IN THE HIGH COURT OF LESOTHO

CIV/APN/561/2013

In the matter between:

SEROALA TSOEU	**1ST APPLICANT**
TSEPANG RANTSO	**2ND APPLICANT**
RETSELISITSOE THOAHLANE	**3RD APPLICANT**
KENEUOE MOTSOENE	**4TH APPLICANT**
REGINA THETSANE	**5TH APPLICANT**
MOSES DAMANE	**6TH APPLICANT**
PULENG LETSOELA	**7TH APPLICANT**
SETSOMI MOLAPO	**8TH APPLICANT**
MOIPONE LETSIE	**9TH APPLICANT**

And

NATIONAL UNIVERSITY OF LESOTHO **RESPONDENT**

JUDGMENT

Coram : Honourable Mr.Justice E.F.M. Makara

Dates of Hearing : 23 April, 2014

Date of Judgment : 24 June, 2014

Summary

The respondent through its Vice Chancellor concluded a contract with the Kellogg Foundation. The main term therein being that the latter would sponsor the respondent's selected members of the academic staff to pursue a doctoral or masters degree for 23 months subject to renewal. Clause 1 of the contract provided for the deal to be terminated by the respondent or by Kellogg. After just 5 months of the sponsorship Kellog terminated the contract. The respondent thereafter stopped paying each applicant's M5000.00 honoraria per month and the M20.000 field allowance per annum on the basis that the source of the funding had suddenly collapsed. The applicants then sought for a declaratory order that the respondent was in breach of the contract and that it be directed to release all the outstanding

amounts to the tune of M95,000 to each of them. Another protestation being that the termination was made without the audi alteram parterm rule observed by the respondent.

Held:

1. *The contractual termination by the Respondent was in line with the exercise of its contracted right.*
2. *The respondent was not in terminating the contract performing a public or exercising legislative powers duty and, therefore, not bound by the audi alteram parterm rule.*
3. *The applicants not entitled to the M5000 per month honorarium after the termination of the contract but each entitled to the M20,000 which is the field allowance that they qualified for right from the time they embarked on the field research work.*
4. *No order on costs.*

CITED CASES

Faure v Louw (1880) 1 SC3 and Kaplan of Laughton1949 (2) SA 840.
Collen v Reitfontein Engineering Works 1948 (1)SA (AD) 430
Siboyeni and Others v University of Ford Hare 1985 (1) SA 19 (CKSC); Government of the RSA v Thabiso Chemicals [2009] 1 ALL SA 349 (SCA) and in particular Logbro Properties CC v Beddessen No and Others [2003] 1 ALL SA 424 (NCA) and Ministry of Public Works and Others v Lesotho Consolidated Civil Contractors (Pty) Ltd C of A (CIV) NO. 9/ 2014.

ABSA Bank Ltd v SACCAU National Provident Fund (under curatorship) 2012 All SALR 121 (SCA)
The Ministry of Public Works and Transport and Others v Lesotho Consolidated Civil Contractors (PTY) LTD C of A (CIV) No. 9 / 14
Cape Municipality Council v Metro Inspection Services CC 2001 (3) SA 1023.

STATUTES AND SUBSIDIARY LEGISTLATION

National University of Lesotho Order No.19 of 1992
National University Act 1992
Interpretation Act No.19 of 1977

MAKARA J

Introduction

[1] These motion proceedings have been initiated by the applicants against the respondent which is the National University of Lesotho (NUL); an institute of higher learning established as such under the National University of Lesotho Order, 1992. They have prayed for an order in the following terms:

> 1. declaring that the Respondent is in breach of its agreement with the Applicants herein to pay each Applicant, a monthly stipend or *honorarium* in the amount of Five Thousand Maluti (M5000) together with an amount of Twenty Thousand Maluti (M20 000) per annum for field work out of funds granted by Kellogg Foundation;
> 2. directing the Respondent to pay to each of the Applicants herein an amount of Ninety Five Thousand Maluti (M 95 000) being the total amount of stipends or *honoraria* withheld by the Respondent from July, 2008 to January 2010.
> 3. directing the Respondent to pay costs hereof in the event of opposition hereto.
> 4. granting the Applicant further and or alternative relief.

