IN THE HIGH COURT OF LESOTHO

HELD AT MASERU	**CIV/APN/368/2019**

In the Matter Between:-

RASEKONATLA TELEKI	**APPLICANT**
AND	
LESOTHO COLLEGE OF EDUCATION	**1ST RESPONDENT**
REGISTRAR LESOTHO COLLEGE OF EDUCATION	**2ND RESPONDENT**
DISCIPLINARY TRIBUNAL LESOTHO COLLEGE OF EDUCATION	**3RD RESPONDENT**
EXECUTIVE COMMITTEE OF SENATE	**4TH RESPONDENT**

JUDGMENT

CORAM	**:**	**MOKHESI J**
DATE OF HEARING	**:**	**O4TH NOVEMBER 2019**
DATE OF JUDGMENT	**:**	**12TH DECEMBER 2019**

CASE SUMMARY: *Application for review of Disciplinary proceedings held against the applicant on the basis that his rights were never explained to him; non-compliance with peremptory requirement that the decision against him be communicated within five working days: that summary of facts was not made after the applicant had pleaded guilty,; double – jeopardy: Application dismissed with costs.*

ANNOTATIONS:

CASES **:** *Lesotho National Olympic Committee v Morolong LAC (2000 – 2004) 449*

Frasers (Lesotho) Limited v Hata-Butle(Pty) Ltd LAC (1995-99)698

Shepard v Tuckers Land and Development Corp (1) 1978 (1) SA (W) 173

Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 AII SA 108 (SCA)

NthabisengKhotle v the Principal Secretary Ministry of Finance and Others CIV/APN/215/19 (unreported) dated 14th /November/2019

Per Mokhesi J

[1] Introduction

This is an urgent application in terms of which the applicant is seeking following relief:

> "1. That the ordinary Rules of this Honourable Court pertaining to normal periods and modes of service be and are hereby dispensed with on account of urgency hereof.
>
> 2. That a Rule Nisi be and is hereby issued returnable on the date and time determinable by this Honourable Court calling upon the Respondents to show cause why the following prayers cannot be made final and/or absolute on the return date:-
>
> (a) That the 3rd Respondent be ordered to dispatch the original record of proceedings, inclusive of the electric voice recording relating to the disciplinary hearing of the Applicant within fourteen (14) days of the order hereof.
>
> (b) That the decision of the Respondents to suspend the Applicant for a full academic year and to pay surety upon his return be stayed pending finalization of this Application.
>
> (c) That the Respondents' decision to suspend Applicant from his duties within the 1st Respondent for a full academic year and to pay surety upon his return be reviewed, corrected and set aside for being irregular and null and void ab initio.
>
> 3. Costs of suit on a scale as between attorney and client, including costs consequent upon employment of two (2) counsel.
>
> 4. Further and/or alternative relief.
>
> 5. That prayers 1, 2, (a) and (b) herein operate with immediate effect as the interim relief."

[2] This application is opposed. When both counsel appeared before me I made it plain that I would not grant prayer 5, instead I insisted upon counsel to complete the filing of all papers and to come and argue the matter on the 04th November 2019 given the urgency of this matter. After arguments I gave an *ex tempore* judgment dismissing the application with costs, and promised to deliver written reasons in due cause. The following are the reasons.

[3] Factual Background:

The facts of this case are pretty much straightforward, and are common cause. The applicant is a final year student at the Lesotho College of Education (LCE). On the 16th August 2019 the students held a celebration known as "pens up" at the Refectory Hall located within LCE precinct. It was during the night. These kind of celebrations at this institution more often than not are a breeding ground for intra-student infighting, and in view of this, the police were enlisted to undertake patrols. The applicant had a firearm on his person. And as is customary on the LCE campus, the intra-student in-fighting broke out thereby necessitating police intervention. The police raided the party and placed the whole campus on lockdown. Everyone was searched, and upon the applicant being searched, the police discovered a firearm on his person. He was accordingly arrested and taken before the Maseru Magistrate court where he was charged with illegal possession of a firearm, on 20th August 2019. The applicant pleaded guilty and was accordingly sentenced to pay a fine of two thousand Maloti (M2000.00), which he paid.

[4] On his return to the campus, on the 23rd August 2019 he was suspended from the students' residences (hostels) for ten (10) working days on the basis of his being found in possession of a firearm by the police.

[5] On the 02nd September 2019, the applicant was served with a charge sheet hauling him before the disciplinary hearing. The basis of the charge was his being found in possession of a firearm on campus. The disciplinary proceedings were undertaken on the 27th September 2019, and were concluded on the same day. On the 24th October 2019, the applicant was served with a letter notifying him that the Executive Committee of LCE had approved a recommendation by the

Disciplinary Committee to suspend the applicant from the college for a full academic year andthat upon his return, the applicant would be expected to pay an amount of one thousand Maloti as surety.

