IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV)/48/2014

In the matter between:

THE DIRECTOR–LESOTHO COLLEGE OF EDUCTATION	**1st Appellant**
LESOTHO COLLEGE OF EDUCATION DISCIPLINARY COMMITTEE	**2nd Appellant**
LESOTHO COLLEGE OF EDUCATION SENATE	**3rd Appellant**
LESOTHO COLLEGE OF EDUCATION	**4th Appellant**

AND

KAKHISO MASIU	**1st Respondent**
KATISO NKOTJO	**2nd Respondent**
TANKI SEHLABAKA	**3rd Respondent**
SEPHOKO MOJALEFA	**4th Respondent**
TŠELISO NTENE	**5th Respondent**
MOETI LELEKA	**6th Respondent**

CORAM:

MONAPATHI JA
MUSONDA AJA
DAMASEB AJA

Heard : 28th July, 2015
Delivered : 7th August, 2015

SUMMARY

An appeal against the High Court Judgement which reviewed disciplinary proceedings. The Respondents having been charged under schedule 11 of code when they were first offenders – whether fatal. The Respondents failing to supply Appellants with documents in preparation for trial – Interpretation of Regulation 7.1.4 of the Code of Procedure of Students Discipline. Statement obtained under duress - whether can be basis for disciplining the Respondents, students alleged to belong to an organization whose objective is to rape and selling dagga - But not charged with those offences – confession obtained under duress – one of them admitting and implicating others as members of 'Liboba' - an organization which espouse criminal conduct and moral erosion. But unhappily Respondents not charged with being members of 'Liboba' – but holding a public gathering without permission and for having disrupted and chased away fellow students who were studying and using offensive language.

JUDGEMENT

MUSONDA AJA

[1] The background to this appeal was the Respondents brought an application in the court *a quo* on an urgent basis to review disciplinary proceedings. The Respondents sought a stay of their suspension from the college for the remainder of the first semester imposed on them.

[2] The Respondents were all students of the Fourth Appellant in their third year of study towards a Diploma in Education.

[3] The Respondents were charged with two counts. The first being contravention of section 4 (7) of the College's Code of Conduct and procedure of Student Discipline for failing to secure a written approval of the Rector for holding activities of a public nature on 28th February 2014, yet they were not a recognised club or society, but a banned 'Liboba' Society Club.

[4] The second charge was being in contravention of section 4 (13) read together with section 4 (3) of the College's Code and Procedure of Student Discipline. The sections deal with behavior which brings the College into disrepute and violent, indecent, disorderly, threatening or offensive behavior or language respectively whilst on College premises on the 28th February, 2014.

[5] The charges further alleged that the Respondents on the day in question intimidated, disrupted and chased away fellow students who were studying in a room that the Respondents wanted to use for their meeting. The Respondents were doing all that while dressed in a manner not befitting the teaching profession.

[6] The court a quo found that it was common cause that all the Respondents appeared before the Second Appellant and though they had initially pleaded not guilty in the course of their hearing, some of them later admitted their guilt.

[7] On 26th May 2014, a verdict of guilty was returned against all the Respondents. The penalty for each of them was a suspension for the remainder of the semester.

[8] The Respondents instituted proceedings before the court *a quo* on the following grounds:

a) They were, despite having demanded denied copies of witnesses' statements to which they were entitled to in terms of Regulation 7.1.4 of the Code;

b) They were denied the right to call witnesses, the First Respondent specifically saying he had wished to call Sixth Respondent as his witness, but was denied that opportunity;

c) That most of their questions were refused by the committee;

d) They were charged under schedule 11 of the code yet there was no evidence they were repeat offenders.

[9] The Appellants lamentation in the court below and in this court, was that the matter ought not to have been awarded the urgency it was accorded, which deprived them enough time to prepare. The papers were filed on 4th June and the return date was the 5th of June.

[10] The learned Judge justified the expediting of the hearing because the first semester was coming to a terminal and the final examinations were commencing on the 9th of

June 2014. This point was not denied by the Appellants in the court below.

[11] The learned Judge characterized Regulation 7.1.4 as mandatory. The Regulation is couched in these terms:

> "*If the matters giving rise to the alleged offence or offences involve consideration of any document or documents, the student shall have at least four further working days' notice in order to inspect the document of all or any of the documents and shall be entitled to question the accuracy of such document or documents."*

[12] The learned Judge disagreed with the proposition from the Appellants in the court below, that Regulation 7.1.4 meant that the Respondents were just going to inspect them and inspection would mean just looking at the document and not reading it. She agreed that the case of ***Nkisimane and Others v Santam Insurance Co. Ltd***[1], which stated that:

> "*Peremptory requirement requires exact compliance, whilst directory requires merely substantial compliance"*

Based on this decision the learned Judge held that non-compliance with a peremptory statutory requirement renders a decision taken thereof a nullity.

