IN THE HIGH COURT OF LESOTHO

CIV/APN/23/2014

In the matter between:

STUDENTS' REPRESENTATIVE COUNCIL – LCE & 318 ORS **1ST APPLICANT**

And

LESOTHO COLLEGE OF EDUCATION **1ST RESPONDENT**
COUNCIL ON HIGHER EDUCATION (CHE) **2ND RESPONDENT**
PRINCIPAL SECRETARY MINISTRY OF EDUCATION **3RD RESPONDENT**
ATTORNEY GENERAL **4TH RESPONDENT**

JUDGMENT

Coram :Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 20th January, 2013
Date of Judgment : 31st January, 2013

Summary

The 318 Applicants who are the students of the 1st Respondent filed an urgent application for, in the main, a declaratory order that the decision of the College to cancel their DTEP study programme is unlawful and null and void and for an interdict against the authorities from terminating their Study – This being against the background that the Applicants had already been accepted into the programme and accordingly registered for it – A foundation of the case being that the decision was sudden and that the Applicants hadn't been accorded a hearing before it was taken – The 1st Respondent raising a main defence that the decision was dictated by the 3rd Respondent since the Study was founded and driven by her Ministry and that its supportive funding had collapsed – The Court rejected the explanation on the reasoning that the Study contract existed between the College and the Applicants under the circumstances in which they were ignorant about the Ministry and that the 1st Respondent hadn't observed the *audi alteram partem Common Law principle* before reaching the decision despite its adverse impact on the present and future legitimate interests of the Applicants – Thus, the declaration sought for granted and the College consequently directed to resuscitate the Programme by the end of October 2014.

CITED CASES
Tsenyehelo Ramotsabe & Ors v Rector, Lerotholi Polytechnic & Anor CIV/APN/412/2013
Non-academin Workers Union (NAWU) vs NUL LAC/CIV/A/04/2006.
Freeman and Lockyer vs Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB480 Lesotho Public Service Staff Association vs Makakole C of A (CIV) 31/2012
Koatsa Koatsa vs NUL C of A (CIV) 12/1985
Khathang Tema Baitŝokoli & Ano. v Maseru City Council & Ors C of A (CIV 4/2000
Mkhize v University of Zululand and Another 1986 (1) S A 901
Lesotho Electricity Corporation v Moshoeshoe LAC 1995 – 1999
Russel v Duke of Norford [1949] 1 All ER 109
Tyatya v University of Bophuthatswana 1994 (2) SA 375

STATUTES
Government Proceedings and Contracts Act 1965
The High Court Rules 1980
The Lesotho College of Education Act 1998

MAKARA J.

Introduction

[1] This is a case in which the Applicants have through a notice of motion urgently sought for a refuge underneath the shelter of the justice of this Court seeking for its issuance of a rule nisi order calling in the main upon the Respondents to show cause if (any) why:

(1) .....
(2) .....
(3) The immediate suspension and/or termination of the **Distance Teacher Education Programme [DTEP**] by the 1st and 3rd Respondent shall not be set aside as unlawful and therefore null and void;
(4) The 2nd to 318th Applicants' departure date set for the 21st January 2014 shall be put on hold pending the finalization of this application;
(5) The 1st Respondent may not be interdicted and restrained from removing 2nd to 318th Applicants from the students residence they currently occupy pending finalization of this application.

[2] In conclusion of the prayers the Applicants had asked the Court to render prayers 1, 4 and 5 to operate with immediate effect. It should suffice to indicate that the Court granted the interim order as prayed and scheduled the return date to the 23rdJanuary 2014. On the return date, it was only the 1st Respondent who had filed a notice of intention to oppose and the corresponding opposing papers. A paradox in this matter is that the 3rd Respondent was despite having been served with the application and in the face of the adverse allegations towards the Ministry, had demonstrated serious inconsistencies and contradictions in the matter.

[3] It should however, the highlighted that on the 23rd January 2014 which is the day on which the case was fixed for hearing, Adv. Lebakeng of the Attorney General's Chambers. She advised that she is not representing the 3rd Respondent since they have not filed any papers and that the 3rd Respondent has never given herself a chance to instruct her in the matter. In the circumstances, she expressed a view that she was not expecting the Court to require her attendance.

