C of A(CIV)No. 23 of 2007

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

THE CHAIRMAN OF THE STUDENTS' DISCIPLINARY COMMITTEE,

LEROTHOLI POLYTECHNIC — First Appellant

LEROTHOLI POLYTECHNIC — Second Appellant

AND

MOKONE MALIBENG — First Respondent

SEBEKA LETSOTA — Second Respondent

HEARD: 2 April 2008
DELIVERED: 11 April 2008

CORAM: STEYN, P
GROSSKOPF, JA
MELUNSKY, JA

SUMMARY

The appeal is an example of how judicial proceedings should not be conducted - manner of initiation and prosecution of alleged urgent proceedings - proceedings a travesty and a miscarriage of justice occurred - both Counsel and the court a quo per Mahase J perpetrated serious irregularities - Polytechnic suspending 2 students for 12 months - failure to carry out sentence of community service - High Court wrongly holding that double punishment imposed for the same offence - validity of regulation that no second hearing necessary - no failure of justice occurred as applicants were treated fairly - appeal upheld.

JUDGMENT

STEYN, P

[1] This appeal is a sad example of how judicial proceedings should not be conducted. The manner in which both applicants' counsel and the Judge in the High Court dealt with the hearing of the matter can only be described as a travesty and in the event a miscarriage of justice occurred.

[2] I will first set out the tortuous road these proceedings traversed. These commence with the filing of an application for urgent relief in the High Court. In papers filed on its behalf the two applicants, who were students at the Lerotholi Polytechnic - the second respondent in this appeal - moved the High Court for an order setting aside their 12 month suspension from this educational institution. They cited the Chairman of the Students' Disciplinary Committee who had recommended the imposition of this disciplinary measure as the first respondent. The technic that made the decision affecting the applicants was cited as nd respondent. The document which conveyed this decision to follows:

"Dear Student

RE: VERDICT ON A CASE OF FAILURE TO COMPLY WITH PUNISHMENT

This note serves to notify you that you are with immediate effect, suspended from Lerotholi Polytechnic and its related activities for the whole 2007/2008 academic year. This resolution was taken on the basis that the Students Disciplinary Committee found you guilty of failing to comply with its punishment (refer to the letter dated 10 January 2007), hence violating Clause 14.1 (i) of the Students Discipline and Residence Regulations. The clause provides that, "if a suspect is found guilty of an offence(s) and does not comply with the punishment meted out, he/she is liable to immediate suspension or expulsion without further hearing(s).

I hope this punishment will assist you to transform into a responsible and law abiding citizen.

Thank you.

Yours sincerely

(Signed)
T.J. Lebakae (Mr)
RECTOR

CC Deputy Rector Academic
Deputy Rector Administration (a.i.)
Registrar
DOS-SOBE
Chairman - SDC
Director of Student Affairs
Parent".

[3] The applicants (I refer to the parties as they were cited in the court below) moved the Court for urgent relief without notice to the respondents.

Whilst there were grounds upon which it could be contended that there was a need for the court to deal with the matter expeditiously, there were no reasons why notice could not or should not have been given to the respondents. Such notice would in no way have caused any prejudice to or jeopardized any relief to which the applicants were entitled.

[4] There are many judgments of this Court and of the High Court deprecating the abuse of the provisions of High Court Rule 22. See in this regard Commander, Lesotho Defence Force and Another v Matela LAC - 1995-1999, 799 at 804-805, Fothoane and Another v President of the C.D.P. and others LAC 2000-2004 287 at 294 and LNDC v LNDC Employees and Allied Workers Union LAC 2000-2004, 315.

[5] It should be noted that the applicants had received written notice of their suspension on the 7th of February 2007. They filed their application for urgent relief some 3 weeks later. (Although the notice of motion is dated the 27th of March this is an error. The founding affidavit is indeed correctly dated the 27th of February 2007.) The matter was set down for

hearing on the 5th of March 2007, 4 weeks subsequent to the decree of suspension having been communicated to the applicants.

