IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CONST/17/2017**

In the Matter Between:-

TUMO LEKHOOA **APPLICANT**

AND

THE PRIME MINISTER **1ST RESPONDENT**

THE MINISTER OF DEFENCE AND AND NATIONAL SECURITY **2ND RESPONDENT**

MINISTER OF LAW AND CONSTUTUTIONAL AFFAIRS **3RD RESPONDENT**

THE ATTORNEY GENERAL **4TH RESPONDENT**

JUDGMENT

CORAM **S.P PEETE J, E.F.M MAKARA J, and M. A. MOKHESI J**

DATE OF HEARING **: 01st APRIL 2019**

DATE OF JUDGMENT **: 05th AUGUST 2019**

Summary: *Constitutional Law: Applicant a commissioned officer at the level of Colonel in the Lesotho Defence Force- Applicant was seconded to the National Intelligent Agency as its Director General, on a three year contract terminable on three months' written notice- The Prime Minister terminating the contract without observing the notice period stipulated in the contract, and without affording the applicant pre-termination hearing- Applicant challenging termination of contract on the basis of rationality and legality- Held that the Prime Minister's decision to terminate the contract without observing the procedural rules of natural justice breached the principle of legality and the Rule of Law, and is, therefore unconstitutional- Held further that applicant is entitled to salary and benefits for three months' notice period.*

Annotations:

STATUTES : *Constitution of Lesotho 1993*

National Security Service Act No. 11 of 1998

BOOKS : *Cora Hoexter: Administrative Law in South Africa 2nd ed. Juta*

Cases : *Albutt v Centre for the Study of Violence and Reconciliation, and Others [2010] ZACC 4*

Betterbridge (PTY) Ltd v Masilo and Others (54727/2011) [2014] UKSC 24

Council of Civil Service Unions and Others v Minister for the Civil Service [1984] UKHL 9; [1984] 3 WLR 1174; [1985] AC 374

Democratic Alliance v President of South Africa and Others (CCT 122/11) [2012] ZACC 24

Harper v Morgan Guarantee Trust Co. of New York, Johannesburg 2004 (3) SA 253

Wood v Capital Insurance Ltd [2017] UKSC 24

Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 556

Matebesi v Director of Immigration and Others LAC (1995 – 1999) 616

Namibian Central Intelligence Service and Another v Haufiku; Mathias and Another (SA 33/2018) [2019] NASC 7 (12 April 2019) (unreported)

South African Football Association v Mangope (JA13/11) [2012] ZALAC 27; (2013) 34 ILJ (LAC)

Minister of Defence and Military Veterans v Motau and Another 2014 (5) SA 69 (CC)

Comissioner of Police v Manamolela and Others C of A (CIV) 40A/2014 [2014] LSCA 39

Other Resources: T. S Maqakachane, ***Towards Constitutionalisation of Lesotho's Private Law Through Horizontal Application of the Bill of Rights and judicial Subsidiarity*** *(Thesis submitted for the Fulfilment of the requirements of Master of Laws Degree at the University of Free State)*

C. Hoexter 'Clearing *the Intersection? Administrative Law and Labour Law in the Constitutional Court'* ***(2008) 1 Constitutional Court Review 209***

J Raz "The Rule of Law and its Virtue" ***(1977) 93 LQR 195***

Melanie Murcott "Procedural Fairness as a Component of Legality: Is Reconciliation Between Albutt and Masetlha Possible? ***(2013) SALJ 260***

[1] ***Introduction***

The applicant had approached this court for relief couched in the following terms;

> 1. The purported termination of applicant's appointment on secondment as Director General of the National security Service shall not be declared unconstitutional, null and void and of no force or effect.
>
> 2. The purported termination of applicant's appointment on secondment as Director General of the National Security Service shall not be reviewed and set aside.
>
> 3. Declaring that that the applicant is entitled to his emoluments and benefits for the unexpired period of secondment as Director General of the National Security Service calculated from the 10th of July 2017.
>
> 4. Directing the respondents to pay costs of this application.

The applicant is only pursuing prayers 1 and 3 above. This application is opposed.

