] In the foreword to the United Nations' Convention against Corruption, Mr Kofi Annan, the erstwhile Secretary-General of the United Nations wrote the following:

> "Corruption is 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 organized crime, terrorism and other threats to human security to flourish.
>
> This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are more destructive. Corruption 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…"

[16] Lesotho is also not immune to the dangers that corruption poses to democracy, the rule of law and the socio-economic upliftment of citizens. In an attempt to address the pervasiveness of corruption and to arrest its spread the Act was promulgated.

LEGISLATIVE SCHEME

[17] The relevant functions of the Directorate as set in section 6 are inter alia to:

> "(a) to receive and investigate any complaints alleging corruption at any public body;
>
> (b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
>
> (c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of Lesotho;
>
> (d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;
>
> (e) to prosecute, subject to section 43, any offence committed under this Act;
>
> (f) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue;..
>
> (l) to undertake any other measures for the prevention of corruption and economic offences."

[17] In order to perform the functions of the second respondent the first respondent is given the power to investigate alleged or suspected offences and to require persons to give information or provide documents. Section 7 of the Act reads as follows:

> "(1) For the Performance of the functions of the Directorate, the Director-General may –
>
> (a) Authorise an officer of the Directorate to conduct an inquiry or investigation into an alleged or suspected offence under this Act;

(b) Require a person, in writing, to produce, within a specified time, books, records, returns, reports, data stored electronically in a computer or otherwise and any other documents relating to the functions of a public or private body;

(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 resources of income in accordance with the prescribed form.

(2) A person who fails-

(a) to produce a matter required under subsection (1) (b); or

(b) provide any information, or to answer the questions, provides a false statement in answer to a question under subsection (1) (c), commits an offence and shall be liable on conviction to the penalty prescribed under section 17 (2)."

[18] Section 8 of the Act also gives the first respondent the power to obtain information. It reads:

(1) If in the course of any investigation into any office under Part IV or V the Director is satisfied that it would assist or

expedite such investigation, he 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 in Lesotho or elsewhere, and specifying the date on which every such property was acquired and 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 on his behalf during such period as may be specified in such notice;

(b) Any other person with whom the Director 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 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 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)."

[19] Section 17 (2) reads as follows:

"Any person who knowingly-

(a) Makes or causes to be made to an officer a false report of the commission of any offence; or

(b) Misleading an officer by giving false information or by making false statements or accusations, commits and offence and shall be liable on conviction to a fine not exceeding M2,000.00 or to a term of imprisonment not exceeding 2 years, or both."

[20] Mr Teele, on behalf of the applicant, firstly submitted that sections 7(1)(c) and 7(2) of the Act should be declared invalid because they are inconsistent with section 12 of the Constitution of Lesotho. He, secondly, argued that the reliance on section 7(1)(c) of the Act by the first and second

respondents in requiring the applicant to supply information is ultra vires the powers conferred upon them by the Act. Thirdly, he submitted that the obtaining of the applicant's personal banking details from the Banks without the applicant's consent violated the applicant's right to privacy as guaranteed by section 11 of the Constitution.

[21] Although the applicant alleged, in his founding and replying affidavits that the investigation was motivated by bad faith, Mr Teele correctly in my view did not persist with this point in his argument before us.

[22] Mr Teele, belatedly, placed reliance on the Data Protection Act 2013 for his submission that the consent of the applicant was needed before his banking details could be given to the first and second respondents.

[23] Mr Trengrove, on behalf of the first and second respondents, argued that the applicant's case is without merit. He submitted that sections 7(1)(c) and 7(2) do not violate the applicant's right to a fair trial. Likewise he argued that the applicant's right to privacy was not violated by the first and second respondents and by extension by the fifth and sixth respondents.

[24] Mr Thoahlane, on behalf of the sixth respondent, submitted that it did not violate the applicant's right to privacy.

IS RELIANCE ON SECTION 7 (1) (C) ULTRA VIRES?

[25] Mr Teele argued that the powers conferred on the first respondent in terms of section 7(1)(c) are not identical to the powers conferred in terms of section 8 (1) (a) (ii) of the Act. His main argument was that section 7(1) (c) of the Act does not apply to a suspect and was intended to cover people who are not suspects and who do not fall in the categories set out in section 8(1)(b)-(d). The submission of the applicant was therefore that section 7(1) (c) cannot be used as authority to secure information from a suspect whilst that machinery is provided for under section 8(1) (a) (ii).

[26] I prefer to deal with the two notices separately. The first notice was issued in terms of section 7(1) (c). Although the first respondent received information to the effect that the applicant probably took bribes from the company, he deemed it prudent to firstly require the applicant to provide information or to answer questions which he considered necessary in the investigation. The fact that the applicant was implicated at that stage does not necessarily make him a suspect. He was a person that could give information relating to the investigation of the tender granted to the company. The applicant could give any plausible explanation for the deposits. It is clear that the first respondent considered the information or answers that the applicant could provide necessary in connection with an enquiry or investigation which he is empowered to conduct under the Act. The first respondent clearly acted within his powers when the first notice was issued and it was not ultra vires. The investigation, at this stage was geared at finding

out whether a crime has been committed. I now turn to the second notice.

[27] The second notice was issued after this application was launched. It was issued after numerous letters were exchanged between the parties wherein the applicant insisted to know whether he was a suspect. No answer was forthcoming. When the second notice was issued, the applicant did not know whether he was a suspect. According to the first respondent he issued the second notice in terms of section 8(1) (a) (ii) "in the light of the applicant's attitude… that he should be dealt with under section 8 of the Act…."[1]

[28] It is regrettable that the first respondent decided to exercise a statutory power vested in him on the advice of or based on the attitude of a person who could assist in the investigation or a suspect. Section 8(1) of the Act sets preconditions for the actions of the first respondent. These are:

[28.1] There must be an investigation;

[28.2] The investigation must be into any offence under Part IV or V of the Act;

[28.3] The Director must be satisfied that it would assist or expedite such investigation; and

[28.4] The person required to furnish a written statement must be a suspect.

