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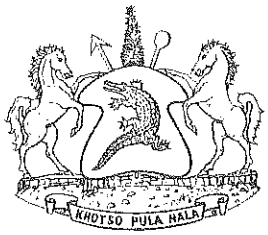

LESOTHO

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CONSTITUTIONAL CASES Nos. 0007/2023 and 0009/2023**

In the matters between:

MACHESETSA MOFOMOBE	**APPLICANT (in CC No. 0007)**
MOEKETSI SHALE	**APPLICANT (in CC No. 0009)**

And

THE PRIME MINISTER	**1ST RESPONDENT**
DIRECTOR GENERAL OF THE NATIONAL SECURITY SERVICE	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

Neutral Citation: Mofomobe and Shale v. The Prime Minister and others [2023] LSHC 125 Cons (20 June 2023)

CORAM: S. P. SAKOANE CJ, F. M. KHABO and M. KOPO JJ

HEARD : 5 JUNE 2023

DELIVERED : 20 JUNE 2023

Summary

Constitutional law – right of privacy and freedom from arbitrary seizure of property – applicants' cellphones sought to be seized and searched by the National Security Services on grounds that they were in communication with some National Security Service members who had leaked classified material to them; further that the applicants were implicated in criminal offences of murder and money laundering – Assessment of validity of a warrant - seizure and search conferred on the Prime Minister – whether the procedure authorizing the issuance of the warrants has necessary safeguards against abuse of power – whether the warrants issued by the Minister in the Prime Minister's office were issued by the proper authority - whether the terms of the warrants were vague and overbroad - Constitution, 1993 sections 11 and 17; National Security Service Act 1998 section 26 (2); National Security Service Regulations, 2000.

ANNOTATIONS

Cited Cases:

Lesotho:

Attorney-General v. 'Mopa LAC (2002-2004) 427

Maseko v. Attorney-General LAC (1990-94) 13

Moosa and Others v. The Magistrate and Others LAC (2007 -2008) 318

Canada:

R v Plant [1993] 2 SCR 281

R v Spencer [2014] 2 SCR 212

Suresh v. The Minister of Citizenship and Immigration of Canada and the Attorney General of Canada [2002] 1 SCR 3

South Africa:

Amabhungane Centre for Investigative Journalism NPC and Another v. Minister of Justice and Correctional Services and Others (Media Monitoring Africa Trust and others as amici curiae) and related matters 2021 (4) BCLR 349 (CC)

Gaertner and others v. Minister of Finance and Others 2014 (1) SA 442(CC); 2014 (1) BCLR 38 (CC)

Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others 2001 (1) SA 545 (CC)

Lipschitz and Schwartz NN.O v. Markowitz 1976 (3) SA 775

Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte Application of President of South Africa and Others 2000 (2) SA 674 (CC)

Europe:

Big Brother Watch and Others v. United Kingdom [2021] ECHR 439 (25 May 2012)

United Kingdom:

Attorney-General v. Guardian Newspaper Ltd and Others [1988] 3 ALL ER 545 (ChD)

Attorney-General v. Guardian Newspaper Ltd and Others (No.2) [1988] 3 ALL ER 638 (HL)

Inland Revenue Commissioners and Another v. Rossminster Ltd [1980] 1 All ER 80 (HL)

Regina v. Shayler [2002] UKHL 11 (21 March, 2002)

Secretary of State for the Home Department v. Rehman (AP) [2001] UKHL 47 (11 October, 2001)

Statutes:

Constitution of Lesotho, 1993

Criminal Procedure and Evidence Act No.7 of 1981

First Amendment to the Constitution Act, 1996

Money Laundering and Proceeds of Crime Act No. 4 of 2008

National Security Service Act No. 11 of 1998

National Security Service Regulations, 2000

Journals:

Mavedzenge, J.A. "The Right to Privacy v. National Security in Africa: Towards a Legislative Framework which Guarantees Proportionality in Communications Surveillance." *African Journal of Legal Studies*, Volume 12 (3), 2020 pp.360-390

Books:

Palmer and Poulter (1970) *The Legal System of Lesotho* (Mitchie)

Zeffert and Paizes - *The South African Law of Evidence* 3rd ed. (Juta)

International Instruments:

European Convention on Human Rights, 1950 (18 July 2014)

"*The right to privacy in the digital age*" Report of the Office of the United Nations High Commissioner for Human Rights (18 July, 2014)

Report of the European Commission for Democracy through Law on the Democratic Oversight of Signals Intelligence Agencies, 2015

United Nations Resolution No.68/167 (adopted on 18 August 2018)

JUDGMENT

SAKOANE CJ:

I. INTRODUCTION

> "One of the main arguments put forward by the editors in favour of a conclusion that would permit the press to report unauthorized disclosures about the security services was the so-called unaccountability of the security services. But the security services are not unaccountable. They are accountable to Ministers of the Crown, who in turn, through the ballot box, are accountable to the public. MI5 is accountable to the Home Secretary and to the Prime Minister. The Prime Minister is the leader of a democratically elected government. The editors' complaints of unaccountability come to no more than that, in their view, the Home Secretary and the Prime Minister do not exercise a sufficiently close control and that they desire ministerial control to be more openly exercised.
>
> These are matters of legitimate public debate. But they do not, in my opinion, create any legitimate public interest requiring the public disclosure of the operations of the security services. Nor do I think there is any legitimate public interest served by the disclosure of Burgess's activities with Churchill's daughter..."[1]
>
> "...as a general policy, Governments do not comment on assertions about security or intelligence; true statements will generally go unconfirmed, and false statements will normally go undenied. As a result, and because of the particular credibility attaching to statements about security or intelligence by members of the services concerned, the circulation of misinformation by a member of the services may, in a different way, be as harmful as his disclosure of genuine information."[2]

[1] What is quoted above provides context to the issues raised in the two consolidated cases before us, save to say that the main issue is the legal accountability of Lesotho's National Security Service. The consolidation

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[1] Attorney–General v. Guardian Newspaper Ltd and Others (No.2) [1988] 3 ALL ER 545 (ChD) at p. 588 b-d

[2] Regina v. Shayler [2002] UKHL 11 (21 March 2002) para 11

of these cases was necessitated by the identical nature of the cause of actions. The applicants in the respective cases, namely, *Mofomobe* in *CC No.0007* and *Shale* in *CC No.0009*, were served with executive warrants authorizing the seizure and search of their cellphones by the National Security Service (NSS) in terms of section 26 of the **National Security Service Act No.11 of 1998** (hereinafter referred to as the NSS Act). Both warrants were issued on 16 May, 2023.