[2] *Brief Factual Background:*

The applicant served as a member of the Lesotho Defence Force at the rank of Colonel until the 16th of September 2016 when he was appointed Director General of the National Security Service (NSS) on secondment. His appointment was for the period of three (3) years effective from the 16th of September 2016. In terms of clause J of the Secondment Contract, the applicant's appointment was terminable upon either party giving a three months written notice. In terms of the said clause J the termination shall not affect or otherwise limit the rights inclusive of the benefits accruing to the applicant during the subsistence of the secondment. On 10th of July 2017 the applicant was served with a letter in terms of which The Prime Minister Dr. Motsoahae Thomas Thabane terminated the applicant's appointment on secondment as the Director General of NSS. In the said letter, Dr. Thabane said (in relevant parts);

"Dear Colonel Lekhooa,

RE: TERMINATION OF YOUR APPOINTMENT ON SECONDMENT AS DIRECTOR GENERAL, NATIONAL SECURITY SERVICE

The above matter refers.

You are hereby informed that your appointment on secondment as Director General, National Security Service (NSS) is hereby terminated with effect from the 10th July, 2017. As you are aware, the appointment of your secondment was done on the 16th September, 2016, in accordance with section 148(3) of the Constitution of Lesotho read with section 6 of the National Security Service Act, of 1998.

Clause (J) of your contract with the Government of Lesotho on termination of secondment provides that, notice to terminate secondment may be done by either party giving three (3) months notice thereof. Please note that you shall be paid three (3) months in lieu of notice.

Kindly note further that, you will be paid all your benefits accruing from your contract."

[3] The applicant attacked the Prime Minister's decision to terminate his secondment on the basis that it is unconstitutional, unlawful, and null and void on account of:

a) Not complying with the notice period for termination provided under clause (J) of the Secondment Contract.

b) The decision to terminate the contract was not preceded by affording the applicant a hearing

c) The decision to terminate the contract flouts the principle of legality.

[4] The Prime Minister, on the other hand, in opposition raised a point in *limine* of jurisdiction. In terms of this point the Prime Minister alleges that this application

is not constitutional but a quintessentially contractual dispute which should not have been brought before the High Court sitting as a Constitutional Court. In order to grasp the nature of this point it is apposite to quote verbatim the affidavit of the Prime Minister how it was couched. The point was advanced as follows in para. 1.2;

> "1.2 I aver that the nature of the application is not by any stretch of imagination one that falls within the purview of THE HIGH COURT SITTING AS A CONSTITUTIONAL PANEL and I say so for the following reasons:
>
> a) The nature of the claim placed before the Honourable Court is that of an alleged breach of contract not a constitutional matter as defined by authorities in this jurisdiction. The case does not raise any constitutional matter of broader significance and does not seek to test the constitutional validity of any legislative provision.
>
> b) The issues which are being contested by the APPLICANT do not involve the interpretation of the constitution and legislation enacted to give effect to the Constitution but merely a simple run of the mill interpretation of the contract of engagement.
>
> c) The APPLICANT has dismally failed to satisfy the jurisdictional requirements which justify the lodging of the matter in THE HIGH COURT sitting as a Constitutional Panel and nowhere in the founding affidavit are there any such averments."

[5] On the merits, the Prime Minister's response can be summarized as follows:

a) That the decision to terminate applicant's secondment was not arbitrary nor malicious.

b) The decision was anchored on the existence of investigations, currently underway, into the undisclosed felonies allegedly committed by the applicant.

c) The decision to terminate the secondment contract was an executive one made in the name of national security in respect of which the courts are non-suited to inquire into due to their sensitivity.

d) As the issue is contractual, hearing was not indicated as the decision to terminate did not have the effect of prejudicing the applicant by forfeiting his emoluments under the contract.

[6] ***Jurisdiction***

I revert to the issue of jurisdiction raised by the respondents. In a nutshell the 1st respondent's argument is that the issue regarding the dismissal of the applicant is a contractual issue and not a constitutional one which should be decided by this court sitting as a Constitutional Court. To fully understand the breadth of this case it is necessary to refer to the provisions of the Constitution and the National Security Service Act No. 11 of 1998 "hereinafter the Act", regarding the appointment and dismissal of the Director General of National Security Service (DG NSS). The power to appoint the Director General NSS is found in section 148(3) of the Constitution and section 6 of the Act, however the power to dismiss is not provided in the Act, but in the Constitution. Section 148 of the Constitution provides;

"**National Security Service**

148 (1) There shall be a National Security Service that shall be responsible for the protection of National Security.

(2) The command of the National Security Service shall be vested in the Director of the National Security Service who shall be responsible for the administration and discipline of the National Security Service.

(3) *The power to appoint a person to hold or act in the office of Director of the National Security Service and the power to remove him from that office shall vest in the Prime Minister."(emphasis added)*

On the one hand, the Act, under section 6 provides that:

"**Appointment of Director General**

6. The Prime Minister shall appoint the Director General of the Service whose office shall be an office in the public service."