[6] The application, duly came before the High Court on the 5th of March. The Court ordered the respondents to "indicate their opposition by Wednesday the 7th of March at 2.30 p.m. and file opposing affidavits by Friday 2.30 p.m. and that the matter be argued on Monday 12th of March 2007". It should be noted that the applicants took 3 weeks to bring their application, the respondents were given 2 days to file their opposing affidavits. (The papers were only served on them on Wednesday the 7th of March.) Indeed they responded with commendable alacrity and their opposing affidavits were filed on the 8th of March.

[7] The matter which was so urgently and without notice to the other side enrolled by the applicants now loses its momentum. The applicants do not file any replying papers and the matter is not dealt with on the 12th of March and despite the fact that, in terms of Rule 8 (11) their replying affidavit should have been filed within 7 days of the service of the

opposing affidavits, the applicants take 6 weeks to do so and only file their response on the 18th of April 2007. All the postponements take place at request of the applicants.

[8] In Fothoane cited above this Court points to the prejudice an improper resort to the invocation of rule 8 (22) can have on a litigant. At p294 [H] the Court says:

> "Such an order is a powerful tool that can be exploited by a litigant to secure a substantial, unmerited advantage in litigation and can cause irreparable harm or real prejudice."

The prejudice to the respondents in the court below is evident. Criticism was levelled at the respondents by the Court a quo because of imperfections in their papers. No regard was had to the disadvantages to which the inappropriate use of the urgency provisions of the rules had on their capacity to plead their cause. Nevertheless, an examination of their opposing affidavits demonstrated remarkable and commendable efforts to comply with the rigorous directives of the High Court.

[9] The travails to which the respondents were subjected were only beginning. It is not clear at whose behest, but the matter was removed from the uncontested roll by Mofolo J on the 23rd of April. According to the notation on the file both Counsel were present when this step was taken.

An application eventually comes before the Court a quo on 3 May for interim relief in a most unusual manner. There is no record of it ever having been formally enrolled. Certainly no notice of set down was ever filed. As will be seen below a hearing took place on 10th May. For what next occurred this Court has to rely on the comments of the Trial Judge (Mahase J) contained in a judgment on merits delivered some 7 months later as well as her notations on the court file. In the judgment the Court says:

> "Having been approached by Mr. Tsenoli - Counsel for the appellants; this Court set aside its business for that afternoon to deal with this application. Prior to that the Deputy Registrar had informed Court that both Counsel were aware of the indulgence having been granted. However, and to the dismay of this Court, Mr. Letsika, Counsel for the respondents did not attend court [on 3 May]. No reasons were given why he did not attend."

[10] As is evident from the above a completely informal and *prima facie* irregular process was adopted both by the legal practitioner concerned and by the Court. It is apparent from the Judge's comments in her judgment that the initiative to have the matter enrolled informally emanated from one of the parties' counsel. It could happen that in circumstances of great urgency, particularly where an issue of great public interest is concerned, that both parties may seek to access the court informally and enlist the services of a Judge who may have become available. However, to do so at the behest of one of the parties is calculated to endanger the integrity of the legal process.

[11] This Court has had access to the original file in this matter. From these file notes it is clear that counsel for the applicant not only took the initiative to seek to enroll the matter as a matter of urgency but that both he and the Court a quo knew that counsel for the respondents was not available. Applicants' counsel also gave evidence from the bar inasmuch as he alleged that the urgency of the matter was that "the examinations at the Lerotholi Polytechnic are due to commence very soon". (This

allegation is nowhere to be found in the papers before the Court and Counsel's averments are not substantiated by any evidence. The only averment in the certificate of urgency is that the applicants would be "missing lessons".) The Court a quo also did not know how soon the examinations would commence and how the applicants would be able to write them if they had not attended any lessons for the first quarter. The Judge records in her handwritten note that she had another matter to try but had postponed it to hear the parties that afternoon. The note also records:

> "This is a sacrifice and even if Mr. Letsika (respondent's counsel had(?) or felt like not attending court, he should have arranged to send someone".

The court then proceeds to grant an order which operated as a temporary interdict on the 3rd of May despite the fact that she is aware of the opposition by this public institution and that they are not represented. This order reads as follows:

"INTERIM ORDER OF COURT

> BEFORE HER LADYSHIP THE HONOURABLE MRS JUSTICE MAHASE JUDGE OF THE HIGH COURT OF LESOTHO, ON THE 3DD DAY OF MAY 2007, AT 2.30PM.

