CIV/APN/241/2014

IN THE HIGH COURT OF LESOTHO

In the matter between:

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

and

THE DIRECTOR LESOTHO COLLEGE OF EDUCATION	**1st Respondent**
LESOTHO COLLEGE OD EDUCATION DISCIPLINARY COMMITTEE	**2nd Respondent**
LESOTHO COLLEGE OF EDUCATION SENATE	**3rd Respondent**
LESOTHO COLLEGE OF EDUCATION	**4th Respondent**

JUDGMENT

Coram : Hon. Hlajoane J

Dates of Hearing : 6th Jun, 2014, 12th June, 2014.

Date of Judgment : 26th June, 2014.

SUMMARY

Applicants having been charged by the 4th Respondent before the 2nd Respondent – The Court having considered the matter as urgent since Applicants are in their 3rd year of Diploma in Education and are to sit for their examinations now – Application for review of disciplinary hearing proceedings - Respondents having failed to supply Applicants with documents in preparation of trial – Interpretation of Regulation 7.1.4 of Code of Procedure of Students' Discipline. Applicants charged under II Schedule of the Code yet were first offenders.

HELD: *Proceedings in the disciplinary hearing set aside as irregular for having charged applicants under wrong schedule and having failed to supply them with documents in preparation of trial.*

Annotations

Statutes

1. **Code and Procedure of Student Discipline formed in 2013-2014 Lesotho College of Education Calendar, section 7.1.4 of the Code**

Books

Cases

1. **Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) S.A 430**
2. **These Construction (Pty) Ltd vs FNB and Another LAC 2005-2006 307**
3. **R v Jacobson and Levi 1931 AD 464 at 476-7**
4. **Lion Match Co. Ltd v Wessels 1946 OPD 376 at 380**
5. **Jockey Club of SA v Feldman 1942 AD 340 at 359**

[1] This application was brought on urgent basis. It is for the review of the disciplinary proceeding which was instituted against all the applicants by the 4th respondent (the college). The applicants are also seeking for the stay of the penalty of suspension from the college for the remainder of the 1st semester imposed upon each one of them.

[2] The facts of this case being that the applicants are all students of the 4th respondent in their 3rd year of study towards a Diploma in Education. They each appeared before the 2nd respondent on a disciplinary hearing.

[3] The applicant were charged with two counts. The 1st being contravention of **section 4 (17) of the College's Code of**

Procedure for failing to secure a written approval of the Rector for holding activities of a public nature on the 28th February 2014 yet were not a recognized club or society but a banned Liboba Social 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 Students 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 applicants on the day in question intimidated, disrupted and chased away fellow students who were studying in a room that applicants wanted to use for their meeting. Also that applicants were doing all that dressed in a manner not befitting the teaching profession.

[6] It is common cause that all the applicants appeared before the 2nd respondent and though they had initially pleaded not guilty, some of them later admitted their guilt in the course of their hearing.

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

[8] The applicants instituted the present application challenging the manner in which the disciplinary hearing was conducted as irregular.

[9] The applicants approached this Court for dispatch of the record of proceedings for disciplinary hearing, stay of execution and review of the proceedings of the disciplinary hearing on the following grounds:

(a) that they were, despite demand, denied copies of witnesses' statements to which they were entitled to in terms of s**ection 7.1.4 of the Code[1].**

(b) they were denied the right to call witnesses – the 1st applicant specifically saying he had wished to call 6th applicant as his witness but denied that opportunity,

© that most of their questions were refused by the committee,

[1] Code and Procedure of Student Discipline formed in 2013-2014 Lesotho College of Education Calendar

(d) they were charged under **Schedule II of the Code** yet there was no evidence that they were repeat offenders.

[10] The respondents denied all what was said in applicants' founding papers. The respondents raised a point of law on urgency in their answering papers. This point was argued together with the merits of the Application.

[11] The verdict was given on the 26th May, 2014 and the application filed on the 4th June, 2014. Considering the lapse of time between the two occurrences the issue of inordinate delay in bringing the application would be without merit.

[12] The concern by the respondents has been that the matter is not urgent, and also that enough time was not allowed after the service of the Application and when it was moved. The Application was filed on the 4th of June and moved on the 5th June, 2014.

