

CIV/APN/20/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MAMAHAO MATETE

APPLICANT

and

THE ACADEMIC BOARD (N.T.T.C.)
 THE BOARD AGRICULTURE DEPT (N.T.T.C.)
 TUTOR AGRICULTURE DEPT.
 (Mr Phenithi) N.T.T.C.
 ATTORNEY GENERAL

1ST RESPONDENT2ND RESPONDENT3RD RESPONDENT4TH RESPONDENTJUDGMENT**For Applicant** : Mr Fosa**For Respondents** : Miss Ranyali

Delivered by the Honourable Mr. Justice T. Monapathi
on the 26th day of January 2001

The notice of motion showed very clearly that, amongst others, the Applicant wanted an order to be allowed to write certain test or mid-term test in Agriculture

at the National Teachers Training College (the College). This is referred to in paragraph 1(b) of the notice of motion.

The circumstances or the pre-history of the matter were that at one time there had been a strike action at which time this Applicant was a member of the Student Representative Council. There was even a temporary closure of the school. There ended up being some students who were charged, this Applicant being one of them. There was, as was common cause, a situation that there had been a holding suspension against the students including the Respondent. This resulted in disciplinary proceedings being preferred against this Applicant and other students although the circumstances surrounding the Applicant's charges or progress of the proceedings became somewhat different.

The difference in Applicant's case was that after a sitting of the disciplinary committee had occurred Applicant had, after some considerable delay, had to make a request for its finding or conclusion since awaited. This resulted in a hearing being re-instituted or the matter being re-heard. What happened afterwards seemed to suggest that at the latter hearing Applicant might have conceded guilt or participation to some wrongdoing which thing or aspect was never made clear even after an attempt from this Court to get such clarification. In short it was never made clear what conclusion and findings were recorded. The Applicant's latter conduct (of contrition) probably led to an attitude on the part of the disciplinary committee that Applicant be allowed to go back into her classes and attend as usual and resume her studies. Why would it make her be viewed with less favour in other respects? This she duly did as one of and like other students. I noted that she was a final year student at First Respondent teaching college. That was what added to the urgency and sensitivity of the matter.

The result had been that there had been a delay to write assignments and tests caused by Applicant's extended suspension which was rather long as I gathered. That delay had been caused by the suspension and the disciplinary hearing and the latter having been re-heard as it were. This resulted in her belated writing of some tests and putting in assignments as some students had regularly done except that contentious test referred to in prayer 1 (b) of the notice of motion which (test) it appeared, nevertheless, the Third Respondent was not willing to allow Applicant to take the test or make arrangement for Applicant to sit for and write the test. The matter of delay was clearly therefore a relevant consideration.

Very briefly the Applicant complains of unfair discrimination in that other students with whom she was suspended and others had been allowed to write all their tests. And that she (Applicant) had however been allowed to write other tests except this one which the Third Respondent refuses to make it possible for her to write. She says the reasons put forward by the Third Respondent are invalid and unreasonable because irrelevant considerations were used and moreover the purpose (of not allowing her to write) was even improper if bad faith and ulterior motive could not be completely excluded. See *JABAAR v MINISTER OF INTERIOR* 1958(4) SA 107(T) 113-114C.

There has been a going up and down by the Third Respondent who had to consult his colleagues teachers and tutors and the First Respondent about their attitude as against the demonstrated attitude of others (in having allowed her to write their subjects). The consultation was about whether it was permissible to allow Applicant to write the test. The Applicant also did her homework. She consulted one Masimole who led the Applicant to one Semethe. The latter authority advised or informed that the First Respondent had resolved that it was "entirely in the discretion of the concerned tutor (the Third Respondent) to offer

the test.” And then again followed that primary question of whether the Third Respondent could exercise his discretion to allow or not to Applicant her to write the test. Most importantly it would be how his discretion was exercised if it was to be seen to be reasonable in the circumstances of the case. I said that would be inconsistent if others were allowed to write and Applicant was not. It would be unfair if it resulted in a denial of what the Applicant legitimately expected as her right. If the Third Respondent acted irrationally as I concluded this could only be that he was abusing his powers. He should not have done that.

