IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Case No. 13 of 1994
Misca No. 396 of 1993

In the matter between:

STUDENT REPRESENTATIVE COUNCIL (of Molepolole College of Education) APPELLANT

AND

THE ATTORNEY GENERAL OF BOTSWANA (for and on behalf of the Principal of Molepolole College of Education and the Permanent Secretary of the Ministry of Education) RESPONDENT

Mr. O.K. Dingake for the Appellant
Mr. M. Chamme for the the Respondent

J U D G M E N T

CORAM: A.N.E. Amissah, J.P
T.A. Aguda, J.A.
W.H.R. Schreiner, J.A.
Lord Wylie, J.A.
J.H. Steyn, J.A.

AMISSAH, J.P.

The Student Representative Council of the Molepolole College of Education, hereafter referred to either as " the Appellant" or "the SRC" filed a motion against the Attorney General as the representative of the Principal of the Molepolole College of Education and the Permanent Secretary in the Ministry of Education, referred to as "the Respondent" in October 1993 seeking reliefs from the High Court for its stated grievances. Although the Notice of Motion did not specifically say so, the

application to the Court was for a declaration of the rights in respect of the itemised matters therein. These matters were:-

"1. That the deduction of the sum of P65.00 from the subsistence allowances of the students of Molepolole College of Education who did not take part in the so-called Open Day activities is unlawful and of no force and effect.

2. That the denial of a lunch meal to the students of Molepolole College of Education who did not take part in the so-called Open Day activities on the 11th of September 1993 is inhuman, degrading and unlawful.

3. That the students who were denied the meal are entitled to be compensated by payment of the value thereof.

4. That Regulation 6 (and sub-regulations thereunder) of Molepolole College of Education is unfair, unreasonable and null and void.

5. That Regulation 6 (and sub-regulations thereunder) of Molepolole College of Education Regulations is ultra vires Section 3 of the Constitution of Botswana by reason of its discriminatory effect.

6. Costs of suit.

7. Further and/or alternative relief.

The complaint of the appellant, therefore, fell into two distinct categories, namely, matters arising out of the Open Day activities of the College which took place on 11th September, 1993 (Items 1 to 3 above) and matters arising out of Regulation 6 of the College Regulations (Items 4 and 5 above).

The battle between the parties was fought on their affidavits. As these affidavits contained not only known facts but interpretations of, and inferences derived from, the facts, as well as submissions in support of the case made by each party,

I feel obliged, in order to give a full picture of what happened, to quote estensively from them.

The facts which formed the basis of the complaint were given in the founding affidavit in support of the motion which was sworn by Given Khuta, the President of the SRC. The affidavit opened with a statement of the right of the appellant to bring the motion in these terms:

> "3. The Applicant is the Student Representative Council of Molepolole College of Education (hereinafter referred to as the SRC) and is entitled to sue or to be sued in its name in terms of Section 25 of its Constitution alternatively in terms of Order 18 Rule 2 by virtue in existence independently of its membership, with perpetual existence and capable of owning property in its own right.
>
> 4. The SRC is entitled to bring this application on behalf of the students by virtue of its Constitution as provided as followed:-
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> 4.1. Article 3 (i)
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> The SRC shall act for the student body as the official organ of the student body of Molepolole College of Education.
>
> 4.2. The functions of the SRC shall be to:-
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> (i) Represent the students in relation with the authorities of Molepolole College of Education ...
>
> (ii) Promote the general welfare and interests of the students, and to co-ordinate the social, cultural, intellectual and recreational activities of the students of Molepolole College of Education.

4.3. Article 4

> Student body resolution authorising the institution of legal proceedings dully passed in terms of the SRC Constitution on the 13th September, 1993."

Obviously, this last statement made in sub-paragraph 4.3 dealing with Article 4 of the SRC Constitution was not a direct quotation from the Article, but a statement of the fact that a resolution was passed, presumably in accordance with Article 4, authorising the SRC to take legal proceedings. Nothing much turns on this, as a copy of a resolution purporting to be made by the students of the College on the given date authorising the SRC to instruct attorneys on behalf of the students, was attached to the affidavit.

The founding affidavit then proceeded to give the SRC's version of the facts which ground their complaint arising out of the Open Day activities of the College. According to the paragraphs of the affidavit dealing with the issue, towards the end of the second term, presumably, of 1993, the Principal of the College intimated that an Open Day may be arranged during the current term and asked the students to tell their parents about the possibility. The Principal gave no details for further directions. When the third term resumed, the Principal intimated that the Open Day might be postponed due to the death of the Deputy Permanent Secretary in the Ministry of Education. The students were never consulted or informed in detail about the Open Day so that they could contribute to it. The Open Day event did not appear on the College calender, a copy of which was

attached to the affidavit. The students only heard on the eleventh hour that the Open Day was scheduled for the 11th of September 1993. Approximately 400 students, including the President and other members of the SRC did not take part in the Open Day activities. At lunch time, these students went to the dining hall as usual to have their meals. To their surprise, the doors of the hall were locked. On enquiry the President of the SRC was informed by the kitchen staff that the Principal had instructed them, the staff, not to give the students food as a form of punishment, for not taking part in the Open Day activities. But the students who took part, about 134 in number, were given meals, the value of which was given in the affidavit as P30.00 for each student.