[29] What section 8(1) requires is for the first respondent to apply his mind to all the circumstances and facts of the investigation, in conjunction with the legislative injunction

[1] Paragraph 8 of the answering affidavit.

before issuing a notice in terms of section 8(1) of the Act. In this matter that was not done. The first respondent has, it appears, abdicated his responsibilities. I leave this issue right here because there is no prayer to review and set aside the decision of the first respondent in relation to the second notice. There is also no prayer in the notice of motion relating to the second notice. In my view the notice issued in terms of section 7(1) (c) of the Act was not issued ultra vires because there is no evidence that the applicant was a suspect at the time that the notice was issued. The fact that the first respondent decided to issue the second notice in terms of section 8(1)(a)(ii) because of the applicant's attitude is a further pointer to the fact that he did not consider the applicant a suspect when the first notice was issued.

ARE SECTION 7 (1) (C) AND 7 (2) UNCONSTITUTIONAL

[30] The applicant's challenge is predicated upon the fact that section 7(1)(c) and 7(2) violates his rights to a fair trial, in particular his right against self-incrimination and allied thereto his right to remain silent. According to the applicant, the compulsion imposed by the sections is of such a nature that they destroy the very essence of the right against self-incrimination.

[31] The applicant relies on section 12 of the Constitution and submitted that sections 7(1) (c) and 7 (2) of the Act is in conflict with section 12 of the Constitution and therefore unconstitutional.

[32] The relevant parts of section 12 of the Constitution, relied on, reads as follows:

> "12 (1) If any person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence –
>
> (a) Shall be presumed to be innocent until he is proven or has pleaded guilty
>
> (b) Shall be informed as soon as reasonably practicable, in a language that he understands and in adequate detail of the nature of the offence charged…"

[33] Section 12(1), as Mr Teele correctly submitted contains three separate guarantees, firstly the right to a fair trial, secondly, the right to a hearing or trial within a reasonable time and thirdly the right to be tried by an independent and impartial court established by law. This case is only concerned with the right to a fair trial.

[34] Section 12 (2) of the Constitution is the same as Article 6 of the European Convention of Human Rights. **In John Murray v UK** the European Court of Human Rights found that the notion of a fair trial under Article 6 of the convention encompassed two immunities namely, the right to remain silent and the privilege against self-incrimination.[2]

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[2] (1996) 22 EHRR 29 para 45. Rantuba and Others v Commander of the LDF and Others (1998) LSCA 110 para 18

[35] In a dissenting opinion in the infamous **Saunders v UK** case Martens J explained the inter-relation between the immunities as follows:

> "From a conceptual point of view it would, however, seem obvious that the privilege against self-incrimination (= roughly speaking, the right not to be obliged to produce evidence against oneself) is the broader right, which encompasses the right to silence (= roughly speaking, the right not to answer questions)."[3]

[36] It is common cause that the Constitution does not include a limitations clause. Legislation must therefore be interpreted as subject to and, where possible consistent with it. If any Act or provision thereof is inconsistent therewith it must be declared unconstitutional.

[37] The first and second respondents have accepted that any person compelled in terms of section 7 or a suspect compelled under section 8 (1) (a) enjoys the right to be protected against compulsory self-incrimination. They therefore accepted that the pre-trial or investigatory stage can influence the fairness of the trial stage. The applicant and the first and second respondents were *ad idem* that the applicant may invoke his right to a fair trial which encompasses the right not to incriminate himself and his right to remain silent. To that extent the second respondent accepted that it is precluded from using incriminating testimony any person or suspect gave pursuant to section 7 or 8 in any subsequent criminal proceedings. It gave the applicant and undertaking that any direct testimony received

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[3] [1996] ECHR 65, para 4

from him under compulsion would not be used at a subsequent criminal trial, should there be one.

[38] Both Mr Teele and Mr Trengrove relied, heavily, on **Ferreira v Levin N.O. and Others and Vryenhoek and Others v Powell N.O and Others**,[4] a South African Constitutional Court matter for their respective submissions.

[39] In **Ferreira v Levin** the SA Constitutional Court was called upon to decide whether section 417 (2) (b) of the Companies Act 68 of 1973 as amended was unconstitutional under their interim Constitution.[5]

[40] Ackerman J found, after a comprehensive comparative analysis, that section 417 (2) (b) does not constitute an infringement or threat of infringement of any section 25 (3) rights of the applicants and that the attack on section 417 (2) (b) on that basis cannot succeed.[6] He however found that it constituted an infringement of section 11(1) of the interim Constitution.[7] He concluded that section 417(2) (b) of the

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[4] 1996 (1) BCLR 1 (CC)

[5] Section 417 (2) (b) read as follows:

"'417. Summoning and examination of persons as to affairs of company.

(1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company…

2a…

(b) Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.

[6] At para 41

[7] Section 11 (1) guaranteed everyone's right to freedom and security of the person. There relevant parts of section 245 (3) reads as follows:

"(3) Every accused person shall have the right to a fair trial, which shall include the right-

Companies Act is inconsistent with the Constitution and declared it invalid to the extent only that the words:

> "And any answer given to any such question may thereafter be used in evidence against him" are included therein.

[41] Ackerman J pointed out that in many countries legislatures attempted to strike a balance between the privilege against self-incrimination and the State's interest in investigative procedures. He stated it thus:

> "Both in the United States and Canada, and also elsewhere, legislatures have sought a legislative solution to the tension between the privilege against self-incrimination and the interest of the State in investigative procedures of various kinds. This has been achieved by compelling examinees to answer questions even though the answers thereto might tend to incriminate them and, at the same time, protecting the interests of the examinees by granting them either an indemnity against prosecution or conferring some form of use immunity in respect of compelled testimony. What is important to note is that the privilege has not, in most cases, simply been abolished by statute without providing some form of protection to the examinee. The somewhat fragmentary treatment in England has been alluded to above."

