CIV/APN/105/89

IN THE HIGH COURT OF LESOTHO

In the Application of :

'MALERATO LEAH RAMAKHULA Applicant

and

THE NATIONAL UNIVERSITY OF LESOTHO Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 7th day of July, 1989.

The Respondent herein has raised points in limine in an application wherein the applicant obtained a rule nisi framed in the following terms:

"1. A Rule nisi do hereby issue returnable on the 12th day of May, 1989 at 9.30 a.m., calling upon the Respondent to show cause (if any) why :-

(a) The Respondent herein shall not be restrained from preventing Applicant from sitting for her end of year examinations beginning on the 3rd May, 1989, pending the finalisation of this application, and or an appeal against the decision of Respondent's Senate in case No.89/2 noted by Applicant forthwith;

(b) The Respondent herein shall not be restrained from executing the decision to rusticate applicant from the University pending the finalisation

2/ of this .....

of this application and or an appeal in case No. 89/2;

(c) The proceedings and recommendations of Respondant's Discipline committee of Senate dated 20th April, 1989, shall not be reviewed and set aside;

(d) The decision of Senate in case No. 89/2 shall not be reviewed and set aside;

(e) The Respondent's Discipline Committee of Senate and Senate shall not be directed to forward within seven days hereof to the above Honourable Court, a record of their proceedings in case No.89/2

(f) This Honourable court shall not dispense with the forms and service provided for in the Rules;

(g) The applicant shall not be granted such further and or alternative relief as this Honourable Court may deem fit;

(h) The Respondent shall not be directed to pay costs hereof.

2. That prayers 1(a), (b), operate with immediate effect as an interim Order subject to final order of court; if the court makes a final order against the applicant, then the University shall be free to disregard any paper sat by the applicant in the forthcoming examination."

The Respondent intimated intention to oppose confirmation of the Rule and affidavits were duly filed by the parties.

Very briefly, the facts disclosed by the affidavits are that during the academic year 1988/89 the applicant was a third year degree student at the National University of Lesotho.

3/ On the .....

On the afternoon of 12th December, 1988 she and other students assembled in a hall to write an examination paper on English literature, commonly known as E.301.

Whilst he was walking around the desks to check and ensure that no candidate had in his/her possession unnecessary materials that might lead to copying, the invigilator noticed a piece of paper on the applicant's desk. He took the piece of paper and found that notes on one of the set works which was the subject matter of the examination paper were scribbled on it. The invigilator seized the piece of paper. It was subsequently handed over to the chief invigilator and the Assistant Registrar (Academic) who reported the incident to Senate.

At its meeting of 25th January, 1989 Senate decided that the matter be referred to its Discipline Committee for action. On 21st February, 1989 the applicant was accordingly served with notice to appear before the Discipline Committee on 27th February, 1989 and answer a charge, the allegations of which were to the effect that she had, in contravention of the provisions of rule 4 of the Rules for Examination Candidates read with regulation 1.3 on misconduct, brought into the examination hall notes calculated to assist and/or enable her in answering a particular question in course E.301.

It is significant to observe that although rule 4 of the Rules for Examination Candidates was annexed to the founding affidavit (annexure "D") regulation 1.3 was not. Rule 4 of the Rules for Examination Candiates reads, in part:

4/ "No candidate.....

> "NO candidate may bring into the examination hall any papers, books, notes or equipment other than what is permitted i.e. pens, pencils, rulers, calculators."

It is common cause that Mrs. Molapo, one of the adjudictors in the Discipline Committee that adjudicated over the applicant's case, is also a member of the Senate and was present in the meeting of 25th January, 1989 when Senate resolved that the case be referred to the Discipline Committee for action. According to her, the Applicant was informed by one Kananelo Mosito, the President of S.R.C. and, by virtue thereof, a member of the Senate, that before it was referred to the Discipline Committee her case had been thoroughly discussed at the meeting of 25th January, 1989. By reason of her presence at the meeting Mrs. Molapo had, therefore,foreknowledge of the facts of the case. In the contention of the applicant the inclusion of Mrs. Molapo in the panel of of ajudicators rendered the whole proceedings unfair and prejudicial to her case.

