

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/0090/24**

In the matter between

**LESOTHO COLLEGE OF EDUCATION STUDENT  
REPRESENTATIVE COUNCIL**

**1<sup>ST</sup> APPLICANT**

**LESOTHO COLLEGE OF EDUCATION STUDENT  
UNION**

**2<sup>ND</sup> APPLICANT**

**AND**

**THE REGISTRAR LESOTHO COLLEGE OF EDUCATION**

**1<sup>ST</sup> RESPONDENT**

**LESOTHO COLLEGE OF EDUCATION**

**2<sup>ND</sup> RESPONDENT**

**NATIONAL MANPOWER DEVELOPMENT  
SECRETARIAT (NMDS)**

**3<sup>RD</sup> RESPONDENT**

**MINISTRY OF FINANCE AND DEVELOPMENT PLANNING**

**4<sup>TH</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY–MINISTRY OF EDUCATION**

**5<sup>TH</sup> RESPONDENT**

**MINISTRY OF EDUCATION AND PLANNING**

**6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL**

**7<sup>TH</sup> RESPONDENT**

**Neutral Citation:** Lesotho College of Education Students Representative and Another v The Registrar Lesotho College of Education and 6 Others [2024] LSHC .... Civ (12<sup>th</sup> June 2024)

## **JUDGMENT**

**CORAM** : **BANYANE J**  
**HEARD** : **05<sup>TH</sup> JUNE 2024**  
**DELIVERED** : **12<sup>TH</sup> JUNE 2024**

### **Summary**

Contract-interpretation of -loan bursary agreements of students enrolled with Lesotho College of Education-government undertaking to pay tuition and academic fees according to school prospectus-paying part of the revised fee structure-refusal based on allegation that the college did not consult the government before increment in fees-whether the government has the duty to pay the outstanding fees-held that it does and thus part payment unjustified-application partially succeeds.

## **ANNOTATIONS**

### **Legislation**

1. Higher Education Act 1 of 2004
2. Lesotho College of Education Act 2 of 1998
3. Finance Act 1973 (as amended by Act 33 of 1975)
4. National Manpower Development Council Act 8 of 1978
5. Loan Bursary Fund Regulations 20 of 1978

## **Cited cases**

### **Lesotho**

1. Ramohalali v Commissioner of Lesotho Correctional Service CC 2 OF 2016
2. Tsela v Principal Secretary Ministry of Justice CIV/T/53/2020
3. Leshapha v Leshapha CIV/APN/434/2020
4. Mohau and others v NULIS and others C of A(CIV) 53/2012

### **South Africa**

1. National Treasury and Others v Urban Tolling Alliance and others (Road Freight Association 2012(11) BCLR 1148(CC)
2. Electronic Media Network Ltd and others v e.tv (Pty) Ltd [2017] ZACC 17
3. Maledu v Itereleng Bakgatla Mineral Resources [2018] ZACC 4
4. Bengwenyama Minerals (Pty)Ltd v Genorah Resources (Pty)Ltd 2011 (4) SA 113(CC)
5. Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA593(SCA)
6. Jones v Anglo- African shipping Co (1936) 1972(2) SA 827(AD)
7. Lipschitz v Wattrus NO 1980(1) SA 662
8. kaputnaza v Executive Committee of the Administration for the Heroes and Others 1984(4) SA 288
9. Setlogelo v Setlogelo 1914 AD 221
10. Sassoon properties and acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974(1)SA 641(A)
11. Coopers v Lybrand and others v Bryant 1995(3) SA 761(A)
12. Privest Employee Solutions (pty) Ltd v Vital Distribution Solutions(pty)Ltd 2005(5) SA 276(SCA).

## **JUDGMENT**

**BANYANE J**

## **Introduction**

[1] The dispute before Court is between the Student Union of Lesotho College of Education (hereafter college), the College and the Government of Lesotho. It pertains to partial payment of tuition and other academic fees by government-sponsored students for the academic year 2023/2024.

## **Factual background**

[2] On the date appointed for hearing of the matter, I frowned upon the state of all parties' pleadings. They were materially lacking and non-compliant with the rules of this Court. Considering the urgency and importance of the matter, I invoked Rule 8(14) of the High Court Rules, 1980 by directing the parties to file all documents relevant to the determination of this dispute. These documents were extracted from the official records of the relevant stakeholders, so they are undisputed. The pertinent facts precipitating this matter are therefore straightforward and largely common cause. They are as follows.

[3] The affected students have enrolled for various courses the college offers, whose tuition fees vary according to individual programs. Besides tuition fees, other fees payable to the College include application Fees, acceptance Fees, Registration Fees, Library Fees, Administration Fees, Boarding Fees, etc.

