

IN THE HIGH COURT OF LESOTHO

In the matter between:-

NATIONAL UNIVERSITY OF LESOTHO STUDENTS' UNION Applicant

and

NATIONAL UNIVERSITY OF LESOTHO 1st Respondent
COMMISSIONER OF POLICE 2nd Respondent
ATTORNEY GENERAL 3rd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 20th day of April, 1990.

This is an ex parte application for an interdict in which the applicant seeks an order in the following terms:

1. That a Rule Nisi do hereby issue calling upon Respondents to show cause, if any why:-
 - (a) First Respondent shall not be directed to forthwith allow the students of the University to have access forthwith to their halls of residence, Applicant's offices, laundry, the library and laboratories in order that students may prepare for the examinations at the end of the academic year;

- (b) First Respondent shall not be directed forthwith to allow the students of the University to have possession of their personal belongings;
 - (c) Directing second Respondent and/or officers subordinate to desist forthwith from expelling students from the Roma Campus of the University or in any way interfering with the students of the University in carrying out their normal duties and/or functions as students of the University;
 - (d) Declaring the closure of the University null and void;
 - (e) Declaring the requirement of Senate and/or Council that the student Union apologises to the Vice-Chancellor, Senate and/or Council null and void;
 - (f) Directing First Respondent to treat the petition of the students as a matter requiring urgent attention;
 - (g) Directing First Respondent to allow the students if they so wish, to write the examination of the end of the academic year;
 - (h) Directing Respondents herein to pay costs of the application;
 - (i) Granting Applicant such further and/or alternative relief.
2. That prayers 1(a), (b) and (c) operate with immediate effect as temporary interdicts.

On the 6th March, 1990 my brother Cullinan, C.J. granted a Rule Nisi as prayed and prayers 1. (a), (b) and (c) were to operate with immediate effect. The students were granted access to the halls of residence and the laundry. Applicant was granted access to its offices.

On the extended return day the Court was informed that the second respondent and the third respondent were not opposing the matter and were prepared to abide by the order of the Court. Mr. Phoko, for the applicant, submitted that the Rule Nisi be confirmed with costs against the first respondent. Mr. Sello, for the first respondent, submitted that the Rule Nisi be discharged with costs.

The material facts of this case are not in dispute and they are as follows:

On the 16th March, 1990 the Council of the first respondent approved the new fee structure. On the 15th March, 1990 the Vice-Chancellor of the first respondent was informed by the chairperson of the applicant pursuant to Regulation 1.4.2 of the Students' Handbook that students would go on demonstration on the 16th March to register their dissatisfaction with the new fee structure.

In his opposing affidavit the Vice-Chancellor deposes that the chairperson informed him telephonically at 9.00 a.m. on the 16th March and at that time the demonstration was already in progress. Thus there is a dispute of fact on this point but I am of the opinion that there is no need for me to make a decision on this point because it is a minor one.

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On the 16th March the students carried out a demonstration and boycotted classes. On the same day the students held a meeting at which it was agreed that the 19th March was to be set aside as a day on which a petition regarding the new fee structure was to be signed by the students and was to be submitted to the Registrar of the first respondent at 2.00 p.m. This was done and the demonstration and boycott of classes continued.

In their petition (Annexure "A2" to the founding affidavit) the students set out in detail their grievances and authorised the S.R.C. to present a paper to Council in June for Council to reconsider its decision on the new fee structure.

On the 19th March the Senate met and decided that the students must return to classes by 2.00 p.m. and failing which they should leave the campus by 6.00 p.m. of the same day. Another circular memorandum was issued by the Senate on the 19th March to the effect that:

"in the interests of ensuring that the work of the University does not suffer and having further noted that the students' representatives in Senate had given assurances that the students would resume classes on the 20th March, 1990, decided as follows:

- (a) to unequivocally condemn the students' stay-away from classes on Friday 16th and Monday 19th, March, 1990, without the authorization of the Senate;
- (b) that it can no longer countenance the persistence with which the authority of Senate is undermined by the students' behaviour;

Further, Senate noted that the representatives of the Students' Union in Senate appreciated the strong position taken by the Senate to the effect that the Students' Union owe the Senate an apology for their act of absenting themselves from lectures without authority. In that regard, Senate expects a show of remorse and an expression of regret from the Students' Union without undue delay.

In the light of the above, Senate therefore expects students to resume classes on schedule, tomorrow, Tuesday, 20th March 1990.

Senate, however, reserves the right to review the situation in the light of further developments." (See Annexure "A4").