[7] Since the power to dismiss is provided for directly by the Constitution it follows that any challenge based on the dismissal by the incumbent of the office of the DG of NSS has to be based on section 148 of the Constitution. A challenge to dismissal of the DG NSS is quintessentially a constitutional one. In view of this it follows that this court sitting as a Constitutional Court, has jurisdiction to determine the issues in this case. Perhaps before I close curtains on this issue something need to be said about the sources of the powers of this court sitting as Constitutional Court. The respondents seemed to labour under a misconception that the Constitutional Jurisdiction of this Court flows from two provisions of the Constitution only, *viz*, (1) the supremacy clause – ie section 2 of the Constitution, and (2) rights – based review jurisdiction under section 22 of the Constitution. This perspective is inaccurate as I demonstrate in the ensuing discussion. Section 119 (1) bestows unlimited original jurisdiction on this court to hear and determine any civil or criminal proceedings, and the power to review the decisions or proceedings of any subordinate or inferior court tribunal or office exercising judicial or quasi-judicial or public administrative functions under 'any law'. "Any law" is inclusive of the Constitution. Section 2 confers jurisdiction on this court when legislation is challenged for inconsistence with the Constitution. Section 22 confers jurisdiction on this court when the applicant alleges contravention of his rights or detainee's rights. There is also section 155(7) which grants jurisdiction in a situation where the applicant alleges unconstitutional control over a person or authority, who or which in terms of the Constitution is enjoined to exercise his functions independently and without any external manipulation and direction. Section 155 provides that:

"(7) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has

exercised those functions in accordance with this Constitution or any other law."

A situation in terms of s.155 (7) (above) where a person would be granted direct access to this court may arise for example, under section 132 of the Constitution as regards Judicial Service Commission. Section 132(8) provides that "In the exercise of its functions under this Constitution, the Commission shall not be subject to a direction or control of any other person or authority." Any sufficiently interested person is granted direct access to challenge the unconstitutional interference or influence in the functions of the Judicial Service Commission. A lucid and apt exposition of jurisdiction – conferring clauses of the Constitution was done by T.S Maqakachane in his LLM Thesis, titled "*Towards Constitutionalisation of Lesotho's Private Law Through Horizontal Application of the Bill of Rights and Judicial Subsidiarity" (available at scholar.ufs.ac.za).* I can do no better than quote directly from the same Thesis where the learned Advocate from pp. 93 – 94 says:

> "There is no doubt that the High Court and the Court of Appeal, as superior courts of general unlimited jurisdiction, perspective, are empowered to exercise , review jurisdiction based on fundamental human rights and freedoms. The Constitution provides that if any person alleges actual or potential contravention of the Bill of Rights provision in relation to himself or in relation to a detained person, he may apply to the High Court for redress. The High Court is expressly granted "original jurisdiction made in terms of section 22(1) of the Constitution and " to make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provision" of the Bill of Rights. Besides section 22, section 2 provides to the private actor access to the constitutional jurisdiction of the High Court. Section 2 of the Constitution is not only remedial; it is also a source of constitutional jurisdiction. Clearly, sections 2 and 22(1) of the Constitution have created, through direct application procedure, direct access to the High Court's constitutional jurisdiction by the aggrieved person, or one with sufficient interest in the matter. Thus, sections 2 and 22(2) of the Constitution establish a direct constitutional review. The Court of Appeal hears final

decisions made by the High Court in the exercise of its direct constitutional review powers under sections 2 and 22 of the Constitution.

Nevertheless, access to the High Court's jurisdiction is not only through direct application procedures; it may also be incidental or indirect, and therefore incidental or indirect constitutional review, takes place when in an ordinary case filed in the ordinary jurisdiction of the High Court – whether civil or criminal – constitutional questions arise so that the case or part of it "assumes a constitutional dimensions" and the court invokes its constitutional jurisdiction to determine such constitutional question. Section 2 and 156(1) of the Constitution are the sources of constitutional jurisdiction in incidental constitutional review."

[8] ***Merits***

(i) *Executive Action and National Security Issues not susceptible to Judicial Review?*

It is the Prime Minister's contention that the decision to dismiss the Director General of NSS is an executive one, and that it touches upon national security issues which are off-limits for the courts in the exercise of their review powers. This argument is untenable in our constitutional dispensation which is founded on the rule of law to say that the exercise of executive power is beyond the curial review reach of this court. In this country, it can safely be taken as trite that executive exercise of powers is not untrammeled as is constrained by the principles of legality and rationality, and is susceptible to judicial review ***(see: The President of the Court of Appeal v The Prime Minister and Others (Constitutional case No. 11/2013)***. The source of much determined resistance about the curial review powers of this court over the executive exercise of public power, in this matter, on the part of the respondents, seems to have been engendered by the following dictum in ***Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 556 at paras. 75 – 78*** where Moseneke DCJ said:

"[75] [I]t was recognized in Zenzile that the power to dismiss must ordinarily be constrained by the requirement of procedural fairness, which incorporates the right to be heard ahead of an adverse decision.