[2] On 17 May officers of the NSS served *Mofomobe* with a warrant. He refused to accept it and contested its execution and the officers left. The following day he filed his constitutional application on grounds of urgency. It was moved on 19 May and a consensual interim order was made suspending the execution of the warrant.

[3] On 18 May the NSS served *Shale* with a similar warrant. It was executed upon being advised by his lawyer to surrender the cellphones. His application was filed on 22 May on grounds of urgency seeking interim orders for the return of the cellphones and stay of their search. I considered that there was unjustified delay but ordered that his application be heard on the date scheduled for *Mofomobe's* application on 5 June.

Reliefs

[4] The applicants seek the following orders:

1. Striking down section 26 of the NSS Act, as unconstitutional.

2. Declaring the issuance and execution of the warrants as a contravention of the applicants' constitutional rights to privacy and freedom from arbitrary seizure of property protected by section 11 and 17 of the Constitution.

3. Reviewing and setting aside of the warrants on the ground that their authorization is legally invalid.

4. Costs of suit [sought by *Shale* only].

5. Further and / or alternative relief.

II MERITS

The Seizure and Search Warrants

[5] It is common cause that the issuance of the impugned warrants is authorized in terms of section 26 which reads as follows:

> "26. (1) Notwithstanding any other law, no entry on, or interference with, property shall be unlawful if it is authorized by a warrant issued by the Minster under this section.
>
> (2) The Minister may, on an application made by a member of or above the rank of Higher Intelligence Officer, issue a warrant under this section authorizing the taking of such action in respect of any property specified in the warrant as the Minister

thinks is necessary to be taken in order to obtain information which –

(a) is likely to be of substantial value in assisting the service to discharge any of its functions; and

(b) cannot reasonable (sic) be obtained by any other means.

(3) A warrant shall not be issued under this section unless-

(a) it is signed by the Minister; or

(b) in an urgent case where the Minister has expressly authorized its issue and a statement of that fact is endorsed on it, it is signed by the Director General or an officer authorised by the Director General.

(4) A warrant shall not be issued under this section unless-

(a) if it was signed, by the Minister, at the end of six months from the day it was issued; or

(b) in any other case, at the end of the second working day following the day it was issued.

(5) If at any time before the day on which a warrant would cease to have effect the Minister considers it necessary for the warrant to continue to have effect for the purpose for which it was issued, he may renew it, in writing, for a further period of six months.

(6) The Minister shall cancel a warrant if he is satisfied that the action authorized by it is no longer necessary."

[6] The parties are on common ground the warrants were issued following applications by the Director General of the NSS[3]. The first application reads as follows:

" MEMO

TO : MINISTER OF DEFENCE, NATIONAL SECURITY AND ENVIRONMENT

FROM : DIRECTOR GENERAL – NSS

REF : SF.2/9/2

[3] Annexures "PR1" to the answering affidavits

SIGNATURE : .....

NAME : P.J. RALENKOANE

DATE : 16th May, 2023 **FILE NO:---------**
(Receiving Min/Dept)

RE: APPLICATION IN TERMS OF SECTION 26 (2) OF THE NATIONAL SECURITY SERVICE ACT NO.11 OF 1998

The above subject matter bears reference.

I humbly request that you issue a warrant in terms of Section 26 of the National Security Service Act No.11 of 1998 (hereunder referred to as the NSS Act), authorizing the Service to seize with immediate effect, the mobile phones of, and or those in the possession of one Machesetsa MOFOMOBE, a Mosotho male adult resident at Ha-Thetsane in the district of Maseru.

Further authorizing that upon the said seizure, the Service conduct an investigation on such mobile phones and make copies of any information contained therein which have a bearing on the functions of the Service.

Further that the Service retain possession of such mobile phones for a period of thirty (30) working days for the purpose of investigations.

The request is premised on the fact that the said Machesetsa MOFOMOBE is in possession of classified information/material which he received through electronic means without authorization from Intelligence Officer 4 (I.O.4) PITSO stationed at Maseru NSS. There is further credible information to the effect that I.O.4 PITSO is not the only NSS member who has sent such classified material to Machesetsa MOFOMOBE therefore information obtained from the phones shall reveal such members.

Further that there is information therein which implicates his involvement in criminal activities that may tend to operate to undermine national security. These include money laundering using an unregistered money lending business with the help of I.O.4 PITSO and others. Furthermore the said Machesetsa MOFOMOBE is implicated in the murder of one Ralikonelo JOKI.

The information obtained therefrom will assist the Service to counter the said unauthorized reception of classified material and any activity intended to undermine the national security of the Kingdom of Lesotho. Such information cannot be reasonably obtained by any other means except those sought herein."

[7] The warrant issued in response thereto reads:

"WARRANT ISSUED IN TERMS OF SECTION 26 OF THE NATIONAL SECURITY SERVICE ACT NO.11 OF 1998

This warrant serves to authorize members of the National Security Service to;

1. Seize the mobile phones of, and/or those found in the possession of Machesetsa MOFOMOBE, a Mosotho male resident at Ha-Thetsane Maseru with immediate effect, and;

2. Conduct an investigation on such mobile phones and make copies of any information contained therein which has a bearing on the functions of the Service.

3. Retain possession of the said mobile phones for a period of thirty (30) working days for the purpose of investigations.

Thus issued on this 16th day of May, 2023.

Signed

.....