[4] On 13 April 2022, the College governing Council held a meeting. In this meeting, it was resolved that tuition fees should be increased by 5 %. The new fee structure was to be implemented at the commencement of the academic year 2023/2024. On 15 November 2022, the College Rector addressed correspondence to the Director of the National Manpower Development Secretariat (NMDS), a body responsible for administering the Government bursary scheme. The letter informed the Director about the increase and that it would be implemented at the beginning of the next academic year – namely August 2023 to July 2024. In the letter, the Director of NMDS stated that the increase is necessitated by the dire financial difficulty the college has faced over the years.

[5] On 03 January 2023, a meeting was held at NMDS, (apparently at the request of NMDS). The NMDS Deputy Director, NMDS Training and Development Officer, NMDS Finance Officer, LCE Rector, Registrar, and Bursar attended the meeting. In this meeting, the Director indicated that the Government, through the Minister of Finance, had noted some challenges of an oversized Government budget. It is recorded in the minutes that:

“Students loan Bursary grants that provide bursaries for students to tertiary institutions has been identified as one of the key drivers of oversized Government budget and considered to be streamlined by cutting down sponsored students quotas to institutions and not to accommodate any new programs and increases to the budget line.”

[6] In this meeting, the Rector justified the fee increase by stating that it is strenuous for the college to meet its operational costs due to fewer government subsidies and low fees.

[7] The NMDS resolved and requested the college to prepare a written request with justification to be submitted to the Minister of Finance for consideration. The NMDS highlighted that in making its request, the college must be mindful of the financial challenges faced by the Government.

[8] On 10 January 2023, the Rector wrote back. He expressed his gratitude for the invitation to a meeting (presumably the meeting of 03 January 2023). In relevant parts, the letter reads:

“However, allow me to address your request for the college to justify its increase of the tuition fees and the rationale behind it.

I would like to point this that we have been very modest and prudent in considering the increase taking cognize that the government is in financial crisis.

As a college we do appreciate and understand very well the Hon. Minister's vision and what she is trying to do considering the financial challenges the government is confronted with at the moment. We therefore humbly request the Hon. Minister of Finance and Development Planning to consider this submission for the following reasons:

The college has not increased the fees since 2018 despite the consistent increase in all the operational costs every year due to inflation caused by the raise of fuel process. The Government Subvention has also been decreasing consistently every year as such there is no funding to budge the deficit gap to allow the college to function optimally and meet its immediate operational obligation. Thus, this has a direct bearing on teaching and learning which at the will impact on the quality of our education system in the country.

[9] On 16 June 2023, the Principal Secretary Ministry of Finance addressed correspondence to the Rector of the college.

The letter reads as follows:

**RE: CONDUCT OF GOVERNMENT OF LESOTHO SPONSORED LOCAL INSTITUTIONS OF TERTIARY EDUCATION**

It has come to the attention of the Government of Lesotho that some local institutions sponsored by the Government are making unilateral decisions on matters that adversely affect students and funding towards those institutions. Some of these institutions just impose fee increases and also change and extend academic years without consultation, discussion, and agreement with the Government.

It is against this background that the Government requests all sponsored institutions to, at all costs, cease making unilateral decisions on matters relating to funding from the Government. Institutions must be aware that arbitrary fee increases and impulsive extensions of the academic year create unplanned costs on the Government and put students at risk and in limbo.

Any request for fees increases must be made well on time before budget preparation and be discussed and agreed with the Government through the Ministries of Education and of Finance and Development Planning to ensure smooth implementation. Furthermore, all institutions are hereby requested to prepare and submit academic calendars to the Ministry of Education for Endorsement and then be submitted thereafter to the National Manpower Secretariat (NMDS) well before the beginning of the academic years and be adhered to throughout the academic year.

I wish to indicate that any institution that makes unilateral decisions on the matters discussed above will bear all the costs and no allowances will be paid to students beyond the closure of the academic year as stipulated in the Academic Calendars.

Your usual cooperation, compliance and support are highly appreciated.

Yours Sincerely

**NTHOATENG LEBONA**  
**PRINCIPAL SECRETARY**

**CC: PRINCIPAL SECRETARY**  
**EDUCATION AND TRAINING – HIGHER EDUCATION**

[10] On 21 June 2023, the Director NMDS wrote to the Rector and said the following:

**RE: PROPOSAL FOR INCREASE IN FEES FROM JULY 2023 – JUNE 2028**



Reference is made to your letter dated 10<sup>th</sup> January 2023 on the above-captioned subject matter and the meeting between the National Manpower Development Secretariat (NMDS) and Lesotho College of Education (LCE) management and the meeting of the Honourable Ministers of Education and Training and of Finance and Development Planning with institutions on the 15<sup>th</sup> of February 2023, in which the matter together with quotas were discussed. The NMDS acknowledges your proposal for fee increase in the financial year 2023-2024 and your patience in awaiting the Government of Lesotho's decision on the matter as was requested.