[13] When the application was placed before Court no prayer was granted in the interim but the Court treated the matter as urgent by putting parties involved to terms in filing the necessary affidavits.

[14] The applicants in their papers filed of record have shown that they are all students at the 4th respondent college and are in their 3rd year of study pursuing Diploma in Education. That has not been denied.

[15] In the interest of justice the Court allowed the case to proceed on urgent basis considering that it was stated in the papers that the college was at its 1st semester and final examinations were due to commence on the 9th June, 2014 which point was not denied by the respondents.

[16] The first point of having, despite demand, been denied copies of witnesses' statements which they considered were entitled to in terms of **Regulation 7.1.4 of the College,** the Regulation is framed thus:-

"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 or all or any of the documents and shall be entitled to question the accuracy of such documents or documents."

[17] Applicants contented that the above Regulation seems to incorporate elements of fair procedure. That they were entitled to the statements and the fact that they were denied copies of such, were prejudiced in their defence.

[18] Responding to the suggestion by respondents' counsel that they were not supplied with statements because they never asked for them, applicants showed that it was mandatory that they be supplied with copies of statements even without having asked for them.

[19] Respondents counsel had argued that even if such statements were supplied, in terms of that **Regulation 7.1.4** they were only going to inspect them and that inspection would mean just looking at the document and not reading it.

[20] Applicants on this point referred to the case of **Nkisimane and Others v Santam Insurance Co Ltd**[2] and cases cited therein in dealing with 'peremptory' or 'directory' statutory requirements. The case cited showing that peremptory requirement requires exact compliance whilst directory requires merely substantial compliance.

[2] 1978 (2) S.A 430 A

[21] The construction of a statutory provision will show the intention of the law maker which will be ascertained from the language used, the scope and purpose of the enactment as a whole.

[22] **Regulation 7.1.4** has been couched in mandatory terms as the word shall is used. It says the student shall be supplied with documents. Therefore following on the decision in **Nkisimane** *supra* non-compliance with a peremptory statutory requirement renders decision taken thereof a nullity.

[23] Applicants have alleged that they were denied the right to call witnesses. This point has not been adequately dealt with by both sides. It is the word of applicants against that of respondents. The same applies with the point of having not been allowed to ask some of the questions.

[24] Applicants have further shown that they had been charged under **Schedule II of the Code** yet they were first offenders. This point was not denied by counsel for the respondents, he admitted that though applicants were first offenders they were charged under **Schedule II.**

[25] To understand this point it would be worth a while to show how the two schedules have been framed.

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."

[26] Also of common cause is the fact that the wrongs constituting misconduct under the two schedules are the same word for word. The 1st schedule is for first offenders and the 2nd schedule is for repeat offenders.

[27] To get to understand where respondents' counsel sought to lead the Court to, the Court will cite only two of the provisions of what the respondents considered to be the constitution of

"*Liboba*", a movement which it was alleged the applicants belonged to.

[28] Out of the eleven provisions of that "*Liboba"* constitution numbers nine and ten read as follows:-

(9) *Seboba* can rape when necessary.

(10) *Seboba* can sell dagga everywhere as he pleases.

[29] Respondents' counsel therefore argued that the way the two schedules have been framed creates the impression that each schedule constitutes misconduct. And that could not be correct as each schedule is only a receptacle or container of acts that are prohibited as acts of misconduct under the Code.

[30] He argued further that the impression also created by the wording is like acts become less serious or serious misconduct depending on whether they are committed for the first time or not.

[31] Respondents' counsel referred to the case of **These Construction (Pty) Ltd vs FNB and Another**[3] to demonstrate that indeed the Courts have gone so far as substituting words used in a statute with words that properly reflect the intention of the law maker.

[32] This was in an effort of showing that the Court is not always bound by the literal meaning of words because the draughtsman may have made a mistake in the use of word, or may have omitted a word.

[33] Respondents counsel therefore argued that the Court has to substitute the second "shall" in the heading of the second Schedule with "or those that", so that instead of reading "this schedule shall apply in the cases of repeated offences and shall constitute very serious misconduct", the heading should read:

'This schedule shall apply in the cases of repeated offences [or those that] constitute very serious misconduct.