Honourable Minister of Defence, National Security and Environment"

[8] The second application was in the following terms:

"

MEMO

TO	:	MINISTER OF DEFENCE, NATIONAL SECURITY AND ENVIRONMENT
FROM	:	DIRECTOR GENERAL – NSS
REF	:	SF.2/9/2
SIGNATURE	:	.....
NAME	:	P.J. RALENKOANE
DATE	:	16th May, 2023

FILE NO:--------
(Receiving Min/Dept)

RE: APPLICATION IN TERMS OF SECTION 26 (2) OF THE NATIONAL SECURITY SERVICE ACT NO.11 OF 1998

The above subject matter bears reference.

I humbly request that you issue a warrant in terms of Section 26 of the National Security Service Act No.11 of 1998 (hereunder referred to as the NSS Act), authorizing the Service to seize with immediate effect, the mobile phones of, and or those in the possession of one Moeketsi SHALE, a Mosotho male adult resident at Ha-Thetsane in the district of Maseru.

Further authorizing that upon the said seizure, the Service conduct an investigation on such mobile phones and make copies of any information contained therein which have a bearing on the functions of the Services.

Further that the service retain possession of such mobile phones for a period of thirty (30) working days for the purpose of investigations.

The request is premised on credible information which implicates the involvement of the said Moeketsi SHALE in criminal activity that may tend to operate to undermine national security being the murder of Ralikonelo JOKI.

Furthermore, the said Moeketsi SHALE is suspected of having access to classified information of the Service through the help of some NSS personnel. Information obtained from the phones will assist in identifying such compromised members so that they are dealt with accordingly and the disclosure of classified material be countered against in an appropriate manner.

The information obtained therefrom will assist the Service to counter the said criminal activities intended to undermine the national security of the Kingdom of Lesotho. Such information cannot be reasonably obtained by any other means except those sought herein."

[9] The Minister obliged by issuing the following warrant:

"WARRANT ISSUED IN TERMS OF SECTION 26 OF THE NATIONAL SEURITY SERVICE ACT NO.11 OF 1998

This warrant serves to authorize members of the National Security Service to;

1. Seize the mobile phones of, and/or those found in the possession of Moeketsi SHALE, a Mosotho male resident at Ha-Thetsane Maseru with immediate effect, and;

2. Conduct an investigation on such mobile phones and make copies of any information contained therein which has a bearing on the functions of the Service.

3. Retain possession of the said mobile phones for a period of thirty (30) working days for the purpose of investigations.

Thus issued on this 16th day of May, 2023.

Signed

.....

Honourable Minister of Defence, National Security and Environment"

[10] For ease of reference, the warrants will be referred to as "Warrant 1" and "Warrant 2" respectively.

[11] As earlier said, the execution of "Warrant1" has by consent been suspended by order of court. Thus, *Mofomobe* is still in possession of his cellphones. "Warrant 2" was executed, thereby depriving *Shale* the possession of his cellphones.

[12] The reasons proffered for applying for issuance of the warrants and the contents of the warrants are not in dispute. What is in dispute are:

12.1 the constitutionality of the procedure for their issuance under section 26;

12.2 their violation of applicants' privacy and freedom from arbitrary seizure of property;

12.3 the competence of the Minister who issued them as he is not the Prime Minister;

12.4 the alleged vagueness of the reasons given in the applications for their issuance; and

12.5 the alleged broad terms of the warrants.

[13] All these disputes call for the correct interpretation of the applications for the warrants, the terms of the warrants, section 26 and effect of all of these on the applicants' constitutional rights of privacy and freedom from arbitrary seizure of property.

III. ANALYSES

A. Interpretation of Constitutional Provisions

Right to Privacy

[14] Section 11 of the Constitution protects the right to privacy without detailing its contours. It is left to the courts of law to expound on it on a case by case basis. A useful exposition of privacy is found in the judgment of the Supreme Court of Canada in **R v Plant**[4] where Sopinka J said:

[4] [1993] 2 SCR 281 at 293

"I do agree with that aspect of the *Miller* decision (United States v. Miller 425 U.S. 435 (1976)) which would suggest that in order for constitutional protection to be extended, the information seized must be of a "personal and confidential" nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual."

[15] In **R v Spencer**[5] the same court said:

"[36] The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. To paraphrase Binnie J, in *Patrick*, the issue is not whether Mr Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes."

.....

[38] To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.

[39] Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician.

[40] Privacy also includes the related but wider notion of control over access to and use of information, that is, the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. The understanding of informational privacy as control derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit. Even though the information will be communicated and cannot

[5] [2014] 2 SCR 212

> be thought of as secret or confidential, situations abound where he reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.
>
> [41] There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity. In my view, the concept of privacy potentially protected by s. 8 must include this understanding of privacy." (internal references omitted)

[16] However, the right to privacy can be restricted by law if the interests of the Crown in law enforcement so dictate. Where the Crown provides the defence of law enforcement, to pass constitutional muster, the law relied on must meet the following criteria[6]:

> "28. Paragraph 2 of the article 17 of International Covenant on Civil and Political Rights explicitly states that everyone has the right to the protection of the law against unlawful or arbitrary interference with their privacy. This implies that any communications surveillance programme must be conducted on the basis of a publicly accessible law, which in turn must comply with the State's own constitutional regime and international human rights law. 'Accessibility' requires not only that the law is published, but that it is sufficiently precise to enable the affected person to regulate his or her conduct, with foresight of the consequences that a given action may entail. The State must ensure that any interference with the right to privacy, family, home or correspondence is authorized by laws that (a) are publicly accessible; (b) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims; (c) are sufficiently precise, specifying in detail the precise circumstances in which any such interference may be permitted, the procedures for authorizing, the categories of persons who may be placed under surveillance, the limits on the duration of surveillance, and procedures for the use and storage of the data collected; and (d) provide for effective safeguards against abuse.

[6] "The right to privacy in the digital age" Report of the Office of the United Nations High Commissioner for Human Rights (18 July 2014)

> 29. Consequently, secret rules and secret interpretations – even secret judicial interpretations – of law do not have the necessary qualities of "law". Neither do laws or rules that give the executive authorities, such as security and intelligence services, excessive discretion; the scope and manner of exercise of authoritative discretion granted must be indicated (in the law itself, or in binding, published guidelines) with reasonable clarity. A law that is accessible, but that does not have forseeable effects, will not be adequate. The secret nature of specific surveillance powers brings with it a greater risk of arbitrary exercise of discretion which in turn, demands greater precision in the rule governing the exercise of discretion, and additional oversight."

