C of A (CIV) 10 of 1990

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

In the matter between:

NATIONAL UNIVERSITY of Lesotho Students Union	Appellant
and	
NATIONAL UNIVERSITY OF LESOTHO	1st Respondent
COMMISSIONER OF POLICE	2nd Respondent
ATTORNEY GENERAL	3rd Respondent

Coram

Mahomed P.
Ackermann J.A.
Browde J.A.

JUDGMENT

Mahomed P.

The appellant in this matter applied for and obtained from Cullinan C.J. in the Court *a quo* 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 at 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 extended return day, Kheola J. who heard the matter was informed that the second and third respondent were not opposing the matter and abided by the decision of the Court.

The second and third respondents apparently took no further part in the proceedings thereafter and there was no appearance on their behalf on appeal.

The first respondent however, vigorously opposed the confirmation of the rule which was eventually discharged by Kheola J. after lengthy argument.

The main argument advanced by Mr. Pheko who appeared for the appellant was that the decision of the University authorities to close the University was wrongful and unlawful and that for this

reason paragraphs (c) and (d) of the rule and such parts of the other sub-paragraphs which follow as a necessary consequence thereof should have been confirmed. His ancillary argument was that even if the closure of the University was indeed lawful, the appellant was entitled to confirmation of some other parts of the rule. I shall deal with both these submissions seriatim.

The Closure of the University

It is common cause that the University was in fact closed on the 4th of April 1990, following upon a resolution of its Council adopted on the 3rd of April 1990. The formal closure of the University on the 4th of April 1990 was preceded by the following chronology of events:-

1. 15 March 1990

   On this day the Vice Chancellor was informed by the appellant that the students intended to demonstrate on 16 March and to "register their dissatisfaction" in relation to a proposed new fee structure.

2. 16 March 1990

The Council of the University approved a new fee structure.

3. 16 March 1990

(a) The student body boycotted their lectures, on this day.

(b) The students resolved that 19 March be set aside as a day for petitioning the University in respect of the new fee structure.

4. 19 March 1990

(a) The students again boycotted their lectures.

(b) The Senate of the University met and resolved that students should return to classes by 2.00 p.m., failing which they should leave Roma campus by 6.00 p.m. on that day.

(c) A petition was presented by the appellant on behalf of the students to the secretary of the Council of the University.

The petition protested against the proposed increases in fees in the following academic year and authorised the Students Representative Council ("SRC") to prepare a paper to the University Council in June to enable the Council to reconsider its decision.

(d) Following on this, the Senate of the University passed a further resolution condemning the boycott of classes and stating that the Students Union owed the Senate an apology and that the Senate expected students to resume classes on Tuesday the 20th of March.

(e) At a general meeting the students resolved to resume classes on 20 March 1990.

5. 21 March 1990

(a) The SRC of the students wrote to the Chairman of the University Council communicating a resolution that a meeting of Council be held within ten days of the date of the letter, that

is, by 30 March, "to consider the demands in the petition". The resolution further provided that "if the meeting is not convened within such a period or there is no indication (response) from the Chairman of Council within such a time, the SU will take a definite course of action at the expiration of the stipulated period".

(A letter from SRC President to the Registrar dated 27 March, reiterated that "the deadline is Friday 30th for meeting of Council as demanded by the Student Union")

6. 23 March 1990

(a) A meeting of students was held at which it was resolved, *inter alia*, "that Council should sit immediately" to consider the students' petition and "that until Council has met to consider the petition students at the Roma campus should not attend classes".

(b) A boycott of classes thereafter commenced, on the 23rd of March notwithstanding the fact that the "deadline" of 30th march previously set had not yet expired.

7. 25 March 1990

The SRC President and a delegation of students met with the acting Minister of Education, who urged them to persuade students to resume classes. The students were told that the Government was considering the matter.

The students and the SRC President stated that they had no power to order the students to resume classes.

8. 26 March 1990

There was a report back to students at a general meeting of students on Roma campus. The students resolved to continue the boycott.

9. 29 March 1990

The letter written by the SRC President to the Council, in which it was demanded that the petition be considered within ten days, was answered to the effect that the students' grievances would be considered at the next Council meeting in June.

10. 2 April 1990

(a) The Senate of the University met and was informed by the SRC President that the students intended to continue the boycott of classes.

(b) The Vice Chancellor caused a notice to be placed on all notice boards and delivered to the SRC offices stating that he would be addressing the students at 2.30 p.m. that day. He was to be joined by other members of the Senate.