[4] It should for the purpose of the elucidation of the position of the Ministry in this case be recorded that notwithstanding the absence of its opposing papers and the representations made by Adv. Lebakeng from the bar; A legal officer for 3rd Respondent filed an urgent application in which he asked the Court to condone the late filing of the opposing papers for the 3rd Respondent. There was

in support of the application a founding affidavit deposed to by KERATILE THABANA who is described as the Principal Secretary of the Ministry of Education. Be that as it may, the answering affidavit of the same deponent remains unsigned. Council for the 3rd Respondent upon realizing the fact that the answering affidavit stands unsigned ethically conceded that his last minute rescue measure has been rendered futile by the defect.

[5] Ultimately, the hearing proceeded on the 23rd January 2014. At the commencement of the proceedings Adv. Mohau KC motivated a *legal point in limine.* He with vehemence charged that the Applicants ought not to have approached this Court by way of an *ex parte* application. In this respect, he maintained that the Applicants ought to have first served the Respondents before rushing to the Court to obtain an interim order. According to him, had the Respondents been firstly served, the Applicants could have been appraised about the material facts on the ground and availed themselves an opportunity to amicably discuss a solution with them.

[6] In a nutshell Adv. Tlapana counter maintained that the Court has been properly approached in consonance the arguments expressed the view that whilst it is skeptical about the correctness of the approach adopted by the Applicants, it thinks that it is seized with a case which for the sake of justice warrants for the interrogation of the merits. In that posture of mind, it invoked **Rule 59 of the High Court Rules**, and directed that the merits be traversed.

[7] On the merits Adv. Tlapana from the onset appraised the Court that the material developments which have occasioned the litigation are of a common cause nature. A chronological presentation of the developments is unfolded in the subsequent paragraphs immediately here below.

[8] The Applicants are *bona fide* registered students of the Lesotho College of Education. They have at all material times registered for a Diploma in Primary Education in the Distance Teacher Education Programme (DTEP]. They have attained the status after they applied for enrolment into the programme and received letters of admission into it. Their study was planned to commence from the 17th January to 21st January 2014. It should be highlighted that all this three hundred and eighteen (318) Applicants had filed their application to study with the 1st Respondent in the year 2012. The applicants had duly reported themselves at the College on the 17th January 2014 and were accordingly registered as the students in the DTEP programme. All progressed as scheduled on the day in question. This notwithstanding, their study activities were suddenly interrupted on the 18th January 2014.

[9] The interference with their studies timetable, was initiated by Rector of the college who on an emergency basis summoned them into the Allen Hall. In that assembly he disclosed to them that the programme has been suspended by the 3rd Respondent. The contextual understanding from the papers before the Court is that the Rector had suddenly been ordered by the 3rd Respondent to

suspend the programme and that he had found himself in a precarious, embarrassing and desperate situation of having to convey the decision to his desperate students.

[10] There is in this respect a copy of a letter addressed to the Rector by a letter addressed to Rector by the Principal Secretary of the Ministry of Education. It is dated the 17th January 2013 and bears the heading:

> RE SUSPENCSION OF DISTANCE TEACHER EDUCATION PROGRAMME (DTEP)
>
> It is worth which to make a verbatim revelation of its content, It read:
>
> We acknowledge receipt of your letter in relation to the above subject matter. This letter serves to inform you that the Ministry's decision to suspend DTEP still holds until further notice. Please comply. *(emphasis added)*
>
> Yours sincerely
>
> Keratile Thabana
> Principal Secretary

[11] The correspondence written to the Rector by the Principal Secretary deserves to be read in conjunction with the one which the Rector had written to the Principal Secretary on the same subject matter. It is dated the 08th January 2014. In the comprehension of this Court the latter could be interpreted as a desperate measure by the Rector to resuscitate the programme. This is conjectured from his reference to the programme's review meeting which was held at Ha Mohale. He has therein reminded the Principal Secretary that it was resolved at that session, which involved the Word Bank and the Irish Aid that the students should

be enrolled later in the year so that prior arrangements be made for those who would be sponsored under the Incentive Scheme. From there, he sought for the clearance by the Principal Secretary regarding the enrolment of the Applicants. In the same vain, the author advises the Principal Secretary that the Applicants were already in possession of letters of admission that it would be prudent for them to be enrolled to avoid possible complications. In concluding his letter, the Rector informs the 3rd Respondent that the students will entirely pay funds for themselves with the exception of those who may be financially incapacitated to do so.