[17] In order to ensure that privacy receives the best and effective protection, the UN General Assembly[7] has resolved that all States must "establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception, and the collection of personal data."

[18] The Venice Commission[8] calls for the balancing of privacy interests against other interests whenever law-enforcement and security agencies seek to interfere with privacy. It puts emphasis on safeguards, two of

[7] Resolution No.68/167 (adopted on 18 December 2013)

[8] 2015 Report of the European Commission for Democracy through Law on the Democratic Oversight of Signals Intelligence Agencies.

which are authorization of collection of data and access and oversight of the process by an independent external body.

[19] The recommendation of the UN High Commissioner for Human Rights is that States should ensure, through appropriate legislation and other means, that any interference with the right to privacy, including by communications surveillance and intelligence sharing, complies with principles of legality, legitimate aim, necessity and proportionality. The legislation should also clarify that authorization of surveillance requires reasonable suspicion that a person is engaged in acts amounting to a specified threat to national security[9].

[20] The settled jurisprudence of the European Court of Human Rights is that the following should be provided in legislation as minimum safeguards to avoid abuses of power:

(i) the nature of the offences which may give rise to an interception order;

(ii) a definition of categories of people liable to have their communications intercepted;

(iii) a limit on the duration of interception;

[9] A/HRC/39/29 para 61(e) (3 August 2018)

(iv) the procedure to be followed for examining, using and storing the data obtained;

(v) the precautions to be taken when communicating the data to other parties; and

(vi) the circumstances in which the intercepted data may or must be erased or destroyed[10].

[21] Because by its nature and logic surveillance is secret, the European Court of Human Rights cautions[11];

> "In view of the risk that a system of secret surveillance set up to protect national security (and other essential national interests) may undermine or even destroy the proper functioning of democratic processes under the cloak of defending them, the court must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, and the kind of remedy provided by the national law. The court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to, keep the 'interference' to what is 'necessary in a democratic society'."

[22] In my judgment, the principles enunciated in respect of surveillance apply to searches for data and information in mobile phones.

---

[10] Big Brother Watch and Others v. UK [2021] ECHR 439 para 439 (25 May 2021)
[11] Ibid para 339

Freedom from Arbitrary Seizure of Property (Section 17)

[23] Section 17 of the Constitution protects citizens' interest in or right in property. The Crown is disallowed from compulsorily taking possession of such interest or right in the property except where it is necessary to do so in the interests of defence or public safety.

[24] There is doubt that the search of a person's mobile phone implicates informational privacy. A person has the right to be left alone to use his cellphone in any manner he / she wishes. A person is also entitled to communicate with whoever he / she likes, to preserve and delete information / data in the cellphone and disclose or reveal same[12]. Any law enforcement imperative to invade this right can only arise if there are no less invasive means.

[25] Hence, protection of the interest or right in property should be balanced against the Crown's duty of law-enforcement in terms of a law whose enactment is necessary to take possession of the property "by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Lesotho"[13].

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[12] Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others 2001 (1) SA 545 (CC) para [16]

[13] Sub-section 4(a) (ii)

This means that the interference in the interests or right in property must serve the purpose of vindicating rights and enforcing laws through the judicial process. The comments of Professors *Palmer* and *Poulter* on the concepts of "public safety and public order[14]" are insightful:

> "The interest of society in public order expresses itself mainly through the peace-keeping provisions of the criminal law. Public order, in this sense, is germane to public safety because safety is a by-product of public peace. This may explain why laws grounded respectively in each, such as the Internal Security Act of 1967 and the Public Order Proclamation of 1964, seek to regulate or proscribe much the same kinds of activities. Thus both safety and order underwrite the existence of the police and its various powers and duties of patrol, surveillance, control over public movement in the street, the granting of protection, prevention of violence, and the apprehension of criminals."

[26] The necessity for interference with the interest or right in property must be "such as to afford, reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property."[15]

B. Constitutionality of Section 26

[27] I now turn to the issue of the constitutionality of section 26 of the NSS Act in terms of which authorization to seize and search the applicants' cellphones was sought and granted.

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[14] The Legal System of Lesotho (Mitchie) p. 404
[15] Section 17 (1) (a) and (b)

[28] I adopt the template from the European Court of Human Rights[16] to examine whether the section clearly defines:

28.1 the grounds on which seizure and search may be authorized;

28.2 the procedure to be followed for selecting, examining and copying the material / information sought;

28.3 the precautions to be taken when communicating the material to other parties;

28.4 the limits on the duration of the search, storage of the material and the circumstances in which such material must be erased and destroyed;

28.5 the procedures and modalities for supervision by an independent authority for compliance with the above safeguards and its compliance; and

28.6 the procedures for independent *ex post facto* review of such compliance and powers vested in a competent body in addressing non-compliance.

[29] The relevance of this template lies in the similarity between section 11 of our Constitution and Article 8 of the **European Convention on**

[16] Footnote 10

Human Rights, 1950 and the jurisprudence generated in the adjudication of compatibility of security legislation with the Convention.

Procedure to follow for granting of authorization

[30] Section 26 (1) and (2) provides that interference with property should be by a warrant authorized by the Minister. When dealing with the NSS's application for the warrant and necessity to issue it, the Minister must consider whether the information:

> "(a) is likely to be of substantial value in assisting the service to discharge any of its functions; and
> (b) cannot be obtained by any other means."

These are the jurisdictional facts the Minister must be satisfied with before he approves the application and issues a warrant.

[31] It is the duty of the NSS to articulate the reasons for seeking the authorization and to indicate the likelihood of its substantial value in assisting in the discharge of its functions. To properly assess the likelihood of substantial value of the information sought, the function in respect of which information is sought must be clearly stated with

details on the nuts and bolts of the function[17]. Reference to functions in general terms will not suffice. Furthermore, the NSS should state whether the information sought cannot reasonably be obtained by any other lawful means. It is only if these two statutory requirements are met that the Minister can issue the warrant.