[42] His conclusion, with which the majority agreed, was that:

(a) To a public trial before an ordinary court of law within reasonable time after having been charged;
(b) To be informed with sufficient particularity of the charge;
(c) To be presumed innocent and remain silent during plea proceedings or trial and not to testify during trial;
(d) To adduce and challenge evidence, and not to be a compellable witness against himself or herself."

> "A compulsion to give self-incriminating evidence, coupled with only direct use immunity along the lines indicated above, and subject to a judicial discretion to exclude derivative evidence at the criminal trial, would not negate the essential content of the section 11(1) right to freedom or the section 25(3) right to a fair trial. Only a discrete and narrowly defined part of the broad right to freedom is involved which could not conceivably be described as a "negation" of its essential content. As far as section 25(3) is concerned, the trial judge is obliged to ensure a "fair trial", if necessary by his or her discretion to exclude, in the appropriate case, derivative evidence. Ultimately this is a question of fairness to the accused and is an issue which has to be decided on the facts of each case. The trial judge is the person best placed to take that decision. The development of the law of evidence in this regard is a matter for the Supreme Court. The essential content of the right is therefore not even touched."

[43] Chaskalson P, writing for the majority, was of the view that the matter can and should be dealt with under section 25 (3) of the Constitution – the right to a fair criminal trial. He pointed out that the reasoning which led Ackerman J to conclude that section 417(2) (b) is inconsistent with section 11(1) would also have led him to concluded that it is inconsistent with section 25 (3). With regard to the status and effect of the rule he stated that:

> "The finding that section 417(2) (b) of the Companies Act is inconsistent with the Constitution is in essence based on a finding that the section infringes the rule against self-incrimination. This is apparent from the reasons given by Ackermann J for holding the section to be inconsistent with the Constitution. The rule against self-incrimination is not simply a rule of evidence. It is a right which by virtue of the provisions of section 25(3) is, as far as an accused person is concerned, entitled to the status of a constitutional right. It is inextricably linked to the right of an accused person to a fair trial. The rule exists to protect that right. If that right is not threatened the rule has no application. Thus a person who has been indemnified against prosecution, or a person convicted of a crime who is subsequently called

to give evidence against a co-conspirator, would not be entitled to claim the privilege in respect of evidence covered by the indemnity or the conviction. This connection between the unconstitutionality of section 417(2)(b) and the privilege is recognised in the order made by Ackermann J which is designed to eliminate the conflict by ensuring that evidence given by a witness at a section 417(2)(b) enquiry cannot be used against that witness if he or she is subsequently prosecuted."

[44] Mr Teele also referred as to dictum in **Park Ross v Director; Office for Serious Economic Offences** where Tebutt J said the following:

"I am also of the view that s 6 of the Act violates the Constitution for another reason. I have already dealt at length with the safeguards, insofar as s 5 is concerned, contained in s 5(8) *(b)* of the Act. No similar safeguard exists in regard to s 6, where s 6*(c)* provides that the Director or person authorised by him to conduct a search of premises may
'make copies of or take extracts from any book or document found on or in the premises, and request from any person whom he suspects of having the necessary information, an explanation of any entry therein'.
A person who fails to give such an explanation is guilty of a punishable offence. 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.
I accordingly hold that s 6 as it presently reads is in conflict with the Constitution."[8]

[45] I disagree. In my view there is no need, as I will demonstrate presently, for a section excluding the use of evidence obtained by compulsion in any subsequent proceedings because the right not to be compelled to give self-incriminating evidence is a common law right. In terms of our common law, evidence gathered by force or compulsion

[8] 1995 (2) SA 148 (CPD) at 173 B-E

is inadmissible.[9] In the Australian case of **Hammond v Commonwealth**, Murphy J pointed out that:

[9] R v Camane 1925 AD 570. Levack and Others v Regional Magistrate, Wynberg and Another 2004 (5) SA 573 (SCA) para 17 and 18

"The privilege against self-incrimination is part of our legal heritage where it became rooted as a response to the horrors of the Star Chamber. In the United States it is entrenched as part of the Federal Bill of Rights. In Australia it is a part of the common law of human rights. The privilege is so pervasive and applicable in so many areas that, like natural justice, it has generally been considered unnecessary to express the privilege in statutes which require persons to answer questions. On the contrary, the privilege is presumed to exist unless it is excluded by express words or necessary implication, that is, by mistakable language."[10]

[47] The privilege against self-incrimination is also part of Lesotho's, and South Africa's legal heritage. In **R v Camane** it was stated that:

> "it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial. The principle comes to us through the English law, and its roots go far back in history. Wigmore, in his book on *Evidence* (vol IV, s 2250) traces very accurately the genesis, and indicates the limits of the privilege. And he shows that, however important the doctrine may be, it is necessary to confine it within its proper limits. What the rule forbids is compelling a man to give evidence which incriminates himself. ''It is not merely compulsion'' says *Wigmore* (s 2263) ''that is the kernel of the privilege, but testimonial compulsion''.

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[10] 152 CLR 188, Murphy J

It is important to bear this in mind, because a man may be compelled, when in Court, to do what he would rather not. His features may be of importance, and he may be made to show them; his complexion, his stature, mutilations, or marks on his body, may be relevant points, and he may be compelled to show them to the Court. That is what *Wigmore* calls autoptic evidence (vol II, s 1150) which is perceived by the Court itself, and which it has a right to see. In such cases the man is really passive. But he cannot be forced to go further and to give evidence against himself."

[48] In **Ferreira v Levin** the Constitutional Court reiterated the principle that compelled testimony would always be inadmissible against the person who gave such testimony and in that way the right against self-incrimination would be protected.