MR. TSENOLI FOR APPLICANT
NO APPEARANCE FOR/BY RESPONDENTS
MR. MOHOBO THE JUDGE'S CLERK

HAVING read papers filed of record and having heard Applicant's Counsel

IT WAS ORDERED THAT

1. a rule nisi do hereby issue returnable on the **21st day of May 2007** calling upon the respondents to show cause, if any why;

   (a) The decision of the first respondent as contained in annexure **"M M 4"** herein dated the 7th February 2007 shall not be stayed pending finalization of this application;

   (b) The decision of the first respondent as contained in the annexure **"M M 4"** herein, dated the 7th February 2007 shall not be reviewed and corrected or set aside as being irregular, improper and /or illegal;

2. The first respondent is hereby directed to dispatch to the Registrar of this Honourable Court, within fourteen (14) days upon receipt thereof, the record of proceedings in the matter between applicant and second respondent herein (of the alleged disciplinary case).

(3) Orders 1(a) and 2 herein operate with immediate effect as interim orders of Court".

[12] The saga continues. On the 7th of May respondents file a notice in terms of rule 8 (18) to anticipate the return date of the rule operating as a temporary interdict which is opposed by the applicants. However the notice to anticipate is superseded by a further notice issued by the

respondents in terms of Rule 8 (10) (c) to raise certain questions of law. This notice reads as follows:

> "KINDLY TAKE NOTICE THAT the Respondents herein intend to raise the under mentioned points of law at the hearing of the matter without going into the merits of the case or filing any affidavit, namely;
>
> (a) The Rule Nisi sought and granted is insupportable in law in as much as the matter had been removed from the roll on the 23rd April 2007 by his Lordship Mr. Justice Mofolo;
>
> (b) It was irregular for the applicant to approach the learned judge in chambers when he knew well that the matter had not been reinstated.
>
> (c) The Rule Nisi was granted ex *parte* without notice to the other party as the rules of court require particularly when due regard is had to the fact that not only had this matter been postponed several times at the behest of the applicant but also because the whole application was opposed.
>
> (d) The Rule Nisi was sought and granted without hearing the respondents as the rules of natural justice require particularly when due regards is had to the fact that the opposing papers had been filed of record.

(e) After numerous postponements of the matter no reasons have been filed either by way of certificate of urgency or affidavit as to the circumstances that make it urgent.

DATED AT MASERU THIS 9th MAY 2007".

Despite having issued a rule returnable on the 21st of May 2007, the Court proceeds to hear what counsel before us referred to as the merits of the application and it is "argued to finality". The file note records that the court reserved judgment on this date i.e. the 10th of May 2007.

[13] In the meantime the rule nisi operating as a temporary interdict is still extant and is returnable on the 21st of May 2007. On this date the rule should either have been confirmed or discharged. However nothing is done and in the ordinary course of events it must be presumed to have lapsed. On the 17th of September counsel for the respondents receives an order of Court that the rule returnable on the 21st of May 2007 had been "revived" and extended to the 12th of October. It is common cause that this extension was granted without notice to the respondents. The file note records that the rule is extended on the application of applicants'

counsel. In the appeal record there is a notice by the respondents' attorneys to anticipate the return date. What happened to that application of the rule returnable on the 12th of October cannot be determined on the papers or from the file. I could find no file note subsequent to what is referred to above.

[14] Judgment on this urgent application which was reserved on the 10th of May 2007 is finally delivered on the 4th of December 2007, nearly seven months later. In its judgment the court finds *inter alia* that the regulation pursuant to which the applicants were found guilty and suspended "is illegal because it operates against and excludes the *audi alterum* (sic) principle." The fact that the Court appreciated the importance of this principle is commendable. The failure of the Court to apply the rule itself on at least three previous occasions is most regrettable.

As I said in paragraph [1] above the irregular conduct of counsel for the applicant compounded by the actions of the presiding Judge was a travesty. I also said that it resulted in a miscarriage of justice. The

reasons why this is so will appear from what is recorded below when I deal with the merits of this dispute.

[15] As can be seen from what is set out in paragraph [2] above the two applicants moved the High Court and obtained a judgment setting aside their 12 month suspension from the Polytechnic. The High Court held that this suspension was double punishment. It also held that the regulations which authorised the punishment, denied them a hearing and was "illegal".