(c) A students meeting in fact took place at about that time but the Vice Chancellor was not permitted to address the meeting. The students "maintained their stand" and decided to continue the boycott.

(d) The Senate later met and upon receiving the Vice Chancellor's report of what had transpired resolved to recommend to Council that the University be closed.

11. 3 April 1990

The Council of the University considered the recommendation of the Senate and resolved, *inter alia*, that unless students resumed classes unconditionally the next day, and the Students Union apologized in writing for their disregard for the authority of the Senate, Vice Chancellor and the Council, the University" should close by 12 noon on Wednesday 4th April 1990". It also resolved to consider the petition on fees at the next scheduled Council meeting in June, 1990.

12. 4 April 1990

The Vice Chancellor issued a notice addressed to all students, Deans, Directors of Institutes and Heads of Departments, that the University was closed until further notice and that all academic activities would cease with

immediate effect. All students were required to leave the University immediately.

Mr. Pheko conceded, as he was obliged to, that the Students of the University represented by the appellant had indeed been engaged in a boycott of classes for a considerable period, before the University authorities decided to close the University and that the Council of the University had the statutory power in terms of Section 13 of the National University Act No.13 of 1975 to close the University. He submitted, however, that before invoking such a power, the University was obliged as a public body to give to the students adversely affected by such a decision notice of such intended action and an opportunity of being heard as to why such action should not be taken. In his able and concise argument on behalf of the first respondent Mr. Marcus rightly conceded the correctness of these submissions but he contended that the appellant could not on the facts establish that there had been a breach of the *audi alteram partem* rule.

I am of the view that Mr. Marcus is correct in this approach. Before the Senate meeting of the 2nd of April 1990, the Vice Chancellor had clearly sought to avert the impending crisis by addressing and talking to the students. He was accompanied by other members of the Senate. He arrived at the hall where the

student assembly had gathered to hold a meeting, and told the Chairperson that what he "intended to communicate to the students might be of assistance to them in whatever decisions they may arrive at". The Chairperson retorted that the Vice-Chancellor would have to follow the procedure of calling the meeting through the S.R.C. The Chairperson himself avers that the Vice Chancellor asked him "to persuade the students to stop their meeting to allow (the Vice-Chancellor) to address them". The Chairperson in fact communicated that request to the students but they "maintained their stand". In the result the Vice Chancellor was simply not allowed to talk to the students and he reported to the Senate that this seemed to him to "constitute the last blow to any efforts at resolving the crisis".

The appellant cannot in these circumstances properly complain that the University authorities had simply taken a decision to close the University, without affording to the students an opportunity of being heard in this regard. By 2.30 p.m. on the 2nd of May, the possibility that the University might have to be closed, (in the face of a continuing and unremitting boycott of classes), must have been present in the minds of everyone in the University Community. The opportunity to debate this crisis and to find some solution which would enable the University to function normally again, presented itself when the Vice-Chancellor sought

to talk to the students. The students elected to deny that opportunity.

In his tenacious address on behalf of the appellant, Mr. Pheko further contended that what the first respondent had effectively done was to exclude the students from the University on the grounds of "misconduct" and that such "punishment" had to be preceded by a proper disciplinary enquiry in terms of its domestic statutes under Section 36(1) of the National University Act No.10 of 1976.

In my view, however, this is not a proper interpretation of what the first respondent had resolved to do. It never intended and never purported to find any student or students guilty of "misconduct" in terms of its domestic statutes. It never intended to impose any "sentence" or "punishment" on any student by excluding, suspending or rusticating such student from the University. It was simply exercising its general statutory power to close the University temporarily, in circumstances where the very rationale for the effective continuation of the University as a University was being subverted by a prolonged boycott of all classes and a rupture of effective discipline and respect for the University administration in the student body. A properly disciplined student body is perfectly entitled to be critical and even vigorously critical of the University administration and the

government of the day and to manifest its disagreement with any of the policies or actions of these bodies by organised protest. It must, however, maintain at all times that minimum discipline and respect for the administration and staff of the University as is essential for the University to function effectively as a University and to discharge its statutory duties and functions.

Mr. Pheko also contended that even if the decision of the first respondent to close the University was in the circumstances justified in principle, it was accompanied by other conditions which were unjustified and which he submitted contaminated the decision to close the University. In order to appreciate this objection it is necessary to refer to the material parts of the resolution of the 3rd April 1990 which are in the following terms:

> "3.1 that students resume classes unconditionally, tomorrow, Wednesday 4th April 1990 at 8.00 a.m.;
>
> 3.2 that the Students Union apologies, in writing, to the Senate, Vice Chancellor and the Council;
>
> 3.3 that in the event 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."