[49] With regard to derivative evidence obtained as a result compulsion or force the court in **Ferreira v Levin** found that:

> "A compulsion to give self-incriminating evidence, coupled with only a direct use immunity along the lines indicated above, and subject to a judicial discretion to exclude derivative evidence at the criminal trial, would not negate the essential content of the 11 (1) right to freedom or the section 25(3) right to a fair trial. Only a discrete and narrowly defined part of the broad right to freedom is involved which could not conceivably be described as a 'negation' of its essential content. As far as section 25 (3) is concerned the trial Judge is obliged to ensure a 'fair trial', if necessary by his or her discretion to exclude, in the appropriate case, derivative evidence. Ultimately this is a question of fairness to the accused and is an issue which has to be decided on the fact of each case. The trial judge is the person best placed to take that decision. The development of the law of

evidence in this regard is a matter for the Supreme Court. The essential content of the right is therefore not even touched."

[50] Mr Teele also relied on **Saunders v UK** for his submission that section 7 (1) (c) violates the fair trial right of the applicant. In **Saunders v UK** it was alleged that sections 434 and 435 of the Companies Act 1985 violated section 6 (1) of the Convention.

[51] Section 434 of the UK Companies Act 1985 read as follows:

> "(1) When inspectors are appointed under section 431 or 432, it is the duty of all officers and agents of the company….
>
> (a) To produce to the inspectors all books and documents of or relating to the company…
>
> (b) To attend before the inspectors when required to do so and…
>
> (3) An inspector may examine on oath the officers and agents of the company or other body corporate, and any such person as is mentioned in subsection (2) in relation to the affairs of the company or other body, and may administer an oath accordingly…
>
> (5) An answer given by a person to a question put to him in exercise of powers conferred by thus section… may be used in evidence against him." My underlining.

[52] Section 436 reads as follows:

"….(2) If that person-

(a) Refuses to produce any book or document which it is his duty under section 434 or 435 to produce or…

(c) Refuses to answer any question put to him by the inspector with respect to the affairs of the company or Other body corporate….the inspectors may certify the refusal in writing to the court.

(3) The court may thereupon enquire into the case, and, after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, the court may punish the offender in like manner as if he had been guilty of contempt of court."

[53] During Saunders' criminal trial the prosecution read lengthy extracts from the transcripts of the evidence before the inspectors into the record in the presence of the jury. The court stated that its sole concern in the matter was with the use made of Saunders' statements at the criminal trial. The court found out as follows:

> "The Court recalls that, although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6) (see the above-mentioned John Murray judgment, p. 49, para. 45, and the above-mentioned Funke judgment, p. 22, para. 44). The right not to

> incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2)."[11]

[54] The Court went on to find that although the investigation by the inspectors was inquisitorial as opposed to judicial, it is the use of the evidence at the subsequent trial that attracted Article 6 (1) of the Convention. Because Saunders was compelled, on pain of punishment for contempt, to answer questions and such answers were used against him, at the subsequent trial, the court found that the sections of the Companies Act violated Article 6(1) of the Convention. The rationale and conclusion in **Saunders** is the same as **Ferreira v Levin** in respect of use immunity.

[55] Mr Teele also referred us to **Jalloh v Germany**.[12] In Jalloh the applicant apparently dealt in cocaine. When the police approached him he swallowed the cocaine. He was taken to a hospital where he refused to take medication to induce vomiting. Four police officers held him down whilst a doctor inserted a tube through his nose and administered a salt solution and Ipecacuanha syrup by force. The doctor also injected him with a morphine derivative which acts as an emetic. As a result he regurgitated a small bag of cocaine.

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[11] Saunders supra at para 8

[12] (2006) 20 BHRC 575

What was at issue in this matter was the use of real evidence obtained by forcible interference with Jalloh's bodily integrity. The court found that even if it had not been the authorities' intention to inflict pain and suffering on the applicant, the evidence had nevertheless been obtained by a measure which breached one of the core rights guaranteed by the Convention. The court found that the drugs obtained by the impugned measure had proved the decisive element in securing Jalloh's conviction. Accordingly, the use of the evidence of the drugs obtained by the forcible administration of the emetics to Jalloh had rendered the whole trial unfair. The methods used were found to inhumane and disproportionate. They could have left him to excrete the cocaine naturally. It is clear that Jalloh's case is not helpful for our purposes except that it reiterated and approved what was said in Saunders' case.

[56] The applicant also referred us to **Shannon v UK**.[13] Shannon who lived in Belfast, Ireland was the chair of the Republican Felons Club a registered social club. In May 1997 the Royal Ulster Constabulary (RUC) carried out a search of the premises of the Club and removed documents. On 27 January 1998 Shannon attended an interview with a financial investigator appointed in terms of the Proceeds of Crime (Northern Ireland) Order 1996, and answered all questions put to him. On 16 April 1998 he was charged with false accounting and conspiracy to defraud. On 2 June 1998 a further notice was served on him requiring his attendance

[13] [2005] ECHR 6563/03

before financial investigators on 11 June 1998. After numerous letters were exchanged between his legal representatives wherein they inter alia sought a written guarantee that no information or statements obtained during the interview would be used in criminal proceedings. No such undertaking was given. The maximum penalty for failure to attend an interview was six months' imprisonment or a fine not exceeding GBP5.000. Shannon ultimately failed to attend the interview. He was charged with failing, without reasonable excuse, to comply with the financial investigator's requirement to answer questions or furnish information. He was convicted and sentenced to GBP200. Paragraph 6 of the order restricted the use that could be made of statements made to the investigators to three situations namely:

a) on a prosecution for an offence under the Perjury Order 1979

b) on a prosecution for some other offence where evidence inconsistent with any such answers or information is relied on by the defence or

c) on a prosecution for failing to comply with a requirement of the 1996 Order, such as attending to answer questions.