This letter serves as a conveyance of the Government's decision on the matter as was awaited. You are therefore, informed that the Government, in consideration of the need for the institution to cover financial costs and available government financial resources to be shared to cover various public needs, has approved providing LCE with maintaining of new sponsored students' quota at 800 with tuition fees increase at a maximum of 2.5% only. The decision is effective from the academic year beginning July/August 2023. LCE is further requested to submit the 2023/2024 almanac of events/calendar as soon as possible in line with the Principal Secretary Finance and Development Planning letter of 16<sup>th</sup> June 2023.

I hope you find this in order and your usual cooperation is highly appreciated.

Kind regards,

**F. RAKEKETSI**

**DIRECTOR – NMDS**

Cc: PS – Ministry of Education and Training

PS - Ministry of Finance and Development Planning

[11] On 31 August 2023 the Director, NMDS addressed a memorandum to the relevant Departments at the NMDS. It reads:

RE: Authority for contract endorsement for Lesotho College of Education students for the academic year 2023/2024 August intake.

Above captioned subject matter bears reference.

Kindly refer to the following fee structure to be endorsed in the contracts for students studying at Lesotho College of Education for the academic year 2023/2024.

DEP	11 275.00
DES Arts and Soc. Sci	11 275.00
DES Tech	13 785.25
DES applied Science	13 786.25
DES Pure Science	13 876.25

[12] These applied to both new intakes and returning or continuing students. The table below sketches out (in part) the Fee Structure (old and new) and the amounts paid by NMDS.

	Old	New	Increase	NMDS paid
Diploma in Education Primary	11 000,00	16 000.00	5 000.00	11 275.00

Diploma In Technology	13 450.00	19 000.00	5 550.00	13 786.00
Diploma In Applied Sciences	13 450.00	18 000.00	4 550.00	13 786.25
Diploma In pure Sciences	11 000.00	16 000.00	4 500.00	13 786.25

[13] As shown above, the college and the Government converged over the increased fee structure from November 2022. Regrettably, when the academic year 2023/2024 commenced in August 2023, there still was no consensus on the percentage of the increase. The college went ahead to implement the new structure which NMDS partially honoured as shown above.

[14] Due to the deadlock regarding payment of the outstanding amount, the College through its Registrar issued a memo on 8 March 2024 informing the student community about the deficient payment by NMDS and that the College and the government reached a deadlock over the matter. The college advised the funded scholars to settle the outstanding amounts. After the communication, the college, and the Student Representative Council (SRC) convened a meeting. In this meeting, the SRC aired the views of students affected by this situation, their financial challenges, and their inability to raise the outstanding fees. Their grievance fell on deaf ears. This triggered a demonstration at the college campus on 18 March 2024 to show their dissatisfaction with the college's decision. The demonstration resulted in the expulsion of the students from the campus. The SRC thereafter engaged the PS Ministry of Education, and Ministry of Finance for intervention, and college

management. On 04 April 2024, a meeting was held with management. A consensus was reached to return to normalcy. On this day the College Registrar issued a memo reminding the students of their obligations under the college Regulations to settle their fees. The memo stipulated certain preconditions for the students' entry into campus. The students were required to sign a financial undertaking to settle the outstanding fees.

### **Relief sought**

[15] When the parties reached an impasse, the college barred students from entry into the college until fees were fully settled.

Dissatisfied with the decision, the SRC approached this Court seeking reliefs couched as follows:

1. Dispensing with the normal rules relating to modes of service and process on account of urgency hereof.
2. That a Rule Nisi be issued and made returnable on a date and time to be determined by this Honourable Court, calling upon the Respondents to show cause why (if any) the following shall not be made final:
  - a) It is declared that the Government of Lesotho through 3<sup>rd</sup> Respondent and the Lesotho College of Education have an agreement, wherein the government is obliged to pay all NMDS-sponsored students' academic fees.

- b) The government of Lesotho through 3<sup>rd</sup> Respondent and Lesotho College of Education are ordered to negotiate the fees impasse within reasonable time and during negotiation the Lesotho College of Education shall allow students to continue with their studies.
- c) The conduct of Lesotho College of Education of requiring NMDS-sponsored students to sign new and distinct contracts from the arrangement made with the government of Lesotho is declared unlawful.
- d) The 3<sup>rd</sup> Respondent is ordered to pay all the academic tuition fees it undertook to pay for individually sponsored students.
- e) It is declared that Lesotho College of Education is estopped from demanding additional fees from NMDS-sponsored students but such fees are recoverable from the government of Lesotho.
- f) The Lesotho College of Education decision that students sign contracts as prerequisite to returning into campus and lecture halls be stayed pending finalization of this matter.
- g) Lesotho College of Education is ordered and directed to allow all NMDS-sponsored students into campus and lecture halls pending determination hereof
- h) Further and/or alternative relief.