[2] The respondent who will interchangeably also be simply referred to as the University has reacted to the application by filing its intention to oppose the application and subsequently filed the answering papers including the annexures thereof. This notwithstanding, it has emerged from the papers before the Court that the two sides share a convergence of views on the background material aspects of the facts which have occasioned this litigation.

[3] Their divergences are intrinsically of a legal nature. They emerge primarily from their differences regarding the position of the applicants in the agreement concluded between the

Foundation and the University; the parameters and the implication of the clause which gave these two parties a latitude to terminate the contract and the legal justification of the University to have exercised the option upon its claim that the sponsorship had been secured on its behalf contrary to the Localisation Training Board (LTB) regulations without giving them a hearing.

Common Cause Facts

[4] The applicants were at all material times the employees of the University. This obtained irrespective of the exact nature of their respective contracts of employment with the institution.

[5] A foundational basis of the redress which the Applicants are seeking from the Court is in a simplified version that they are blaming the University for having breached an agreement concluded between themselves and the University that they shall starting from July 2008 to the 31st January 2010 receive a Kellogg Foundation financial sponsorship to pursue their studies towards Masters or Doctoral degrees in various fields of study. They perceive themselves as the **third parties** who became the beneficiaries in the relationship concluded between the University and the Foundation. This followed the extension of invitation to the qualifying members of the academic staff to apply for the sponsorship and consequently their selection for the scholarship to read for those higher degrees. It is against this backdrop that they maintain that they are entitled to all the sponsorship related financial stipends and allowances which according to them, the

University had **unilaterally** withheld after terminating the sponsorship contract with the Kellogg.

[6] The immediate apposite development for recognition at this stage is that the applicants had after being chosen for the programme, accepted the award of the sponsorship by signing a document which is headed – ***Statement of Undertaking.*** Its contents shall be interrogated later in the judgment. Resultantly, the University had honoured the agreement entered into with the applicants by paying each of them a monthly stipend of M5000. 00. This commenced from **February 2008 until in July 2008 when it *unilaterally* stopped the payments before the expiry of the sponsorship which was scheduled for the 31st January 2010.** The indication is that the fellows concerned were paid their monthly stipends for only six (6) months and not for 23 months in accordance with the original duration of the sponsorship and, therefore, that they had not been paid for 17 months.

[7] There has further been no disputation that the University had not released the M20 000 annual field allowances to the applicants. A *prima facie* arithmetic calculation would be that the 17 outstanding months would, when multiplied by the M5000.00 stipends planned to be paid to each of them, reveals that they are individually entitled to an outstanding M85 000 stipends in total. Thus, this amount would then be added to the roughly 2 years of the field allowance which would amount to around M40 000. The

ultimate indication is that according to them, the University should pay each of them M135. 000.

[8] The applicants have in support of their founding and supporting affidavits annexed thereon the relevant documentations for the elucidation of their case. This has facilitated for a systematically and a chronological comprehension of the developments which have precipitated the litigation. The key annexure is the *Public Notice from the Vice Chancellor*. Its salient features are that it primarily announced the availability of $800, 000 grant from the Kellogg Foundation which would subsist for two (2) years (subject to renewal) to support the candidates who would be selected for the degrees. Secondly, it invited the potential candidates to tender their applications for the selection of the successful applicants. Lastly, it stipulates the incentives for the successful applicants.

[9] A second annexure of significance is a correspondence authored by the Vice Chancellor and addressed to the applicants to whom he registers his pleasure in announcing their selection for the scholarship and its concomitant benefits. These have been listed as:

- Free local mentorship;
- An *honorarium* of M5000. 000 per month;
- A lap top;

- An overseas conference ;
- M20. 000 annum per annum for laboratory supplies or field work per year;
- The programme will be formally launched on April 4, 2008.