The classes did resume on the 20th March, 1990.

On the 21st March the applicant wrote a letter to the Chairman of Council informing him that the students at Roma campus had resolved that a meeting of Council be held within ten days of the date of the letter and that it was not the intention of the students to undermine the authority of Council (See Annexure "A5").

The Chairman of Council replied by his letter dated the 25th March and informed the students that for various reasons it would not be possible to convene a meeting of Council at that time. He promised that the grievances of the students would be considered at the June meeting of the Council.

On the 23rd March, 1990 students resolved that until Council met to consider the petition students at Roma campus should not attend classes and that the S.R.C. should send a delagation to meet the Minister of Education, and that Council should sit immediately to consider their petition.

On the 25th March a delegation of students met the Acting Minister of Education who informed them that the Government was considering the matter and that the students must resume classes. The students subsequently resolved that the Acting Minister of Education had not taken the matter seriously and resolved to continue the boycott.

On the 3rd April, 1990 the Council met and passed a resolution which reads as follows:-

"Council received the following Senate resolution of 2nd April, 1990 on the Students boycott of classes;

"That this Senate noting:

1. The continuation of the students' boycott of classes despite;
 - (a) repeated calls from the Senate, Council, and Government that their grievances are being looked into;and further noting;
2. The manner in which the Students' Union has thus far consistently disregarded the authority of the Senate and the Vice-Chancellor;
3. That the present situation of uncertainty renders it impossible for the University to carry out its functions.

Therefore, with great regret, resolves to recommend to the Council that the University be closed until further notice."

Council having considered the Resolution of the Senate:

1. noted with great concern the Students Union's disregard for the authority of the Senate, the Vice-Chancellor, and the Government through their refusal to resume classes despite assurances that their grievances will be considered;
2. condemns in very strong terms the attitudes of the Students' Union and objects to the tone of the correspondence emanating from their sources;
3. resolves and directs:
 - 3.1 that students resume classes unconditionally, tomorrow, Wednesday 4th April, 1990 at 8.00 a.m.;
 - 3.2 that the Students' Union apologises, in writing, to the Senate and Council for their disregard for the authority of the Senate, Vice-Chancellor, and the Council;
 - 3.3. that in the event any of the directives outlined in the paragraphs above is not complied with, the University should close by 12.00 noon on Wednesday, 4th April, 1990.
4. Decided that the Students' Union petition on fees will be considered at the next scheduled meeting of Council in June, 1990."

As a result of the Council resolution the Vice-Chancellor issued a memorandum addressed to all students of the University to the effect that the University is closed until further notice and that all students must leave the University immediately.

Mr. Pheko submitted that the first respondent was guilty of a very serious breach of one of the most important principles of the rules of natural justice in that the students were not given a chance to be heard before they were punished. He also criticized the punishment of closing the University as unfair and unjust because it is a collective punishment which included all the

students of the University despite the fact that not all the students signed the . petition or took part in the demonstration. The closure also included other campuses of the University despite the fact that the students at those other campuses were not involved in the boycott of classes.

In his opposing affidavit the Vice-Chancellor denies that the other campuses were closed (See paragraph 7 (b) of his affidavit). There is a dispute of fact on this point and it is impossible for the Court to resolve it on papers. The applicant has not even seen it proper to get supporting affidavits from some students at the other campuses.

Regarding the allegation that not all students were willing to go according to the resolution of the applicant and that some students who were willing to continue with classes who have been punished by the closure of the University through no fault of theirs, the Vice-Chancellor replies as follows:

"The deponent could hardly expect this Honourable Court to enquire into the state of mind of each individual student nor, indeed, could the first respondent be expected to do so."

There is substance in what the Vice-Chancellor is saying because there is no evidence that any students attended classes or attempted to do so and that they were intimidated not to do so. Not a single student attended classes ever since the start of the boycott. No student has intimated to the University authorities

that her or she is willing to attend classes and that he or she is unable to do so through intimidation by other students. How was the first respondent expected to identify the students who were willing to resume attending classes?