[16] On 08 April 2024, my sister Ralebese J granted dispensation and issued interim reliefs by allowing the students to continue their studies pending the finalization of the matter. After hearing argument in the matter, I issued an order confirming the rule in terms of prayers (d) and (e) of the notice of motion. These reasons for this order follow.

### **The answering affidavits**

[17] The matter is opposed by both the college and the NMDS. The Government contends that the college unilaterally increased the fees despite the notification embodied in the letter dated 21<sup>st</sup> June 2023 that the government through the responsible Ministry of Finance and Development Planning, had provided that it can only afford an increase of 2.5% and not 5% as proposed.

[18] In paragraph 4.2 of the opposing affidavit, the Director, NMDS, asserts that the College Council does not have the right to unilaterally increase tuition fees because the college is a government institution. She asserts further that:

“Therefore Council make a proposal which the Government through the Ministries of Education and Training and of Finance and Development Planning looks into and makes a determination on the proposal. This is as reflected on the letter of the Principal Secretary Ministry of Finance and Development Planning dated 16 June 2023.”

[19] The government further asserts that it can afford only the amounts endorsed in the individual bursary contracts, reflecting 2.5% of the increase. According to it, by paying these amounts, it discharged its obligation.

[20] The College asserts that it is entitled to implement the new free structure because all stakeholders were consulted regarding the matter. The college denies any liability to pay the outstanding fees and asserts that the students are bound by the financial regulations of the college to settle the outstanding fees.

### **The applicants' argument**

[21] Advocate Thienyane for applicants argued firstly that a tacit contract exists between the college and NMDS. According to him, the college submitted a list of students to the NMDS. This conduct constituted an offer by the college to NMDS to sponsor eligible applicants. He says the NMDS's acceptance of the list of students constitutes an acceptance of the offer made by the college. He cited several authorities addressing the requirements of tacit contracts.

[22] According to his understanding of the respondents' affidavits, the college and the government have conceded that they must consult with each other and deliberate on matters relating to payment of tuition fees. He therefore urged the Court to issue an order directing the duo to negotiate the impasse within a reasonable time.

[23] The second leg of his argument relates to mandamus relief. He cited the case of **Tsela v Principal Secretary Ministry of Justice**<sup>1</sup> to submit that the remedy of mandamus is appropriate where the administrator is compelled to perform his statutory duty. He submitted that the NMDS is bound by the individual loan bursary contracts signed by the affected students to pay all tuition and academic fees.

[24] Another dimension of his argument relates to the declaratory orders sought. In this connection he cited the case of **Leshapha v Leshapha**<sup>2</sup> and section 2 of the High Court Act of 1978 (as amended by Act No.34 of 1984). He submitted that where a declaratory relief is sought, the proper approach is to establish whether an applicant has any interest in existing, future, and contingent rights; secondly; if the court is satisfied that these factors exist it must then determine whether or not it is prepared to grant a declaratory relief.

### **The College's submission**

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<sup>1</sup> CIV/T/53/2020

<sup>2</sup> CIV/APN/434/20) (2021) LSHC 70 (17 June 2021



[25] Ms. Mokobocho for the college argued that no contract exists between the college and the NMDS. For this reason, the college has no obligation to cover the outstanding fees.

[26] The College further argued that when the decision to increase the fees was made, all the stakeholders were consulted. The argument was regrettably not comprehensively developed, nor did I find any assistance from the college's answering affidavit in this regard.

### **The government's argument**

[27] Mr. Ncheke for the government argued that in prayer 2 (d) the applicants are relying on Principles of State Policy under sections 26 and 30 of the Constitution. These principles are not enforceable by any court. For this submission, he relied on **Ramohalali v Commissioner of Lesotho Correctional Service**<sup>3</sup> where the court said:

Regarding reliance on Principles of State Policy under sections 26 and 30 of the Constitution as the basis for invoking this court's Jurisdiction, it suffices to say the reliance thereon is misplaced. Section 25 unequivocally states that "these principles shall not be

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<sup>3</sup> CC 2 of 2016 [2017] LSHC (12 September 2017)

enforceable by any court.” This says to me that no court order may issue to enforce them as they are merely guides to the public institutions and agencies in the performance of their duties.”

[28] Regarding the college’s entitlement to increase the tuition fees, he argued that the college has no right to increase fees unilaterally without consulting its Proprietor, the Government of Lesotho. According to him, the proper procedure is to first submit a proposal to the Ministry of Education and Training and the Ministry of Finance and Development Planning. These two would then consider and make a decision on the proposal. This is necessitated by the fact that a great number of college students are government-sponsored. According to him, the college was not entitled to implement the 5% increase despite the government’s partial approval of the increase rate.