[12] It is appropriate to indicate that the Rector had disclosed to the 3rd Respondent that according to the plan of the 1st Respondent the students would be registered on the 17th January 2014 and has expressed his readiness to discuss the matter further with the Principal Secretary should need arise.

[13] The parties agree that the determining factors are as follows:

> (a) Whether or not the Applicants ought to have been given a hearing by the 1st Respondent prior to the termination of the programme by the Rector on the 18th January 2014.
>
> (b) An incidental question for a decision by the Court would be whether the financial related *supervening evil* which had transpired between the Ministry and in the background the International sponsors of the programme, is a factor for consideration in the contractual relationship between the Applicants and the College.

[14] Counsel for the Applicants founded his main argument by charging that the Applicants ought to have been afforded a hearing prior to the termination of the programme on the 19th of January

2014. His reasoning unfolded that the Applicants had obtained a legitimate expectation that the programme would throughout proceed as scheduled and that at the end they would obtain the diploma. He maintained that the sudden termination had violated the students' natural rights particularly its *audi alteram partemdimension*. The council advised the Court that the contractual nature of the relationship between the students and the college cannot in the law of contract justify its unilateral action. He contended that the decision cannot be justified on the financial constraints of the Ministry. He further warned that at the time of the conclusion of the contract the students were never advised that the programme was subject to the availability of the financial sponsorship from the Ministry of Education. The impression hereof being that the Applicants perceive the Ministry of Education as a stranger in the contract. In advancing his argument the Counsel relied heavily on the contractual principles which were interfaced with those of Administrative Law in **Tsenyehelo Ramotsabe & Ors v Rector, Lerotholi Polytechnic & Anor CIV/APN/412/2013** and the cases cited therein.

[15] Adv Mohau KC contradicted the arguments raised for the Applicants by primarily contending that the Court should recognize the fact that the programme had been terminated by the Ministry. He emphasized that the latter was the one which was financially sustaining the programme and that as a result of the drying up of the funds provided to the College, the World Bank and the Ministry, it became practically impossible to fund the programme. On this note he cited the impossibility for the 1st

Respondent to run the programme after having been instructed by the Ministry to suspend it indefinitely. The Counsel warned the Court to be cognizant of the authority of the Ministry in the formulation of education policies and its decisions thereof.

[16] In addressing the *audi alteram partem* related issue, he contended that the Rector had in the circumstances of the challenges confronting himafforded the Applicants moment, he had as accorded the Applicants a hearing. He attributed this to the verbal encounter which the Rector had with the students inside the Allen Hall on the 18th January 2014. The Rector had according to him conveyed to the students the supervening decision reached by the Ministry and the helplessness of the College in the matter.

[17] Regarding the relevance or otherwise of the decision in **Tsenyehelo Ramotsabe** case *(supra)* he stated that it was irrelevant for guidance of the Court. His position was that the present case is clearly distinguishable from the abovementioned case. He identified the distinction to relate to the fact that in the **Ramotsabe** matter, there had been *no supervening evil* which had rendered the performance of the contractual obligation by the Lerotholi Polytechnic to be impossible while in the instant case there is such.

Findings and the Decisions

[18] The Court having addressed itself to the facts, the identified issues and the legal reasoning advanced by the parties,

precipitates the understanding that the question of the relationship between the applicants and the 1st Respondent is of a foundational significance. Thus, the rest of the considerations should be interfaced with it in the determination of justice in this case.

[19] In interpreting the relationship between the applicants and the 1st respondent who would alternatively herein also be called the College, the Court concludes that it is a contractual one. It commenced from the time the College advertised that it would provide a Diploma in Distance Teacher Education Programme (DTEP) and invited the potential students to apply for an admission into it and became concluded between the parties at the time the College accepted the applicants' offers in the form of their respective applications. This in the circumstances of the instant case became sealed when the College had ultimately registered them as its students in the programme. To crown it all, they had subsequently been called to attend a training session which was scheduled for the 17th – the 21st January 2014 at the premises of the College where upon their arrival, were given different rooms for accommodation. It is trite that it is a basic principle in the Law of Contract that for a valid contract to exist, one party must make an offer and that the other one must accept it. This has been attested to in **Non-Academic Workers Union (NAWU) vs NUL LAC/CIV/A/04/2006**.