[32] In issuing a warrant, the Minister exercises public power. Its exercise must pass the constitutional test of rationality as explained by the Constitutional Court of South Africa thus:[18]

> "[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.
>
> [86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.
>
> .....
>
> [90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by

[17] Amabhungane Centre for Investigative Journalism NPC and another v. Minister of Justice and Correctional Services and others (Media Monitoring Africa Trust and others as *amici curiae*) and related matters 2021 (4) BCLR 349 (CC) para [134]

[18] Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA 2000 (2) SA 674 (CC) paras [85], [86] and [90]

> members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision..."

[33] This means that the power to issue a warrant is disciplined by internal statutory requirements and the discipline of the Constitution.

[34] The Constitution permits limitations of privacy and property rights. The limitations must be authorized by a law whose provision or act done under its authority do not abridge the right or freedom to a greater extent than is necessary in a practical sense in a democratic society. The Constitution puts the onus of proof of violation of the rights on the applicants and the onus of justification of the limitation on the Crown. The onus of justification of the limitation burdens the Crown to demonstrate that the limitation is lawful, necessary and proportionate to the specific risk sought to be addressed[19].

[19] Attorney-General v. 'Mopa LAC (2002-2004) 427

[35] The court's task is to engage in two processes, namely, the process of interpretation and the process of legal evaluation (if the Crown seeks to justify the limitation). The law that the Crown relies on to justify the limitation has to be interpreted to ascertain whether there exists incompatibility between it and the guaranteed right / freedom. The evidence of otherwise of incompatibility is tested on the criteria of the overarching principles of legality, necessity and proportionality.

[36] It is common cause that the Minister issued warrants authorizing the seizure and search of the applicants' cellphones for a period of a month. The seizure and search constitute a violation of privacy rights and freedom from arbitrary seizure of property. The Crown justifies the seizure and search on the basis of section 26(1) and (2). This calls for the interpretation of the section to determine whether or not it is incompatible with the constitutionally guaranteed right of privacy and freedom from arbitrary seizure of property.

[37] The section empowers the Minister to authorize acts of the NSS whose broad constitutional mandate is "protection of national security"[20]. This power is exercised to enable the NSS to discharge that mandate –

[20] Section 148(1) of the Constitution

nothing more nothing less. The constitutional mandate of "protection of national security" is not defined in the Constitution. It is left to Parliament to put flesh on the bones. This, Parliament has done under section 5 which reads as follows:

> **"Functions of the Service**
>
> 5. (1) The function of the Service shall be the protection of the national security.
>
> (2) Without prejudice to the generality of subsection (1) the Service shall –
>
> (a) protect the state against threats of espionage, terrorism or sabotage which may infringe on national security;
>
> (b) protect the state from activities of agents of foreign powers and from actions of persons intended to overthrow or undermine democracy by political or violent means;
>
> (c) protect the economic well-being of the state against threats posed by the actions or intentions of persons inside or outside Lesotho; and
>
> (d) protect the State against any activity that may tend to operate to undermine national security."

[38] It is in performance of these functions that the Minister can authorise the NSS to seize and search the applicants' cellphones. In reaching a decision to issue the warrants, the Minister must be satisfied of the following three things:

38.1 that the seizure of the cellphones is necessary to obtain information;

38.2 that the information sought is likely to be of substantial value in assisting the NSS to discharge any of its functions; and

38.3 that there are no other reasonable means of obtaining the information.

[39] The lawfulness of the authorization to seize the cellphones and search for information or data in them is dependent on the proper assessment of the above mentioned factors. This requires that the decision to grant the warrants must be reached after anxious consideration of the triad of factors.

[40] The applicants contend that as written, section 26 is unconstitutional for empowering the Minister, and not courts of law, to authorize issuance of a warrant that their cellphones be seized and searched. They advance the proposition that for authorization of the warrants to pass constitutional muster, it must be judicially authorized and not executively authorized. Their counsel, Messrs *Lephuthing* and *Lesupi*, submitted that being a politician, the Minister is prone to the temptations to drive political agendas and not bring an independent and objective mind to bear when granting the authorisation – something a judicial officer is unlikely to do. Crown counsel, Mr *Moshoeshoe*, countered by submitting that the law is clearly written and does not have any shortcomings to ground the fears suggested by the applicants' counsel.

[41] Although the fear of politically motivated authorisation is not out of this world given the experience elsewhere in Africa[21], or without cause given the secrecy in which the process is shrouded, the absence *per se* of a judicial officer in the process is not necessarily a problem where it is subjected to external, independent supervisory authority capable of ensuring transparency and accountability. Such an authority can and must act robustly to keep interference with privacy and search of cellphones to what is necessary and proportionate. It is the absence of such independent authority that exposes the soft underbelly of section 26.

[42] Another problematic aspect in the procedure is that there is no explicit requirement to explain what other alternative means were explored and why they were found not to be reasonable. This gives a free pass to the NSS and the Minister. When challenged, they hide behind the bald assertion of absence of alternative reasonable means of acquiring information. This is important because the NSS is boastful about its sole technological ability to search cellphones and copy information.

[21] Mavedzenge, J.A. "The Right to Privacy v. National Security in Africa: Towards a Legislative Framework which Guarantees Proportionally in Communications Surveillance." African Journal of Legal Studies, Volume 12(3), 2020, pp.360-390

[43] I find that the procedure lacks safeguards that are necessary to guard against abuse of power. Absent the necessary safeguards, section 26 lacks the qualities of a law that ensures that seizures and searches are kept to what is necessary and proportionate in a democratic society.

C. Validity Of The Warrants

[44] A warrant is legal authority to do an act which is otherwise legally unprotected in law. As eloquently put by Lord Diplock in **Inland Revenue Commissioners and another v. Rossminster Ltd**[22]:

> "The construing court ought, no doubt, to remind itself, if reminder should be necessary, that entering a man's house or office, searching it and seizing his goods against his will are tortious acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority."