In my view however, the special legal relationship that obtains between the President as head of the national executive, on the one hand, and the Director General of an intelligence agency, on the other, is clearly distinguishable from the considerations relied upon in Zenzile, One important distinguishing feature is that the power to dismiss is an executive function that derives from the Constitution and national legislation.

……

[77] It is clear that the Constitution and the legislative scheme give the President a special power to appoint and that it will be only reviewable on narrow grounds and constitutes executive action and not administrative action. The power to dismiss – being a corollary of the power to appoint – is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit by national security…

[78] This does not, however, mean that there is no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. *Procedural fairness is not a requirement*. The authority in section 85(2) (e) of the Constitution is conferred in order to provide room for the President to fulfill executive functions and should not be constrained any more than through the principle of legality and rationality."(*emphasis added*)

[9] It is on the basis of the above *dicta* that the Prime Minister is arguing that in the exercise of his executive powers to dismiss the applicant, he was not

constrained by the procedural fairness requirements because the matter involves national security issues. This point was argued with much vigour and conviction by Mr Rasekoai for the respondents. He even cited the famous decision in **Council *of Civil Service Unions and Others v Minister for the Civil Service [1984] UKHL 9; [1984] 3 WLR 1174; [1985] AC 374"hereinafter CCSU case"),*** in support of this proposition.

[10] The issue for determination in this regard is whether the decision to dismiss the Director General of NSS being an executive decision trumps the requirements of the duty of fairness on the part of the Prime Minister, put differently, is legality and rationality constraints on the executive exercise of power conditioned by procedural fairness requirements? *The* ***Masetlha*** dictum referred to above accepts that the exercise of executive function can only be constrained by the principles of legality and rationality, but goes on to explicitly reject the assertion that procedural fairness is part of the principle of legality and rationality. This view it has to be noted was expressed at an infancy stage of the development of the content of the principle of legality. This perspective of legality not having the space for procedural fairness has been departed from (or developed) in later jurisprudence of the same court. Where the decision is challenged on the basis of rationality "courts are obliged to examine the means selected to determine whether they are rationality related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could been used, but whether the means selected are rationally related to the objective sought to be achieved. ***"(Albutt v Centre for the Study of Violence and Reconciliation, and Others [2010] ZACC 4)***

At para.50 of ***Albutt*** (ibid) Ngcobo J said;

> "The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the power it grants. *To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the*

achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution."(emphasis added)

The importance of *Albutt* decision is the imposition of procedural fairness requirement on the executive exercise of public power where it would be irrational not to do so.

[11] The view that legality and rationality review target both the fairness of the process by which the decision was reached and the decision itself, to determine whether both the process and the decision are rationally related to the achievement of the objectives of the process, and whether the decision is rationally related to the purpose for which the power was granted to the public functionary, was affirmed in the ***Democratic Alliance v President of South Africa and Others (CCT122/11) [2012] ZACC 24 at para. 34)*.** The decisions in ***Albutt and Democratic Alliance*** have expanded the content of the principle of legality by treating procedural fairness as a requirement of rationality **(see also Cora Hoexter: *Administrative Law in South Africa 2nd Edition, Juta* at p. 123**). These two decisions make it crystal clear that in legality and rationality review, both the fairness of the process leading up to the decision and the decision itself are targeted to determine rational relationship. By including the procedural fairness requirements in legality and rationality constraints of the executive exercise of power, the South African Constitutional Court has firmly recognized that the principle of legality being an aspect of the Rule of Law should have a procedural fairness component.