[20] The Court recognizes the reality that the applicants had against the backdrop of the advanced developments in the

contractual relationship between the students and the College created legitimate expectations between them. These constituted of the common understanding between them that each party would fulfill its obligations in the contract. It was a conceived material term of the contract that the College would accordingly provide the applicants the professional training towards their attainment of the planned Diploma (primary) within the prescribed period. It deserves to be highlighted that in this case, analogous to that of **Tsenyehelo Ramohapi v Lerotholi Polytechnic *(supra)*,** the Registrar of the College was the one who had written to the applicants the letters in which they were notified about their admission into the Study. An official of that high standing qualified to be recognized by the students to have the requisite credentials to conclude a binding contract for the College. The latter cannot unless otherwise proven, deny that fact.

[21] It is *ex facie* the papers before the Court clear that the Rector of the 1st respondent had on the 18th January 2013, announced the suspension of the programme to the applicants in consequence of the directive from the Ministry. The explanation furnished for decision had according to his Counsel been that the Ministry had informed the Rector that the international financers of the Scheme had run out of funds and that it had become practically impossible for the College to immediately continue with it.

[22] The Court finds that the sudden suspension of the Programme by the Rector amounted to a clear breach of the

contract concluded between the applicants and the 1st Respondent. It has to be highlighted that the applicant hadn't at any material time entered into any form of negotiations calculated at establishing any contractual relationship with the Ministry. The latter is a stranger in the agreement between the College and the students. There has *hitherto* been no averment or documentary evidence provided to demonstrate that the applicants were ever at the inception of the contract made privy to the background role of the Government and the involvement of the World Bank and the Irish Aid in the Programme. And further, there has been no evidence that they were ever warned about a possibility of an occurrence of a Supervening Evil in the form of a sudden unavailability of funds which could cause the Scheme to be suspended. The statement is registered despite the Court's consciousness that normally a contract is concluded on the understanding that a *vis major* or *supervening evil* could possibly frustrate the performance of a contractual obligation by one or both parties. Nevertheless, in the instant case, the Ministry and the College were from the onset aware that the Scheme was being sponsored. It was, therefore, incumbent upon them to have made a material disclosure to the applicants about the source of the funding, its possible inherent problem and whatever alternative plan to immediately address *inter alia* the collapse of the funding.

[23] The applicants had throughout been entitled to believe that they had entered into the deal with the College in its independent standing as a statutorily created body corporate which is legally

qualified to enter into contracts sue and be sued in its own name.[1] This suggests that they had *in good faith* believed that it had the fiscal and the logistical capacity to sustain the programme throughout its duration such that the process would normally culminate in their graduation in the Diploma for which they were enrolled. The College itself had through its officials and its due processes made all the ostensible representations[2] to the applicants indicative that it will sustain the course across all the academic years involved.

[24] In the foregoing paragraphs under this part, the Court subscribes to the analogy made by the Counsel for the Applicant that this case is materially similar to the facts and the issues involved in the case of **Ts'enyehelo Ramots'abe and Others v Lerotholi Polytechnic CIV/APN/412/2013** such that the jurisprudence espoused there could provide guidance in the present case. In the former case, the Polytechnic had through its Registrar conveyed to the students who were the applicants that they had been allowed to repeat certain courses towards satisfying their 2 year Diploma in various areas of specialization. The students had acting pursuant to the Notification by the Registrar, successfully applied for admission into the School and registered as such. This was after the Senate of the Polytechnic had initially authored that

[1]Section 3 (1) – 3 (a) (b) (c) (d) and (d) of the Lesotho College of Education 1998 clearly bestows the status upon the Institution.

[2]Ostensible authority takes place where an official of standing in an organization concludes an agreement with an individual (s) is in the circumstances made to believe that the official concerned, had its mandate to enter into a contract with them. Such an establishment will subsequently be *estoped* from denying its obligation therein. The theory of *Ostensible authority and its consequential effect has been satisfactorily explained in***Freeman and Lockyer vs Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB480 Lesotho Public Service Staff Association vs Makakole C of A (CIV) 31/2012**

decision. Subsequently, the Senate purported to withdraw this resolution and substituted it with the one that those students should be registered into a 3 year programme. The students sought for a declaratory order that the substituted decision of the Senate was *null and void* since it was taken without having afforded them a hearing and advanced legal based reasons in support. Their application was upheld and the directory orders for immediate compliance by the Polytechnic were issued.

