CIV/APN/248/2001
IN THE HIGH COURT OF LESOTHO

In the matter between:

MATSOBANE PUTSOA	APPLICANT
and NATIONAL UNIVERSITY OF LESOTHO	RESPONDENT

IUDGMENT

Delivered by the Honourable Mr. Justice G.N. Mofolo on the 10th day of August. 2001.

On 8 January, 2001 a letter which we reproduce in full below was written to the applicant by the Acting Vice-Chancellor Dr. . Thikhoi Jonathan as follows:-

The National University of Lesotho

Vice Chancellor,	P.O. Roma 180
R.I.M. Moletsane	Lesotho.
B.A., B.Ed, M.Ed (UBLS)	Africa.

M.A. (UOFS)	Telephone: Roma 340601/340269
DEd (UMASS)	Telegrams: Uniter, Roma, Lesotho
Telex 403 LO	Telefax: 340000

OFFICE OF THE VICE CHANCELLOR

8 January, 2001.

Mr. M. Putsoa,
National University of Lesotho,
P.O.Roma 180.

Senate in its meeting of 4 January, 2001 recommended and advised the Acting Vice-Chancellor that since council has authorised a Forensic Audit of the Bursary to be carried soon, you should be barred from entering university premises.

In pursuance of the powers vested in me under Section (16) (8) (b) of the 1992 NUL Order, please note that you are excluded from any part of the university premises until the forensic audit of the Bursary has been completed.

Please hand in any university property that may be in your possession. Hoping for your understanding and cooperation in the matter.
Yours sincerely,

Sgd. Dr. L. Thikhoi Jonathan Acting
Vice-Chancellor

cc: Registrar

On receipt of the letter it would seem the applicant had approached

3

this court on an application couched as follows:

Kindly take notice that an Application will be made to the above-mentioned court on behalf of the Applicant herein on 29th June, 2001 at 9.30 in the forenoon or so soon thereafter as the matter may be conveniently heard for an order in the following terms:-

1) That the Rules of this Honourable Court pertaining to the notice and service be dispensed with and the matter be heard as of urgency.
2) That a. Rule Nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondent to show cause, if any, why:

a) The respondent and/or its office shall not be interdicted forthwith from unlawfully interfering with the applicant in the execution of this duties pending determination of this application.
b) The purported exclusion of the Applicant from the respondent's premises shall not be set aside;

4

c) (c) The respondent shall not be ordered to pay the costs of this application in the event of opposing the orders sought herein.
d) (d) Applicant shall not be granted such further and/or alternative relief.

3) 3. That prayer 1 and 2(a) operate with immediate effect in the interim.

My brother Monapathi J. had granted the order that respondent be served with the papers. Respondent having been served with the papers had opposed the application. When counsel appeared before me it was agreed that points in limine be argued together with merits of the case.

The respondent's answering affidavit was an expansive rolling document which hardly addressed itself to issues raised. Mr. Mosae's argument before me was no different: pedantic and avoiding issues raised by the applicant.

Repeatedly in his Founding Affidavit the applicant has said that he is Bursar of the respondent. A bursar according to the Oxford Illustrated

5

Dictionary 2nd Ed. is a treasure of a college so that when the applicant was written the above letter he was Treasurer of the respondent. The same dictionary referred to above refers to a Treasurer as 'now one responsible for funds of public body or any corporation, society or club. The respondent can be safely classed as a corporation so that in this court's view

applicant's position with the respondent is no mean one and deserves to be treated with candour and respect and not off-handedly as if anything said or done to him did not matter.

In his paragraph 8 of the Founding Affidavit applicant has deposed:

I respectfully submit that my purported exclusion is not only prejudicial to me for being purposeless, but wrongful and improper for the following reasons:

8.1 When the vice-Chancellor decided to issue the banning order, I was never offered an opportunity to make representation on the matter. I respectfully submit that in my position as the University Bursar I have a legitimate expectation to be heard when a drastic step like excluding me from the University in general and my office in particular was contemplated.

6

8.2 When excluding me from the University the vice-Chancellor purports to have acted on the recommendation and advise of Senate, I respectfully submit that since the Senate has no power to recommend and/or advise the vice-Chancellor in the manner it did, the vice-Chancellor has failed to exercise the discretion vested in her, and/or she exercised such discretion improperly.

8.3 When excluding me from the University the vice-Chancellor appears to have had no other apparent basis for exercising the discretion except the recommendation and advise of Senate.

8.4 The exclusion contemplated by section 16(8), (b) of the 1992 N.U.L. Order is purely aimed at maintaining and promoting the efficiency and good order of the University. I respectfully submit that no basis whatsoever has been laid in the vice-Chancellor letter of exclusion, that maintenance of efficiency and good order of the University was at stake. Even if some basis whatsoever was laid, I still maintain that I was entitled and I legitimately expected to be heard.