The affidavit submitted that the denial of meals to the students who did not take part in the Open Day activities was an inhuman and degrading punishment, and unreasonable in view of the fact that it was imposed without seeking any representation from the students concerned. The students, the affidavit claimed, were entitled to payment of the value of the meals they were denied. By a Memorandum of Agreement made between each student and the Government of Botswana, students were entitled to payment of boarding fees, which included payment for meals, by the Government, therefore they were entitled to meals as of right not as a privilege. The withdrawal of meals was done unreasonably and arbitrarily without affording the victims any hearing.

Further, the affidavit went on, the students were shocked to learn that only the students who participated in the Open Day activities would be paid their full allowance of P195.00 per term to which all students were entitled under the Memorandum of Agreement at the beginning of the term. On the 14th of September, 1993 those who did not participate were penalised by the withholding of their allowances, and when they were paid after the intervention of lawyers, they found that P65.00 had been deducted from their entitlement. None of the students whose allowance was witheld or reduced was afforded any form of hearing either with respect to the charges against him or the nature and gravity of the punishment. They were subsequently informed by the Permanent Secretary of the Ministry of Education that this was punishment for their refusal to participate in the Open Day activities. The decision to withhold or deduct the students' allowances, the affidavit claimed, was unreasonable, arbitrary and unlawful. The College authorities had also acted irregularly in that they failed to comply with the procedure set out in the College Regulations especially the part relating to discipline in several respects which were catalogued.

As advised by Attorney, the President of the SRC claimed that the deduction of students' allowances without their consent or due process of law was unlawful and in breach of Sections 3 and 8 of the Constitution of Botswana. The decision to reduce their subsistence allowance was also ultra vires the Teacher Training College Regulations, Statutory Instrument No. 98 of 1978 as amended by Statutory Instrument No. 58 of 1990. The affidavit also stated that there was general ill-treatment of the students

by the Principal who did not regard them as human beings deserving to be consulted on and involved in matters pertaining to their daily lives.

That was the affidavit evidence given in support of the grievances arising from the Open Day activities. It is convenient and makes for better understanding that I here deal with the answering affidavit which refers to the foregoing part of the founding affidavit.

The answering affidavit was filed by Mrs. Maggie Flora Mbaakanyi, the Principal of the College. In it she first of all challenged the standing of the SRC to bring the proceedings in Court. That challenge is contained in paragraphs 3 to 5 of her affidavit which read as follows:-

> "3. The Student's Representative Council of the Molepolole College of Education hereinafter referred to as the "SRC" cannot be in existence independently of its membership. It is not autonomous. Part V of the Non-Academic Regulations of the said College provides that:-
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> "22.1 The SRC shall function under the authority of the College Administration and shall be responsible for all its activities.
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> 22.2 The Constitution of the SRC shall be subject to the approval of the College Administration ...
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> 24.5 The Principal has the authority to limit and/or suspend the activities of the SRC if he/she considers that the SRC is failing

in any of its functions."

4. The SRC is not entitled to bring an application on behalf of the students by virtue of its Constitution. The Constitution is still in its draft form and has not been ratified by the College Administration. Part of the Non-Academic Regulations of the said College provides:-

> "22.2 The Constitution of the SRC shall be subject to the approval of the College Administration. The SRC shall make its constitution available to the College authorities. Any amendments thereto shall be presented to the College authorities within 7 days of such amendment. The College Administration shall have the right to raise objection to any clauses of or amendments to the SRC Constitution within 14 days of receipt of the Constitution or of receipt of notification of amendments, failing which the amendments shall be regarded as condoned by the Administration.

5. There exist some clauses in the SRC Constitution which have been objected to by the College Administration and accordingly the SRC Constitution has never been approved by the College Administration. The clauses that the College Administration objected to amongst others was that "the SRC was autonomous". These objections have been discussed at various fora during the reviews of the Non-Academic regulations and have as yet not been resolved. In particular the SRC wrote to the Permanent Secretary in the Ministry of Education on 5th July, 1991 regarding SRC autonomy and on 27th November, 1991, the SRC wrote to me expressing their view on autonomy ..."