The Senate made several appeals to resume classes but no student attempted to comply with that appeal. The behaviour of the students indicated that they were all not prepared to attend classes before their demand was met. In the Students' Representative Council of the University of Botswana v. The University of Botswana, Appeal No. CAPP 1/89 (unreported) (to which I shall refer as The U.B. case) the Council had found as a fact that not all students were at fault since a small number were known to have continued attending lectures whilst others were known to have left the University for fear of alleged intimidation by others. The closure of the University by the Council punished those few students who were continuing to attend lectures and those who had left the campus because of intimidation by others. At page 22 of the U.B. Case, Bizos, J.A. had this to say:

"Although the Council has the power to close the University for certain purposes it cannot do it for the purpose of "sifting" out of student body and impose what may be described as collective punishment. The fact that the SRC may have claimed that it represented all the students on this issue did not bind all the students, particularly those who did not obey the call of the Action Committee which was a different body from the SRC."

In the present case the Council found that all students at Roma campus were not attending classes. It is a fact that no student ever attempted to attend lectures nor that there was any intimidation by other students. The mere allegation by Mr. Mosito that not all students were willing to go in accordance with the decisions of the applicant, is vague and unhelpful because such students made no indication to the University authorities that they were prepared to attend lectures. For these reasons the question of collective punishment, in the sense that even the students who were not at fault were included, does not arise. All the students at the Roma campus were involved in the boycott. I shall not concern myself with the students at the other campuses of the first respondent because there is a dispute of fact concerning the effect of the closure of the University to them.

It has been argued that the students were denied the right to be heard before the University was closed. In the long correspondence between the applicant and the Senate of the first respondent, ^{the} former clearly expressed their opinion on the resumption of attendance of lectures.

They unequivocally stated that unless the Council met immediately to consider their grievances concerning the new fee structure they would not attend classes. In their petition the students authorised the S.R.C. to present a paper to Council in June for Council to reconsider its decision. On the 21st March they changed their position and demanded that Council should meet

within ten days of the date of their letter. Again on the 23rd March they resolved that Council should sit immediately to consider their grievances.

The Chairman of the Council had made it clear that it would not be possible to convene a Council meeting within ten days. He did not state the various reasons which made it impossible for Council to meet. A students' delegation met the Assistant Minister of Education who told them that Government was considering their grievance. The students were adamant that unless Council met immediately they would not attend lectures.

I am of the opinion that before the closure of the University students were given ample chance to be heard and they expressed their opinion in writing to the Senate and to the Council. Their representatives attended Senate meetings and expressed the opinion of the applicant.

It was argued on behalf of the applicant that the Senate and/or Council have no power in terms of the Act, Statutes and Regulations of the University to exercise the powers they purportedly exercised which resulted in the closure of the University. I think it must be made quite clear that it was the Council which closed the University. The first respondent was established by the National University Act. No.13 of 1975. (hereinafter called the Act). The powers of the Council are set out in section 13 of the Act and they are as follows:

13. (1) The Council shall be the supreme governing body of the University.
- (2) Subject to this Act and the Statutes, the Council shall have the entire management and control of the affairs, concerns and property of the University and may act in all matters concerning the University in such manner as appears to it best calculated to promote the interests and purposes of the University and in particular and without limiting the generality of the foregoing shall have and may exercise the following powers -
- (a)
 - (b)
 - (c)
 - (d)
 - (e) to consider reports of and, if Council deems it proper so to do, give effect to recommendations made by the Senate."

I am of the opinion that section 13 (1) and (2) are couched in such wide terms that they include the power to close the University. "That the word "control" to a certain limited extent conveys the meaning of prohibition is true. The right to control a thing necessarily includes the right to impose minor restrictions or prohibitions, e.g., in the present case, the right to fix the age limit of the driver and the speed limit. But it does not confer the power to prohibit in any substantial degree, the decided cases on this point as conclusive." (per De Waal, J.P. in R. v. Mogobaya, 1928 T.P.D. 234 at p. 237.

The Council is empowered to manage and to control the affairs of the University. It has closed the University until further notice; it has not dismissed the students from the University. It is alleged that the closure of the University was a precautionary measure to ensure that students actually left the campus thus avoiding the possibility of their deciding upon some irresponsible and, more particularly, violent action.

Having decided that the first respondent's Council had the power to close the University, the next issue is whether it exercised those powers reasonably and justly under the circumstances prevailing at the relevant time. The functions of the first respondent are clearly set out in section 5 of the Act as follows:

- (a) to encourage and provide facilities for study and research and learning generally;
- (b) to provide educational facilities at University standards for persons who, being eligible, seek the benefit of such facilities and to give instruction and training to such persons in such branches of knowledge as will most effectually improve their education and prepare them for service to their community;
- (c) to promote by research and other means the advancement of knowledge and its practical application to social, technological problems primarily within Lesotho and more generally in Southern Africa.
- (d) to disseminate knowledge and to promote scholarship otherwise than as elsewhere in this section provided; and
- (e) subject to the Statutes, to award and confer degrees, diplomas and other awards."