8.5 The vice-Chancellor's act of excluding me as she did smacks of discrimination and some ulterior motives

7

in that I have been singled out of the staff of about 20. The intended forensic audit is aimed at and to be carried on the Bursary. I am a Bursar. No explanation whatsoever, has been given as to why the investigation has to be carried out in my absence and/or to my exclusion.

This court is concerned with whether the applicant can, in law, be barred and excluded from university premises without being heard. Whether it is justifiable that without being heard he should 'hand in any university property that may be in' his possession. As to the doctrine of audi alterant pattern, according to Prest (The Law and Practice of Interdicts, Juta &. C. Ltd., 1996 at p.223, 'however urgent a matter may appear to be, and however anxious an applicant may be to obtain his relief, a court is seldom willing to come to the assistance of a party without giving the other party the opportunity to state his case. I may add, however satisfied a party is with the bona fides of a party before it, it will not take drastic steps against the offending party before hearing it. It has been said so firmly entrenched in the South African justice is the principle of audi alteram partem that the maxim has been described by the

Appellate Division as 'sacred' - see Sachs v. Minister of Justice; Diamond v. Minister of Justice, 1934 AD. 11 t 38 and cases quoted at footnote 64 p.223 of Prest, The Law and Practice of

8

Interdicts above.

In this case as I have shown above from applicant's Founding Affidavit he has shown that he has civil rights and interests which were prejudicially affected - see Mankatshu v. Old Apostolic Church of Africa and Others, 1994 (2) SA. 458 (TKA) at 462; see also Seloadi and Others v. Sun International (Buphuthatswana) Ltyd., 1993 (2) SA. 174 (B) at 179 - 180; S. v.Dobson, 1993 (4) SA. 55 (E); Masinga v. Minister of Justice, Kwazulu Government, 1955 (3) SA. 214 (A) at 221 - 224 B.

According to H.W.R. Wade in 10 Cambridge Law Journal 216 at 228, 'as a general rule it may be said that rules of natural justice must be complied with in a quasi-judicial act. The act complained of must of course be performed in the exercise of a discretion and the organ is to be established normally from its rules vested with free discretionary power and may decide for itself about the desirability and efficacy of its choice; in such a case no court will prescribe to it how it is to make its choice. This notwithstanding, the organ cannot exceed its powers or use its powers for an ulterior motive or fail to apply its mind to the matter - see Johannesburg Consolidated Investment Co. v. Johannesburg Town Council, 1913 T.S. Ill at 115; Union Government (Minister of Mines and Industries) v. Union Steel Corp. (SA.) Ltd,

9

1928 AD. 220 at 224. From these cases it emerges that if a discretion is conferred by statute upon an individual and he fails to appreciate the nature of that discretion through misreading the Act which confers it, he cannot and does not properly exercise that discretion. In such a case a court of law will correct him and order him to direct his mind to the true question which has been left to his discretion.

It is to be understood that though the organ has a free discretion this does not mean that such a discretion stands outside the law and is not bound by law - it still has to adhere to rules laid down by law.

On the other hand, according to judgment in cases above, there is what is termed circumscribed administrative discretion which is of course circumscribed and limited; here the number of options is limited by statute and circumscribed under which the discretion is to be exercised and is clearly defined by the statute. According to this, jurisdictional facts are employed being those facts and circumstances which determine the powers of the organ and the existence of such facts may be established by a court of law and if the facts and circumstances do not exist, the discretion may not be exercised. Accordingly, where, for example, the statute provides that an administrative organ may make an eviction or bar an individual as in the

10

present case, circumstances should prevail to warrant or prompt the organ into exercising the discretion under the law. A case in point is where teachers or employees are on strike; if the authorities fear there might be violence and property damaged, it is in order to lock our or as it were restrict and/or exclude striking teachers from school or university property. As Mr. Mosae correctly conceded, applicant is not guilty of any malfeasance and yet visitations on the applicant are drastic and to be feared these coming, as it were, out of the blue and not against the backdrop of Ernst & Young, Lutaru/Nawu recommendations. I am not saying respondent would only act were there such recommendations, I am saying circumstances did not warrant drastic steps taken against the applicant.

Mr. Mosae before this court and in his heads of argument has contended that the respondent acted as it did to apply the law as authorised by the relevant section of the order under which it acted. Now, the relevant section is 16(8) (b) of Order No. 19 of 1992. Sub-section (8) reads:-

In pursuance of this powers under subsection (7) the vice-Chancellor may,

b) exclude any student or member of staff of the University from any part of the University premises.

11

sub-section 7 reads:

The vice-Chancellor shall, subject to this order and the status, have a general responsibility to the council for maintaining and promoting the efficiency and good order of the University.

As I understand subsection 7, the law gives the vice-Chancellor discretion to deal with students and members of the staff who are out of order or inefficient vices the applicant is not associated with. Having said this, I must caution that even where the vice-Chancellor has applied the subsection it does not mean that the court is precluded from inquiring whether in so acting the law was followed. It is also to be observed that 'may' in subsection 8 is directory and not peremptory or as it were imperative thus giving the vice-Chancellor a wide discretion in the circumstances.

