

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/0150/2022

In the matter between

**MOLOANTOA NYAMANE
SECHABA LEPOTA
TOTA LEPHUTHA
TSEPANG PHORORO
TEBELLO HLAISI
THUTO RAMASIMONG
MOHLAOLI MAHAMO
PITSO MOHLOMI
MOLAPO THAPELO**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT
6TH APPLICANT
7TH APPLICANT
8TH APPLICANT
9TH APPLICANT**

AND

**LEROTHOLI POLYTECHNIC GOVERNING
COUNCIL
RECTOR LEROTHOLI POLYTECHNIC
RESPONDENT
LEROTHOLI POLYTECHNIC
RESPONDENT**

**1ST RESPONDENT
2ND
3RD**

JUDGMENT

**CORAM : M. G. HLAELE J
HEARD : 31st May 2022
DELIVERED : 17th June 2022**

Neutral Citation: Moloantoa Nyamane and Eight Others v Lerotholi Polytechnic Governing Council and Two Others [2022] LSHC 132 CIV (17th June, 2022).

SUMMARY:

Review of decisions of quasi-judicial bodies. Grounds for review. Tribunal ordering retrial. Test for reasonableness of administrative action.

ANNOTATIONS:

Cases:

Astral Operations Ltd t/a country Fair Foods and others vs. The Minister for Local Government, Environment Affairs and Development Planning and other (3509/2014) [2022] ZASCA 62

Ajay Kumar Ghoshal V The State of Bihar 2017 SCC Online. Decided on the 31.01.2017

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation, 1 KB 223, EWCA Civ 1

Dart v Chairperson of the DAC of Stellenbosch University and others (6501/2020) [2021] ZAWCHC 8; [2021] 2 All SA 141 (WCC) (1 February 2021)

Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 at 152

Mosoeunyane v Likotsi (CIV/APN/89/2014) [2016] LSHC 2 (18 August 2016)

Ntone v Chairman - Lesotho Prison Services Disciplinary Committee - Quthing and Others (CIV/APN/306/99) [2001] LSCA 133 (10 December 2001);

R v Somerset County Council, ex parte Fewings & others [1995] 1 All ER 513 (QB) at 515d-g

BACKGROUND:

- [1]** The parties herein are students at a tertiary institution, that is, the Applicants. The Respondents are the administration of the institution. The facts that are *common cause* are that in January 2022, the Applicants, who were alleged to have participated in an unlawful strike, were summoned to appear before the School's Disciplinary Body. The ultimate outcome of this hearing was that the Rector of the school ordered that the Applicants should be expelled from the institution. (Annexure MN2 page 40 of the Record.).
- [2]** As a result of the expulsion, the Applicants appealed, in terms of the school's code of conduct being the Lerotholi Polytechnic 2014/2015 Student Handbook. The appeal was to the Council of the institution (the 1st Respondent). After deliberating on the appeal by the students, the Council made, amongst others, an order that the matter appealed against should go for retrial.
- [3]** It is this decision ordering that the matter should go for retrial that is the subject matter of the review application. The prayers by the Applicants herein are thus couched as follows;
- "1. Dispensing with the Rules of Court pertaining to periods and modes of service of process owing to the urgency of the matter.
 2. That the record of proceedings before Respondents be dispatched before this honourable court within fourteen (14) days.
 3. That the retrial scheduled to proceed on the 9th day of May 2022 be stayed pending finalization of these proceedings.

4. That the Applicants be allowed to enter 3rd Respondent and participate in the academic activities pending finalization of this application.
5. That a *Rule Nisi* be and is hereby returnable on a date and time to be determined by this honourable court calling upon the Respondents to show cause (if any) why:
 - a) The decision of the 1st Respondent shall not be corrected and act aside as irregular;
 - b) The decision of the 1st Respondent be declared *null and void*;
 - c) The decision of the Lerotholi Polytechnic Disciplinary Hearing be confirmed by this honourable court and Applicants be allowed to write the tests and exams they missed during the time of their expulsion;
 - d) The Respondents herein shall not be directed to pay the costs at attorney and own client scale;
 - e) The Applicants shall not be granted such further and/or alternative relief.
6. Those prayers 1, 2, 3 & 4 operate with immediate effect as interim orders."

[4] It is worth mentioning that this Court granted interim reliefs sought that the Applicants be allowed to enter the premises of the institution and participate in academic activities pending finalization hereof. The court also ordered that the 1st Respondent dispatch the record of proceedings that took place before them.

