IN THE APPEAL COURT OF LESOTHO

C OF A (CIV) 23 OF 2012

In the matter between:

KARABO KARABO MOHAU
& 44 OTHERS **APPELLANTS**

and

THE PRINCIPAL, NULIS **FIRST RESPONDENT**

THE REGISTRAR, NUL **SECOND RESPONDENT**

THE NATIONAL UNIVERSITY
OF LESOTHO **THIRD RESPONDENT**

CORAM: SMALBERGER JA
MELUNSKY JA
TEELE AJA

HEARD : 11 OCTOBER 2012
DELIVERED : 19 OCTOBER 2012

SUMMARY

National University of Lesotho International School – substantial increase of school fees – necessary to give reasonable notice of increase to parents before implementation – period of notice inadequate – increase invalid. Necessary for University Council to approve such increase in terms of section 10 of Order 19 of 1992 – no evidence that Council approved – increase set aside on appeal.

JUDGMENT

MELUNSKY JA

[1] The first appellant is employed on permanent and pensionable terms as a lecturer in the faculty of law at the National University of Lesotho ("the University"). He and the other appellants (many of whom are also employed by the University) are parents of children who attend school at the National University of Lesotho International School ("NULIS"). Cited as respondents are the Principal of NULIS (the first respondent), the Registrar of the University as well as the University, being a body corporate in terms of section 3 (1) of the National University of Lesotho Act, No. 19 of 1992 ("the 1992Act"). The University is the proprietor of NULIS, a combined primary and secondary school situated at the University's Roma campus. According to the first appellant, Advocate Mohau, the school was established "decades ago" with a view to providing quality

providing quality educational facilities in the main for children whose parents were members of the staff of NULIS.

[2] During December 2011, and after an open day held at the school, the new school fee structures to be implemented in 2012 were communicated to the parents by means of a document contained in the end of year school reports. This reflected that in the primary section of NULIS the fees per annum would amount to M11 280 (M2 820 per quarter) and that in the secondary section the fees would be M16 360 per annum (M4 090 per quarter). In the 2011 school year and in preceding years, school fees payable by parents depended upon whether the parents were employed by the University or not. In the former case the parents paid slightly less due to a subsidy of M2 000 per pupil given annually to its employees by the University. The first respondent, the head teacher at NULIS, refers to

the subsidy as a "discount", avers that it could be withdrawn at any time and that it is limited to M750 per annum. Whether the extra amount is termed a subsidy or a discount does not seem to be of much moment but it is clear from the figures produced by the first appellant and admitted by the first respondent that he paid M4 520 per annum in respect of his elder child, a pupil in the secondary school, while a parent who was not a staff member at the University paid annual school fees of M6520 for secondary school pupil – exactly M2 000 more. The first respondent's assertion that this amount could be withdrawn "at any time", may not be a proper reflection of the legal position but this is a matter that will be commented on later.

[3] The fees payable for pupils at NULIS in 2011 and the preceding years were the following:

Primary Pupils: M3 360 per annum but M5 360 if the parent was not a member of the University staff;

Secondary Pupils: M4 520 annually but M6 520 if the parent was not a member of the University staff.

[4] The new fee structures not only did away with the subsidy or discount available to University staff members with children at NULIS but increased school fees very substantially – by M5 920 per annum (and M7 920 in respect of University staff parents) for primary school pupils and by M9 840 per annum (M11 840 in respect of University staff parents) for secondary school pupils. And the increases operated more harshly on parents with more than one child at the school. Thus the first appellant who

has two children at the school – one a primary school pupil and the other a secondary school pupil – paid annual school fees totaling M7 880 in 2011 and was now called upon to pay the total sum of M27 640 per annum. His claim that the increases of M7 920 and M11 840 in his case amount to increases of 336% and 362% respectively does not appear to be far off the mark.