In the U.B. Case (supra) at page 16 Bizos, J.A. had this to say on the relationship between the University and students:

"Although the relationship between students and the University may in some respects be contractual in nature, it is not entirely governed by the principles of the law of contracts. The right to education is too important a right to be left to the absolute discretion of anyone without scrutiny by the Courts to determine whether or not any principle of natural justice has been violated. See Rampa en Andere v. Rektor Tshiya Onderwys Kollege en Andere 1986 (1) S.A. 424 (O)."

I entirely agree with the learned judge. In the present case the students decided to stay away from classes despite promises from the Senate, the Council and the Government that their grievances concerning the new fees would be considered by Council in its meeting scheduled for June, 1990. In their original petition they seemed to agree that June was good enough. But on the 21st March they changed their stand and demanded that Council should sit within ten days of their letter. They finally resolved that Council should sit immediately.

In my view the students behaved in the most irresponsible way and made it impossible for the first respondent to consider their grievances. They were obviously in breach of their contract with the University because the primary function of the University is to give tuition to the students. It is an implied term of the contract that the students will make themselves available to be taught by attending lectures. If students refuse to attend lectures the University will not be in a position to perform its part of the

contract, i.e. teaching the students and preparing them for examinations. It would serve no purpose to keep students within the premises of the University while the most important function of the University had come to a standstill.

It is true that during the demonstration and the boycott of classes the students have never been violent. They never threatened any person with violence or threatened to damage the property of the University. I think they have behaved in a responsible way. However, that does not mean that the Council was not entitled to close the University. As I have said above there was no good reason why it should remain open because the students were not attending lectures which is the main function of the University. Their demand that University Council should sit immediately was unreasonable. The new fees were not put into force immediately and the students would only have to pay them at the beginning of the next academic year in July or August.

In their memorandum to the Chairman of the Council the students stated that if the meeting is not convened within ten days from the 21st March, or there is no indication (response) from the Chairman of Council within such a time, students will take a definite course of action at the expiration of the stipulated period. The underlined words are capable of being interpreted to mean various things such as violence to other people, institution of legal proceedings or damage to property. It is unfortunate that students did not state exactly what course of action they intended to do.

I am of the view that the Senate acted within its powers when it recommended to Council that the University be closed until further notice. The Senate could not take a chance when the students who were not only in breach of the terms of their contracts by boycotting classes, were also threatening to take an unspecified course of action. Its powers and duties are set out in Statute 7 and in section 23 of the Act. It acted within these powers when it made a recommendation to the Council.

I come to the conclusion that the Council not only acted within its powers as set out in the Act but also acted reasonably. In the U.B. Case (supra) at page 24 Bizos, J.A. said:

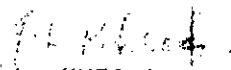
"I am of the view, therefore, that although the Council has the power to close the University, to have done so, primarily to "sift" out students and to induce those it accepted to again sign a declaration, was not a proper exercise of that power especially as it adversely affected all students whether or not they had taken part in action which amounted to misconduct in terms of the University's Discipline Regulations."

In the present case the University has not been closed for any ulterior motive other than that it was a precautionary measure. The students were defying the authority of the Senate Council and the Government. The stand of the students was that unless Council sat immediately they would continue the boycott of classes. On the other hand the stand of the Council was that it would meet in June. I agree with the submission that it was pointless and unwise to allow a student body of some 1200 individuals, which was not attending classes to remain within the campus.

It was argued that participation in the demonstration is permissible under Regulation 1.4.2. and did not warrant the action taken by the Senate and/or Council in this matter. It must be pointed out that the action taken by the Council was not taken against the demonstrations but against boycott of classes which brought the function of the University to a standstill.

It was submitted that the Council gave the impression that it was not possible to meet within ten days from the 21st March, but on the 3rd April it met and passed a resolution to close the University. There was no reason why the grievances of the students were not discussed at that meeting. The Council had already informed the applicant that the new fees would be considered in the June meeting. The meeting of the 3rd April was convened for a very special purpose. There was a crisis or an emergency brought about by the students' refusal to attend lectures and a fear based on reasonable ground that students might resort to violence to other people or damage of property.

For the reasons stated above the rule nisi is discharged with costs to the first respondent.


J.L. KHEOLA
JUDGE

20th April, 1990.

For Applicant - Mr. Pheko
For 1st Respondent - Mr. Sello.