[10] There is afterwards for the purpose of this case a more determinative document which bears a heading - ***Statement of Undertaking.*** It is basically reflective of a contractual agreement between the University and Kellogg Foundation in that it details the conditions upon which it has been founded. Perhaps, it was on account of the recognition of the value of the undertaking by the main parties and a realization of its implied propensities towards the applicants that it formed part of the papers which each in his or her individual capacity as a fellow had signed. This indicated that they had each read the terms therein and subscribed to them. The agreement commences with an opening statement which is that – *the fellowship starts on the 1st February 2008 and that the end date shall be 31st January 2010 (2) years* ***subject to any continuation or withdrawal of the grant either by Kellogg or by NUL.*** (Emphasis supplied).

[11] The historical scenario receives more illumination from a letter of the 2nd February 2010 addressed to Messrs G G Nthethe & Co by the then Acting Vice Chancellor Professor E M Sebatana and correspondingly by the 9th February 2010 one which he had written

to the Kellogg Junior Fellows. Given the centrality of the contestation in the matter, a content of significance in both documents is the advice to the addressees respectively that at the time they were enquiring about the predicament surrounding the sponsorship; **Kellogg had already terminated its financial support of the programme.** (Emphasis supplied)

[12] NUL had apparently prior to the termination of the deal by Kellogg discovered that its late Vice Chancellor Professor A F Ogonrinade, had while concluding the contract with the Foundation, violated the requisite procedures. This had according to Professor Sebatana, been occasioned by the Vice Chancellor's failure to have followed the Localization and Training Board (LTB) regulations and yet all the agreements with the University should be in tandem with its laws.

[13] Prior to what the applicants have termed a **unilateral termination** of the agreement by the University, each of the applicants had received a monthly stipend or *honorarium* of M5000. It should, however, be highlighted that they had not been paid their allowance of M20 000 per annum for field work. Their case in this connection is that the University has, despite their application for the release of this allowance, wrongfully and unlawfully failed or refused to release it to each of them.

The Arguments Advanced

[14] The applicants have through their Counsel argued their case from the premise that the Vice Chancellor (VC) is in terms of **S 16 (1) of the National University Act 1992,** a Chief Academic and Administrative Officer. On the strength of the provision it was submitted that it is immaterial to the applicants who were the third parties as to whether or not the VC had been mandated by the University and, therefore, that it is estopped from escaping the consequences of the acts of its Chief Academic and Administrative Officer. It was in this regard explained that the manner in which the officer had acted at the material time, had given the applicants the impression that he had been authorised to have concluded the initial agreement with Kellogg and subsequently with them on the same subject. The Counsel had in motivating the estoppel based submissions relied upon in **Faure v Louw (1880) 1 SC3 and Kaplan of Laughton1949 (2) SA 840.**

[15] On a different but related note, it was contended for the applicants that the developments which culminated in the signing of the contract between the VC and the applicants should have alerted the University that the processes were being transacted in violation of its regulations. These had commenced from the moment the invitation for the illegible candidates was circulated under the authority of the VC and progressed to the stage when the applicants won the fellowship. It was stated that the different phases had taken a whole year before the respondent had disassociated itself from the contract.

[16] The Counsel for the applicants submitted that even if it could be perceived that the VC did not have the authority to have concluded the contract with the applicants, the University has by a subsequent conduct ratified it. This was said to be ascribable to the fact that it had between February 2008 and July 2008, consistently paid the applicants their M5000 monthly stipends which were provided for in the contractual document signed between the applicants and the respondent who was at the material time represented by the VC. The Court was for its guidance invited to *inter alia* consider **Collen v Reitfontein Engineering Works 1948 (1) SA (AD) 430.**

[17] In conclusion the applicants protested that the respondent had not accorded them a fair hearing before terminating the said contract which the VC had on its behalf, concluded with them. They maintained that they were entitled to the process by reason that the decision had let to the withdrawal of their financial sponsorship and that was that the applicable enactment had not excluded it.

[18] The Counsel for the respondent has reacted to the representations made for the applicants by initially raising purely technically legal arguments through which he basically challenges the procedural approach followed by the applicants in seeking for the declaratory and the specific oriented redresses from the Court.