[57] The Court of Appeal in Northern Ireland found that Article 6 (1) of the Convention is directed towards the fairness of the trial itself and is not concerned with extra judicial inquiries "with the consequence that a person to whom those inquiries

are directed does not have a reasonable excuse for failing or refusing to comply with a financial investigator's requirements merely because the information sought may be potentially incriminating." The conviction was confirmed.

[58] Shannon approached the European Court of Human Rights. The Court approved and followed Saunders. It went on to say the following:

> "Secondly, the Court notes that information obtained from the applicant at interview could have been used at a subsequent criminal trial if he had relied on evidence inconsistent with it. Such use would have deprived the applicant of the right to determine what evidence he wished to put before the trial court, and could have amounted to "resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused." The limitation on use in paragraph 6 (b) of schedule 2 cannot be seen as providing procedural protection for the applicant."[14]

[59] It is clear that Shannon ran the risk that evidence procured by the investigators could be used at a subsequent trial and therefore the court found that the Order violated article 6 (1) of the Convention. The court found that the Convention was violated even though there were no criminal proceedings pending. It must be remembered that the matter was "struck out" and that the possibility of him being recharged for the original offences was always present. He was not acquitted and therefore his right to a fair trial was still under threat. He

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[14] At para 40

did not enjoy use immunity. I now return to sections 7(1) (c) and 7 (2).

[60] The first question to consider is whether those sections extinguish the privilege against self-incrimination. Mr Teele argued that there can be no doubt that the compulsion imposed by section 7 (1) (c) and 7 (2) is of such a nature as to destroy the very essence of the right against self-incrimination. In **Allan v The United Kingdom**[15] it was said that:

> "In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the court will examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put."

[61] It is clear that section 7(1)(c) and 7(2) compels an examinee on pain of punishment to answer questions and or give information. As pointed out above, many democratic countries endeavour to strike a balance between the right against self-incrimination and the State's interest in investigating certain crimes.

[62] The crime of corruption, particularly, is not a victimless crime. It is a crime which is so pervasive that it hits the citizens of any country, let alone a relatively poor country such as

[15] (2002) 13 BHRC 652 at para 44

Lesotho, very hard. It affects service delivery, transparency in government business and economic development.

[63] The question is therefore whether sections 7(1) (c) and 7(2) represents a proportionate legislative response to the problem of corruption and serious economic crime. Is the imbalance between societal interests or the interest of the community and the interest of the individual who is compelled to give information of such a nature that the individual's right to a fair trial would be prejudiced?

[64] In my view sections 7 (1) (c) and 7 (2) are investigative sections geared at gathering information in cases where there is an allegation that a crime has been committed or a suspicion that one has been committed. The investigation is conducted in order to ascertain whether an offence has been committed. The inquiry or investigation is done in a discreet and professional manner in order to protect the interest and integrity of the person requested to give information. Clearly this is only an information gathering procedure as the person who is required to answer questions or information is not necessarily the subject of a criminal investigation. The abrogation of the right to self-incrimination in this case is not as marked as in cases where the information or answers gathered during the investigation is decreed to be admissible in subsequent proceedings. In **Saunders** supra the court stated that it does not accept the Government's argument

that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure from one of the basic principles of a fair procedure which includes the right to be presumed innocent until proven guilty as that which has occurred in that case.

[65] Sections 7(1) (c) and 7 (2) is not on the same footing as the legislation considered in Saunders. In Saunders the information gathered by the inspectors was by legislative decree made admissible in the subsequent proceedings and it was indeed used. Sections 7(1) (c) and 7 (2) does nothing of the sort. It compels a person on pain of punishment to give answers and or information but does not state that such information or testimony could be admissible in any subsequent proceedings.

[66] The right to a fair trial which includes the right to be presumed innocent until proven guilty and the right against self-incrimination are common law human rights principles which are given Constitutional force. The common law rule is clear; no one may be compelled to give self-incriminating evidence. This common law principle is left intact by sections 7 (1) (c) and 7(2) of the Act. The State may therefore not use such evidence at a trial, against a person who gave such evidence under compulsion. Such evidence is inadmissible. The safeguard is in my view sufficient to make those sections pass constitutional muster.

[67] Mr Teele did not address us on status of the information given by the examinee. He accepted, so it seems, that the admissibility of derivative evidence is best left for the trial judge to decide. Such view is in conformity with the views of the South African Constitution Court's decisions. In Ferreira v Levin this principle was accepted by Ackerman J and Chaskalson P.[16]

[68] In **Shaik v Minister of Justice and Constitutional Development and Others**, Ackerman reaffirmed the principle and stated that:

> "In the South African context, mere direct use immunity was sufficient, bearing in mind that the trial judge had discretion – in appropriate cases – to exclude derivative evidence if that were necessary to ensure a fair trial."[17]

[69] In as far as the views in **Park Ross v DOSEO** was inconsistent with the views in **Ferreira v Levin** and **Shaik** it was held to be wrong.[18]

[70] In my view the same should hold true in Lesotho. Direct use immunity is guaranteed by the common law and in this particular matter there is an added guarantee in that the first

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[16] See Paragraphs 153 and 185.
[17] 2003 (3) SA 599 (CC) at para 36
[18] Ferreira v Levin supra 152; Key v Attorney General, Cape Provincial Division, and Another 1996 (4) SA 187 (CC) at para 14.

and second respondents have undertaken not to use the information in a subsequent trial, should there be one. Sections 7(1)(c) and 7(2) are consistent with the constitution.

AUTHORITY OF Mr. MOLISE

[71] Although the applicant contended, in his replying affidavit, for the first time, that the notices issued in terms of section 8 to the banks were issued ultra vires because they were issued by Mr Molise and not the Director-General, he did not take this matter further. This was a correct stance because it is clear that Mr Molise acted in terms of delegated powers. Secondly, the late averment offended the rule that a party should make out its case in its founding affidavit and not in reply, especially in a case where the information was known at time of the launching the proceedings.