ISSUES FOR DETERMINATION:

[5] At the commencement of this matter, the parties agreed that the issue to be determined by this court was whether the 1st Respondent, being the Lerotholi Polytechnic Council, was correct in ordering a re-trial of the Applicants' case. This means whether the matter should be remitted to the School's Disciplinary Committee. Put differently for the purposes of this application; the issue is whether the decision of the Council is reviewable and can be set aside as a result.

APPLICANTS' CASE:

[6] The Applicants' grounds of review appear at page 17 of the record specifically at paragraph 9 of the founding affidavit. In essence the Applicants case is that the 1st Respondent arrived at the decision no reasonable decision-maker could reach on material facts before it.

[7] The Applicants also founded their case on the ground that; in resolving that their case should go for a retrial, the Respondents went beyond the scope of appeal. This ground was based on the submission that the 1st Respondent ought to have either dismissed or upheld their appeal and not order a retrial. More so because the re-trial would result in a mis-courage of justice.

[8] It was also their contention that the 1st Respondent in ordering a retrial, it failed to take into consideration the prejudice the retrial will bring on the Applicants. This prejudice was premised on the time that such inquiries take.

[9] Further, it was the Applicants' case that the retrial was made without taking into consideration the time these cases normally take.

[10] In support of his grounds for review, Advocate Ketsi relied on the case of *Astral Operations Ltd t/a country Fair Foods and others vs. The Minister for Local Government, Environment Affairs and Development Planning and other*¹ for the proposition that a body hearing an appeal has no power to order a retrial. That in so doing, it went beyond the scope of the appeal or its powers.

[11] It was a further argument advanced by the Applicants that nothing in their grounds of appeal filed before the Council cried for a re-trial. Hence ordering a retrial was not established in the grounds of appeal. The grounds of appeal Advocate Ketsi was referring to during his submissions appear at page 69-71 of the record.

RESPONDENTS' CASE:

[12] The Respondents relied on the Students Handbook Clause 12.7 for the proposition that the council had acted within their powers when they ordered that the matter should go for a re-trial. Clause 12.7 reads as follows;

- It is provided that the student has the right to appeal to the council through the secretary of the council if he is not satisfied with the decision of the Students Disciplinary Committee; the student shall be provided with copies of the summaries of the evidence and the decision against him and he may appeal to the council. Notice of such appeal shall be made in

¹ (3509/2014) [2022]ZASCA 62

writing to the secretary of the council within fourteen days (14). The decision of the council shall be final.

[13] The Respondents relied on the *Astra* case above and provided what the court had said in that matter:

“...Although in terms of this latter subsection the appeal authority is empowered to ‘confirm, vary or revoke the decision’ it exercises that power in the context of hearing ‘the appeal’ viz the appeal and the reasons lodged by the aggrieved person... That defines the ambit of the appeal, the sole issue being whether that aggrieved person should succeed for the reasons it has advanced. It is not for the appeal authority to reconsider all the tenders that had been submitted. If that had been the legislature’s intention, it would have said so. It did not, and for obvious reasons. There is a need in matters of this nature for decisions to be made without unreasonable delay...*The appeal board may - (a) confirm, set aside or vary the decision under appeal, and order that any such decision of the appeal board be given effect to; or (b) remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the appeal board may determine,*”

(my emphasis).

[14] Advocate Limema also relied on the case of *Ajay Kumar Ghoshal V The State of Bihar*² for the proposition that the appellate body can order a retrial in circumstances that exist that warrant such. He argued that in the circumstances of this case, the Council reasoned that there was a need for a retrial.

² 2017 SCC Online. Decided on the 31.01.2017

ANALYSIS OF THE CASE:

[15] It was the decision of this court as prayed for by the Applicants in their Notice of Motion, that the record of the proceedings of the hearing by the 1st Respondent should be dispatched. The 1st Respondent complied with this order.

[16] I have had occasion to glean at the record so dispatched. The record is informative regarding what occurred in the hearing and how each ground of appeal placed before the Council (1st Respondent) was addressed. The parties before court agreed that the dispatched record is a true reflection of the proceedings of the 1st Respondent.

