

**CIV/APN/253/96**

**IN THE HIGH COURT OF LESOTHO**

**In the matter between:**

**MANTHO LYLLIAN MATELA  
(duly assisted by her husband)**

**APPLICANT**

**and**

**THE ACADEMIC COUNCIL  
(National Health Training Centre)  
THE PRINCIPAL SECRETARY  
THE ATTORNEY GENERAL**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT**

**JUDGMENT**

**Delivered by the Honourable Mr. Justice T. Monapathi  
on the 29<sup>th</sup> day of May 1997**

The following are my reasons for a decision I made on the 2<sup>nd</sup> September 1996 in this matter.

This was an application in which a *rule nisi* had originally been sought. This Applicant had in the main applied for Orders as follows: That the decision of the First Respondent (the Academic Council) of the National Health Training Centre in which all students including the applicant except candidate 179 in a certain Examination set by the Council were ordered to re-sit be declared null and void. Furthermore that the Council be ordered and directed to release to

the Applicant, her examination results of May 1995 together with a certificate reflecting the same. An Order for costs and further and alternative relief was also sought. Adv. Putsoane appeared for the Applicant and Miss Sesinyi appeared for the Respondents.

The Applicant was a candidate No.175 and a member of the group of students who had sat a certain examination offered by the First Respondent at the National Health Training Centre (NHTC). The basis of her complaint was that she had not been given a hearing prior to Academic Council reaching the decision of the 21<sup>st</sup> May 1996. The decision recorded that:

"It was stated that the Academic council members had already reached the following conclusions, which they re-agreed upon:

- (a) that generally the whole class had access to the examination information, therefore the whole May 1995 Nurse Clinician Final Examination be declared null and void and the 8 students should resit the examination except candidate #179.
- (b) that the concerned candidate had, beyond doubt, copied. Consequently candidate # 179 deserves a severe punishment and should therefore be disqualified and suspended for two (2) years after which she could reapply to retain.
- (c) implicated individuals should be cleared since there is no evidence or proof warranting further action. However, there is a need to strengthen management skills like responsibility, confidentiality, reliability or trustworthiness etc. for smooth running of the institution, especially in the concerned areas or departments."

.....  
.....  
.....

Consensus was reached that the repeat examination be written in September and that the 8 students should be given a period of one month for revision and that all the students would be called to the institution to inform them of the decisions taken." (My underlining)

It was to be noted that the whole class was alleged to have had access to the papers. Secondly, the Nurse Clinician Final Examination was nullified. Thirdly, One candidate had copied and this was not candidate 179 and finally and paradoxically the implicated individuals ought to be cleared (see (c)). The paradox did not only lie in the fact that there was apparent conflict in the three paragraphs. The paradox was to be found in that the "Council members had already reached conclusions" which the Council endorsed without itself having had an inquiry. The initial question would be: When was the original agreement reached about the above resolutions? When originally were the conclusions agreed upon, to be precise? This was not easy to answer.

The above resolution by the Academic Council concerned final examinations of the Nurse Clinician Training of the Centre which were conducted in May 1995 whose results was to be published during about February 1996. The writing of the examinations was to be followed by a practical or oral examination which was also conducted.

The Applicant deposed that she was surprised when around the 5<sup>th</sup> January 1996 she together with Mrs Moshoeshe and other five students were called by the Deputy Director of the Centre and was informed of the contents of a certain letter. In the letter one candidate alleged that they had a suspicion that the Applicant, the five students and Mrs Moshoeshe had already had prior information about the contents of the examination that is before the sitting of the May 1995 examinations. The Deputy Director also informed that a concern had also been shown by the external examiner. The Deputy Director, as the Applicant deposed, further advised that investigations were to be conducted into the whole issue and as soon they were concluded the outcome would be published. The history of the matter would show the nature of the investigations that followed.