PRIVACY

[72] The applicant contended that the disclosure of his bank statements was impermissible because such action violated his right to privacy. He relied on section 11 of the Constitution, which reads:

> "**Right to respect for private and family life**
>
> 11. (1) every person shall be entitled for his private and family life and his home.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) In the interest of defence, public safety, public order, public morality or public health; or

(b) For the purpose of protecting the rights and freedoms of other persons.

(3) A person shall not be permitted to rely in any judicial Proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the right guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2) (a) or for the purpose specified in subsection (2) (b)."

[73] In Investigating Directorate: SEO and Others v Hyundai Motor Distributors (Pty) Ltd Langa DP said the following about the right to privacy:

"[15] The right to privacy has previously been discussed in judgments of this Court. In *Bernstein and Others v Bester and Others NNO*, Ackermann J characterises the right to privacy as lying along a continuum, where the more a person inter-relates with the world, the more the right to privacy becomes attenuated. He stated

"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this

> most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation." (Footnotes omitted)
>
> [16] The right, however, does not relate solely to the individual within his or her intimate space. Ackermann J did not state in the above passage that when we move beyond this established "intimate core", we no longer retain a right to privacy in the social capacities in which we act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play."[19]

[74] The right to privacy is more intense the closer it is to the intimate personal sphere of the life of human beings and less intense as it moves away from that core.[20] The further it moves from the core the more scope would be to limit it and thereby afford it lesser protection. I turn to deal with the validity of the notices issued to the banks before I discuss whether the infringement was justified.

ARE THE NOTICES TO THE BANKS INVALID?

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[19] 2001 (1) SA 545 (CC) at para15 and 16
[20] Ibid at para 18

[75] It is common cause that the second respondent purported to invoke section 8(1)(d) when it issued the notices to the banks. Mr Teele argued that the applicant was treated as a suspect in order to obtain his bank records because section 8(1) only deals with suspects. He submitted that the second respondent could not use section 7 (1) (c) because it does not relate to suspects but persons who are potential or actual witnesses. He further submitted that the powers conferred for one purpose cannot be used for another purpose. Therefore, if I understand the argument correctly, the powers given to the first respondent with regard to persons in section 7(1)(c) cannot be used to get information relating to suspect.

[76] There is no evidence, other than the section 8(1)(d) notices, that the applicant was treated as a suspect. The second respondent wrote a letter to the applicant's legal representative on 30 July 2014, which is 5 (five) months and 19 days after the notices to the banks were issued, on 11 February 2014, stating that:

> "1. We note that in your response you wish *inter alia* to make an inquiry 'whether Hon Metsing is a suspect in the investigations' we are conducting. Kindly be adviced that we are not at this stage prepared and/or able to respond to your inquiry for the simple reason that the Directorate on Corruption and Economic Offences is at the present moment conducting an inquiry relating to the matter under reference.
>
> 2. The inquiry, we reiterate, is premised on the provisions of section 9 (1) (c) of the Act (as amended) which empowers the Director- General to "require <u>a person</u> within a specific

time, to provide information or to answer any question which the Director General considers necessary in connection with an enquiry or investigation…

3. This, in our understanding is the spirit in which we are seeking Hon Metsing to provide information the Director-General considers necessary in connection with the inquiry."

[77] Therefore, even though the notice was issued under section 8(1)(d) the applicant was a not a suspect when it was issued. It must be remembered that the notices to the banks predated the notice to the applicant.

[78] It seems to me that the applicant's complaint is that the first respondent cited the wrong section when he issued the notices to the banks. The applicant does not contend that the first respondent did not have the power, at all, to issue the notices. **In Howick District Landowners Association v Umgeni Municipality and Others** Cameron JA, as he then was stated:

> "When an empowering statute does not require that the provision in terms of which a power is exercised be expressly specified, the decision-maker need not mention it. Provided moreover that the enabling statute grants the power sought to be exercised, the fact that the decision-maker mentions the wrong provision does not invalidate the legislative or administrative act."[21]

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[21] 2007(1) SA 206 (SCA) at para 19. See also Shaikh v Standard Bank of SA and Another 2008 (2) SA 622 (SCA) para 17 and 18.

[79] If one has regard to the notices issued by the first and second respondents in this matter, it is clear that they were not issued with the necessary diligence and attention to detail. I say this for the following reasons:

- The notice to the applicant was issued in term of section 9 (1) of the Act. It ought to have been section 7 (1) (c) of the Act as amended by section 9 of the amendment Act. The Act does not contain a section 9 (c).

- The notices to the banks were issued in terms of section 8 (d) and not in terms of section 8 (1) (d), which was on their case not their intention, in any case, because they never regarded the applicant as a suspect.

[80] Be that as it may, section 7 (1) (c) gives the first respondent the power to require the bank to give him information which could also be sought under section 8(1) if it is information of a suspect. The first respondent therefore had the power to ask the bank for the information in terms of section 7(1)(c), because it did not regard the applicant as a suspect at the time. Although the first respondent wrongly cited section 8 (1)(d), he had the power in terms of 7 (1) (c) to get the information from the banks. The notice to the banks was therefore valid.

JUSTIFICATION

[81] I will accept that the appellant's right to privacy was infringed. The question is whether it was a justifiable infringement? The proportionality test as espoused in the well-known

Canadian case of R v Oakes[22] was adopted by the Court of Appeal in Attorney-General v 'Mopa.[23] In R v Oakes it was said that:

> "There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designated to achieve the objectives in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objectives in this first sense, should impair 'as little as possible' the right or freedom in question: R v Big M Drugmart Limited (1985) 18 DLR(4th) 321 at 352. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as 'of sufficient importance'."