[25] The Court in interfacing the facts and the law which were traversed in **Ts'enyehelo Ramots'abe and Others v Lerotholi Polytechnic *(supra),*** discovers material similarities and an irresistible persuasion to adopt it as a case for guidance in this case. The two cases share a factual scenario in that here the applicants who are equally students in a tertiary institution had been accepted into the Diploma (primary) by the College, duly registered for the study, already allocated the College residential quarters for their stay during their attendance of the contact lectureship days and started going for the classes. Things had taken a completely different turn when the Rector summoned them before him inside the Allen Hall where he alerted them that the course had at the behest of the Ministry been suspended for an indefinite duration.

[26] It has now become a settled position of law that a relationship between a student and a higher institution of learning is contractual and periodically renewable by the parties. This is

subject to the application for renewal by the student and its acceptance by the institution concerned. Resultantly, the relationship is basically governed by the principles of the Law of Contract. This Court has in the **Ts'enyehelo Ramots'abe and Others v Lerotholi Polytechnic *(supra)*** cited with approval a decision in which this position was well articulated by Booysen J in **Mkhize v University of Zululand and Another 1986 (1) S A 901**. The pertinent part of the judgment would be extracted in *extenso.* It details thus:

> **It seems to me that the relationship between a student and the University is a contractual one** (Schoeman v Fourie 1941 AD 125 at 133 and 136; Sibanyani and Others v University of Fort Hare 1985 (1) SA 19 (ck) at 30D-31B) **and that it is a contract in respect of each academic year. It is entered into by acceptance of the student's application for admission; be it a first or a subsequent admission.** It seems to follow that, **in the absence of an implied term** binding the University to acceptance in years subsequent to the first year, **the University would be free to accept or refuse the offer contained in the application for re-admission. In the absence of such an implied term, there would be no reason why an applicant for admission or re-admission should be in any better position than an applicant for membership of a club** (Johnson v Jockey Club of South Africa 1910 WLD 136; Ransfird v Trustee of the Salisbury Club 1914 SR 65; Ricardo v Jockey Club of South Africa 1953 (3) SA 351 (W); Carr v Jockey Club of South Africa 1976 (2) SA 717 (W)); **or an applicant for a permit** in terms of S24 (1) or Act 18 of 1936 to go upon trust property (Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A)); **or an applicant for a job** (Rajab v University of Durban – Westville and others, an unreported judgment by Magid AJ delivered in this Court on 10 January 1984)

[27] Whilst the Court recognizes the accuracy in the description of the said relationship and its basic governess by the principles of the Law of Contract, it is nevertheless, alive to the fact that these have to be interrelated with other relevant substantive and

procedural laws. The Statutory, Constitutional and Administrative Law considerations indispensably assume a supportive role in the determination of the merits of the complaint raised by the applicants. In this regard, it is found that **The Lesotho College of Education Act,** doesn't expressly or impliedly excludes the *audi alteram partem rule* in the relations between the College and the students. The statutory based dispensation was illustrated by the Court of Appeal in **Lesotho Electricity Corporation v Moshoeshoe LAC 1995 – 1999.** Here the Court came to terms with the reality that the Legislature had expressly excluded a need for the owner of a building where the agents of the Lesotho Electricity Corporation discovered that there was a tempering with the power supply.

[28] A *right to a fair hearing* could also be regarded as having been excluded where the circumstances would justify a conclusion to that effect. This was illustrated in **Russel v Duke of Norford [1949] 1 All ER 109** in these terms:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

[29] There are no grounds in this case to justify a departure from the principles of *natural Justice* specifically the *audi alteram partem one.* Thus, it was incumbent upon the Rector to have demonstratively extended it to the applicants and to have paid particular attention to their individual concerns and in that encounter, explored prospects towards a possible settlement. It is

here of paramount importance that the respondents must be seen to have been mindful that the College is a national institution and that the applicants by virtue of their citizenship, have a right to study there provided they met the requirements. Any decision to interfere with the enjoyment of that right must be convincingly justifiable and a strict interpretation would have to be followed in favour of the retention of the right. The law propounded in **Mkhize v University of Zululand and Another *(supra)*** that the relationship between a student and learning institution is the same as that of a member of a Jockey Club cannot apply in the Kingdom particularly concerning the public schools.