[45] The functional utility of a warrant is stated by the Constitutional Court of South Africa in **Gaertner**[23]:

> "A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guarantees that the State must be able, prior to an intrusion, to justify and support intrusions upon individual's privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our history provides evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation."

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[22] [1980] 1 All ER 80 (HL) @ 90e-f

[23] Gaertner v Minister of Finance 2014 (1) SA 442 (CC) @ 460 para [69]

[46] In **Moosa**[24], the Court of Appeal said the following in regard to assessment of validity of a warrant:

> "[7] The approach to be adopted by a court in assessing the validity of warrants has been the subject of many reported decisions, in Southern Africa and elsewhere in the world. In my view, a useful overall summary is provided by the recent South African Supreme Court of Appeal decision in *Powell N O and Others v Van der Merwe N O and Others* 2005 (5) SA 62 (SCA) at 85C-F:
>
> '(a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.
>
> (b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.
>
> (c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in terms in which it is expressed.
>
> (d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorizes.
>
> (e) If a warrant is too general, or if its terms go beyond those the authorizing statute permits, the courts will refuse to recognize it as valid, and it will be set aside.
>
> (f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute'."

Authority of Minister *Tau* to issue the Warrants

[47] The applicants question the authority of Minister *Tau* to issue the warrants and the broad terms in which they are couched. They contend that Minister *Tau* is the Minister in the Prime Minister's office and not the Prime Minister. Absent the Prime Minister, the Deputy Prime Minister could rather have signed on his behalf. The Crown argues to the contrary that Minister *Tau* is designated by the

[24] Moosa and Others v. The Magistrate and Others LAC (2007 -2008) 318

Prime Minister in terms of section 2 of the NSS Act and was, therefore, competent to issue the warrants.

[48] Indeed, the section empowers the Prime Minister to designate a Minister to perform the statutory functions. The word "designate" is defined in the Black's Law Dictionary 6th edition, to mean:

> "to indicate, select, appoint, nominate, or set apart for a purpose or duty; as to designate an officer for a command. To mark out and make known; to point out; to name; indicate".

The Shorter Oxford English Dictionary on Historical Principles 3rd edition defines "designate" to mean:

> "1. To point out, indicate, to specify.
> 2. To point out by a name or description; to name, denominate.
> 3. To appoint, nominate for duty or office; to destine to a purpose or fate."

[49] Since the designation is to perform important functions in the arena of safeguarding the Nation's security, I consider that in context, the relevant meaning of "designate" is to make known by name. This accords with the constitutional imperatives of transparency and accountability. Although the Act is silent on the procedure and formality of designation, for example, whether or not this be done in writing or by gazettement, I consider that designation is too important to be left only to the knowledge of the Prime Minister and the designated Minister. It should, be like appointments of Ministers to performance duties in

offices of other absent Ministers, be gazetted. I conceive of no reason to the contrary.

[50] There is nothing on record that constitutes tangible proof of designation. Neither the Prime Minister nor Minister *Tau* have filed any affidavits to throw light on the contested issue. The court is left to resolve it on the basis of the assertion of the Director General that Minister *Tau* has been designated to issue the warrants. Even then, the Director General does not tell us how and when he came to know about the designation. What is more telling against the Director General's claimed knowledge / awareness of the designation is that the applications for the warrants were addressed to the Prime Minister and not Minister *Tau*.

[51] Minister *Tau* signed the warrants, not in the name of the Prime Minister but in the capacity of "Honourable Minister of Defence, National Security and Environment." The responsibilities of Defence and Environment are not covered by the NSS Act. Their reference in the capacity in which he issued the warrants casts doubt on whether there was a designation. If indeed there was designation, he could only have signed in his capacity as the designated Minister in relation to National Security because his remit would be to administer the NSS Act and no more.

[52] What then becomes of the disputed allegation of existence of a designation? The presumption of regularity (*omnia praesuuntar rite esse acta)* would provide a favourable answer to the Crown if there was admissible evidence that Minister *Tau* had in the past been designated as the Minister of Defence[25]. But neither him, the Prime Minister nor the Director General have said anything of the sort. Absent public notice about the designation, which I consider to be an irregularity, there is no room for invoking the maxim *omnia praesumuntur.*

[53] I find that Minister *Tau* was not designated. It follows that on this ground alone, the issuance of the warrants is invalid, null and void.

Vagueness and overbreadth of the Warrants

[54] The application put before the Minister sought information that fell in the following two categories:

54.1 communications between the applicants and unknown (bar *Pitso*) NSS officers that disclose classified information / material; and

54.2 information implicating the applicants in crimes of murder and money-laundering.

[25] Zeffert and Praizes, The South African Law of Evidence 3rd ed. p.227

***Apropos* Warrant 1**

[55] The application for seizure and search of *Mofomobe's* cellphones was premised on the allegations that:

55.1 he is in possession of classified information / material he received electronically from Intelligence Officer *Pitso*;

55.2 other unknown NSS members, are suspected to have behaved like *Pitso* and the information obtained from the cellphones shall reveal their identities;

55.3 there is information in the cellphones which implicates him in crimes of murder and money-laundering.

[56] The common complaint by the NSS is that *Mofomobe* is in receipt of classified information / material. There is no particularized level of the alleged classified information. No reason is proffered for this omission. The need to mention the level at which the information / material is classified is important in gauging the gravity and seriousness of the damage to national security.

[57] There are three levels of classification of information[26], namely "top secret", "secret" and "confidential". "Top" "secret" is information whose unauthorised disclosure reasonably could be expected to cause **exceptionally grave damage** to national security. "Secret" is information whose unauthorized disclosure reasonably could be expected to cause **serious damage**. "Confidential" is information whose unauthorized disclosure could reasonably be expected to cause **damage**.

[58] The phrase "reasonably could" imports an objective test. This means that in deciphering the nature of the suggested threats / damage to national security, enough should be disclosed by the NSS to enable the Minister and the court on review to test the validity of the allegations.