[12] Despite Moseneke DCJ's rejection in *Masetlha*, of procedural fairness as a stand-alone requirement in the review of executive action under the principle of legality, the same court in ***Minister of Defence and Military Veterans v Motau 2014 (5) SA 69 (CC)*** (*obiter*) sought to dispel the notion that the *Masetlha* decision stands for the proposition that procedural fairness is not a stand-alone requirement in the review of executive action, and this is what the court said, at para.81:

> "[81] Were it not for the operation of the Companies Act, would there be an obligation on the Minister to dismiss directors in a procedurally

fair manner? This Court's decision in *Masetlha*, which was extensively relied on by the Minister in her submissions, has been interpreted to exclude the requirement of procedural fairness in the review of executive action as a stand-alone requirement under the principle of legality. *Masetlha* does not stand for this unequivocal proposition, however. The decision was limited to the specific context of that case and the power under consideration: the distinguishing feature which rendered the observance of procedural fairness inapposite in that case was 'the special legal relationship that obtains between the President as the head of the National Executive and the Director General of intelligence agency, on the other.' The sensitive nature of this special relationship, lying as it did in the heartland of 'the effective pursuit of national security', meant that Mr Masetlha, the spymaster-in-chief, could continue to occupy his position only as long as he enjoyed the trust of the President, his principal. Moreover, the power to appoint and dismiss in Masetlha was 'conferred specially upon the President for the effective business of government and ….for the effective pursuit of national security.'"

[13] Although, initially, the South African Constitutional Court seemed unwilling to embrace the idea of procedural fairness as self-standing requirement for the review of executive action, the *Motau* decision represents a tectonic shift in attitude, a shift which this Court consider to be in sync with the Rule of Law which is a foundation of our Constitution. In his minority judgment in *Masetlha,* Ngcobo J expressed a pertinent view (to which I subscribe) that procedural fairness is self-standing requirement of legality and the rule of law, and that implicit in this, is the recognition of a concept much more deeper than unlawful and irrational decisions as constraints to executive exercise of power. This is how he put it:

"179. In the context of our Constitution, the requirement of the rule of law that the exercise of public power should not be arbitrary is not limited to non-rational decision. It refers to a wider concept and a deeper principle: fundamental fairness. It does not only demand that decisions must be rationally related to the purpose for which the

> power was given. The Constitution requires more; it places further significant constraint on how public power is exercised through the Bill of Rights and the founding principle enshrining the rule of law….The right to a fair hearing contemplated in section 34 affirms the rule of law." *(emphasis provided)*

[14] The approach of Ngcobo J, of locating procedural fairness as a self-standing constraint of executive action, finds resonance in the approach to these issues in this jurisdiction. It has always been recognized that procedural fairness is a facet of the rules of natural justice which find expression in the Latin maxim *audi alteram patem*. This maxim essentially entail that a decision-maker who makes a decision which adversely affect other people must cause those people to know about such a decision prior to the decision and should give them an opportunity to participate in the decision by making representations in order to influence the decision-maker against the anticipated course of action. In the famous decision of ***Matebesi v Director of Immigration and Others LAC (1995 – 1999) 616 at 623 A – G*** it was recognized that doctrine of *audi alteram patem* is underpinned by two important policy considerations, *viz*, (i) the recognition of self-worth and dignity of individuals to be heard and told why decisions are taken against them, and (2) giving people an opportunity to be heard generally conduces to good governance in the sense of the decision-maker making his decision after having had the benefit of fuller facts laid out in front of him for consideration before making his decision. Given these weighty considerations, can it be said that due to the 'special relationship' between the Prime Minister and the DG NSS, requiring the former to act in a procedurally fair manner in dismissing the latter, would place an onerous burden on the Prime Minister in the efficient running of the NSS? My considered view it that it is not clear how that should be the case, for the following reasons: the courts in this jurisdiction have always recognized that procedural fairness is not immutable, it is forever flexible **(Commissioner *of Police v Manamolela and Others C of A (CIV) 40A/2014 [2014] LSCA 39 at para.1*5; J Raz "The Rule of Law and its Virtue" *(1977) 93 LQR 195 at 201*)**. Given the flexibility of procedural fairness it difficult to fathom a situation where requiring the Prime Minister to act fairly in dismissing the DG NSS

would prove to be onerous and therefore, affect national security (see C. Hoexter "Clearing the Intersection? Administrative Law and Labour Law in the Contitutional Court"*(2008) 1 Constitutional Court Review 209*. The concern or focus of this court should rather be the standard of fairness or the amount thereof required in each case. In formulating the standard of fairness required, if at all, for curial scrutiny of executive action, in my considered view, the following considerations as outlined by Melanie Murcott "Procedural Fairness as a Component of Legality: Is a Reconciliation Between Albutt and Masetlha Possible?" *(2013) 130 SALJ* at 272, must be borne in mind, wherein the learned author said:

> "[T]he political nature of some decisions might render it inappropriate, by virtue of the separation of powers doctrine, to subject them to the requirements of procedural fairness(as in *SARFU*(supra) and possibly even *Masetlha*), whilst the deliberative nature of other decisions could mean that it is unnecessary to do so(as in *Fedsure*(supra)).*Further, practical reasons, such as the need to run an efficient administration, or the need to make a decision on an urgent basis might make it appropriate to bypass- some, if not all of - the requirements of procedural fairness(Masetlha para 206)…"(emphasis added)*

In my opinion, given the 'special relationship' between the Prime Minister and the DG NSS and the need not to unnecessarily hamstring the Prime Minister to efficiently run the NSS, the standard of fairness in dismissing the DG NSS, should be a hearing in its simplest of forms, that is, simple notification of the proposed action by the decision-maker, and a verbal or written representation by the affected person. The standard of fairness postulated in the preceding sentence, is in my considered view, in sync with the notion that the Prime Minister must not be unnecessarily shackled in discharging his executive functions in regard to the NSS by strict procedural requirements such as formal notice, and a fully-fledged hearing.

[15] It will be observed that the decision of the Prime Minister to terminate the applicant's contract as evinced by the letter of termination, is simply that he was terminating the contract because a clause in the contract provides for such, but

then this needs to be juxtaposed with what the Prime Minister says in his answering affidavit, wherein he says the applicant is a threat to national security as he has a "trail of felonies" for which he is suspected, which felonies are not detailed out. In my judgment the decision of the Prime Minister to dismiss the applicant without affording him a hearing, is unconstitutional.

[16] *(ii)* ***National Security Argument:***

In his answering affidavit the Prime Minister makes a point that terminating the applicant's contract prematurely was;

> "[b] The decision was clearly an executive decision and or was driven by the dynamics of national security and courts clearly have no role to play in interrogating such a decision unless such a decision has far-reaching consequences on the rights of a citizen."

And in paragraph 8.3 of his founding affidavit, he says:

> "8.3 The APPLICANT is and has always been a threat to national security and I shall beg leave to further articulate some facts which clearly illustrate the extent to which he is compromised and I shall readily give such evidence in camera should the court direct me to act as such. I aver that the APPLICANT is under investigation over a trail of felonies and I am reluctant to divulge its details in fear of jeopardizing investigations and also owing to their impact on national security and stability…"

[17] The above excerpts represent the main thrust of the Prime Minister's efforts to forestall curial scrutiny into the dismissal of the applicant as head of NSS. May I venture straight away to put it in categorical terms that, it is heretical to our constitutional democracy which espouses accountability and respect for human dignity and openness, to expect the courts to be rendered impotent to bring to bear their curial scrutiny into matters which may have a bearing on national security issues merely because the defence is so raised. The question whether those national security considerations outweigh the requirements of the duty to act fairly is a question of evidence, and without which the courts cannot be forestalled from exercising curial scrutiny into the process of reaching a particular

decision, to determine its fairness. It has to be emphasized that the involvement of the courts in these matters is not aimed determining the fairness of the decision as that falls squarely within the exclusive executive purview of the public functionary. These sentiments were echoed in the famous decision of ***Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9*** where Lord Fraser said:

> "The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. *But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security…"(emphasis added)*

[18] Closer to home, more recently, the Namibian Supreme Court in the matter of ***Director-General of the Namibian Central Intelligence Service and Another v Haufiku; Mathias and Another (SA 33/2018) [2019] NASC 7 (12 April 2019***, a matter in which the Namibian National Intelligence Agency sought an interdict against publication by Journalists of information implicating the Agency in the improper use of state resources. Regarding national security argument raised by the Agency for seeking an interdict, Damaseb DCJ at paras. 85 – 86 said;

> "[85] It needs to be made clear as a preliminary matter that we do not agree with the Government's refrain, repeatedly pressed with great force in the written heads of argument, that once the Executive invoked secrecy and national security, the court is rendered powerless and must, without more, suppress publication by way of interdict.
>
> [86] The notion that matters of national security are beyond curial scrutiny is not consonant with the values of an open and democratic society based on the rule of law and legality. That is not to suggest that secrecy has no place in the affairs of a democratic state. If a proper case is made out for

protection of secret governmental information, the courts will be duty bound to suppress information."

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[19] In *casu*, the applicant is challenging the fairness of the procedure adopted in terminating his contract on the basis that he was not afforded a pre-decision hearing. This matter is not concerned with the fairness of the decision of the Prime Minister to terminate the applicant's contract, that is a no-go area for the court as already said above, but where, as in this case, the applicant is challenging the procedural fairness of the process to terminate his contract, for the matter to be beyond the curial reach of this court, the Prime Minister ought to have produced evidence that it was a matter concerned with national security. In this case the bald assertion, without more, by the Prime Minister that the courts are not entitled to deal with this matter as it concerns national security is not enough. Even the averment that the applicant has a "trail of felonies" for which he is a suspect, without evidence to back the assertion, this court will not agree that this is a matter deserving of such characterization, and in respect of which curial scrutiny should be withheld. It follows that the national security argument should be rejected.