Mrs Matiisetso Mateboho Moiloa who was the Director of the Centre

deposed to the answering affidavit of the First Respondent. In the affidavit she spoke of having received a copy of a letter (Petition) (dated the 28<sup>th</sup> September 1995) addressed to the President of the Students Representative Council. In the petition five students had requested that an investigation be conducted into the allegation that two (2) students had had access to examination questions prior to the examination day. The letter was annexed (TT 1). I could not reconcile the fact that only two (2) suspected students were being specifically mentioned in the petition as against the five (5) mentioned by the Applicant as having also been named as suspects.

Upon receipt of the petition investigations were made into the unsavoury allegations. Coincidentally there had been a report by the external examiner in which the external examiner had raised her suspicion that the confidentiality of question papers (paper II) appeared not to have been maintained. She had also made certain recommendations in a report annexed to the answering affidavit (TMTN). It was perhaps necessary to indicate that while concern was raised in respect of the examination script of student no.179 there was no reference to that of student no. 175 (the Applicant). Contrast this with Mrs Makhasane's report.

While the examiner commented that "The student's script raises suspicion and concern especially in relation to the accuracy of the responses", no other report or recommendation was made with respect to the nine candidates whatsoever. The other significant aspect about the petition was that it was raised only after the holding of the oral examinations. The fear had been that (as was disclosed from the bar) if the query had been made before the sitting of the oral examination that would have prejudiced the conduct of the oral examinations or "that they (the petitioners) were afraid that if they had done so they would have been victimized by their tutors when they did their health centre phase."

The investigations also revealed that the internal examiner one Mrs 'Makhasane had shown that she also entertained a suspicion that the Applicant and Mrs Mosheshoe had had access to the examination questions or model answer sheets. This was in the letter to the external examiner of the 7<sup>th</sup> June 1995. Contrast with Mrs Makhasane's of the 21<sup>st</sup> December 1995 to the Director of the Centre. In the latter letter although she continues to associate herself with the contents of her first letter (which she had enclosed) she specifically, only, speaks about the slight difference between two certain responses. Her suspicion was based on the fact that Mrs Mosheshoe's answers were all similar to those in the model sheet. This was also in relation to both students.

With regard to the Applicant it was stated in the affidavit that answers were identical in the model answers. The answers were also exhibited ("A" and "B"). To these allegations the Applicant said she had definite answers which she would have proffered if she was given an opportunity to make an explanation. The internal examiner also wrote a letter to the external examiner alerting her of her suspicion. The letter was annexed as "TM III".

Mr. Putsoane felt that the investigation had failed to come to a standard of a fair hearing. The concerned students should have been asked to make representations. That is why the Applicant wrote the letter(TMV). In the letter she denied knowledge of leakage of questions and alleged friendliness between tutor and students. She also remarked about lack of any underhand practice and demonstrated that the coincidence in some question papers was brought about the material that was prescribed and nothing more. This can only have been in response to the investigation conducted by the Assistant Director.

As I have also found the purported investigation that was allegedly conducted by the investigation team, which consisted of Dr. S.O. Baine, Mrs T. Moiloa, Mrs Lebentlele and Mrs Rantšeli, did not appear to have conducted any inquiry except that it adhered to the original investigation made by the Assistant

Director whose results had been awaited since January 1996. That is why in the investigation report dated the 10<sup>th</sup> January, 1996 the investigation team merely reiterates what, as the parties herein agrees, was in the investigation initiated by the Assistant Director. This was clearly stated in paragraphs 8, 9, 10 of the Applicant's founding affidavit. The Respondents' deponent replied in paragraph 7 ad paras 8 and 9 as follows:

"I admit the contents therein however I wish to point out that following the above investigations the Academic Council felt that a hearing should be given to all the students as it was clear that there had been leakage of examination information". (My underlining)

This confirmed that a hearing should have been conducted. But the question would be: except this investigation by the Assistant Director when was an inquiry conducted and how was the hearing conducted if any? Also refer to my remarks concerning the Council's minutes of the 21<sup>st</sup> May 1996 starting at page 2 above. Did the Academic Council hold the hearing. If not who did?

At paragraph 10 of the Applicant's affidavit the Applicant has said:

"The said Deputy Director informed us that investigations are going to be conducted into the whole issue and that as soon as they are concluded we will be appraised of the outcome thereof."