[17] A microscopic view of the record reveals that the council summarized the grounds of appeal as placed before it by the Applicants. These appear in page 2 of the record and appears under the heading "*Grounds Dispositive of the Appeals.*" I inquired from Adv. Ketsi during the hearing whether this summary of the grounds articulated by the 1st Respondent are not a true reflection of the Applicants' grounds for appeal as appears in pages 69 and 71 of the record. He confirmed that indeed they are although they were rephrased. This being the case Adv. Ketsi confirmed that of all the grounds listed in the record of the 1st Respondent (the Council), it was ground number 2 that was the bone of contention. The said ground is recorded as follows:

"2. They challenge the findings of guilt by the disciplinary committee based on the evidence presented.

It should be noted that "they" here refers to the student who had lodged the appeal with the 1st Respondent.

[18] In the words of the Applicants, this ground of appeal was couched as follows;

“The disciplinary panel has made the mistake of finding me guilty as charged and rejecting my evidence based on records(sic) in that on the set(sic) date I was not part of the students who did cause the strike and all boycotting of classes as I had indicated that on the set (sic) date I was ill due to running(sic) stomach.”³

[19] In essence the students were challenging that the evidence did not support the outcome of the disciplinary committee. Hence their appeal to the Council.

[20] The reason why this ground forms the bone of contention and is the crux of this case is that it is the only ground of appeal wherein the 1st Respondent (the Council) ordered a retrial to be undertaken.

[21] The decision of the 1st Respondent on this issue appears on page 4 of the dispatched record. After deliberations on the issue relating to the evidence analyzed by the student disciplinary committee, the 1st Respondent made the following decision:

“To balance the conflicting interests therefore, which are to ensure that the management enforces discipline and that only the guilty are punished, the only logical and reasonable recommendation to make in the circumstances is to order a retrial.”

³ Page ..of the records.

Thus, the question is, does the 1st Respondent's decision to order a retrial stand to be reviewed.

THE LAW:

[22] There are three possible grounds for bringing judicial review proceedings: 1) Illegality 2) irrationality and 3) procedural impropriety.⁴ However, these three grounds are not watertight compartments; accordingly, more than one ground might overlap in challenging certain facts.

[23] The duty of this court therefore is to establish whether, the grounds of review raised by the applicants against the decision of the 2nd Respondent can be reviewed on these grounds. In ***Ntone v Chairman - Lesotho Prison Services Disciplinary Committee - Quthing and Others***⁵ Monaphathi J quoting Civil Practice of the Supreme Court of South Africa, Van Winsen al (4th edition) at pages 946-948 at G. "The Modern Law Reformulated" put it as thus;

A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been "failure of justice". A mere possibility of prejudice not of a serious nature will not justify interference by a superior court.

[24] In doing so, this court aligns itself with the sentiments expressed in the case of ***Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another***⁶, where the concept of judicial review is aptly captured. The Court held that in order to establish review

⁴ Mosoeunyane v Likotsi (CIV/APN/89/2014) [2016] LSHC 2 (18 August 2016);

⁵ (CIV/APN/306/99) [2001] LSCA 133 (10 December 2001);

⁶ 1988 (3) SA 132 at 152

grounds it must be shown that the presiding officer in the Court **a quo** failed to apply his or her mind to the relevant issues in accordance with the *‘behests of the statute and the tenets of natural justice.’* The Court pointed out that such failure may be shown by proof, *inter alia*, that the decision was arrived at either arbitrarily, capriciously, *mala fide*, as a result of unwarranted adherence to a fixed principle, in order to further an ulterior or improper purpose, that the presiding officer misconceived the nature of the discretion conferred upon him or her and took into account irrelevant considerations or ignored relevant ones. The Applicant must prove that the decision of the officer presiding in the lower Court was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter as aforestated. As far as we are concerned the learned Arbitrator applied his mind to the condonation application that was before him.

[25] From the reading of the Applicants’ papers and the submissions made on their behalf by Advocate Ketsi, it appears that the grounds of review that the Applicants are relying on is (i) the irrationality of the decision of the 1st Respondent and (ii) procedural impropriety.

[26] The allegation is garnered from paragraph 9 of the founding affidavit where the Applicants state;

“...we are of the view that 1st Respondent arrived at a decision no reasonable decision-maker could reach on all material placed on him.” ⁷

[27] The duty of the reviewing court, that is my duty in the present matter, was aptly captured in the case of **R v**

⁷ Page 17 of the record paragraph 9 of the Founding affidavit.