[20] *Measure of damages and the issue whether the contract was terminable without cause*

It is the applicant's argument that he is entitled to the payment of salary and benefits for the unexpired period of his employment. On the other hand the Prime Minister argues that there was nothing wrong with him paying the applicant salaries in lieu of notice. He argues that the payment of salary as envisaged in clause 2(g) of the contract is a matter of right during the subsistence of the contract and not after its termination, and therefore in the circumstances the applicant is not entitled to any salaries beyond three months' notice period.

The contract in relevant part to this matter provides:

"…….

Termination of Secondment

(j) Notice to terminate secondment may be done by either party through a written notice of three (3) months. The termination shall not affect or otherwise limit any rights including benefits accrued to the employee party during the subsistence of the secondment."

It will be observed that the applicant's case is that he is entitled to payment of salary due to him for the unexpired period because the Prime Minister did not terminate his contract by giving him three (3) months' notice. The applicant further argues that his contract could not be terminated while he properly discharged his duties. To better understand what the intentions of the parties are under the contract, an interpretative exercise of same has to be undertaken.

[21] It is trite that interpretation is unitary exercise, which focuses on the text, context and purpose of the language used in the contract in light of the contract as a whole. In ***Betterbridge (PTY) Ltd v Masilo and Others (54727/2011) [2014] ZAGPPHC 813; [2015] (2) SA 396 (GP) at para. 8***

In ***Wood v Capital Insurance Ltd [2017] UKSC 24,*** *Lord* Hodge at para. 10**,** said that;

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning, In Prenn v Simmonds [1971] 1 WLR 1381 (1383 H- 1385 D) and in Reardon Smith Line Ltd v Yngvar Hansen – Tangen [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations."

[22] It is against the background of these principles that I now turn to determine the intention of the parties in terms of whether they intended that due

performance of his duties by the applicant, on termination of the contract, would entitle him to be paid his salary and benefits for the reminder of the contract period. The contract was concluded against the background that the applicant is Commissioned Officer in the Lesotho Defence Force – Colonel- who has been seconded to head the National Intelligence Service. Clause J which provides for termination on notice, does not state conditions-precedent for the trigger of such option. Apart from express warranty of professionalism, competency, diligence and loyalty, in the performance of work by the employee, which could found the basis for dismissal if breached, the contract is dead silent on the circumstances (other than those mentioned in the preceding sentence) on which it may be terminated on three months' notice. No fetter is placed on either employer or employee's trigger of clause J. The head of the NSS reports directly to the Prime Minister and advices him on national security issues. It is hardly surprising that this contract is drafted in this manner: the reason is simply that due to the special relationship between the Prime Minister and the head of NSS it would not make it easier for the former to efficiently run the NSS when fetters are placed on the Prime Minister as to when to exercise the option to terminate the contract. It has to be borne in mind that, of critical and utmost importance in the relationship between the head of NSS and the Prime Minster is mutual and absolute trust. Whether the Prime Minister's assertions of criminality on the part of the applicant are plausible or not, the fact remains, trust between the two men is at its lowest ebb, and this does not conduce to the working relationship of the nature alluded to in the preceding sentences. Other than for breach of the warranty by the employee, mentioned above, both parties in my judgment, in terms of clause J have agreed to terminate their agreement without cause, and have agreed that the applicant would only be entitled to "benefits accrued to the employee party during the subsistence of the secondment." Once the contract is terminated, it ceases to subsist, and it follows that no benefit would accrue to non-subsisting contract.