[1] 1978 (2) SA 430 A

[13] The Judge did not agree with the Respondents that they were denied the right to call witnesses and to ask questions, as there was no sufficient evidence adduced in support or in denial of that issue. The Judge further held that the Respondents were irregularly charged under the second schedule of the code yet they were first offenders. The First Schedule and Second Schedule are couched in these terms:

Schedule I

a) *"This schedule shall apply in the cases of first offenders and shall constitute less serious misconduct for which less serious penalties short of expulsion from the College may be imposed."*

Schedule II

"*This schedule shall apply in the cases of repeated offences and shall constitute very serious misconduct for which serious penalties including expulsion from the College may be imposed."*

[14] It was common cause as the learned Judge in the court *a quo* found that "misconduct under the two schedules are the same word for word. The first schedule is for first offenders and the second schedule is for repeat offenders".

[15] The learned Judge was of the view that the intention of the legislature with the two schedules, schedule I and II has been to categorise the offenders into first offender and second offender, not to show how serious the offence could be. So it would be wrong in that case to substitute the second schedule to mean something else. It was therefore wrong to have charged the applicants under the second schedule, yet they were first offenders the learned Judge said.

[16] She went on:

> "*But it would be realized that the applicants were not charged for being members of 'Liboba' and were also not charged for offences appearing in the 'Liboba' constitution. The offences were for holding a public gathering without permission and for having disrupted and chased away fellow students who were studying and using offensive language.*"

[17] The applicants were exposed to police intervention where they were assaulted hence why they admitted to having been members of 'Liboba'. This comes from affidavit of the Sixth Applicant at page 33 of the record. The Sixth applicant even attached to his papers a medical form showing the injuries he sustained on the day he said was arrested being 4th March 2014.

[18] The learned Judge agreed with the applicants counsel when he said:

> "*Appellants were definitely prejudiced in having been made to make statements before the police whilst being subjected to torture. Had they known that the statements were going to be used against them in evidence they would have prepared themselves. The statements which were never given to them prior to appearing before the disciplinary hearing denied them the opportunity to prepare for the trial and were therefore prejudiced*."

[19] In the court *a quo* the learned Judge restated the compliance with a statutory requirement construed as peremptory by citing the case of ***Lion Match Co. Ltd. V Wessels***[2] where it was said:

> "*Statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequence, and any purported compliance failing short of that is a nullity*."

[20] She went, that the law on review as was held in ***Jockey Club of SA v Feldman***[3], has been that:

> *"Where the irregularity complained of is calculated to prejudice a party, he is entitled to have the proceedings set aside, unless the court is satisfied that the irregularity did not prejudice him"*

[21] The learned Judge concluded that:

> "The court finds that the applicants have been irregularly charged under the second schedule of

[2] 1946 OPD 376 at 380
[3] 1942 AD 340 at 359

the code, yet were first offenders. Also that Regulation 7.1.4 encompassed the ingredient of fairness which encompasses disclosure and discovery."

[22] Dissatisfied with the learned Judges' findings and determination. The Appellants appealed to this court.

[23] The Appellants fault the High Court Judgment in three material respects:

a) "That the matter should not have been treated with the urgency that the learned trial Judge accorded to the matter."

In aid of this agreement, Counsel cited the case of Commander, ***Lesotho Defence Force, and Another v Matela***[4], where this court said:

"…It is once again brought to the notice of practitioners that they face punitive costs orders should they issue certificates of urgency and launch proceedings whether ex parte or not, when the circumstances do not justify the use of the extraordinary measures provided for in ***Rule 22*** *of the* ***High Court Rules****. The High Court is requested to ensure that the abuse of this Rule by practitioners ceases forthwith."*

b) The finding that the College unlawfully charged the Respondents under schedule II, when they should have done so under schedule I since it

[4] 1995-1999, 1999-2000 LLR-LB 13 CA

was common cause that they were not repeat offenders.

On this ground Counsel for the Appellant cited to us the case of ***University of Cape Town v Cape Bar Council***[5], in which case it was said:

> *"It is significant that the Code constitutes a standard of acceptable behaviours among students (who are future teachers) and it sets penalties for its transgressions so as to ensure compliance."*

Counsel valiantly agreed in demonstrating the absurdity, that:

> *"Taken literally, the underlined words mean that irrespective of the seriousness of an act of misconduct committed by a student (which could be anything from stealing examination papers to committing rape) if the student is offending for the first time, they are not to be charged under the second schedule, but under the first schedule whose head say it is for "less serious misconduct for which less serious penalties short of expulsion from the college may be imposed";* and

c) The finding that the witness statements which the college relied on during the disciplinary proceedings were not disclosed to the Respondents as contemplated by Regulation 7.1.4, this rendering the proceedings unlawfully.

