CIV\APN\327\91

IN THE HIGH COURT OF LESOTHO

In the matter between:-

BERNARD MOSELANE AND THIRTY FIVE OTHERS — Applicant

and

THE MANAGER -BONHOMME COMMERCIAL HIGH SCHOOL — 1st Respondent
THE BOARD OF GOVERNORS-BONHOMME COMMERCIAL HIGH SCHOOL — 2nd Respondent
BONHOMME COMMERCIAL HIGH SCHOOL — 3rd Respondent

JUDGEMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 11th day of November, 1991.

This is an application for an order declaring that the purported expulsion of certain students from the third respondent is null and void. The said students were expelled on the 18th September, 1991 for allegedly being involved in a violent strike which took place at the third respondent on the 9th September, 1991. The applicants are the parents of some of the students who were expelled following the strike.

It is common cause that some time at the beginning of September, 1991 the students of the third respondent took a trip to

Quthing in order to participate in various sporting activities. The students travelled to Quthing by bus accompanied by their teachers in the same bus. On the way the male students started singing insulting songs.

On the 9th September, 1991 the Headmaster of the third respondent convened a meeting of all students at which he reprimanded all the students who sang insulting songs on their trip to Quthing. The Headmaster avers that he informed the students that he had set up a committee of teachers under the chairmanship of Mr. Mokete Moloko , the sportmaster, to investigate the unbecoming behaviour of the male students who travelled to Quthing in a bus, so that appropriate disciplinary action could be taken against them. After he had spoken, he gave the Sportmaster a chance to address the assembly. After that he dismissed the parade\meeting.

Mr. Moloko confirms that the Headmaster told the students that a committee of inquiry had been set up. The applicants deny this allegation and depose that after the Headmaster had reprimanded the male students for their unbecoming behaviour in the bus the parade was dismissed and no mention was made by the Headmaster of the setting up of a commission of inquiry. Mr. Moloko further deposes that the committee convened at the library and caused all the male students who had travelled to Quthing by bus to assemble thereat.

The upshot of the matter is that the students were wary to reveal the identities of the ring leaders. As a result he (Mr. Moloko) ruled that the boys should go to their classrooms as he would then question them one by one. He went out of the library in search of the boys with the Deputy Headmaster. The boys suddenly started throwing stones at them.

It is common cause that the boys then went on the rampage and destroyed school property and seriously injured some of the teachers. The applicants' version is that when the teachers came out of the library they started throwing stones at the students and the latter defended themselves by throwing stones at the teachers. The Court is entitled to assume the correctness of the version of the respondents where there is a conflict of fact in motion proceedings designed to secure final relief (**National University of Lesotho Students Union v. National University of Lesotho and others**, C. of A. (CIV) 10 of 1990 (unreported). In any case it is inconceivable how two or even eight teachers could fight a group of more than seventy male students.

It is common cause that on the 17th September, 1991 a parents' meeting was held at the school. However, the parties do not agree as to what was discussed at that meeting. In his opposing affidavit Mr. Ramahapu, the Headmaster, avers that the parents were

requested to inspect the damaged buildings before the reports could be made in order to accord them with a graphic facility of appreciating the reports. He avers that the chairman informed the parents that the Board had already decided to meet the emergency by expelling all the affected students forthwith, without prejudice to the said students and their parents making representations thereafter to the second respondent and\or to the Headmaster. The respondents categorically deny that the chairman made such an invitation to the students or the parents.

The respondents have admitted that they expelled the students before giving them a hearing. They aver that there was an emergency to be met and it was necessary to take immediate action. Teachers had been assaulted and the property of the school had been damaged. After the violent strike the teachers were still afraid to return to work because the safety of their lives was not guaranteed.

I think the feeling the teachers had about the safety of their lives was not unreasonable. The students had run amok and had thrown stones at the teachers and injured a number of them. One lady teacher was so seriously injured that she had to remain in the intensive care unit of the hospital for a number of days. The behaviour of the students was grossly outrageous. These same

students had sung insulting songs in the bus, completely ignoring the presence of their teachers. Their actions speak volumes as to the type of people the teachers were facing. It is naive to suggest that this type of students were attacked by the teachers and only reacted in self-defence. If they were defending themselves one wonders why they damaged school property. I am not convinced that they were acting in self-defence.

**Mr. Mafisa**, attorney for the application submitted that the Board, having admittedly denied the boys a hearing, acted to the detriment of its decision because on authority it is null and void. However detestable the behaviour of the boys, given their relationship with the Board, and whatever their status or social standing, they were entitled to be heard in their defence before the punishment was imposed. He further submitted that the rules of fairness as anchored in the rules of natural justice know no bounds, no colour or status. In the absence of statute which excludes the operation of **audi alteram partem rule** this Court cannot place any limitation to the application of this rule in the present case. To do so the Court should have better reasons than that the people involved are school children who need to be disciplined.