The first objection made by Counsel for the appellant is to the word "unconditionally" in paragraph 3.1. Why, Counsel argued, can the students not have the right to return to classes under protest or to persist in their insistence that the proposed new fee structure should be reviewed? I have no doubt that the students indeed have such rights. The word "unconditionally" was never intended to detract from the right of the students to continue their criticism of the University administration, to manifest such criticism by orderly protest and to insist that the new fee structure should be reviewed; provided, however, that the proper revision of the new structure was not imposed by them as a pre-condition before they resumed class attendances. The obligation to resume classes had to be "unconditional" in that sense only.

Mr. Pheko also attacked paragraph 3.2 of the resolution which required the Student Union to apologize in writing to the University Administration. He submitted that this was a condition more appropriate to disciplinary proceedings and should not properly have been combined with a direction requiring the students to resume classes the next day.

I think there are two answers to this objection. In the first place, even if paragraph 3.2 was objectionale it was both notionally and grammatically severable from paragraph 3.1 and cannot on the evidence be said to constitute a material reason for the resolution of the 3rd of April, (without which it would not have resolved to close the University if the students did not resume classes on the 4th of April 1990) (see Patel v Witbank Town Council 1931 TPD 284 at 290; Jabaar and Another 1958(4) SA 107(T) at 114; WADE: Administrative Law 6th Edition page 442).

Secondly, for the reasons I have previously mentioned, effective discipline and a basic respect by students for the administration and staff of the University are essential for the University to be able to discharge its functions and duties. The condition set out in paragraph 3.2 of the resolution of the University Council, could reasonably have been considered necessary by it to create the atmosphere conducive to the discharge of such functions.

The Ancillary Prayers

Counsel for the appellant argued that even if the first respondent had acted lawfully in causing the University to be closed, appellant was entitled to have certain other parts of the

rule nisi confirmed by the High Court.

In the first place it was contended that that part of prayer (a) which sought to direct the first respondent to allow students access to the applicants offices on the campus was in any event justified. In my view, however, the applicant's activities and functions on the campus are related to the presence of students there. There was no evidence on the record that if the University itself was lawfully closed, the applicant had any independent functions to perform on the campus or that it had any right to do so.

Secondly it was submitted that the appellant was entitled to the relief claimed in paragraph (b) directing the first respondent "to allow students of the University to have possession of their personal belongings". Whilst there is an allegation in the founding affidavit that access to the campus for this purpose was being denied to some students on the 5th of April and at some time on the morning of the 6th of March, the Vice Chancellor says expressly that

> "on the morning of the 6th April when it became apparent that there were some students outside campus who desired to enter the premises for

> the purpose of collecting their belongings, I arranged for the security staff at the gate to admit such students and a number of students were so admitted to collect their belongings."

The Vice Chancellor is supported by Chief Security Officer Mr. Mohapi who confirms these instructions from the Vice-Chancellor and says that on the 6th of October he spent "the whole day ferrying students in the 1st respondent's mini-bus ..... to their residences to collect their belongings". Quite apart from the fact that the Court is entitled to assume the correctness of the version of the respondent where there is a conflict of fact in motion proceedings designed to secure final relief (see Plascon-Evans Paints v Van Riebeeck Paints 1984(3) SA 623(A)), the evidence does not establish that by the time the appellants moved the application in the Court *a quo* on the 6th of April 1990 there was any legitimate basis for believing that any student who sought to take "possession of (his) personal belongings" would be obstructed from doing so by the first respondent.

Thirdly, it was contended that prayer (g) should have been confirmed. This prayer sought to "direct the first respondent to allow the students if they so wish, to write the examination at the end of the academic year". There is nothing in the record of the

proceedings, however, which suggests that the first respondent had resolved to deny to any student the opportunity to write his "examination at the end of the academic year", if such a student was otherwise qualified and prepared to do so and had properly requested such an opportunity.

In the result I order that the appeal be dismissed with costs.

Dated at Maseru this 26th day of July, 1991.

.....
I. MAHOMED
PRESIDENT OF THE COURT OF APPEAL

I agree .....
L.W.H. ACKERMANN
JUDGE OF APPEAL

I agree .....
J. BROWDE
JUDGE OF APPEAL

For the Appellant : Mr. L. Pheko
For the 1st Respondent: Mr. G. Marcus (Instructed by Mr. K. Sello)