[59] Executive decisions of what constitutes danger to national security are fact-based and political. This provides room for flexibility necessary for the Minister's approach to determine whether what is said to be leaked constitutes harm to national security. The separation of powers principle dictates that courts should defer to the Minister's decision. However,

[26] Part IV of the National Security Service Regulations, 2000

this is subject to the caveat that there is evidence of a real possibility of harm to national security[27].

[60] In reaching a decision that leaked information / material poses a danger to national security, the Minister has to distinguish "danger to national security" from "danger to the public safety, a public order". The latter are intended to address threats to individuals and maintenance of law and order by the police[28].

[61] The nature and level of classified material is not disclosed in the application for the warrant. Neither is the basis of the allegations of involvement in crimes of murder and money-laundering. It is only in the answering affidavit that the nature and contents of the communications between *Mofomobe* and *Pitso* are disclosed. This has been done by annexing a print-out of WhatsApp messages.

[62] No effort is made in the answering affidavit to direct the court to specific messages that indicate the classified material / information and the nature of damage to national security caused by its disclosure.

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[27] Security of State for the Home Department v. Rehman (AP) [2001] UKHL 47 paras 16,50 & 62; Suresh v. Minister of Citizenship and Immigration of Canada and the Attorney-General of Canada [2002] 1 SCR 3 para 85

[28] Suresh para 84 and Note 12

[63] This is unacceptable for at least two reasons. Firstly, it is legally impermissible for a litigant to throw a mass of annexures to his opponent and to the court and merely invite them to read, discover and identify the issues and their relevance[29]. Some of the WhatsApp messages contain information which is trivia, useless, in the public domain or even has nothing to do with national security.[30] For example, information about debates in the upper house of Parliament (the Senate), exchange pleasantries and suggestions of a liaison. Secondly, in law there is no absolute non-disclosure of Government secrets. Any claim of non-disclosure must be weighed against disclosure in the public interest. The point is well put by Lord Goff of Chieveley in **Guardian Newspapers** where he said[31]:

> "In cases concerned with government secrets, as appears from the judgments of two Chief Justices (Lord Widgery CJ in *A-G v Jonathan Cape Ltd* [1975] 3 ALL ER 484 at 495, [1976] QB 752 at 770 and Mason CJ (then Mason J) in *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 492-493), it is incumbent on the Crown, in order to restrain disclosure of government secrets, not only to show that the information is confidential, but also to show that it is in the public interest that it should not be published. The relevant passages in the above judgments are set out in the speech of my noble and learned friend Lord Keith, and I need not repeat them. The reason for this additional requirement in cases concerned with government secrets appears to be that, although in the case of private citizens there is a public interest that confidential information should as such be protected, in the case of government secrets the mere fact of confidentiality does not alone support such a conclusion, because in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism. From this it follows that, in such cases, there must be demonstrated

[29] Lipschitz and Schwartz NN.O. v. Markowitz 1976 (3) 775 @ 772 H (W.L.D)
[30] Attorney General v. Guardian (No.2) [1988] 3 ALL ER 638 (HL)
[31] Ibid @ 660 b-d

> some other public interest which requires that publication should be restrained."

[64] The NSS was already in possession of the WhatsApp messages when the Director General applied for "Warrant 1". However, for reasons known to him, the messages were not annexed to the application for search and seizure. This, I consider, constitutes a non-disclosure of critical information relevant to the Minister's consideration of whether the messages contained classified information and whether it would be a necessary and proportionate step to seize and search the cellphones. If the NSS was able to get hold of *Pitso's* cellphone, searched it thoroughly and all it could find is what is in the annexed WhatsApp messages, it was a long short for the Director General to suggest, without full disclosure of the so-called credible information, that *Mofomobe* was communicating with other unknown NSS members. The basis of the said "credible information" should have been disclosed to the Minister to put it in the scale in evaluating whether the information sought be searched for was likely to assist substantially in discovering the identities of unknown members.

[65] As regards *Mofomobe's* alleged implication in the crimes of murder and money laundering, no articulation of the basis of these serious allegations is made. The allegation is a conclusion devoid of any details

of the information on which it is reached. Disclosure of the "credible information" to the Minister would not be prejudicial to national security or injurious to public safety as he is the proper statutory authority to whom the NSS is accountable. Without its disclosure, the Minister is left to speculate about its source and credibility. There is a vast middle ground between disclosing all and disclosing nothing[32].

[66] In my respectful opinion, in order for the Minister to properly discharge his functions, the Director General must take him in his confidence by disclosing all relevant and necessary details and sources of the "credible information" in his possession. This will enable the Minister to determine whether the information sought from the cellphones is indeed classified and likely to be of substantial value in assisting the NSS to discharge its functions and also to be satisfied that there are no other reasonable means of obtaining it.

[67] Another fact that I consider should have been canvassed in the applications and which is relevant for consideration by the Minister, is the linkage between the NSS's statutory functions and investigation of criminal offences of murder and money laundering. The Director

[32] Maseko v. Attorney-General LAC (1990-94) 13 @35 F-H

General says the linkage is the spate of "rampant killings in the country which threaten not only the national security and is also necessary for public safety and prevention of public disorder or crimes[33]". This linkage is tenuous and trenches on the constitutional mandate of the police. Nothing tangible is shown that the murder of one person and money laundering threaten national security.

[68] Mr *Moshoeshoe* for the Crown submitted that it is within the competence of the NSS to investigate crimes of murder and money laundering and for that reason, the NSS could apply for a warrant to obtain information in that regard. For this proposition, reliance was reposed in section 36 which reads as follows:

> "The service, Lesotho Defence Force and Lesotho Police Force shall, at all times, maintain an effective liaison with the objective of fostering, preserving and strengthening national security."

[69] The plain reading of the section is that it enjoins the three institutions to cooperate and liaise in order to strengthen national security. But this is not a license for them to transgress on each other's constitutionally and statutorily delineated mandates. The section empowers them to share information and intelligence among them with the view to enabling each to competently do what it has to do. There are reporting obligations of

[33] Answering affidavit para 9.10

criminal offences to the police by the Army and the NSS. If the police have a reasonable suspicion that what is reported constitutes a criminal offence, they should trigger investigations.