[5] It is obvious that the extent of the increases shocked the parents. They held a meeting at which it was decided to request the School Board to meet with them on 5 January 2012 to discuss the increased fees. A letter to this effect was addressed to the first respondent in her capacity as secretary of the Board. The chairperson of the Board refused to agree to the meeting on the grounds that the letter was unprocedural as the request should have been addressed to the said chairperson. On 30 December a

group of parents wrote to the chairperson of the Board of Governors of NULIS expressing their dissatisfaction with the manner in which the review of school fees had been conducted and again requesting a meeting with the school Board for 5 January 2012. This request was also refused, apparently on the grounds that the Finances and General Purposes Board ("the FGPB") had decided that there should be no such Meeting.

[6] Thereafter a group of parents met on 5 January 2012 and resolved that they would pay the school fees that were in force in 2011 until proper consultations on the matter had been held and a more reasonable fee structure put in place. A number of parents acted on this decision with the result that the first respondent apparently threatened to withhold the issue of textbooks and other learning materials to pupils whose parents had not paid school fees

according to the 2012 rates. This, in turn, led to the appellants applying to the High Court for relief and on 2 February 2012 Mosito AJ issued an order. The relevant parts of paragraphs 3 and 4 thereof read as follows:

> *"3. That a Rule Nisi issue returnable on 10th day of February 2012 calling upon the Respondents to show cause (if any) why:*
>
> *(a) The 1st Respondent shall not be interdicted forthwith from dismissing the applicants' children from NULIS for non-payment of fees stipulated on Annexure 'A' to the Founding Affidavit pending the outcome hereof*:
>
> *(b) That 1st Respondent shall not be directed forthwith to provide the applicants' children with stationery, textbooks and other learning materials pending the outcome hereof;*
>
> *(c) The decision to implement the fee structure set out on Annexure 'A' for the school year 2012 shall not be reviewed and set aside;*

(d) The Respondents shall not be directed to pay the costs hereof;

(e) The Applicants shall not be given further and/or alternative relief.

4. That prayers . . .3 (a) and (b) operate with immediate effect as interim orders of Court."

[7] On the extended return day the matter was argued before Monapathi J who, on 13 July 2012, dismissed the application with costs and, by implication, discharged the Rule granted by Mosito AJ. It is against this decision that the appellants appeal. The main reasons advanced by the appellants are the following:

(1) The increases were imposed at an unreasonably short notice;

(2) The said increases were not imposed by the University Council;

(3) The new fee structure was put into force without giving the parents a prior hearing;

(4) The fee structure had the effect of altering the terms of employment of parents who were University employees without giving them a hearing;

(5) The parents had a legitimate expectation to be heard in respect of items (3) and (4) above.

[8] It seems to me to be necessary to emphasise that this Court is not concerned with whether the significant increases in school fees was justified on the grounds stated by Mr. Selepe (the special assistant for finance and administration to the University's Vice Chancellor) namely that the increased fees are essential to ensure that NULIS is able to cover its operating expenses, failing which the school would have to close. That is a matter that is not germane to the issues before this Court. We are only

concerned with whether, in seeking to increase the fees, the respondents followed the correct and appropriate procedural steps. And in this respect we have to have regard to all the facts placed before us.

[9] In the main the questions before this Court have to be answered in terms of the contractual relationship between the appellants on the one hand and NULIS and the University on the other. Counsel for the respondents conceded, quite correctly in my view, that, as a general rule, NULIS would be obliged to give the parents some notice of its intention to increase school fees. Counsel also agreed that the period of notice would have to be a reasonable one, having regard to all the circumstances. The appellants submit that they were first made aware of the increase in December 2011; and that at that stage there was no time to apply for admission to other schools

as applications for admission are done well in advance of the end of the school year. It is not open to doubt that the fee increase was a very substantial one and that parents who were unable or even unwilling to meet the additional costs would need time to ascertain what schools, if any, had vacancies for new pupils from January 2012, the cost and the quality of the education offered and the situation of the schools in relation to the home of the pupils. Many other factors would also come into play, including the possible disruption to the children's education. In short, the time scale fixed by the respondents was not only unreasonably inadequate, it was also insensitive for the respondents to have expected the parents to do the best for their children within the given period.

