IN THE LESOTHO COURT OF APPEAL

In the matter between:

WILLIAM LEMENA	First Appellant
MESHACK PETLANE	Second Appellant
SUSAN XOKELO	Third Appellant
'MAKOU CHERE	Fouth Appellant
MOTLATSI DUPLISI	Fifth Appellant
THOLOANA	Sixth Appellant
ELIZABETH SENGOAI	Seventh Appellant
COLLIARD PALI	Eighth Appellant
NTHELANE	Ninth Appellant
TSELISO MOKHETHI	Tenth Appellant
'MATSEKO RAMAOTO	Eleventh Appellant
MATEKANE	Twelfth Appellant

and

I. Nurcombe (in his capacity as headmaster of Lesotho High School)	First Respondent
Board of Governors of Lesotho High School	Second Respondent

HELD AT MASERU

CORAM:

SCHUTZ P.
MAHOMED J.A.
WENTZEL J.A.

JUDGMENT

WENTZEL, J. A.

On the 4th May 1984 the first respondent, the headmaster of the Lesotho High School (to whom I shall refer as (the headmaster) expelled from that school twelve boys (in some cases young men) whose guardians are the twelve appellants. It was against that expulsion that an application was brought in the High Court. The relief sought was the setting aside of the expulsions and the re-instatement of the scholars.

/Cotran C.J. ...

Cotran C. J. dismissed the application, and it is against that order that this appeal is brought. For the sake of identification I shall refer to the latter as No.1, No.2, and so on (in a non-pejorative sense).

The expulsions arose out of an incident at the headmaster's house on 3rd May, 1984. According to him, he and his wife were in the house when she called out "they are trying to break in." He then saw persons outside the kitchen door whose faces were camouflaged by balaclavas or "O.K. Bazaars bags. Because of this he could not recognise any of the persons. Next he saw them pulling at the door handle, and kicking and banging the door in an effort to break in. Some also banged on a window. He says that they failed to open the door only because his wife, with rare presence of mind, secured the bolts on it. As to the atmosphere prevailing at the time, it is interesting to observe that three of the four youths who admit to being present at the time (Nos1, 3 and 11) state that the headmaster's wife screamed, a fact that he himself does not mention. The youths then departed.

Of the twelve youths only eight have made affidavits. Those who have not are nos 6,9,10 and 12. Accordingly those four have put forward no version of the events of the day or of the following day, nor is their case particularly advanced by those who did make affidavits, as the general pattern of the last-mentioned is that they speak of the envolvement of the individual deponents only. Of the eight who did make affidavits, three now admit to being at the house (namely nos 1, 3 and 11). But according to the headmaster, when he was making his subsequent enquiries, one of them (no.1) confessed not only to his being at the house,

/but also ....

but also to the purpose of the band being to assault him. He adds that a similar confession was made by another who has not made an affidavit, namely No.9.

The three who admit to being at the house put a bland aspect on the whole incident. According to them the band went in order to enquire of the headmaster why one Thabo Mapenyane had been expelled and to request his re-instatement. None of them is forthcoming as to who "the several other boys" in the band were. The headmaster stigmatizes this version as a complete fabrication and states that Thabo never was expelled and that he still is a member of the school, although he was suspended for nearly two weeks. In his affidavit No.1 retracts from his full confession made to the headmaster, and states that the headmster's statement that he confessed to an intention to assault (a confession made in the presence of No.1's own father, who in his affidavit essentially confirms it) arose out of a "misunderstanding."

No replying affidavits whatever were filed, so that we have no version at all from the youths on details such as whether the members of the band were masked.

The thrust of the case made in the application is not easy to perceive. Apart from a reference to breach of contract, the founding affidavit refers to the expulsions simply as being "wrongful, unlawful and malicious," and to the punishment as being excessive.

Before the High Court and again in this Court the case was rather refined into one based upon the audi alteram partem doctrine. Although elements of such a case are to be found in some of the affidavits it is nowhere clearly

/developed ...

developed, and, if the affidavits are to be believed, different procedures were at times adopted in the various individual interrogations. I pass over No. 1 as being sui generis, save to state that his full confession arose out of his own father's threat to thrash him if he did not tell the truth. I shall refer briefly to the complaints as to procedures raised by the various deponents. No.2 states that he was told that some of his friends had implicated him, but that his request that he be allowed to confront them was refused. No.3 concedes that he was told that he stood in danger of expulsion. He was told that two boys had already implicated him (presumably of an intention to assault as he admits being at the house). No.4 states that he was told that he was implicated in an intended assault by No.1 and No.9. He also complains of not being allowed a confrontation. No.5 concedes that he was told that the charge was intended assault, and that he was also told that the basis of it was what had been said by other persons present. His request for a confrontation was also refused. No.7 complains that no charge of intended assault was levelled against him, although he was called upon to explain his whereabouts on the afternoon of the day before. No.8, like others, concedes that the vice-headmaster was present and states that the latter conducted the interrogation. He put forward an alibi, upon which he was told that he was lying. No.11 (admittedly present) was asked why he had gone to the headmaster's house, upon which he put forward the "Thabo" story. That is essentially what was said about procedures.