[23] At common law where the contract provides for its termination on notice, the measure of damages is the loss of salary for the notice period. In *casu,* as already said, the parties have agreed that the contract would be terminated without cause, on three months' notice. The applicant's entitlement is therefore limited to

whatever was due to him under the contract for three months' notice period which was not observed by the Prime Minister. This is the common law position which governs this contract. The position governing the current situation was stated in ***Harper v Morgan Guarantee Trust Co. of New York, Johannesburg 2004 (3) SA 253 at 258 B*** –I where Flemming DJP said;

> "[5.1] The Common law of England and Canada in regard to decisions by contractual parties is evident also from two decisions on which plaintiff's Counsel placed reliance. Johnson v Unisys Ltd [2001] 2 ALL ER 801 (HL) at para. [40] indicates acceptance that:
>
> 'At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract.'
>
> There is also approval in para. [39] of the statement from the Canadian case Wallace v United Grain Growers Ltd (1997) 152 DLR 4th 1 at para. 39:
>
> *'A wrongful dismissal action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given.'*
>
> *Damages were limited to the period required for elective dismissal upon notice – which in the present case would be the earning of four weeks.*
>
> [5.2.1] The principles are part also of our law. In Mustapha and Another v Receiver of Revenue, Lichtenburg, and Others 1958 (3) SA

343 (A) at 358F it was said that in the case of a contract, a party's reasons or motives for exercising an admitted right of cancellation of that contract are normally irrelevant. The result that the employee ends up with what he would have had if the employer had stayed within his legal right to terminate by notice was stated in Grundling v Beyers and Others 1967 (2) SA 131 (W) at 142; Langeni and Others v Minister of Health and Welfare and Others 1988 (4) SA 93 (W) at 101C.

[5.2.2] If in a specific case the right to give notice may only be exercised within some limitation, it would be for the plaintiff to prove and therefore to plead such a term…..

[5.2.3] There is obvious logic for limiting the damages claim to the equivalent of earnings in the permissible notice period. To put the employee in the position in which he would have been but for the instanter dismissal would leave him exposed to dismissal by notice – and a right of earnings for no more than that period. Even when the step of dismissing is effective to end the employee's obligation to pay further salary, it effectively conveys that the employee must leave and so serve as the giving of notice."*(emphasis added)*

[24] It is my considered view that the applicant has failed to prove any damages beyond the notice period: In any event this would have been difficult to prove as the applicant, automatically reverted to his former position in the military upon termination of his contract. Mr. Teele KC pressed this court that the applicant is entitled to salary and commensurate benefits for the reminder of the contract. This contention is untenable, in view of the common law position quoted above. In *casu,* the applicant in contending that he is entitled to the salary and benefits for the unexpired period of the contract, is basing himself on the award which was made in ***Masetlha*** decision. The ***Masetlha*** matter turned on its own facts and it is not to be taken as precedent for the position being advocated for by the applicant. The common law is the law in terms of which damages in this case are to be

determined. The confusion created by ***Masetlha*** decision was alluded to and criticized (quite correctly in my view) in ***South African Football Association v Mangope (JA13/11) [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC) at para. 43,*** where Murphy AJA said;

> "The quantum of damages awarded seems to rest upon an uncritical application of the standard enunciated 60 years ago by the Cape Provincial Division in Myers v Abramson which in relation to damages for breach of a fixed term contract of employment (as opposed to an indefinite term contract terminable on notice) stated the following:
>
> > 'The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment.'
> >
> > *There is a tendency among lawyers practicing in the field of labour law to rely on these dicta to contend that the unlawful premature termination of a fixed term contract of employment entitles the wrongfully dismissed employee to be paid the balance of the unexpired portion of his or her contract. That view has been reinforced by the order made more recently by the Constitutional Court in Masetlha v President of the Republic of South Africa and Another. In that case the court held that the dismissal of the applicant from his post of Director-General of the National Intelligence Agency was in violation of his constitutional rights. In exercising its decision in terms of section 172(1) (b) of the Constitution to grant a remedy which is just and equitable, the Constitutional Court ordered the appellant to be paid the remuneration payable for the balance of his fixed term contract. It is not clear from the judgment whether the court gave any consideration to either a contractant's duty to mitigate damages or the collateral benefit rule as envisioned in the dicta pronounced in Myers v Abramson. The order in Masetlha, being one in terms of the*

Constitution, was not intended, in my opinion, to redefine the contractual measure of damages in respect of a material breach of a fixed term contract of employment."(emphasis added)

[*25*] In the result the following order is made:

a) The termination of applicant's appointment on secondment as Director General of the National Security Service is declared unconstitutional.
b) It is declared that the applicant is entitled to emoluments and commensurate benefits for three months notice period as Director General of the National Security Service calculated from the date of termination of Secondment.
c) The applicant is awarded costs

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M. A MOKHESI J

I CONCUR _____

S. P PEETE J

I CONCUR _____

E. F. M MAKARA J

FOR APPLICANT : ADV. M TEELE K.C instructed by T. MATOOANE AND CO. ATTORNEYS

FOR RESPONDENTS: ATTORNEY M. RASEKOAI assisted by ATTORNEY V. MOKALOBA