[6] The applicant's grounds of review are captured in para. 6 of his founding affidavit as follows:

> "6. **GROUNDS FOR REVIEW**
>
> I aver that the entire disciplinary process against me stands to be quashed and set aside on the basis of the following factors to wit:-
>
> 6.1 The charges were read and explained to me, but my rights were never mentioned or explained.
>
> 6.2 After the conclusion of the hearing, I was never formally informed of the outcome, whether I was found guilty or not. Five (5) working days lapsed without any such communication in stark breach of the mandatory provisions of clause 7.1.11 of the Code and Procedures of Student Discipline as amended.
>
> 6.3 The 3rd Respondent never had a summary of facts and evidence to sustain the charges levelled against the Applicant.
>
> 6.4 Respondent failed to take into account the fact I had already been sentenced by a Criminal Court, despite being fully aware, in determining my penalty, contrary to clause 2.2 of the Code and Procedures as amended.
>
> 6.5 I have been punished twice for the same alleged offence in that prior to the hearing I had already been punished through the expulsion from the 1st Respondent's halls of residence."

[7] The above are the issues to be determined in this matter.

a) *Rights never explained to the applicant?*

In his founding affidavit the applicant merely makes a bald statement that his rights were never explained to him, but when the respondent made it plain in the answering affidavit that the Notice of the charges addressed to the applicant made it sufficiently clear what his rights are, and that they were even tabulated in the charge sheet. Faced with this, the applicant, in reply, changed tune and said he is referring to his right to appeal. It is this approach the respondents took issue with. I agree with the respondents that the applicant is shifting the goal posts, and this should not be countenanced. It is particularly wrong to direct the party's attention to one issue and then attempt to canvass the other *(**Frasers (Lesotho) Limited v Hata-Butle (PTY) Ltd LAC (1995 – 99) 698, 702 C – D).***In application proceedings the rule is expressed in terms that the applicant must make out his case in his founding affidavit and not in reply. The applicant must make out a *prima facie* case against the respondent in his founding affidavit, and for the respondent in his answering affidavit to indicate which facts he denies or admit and to set out his version of events on which his opposition is based. The applicant must stand or fall by his founding affidavit as the resolution of the dispute between the parties is restricted to issues raised in the founding affidavit *(**Lesotho National Olympic Committee v Morolong LAC (2000 – 2004) 449, 457**).*

[8] The court is however, mindful that the above rule is not absolute, as the court has a discretion in deserving cases to allow the new matter to remain in reply and to afford the respondent to deal with it in the second set of answering affidavit. However this was not such a deserving case. Nestadt J put the rule thus, in ***Shepard v Tuckers Land and Development Corp (1) 1978 (1) SA (W) 173, 177 H – 178 A:***

> "This is not however an absolute rule. It is not a law of the Medes and Persians. The court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances (citations omitted)"

It needs to be remembered that this was a disciplinary proceeding in terms of which criminal standards of conduct of trial do not find strict application, in spite of this I am convinced that the applicant's rights were fully explained to him.

[9] (b*) Applicant not informed of the outcome of the disciplinary hearing within (5) five days.*

> In terms of section 7.1.11 of the LCE Code and Procedures of Student Discipline as Amended;
>
> > "The discipline Committee *shall* consider the matter and reach its decision in private: the decision shall be communicated to the student by the Secretary to the Discipline Committee in writing at the least within five working days of the meeting; the notice communicating the decision shall give reasons for the decision and give details of the right of appeal."

[10] Advocate Molise, for the respondents, conceded that the above section of the Code was not complied with regard to communicating the decision within five working days. It is no doubt clear that the word "shall" has been employed to denote that the requirement that a decision be communicated within five working days is mandatory. Although, Adv. Molise made a concession that the LCE is in breach, I however, did not find any such breach. It will be observed that clause 7.1.11 mandates the Disciplinary Committee to consider the matter and reach its decision in private and its decision be communicated "in writing within five working days of the meeting;" I think the use of the word "meeting" is significant. By using this word instead of a hearing or proceedings, my view is that this clause is not referring to disciplinary proceedings, but a *meeting* by the Disciplinary Committee held in the aftermath of the conclusion of disciplinary proceedings. It will further be observed that the time within which the Committee must sit to consider the matter in private is not provided; what is provided is the time within which the decision is to be communicated after the *meeting*. The applicant has not laid out a factual foundation to support this; he has not stated when the Disciplinary Committee met to consider the matter after the conclusion of the disciplinary hearing. What is common cause is that the

decision of the Disciplinary Committee was communicated a month and three days after the conclusion of the disciplinary hearing. I do not know when the Committee met to consider the matter, such that it can be said that a five day period was not met.