[29] Relying also on the case of **Mohau and others v NULIS and others**,<sup>4</sup> he argued that the present matter is concerned with the question of whether the necessary procedural steps were followed before increasing the fees. He argued that the college’s failure to consult and obtain the consent of the government before implementing the increase exonerates the government from paying the outstanding fees.

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<sup>4</sup> C of A (CIV) 23 of 2012

### **Issues for determination**

[30] A triad of issues arises for determination in this matter. The first is whether the College unilaterally increased the fees. The second is whether the NMDS's partial payment of the fees is justified. The third is whether the outstanding fees are recoverable from the individual students.

### **Discussion**

[31] During argument, the applicants' counsel cited numerous cases dealing with implied or tacit contracts to support the relief sought in prayer 2 in terms of which the applicants ask this court to declare that there was an implied agreement between the college and NMDS. In my view, these cases are of no assistance in this matter. It is therefore unnecessary to review any of them. I say this because first; the facts supporting this prayer are too vague and generalized. Second, the success or failure of this application depends, in my view, upon the correct interpretation of several pieces of Legislation establishing the Lesotho College of Education, The National Manpower Development Secretariat as well as the obligations of the Government under the loan bursary agreement signed by the learners concerned.

### **Statutory Framework**

[32] The Lesotho College of Education(LCE) is established under section 3 of the **Lesotho College of Education Act 2 of 1998** as a body corporate with perpetual succession and a common seal. Its establishment is in accordance with section 18(2) of the **Higher Education Act 1 of 2004**. LCE provides education for members of the teaching profession and to such other persons as may be determined by the Council.

[33] Section 7 of this Act establishes the Governing Council of the College. It consists of the following ex officio members;

- (i) The Principal Secretary of the Ministry responsible for education
- (ii) A representative of the Ministry of Finance
- (iii) A representative of the Ministry responsible for economic planning
- (iv) The Chief Education Officer (Tertiary)
- (v) The Director of the College
- (vi)....
- (vii)....
- (viii) ....

(ix) The President of the Students' Representative Council:

[34] In terms of section 10 (1) of this Act, the Council is the governing body of the college. The powers of the Council are enumerated in section 10(3). Chief among its powers is to determine college fees. It must do so after consultation with the Academic Board. The Academic Board, is, in turn, established under section 17 of the Act.

[35] Loan Bursaries on the other hand are governed by the **Finance Act 1973** (as amended by Act 33 of 1975). In terms of Section 16 (3) of this Act, the Minister of Finance is empowered, by Regulation, to establish a special Fund. This section provides that such Fund shall be administered in the manner provided by any law, or trust instrument creating it.

[36] The Minister of Finance, through Regulation 3 of the **Loan Bursary Fund Regulations** 20 of 1978 established a special Fund called Loan Bursary Fund. In terms of regulation 3(2), the Fund is administered by the NMDS director.

[37] In terms of Regulation 4, the purpose of the Fund is to provide a revolving Fund from which assistance can be given to Basotho to further their education on a repayment or partial repayment basis. Under Regulation 13, the Accountant General must maintain a separate account entitled loan bursary Fund in which he shall record the receipts and disbursements.

[38] In terms of Regulation 7 (1), bursaries are awarded by the National Manpower Development Council. This council was established in section 3 of the **National Manpower Development Council (NMDC) Act** 8 of 1978. If the bursaries are awarded directly from the Fund, they shall not in any one year exceed the amount shown as available in the approved estimates of the Fund for that year. Regulation 12 provides that the Council shall cause estimates to be prepared each year and submitted to the Minister for consideration and approval.

[39] Key among the functions of the Council is the selection of candidates qualifying for the award of bursaries through the selection committee. This is provided for in section 5 (d) of the NMDC Act.

[40] Bursary is defined in the NMDC Act to mean;

“payment by Government of University, College, Post-Secondary institution, or hostel fees or allowances to, or, on behalf of a student undergoing an educational course and any other disbursements and expenditure for or on behalf of a student in connection with that course, and includes donor funded bursaries channeled through Government;”

[41] Section 10 of the NMDC Act establishes the NMDS. It provides that:

“10 (1) The Minister shall have the National Manpower Development Secretariat staffed with public officers the official head which shall be the Director, who shall be responsible for the efficient administration of this Act.

(2) Without prejudice to the generality of the power specified in subsection (1), the secretariat shall -

(a) implement all the decisions of the Minister relating to manpower training and development

(b) draw up short and long term plans relating to manpower training and development for the consideration of Council

(c) administer training and bursary matters;

d) negotiate through other appropriate Government Ministries and department, bursaries and aid for training

### **Did the college unilaterally increase the fees?**

[42] With these legal provisions in mind, I turn to consider the first issue of whether the college unilaterally increased the fees. The government's complaint is that the College council is not entitled to increase the fees without consulting its proprietor. Before considering the validity of this argument, it is perhaps useful to highlight some guiding principles on the role of consultation.