One complaint of several of the youths, as emerges from the above, is a refusal of a confrontation with their accusers. Another complaint, in varying degrees expressed

/by some ....

by some of them, is the lack of a precise charge. But none of them says that he did not know why he had been summoned, or that he did not realize that the matter was serious.

In this Court, Mr. Tsotsi, appearing for the appellant, based himself firmly on the principle of audi alteram partem and urged upon us that the 1st respondent had failed to observe the requirements of natural justice in deciding to expel the boys. Mr. Tsotsi was able to bring to bear his one time experience as a headmster and he put his submissions moderately and persuasively.

In the Court of Appeal, Mr. Tampi, for the respondents, rightly in my opinion, conceded that audi alterem partem had to be observed in a matter of this kind and that the Teaching Service Regulations of 1974 promulgated pursuant to Section 21 of the Education Order of 1971 (and especially Section 13 (10)) did not provide to the contrary.

Indeed the policy of this Kingdom in the Education Order of 1971 is to secure the advancement through education of every child in the Kingdom (section 3). The decision to expel a child is a very grave one; it may irreparably mar his future. In my opinion fairness and a hearing in accord with natural justice is self-evidently to be expected.

Van Wyk N.O. and Another vs V.D. Merwe 1957(1) S.A. 181 (AD). Naido vs Director of Indian Education 1982 (4) S.A. 267 (N).

That having been said, I must now consider what natural justice requires in the context of the school situation as it arose in this case.

/What is ...

What is natural justice? It is the simple rule of fair play, broadly it implies a due enquiry with notice given of the complaint being investigated with a decision honestly arrived at after fairly considering all the relevant facts and especially the response of the person accused to the allegations of those who accuse him. (Lesson vs General Medical Council (1889) 43 C.L.D. 366 C.A.).

No hard and fast rules can be laid down. The requirement is judged in the circumstances of a particular case bearing in mind the nature of the enquiry, the subject matter that is being dealt with and so forth.

Russell vs Duke of norfolk 1949(1) AER 109 at 118

Against the background as I have described it, with the history of violence and ill-discipline which had infected the school in the context of a disguised posse of hooligans seeking to invade the headmasters' home, what kind of enquiry was appropriate to the situation.

The school situation is not an arms-length one as between the children and the teachers. It is more akin to a family with its closeness of ties and intimacy of knowledge of what is going on.

The headmaster knew the boys. He was more than aware of their records, academic and behavioural. News of the incident at the headmaster's home must have spread through the school and become the subject of intense discussion. No one boy but must have known of the possible consequences of involvement. The proposition that any boy came to the headmaster ignorant of what was at issue is fanciful. Each must have expected a confrontation concerning his part. The

/headmaster was ...

headmaster was entitled to bring to bear his knowledge of those who gave any information and his assessment of its reliability of the denials offered by those who did deny involvement.

There was an emergency to be met. The headmaster rightly felt that all semblance of discipline would have been lost if he had not acted. The boys were simply not entitled to expect a full scale hearing in the formal sense,, and in the atmosphere that then prevailed to be wary of revealing the identities of those who implicated others is quite understandable.

I have said that to expel or even to suspend a child is a serious matter: It may gravely affect the child's future, I have that consideration very much in mind in considering this matter. It must, however, be appreciated that the person with the power to expel and the duty to exercise it is the headmaster. The Court will only act to interfere with his decision in a case in which the headmaster's decision cannot stand because he has been manifestly unfair in failing or refusing to hear the scholars answer to the complaint against him. That simply did not happen in this case.

One has a natural distaste for relying on information from those who give a report but whose names are withheld. One is conscious of false accusations made to avoid the consequences of the accused's own guilt. Where expulsion is considered, ordinarily the parents should be advised and invited to make their representations. Suspension pending such representations, no doubt, is the normal procedure and expulsion only then follows after deliberation and preferably when the heat of the incident has abated.

/These are all ...

"These are all appealing considerations but I remind myself that this Court is not the decision-maker nor yet is it the principal of the Lesotho High School. The consideration I must apply is not what the Court might or might not have done had it had that responsibility. The question is whether it has been shown that the 1st Respondent acted in a manner which calls for us to intervene."

I am not so persuaded.

Accordingly the appeal fails with costs.

Delivered on this day of January, 1985 at MASERU.

(Sgd) .....
E. WENTZEL
Judge of Appeal

I agree (Sgd) .....
I. MAHOMED
Judge of Appeal

I agree (Sgd) .....
W. P. SCHUTZ
President