[10] Counsel for the respondent did not concede that the notice period was unreasonable. He pointed out that even

before December the School Board and other committees held meetings with the parents. What was discussed at such meetings has not been disclosed. Certainly there is no indication that the parents were ever warned at those meetings to expect an enormous fee increase. In fact it is not disputed that the increase came as a shock to the appellants. From the aforegoing it follows that the respondents have advanced no reason to justify the unreasonably short notice period of the increase in school fees. On this ground alone the appeal should succeed.

[11] There is, however, at least one other matter that needs to be dealt with. This concerns the extensive powers given to the University Council in terms of Section 10 of the 1992 Act. It is not necessary for me to set out all the terms of the section. It is sufficient to say that the Council manages and controls all the affairs, concerns and property of the

University, including the power to regulate the finances, accounts, investment and property of the University. It is undisputed that the Council effectively owns and subsidises NULIS. Thus the appellants contend that the Council's consent to the new fee structure was essential and that it was not given.

[12] The first respondent's answer was a denial that the new fee structure had to be approved by the University Council. She maintained that the FGPB determined and approved of finances on the Council's behalf and that in the instant case the FGPB approved of the increases in school fees, reported on this matter to the Council and that the Council accepted the Board's recommendations. The first respondent was clearly wrong in her assessment of the powers of the FGPB. Section 40 of the 1992 Act makes it quite clear that the FGPB is an advisory body only. It

cannot act on the Council's behalf in respect of the latter's powers prescribed in Section 10 without at least having delegated powers from the Council to do so. The Council does have the right in terms of Section 11 to delegate its functions by resolution but there is no evidence to establish that such delegation ever occurred.

[13] Counsel for the respondents submitted that the first respondent's statement that the University Council accepted the Board's recommendations is sufficient proof that it duly exercised its powers. The mere *ipse dixit* of the first respondent, however, is quite insufficient to establish that the Council ever approved of the fee increases. No minutes or resolutions of the Council have been placed before this Court and the appellants' contention that the Council has not approved of the fee increases has not been

answered. It follows, therefore, that this Court is entitled to set aside the new fee structure on this ground as well.

[14] Mention may also be made of the decision to withdraw the subsidies of M2 000 per child given to members of the University staff. It is not clear whether the subsidies formed part of the staff members' conditions of employment with the University. If they did, it must at least be doubtful whether they could simply be withdrawn "at any time" as the first respondent has alleged. However, there is no clarity on the basis upon which parents who are also members of staff became entitled to the subsidies which they received and the lack of certainty on this aspect makes it impossible for this Court to deal with the matter properly and, indeed, it is not necessary for us to do so. Nor do we have to deal with the other issues raised by the appellants including the vexed question of whether the

respondents were obliged to give the appellants a hearing before deciding upon and implementing the new fee structure.

[15] The appropriate order to make is to confirm sub-paragraphs (a) and (b) of paragraph 3 of the *Rule Nisi* and to rephrase sub-paragraph (c) to delete a reference to a review. The appellants' counsel has submitted that the costs should be paid by the University and in my view such an order would be appropriate. The effect of the Order would be to restore the *status quo ante* in respect of the school fees at NULIS i.e. the 2011 fee structures would remain effective.

[16] It is therefore ordered:

1. The appeal is allowed;

2. The Order of the Court *a quo* is set aside and is replaced with the following:

"2.1 Paragraphs 3 (a) and (b) of the Rule Nisi issued on 2 February 2012 are confirmed;

2.2 The fee structures for the school year 2012 contained on the said Annexure 'A' to the founding affidavit are hereby set aside;

2.3 The third respondent is to pay the applicants' costs."

3. The third respondent is to pay the costs of appeal.

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L S MELUNSKY
JUSTICE OF APPEAL

I agree:

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J W SMALBERGER
JUSTICE OF APPEAL

I agree:

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M.E. TEELE
ACTING JUSTICE OF APPEAL

For the Appellants : Mr. Q. Letsika

For the Respondents : Adv L.A. Molati