[16] The ground of appeal that they were punished twice for the same transgression is based on the following facts.

At some time during the third quarter of 2006 some students at the Polytechnic, which allegedly included the two applicants, participated in assaults on the person of certain "Life High School" students and damaging private property (breaking 16 classroom windows and the windows of two vehicles.) This conduct was alleged to have contravened certain provisions of the Students Discipline and Residence Regulations.

[17] The two applicants were duly tried on the 13th of October 2006. There is no challenge to the propriety of these proceedings or to the decision to convict and punish them. It is however important to record these events as deposed to by the Chairman of the Disciplinary Committee. He says the following concerning the proceedings:

> "We invited the parents of the charged students to attend the hearing. The parents of applicant did attend and we proceeded with the hearing on this date. By this time the students had made their statements relating to their responses to the charges against them.
>
> I conducted the hearing fairly and to the best of my abilities making sure that all sides were heard and were able to present their stories comfortably. I must remark that all I wanted to establish was simply whether the allegations against the students were true. After the hearing I considered the evidence of all parties and came to the conclusion that the applicant and his colleagues were guilty of misconduct. I assessed the gravity of each student's misconduct and awarded different punishments. In the case of applicant I considered the punishment of community service for twelve months to be adequate."

(The reference to "applicant" should read "applicants". For some reason two separate sets of the record were compiled in respect of each of the two respondents in this appeal - applicants in the court below)

[18] All the above was common cause in the court below and before us. Indeed there was no challenge to the regularity of these proceedings. As indicated above there was no complaint about the sentences imposed upon them or about the fact that they were obliged to comply with the order to carry out the terms of their punishment. The disputes only arise post their conviction and sentence on the principal charge.

[19] In this regard the applicants allege that they "duly carried out the terms of the punishment, until one day (their) supervisor did not attend to our community service and it was recorded/registered that we failed in carrying out such punishment." This contention is contested on behalf of the respondents. Indeed the chairman of the committee confirms that he received a report from the supervisor of the community service order that the respondents had failed to honour their obligations imposed on them in

terms of the order. He avers that the applicants "made a mockery of their punishment". The supervisor, a Mr. Ntlhakana, deposed to an affidavit in which he says that although the students reported for community service they failed repeatedly and extensively to comply with the requirements of the community service order. In view of the findings made by the Judge a quo in this regard it is necessary to set out his evidence in some detail. He says that the two students reported for community service on the 12th of December 2006. He kept what he called "clean records" of students who report to him for community service. He did so because these records serve to show whether an erring student has duly fulfilled the obligations the order imposed on him or her. He attached a copy of the "time keeping" sheet in respect of these two students and some others. He describes what next occurred as follows:

> "2.2 I aver that after a few days I received complaints from students Mokone Malibeng and Sebeka Letsota. They particularly complained about the fact that they were not allowed to go home to enjoy the Christmas holidays. I made it clear to them that they were obliged to serve their punishments and were not entitled to prescribe how and when they should serve these punishments."

However, shortly after this incident and on the 21st of December the two applicants once again sought permission to absent themselves from service from the 22nd of December 2006 and only report back on the 27th of December. They each gave different reasons for their unavailability, which according to the deponent, were subsequently found to be false. On the strength of their representations he did however grant them permission to absent themselves - the one to seek medical treatment, and the other to sort out residential accommodation. It was however made clear to them that they should return and report back no later than the 27th of December 2006. Neither of them showed up on this date and only returned on the 2nd January 2007 when the Polytechnic resumed its normal activities. He questioned them as to why they had not complied with their undertakings. He received answers which, when investigated were, in the case of the 1st respondent found to be false and in the case of the other clearly spurious.

[20] Most importantly however this witness goes on to say the following:

> "2.5 The last time they attended to serve community service was on the 3rd January 2007 and ever since I have never seen them. I reported their absence to the Chairman of the Students' Disciplinary Committee. I know for sure that they have never provided me with any reasons why they decided not to carry out their punishment in the form of community service. In the premises I deny the contents of paragraph 8 of the applicant's affidavit that I recorded that they did not carry out their punishment because I was not available. The court will observe that Annexure "A" is clear that I made my record every day with the exception of weekends and holidays."