The Respondent averred that when on 25th January, 1989, the applicant's case was reported at the meeting Senate merely referred it to the Discipline Committee for action. The Respondent denied, therefore, that the case was thoroughly discussed at the Senate meeting of 25th January, 1989 and dismissed as baseless the applicant's contention that the inclusion of Mrs. Molapo in the panel of ajudicators vitiated the proceedings on the ground that the case had been thoroughly discussed in her presence and she, therefore, had foreknwledge of the facts. It is worth noting that Kananelo Mosito who allegedly informed

5/ applicant .....

applicant that her case had been thoroughly discussed in the presence of Mrs. Molapo at the Senate meeting of 25th January, 1989 filed no affidavit to that effect.

It is further common cause that on 27th February, 1989 the applicant was duly charged before the Discipline Committee which heard the case and, on 20th April, 1989 found that she had, indeed, contravened the rules against which she stood charged. At its meeting of 27th April, 1989 and after a long debate, Senate, therefore, approved the Discipline Committee's recommendations viz. that the applicant be rusticated forthwith until the end of the next academic year, 1989/90 (May), she re-apply for readmission in March, 1990 and resume her studies in August, 1990. The applicant was apparently unhappy with the decision taken against her and consequently approached this court for an order as aforementioned.

The points that the Respondent has raised in limine are firstly that the applicant has failed to show that unless the application was made ex-parte as against on notice on an urgent basis the Respondent University would frustrate the course of justice. Secondly that the applicant has failed to disclose all the facts that would have influenced the court in deciding whether or not to grant the interim order in an application of this nature. She has, for instance, failed to disclose, in her founding affidavit, firstly that she too was represented before the Discipline Committee by Kananelo Mosito, the President of S.R.C., who by virtue thereof was also a member of the Senate

6/ and secondly .....

and secondly that she failed to disclose that she had admitted to the Assistant Registrar (Academic) that she had, indeed, breached rule 4 of the Rules for Examination Candidates.

As regards the first point in limine which suggests that the applicant ought to have approached this court on notice on an urgent basis rather than ex-parte I fail to see the real significance of this. It seems to me either way the applicant was still going to obtain the order without knowledge of the Respondent. In any event the important thing is that in her application the applicant has asked the court to dispense with the forms and service provided for in the High Court Rules 1980, she has shown the urgency of the matter in that the recommendations made against her by the Discipline Committee were approved by Senate only on 27th April, 1989 when she was due to start writing the end of year examinations early in May, 1989 and her application was accompanied by a certificate of urgency. This granted, it must be accepted that the application complied with the provisions of rule 8(22) of the High Court Rules above, and the applicant was, therefore, entitled to approach this court as she did, on notice on an urgent basis.

Coming to the first leg of the second point in limine viz. that applicant failed to disclose that she was represented before the Discipline Committee by Kananelo Mosito also a member of the Senate, I am not convinced that the disclosure or otherwise of this fact would have had a bearing on whether or not to grant the interim order obtained by the applicant for the simple reason that it is not really disputed that in term of the

7/ provisions .....

provisions of regulation 4.3.3 (annexure "A" to the founding affidavit) a member of the University is empowered to assist a student in the presentation of his/her case before the Discipline Committee. The regulation reads :

> "4.3.3 The student shall be entitled to be present at the hearing and present his own case or seek the assistance of a member of the University who is prepared to assist him."
>
> (My underlining)

Assuming the correctness of the averments that Kananelo Mosito is the President of S.R.C. and, therefore, a member of the Senate it must be accept that he is a member of the University. In terms of the provisions of regulation 4.3.3 above, he was,therefore, entitled to assist the applicant in the presentation of her case before the Discipline Committee.

I must, however, hasten to point out that it seems to be against public policy that Kananelo Mosito, a member of the Senate, undertook to represent, before the Discipline Committee of the Senate, the applicant who was clearly charged with contravention of regulations made by the Senate itself. One would have expected him to protect enforcement, rather than defend violation, of the regulations made by the Senate of which he was admittedly a member.

I have underscored the words "a member of the University" in the above cited regulation 4.3.3 to indicate my view that there is, perhaps, a need to qualify these words in that a student shall seek the assistance of a University member "who is not also a member of the Senate". Failure to do so is bound to result in this undesirable situation whereby a member of the

8/ Senate appears .....

Senate appears before the Discipline Committee of the Senate to defend violation of regulations made by the Senate itself.