[43] The rationale behind the consultative process was considered by Mogoeng CJ (as he then was) in the case of **Electronic Media Network Ltd and others v e.tv (Pty) Ltd**.<sup>5</sup> Although the prominent role of consultation was considered in the context of executive policy formulation, I find the case useful for our purposes. The leaned judge said that:

...Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy development, it must mean that a genuine effort is being made to obtain views of industry or sector role-players and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable the policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration. People or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible. The standpoints of interested parties, who want to have their views taken into account, must be allowed to reach the policy maker...”

[44] In **Maledu v Itereleng Bakgatla Mineral Resources**,<sup>6</sup> the Constitutional Court of South Africa further emphasized the purpose and importance of consultation. The Court, referring to the **Bengwenyama Minerals**,<sup>7</sup> highlighted that

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<sup>5</sup> [2017] ZACC 17, at para 37

<sup>6</sup> 2018 ZACC4(25 October 2018) para 78-80

<sup>7</sup> *Bengwenyama minerals (Pty)Ltd v Genorah Resources (Pty)Ltd* 2011 (4)SA 113(CC) para 63



consultation is necessary when the rights and interests of people are likely to be impacted by the proposed law, policy or administrative action.

[45] In the present matter, the first port of call in answering the government's complaint on consultation is the LCE Act read with the Higher Education Act, 2004.

[46] In terms of section 22(2) of the Higher Education Act, every higher Education Public institution shall establish a Council in its structures. This Council according to section 23 is the supreme governing body of the Higher Education public institution. Under the LCE Act, College Council as the governing body of the College is vested with a wide range of powers including a) the determination of college fees, b) to govern, manage and regulate finances, accounts, investment and property, business, and affairs of the college, c) to approve the constitution of the students' union, etc. Section 10(3) of the LCE Act shows that Council must consult the Academic Board regarding determination of fees.

[47] A close examination of the composition of the Governing Council of the College and its powers shows that the Ministry of Finance, which controls the government budget, and the Ministry of Education are major role players in the governance of

the college. A representative from the Ministry of Finance and Development Planning and the Principal Secretary for the Ministry of Education are ex officio member of the College Council, and thus part of the decision- making.

[48] To my mind, these two offices are represented in the Board because, firstly, the College as a Higher Education public institution receives some funds from the Government allocated by the Minister of Education. This is in terms of section 33(2) of Higher Education Act 2004. Secondly, the decision to increase fees is also likely to affect the government budget on the provision of bursaries. The legislature, by constituting the College Council as stated in section 7 of the LCE Act, intended to ensure polycentric decision-making in matters affecting the management and administration of the College.

[49] The Constitutional Court of South Africa in **National Treasury and Others v Urban Tolling Alliance and others (Road Freight Association)**<sup>8</sup> aptly stated the role of the executive in the control of the public purse as follows:

“[67]... the duty to determine how public resources are to be drawn upon and reordered lies in the heartland of the Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and prerogative to formulate and

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<sup>8</sup> 2012(11) BCLR 1148(CC)

implement policy on how to finance public projects resides in the executive domain of the National Executive subject to budgetary appropriations by parliament.”

[50] Reverting to the facts of the present matter, the evidence reveals that the decision to increase the fees was made on 13 April 2022. The minutes of this meeting show that there was no representative from the Ministry of Finance. On the government’s side, only the Chief Education Officer(tertiary), from the Ministry of Education attended the meeting. There is no explanation in the affidavits why no representative from the Ministry of Finance and Development Planning attended the meeting to present the necessary budgetary issues allegedly facing the government before the council for its consideration. Were they not invited to the meeting? were they not apprised of the agenda? When were they given the minutes of the meeting (if such is the practice)? or when were they notified about the decision? Was the determination made after the NMDS Council prepared and submitted the Bursary Fund estimates to the Minister of Finance? I am posing these questions to show that on the sketchy facts supplied, the government cannot place blame at the door of the college nor accuse it of non-consultation. I conclude that the decision to increase the fees was made by a body empowered by law to do so, which body the relevant Ministries are part of. I am unable to accept the government’s argument college unilaterally increased the fees.

### **The loan bursary contract(s)**

[51] I turn now to the twin issues remaining. Is NMDS justified in paying part of the fees? Is the outstanding amount recoverable from individual students?