[82] Corruption is a scourge that must be investigated and prosecuted at all costs. In **Glenister v President of the Republic of South African** Court correctly said that:

> "When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk."[24]

[83] Sections 7 and 8 of the Act were enacted to facilitate the proper and effective investigation of corruption and other serious economic crimes. It is in the interests of public order and to some extent the public safety that crimes such as

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[22] 26 DLR (4th) 200 (SCC)
[23] 2000 – 2004 LAC 427 at 439
[24] 2011 (3) SA 347 (CC) at para 166

corruption should be investigated by a specialised unit that can do so professionally, independently and expeditiously so that such crimes are prevented or uncovered and where there is sufficient evidence, prosecuted. This is a legitimate government purpose.

[84] It would be very difficult to investigate and prosecute corruption if the investigatory authority does not have access to bank records of persons who might be implicated in the investigation or who might give information relating to the investigation.

[85] The right to privacy is minimally impaired by the first and second respondents. They have access to the bank statements in order to perform their functions as laid down in the Act. The members of the second respondent are not allowed to disclose any information contained in the bank statements except in fulfilment of their tasks under the Act with the permission of the first respondent or pursuant to a court order. Section 39 (1) and (2) of the Act reads as follows:

> "(1) Notwithstanding any oath of secrecy, but subject to subsection (3), no person shall, without the permission of the Director, disclose to any other person-
>
> (a) Any information which came to his knowledge in the performance of his functions in terms of this Act and relating to the business or affairs of any other person;

(b) The contents of any book or document in possession of the Director; or

(c) The record of any evidence given at an inquiry, except-

(i) For the purpose of performing his functions in terms of this Act; or

(ii) When required to do so by order of a court of law.

(2) Any person who contravenes subsection (1) commits an offence.

[86] The procurement and disclosure of the bank statements were rationally connected to the objective of serious crime. There are legislative safeguards to ensure that the right to privacy is impaired as little as possible and that the information so obtained should be used only to fulfil the stated objectives of the second respondent. It is a crime to disseminate such information in circumstances other than those mentioned in section 39.

[87] There is nothing in the Act which states that before information about a person or suspect is requested from another person such person or suspect should be notified to such request. This would defeat the purpose of the investigation, because it would forewarn the person about the investigation and, in any event, many suspects who have something to hide would refuse permission. Those who are forewarned would be given an opportunity to tailor an explanation or defence. The right to privacy does not require

that information about a person should only be disclosed when he/she wishes it to be disclosed.[25]

[88] In my view section 8 (1) (c) and (d) and section 7(1) (c) of the Act authorises the disclosure of a person or suspect's banking statements to the second respondent without recourse to such person or suspect. The first and second respondents' actions were not unconstitutional. Moreover the applicant when he opened the bank account and conducted business with the bank was aware that all authorised bank employers would have access to his bank details and statements. He has therefore to this limited extent given accepted that his private banking details would come to the knowledge of banking personnel. The privacy that he claims is therefore far removed from the core privacy rights.

[89] The sixth respondent relied extensively on American jurisprudence to meet the applicant's challenge. In my view the American jurisprudence is not very helpful because it looks at the right to privacy through the prism of their fourth Amendment rights.[26] They do not have a constitutionally entrenched right to privacy, like Lesotho. In **United State v Miller**[27] the US Supreme Court held that a depositor of money in a bank account at a bank does not have a fourth amendment right in his bank records. The court held that it

[25] Letsielo v Khobethi and Others [2010] LSCA 17 (CA) at para 13.
[26] The fourth Amendment reads as follow:
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…."

[27] 96 S.Ct 1619 (1976)

is up to the bank to claim the fourth amendment right and not the depositor. In fact, in terms of this judgment the bank may give the bank statements of a client to anyone without recourse to the client. This is so because, so held the court, when an individual exposes his affairs to the public, he loses any privacy interest. Even if he conveys information to a third party on the assumption that it will be used only for a limited purpose and that his confidence will not be betrayed, there is no fourth amendment violation when the government nevertheless receives this information. On this basis, the court held that a depositor, in communicating his financial affairs to the bank, relinquishes his right of privacy in that information and has no reasonable expectation of privacy.

[90] Many States follow the Miller approach while others, notably California preferred not to follow it. In **Burrows v Superior Court** the California Supreme Court held that a bank depositor does have a constitutionally protected right to privacy in bank records.[28]There is no uniform approach in the United States of America. Lesotho, on the other hand, like California, recognises the confidential relationship between bank and client.

FRUIT OF THE POISONED TREE

[91] I agree with Mr Trengrove's submission that even if the bank statements were unlawfully obtained, either because of the wrong section being invoked or because his right to privacy

[28] 118 Cal.Rptr.166 (1974)

was violated, they may nevertheless be admissible in proceedings brought against the applicant. In **R v Kopano** the Court of Appeal referred with approval to the Canadian case of **R v Collins (**1987) 28 CRR 122 at 137 where the Canadian Supreme Court said:

> "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason above. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair in the evidence obtained as a result of the search was real evidence, and while prejudicial to the accused as evidence tendered by the crown usually is, there is nothing to suggest that its use at the trial would render the trial unfair."[29]

[92] In **Kopano** the Court said that real evidence procured by illegal or improper means does not involve self-incrimination.[30]

[93] The banks were compelled by the Act on pain of punishment.[31] They complied with the Act. There was no duty on them to request permission from the applicant or to inform him of the request before they gave the statements to the second respondent.

DATA PROTECTION ACT

[29] R v Kopano [2011] LSCA 19 (CA) at para 22.
[30] At para 24.
[31] See section 17 (2) which reads as follows:

> "(2) Any person who commits an offence under this section, or section 8(2) shall be liable on conviction to a fine not exceeding M2,000,00, or to a term of imprisonment not exceeding 2 years, or both.