**In William Lemena and others v. I. Nurcombe and another**, C. of

A. (CIV) no.12 of 1984 (unreported) Wentzel, J.A. said:

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

At page 7 the learned Judge of Appeal said:

> "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.
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> 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."

**In Everett v. Minister of Interior,** 1981 (2) S.A. 453 (C.P.D.) at p. 458 D - E Fagan, J. said:

> "The more usual application of the rule in quasi-judicial decisions is for a hearing to take place, or representations to be received prior to the decision being arrived at. But that is not always the position. Where expedition is required, it might be necessary not to give the affected person the opportunity of presenting his case prior to the decision, but only after. He thus obtain the opportunity of persuading the official to change his mind."

I have already found that there was an emergency at the school and that emergency was created by the students themselves. Mr. Mafisa submitted that there was no longer any emergency on the 18th September, 1991 when the respondents expelled the students. The police had actually brought the situation under control by arresting some of the students.

The evidence by the teachers is that despite the detention of some students the situation at the school was still very tense and they feared for their lives. In fact some of them refused to return to the school unless drastic action was taken against the students. (See paragraph 11.1.1 of the opposing affidavit; paragraph 7 of Mr. Moloko's supporting affidavit; paragraph 4.2 of Mr. Moriana's supporting affidavit).

It seems to me that the mere fact that some students were arrested by the police and detained for some time does not necessarily mean that the state of emergency had ended. The real

culprits in the riot were apparently not all arrested. In fact some students were released by the police and admitted by the respondents because their investigations did not implicate them in the strike. The respondents made their own investigations and relied on the evidence of their own witnesses. All their witnesses are teachers who were assaulted by the students in various ways.They know all their students and saw them during the attack. What is even more confusing is that none of the students who have been expelled has filed an affidavit denying his participation in the fight against the teachers. The two students, Thabang Mochaba and Reentseng Machachamise who have filed affidavits, do not deny their involvement in the fight. Their version is that they were defending themselves. I find their story to be far-fetched and I reject it.

**Mr Mafisa** submitted that even the so-called eye witnesses merely state that they identified the perpetrators but fail to name even one of them. If any of these boys had been identified as alleged it would have been the easiest thing under the sun to name them. General statements of identification in matters such as this do not help the Court at all. From such statements the Court is perfectly entitled to come to the conclusion that there was no identification at all. I entirely agree with the submission but have to qualify it by saying that all the students concerned do not

deny that they took part in the violent strike. They have not filed any affidavits. It seems to me that the chairman of the commission of inquiry recorded the names as each witness was giving evidence and then the culprits were found.

**Mr. Mafisa** submitted that by discriminating the applicants' sons the respondents acted unfairly and without good faith. It is a well established principle that like cases should be treated alike. He submitted that the students whose names appear in Annexure "TM1" were arrested and had to report to the police for some days before they were allowed to resume classes even before the criminal case was heard. But the students whose names appear in Annexure "1" have not been allowed to resume classes and have been expelled.

It seems to me that **Mr. Mafisa** is under the mistaken belief that the respondents acted in accordance with the police findings. That is not the impression I had from the evidence before Court. The respondents made their own investigations and established the identity of the culprits. I am of the view that there was no discrimination against the sons of the applicants who were apparently implicated by the witnesses who gave evidence before the Board.

**Mr. Mafisa** submitted that the Board was, on the undisputed

facts, improperly constituted because the Headmaster, a complainant in a case of assault, participated in the decision-making process. Anybody with a basic understanding of what is fair would undoubtedly suspect bias. Clearly he acted in more than one capacity in a matter in which he had a lot of interest and in which he could very easily influence the Board's decision. He submitted that the participation of the Headmaster in this manner renders the Board's decision a nullity. I have read all the affidavits in this matter and have found no conclusive evidence that the Headmaster participated in the decision-making process of the Board. Mr. Mafisa relies on the letter of expulsion (Annexure "BM1" to the founding affidavit). It is signed by the Headmaster as the Secretary to the Board, by the Manager and the Chairman of the Board. Surely, the letter of expulsion is not the minutes of the Board which show clearly what transpired in the meeting. As Secretary of the Board, the Headmaster was probably instructed to write the letter and signed it. There is no evidence that as the Secretary of the Board, the Headmster takes part in the deliberations.

In paragraph 6 of the applicants' replying affidavit the deponent avers that the Headmaster as the complainant should not have sat on the Board when it considered the fate of the applicants' children. This important issue is raised for the first

time in the replying affidavit when the respondents have no chance to deal with it. In any case the deponent does not say he attended the meeting or was present within the premises when the meeting was going on and saw that the Headmaster participated in the deliberations.