[30] Administrative Law has consistently for ages detailed that where a *quasi-judicial* or purely administrative decision could impact adversely on the status, remuneration and the legitimate expectation of a person; such a person should be accorded the *audi alteram partem* before the decision could be reached. In this background, the *impugned* decision by the Rector to indefinitely suspend the programme was detrimental to the time planned by the applicants for the completion of their studies, attainment of their professional qualifications, self-esteem and prospects for the enhanced of their remuneration. Thus, they should have been heard before the decision was taken. The relevance of the *audi alteram partem principle* in this basically contractual relationship has recently been recognized by this Court in the **Ts'enyehelo Ramots'abe v Lerotholi Polytechnic *(supra)*** where it cited with approval the qualification acknowledged by Freedman J in **Tyatya**

v University of Bophuthatswana 1994 (2) SA 375 that ***though*** *the relationship between the student and the University is a contractual one, held nevertheless that* ***natural justice should indeed be read into the contract between the two****.(emphasis supplied).*

[31] The next logical question turns on whether the Rector had given the students a hearing prior to his pronouncement. It doesn't *ex facie* the papers before the Court convincing that he had. Instead, the impression which he gives to the Court is that he had at the meeting held at his instance inside the Allen Hall, simply conveyed to them the decision by the Ministry to suspend the Study. This makes sense especially when it emerges that the resolution didn't originate form him or the College but from the Ministry. The Court on the other hand, doesn't gather the understanding that he had extended the *audi alteram partem* to the applicants. Otherwise, he should have comprehensibly disclosed the content of the conversation which had been exchanged between the two of them. This is indispensable for the Court to appreciate if it amounted to a fair hearing.

[32] In the circumstances of this case, it appears that there should be a clear indication from the papers that the Rector had endeavoured to give a hearing to each concerned student. This would have given him the opportunity to appreciate the peculiarity of their individual cases and the exploration of the prospects to address each case on its own merits. There could, for instance, be situations where some of them could in future be rechanneled to

full time studies or agree with others on some future alternative way forward.

[33] The Court is not in any manner, whatsoever, persuaded that the Rector had accorded the applicants the *fair hearing* before pronouncing his decision to them or in the alternative, conveying to them the decision from the Ministry. This is the picture despite the negative consequences of the decision on their present and future rights. This leads to a consequent and incidental determination that the failure by the Rector to have done so, violated the applicants' right to *human dignity* in that they were not *humanely treated.* The Administrative Law *audi alteram partem principle* is instrumental in upholding this right which together with *right to life* were in **Koatsa Koatsa vs NUL C of A (CIV) 12/1985 and Khathang Tema Baitŝokoli & Anor vs Maseru City Council & Ors C of A (CIV) 4/2005,** respectively regarded as the *core rights* upon which all constitutional rights exists.

[34] The *supervening evil* which has been heavily relied upon by the College in justifying the suspension of the studies on the argument that this had been dictated to it by the Ministry cannot stand. The applicants are found to have contracted exclusively with the College in its *Legal Persona Status*. There is absolutely no evidence on the papers before the Court that the applicants were ever made aware of the background position of the Ministry and its collaboration with the World Bank and the Irish Aid in the contract. It would appear that the Ministry was as far back as 2012privy to the information about status of the funds. The

impression is gathered from the letter which the Rector had written to the Principal Secretary on the 8th January, 2014. The correspondence *inter alia* inquires about the position of the new sponsorship of the Programme which replaces the World Bank and the Irish Aid. This indicates that the issue should long have been settled between the Ministry and the College and that the poor students shouldn't be rendered the victims of the delays between the two to have addressed the problem and jointly planned accordingly.