[19] On the declaratory order it has been contended for the respondent that in contractual disputes where there is an allegation of breach of contract or some other invasion of a right entitling the plaintiff to claim consequential relief, *prima facie* such a case is not one for the declaratory order unless such a declaration would bring the matter to a finality more quickly than an action for consequential relief.[1] In the same vein, it was stressed that declaration of rights and specific performance are methods of enforcement of a contact available to the plaintiff either in the alternative or together, subject to the general principles that the claim may not be inconsistent with the remedies and that he may not be overcompensated. Here the Court has been referred to Christie, the Law of Contract.[2]

[20] The Court was further warned that the power to issue a declaratory order involves a determination by the Court of a existing future or contingent right or obligation in order to resolves a real and pertinent dispute of liability on the basis of certain facts.

[21] On specific performance it was stated that the Court has a discretionary power subject to where it would be impossible for the defendant to comply – *lex non cogit ad impossiblia.* Regarding the *ex turpi non oritar action* principle the Counsel maintained that it would pass the test even if the question of the illegality of a contract is raised for the first time and that the Court is at large to *mero motu* dismiss the claim if it evidentially emerges that it was

[1] Christie, The Law of Contract 3rd Edition pp595 - 596
[2] Op cit p 577

illegally concluded between the parties. It was on the same point argued that estoppel cannot be invoked as a defence against the illegality of a contract. The reasoning behind being that the Court cannot enforce an agreement that is prohibited by law.

[22] The more merits related position held by the respondent proceeds from the argument that the applicant's admission of the background facts renders the Court to recognize the former's defence to stand. It should suffice to indicate that these have already been identified under the common cause part of the judgment. They are in a nutshell that:

> (a) The contract had been entered into on the basis of the terms and conditions of the respondent's laws, regulations and policies particularly those relating to its officials and the localization and Training Board;
>
> (b) The applicants were aware that the sponsorship was to be sourced from the Kellog Foundation and not from the respondent;
>
> (c) The sponsorship would be administered in accordance with the laws of the country and those of the respondent and its policies.

[23] It appears that the mainstay of the case presented for the respondent is that the applicants and the then Vice Chancellor had at the material moment irregularly signed the contract in that they were well conscientious that they were acting contrary to the polices of the University and procedures. In particular, it was complained that the contractual documents had bypassed the LTB procedural imperatives. On this basis, it was maintained that the documents have been rendered a nullity and consequently that all

the payments of *honoraria* prior to July 2008 were not duly authorised since they had been made contrary to the laws of the respondent.

[24] An additional charge advanced against the applicants was that it had been *iniquitous* for the 4th to the 8th applicants to have earned their monthly stipends long before commencing with their studies. In that strength, the same description was attributed to the 3rd and the 9th applicant whom it was stated that they were not eligible to have been considered for the sponsorship since they were under fixed terms of employment.

[25] The Counsel for the respondent reiterated for emphasis sake that its laws, procedures and policies constituted a foundational framework which circumscribed the content and the form of the contract. This included the legal capacity of the parties to have respectively concluded it. The perspective has occasioned his submission that the Court would have to base its decision on the meaning of the agreement by confining itself on the express provisions of the contract without any extrinsic evidence. According to him, any failure by the parties to have complied with the contract would render it to be *null and void.*

[26] *In casu,* the Counsel has further raised an intriguing argument that the applicants are the integral component of the University and that, as such, they ought to have ascertained in collaboration with the Vice Chancellor that the sponsorship deal had complied with its laws and policies. The impression radiated

is, in a simplified version, that the University and the applicants shared a reciprocal duty to have established that the contract which they signed with the University conformed with its laws and policies particularly the LTB Rules. These were presented as the more appropriate rules to have guided the processes. Thus, according to the respondent, the applicants should have also realised what the Court interprets as the *inherence of illegality in the original contract between the University and the Kellogg Foundation on the sponsorship and therefore, be instrumental in redesigning it in consonance with the said laws and policies before becoming parties to it.* The underlining consideration being that the VC lacked the credentials to have unilaterally entered into the arrangement in that he had not done so in collaboration with the appropriate structures of the University and that the applicants should as its integral components, have noticed that defect.