It was during or about the 5<sup>th</sup> January 1996. The Respondents' deponent did not then say anything more about the existence or the appointment of investigating Committee and how it had gone about the inquiry. It probably had not been appointed. That is why the answer was that the Assistant Director in January 1996, further informed the concerned students that investigations (not hearings) were going to be conducted into the whole issue and that as soon as they are concluded the outcome will be made known.

The answer to the Applicant's paragraph 10 is to be found in paragraph 8 of the answering affidavit of Mrs Tiisetso Mateboho Moiloa. It was puzzling in

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that while it attempted to deny that a hearing was not held it did not inform as to when such a hearing was held. Furthermore it did not deny that the Academic Council relied on the report of the Acting Director. It was put thus:

“ I deny the contents therein contained and put the Applicant to the proof thereof. I was present when the Acting Deputy Director Mrs Lebentlele informed all the students that after that hearing students would be informed of the outcome reached by the Academic Council. The investigations had been completed by this time.” (My emphasis)

Not only was the point being made that no further investigations would be made, no hearings were conducted, because the Academic Council had solely to rely on and did rely on the report made by the Acting Director. Still no mention is made of the Investigating Committee. Incidentally the same Acting Assistant Director was member of the investigating Committee of the Academic Council. This could explain why the Council's minutes of the 21<sup>st</sup> May 1996 opened with “..... Academic Council members had already reached the followign conclusions which they re-agreed upon.”

Neither the Investigating Committee nor the Academic Council conducted any hearings. That was beyond dispute. Miss Sesinyi was hard pressed and was just unable to point at instances when the Investigating Committee or Academic Council itself conducted any hearings. This is separate from whether there was any such response as to the Applicant's letter (TMV). If there was any hearing something should have been said or highlighted as to what significance was attached to the Applicant's response at that hearing. Be it to the letter (TMV) or any oral replies. There were no such comment at all.

The Applicant was insistent that no hearings were conducted into her alleged misconduct. Neither was she as she contended, personally interviewed by anyone. It was useful to refer to an extract of the minutes of the Academic Council of the 1<sup>st</sup> February 1996. This was to show what trend the investigations would appear to have taken since that date. It was shown in page 4 of the



minutes that:

“Following elaborate discussion on the circumstances surrounding the NCTP examinations a suggestion was made that the results should be declared null and void and the new examination be written. This was not accepted by members. Conclusion was reached by the Academic Council members that the investigations should be continued and the following plan of action suggested:

- (1) Investigations to go on and the case be resolved in 3 months' time.
- (2) The investigating team to continue to handle the case and should co-opt any member of the Counsel whenever necessary.
- (3) There should be inputs sent to the investigating team.
- (4) Investigators to be interviewed.
- (5) The repeat students to be interviewed.” (My underlining)

The investigations that are to continue were those of Dr. Baines, Mrs Moilola and Mrs Lebentlele. It was not clear what the investigating team did except to adhere to the report of the Assistant Director. About the work of the Academic Council nothing appeared to have resulted from what they had set about to do regarding the Applicant and another student. This belies the Respondents' answer to the Applicant's affidavit at paragraph 10 that investigations were complete. These recorded proceedings were followed by a report that followed the said recommendations of the Academic Council of the 1<sup>st</sup> February 1996. There appears to have followed interviews of students, officers of the NHTC and invigilators after the 1<sup>st</sup> February 1996. The Court was shown one undated and unsigned report which could not have been of earlier when the last student was interviewed). It was interesting to the extent that:

- (a) It does not show any proceedings pursuant to the investigations except its contents which were only interviews of invigilators and students.
- (b) It does not speak of a hearing or an invitation to make representations or confrontation having been conducted as against the Applicant as well as the other controversial student

namely Mrs Moshoeshoe.