There is a serious dispute of fact whether at the meeting of the 17th September, 1991 the parents were informed that after the expulsion of the students the door will be left open for them to make representations in order to persuade the respondents to change their decision to expel the students. This being an application for a final relief the Court is entitled to assume the correctness of the version of the respondent (**Plascon-Evans Paints v. Van Riebeeck Paints**, 1984 (3) S.A. 623).

Finally, I find that the **audi alteram partem** rule applies to the present case. However, the respondents found themselves in a state of emergency and had to act in an expeditious manner. They gave the parents and students to make representations after the expulsions and in the circumstances of this case I am of the opinion that this act of the respondents was a full compliance with the **audi alteram partem rule**. In fact some parents took advantage of the respondents' offer and made such representations.

In **William Lemena's case** (supra) Wentzel, J.A. said:

"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 think the same principle must apply in the present case.

In the result the rule is discharged with costs.

J.L. KHEOLA

JUDGE

11th November, 1991.

For Applicants - Mr. Mafisa

For Respondents - Mr. Mda.

CRI/A/105/90

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOTHAE THAANE Appellant

v

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 11th day of November, 1991

On 6th September, 1991 this Court said that Judgment would be delivered on 11th November, 1991.

Here do reasons for that Judgment follow.

The appellant pleaded not guilty to the main and alternative charges.

He was convicted by the Court below in the main charge of the crime of Rape allegedly committed on his 14 year old daughter on or around 28th August 1988 at or near Mazenod in the Maseru district. The Court below returned no verdict in respect of the alternative charge. Since the appellant had pleaded to that charge it would not be wrong to infer that the Magistrate meant to discharge him in respect of the crime of incest preferred in the alternative charge.

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The complainant Palesa Thaane PW1 testified before the Court below that she resides at Ha Majane in the Maseru district. She told that court that at the time of hearing this matter at trial she was aged 15 and attending school at Paul VI. The accused is her father.

On the day of the incident i.e. 28 August 1988 she had come back from Matelile where she had gone to see her mother who is a police-woman stationed and staying at Matelile Police Station.

On arrival back home she performed the usual domestic chores. Thereafter she proceeded to(the sitting room where she was watching T.V. or)one of the bedrooms in the house where she and the younger sister 'Matsepo aged 10 went to sleep.

The appellant taxed PW1 about a man Mahalefele whom PW1 had seen talk with her mother in the morning at Matelile. Thereafter he went to sleep. It was a rainy night and electricity had failed. Five minutes after the ordeal concerning Mahalefele the appellant came back to the room where PW1 and her sister PW2 'MatSepo were sleeping and ordered PW1 to come and massage him. PW1 was rather bewildered how she was expected to do this in darkness. Sensing the appellant's disapproval of her bewilderment PW1 woke up drew water and proceeded to the appellant's dark bedroom and massaged his weary muscles. After PW1 had finished this task she resume her sleep next to 'MatSepo in the sitting room.

Two or so minutes later the appellant armed with a sjambok came to this sitting room and challenged PW1 with having soured relations between him and the Majalles,

apparently a neighbouring couple. PW1 through 'Mat$epo's advice went to the appellant's bedroom to ask for forgiveness. after the accused had left the sitting room. PW1 in the company of 'Mat$epo asked for forgiveness but the appellant grunted his discontent. It is not clear at what stage 'Mat$epo who had accompanied PW1 only as far as the appellant's door had betaken herself from the scene but, the appellant apparently emboldened by PW1's disadvantaged position of a begger for forgiveness, the timidity of her disposition and the darkness in the appellant's bedroom made a relentless utterance in complete disregard of his daughter's supplication and told her that he would only forgive her if she sincerely asked for forgiveness. Saying this he grabbed hold of PW1's hand, pulled her to his bed and having overpowered her he sexually forced himself on her. She cried.

PW.2 'Mat$epo supported PW1's version about persuading the former to go and apologise to the appellant concerning whatever wrong. She further testified that on coming back from the appellant PW1 gave her a report. It is a matter of great significance that around the period of the incident relations between the appellant and his wife 'Mapalesa PW3 the police-woman were not harmonious at all. It becomes apparent that either of the parents was using his or her influence to settle old scores with the other. But PW2 having said in cross-examination PW3 had told her that she hated the appellant and asked her to make known that the appellant had raped PW1, she did under re-examination tell the Court below that even though her mother said she should tell this incident about her father the incident had nonetheless occurred as a matter of fact and that her mother had not asked her to so tell before its occurrence.

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