[52] It is common cause that NMDS paid part of the tuition fees. The director, NMDS deposes that the inability to pay according to the new fee structure is because the government has no budget to support the increased tuition fees. According to the director, The Minister of Finance considered and weighed the state of the government's financial circumstances against the objective of assisting students. She states that the Ministry of Finance had started to implement budget cuts across government departments as a result of the continuing deterioration of the economy. The college was then notified on 21 June 2023 that the Ministry of Finance can only afford a 2.5% increase. It is worth noting at this very juncture that the government presented no documents before this court showing the approved estimates for the financial year 2023/2024 to the Loan bursary fund or disbursements from the fund to justify its refusal to pay.

[53] Based on the refusal to pay the outstanding tuition and other academic fees, the applicants ask for an order compelling NMDS to pay the remainder of the fees. Mandamus is a mandatory interdict against a public authority. It requires an authority

to comply with a statutory duty imposed on it or perform some act that remedies a state of affairs brought about as a result of its unlawful administrative action.<sup>9</sup>

[54] Since mandamus is a mandatory interdict, all the requirements of an interdict must be established.<sup>10</sup> These requirements are trite. The first is that the applicants can only obtain the relief claimed in prayer if they can satisfy the Court that they have a clear right to the payments sought. The second requirements an injury actually committed or reasonably apprehended.<sup>11</sup> A reasonable apprehension is described as one that a reasonable man or woman might entertain on being faced with the facts.<sup>12</sup> The third requirement is absence of similar protection by any ordinary remedy.<sup>13</sup>

[55] The reading of the **Finance Act**, the **Loan Bursary Regulations** and the **NMDC Act**, show that the loan bursary scheme affords financial support to deserving or eligible students to attain university and college qualifications. The administration of the Bursary scheme is supervised by the Director, NMDS. The administration of the bursary includes allocation of funds

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<sup>9</sup> Baxter Administrative Law, p 687

<sup>10</sup> Lipschitz v Wattrus NO 1980(1)SA 662, kaputnaza v Exececutive. Committee of the Administration for the Heroes and others 1984(4) SA 288 at 317

<sup>11</sup> Setlogelo v Setlogelo 1914 AD 221

<sup>12</sup> Free State Gold Areas Ltd Merries (Orange Free State) Gold Mining Co. Ltd and another 1961(2) SA 505(W).

<sup>13</sup> setlogelo v setlogelo(supra)

for loan bursaries to eligible students, to develop the criteria and conditions for the granting of loan bursaries to eligible students and the recovery of these loans. Students who meet the selection criteria sign a loan bursary agreement with terms and conditions.

[56] The affected students in the matter have loan bursary contract(s) with the NMDS. The contracts are executed in terms of Regulation 7 (3) of the **Loan Bursary Fund Regulations**, which reads as follows:

“Awards of bursaries shall be subject to the execution of the loan bursary agreement between the Government and the student”.

[57] To get a fuller picture of the obligations of the government under the contract, I set out the relevant clauses. The government’s obligations are enumerated in clause 3. Under this clause the government undertakes, subject to rules, regulations, and circulars issued by the Director(NMDS);

- a) To pay the subsistence allowance and traveling expenses of the borrower to and from the location of training if such training is undertaken outside Lesotho;
- b) To pay food allowances of the borrower

c) To pay residential expenses of the borrower to:

(i) The institution, as spelled out in the official prospectus of the particular institution, or

(ii) The Landlord for private accommodation, provided the following conditions have been satisfied;

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3 (d) To pay tuition and other academic fees to the specified educational institution as spelt out in the official prospectus of that particular institution.

(f) To pay for the costs of books for the use of the borrower at the rate to be determined by government.

(g) To renew this agreement at the beginning of each subsequent academic year provided the borrower has passed his/her academic work and proceeds to the next level of his/her programme.

**57.1** In terms of clause 7, the duration of this agreement is basically for one programme of study at a time.

**57.2** Clause 10 states that:

“This agreement can be modified from time to time by the Government without changing the substance of the agreement. The Government shall inform the borrowers of such modifications”

**57.3** Clause 11 reads as follows:

This agreement shall be subject to the National Manpower Development Council Act and Loan Bursary Fund Regulations as amended from time to time. In the event that any of these laws are amended so as to substantially alter(sic) this agreement, the borrower undertakes not to claim any vested rights derived from, or to rely upon any reasonable expectation arising from this agreement.

[58] Central to the resolution of the two remaining questions is the meaning of clause 3(d) of the agreement. As shown above the government undertakes *‘To pay tuition and other academic fees to the specified educational institution as spelled out in the official prospectus of that particular institution’*.

**Interpretation of the contract(s)**

[59] In **Natal Joint Municipal Pension Fund v Endumeni Municipality**<sup>14</sup> the court said;

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the

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<sup>14</sup> 2012(4)SA(SCA) para 18



language used in the light of the ordinary rules of the grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.