[27] The advanced perception that the applicants and the University were the same entity was developed into a thesis that the former were not the *third parties in the contract and that resultantly they cannot benefit from the foundational illegality of the contract between their institution and the Kellogg Foundation.* There was emphasis laid on the common cause fact that the applicants were at the time they signed the Kellogg sponsorship contract, privy to its condition precedent that it should operate in accordance with the laws and the policies of the University. The understanding created is that given the condition they, as part of the University, should have realised that the Vice Chancellor had

not followed the requisite procedural essentials and that he did not have the credentials to have alone concluded the contract.

[28] Reacting to the contention raised by the applicants that the LTB Rules had no legal force since they had not been laid before parliament; the Counsel for the respondent warned that **Sections 10(2) (g) and 48 (1) (n) and (5)** read in conjunction with **S 54 of the National University Act 1992**, dispensed with the suggested procedure. He then dismissed the relevance of the **Interpretation Act 1977** in resolving the issue.

[29] It was in conclusion counter argued for the respondent that it was not in law obliged to have observed the *audi alteram partem rule* in favour of the applicants. The reasoning propounded was that the relationship between the parties was purely contractual and that this excluded the application of that common law principle. The cases cited for the support of the proposition were *inter alia* **Siboyeni and Others v University of Ford Hare 1985 (1) SA 19 (CKSC); Government of the RSA v Thabiso Chemicals [2009] 1 ALL SA 349 (SCA) and in particular Logbro Properties CC v Beddessen No and Others [2003] 1 ALL SA 424 (NCA) and Ministry of Public Works and Others v Lesotho Consolidated Civil Contractors (Pty) Ltd C of A (CIV) NO. 9/ 2014.**

[30] Another dimension introduced in relation to the question of the relevance of the *audi alteram partem phenomena was that the applicants had not in their founding papers raised this as their case and that they were only introducing it in the argument stage.*

Findings and the decision

[31] The Court is not persuaded that the applicants have not properly approached it in seeking for a declaratory and specific performance relief. It finds that given the fact that at the time the application was launched, the respondent had already on its own motion terminated the sponsorship contract between itself and the applicants. Thus, they were at large to ask the Court to make a declaratory order that the act tantamounted to a breach of the contract and incidentally pray for a specific relief in which the respondent is directed to settle the claimed financial entitlements in the respective amounts mentioned. The redress in the view of the Court addresses both futuristic and contingent rights of the applicants.

[32] It is recognised as a trite principle of law that where specific performance is sought for, the Court has discretion to determine the extent of its practicability and to contextually mitigate whatever undue hardship which could be occasioned against the other party by the remedy. The judicial approach is encapsulated in the legal maxim *lex non cogit ad impossiblia* and it is further resonated in the principle against unjust enrichment.

[33] On the question of the illegality of the contract, the Court recognises this to be a legal point to which its attention could be drawn at any stage provided that the other side has been alerted that it would be made an issue in the proceedings. Be that as it may, a critical consideration would be on how the Court perceives it within the circumstances of the case. The challenge leads to the

determination of the status of the applicants in comparison to that of the University. It has from the onset featured as common cause that the applicants were at the material times the employees of the University whom it had basically employed in pursuit of its academic mandate. The relationship between them and the University and the assessment of their exact position within the present contractual environment would be safely ascertained with reference to the opposite provisions in the Act. In precise terms, this would easily resolve the core issue on whether or not the applicants were the *third parties in the contractual relationship involving the University and the Foundation and in the end the applicants.*

[34] Navigation through the Act reveals that the primary provisions for guidance would be those which describe the nature of the respondent and the next ones would be those which reveal its officials in their hierarchical order and correspondingly, their respective terms of reference. Lastly, attention would be turned to the part which addresses the position and the role of the academic staff. In this background, the top echelon of the administrative hierarchy of the University is legislatively provided thus:

- The Vice Chancellor (VC) whose office is created under S 16 of the National University Order[3] and who is therein described as the chief academic and administrative officer of the University and in that capacity also its an accounting officer;
- The Pro Vice Chancellor whose office is created under S17 to perform the functions entrusted upon his office by the University statutes and other assignments detailed to him by the VC and to act for the latter in his absence;

[3] The National University Order 19 of 1992

- The Registrar whose office is created under S 18 and scheduled to be responsible to the VC and through him to the Council and for the custodianship of the University records;
- The Bursar whose office is created under S 19 as the chief financial officer;
- The Librarian created under S 20 for the management of the University books and other study materials.

[36] In its next phase, the Order creates the University Council, the Senate and other superior structures who designs general policies, take major decisions including the appointments of some of the above officials, hears appeals and acts as oversight bodies.

[37] The academic staff members are in terms of S 44 appointed by the academic staff appointment committee which is an entity of the Council and the Senate. Whilst there is a foundation in the respondent's assertion that the academic staff members are represented by their colleagues in the various structures of the University including the Council and the Senate, it rejects the argument that this elevates them to be in the same administrative standing as the VC and the other high ranking officials. They simply serve there to provide their expertise or for a representative purpose without having major decision making powers. It would, given the legislative scheme appear that they predominantly command recommending powers and not the executive ones which are a preserve of the high ranking officials. It should suffice to emphasise the fact that the academic personnel is primarily dedicated to *academia including research and publications.* It is relatively insignificantly involved in the core administrative challenges of the institution.

[38] It now becomes logical to address the question as to whether the applicants are in the circumstances of this case the third parties or not. This should in the view of the Court be perceived through their relationship with the contract. An elementary fact is that the University and the Kellogg Foundation are the original parties in the agreement. This is simply attributable to the reality that the two organisations are the ones who laid down a foundation for their relationship in that they had concluded a compact in which Kellogg would provide the University with the financial funding to support the higher degree scholarship as already explained. Understandably, the University had to facilitate for the commencement of the studies by inviting its illegible academicians to apply for the sponsorship and it was in that context that the applicants were selected for the funding.

[39] It is clear from the contract signed between the applicants and the University that there was an incorporation of the terms in the key one concluded between the main parties. The more relevant were the revelations that the second agreement was subject to the laws and policies of the University; the sponsorship originated from the Kellogg Foundation; any one of the main parties could terminate the contract between them and that the applicants were to be funded for almost two (2) years which was subject to renewal.

[40] Consequently, the laws traversed to distinguish the University management from the academic personnel and the

applicants' position in the subsequent contract, the projection is that they have featured therein as the *third parties.* Their prayers before this Court should logically be considered in that perspective. Given their identified status, they were in the circumstances surrounding the case entitled to presume that the contract between the main parties had been procedurally made in compliance with the law, the applicable subsidiary legislation and the policies of the University. It is inconceivable that they would have basis to doubt that or to think otherwise about that covenant. The discernment receives reinforcement from the development that it had taken the University almost five (5) months before it had questioned the credentials of its VC to have signed the papers with Kellogg and for his corresponding alleged violation of the University's legal regimes and policies. Here it must be highlighted that the School was never his personal property. This culminates in the understanding that the Tanquands rule[4] qualifies for a relative relevance in the matter. The rule details that a *third party* who in good faith deals with a company is entitled to presume that there has been a compliance with its constitution and the articles of association. This in the view of the Court includes a relative presumption that the director had the authority to enter into the deal. The Court is, in resolving the issue, enjoined to place itself in the shoes of the applicants in the mist of the surrounding material developments. It would be an ambitious expectation for the applicants to have sort of forensically scrutinised the VC's eligibility and his procedural correctness in the matter. This makes sense especially when he is surrounded by several men of

[4] The Tanquands Rule

eminence in the persons of the PVC, Registrar, Bursar and other technocrats in different fields of specialisation including the University legal Counsel. The applicants as the *third parties* were further entitled to presume that the man had made the appropriate consultations before entering into a contract of its magnitude. That will be in accordance with the expectation that a VC is a person of high integrity, wisdom and vision – hence his S 16 (1) standing as the University Chief Academic and Administrative Officer.