[11] Assuming I am wrong to conclude that the word "meeting" in clause 7.1.11 refers to the meeting of the Disciplinary Committee post the hearing not the actual disciplinary hearing itself, I however, still consider that the applicant would not succeed on this point for the following reasons; In my view the purpose of clause 7.1.11 is to ensure that the student who was subject of disciplinary proceedings receive prompt decision so that he may exercise his right of appeal promptly where the decision has gone against him. My view is that this clause enjoins promptness on the part of the committee in dealing with the matter, so that the "accused" student knows his/her fate, within a reasonable time to enable him to exercise his right of appeal.

[12] If this is the intended purpose of clause 7.1.11 can it be said that a delay of a month in communicating the decision was so fatal as to vitiate the disciplinary proceedings. My considered view is that the decision against the applicant was made within a reasonable time. The presence of the word "shall" in the clause should not be decisive, the question should rather be whether despite non-compliance with the peremptory periods stipulated in the clause, the purpose of the clause had been achieved. In my opinion the purpose of the clause has been achieved in this matter as the applicant could still have exercised his right of appeal without any problem. Support for this approach is found in ***Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 ALL SA 108 (SCA)at para. 22***.

> "….As the applicants also correctly pointed out, it was held in case Killarney Property (1227 E – F) that the requirements of s. 4(2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of

> the defects, the object of the statutory provision had been achieved…"

These views apply with equal force in this case. I do not think that non-compliance with a five-day mandatory period is so fatal as to vitiate the disciplinary proceedings. This point was thus not well taken.

[13] c) *The 3rd Respondent did not summarize the facts and evidence after the applicant had tendered a plea of guilty to the charges.*

It needs to be stated that disciplinary hearings are not criminal proceedings, and, therefore, temptation to seek to apply criminal standards to the former should at all costs should be resisted. However, despite disciplinary proceedings not being criminal proceedings, in the situation where the accused pleads guilty, certain safeguards against wrong convictions which are applicable in criminal proceedings apply *mutatis mutandis* to disciplinary proceedings (**See: *NthabisengKhotle v the Principal Secretary Ministry of Finance and Others CIV/APN/215/19 (unreported) dated 14th /November/2019 at paras 6 – 8)***; those safeguards are the outlining of facts after the plea of guilty and/or questioning of the accused by the presiding officer. In *casu* after the applicant had pleaded guilty to the charges, the Chairperson of the Disciplinary Committee questioned the applicant and the latter's explanations made it clear that he was found in possession of a firearm while on campus. The exchange between the Chairperson and the applicant makes it plain that he pleaded to the charge unequivocally. I therefore find this point to be without merit.

[14] d) *Respondents did not take into account the fact that the applicant had already been criminally sentenced?*

Clause 2.2 where the Code and Procedures of Student Discipline as Amended provides:

> "2.2 Where a student has been sentenced by a Criminal Court, the Court's penalty shall be taken into consideration in determining the penalty under this Code."

The Code is silent as to what purpose considering that the student had already been sentenced criminally, would serve. It does not say whether it serves to aggravate or mitigate sentence; even though it is silent the most logical view is that it serves to aggravate sentence, a contrary view would lead to absurdity, as it would mean that the student who is criminally convicted of a serious offence such a sexual assault of another student should be entitled to the benefit of such conviction mitigating the sentence to be meted out by the disciplinary committee. My view is that a criminal conviction serves the purpose of aggravating the sentence. If this view be the correct one it is not apparent to me why the applicant sought to invoke this clause because a natural inclination on any convicted person is to seek the reduction of sentence, not its upward adjustment. I therefore, find that the point was not well taken.

[15] e) *Double – Jeopardy:*

It is the applicant's case that he was punished twice for the same offence for the reason that prior to the institution of disciplinary hearing he was expelled from the student's halls of residence following his arrest. This point has got to be rejected as only one disciplinary hearing was conducted; the expulsion of the applicant from the residences was a completely different matter in terms of which the Rules applicable to the halls of residences were invoked. I therefore, find the point to be lacking in merit.

[16] In the result the following order is made:

a) The application is dismissed with costs.

_____

MOKHESI J

FOR THE APPLICANT : ADV. TUKE INSTRUCTED BY K. NTHONTHOATTORNEYS

FOR THE RESPONDENTS : ADV. MOLISE INSTRUCTED BY M.W. MUKHAWANA ATTORNEYS