It is worth mentioning that in support of the second leg of the second point in limine viz. that the applicant failed to disclose that she had admitted to the Assistant Registrar (Academic) that she had, indeed, breached rule 4 of the Rules for Examination Candidates the Respondent attached to the answering affidavit annexure "NUL 1", a letter of 13th December, 1988 addressed to the Assistant Registrar (Academic) by the applicant herself. In that letter the applicant clearly stated, inter alia:

> "..... It is true the paper was found on my desk but I have not used it at all, my answer sheet will show the questions that I answered which are questions 5, 3 and 7.
>
> For these reasons, I kindly make a plea before your office that I really admit that the paper was found illegally in my possession although it was brought by mistake."

In her replying affidavit, the applicant contended that annexure "NUL 1" ought to be expunged from the answering affidavit because it did not form part of the record in the proceedings before the Discipline Committee. I am unable to agree with this contention. Litigants who elect to approach the court by way of ex-parte application must take the court into their confidence and make full disclosure of all material facts which may affect the granting or otherwise of an ex-parte order. The fact that

9/ applicant had .....

applicant had admitted that she had, indeed,brought into the examination hall unauthorised material, be it deliberately or negligently, was, in the light of the provisions of rule 4 of the Rules for Examination Candidates, very important for the granting or otherwise of the ex-parte order. In her founding affidavit the applicant failed to disclose this important fact and cannot, therefore, be heard to say she had observed the utmost good faith as the law requires in applications of this nature.

That being so, I am of the opinion that the point in limine, viz. that applicant failed to disclose that she had admitted to the Assistant Registrar (Academic) that she had, indeed, brought unauthorised material into the examination hall and did not, therefore, take the court into her full confidence, was well taken.

In exercising the discretion whether or not to discharge the rule (i.e. dismiss the application) for non-disclosure of this material fact, I take into consideration that in the prayers contained in her notice of motion the applicant clearly seeks, from this court, an order for stay of execution of the Discipline Committee's recommendations pending the appeal she had allegedly noted against, and/or a review of, the recommendations made by the Discipline Committee of the Senate. In my view the applicant must either appeal or ask for review. She cannot be allowed to appeal and, at the same time, ask for a review.

As regards the review of the recommendations made by the Discipline Committee of the Senate it is important to note that rule 4.3.6 of annexure "A" to the founding affidavit provides,

10/ inter alia, ...

inter alia, that save as in rule 4.3.8 the decisions of the Discipline Committee shall be final. Rule 4.3.8 reads :

> "4.3.8. For the purpose of considering recommendations under 4.3.7, the Senate may establish a Review Committee consisting of not more than five members one of whom shall be a member of the Law Department and another a student representative in Senate (but none of whom shall be members of the Discipline Committee) which may be empowered to give decisions in its name. Notwithstanding any right of appeal to council under 4.4.1 below such decisions of Senate or Review Committee of Senate shall be given immediate effect."
>
> (My underlining)

It is obvious from the words I have underlined in the above cited rule 4.3.8 that the Senate has a discretion to establish a Review Committee for the purpose of considering the recommendations made by the Discipline Committee. If in the discretion of the Senate, the need arose for any such review it would, therefore, be the prerogative, not of the High Court, but the Review Committee established in terms of the provisions of Rule 4.3.8 by the Senate.

In any event, there can be no doubt, on the papers before me, that what the applicant really wants in this proceedings is a stay of execution of the Recommendations made by the Discipline Committee pending the appeal she has allegedly noted. It is, however, significant to observe that in terms of the provisions of rule 4.4.1 of annexure "A" to the founding affidavit a student

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has a right of appeal to the University council (not the High Court) only in the event of a dismissal by Senate. Rule 4.4.1 reads, in part:

> "4.4.1. In any case in which a student is dismissed by Senate, he shall be provided with copies of the summaries of evidence, etc., listed in 4.3.8 above and of the Senate minutes in question, and he may appeal to council...."

In the present case the applicant was merely rusticated and not dismissed by Senate. She cannot, therefore, properly lodge an appeal against the decision of the Senate.

In the premises, I am of the opinion that this application ought not to succeed and the rule is accordingly discharged with costs.

B.K. MOLAI
JUDGE.

7th July, 1989.

For Applicant : Mr. Mohau.
For Respondent : Mr. Matsau.