[21] These detailed allegations of the witness are dealt with by the applicants in the following manner. They allege the following:

The annexure in which their attendance is recorded "has been altered to suit the allegations of the deponent as it has been in his custody throughout the material times"

They contended that neither of them ever made any request to be allowed to absent themselves during the Christmas holidays. This, they allege "is a fabrication of stories".

In so far as the supervisor's allegations concerning their abandonment of their obligations as from the 3rd of January are concerned they say the following:

> 2.3 "I deny allegations herein and reiterate that I attended my community service to conclusion. I deny that deponent made his records everyday as alleged, but only once a week without any remarks. I reiterate averments in paragraph 8 of my founding affidavit and state that I am candid to this Honourable Court; more so as deponent fails to prove the contrary. He has no written record of the daily events in the community service. I aver that the deponent's allegations are irrelevant and transgressing from the issue herein. The supporting affidavit, together with its annexure **"A"** deserves to be dismissed."

[22] A careful examination of the records kept concerning the attendance of those performing community service confirms the evidence of the witness Ntlhakana in every material respect. Indeed, it would have required an elaborate and extensive forgery and manipulation of the records to have "altered to suit the allegations of the deponent". The record reflects in detail the attendance of other students performing

service with their signatures verifying their attendance. There are six sheets with up to as many as 15 names on a sheet. Forgery is a serious allegation with criminal consequences for the person committing such an offence. In the present case the allegations can, however, and should have been dismissed as not only reckless but false beyond question.

[23] It is to be remembered that the applicants at no stage in their founding papers challenged the validity or regularity of their conviction on the principle offence, i.e. the assaults on students, their riotous behaviour or the destruction of property referred to above in paragraph [16]. Yet the court a quo proceeded in extenso to examine the fairness of these proceedings, which were not in dispute before her and therefore never addressed by the parties. Indeed in their founding papers the two applicants did not deny their guilt in respect of their unlawful conduct. It is true that in their replying affidavit they do so when in a single sentence when they say that "the conclusion that (we) are guilty of misconduct was wrong and unlawful". However, nowhere in their founding papers do they challenge the findings of the disciplinary proceedings in respect of their

conduct as alleged. Their only challenge is directed against their suspension as result of their alleged failure to carry out their obligations to perform community service.

[24] What did the court below have to say concerning the damning evidence of the supervisor convincingly corroborated by the time sheets annexed to this affidavit? The Judge a quo does so in a single sentence. This reads as follows:

"Regrettably, annexure A (the time sheets) is inconclusive because it is not completely filled in, so not much weight can be attached to it." This comment is a perverse finding and there is no justification for it on the record. Moreover the Court does not deal with the other detailed evidence of the witness concerning the applicants' failure to perform their service obligations or with the patently false evidence of the applicants when seeking to dispute the version of the witness.

[25] I come to deal with the sentence imposed for the failure to do community service. The Court held that unfairness tainted the validity of the sentence imposed on the applicants on two grounds. The first of these is that the students were punished twice for the same offence. The second finding is that Clause 14.1 of the Students Disciplinary and Residence Regulations "is illegal because it operates against and excludes the *audi alterum* (sic) principle".

[26] As to the alleged "double punishment" the facts are the following. When it was reported to the authorities that the students had not performed their community service the Chairman of the Students Disciplinary Committee convened a meeting of this body to deliberate on this issue. The committee met on the 10th January 2007. According to the deponent it decided that the students should be suspended for 14 days pending an investigation into the matter. A letter to this effect was sent to the two applicants. They were also advised that the matter had been referred to the Governing Council with a recommendation from the committee. Pending its consideration the respondents were suspended

for 14 days. Some four weeks later and on the 7th February 2008 the verdict of this body is conveyed to the students, (see in this regard para [2] above)

[27] The court's reasoning as to why the two suspensions constitute double punishment is difficult to follow. It refers to the fact that the charge sheets informing the students of the nature of their alleged offences and the regulations under which they were charged left "a lot to be desired". The Court also says that no record of the proceedings were kept and for this reason it is difficult "to believe this story of the respondents" (appellants before us). The Court expressed the view that because the respondents before her in pursuing the disciplinary hearing did so "in total disregard of their own regulations, thereby prejudicing the appellants," the proceedings were according to the judge a quo in effect invalidated.