[94] Mr Teele argued that in terms of section 17 of the Data Protection Act, 2013 the personal information of the applicant should have been collected from him and not from the banks. He argued that the first and second respondents did not rely or plead reliance on any of the exceptions in section 17. Section 17 reads as follows:

> "(1) A person shall collect personal information directly from the data subject, except where –
>
> (a) The information is contained in a public record or has deliberately been made public by the data subject;
>
> (b) The data subject has consented to the collection of the information from another source;
>
> (c) Collection of the information from another source would not prejudice a legitimate interest of the data subject;
>
> (d) Collection of the information from another source is necessary –
>
> (i) To avoid prejudice to the maintenance or enforcement of the law and order;
>
> (ii) For the conduct of proceedings in any court or tribunal that have commenced or are reasonably contemplated;
>
> (iii) In the legitimate interests of national security;
>
> (iv) To maintain the legitimate interests of the data controller or of a third party to whom the information is supplied
>
> (e) Compliance would prejudice a lawful purpose of the collection; or
>
> (f) Compliance is not reasonably practicable in the circumstances of the particular case."

[95] Mr Teele submitted that the applicant bore the onus to plead and prove the infringement whilst the respondents bore the onus to prove the justification.[32] According to him the applicability of the Data Act only arose at the justification stage and therefore the respondents bore the onus to show that their actions fell within the exceptions of the Data Act.

[96] Mr Trengrove on the other hand submitted that the applicant's arguments relating to the Data Protection Act

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[32] See Attorney-General v Mopa at 427

forms part of the applicant's infringement claim, therefore he bore the onus to plead and prove the applicability of the Act.

[97] In my view the first and second respondents' contention is correct. The applicant alleged that his right to privacy was infringed. He alleged that because it was his bank statements that were disclosed, his permission was necessary and that it was not sought. He pointed out belatedly that the Data Protection Act, which set the minimum safeguards, states that his personal information should be collected from him and not from the banks. He should have pleaded and proved the applicability of the Act and the non-compliance as part of the infringement stage.

[98] Both the applicant and the first and second respondents are *ad idem* that a party that seeks to rely on a statutory provision must formulate its case clearly so as to indicate the statute that he relies on or must state the section and the statute.[33]

[99] The rationale for this rules is clear, the other party should be informed with sufficient clarity what case he is called upon to meet. Failure to plead with sufficient clarity may render the hearing unfair. In Lesotho the right to a fair trial extends to civil matters as well. Section 12 (8) of the Constitution reads as follows:

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[33] Ketteringham v City of Cape Town 1934 AD 80 at page 90. Yannakou v Apollo Club 1974 (1) Sa 614 (A)

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time."

[100] In this matter the applicant relied exclusively on the infringement of his right to privacy. It was only during argument that the Data Protection Act was referred to. This is nothing but a hearing by ambush, in that the respondents were ambushed by the applicant. The sixth respondent also alluded to the fact that it would be improper to allow the applicant to argue the matter based on the Data Protection Act because "no case was foreshadowed in the applicant's papers on the basis of that Act".[34]

[101] In my view the submission based on the Data Protection Act should be disregarded.

[102] If I am wrong in my conclusion on this issue it seems clear to me that the exceptions in section 17 (1) (c), d (i) and (f) are applicable in this matter. The legitimate interest of the applicant would not be prejudiced because the data would not be published or used for any other purpose than the investigation which the second respondent is busy with. The investigation was conducted discreetly.

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[34] Para 3, 13 of the 6th respondent's heads of argument.

[103] It is clear that, the maintenance or enforcement of law and order may be prejudiced if the information is sought from the applicant. As pointed out earlier he may refuse permission and or he may tailor his defence and thereby prejudice the proper enforcement of law and order.

[104] Compliance would not be reasonably practicable in the circumstances of this case because a request for the information would alert the applicant to the investigation or inquiry which may propel the applicant into action in order to obfuscate the origins of the money or to tailor an offence. For those reasons I am of the view that there is enough material before us to adjudicate the matter on the exceptions. Justification as Mr Teele correctly pointed out does not always require evidence.[35]

BAD FAITH

[105] The applicant alleged that this whole investigation was motivated by an ulterior motive because at some stage unrelated charges were brought against him and subsequently withdrawn and that the fact of the bank statements being obtained by the second respondent was a matter that was reported on in the local newspapers.

[106] The respondents denied that the investigation was motivated by a *mala fide* motive. Their uncontested evidence is that the investigation was started after tip-offs by whistle-blowers. In any event the notice does not make the investigation illegal. In **National Director of Public Prosecution v Zuma** it was said that:

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[35] Ts'epe v IEC and Others 2005-2006 LAC 169 (CC).

> "A prosecution is not wrongful merely because it is brought for an improper purpose. It will be wrongful if, in addition, reasonable and probable grounds for prosecution are absent… The motive behind the prosecution is irrelevant because as Schreiner said in connection with arrest, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal." The same applies to investigations.

[107] There was information and based on that information the inquiry was stated. The motive is irrelevant.

COSTS

[108] The other parties were in agreement that no order as to cost should be made. Mr Thoahlane on behalf of the bank, however, requested a cost order in its favour. It is clear that the applicant prosecuted a constitutional point in order to protect his constitutional rights. In my view no cost order should be made.

[109] The applicant jettisoned prayer 5, relating to equality.

[110] I therefore make the following order:

a) The application is dismissed with no order as to costs.

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C.J.Musi, AJ

I agree

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Maluleke, AJ

I agree

____

Potterill, AJ

For the Applicant: Mr Teele
Teele Chambers

For the first and second respondents: Mr W. H. Trengrove S.C
Assisted by: Ms I. Goodman
Instructed by: Da Silva Manyokole Attorneys
Maseru
For the sixth respondent: Mr Thoahlane

/ar