I have taken a close look at the law applicable and the interpretation clauses thereof and have found that there is no interpretation of the term 'exclude.' However, the Concise Oxford Dictionary 8th Ed. describes 'exclude' as 'shut or keep out (a person or thing) from a place, group or privilege, etc.; 'expel or shut out/ Expel is described in the same dictionary as 'deprive (a person) of the membership or involvement in (a school,

12

society, etc.)';'order or force to leave a building, etc.' In this court's view, nothing can be worse than being excluded from membership or a building without being heard. What's unheard of, the letter of exclusion by the vice-Chancellor referred to above requires the applicant to in addition hand over or as is said 'hand in any university property that may be in your possession.' As this court sees things, the vice-Chancellor went an extra mile without hearing applicant. Moreover, unless I am mistaken, in the law that the vice-Chancellor applied nowhere does it authorise him or her in addition to exclusion, to order that university

property be handed over. Respondent by his/her act dismembered the applicant from the day to day activities of the respondent as if a determination against the applicant had been arrived at. Even were there such a determination, it cannot be made without hearing the applicant.

But of course in the instant case it is to be assumed the vice-Chancellor after reviewing prevailing circumstances (albeit wrongly) such circumstances being a report and recommendations of Ernst and Young, Presidents of Lutaru and Nawu which concerned themselves with restructuring and effective management of respondent's resources by means of 'an audit committee and internal audit department.' The recommendations are wide ranging covering every aspect of respondent's responsibility. Ernst and

13

Young have in particular advocated that the result of forensic audit is that employees who are unproductive and incompetent can be identified; also 'to be undertaken to substantiate or dispel the allegations that have been made regarding the validity of certain expenditure items.' On the other hand, Lutaru and Nawu referred to above have listed a number of financial improprieties among them being concerning a contractor, extension of the bursary, covering a car ports, etc, construction of gates at I.E.M.S, carpeting of Highlands, etc, purchase of photocopies, contracts for the supply of furniture ,privatisation of cleaning services of the University on the Taung Skills Centre in Liphiring. In particular Lutaru and Nawu have complained of 'some individuals are lining their pockets with University funds through these and other schemes'. Nowhere in the recommendations has the forensic team advised the respondent to take steps if anything against the university staff concerned in the improprieties.

As I have demonstrated above, recommendations by Ernst and Young plus Lutaru and Nawu can safely be termed jurisdictional facts which, in the exercise of its discretion respondent should have taken into account. Noticeably, the recommendations and as it were, jurisdictional facts were wide ranging and inclusive covering every aspect of the respondents activity. In adverting to the order under which the respondent acted, he or she should

14

have addressed her mind to the aforesaid recommendations or as it were jurisdictional facts and I find it failed to do this. As I have said, a Bursar is a Treasurer who overseas respondent's treasurers. The respondent has described the applicant as 'a senior officer of the respondent' (vide para. 7 of the Answering Affidavit) and I shudder to reflect that such a senior officer of the respondent was treated so shabbily. In any event, under a Bursar are several mini bursars accountable to the Bursar engaged in daily transactions. Although he is responsible for overall management, he is not immediately accountable until an audit inquiry has revealed otherwise. I find the exercise by the respondent to have been presumptuous and pre-emptive - something this court cannot allow.

The subject matter of audi rule has been dealt with extensively by our courts and hardly requires recapitulation. It is an old hat trampled upon by courts of law for years on end. Whether we are academics or socialites, it does not mean that principles of natural justice are hidden away from us because by nature we are endowed with them. If your child is assaulted by another, you do not go for the aggressor before hearing him. It can never be, my child has told me what you did to him and I am not listening to you. If you do, you will be rightly

accused by bipartismship. Ours is civilised society which cannot be allowed to ignore elementary rules of daily social

15

intercourse. Hearing the other side before acting pre-empts accusations of selective morality and one-sidedness. Much as it is denied by Mr. Mosae that there were accusations against the applicant who continues to receive his salary, it was incumbent on the respondent to hear from the applicant why sanctions imposed on him were not justifiable. These were no ordinary sanctions for they deprived applicant of his rights, privileges and freedom of association without being heard.

Rules of natural justice are nothing but that where individual rights, privileges and immunities are going to be interfered with it is desirable that the subject should be heard. Principles of natural justice are no more than an expression of the rule of law where a person's rights, privileges and liberties cannot be curtailed or extinguished except by due process of law. The law frowns on arbitrary action against a subject. It is arbitrary to deprive a subject and in this case the applicant without hearing him in a matter that was not brought about by him but by exigencies of the situation.

I have found the applicant to have complied with requirements of an ex-parte application in that the urgency arose on the occasion of the applicant having to resume duties from his Sabbatical leave. Sufficient reasons prompting urgency were canvassed in applicant's founding papers.

16

Accordingly, this court grants the application with costs to the applicant.

G.N.MOFOLO
JUDGE
9th August, 2001.

For the Applicant: Mr. Mahlakeng
For the Respondent: Mr. Mosae