The strange thing which I found and which makes the whole exercise or decision very unreasonable was that the Third Respondent said he had no time and the setting of the test and in addition the marking of the test dealt a hardship on him. And furthermore it was harsh on him if he was to make this Applicant to sit the test. In addition as I concluded that a strand went through this conduct of the Respondents suggesting that the attitude could be that of meteing out punishment of some kind on the Applicant. Applicant had been said to be stubborn and difficult. I made a finding that it would be improper to camouflage intended punishment with the so called discretion. And further that the act of the unreasonable exercise of the Third Respondent’s discretion resulted in effect in a punishment of the Applicant which was unacceptable and unjust. Applicant had been pardoned. Why would there have to be any punishment?

The punitive effect of the denial on the Applicant was even more pronounced when it was not appreciated that the denial gave the Applicant a distinct disadvantage and in fact a handicap in the final assessment of her examinations. The denial appeared to have been done with respect to the Applicant alone. This was more keenly felt because once Applicant was released back to her classes she had to be treated like other students who had been

suspended but had nevertheless later been allowed to put in their assignments and write their tests.

It was not being said there were or there are circumstances suggesting that it was impossible to grant her the opportunity to write her test. But instead the Third Respondent merely cited grounds or reasons that could only be said to have been subjective and selfish. That was more so when he could not even speak of any policy rule or guidelines. I found none of the reasons convincing. Applicant ought to complement her subjects so that a complete and comprehensive assessment could be made towards her final certificate.

Another aspect should have been addressed. It was that there had to be an explanation as to what the fate of the Applicant or options were going to be if she remained or ended up not writing the examination. If not it made her case even more precarious. Learned author L Baxter in his ADMINISTRATIVE LAW at page 497 says that:

“Reasonable people do not advocate decisions which will lead to harsh, unjust or uncertain consequences. Hence it would be unreasonable to act in a manner which would have such consequences.”

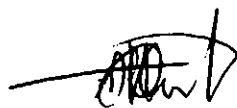
Indeed I found that there were no policy guidelines which motivated or justified a situation where the Applicant would be so clearly unfairly handicapped by the conduct of the Third Respondent in the name of the so called discretion on his part. What would prevail would be that the Applicant will have written all other subjects or tests except this one with the uncertainty that this would entail as to its effect of her final assessment. This was absolutely unnecessary even morally speaking. It was also fundamentally at variance with reason and common sense. See COUNCIL OF CIVIL SERVICE UNION v MINISTER OF CIVIL SERVICE

(1985) AC 385 at 658.

I found that all reasons suggested that this was a situation where the Court ought to intervene. Contrast with the circumstances and conclusions in *KHOSI LESUTU v NATIONAL UNIVERSITY OF LESOTHO* 1982-84 LLR 341. See also *MANTHO LYLLIAN MATELA v ACADEMIC COUNCIL (NATIONAL HEALTH TRAINING CENTRE) AND TWO OTHERS* CIV/APN/253/96, 29th May, 1997 wherein this Court was dealing with the following application: That First Respondent's decision in which it ordered applicant and others to re-sit an examination be declared null and void. First Respondent was to be ordered and directed to release certain examination results as well. The application was allowed with costs.

Everything in the instant case (visa-vis Applicant) indicated a situation which was discriminatory, arbitrary and capricious. The conduct of the Third Respondent was the conduct of someone who exercised his discretion unreasonably and on irrelevant considerations. It may even suggest bad faith on the part of the Third Respondent, on the face of things.

This was the conclusion and finding. That the application had to succeed with costs. Applicant was to be made to write the test. Prayer 1 (a) (b) (c) and (f) were confirmed.



T. Monapathi
Judge