**[60]** In **Sassoon properties and acceptance Co (Pty) Ltd v Barclays National Bank Ltd**<sup>15</sup> the Court held that the first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties.<sup>16</sup> The words must be given its ordinary and grammatical meaning unless this results in absurdity, repugnancy, or inconsistency with the rest of the document.<sup>17</sup>

**[61]** The ordinary meaning of words appearing in the contract will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract.<sup>18</sup>

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<sup>15</sup> 1974(1) SA 641(A) at 646B

<sup>16</sup> Jones v Anglo- African shipping Co (1936) 1972(2)SA 827(AD) at 834E

<sup>17</sup> Coopers v Lybrand and others v Bryant 1995(3) SA 761(A) at 767 E-F

<sup>18</sup> Privest employee solutions(pty) Ltd v Vital Distribution Solutions(pty)Ltd 2005(5) SA 276(SCA).

[62] From the language of clause 3(d), read with clause 7, it is clear in my view that the intention of the parties is that government pays tuition and other academic fees stipulated in the college prospectus for the duration of one program of study at a time. For the purposes of this case, the prospectus means the current prospectus with revised fee structure.

[63] Based on this understanding, the NMDS is obliged under the contract to pay the tuition and other academic fees set out in the college prospectus. The NMDS's partial payment amounts to a breach of its undertaking under clause 3(d) of the loan bursary agreement(s).

[64] While this Court recognizes; **a)** the government's effort through measures such as bursaries to make higher education progressively available and accessible to Basotho children, **b)** and that the government must ensure that the provision of bursaries or student funding is sustainable for Basotho children despite challenges such as the decline in the country's economy, equally important is for the government to discharge its existing obligations under the contracts of the affected students.

[65] To my mind, if the government decided to sponsor students partially, then it should have exercised its right under clause 10 to modify the terms of the loan agreement by spelling out the percentage of fees payable by the government instead of

leaving clause 3(d) intact but paying a certain percentage of the fees. In other words, clause 3(d) should have been modified to accommodate the government's budget. In my view, the NMDS was not justified in changing the contract unilaterally. I say unilaterally because nothing in the opposing affidavit by the government suggests that the students were informed that the amounts recorded in their contracts fulfill partial fees only.

[66] Before concluding, I wish to say a word or two about the Student Union's complaint that NMDS never consulted the affected students before the decision on partial payment was made.

[67] The evidence reveals that in the meeting held between the NMDS and the College management on 03 January 2023, the student community was not part of the meeting to apprise them on the anticipated changes despite that they were at risk of being partially funded. I am not told by the government whether consultation with at least the student representative bodies or any form of communication with the students was made, either prior to or at the time of signing the contracts.

[68] I earlier highlighted authorities to the effect that consultation is necessary when the rights and interests of people are likely to be impacted by the proposed law, policy or administrative action. In the present matter, the decision undoubtedly has a negative effect on government-funded students. Their views as interested parties and recipients of the bursary were not

sought nor considered before making the decision to pay partially was made. In my view, the financial hardships confronting them, coupled with the fact that when the controversy about the fees arose, some of the affected students had already commenced their respective programs were factors worthy of consideration had they been given an opportunity to ventilate them.

### **Disposal**

[69] On the evidence, I am satisfied that the applicants have proved the requirements of an interdict through establishing that: **a)**the affected students have loan agreement(s) with the NMDS; **b)** Under the agreement they have the right to payment of tuition and other academic fees according to the college prospectus, **c)**their contracts have not been altered but the NMDS paid the fees partially, **d)** Partial payment contradicts the NMDS's obligation under the contract because the reading clause 3(d) of the loan agreement makes it clear that the NMDS must pay according to the school prospectus.

[70] In a nutshell, the applicants succeeded in proving the material aspects of their claim to support their prayer for mandatory orders in terms of prayer (d). They also succeeded in their prayer (e). I am therefore satisfied that they are entitled to the orders for payment of their fees and to continue with their studies. **Costs**

[71] Although the applicants have had partial success in the matter, they should be deprived of their costs due to the dissatisfactory state of the pleadings.

**Order**

[72] In the result, the rule granted by this Court on 08 April 2024 is confirmed so I make the following order;

- a) The 3<sup>rd</sup> Respondent (NMDS) is ordered to pay all tuition and other academic fees spelled out in the revised fee structure as prescribed in clause 3(d) of the loan bursary agreements.
- b) Pending such payment, the Lesotho College of Education is ordered to allow all NMDS-sponsored students into campus and lecture halls to continue with their studies.
- e) The Lesotho College of Education is estopped from demanding outstanding fees from NMDS-sponsored students but must recover the fees from the NMDS.
- f) Each party to bear their costs.

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**P. BANYANE  
JUDGE**

For Applicants : Advocate Thienyane

For 1<sup>st</sup> and 2<sup>nd</sup> Respondents : Advocate Mokobocho

for 3<sup>rd</sup> to 7<sup>th</sup> Respondents : Advocate Ncheke