The report was made following the resolution meeting of the Academic Council of the 1<sup>st</sup> February 1996. The following invigilators were interviewed namely Mrs M. Panyane (7<sup>th</sup> March 1996) and Mrs Sepheka (8<sup>th</sup> March 1996). The following students were interviewed in accordance with the item 5 of the plan of action made by the Academic Council on 1<sup>st</sup> February 1996. Mrs Matsoha (10<sup>th</sup> April 1996) Mrs J Tšoanamatsie (3<sup>rd</sup> May 1996) Sr. G. Mokau (7<sup>th</sup> March 1996). But no interview was conducted of the Applicant and Mrs Moshoeshoe.

As I have said I refused to believe that there could have been any interviews other than the recorded ones. Miss Sesinyi had a definite difficulty to point out and identify those other interviews which could have been conducted. To repeat Mrs Moshoeshoe and the Applicant were not interviewed. It is interesting however how the two students were reported to have been described by Sr. G. Mokau one of the interviewers. She is reported to have said:

"Like her colleagues she asserted that she observed that Mrs Moshoeshoe and Mrs Matela appeared unnaturally relaxed before the examinations while most of them were panicking. This was abnormal of them as they were almost always panicking like the rest of these whenever they were to sit for an exam."

This was not for the first time that the statement was made. The same remark is contained in the report by E. Lebentlele (Acting Deputy Director) of the 10<sup>th</sup> January, 1996. It is stated in page 2 of the report. It made more sense if it is quoted. It reads thus:

"Following these reports, students were interviewed both individually and as a group. The following is a summary of their written statements (herein enclosed) and verbal comments:

- (a) Two students, Mrs Moshoeshoe and Mrs Matela appeared very relaxed which was unusual for them, while the rest of the group were working very hard and panicking.

- (b) .....
- (c) .....
- (d) .....
- (e) ....."

Nothing else is stated about any specific finding on the central issues. This was the report that ended with the following recommendations which were made to the Academic Council. That is:

"Following the investigations it is very difficult to ascertain and substantiate the allegations, however, there would be two courses of action to this: One is that the examination be declared null and void and another one be set and written. Another would be to review the staffing pattern both in the examinations office and the concerned programme." (My underlining)

These recommendations seemed to be eminently sensible if allegations had been proved. Indeed how could seriously prejudicial conclusions and punitive steps be based on the observations be made solely on Sr. G. Mokau and Mrs Lebentlele's observations. That is why the recommendations were ambivalent.

In the light of the recommendations of the external examiner it was difficult to understand why, even against the background of the declared difficulty to substantiate allegations, a drastic but unsupported action was recommended. This is even more compounded by an implied concession that in fact there was no proof of misbehaviour by the Applicant except the allegations contained in the petition. The petition was signed by Nomathemba Bhugwana, Pauline Sene, Sr. Georgina Mokau, Mpho Mohlotsane and Phineas Lelaka. Only Sr. Mokau (of the five) was later interviewed. She made the unhelpful remark that the two students "were unnaturally relaxed" before the examinations as stated hereinbefore.

It was mysterious in my view why there was this unsupported conclusion that “generally the whole class had access to the examination information” as the Academic Council sought to conclude. I did not accept Miss Sesinyi’s contention that this was the view of the external examiner. The examiner raised concern about the accuracy of student 179’s responses. She suggested that in the future a multiple choice question paper be compiled and the fill in format should form only 25% of the examination. She felt the questions had seemed “quite easy even though the pass mark is very high.” Wasn’t it logical?

If it was not for the admission that the procedures and controls in the examinations were indifferent, I would have entertained a strong suspicion, on my part, that something seriously mischievous had occurred, most probably before the students sat for the examinations. I emphasize that before the examinations because there was equally more confusion even before the Academic Council as to what were the right procedures during the examination in connection the ways in which the students would be prevented from abusing loose sheets which could be infiltrated into the examination rooms. I quote from page 2 of the minutes of the Academic Council:

“At this point the examination officer was asked to describe the procedure usually followed when conducting written final examinations. In response she stated that students are usually issued loose sheets of papers for rough work and some students hand in their rough work while other don’t. Most importantly there is no stipulated rule governing this re-submission or no submission of rough work of students.” (My underlining)

This appears nevertheless to be the area or an aspect on which Mrs Moshoeshoe was taken to task when the contents of the minutes are taken into consideration. It was reported (as the minutes show) that she further reported that she had used two books i.e. examination answer books and another one for rough work, though she was not sure if the rest of the students that took the examination had also been given the rough work book by the invigilators.