***Apropos* Warrant 2**

[70] With regard to the application for "Warrant 2", the Director General stated that there was "credible information" which:

70.1 implicates *Shale* in the murder of one media person;

70.2 that he is suspected of having access to classified information with the help of some unknown NSS personnel; and

70.3 the information obtained from the cellphones will assist in identifying the suspected NSS personnel.

[71] All these are bald assertions for seizing the cellphones. The grounds are shaky and speculative. Firstly, there is no disclosure of the level of the classified information and the nature of damage to national security. Secondly, nothing is said about the grounds of the suspicion that *Shale* has access to classified information with the help of NSS personnel. Thirdly, the so-called credible information implicating him in the crime of murder is kept under wraps.

[72] All these are pointers to one thing and one thing only, that the application sought permission to trawl through the cellphones to see whether there something is found that may link him to all the suspicions of the Director General. Without disclosure of the "credible information" possessed by the Director General, there would be no way to test its credibility other than by accepting the Director's *ipse dixit*.

[73] As regards the investigation of murder, the NSS's application was an overreach of its statutory functions of protecting national security. Murder is a crime whose investigation is the business of the Police Service.

III DISPOSITION

[74] To summarise:

[75] The impugned warrants to seize and search the applicants' cellphones were applied for on the basis that:

(a) the applicants were suspected to be in possession of classified material / information supplied to them by officers of the National Security Service;

(b) *Mofomobe* is suspected to be involved in crimes of murder and money laundering;

(c) *Shale* is suspected to be involved in the crime of murder.

[76] Section 26 which empowers the Minister to issue the warrants but requires of him to evaluate the likelihood of the information sought in the applicants' cellphones being of substantial value in assisting the NSS to find the allegedly leaked classified material / information and involvement of the applicants in crimes of murder and money-laundering.

[77] After evaluating the likelihood of the sought information from the applicants' cellphones in assisting the investigation of the alleged crimes, the Minister had to be satisfied that there were no other reasonable means open to the NSS to obtain the information sought from the cellphones.

[78] In its applications for the warrants, the NSS made bald statements that there were no other means available to obtain the information and find the officers responsible for leaking classified information / material. The question that sticks out like a sore thumb and ought to have been answered is why the NSS could not resort to the same means it used in revealing the identity of *Pitso* could not be used to search for the identities of the other suspected members.

[79] The Minister issued the warrants to seize and search the applicants' cellphones and / or those found in their possession and make copies of any information contained therein "which has a bearing on the functions of the Service." The referenced functions of the NSS are not specified in the warrants.

[80] The authority of Minister *Tau* to issue the warrants was challenged on the basis that he is not the Prime Minister or designated by him to perform the statutory function laid down in section 26. Neither the Prime Minister nor Minister *Tau* filed any affidavits in these proceedings. It was left to the Director General of the NSS to pick up the cudgels on their behalf.

[81] The judgments holds as follows:

1. Section 26 of the NSS Act authorises issuance of an executive warrants to interfere with the applicants' rights to informational privacy and freedom from arbitrary seizure of their cellphones.
2. The procedure outlined therein requires that the applications for warrants and their issuance to meet the thresholds of information sought being of substantial value in the investigation of the

alleged crimes and there being no other means of obtaining the information.

3. There are no safeguards to guard against abuse of the power to issue warrants. This being a process presided over by a Minister without external independent supervision, the procedure of issuance of warrants under section 26(2) lacks the necessary safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse. For this reason the section 26(2) procedure is declared unconstitutional.

4. Minister *Tau* was not designated to perform the section 26 statutory functions. He, therefore, lacked authority to issue the warrants.

5. The warrants did not tell he applicants what offences they are suspected to have committed as to authorise seizure and search of their cellphones. They only got to know them when the Crown filed its opposition to their applications for relief in court. It emerged from the Crown's papers that they are suspects in crimes of possession of classified information, murder and money-laundering.

6. The crimes of murder and money-laundering are not national security offences. Their investigation is outside the constitutional mandate of the NSS. Furthermore, seizure and search of property

of persons suspected of committing these offences is by judicially authorized warrants[34].

7. The crime of possession of classified material / information by persons who are not members of NSS is found nowhere in the NSS Act. What is found under section 39(b) is persuading a member to omit to carry out his duty or to do any act in conflict with his duty. This is understandably so because unlike members, non-members have no lifelong secrecy obligations.

Order

[82] In the result, the following orders are made:

Ad CC No.0007/2023

1. The application is granted.
2. It is declared that:
   (a) Section 26(2) of the **National Security Service Act No. 11 of 1998** is unconstitutional;
   (b) The warrant to seize and search the applicant's cellphones and / or those in his possession violates his right to privacy and freedom from arbitrary seizure of property and is hereby declared unconstitutional;

[34] Section 46 of the Criminal Procedure and Evidence Act No.7 of 1981; Part IV, Division 4 of the Money Laundering and Proceeds of Crime Act No. 4 of 2008

(c) There is no order of costs.

Ad CC No.0009/2023

1. The application is granted with costs;

2. It is declared that:

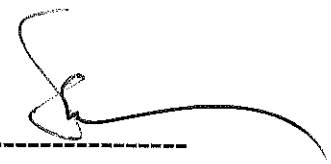
   (a) Section 26(2) of the **National Security Service Act No. 11 of 1998** is unconstitutional;

   (b) The warrant to seize and search the applicant's cellphones and / or those in his possession violates his right to privacy and freedom from arbitrary seizure of property and is hereby declared unconstitutional;

3. The Director General of the National Security Service is directed:

   (a) to return forthwith the applicant's cellphones; and

   (b) to delete all the information copied from the cellphones.



S. P. SAKOANE
CHIEF JUSTICE

I agree

F. M. KHABO
JUDGE

I agree

M. KOPO
JUDGE

For Applicant in CC: 0007/23: Mr. C.J. *Lephuthing*

For Applicant in CC: 0009/23: Mr. T. *Lesupi*

For the Crown: Mr L.P. *Moshoeshoe*