[41] On the controversy concerning the respondent's charge that the main contract was illegal and therefore, unenforceable since it was prohibited by the law; the Court decides in rhythm with its description of the applicants as the *third parties,* that they were contextually snow white innocent in that suggested transgression. If there was such an act, it was the University and the Kellogg Foundation who were the culprits. The condition that the agreement should be in consonance with the University laws and policies did not *per se* oblige the applicants to scrutinise its harmony with those aspects because it was justifiable for them to have presumed that the requisite procedural imperatives had already been exhausted by the main contracting parties. This case is distinguishable from the material reality in **ABSA BANK Ltd v SACCAWU National Provident Fund (under curatorship)**[5] where the respondent's principal officer had without a mandate concluded a contract with the applicant and it was decided that as a result the agreement was not binding upon the Fund. There was no evidence

[5] ABSA Bank Ltd v SACCAU National Provident Fund (under curatorship) 2012 All SALR 121 (SCA)

in that case that the respondent was in a position to have presumed that the officer had the requisite credentials to have entered into the deal with the Fund. It is as a result reiterated that the point that the applicants in the instant case, should have realised that the contract in question had been concluded on behalf of the University by the VC who lacked the requisite qualifications to have done so and that the agreement was unlawful consequently fails.

[42] Concerning the attack of the 4th and the 8th applicants that it was iniquitous for them to have received their stipends long before the commenced with their studies is not a convincing argument. In the view of the Court this has not been sufficiently canvassed for it to make any determination thereon. The Court rejects a related contention that the 3rd and the 9th applicants were not illegible for the scholarship because of being in the employees on fixed term contracts. It reasons on the contrary that the invitation for the qualifying academicians to apply for the sponsorship had not discriminated against those in their category. To demonstrate that they were also selected for the programme and they had thereafter received the sponsorship.

[43] It is clear from the papers before the Court that the Kellogg Foundation had on the 3rd of November 2009, terminated the main contract between itself and the University and that it had done so against the backdrop of the main contract which had been reiterated under *Clause 1 of the Statement of Undertaking. This* is the contract between the University and the applicants. The former

had afterwards reciprocated accordingly by acknowledging that eventuality. It was thereafter that it explained in its correspondence to the lawyers of the applicants the background reasons which culminated into that. Recognisably therein was the University protestation that this resulted from the discovery that the main contract was beleaguered with the said procedural improprieties. Of significance here is that Kellogg had accordingly terminated the main contract.

[44] The applicants' position that there was an implied term in the contract between them and the University that the latter would, in the event of its contemplated termination by any of the main contracting parties, provide an alternative sponsorship, is foundation less. If so, it should have been expressively stated therein as it would represent a material term. It cannot in the absence of a clear provision to that effect, be regarded as being readable from the text. It should appreciably be comprehended that the termination of the foundational agreement by the Kellogg Foundation is analogous to the destruction of the foundation upon which the contract between the applicants and the University was founded. This is recognisable from the observation that the decision had deprived the sponsorship with its indispensable fiscal life support source. The contract between them was logically destined towards a collapse. This penultimate ending cannot be associated with any 'tsunami' *event* since it had already been telescoped in the deal between the University and Kellogg. The end result is that the subsequent arrangement had been stricken by the already expected lightening.

[45] It has to be highlighted in this case that the applicants had by signing the contract with the University *inter alia* demonstrated their awareness of the term therein that the University or Kellogg retained a right to terminate the sponsorship contract. This is indicative that they were fully aware of the background source of the funding and a possibility of its sudden collapses through its termination by in particular its provider. Once again this case is distinguishable from **Students' Representative Council –LCE & 318 others v The Rector Lesotho College of Education and Others**[6]. There the applicants whose studies had been suddenly stopped by the 1st respondent on the reasoning that the donor had withdrawn the funding of their programme, it was found that the affected students were not aware of the donor. All that they knew was that they had entered into a contract with the College to read towards their diploma in teaching. The Court declared the termination of their programme to have been unlawful and directed the College to resuscitate it for them at its own costs.