Somerset County Council, ex parte Fewings & others⁸ where the court succinctly articulated the duty of the sitting court as follows:

“Although judicial review is an area of the law which is increasingly, and rightly, exposed to a great deal of media publicity, one of its most important characteristics is not, I think, generally very clearly understood. It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, "Is this decision right or wrong?" Far less does the judge ask himself whether he would himself have arrived at the decision in question. It is, however, of great importance that this should be understood, especially where the subject matter of the case excites fierce controversy, the clash of wholly irreconcilable but deeply held views, and acrimonious, but principled, debate. In such a case, it is essential that those who espouse either side of the argument should understand beyond any possibility of doubt that the task of the court, and the judgment at which it arrives, have nothing to do with the question, "Which view is the better one?" Otherwise, justice would not be seen to be done: those who support the losing party might believe that the judge has decided the case as he has because he agrees with their opponents. That would be very damaging to the imperative of public confidence in an impartial court. The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did.”

⁸ [1995] 1 All ER 513 (QB) at 515d-g:

[28] The court in *Dart v Chairperson of the DAC of Stellenbosch University and others*⁹ confirms this view of the court and said;

This accords with the following extract from *Wade and Forsyth: Administrative Law*, also quoted in *Bo-Kaap Civic*:

“The system of judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is "right or wrong?" On review the question is "lawful or unlawful?”

[29] Thus, my concern, and indeed my duty is not to substitute the decision of the 1st Respondent with that of this court, but rather, to interrogate its reasonableness and its legality. In so doing I once again take a tour of the report of the 1st Respondent (the dispatched record). The inquiry thus becomes; did they act according to the powers that created them?

[30] As has been said, the 1st Respondent is a creature created by clause 12.7 of the Student Handbook 2014/2015. In terms of this clause, it is an appeal body whose decision shall be final and communicated to an appealing student. The clause does not prescribe or restrict its powers. Thus, like any appellate it can dismiss the appeal, confirm it, or remit the case before it.¹⁰

⁹ (6501/2020) [2021] ZAWCHC 8; [2021] 2 All SA 141 (WCC) (1 February 2021)

¹⁰ Astral Operations (above)

[31] According to the record the 1st Respondent complied with the clause that created it. On good cause shown, and stating in clear terms the reasons of their decision, the 1st Respondent felt that in order for justice to be met, the matter should be retried. I therefore find no merit in the allegation that they acted outside the scope of their mandate.

[32] The second leg of the inquiry is, and I quote once again the clear words of the court in ***Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another***¹¹

“Was the decision arrived at either arbitrarily, capriciously, ***mala fide***, as a result of unwarranted adherence to a fixed principle, in order to further an ulterior or improper purpose, that the presiding officer misconceived the nature of the discretion conferred upon him or her and took into account irrelevant considerations or ignored relevant ones.”

[33] In explaining why, they have reached the decision to send the matter for retrial the 1st Respondent state that they have ordered so as to “balance conflicting interests...” it is my opinion that this does not indicate an arbitrary, capricious, or unwarranted decision.

[34] I have measured the reasonableness of the decision of the 1st Respondent on the simple test laid down by Lord Greene M.R. in the case of ***Associated Provincial***

¹¹ Above

Picture Houses Ltd. v Wednesbury Corporation¹²

where he put a three-tier test as follows;

- The authorities have taken account of all the necessary things which it should have taken.
- The authorities did not take into account the things which it should not have taken.
- The decision is not unreasonable (something which no reasonable authority will take).

[35] The reading of the dispatched record does indeed reveal that the 1st Respondent took all the necessary things they should have taken. This is revealed in how they broke down each and every ground of appeal and address it satisfactorily, making a separate decision for each. In the circumstances they acted reasonable and in the interests of justice.

CONCLUSION:

[36] It is the conclusion of this court that the Applicants have not made out a case for the granting of the prayers sought. As such, the decision of the 1st Respondent stands and the students should go for retrial. The court confirms the *rule nisi* and the students should be allowed to participate in their academic activities pending the retrial. In order that the students should not be prejudiced by protracted hearings, the retrial should take place within a reasonable time.

¹² 1 KB 223,, EWCA Civ 1

[37] The court makes the following order:

1. That the retrial of the case of the Applicants ordered by the 1st Respondent proceeds and it be scheduled within 30 days of this judgement.
2. That the Applicants be allowed to participate in their academic activities pending the outcome of the retrial.
3. There is no order as to costs.

M. G. HLAELE
JUDGE

For Applicants : Adv. L. Ketsi
For Respondents : Adv. N. Limema