[25] The Appellants conceded that the Respondents were not repeat offenders. They also conceded that schedule II is,

[5] 1986 (4) SA 903 (A) at 9135

if literally interpreted, intended only for repeat offenders. Appellants argue, however, that a literal interpretation yields an absurd result and that the High Court ought to have accorded it a purposive interpretation and to hold that the true test in determining whether a person could be charged under Schedule I, was not if it was a second or subsequent transgression, but whether it was a serious transgression.

[26] The Appellants argue in this appeal that lawgiver could not have intended an absurd result, that however serious the alleged transgression as suggested by the Appellants, it cannot be charged the under Schedule II, it being common cause that Schedule I transgressions are visited with light punishment, while Schedule II transgression attracts more session punishment, including expulsion.

[27] In support of that proposition the Appellants cited the case of ***Bhyat v Commissioner for Immigration***[6]. This argument was augumented by the ***Interpretation Act, 1977, Section 12 (1)*** and ***(2)*** couched in these terms:

[6] 1932 AD 125 at 129

12(1) The preamble of an Ac may be referred to for assistance in explaining the scope and object of the Act.

(2) Marginal notes and headings in the body of an Act, forms no part of the Act, but shall be deemed to have been inserted for convenience of reference only.

[28] We would have had no difficulty agreeing with the Appellants, that if for instance the respondents were charged with rape or selling dagger, which are the objects of 'Liboba' and there was evidence before the learned Judge, it would have been a misdirection to let them go free because they are charged under Schedule II.

The problem with this ground the Appellants are misleading this court, as if belonging to 'Liboba' were the charges for which the Respondents were suspended.

At para 34, p12 of the Learned Judge's Judgement, she makes it clear that the respondents were not charged with offences appearing in the 'Liboba' Constitution. The offences were for holding a public gathering without permission and for having disrupted and chased away

fellow students who were studying and using offensive language.

[29] We do not however agree with the Respondents that no matter how serious the offence is, if it is a first offender, there will be no jurisdiction, unless brought under the first Schedule. The courts cannot remain 'meek and mute', when those to whom the parents surrender their children for moral and academic guidance belong to associations that espouse the commission of heinous crimes. It is in public interest that they are weeded from institution which are the hub of giving moral and academic guidance to innocent pupils (our emphasis).

Unhappily the Respondents were not charged with those offences. This ground can therefore not succeed.

[30] The court *a quo* upheld the Respondents' stance that written statements are in the nature of the documents which are within the contemplation of the Regulation, since the written statements of one of the Respondents confessing to the charges had not been distributed to the Second, Third, Fourth and Fifth Respondents, the

failure was unlawful and therefore vitiated the disciplinary proceedings.

[31] On appeal the Appellants maintain that the court a quo fell into error by holding that the written statements are documents giving rise to the offences. As Counsel put it during oral argument, written statements are generated after an alleged transgression and therefore cannot be said to have given rise to the offences charged.

[32] We see merit in this ground of appeal. The court below was therefore in error when it said that the witness statements gave rise to the offences charged and ought to have been discovered in the manner required by the Regulation 7.1.4.

This conclusion of course begs the question: was the refusal to discover the witness statements so unfair as to have vitiated the disciplinary proceedings? In addressing this issue, we must have regard to the charge the Respondents faced and the evidence led in support in of those charges which formed the basis of the convictions.

[33] The Respondents were charged with holding a public gathering without permission and for having disrupted and chased away fellow students who were studying and using offensive language.

It became apparent during the disciplinary proceedings that the Second, Third, Fourth and Fifth Respondents were found guilty of the transgression on the strength of Sixth Respondent confession implicating these Respondents in the 'Liboba' activities after torture PP 92-93 of the record. When the offences they were charged with and convicted with, sharply differed from the Sixth Respondent's confession.

[34] It is apparent to us therefore that, but for the confession statement of Sixth Respondent, Second, Third, Fourth and Fifth Respondents would not have been found guilty – There was no evidence adduced before the disciplinary hearing to implicate them in the unauthorized presence which formed the core of the charges. The refusal therefore to allow to the very document which condemned them, in our view, vitiated the proceedings.

The irregularity is material and severely prejudiced the Respondents.

Every individual must receive fair treatment from the authority he/she is subjected to that is one of the important tenets administrative law.

[35] We are therefore not persuaded that the order given by the court *a quo* was wrong though we have come to that conclusion for reasons different to those of the court *a quo*.

[36] In conclusion, it would be a logical fallacy to criticize the court *a quo* for treating the matter as urgent when the examinations were on the horizon.

The following order is made:

(i) The appeal is dismissed.

(ii) Costs will follow the event to be taxed in default of agreement.

DR. JUSTICE P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree

JUSTICE T. E. MONAPATHI
JUSTICE OF APPEAL

I agree

MR. JUSTICE P. T. DAMASEB
ACTING JUSTICE OF APPEAL

For the Appellants : Adv. K. K. Mohau KC
For the Respondents : Adv. Selimo