[46] The applicants have rendered the Court's assignment to be an easier one regarding its interpretation on whether the University had in Clause 1 of the contract undertaken to provide the funding in the event of a termination by any of the main parties. They have in their 1st prayer sought for an order in relation to the funds granted by the Kellogg Foundation. In prayer 2 they have stated that they want an order for the University to release the involved stipends or honoraria withheld by the University from

[6] Students' Representative Council – LCE $=& 318 others v The Rector Lesotho College of Education and Others

July 2008 to January 2010. The scheme of the prayers is consistent with the reality that the applicants recognise Kellogg as the source of the funding and not the University. A meaning which the Court assigns to the Clause is that the University was at liberty to continue with the funding after its termination provided that it had the means. A letter addressed to the applicant Rants'o by the then Acting Vice Chancellor Sebatane dated 9th February 2010 read in conjunction with his 2nd February one written to the applicants' s attorneys make it clear that the University had no financial capacity to support the studies. It would, appreciably, be senseless and unrealistic for the Court to direct it to do so and yet it never actually funded it.

[47] The stated fate of the contract and its effect is self-explanatory that the rights of the applicants to the benefits in consideration had subsisted from the 1st February 2008 which is the commencement date of the contract up to the 3rd November 2009 when Kellogg exercised its contractually provided right to terminate its relationship with the University in connection with the sponsorship of the studies in particular.

[48] There is finally no merit in the applicant's argument that the University had terminated their contractual relationship with it without giving them a hearing. Here it has to be straightened as it has already explained; that Kellogg was the one which had established a contract with University and subsequently that the students had concluded their own agreement with the University so that they could benefit from the sponsorship. The termination

which has incidentally ended the funding was contractually provided for. Thus, there was no need for the University to have accorded the applicants any *fair hearing* prior to giving effect to the termination. **The University was not, in so doing, performing a public duty or implementing legislation. All it had done was to reciprocate to the Kellogg decision to terminate the sponsorship in accordance with the contract between the two.** The Court has on this issue received guidance from the Court of Appeal decision in recent case of **The Ministry of Public Works and Transport and Others v Lesotho Consolidated Civil Contractors (PTY) LTD C of A (CIV) No. 9/14** wherein the words expressed in **Cape Municipal Council v Metro Inspection Services** [7]at para 18 were cited with approval. These were that:

> The appellant is a public authority, and although it derived its power to enter into the contract with the first respondent from the statute, it derived its power to cancel from the terms of the contract and the common law.... When it purported to cancel the contract, it was not performing a public duty or implementing a legislation it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract.

[49] The foregoing traversed factual and legal scenario culminates in the final judgement that:

1. The Court refuses to make a declaration which the applicant has sought for under prayer 1 to the extent that the M5000.00 *honorarium* and the M20.000 covers the almost two (2) years of the sponsorship. It instead, finds it logically imperative to declare that the respondent is in breach of the contract to the extent that it has not paid each of the applicant the M20.000 allowance or part thereof

[7] Cape Municipality Council v Metro Inspection Services CC 2001 (3) SA 1023.

for the field work which they have indisputably done prior to July 2008 since they were entitled to it during that year.

2. As for prayer 2, the Court finds no basis upon which to direct the respondent to pay to each applicant an amount of M95.000 which the applicants respectively claim to be the total of monthly stipends or *honoraria* withheld by the respondent from July 2008 to January 2010. They each qualified for the M5000.00 *honoraria* (which they had received up to July 2008) and not after the termination by Kellogg.

3. There is no order on costs.

E.F.M. MAKARA
JUDGE

For the Applicant	**:**	**Adv. K.K. Mohau KC Instructed by Messrs G.G. Nthethe & Co.**
For the Respondent	**:**	**Adv. S. P. Sakoane KC Instructed by the Messers V.M. Mokaloba & Co.**