Judging from the conclusion of the examination officers it is clear that the controls were deficient or were non-existent. Mrs Moshoeshoe's explanation might perhaps be making sense in the circumstances and she would be deserving of a benefit of doubt. But as for her there would seem to have been demonstrated a modicum of hearing if it is correct that she was interviewed by the investigating committee. But this was not sufficiently borne out. It was only shown that Mrs Moshoeshoe's room-mate was also interviewed. However she denied the allegation that she saw Mrs Moshoeshoe using a question paper for revision or the fact that Mrs Molapo came to Mrs Moshoeshoe's room looking for her (Mrs Moshoeshoe), presumably with some ulterior motive.

If hearings were conducted and the Applicant was interviewed and confronted my suspicion would have been very strong. I must confess that it became not as strong when Mr. Putsoane gave the following explanation. It was this explanation that Miss Sesinyi for the Respondents was hard put to rebut. About three quarters ( $\frac{3}{4}$ ) of the examination questions in paper II were culled from student work book - Book 2. This is a workbook one of which the students are provided with as a working manual. It is from this book which a student who is well drilled could successfully answer the questions that were set in the examination. This made sense substantially. From this explanation my suspicion became lesser. I was bolstered in my feeling that less than sufficient investigation was made about the problem. The advantage of a fair hearing looms larger in a case like the present such as where in *Botha J A in SOUTH AFRICAN ROADS BOARD OF JOHANNESBURG CITY COUNCIL v JOHANNESBURG CITY COUNCIL* 1991 (4) SA 1(A) at 12 C-F and 13 B-C said:

"For the *audi* principle applies whether the authority exercising the power is obliged to consider circumstances of the individual affected. Its application has a two fold effect. It satisfies the individuals desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise

of the powers.”

The Academic Council's decision was clearly nothing but unfair and unreasonable in these broad set of circumstances. This was more so considering the aspect of the explanation about the workbook. This explanation which is recorded in the already quoted extract (page 2) of the minutes of the Academic Council should have inclined the Council to ratify the results once it concluded that there appeared to be no mischief. I remarked about the way the procedures for conduct of examinations irregularities were so unregulated unlike the situation in South Africa. Contrast EDUCATION AND TRAINING ACT No. 90 of 1979 regulations (Government Notice 12803) especially regulation 17 as dealt with in MINISTER OF EDUCATION AND TRAINING AND OTHERS v NDLOVU 1993(1) SA 89 AD at 101 I-J, 103A. The case was about a challenge almost similar to the present. The need for a fair hearing was emphasized. Furthermore in the instant matter this whole set of circumstances were clearly indicative of investigations which bore no hallmarks of a full inquiry nor of a fair hearing that sought to adhere to the rules of natural justice in order to bring about fair play.

One need not speak of full scale hearing but here “fairness and hearing in accord with natural justice is self-evidently to be expected”. See LEMENA AND OTHERS v NURCOMBE N.O. AND ANOTHER LAC (1985-89) 104 at B-C. Although the case of LEMENA AND OTHERS (supra) which was decided in the circumstances of a case where no full scale hearing was necessary prior to the expulsion of the students. The case further decided that every case depends on its circumstances and more especially whether there was a good opportunity for such investigations to be conducted. The present was a case where there was such a good opportunity. The present case showed no special difficulties that prevented a full scale hearing even or at least of those students who were suspected. But the authorities just made a hash of things. See also the remarks of Botha J in MINISTER OF EDUCATION AND TRAINING AND OTHERS case

(supra) at 103C onwards considering the operation of the *audi alteram partem* rule in the special circumstances of that case.

The application was allowed with costs on the 2<sup>nd</sup> September 1996.

  
T. MONAPATHI  
JUDGE