[35] The Ministry has through its unorthodox approach in the matter rendered the case of the College to be unnecessarily confused and complex. This has been authored by its legislatively unprocedural appearance before Court of its Legal Officer and his desperate attempt to file out of time the counter papers on behalf of the Ministry. He himself appeared to be a victim of the circumstances beyond his control within the Ministry and the College and to be endeavouring to mount an eleventh hour rescue mission. This is demonstrated by the developments that on the first day of the commencement of hearing, Adv. Lebakeng from the Attorney General's Chambers had advised the Court that the Ministry has shown luck of interest in the case. She had explained clearly that she had for a long time been waiting for its instructions and that they never came. Resultantly, the applicants and the College had presented their respective cases to a conclusion.

[36] Subsequently, the Court scheduled its delivery of judgment on the 29th January 2014. On the day, the Court postponed its

delivery to the following day due to the meeting of the judges. On that next day, it had to preside over an urgent matter and that caused the task to be further postponed to the third day. It was on that last day when the Legal Officer filed an urgent application in which the Court was being asked to grant the Ministry an indulgence to file an affidavit so that it could be heard.

[37] The Counsel for the Applicant resisted the application on the basis that it amounted to a reopening of the case at the last minute when the judgment was due to be delivered. The Court reluctantly, allowed the Legal Officer to file the affidavit so that both counsel could subsequently address on its contents for a ruling on the merits of the application by the Ministry.

[38] It became a shock to the Court when the Legal Officer disclosed that the affidavit which was intended to support the application hadn't been signed by Principal Secretary who was supposed to be its deponent. The end result is that there was no application before the Court and therefore, there was nothing to halt or stop it from delivering the judgment as was scheduled.

[39] It doesn't transpire to the Court that the Ministry appreciated the urgency of the case and the imperative of responding accordingly. Moreover, the Court is sceptical about its appreciation of the seriousness of the judicial processes and how it should treat them. The 1st Respondent has demonstrated positive receptiveness throughout the case and responded accordingly. This could explain the noticeable temptation by Adv. Mohau KC to

seek to justify the impugned resolution upon the reasoning that the College had make it since it had been directed to do so by the Ministry as a result of the running out of the international funding. The Ministry for reasons best known to it, never accordingly and procedurally confirmed or denied the statements. The Court, nevertheless, remained conscious that the Advocate had no mandate to represent the Ministry in any manner, whatsoever.

[40] The Ministry has further introduced confusion in this case in that it has acted contrary to the **Government Proceedings and Contracts Act 1965.** The Enactment provides clearly that the Attorney General shall represent the Government in the litigation proceedings and in the conclusion of the contracts in which it is a party. In the instant case, Adv. Lebakeng from the Attorney General's Chambers had prior to the last minute featuring of the Legal Officer of the Ministry, made representations before the Court. She had been unequivocally stated that the Ministry had shown no interest in the matter since she had in vain waited for a long time for its instructions. It was in that context that the case proceeded in the absence of the Ministry. The latter could have prudently collaborated with the College to jointly place the Court in some clear and harmonised perspective about their defence in the case.

[41] It has to be illuminated that whist a Legal Officer in the Ministry operates under the general authority of the Attorney General, it doesn't mean that such an Officer can lawfully on his own accord or acting on the instructions of the Principal Secretary,

substitute a Counsel who had originally been ostensibly assigned the case by the Attorney General. A change of Counsel is formally done with reasons advanced for it. As far as the record stands, Adv.Lebakeng remains a Counsel of record and the Legal Officer shouldn't strictly speaking have been given audience in the matter. He had no right to a direct audience.

[42] If the Ministry had indeed detailed the Rector to suspend the programme, it should have realised its challenge to collaborate with him in according the applicants *a fair hearing* before the decision was pronounced. This could have been dictated by the fact that it would actually, in the background, be the repository of the powers to have done so.

[43] In the premises, the application is granted in that:

(1) The decision of the 1st Respondent to suspend or terminate the contract concluded between itself and the Applicants is declared null and void;

(2) The 1st Respondent is logically and consequently ordered to resuscitate the Programme for the Applicants to continue with their studies not later than October 2014.

(3) There is no order on costs.

E.F.M. MAKARA

JUDGE

For the Plaintiff : Adv. Tlapana Instructed by K.D. Mabulu & Co.

For the Respondent : Adv. K.K. Mohau KC Instructed by G.G. Nthethe & Co.

Adv. T. Lebakeng - The Attorney General's Chambers