She then concludes, illogically it would seem, "that for these reasons MM4 (the letter referred to in paragraph [2] above), constituted double punishment..."

[28] What the respondents did was not to punish the applicants twice. They decided for purposes of the good governance of the institution and pending the decision of the Council on their recommendations to keep the two respondents off the school premises until the nature of their sentence was determined. This was not a sentence imposed for their transgression, i.e. the failure to do community service. Such sentence was to be determined by the governing body in due course. This it duly did. It is clear that there is no substance in this ground of appeal.

[29] I come to deal with the finding of the Court a quo that the regulation in terms of which the applicants were suspended "is illegal because it operates against and excluded the *audi alterum* (sic) principle". The relevant regulation provides that "if a suspect is found guilty of an offence(s) and does not comply with the punishment meted out, he/she is liable to immediate suspension or expulsion without further hearing(s)." I do not think it is tenable to contend that each and every administrative body, such as e.g. an educational institution, is prohibited from prescribing procedures that must in every respect and under every circumstance

provide for a hearing before taking decisions affecting those with whom it has contracted. Indeed such a regulation has been enforced in this Court. See in this regard Lesotho Electrical Corporation v Moshoeshoe LAC (1995 - 1999) 526. See also Momoniat & Naidoo v Minister of Law and Order 1986 (2) 264 at p 276. Moreover, whilst the statute itself might not per se exclude the operation of a hearing, it may confer an administrative discretion which permits that result. See Matebesi v Director of Immigration and Others LAC 1995-1999 616 at 626. Also as Gauntlett JA points out at -625 op.cit ."The right to audi, is, however, infinitely flexible. It may be expressly or impliedly ousted by statute or greatly reduced in its operation". As the authors Wade and Forsyth point out in their work Administrative Law (on p.521): "In order to preserve flexibility the courts frequently quote general statements such as (that) the requirements of natural justice must depend on the circumstances of the case". Maintaining discipline at an institution of higher learning is an arduous task. Mahomed P described their challenge and duties in this context in NUL Students' Union v NUL 1990 - 1994 LAC 212 as follows at pp 221-222. "It (the university) must however maintain at all times that minimum

discipline and respect for the administration and staff of the university as it is essential for the university to function effectively as a university and to discharge its statutory duties and functions."

The court concludes by saying:

> "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." (p 222)

In the present case the following must also be borne in mind. The applicants received a hearing at which their parents were present and were correctly convicted. They were in the circumstances not only heard but, bearing in mind the gravity of the offence fairly, indeed appropriately, punished. There can be no doubt that - as the witness stated - they made a mockery of their punishment. They were apprised of the fact that they had been found guilty of this transgression and that a recommendation to suspend them had been made to the Governing Council. They took no

steps either to challenge the finding -or to seek to present any circumstances to the Council which could have a bearing on their punishment. It should be noted that four weeks elapsed before the recommendation was acted upon by the Council. The fact that no further hearing needed to be given does not mean that representations would be ignored and that those affected were precluded from making them. (See in this regard Momoniat (supra op. cit). The applicants were not entitled to a hearing in terms of the regulation in issue. The institution was therefore entitled to suspend them.

In my view the authorities in all the circumstances cannot be held to have acted irregularly. The applicants' guilt on the principal charge was established beyond question. Also their refusal to do community service was proved conclusively. They also failed to take any steps to respond to the advice they received of the recommendation of the disciplinary committee. I do not in these circumstances consider the decision of the Council to suspend them without a further hearing to be unfair.

For these reasons I would allow the appeal with costs. The order of the High Court is set aside and in its place it is ordered - Application dismissed with costs.

J H STEYN
PRESIDENT

I agree:

F H GROSSKOPF
JUDGE OF APPEAL

I agree:

L S MELUNSKY
JUDGE OF APPEAL

Counsel for the Appellants: Adv Q. Letsika

Counsel for the 1st Respondent:: Adv B.M.R. Masiphole
Counsel for the 2nd Respondent: Adv P.V. Tsenoli