[34] 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

[3] LAC 2005-2006 307

were for holding a public gathering without permission and for having disrupted and chased away fellow students who were studying and using offensive language.

[35] The record shows that 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 6th applicant at page 33 of the record. The 6th applicant even attached to his papers a medical form showing the injuries he sustained on the day he said was arrested being the 4th March, 2014.

[36] Applicants challenged the statements that they made due to pains from assaults by the police as inadmissible as were not freely made but that they had been unduly influenced to make such statement. That also the rest of the names of those students whom he ended up claiming were with him, at the '*Liboba*' gathering to have not been freely given.

[37] Even at page 74 of the record of disciplinary hearing, the warden 'M'e Rafutho in her statement still showed that 6th applicant was before the police when he made the statement. Rafutho even said she realized that 6th applicant was admitting

everything he was asked due to pain. He even promised to give out names of all the other students who were '*Liboba*' and had been in his company.

[38] Applicants were definitely prejudiced in having been made to make statements before the police whilst being subjected to torture. Their counsel argued that 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. I would not agree with them more.

[39] Now back to having charged the applicants under Schedule II though were first offenders, respondents argued further that indeed the Courts have at times gone so far as substituting words used in a statutes with those that properly reflect the intention of the law maker. He referred the Court to a decision of **Ex parte Minister of Justice:** In **Rex v Lesotho Jacobson and Levi**[4] quoted in the Lesotho case of **These Construction (Pty) Ltd v FNB and Another** where it was held:-

[4] 1931 AD 464 at 476-7

"The Court is not always bound by the literal meaning of words because the draughtsman may have made a mistake in the use of a word, or may have omitted a word."

[40] In **These** case respondents' counsel referred the Court to the passage by the Judge on appeal in these words;

"It is within the powers of a Court to modify the language of a statutory provision where this is necessary to give effect to what is clearly the intention of the legislature."

[41] The Court in **These** went on to read the word "debtor" as "creditor" where it appeared for the second time under **Rule 43 (12) of the High Court Rules.** But the Court there clearly pointed out that the draughtsman may have made a mistake in the use of words. Even there it becomes clear that one cannot mistake a "creditor" for a "debtor". It would only be judgment creditor whom to ask for pursuing judgment debtor.

[42] But in *casu* the word used is a shall which appears twice. A shall will not be mistaken for anything except in making a distinction between peremptory and directive provisions of a statute.

[43] The intention of the legislature with the two Schedules, Schedule I and II has been to categorize the offenders into first offenders and second offenders, not how serious the offence could be. So that it would be wrong in that case to substitute the second shall to mean something else. It was therefore wrong to have charged applicants under the IInd Schedule yet they were first offenders.

[44] Following the decision in **Lion Match Co Ltd v Wessels**[5] statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity.

[45] The law on review as was held in **Jockey Club of SA v Feldman**[6] 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."

[5] 1946 OPD 376 at 380
[6] 1942 AD 340 at 359

The test applies in the case of statutory tribunals as well as private tribunals.

[46] In conclusion therefore the Court finds that the applicants have been irregularly charged under the **II Schedule of the Code** yet were first offenders. Also that **Regulation 7.1.4** encompassed the ingredient of fairness which encompasses disclosure and discovery.

[47] Unlike what has been suggested by the respondents on the import of **Regulation 7.1.4** that documents could only be supplied for purposes of inspection and not reading them, the Court has read the Regulation to mean the documents had to be supplied not only for inspection but for reading them so as to prepare oneself for trial. Failure to have not supplied the statements to the applicants caused them prejudice in the proceedings before the tribunal in preparing for their trial.

[48] The irregularities complained of are matters for review, being using the wrong procedure of having charged applicants under the wrong schedule and having denied them documents which ought to have been supplied to them for purposes of preparing for trial under **Regulation 7.1.4**.

The Application thus succeeds with costs.

A.M. HLAJOANE
JUDGE

For Applicants: Mr Selimo

For Respondents: Adv. Mohau K.C.