Thereafter, the Principal proceeded to deal with the issues arising out of the Open Day activities as raised in the founding affidavit. She said she announced on the 6th August, 1993 that a decision had been made to hold an Open Day on 11th September, 1993. When the third term began she informed the students that the Open Day would be held on 11th September and that the Open Day Committee had decided that individual invitations would not be sent to parents. The Committee had so decided because the students at the College were mature students, and the intention of the Open Day was not to look at each individual student's work but the work of the departments and the College as a whole. She also informed the students of the death of the Deputy Permanent Secretary but this was not intended to be linked to the Open Day. The Principal maintained that the students were informed of the Open Day through various boards and committees on which the students had representation and through the various subject departments. She said that each student belonged to a minimum of three departments and the Open Day was discussed in every department, and students in most departments prepared and designed exhibitions for the Open Day. An official notice was also posted addressed to all students and staff on 8th September, 1993 detailing the Open Day arrangements.

Then followed paragraphs 11 to 16 of the answering affidavit which read as follows:

> "11. Every student who enrols at the College concludes a memorandum of Agreement with the Government of Botswana prior to enrolment. The Memorandum is also executed by the parents of the student. This Memorandum of Agreement is a contract between the student

and the Government of Botswana. A copy of the Memorandum of Agreement is attached hereto as "Annexure G". Condition 2 (a) of the Agreement provides that the student's obligations are to attend all College prescribed activities punctually and regularly and, to the utmost of his/her ability, to study diligently until the completion of the course. Condition 3 of the Agreement provides that failure by the student to abide by the conditions in paragraphs 2 (a), (b), (c) and (d) shall without prejudice to other sanctions, render such a student liable to loss or reduction of his maintenance allowance and/or refund to the Government of Botswana in whole or in part and in such manner as the Government of Botswana shall determine a sum equal to the cost of his/her tuition, book and boarding fees and maintenance allowance as set down in paragraph 1 above and or suspension or withdrawal from the course.

12. The Open Day arranged for the 11th day of September, 1993 was a College prescribed activity in terms of Condition 2 (a) of the said Memorandum of Agreement. This is so for the College has the prerogative of translating the curriculum guidelines as laid down by the Ministry of Education into meaningful learning activities for producing functional teachers and the Open Day activity was one of the many such activities that are seen as practical examples of training teachers.

13. On the 11th day of September, 1993 approximately 413 students did not attend the Open Day. They boycotted all the Open Day activities on the said day. As a consequence the Open Day was unsuccessful and apologies had to be sent to the visiting foreign dignitaries. By not attending the Open Day activities, the students were in breach of their obligation to attend all College prescribed activities punctually and regularly. They were in breach of their contract with the Government of Botswana. In particular they were in breach of Condition 2 (a) of the Memorandum of Agreement.

14. In terms of Condition 3 (a) of the Memorandum of Agreement a deduction of

P65.00 was made from the allowance of each student who participated in the Open Day boycott in that they had failed to abide by the conditions of the Memorandum of Agreement.

15. The amount of P65.00 which was withheld by the College authorities is the standard monthly allowance given to all students of tertiary institutions. The P65.00 monthly allowance is in compliance with the provisions of the Public Service Management Directive No. 21 of 1992 ... which states that:-

"Training allowance for students studying in Botswana Training Institutions should be set at a uniform rate of P65.00 per month for the time spent in school."

16. On the 11th of September, 1993 lunch at the College was served punctually at the Open Day venues as part of the College's Open Day activities. The Open Day venues were the New Staff common Room, the Assembly Hall and the Amphitheatre. Since many parents and guests were expected and the refectory could not accommodate everybody alternative arrangements for lunch had to be made. No students were debarred from partaking of the meal, nor were any instructions given to the Catering Officer, who supervises the kitchen, to restrict the entry of students to the venues where lunch was being served. All students who attended the Open Day activities knew of the venue changes and had their lunch at the alternative venues. At the alternative venues, any student who appeared was given a meal. Nobody was denied a meal. It is denied that the value of the meal was P30.00. On the Open Day 2000 meals were prepared for the staff, students, guests and parents."

These paragraphs concluded the Principal's answer to the allegations with respect to the Open Day activities.

We now turn to the charge of infringement of the Constitutional provisions on equal treatment of the law. According to the SRC President's affidavit, there was rampant discrimination against

female students who became pregnant. It described Regulation 6 of the College Regulations as very offensive, exposing pregnant women students to contempt and ridicule. The relevant part of the Regulations, a copy of which was attached to the affidavit, reads as follows:-

"6. Absence through Pregnancy

6.1 A student who becomes pregnant must inform the Dean as soon as pregnancy is confirmed and at the latest not more than three months after conception.

6.2 Any student whose conception date is confirmed to have occurred between December and April will leave College immediately and will re-join the College in the next academic year.

6.3 Any student whose conception date is confirmed to have occurred between May and November will continue her course for the rest of the year but will miss the next academic year.

6.4 Concealment of pregnancy will lead to being charged the equivalent of any extra expense incurred by the Government by remaining at the College contrary to these regulations or may lead to permanent withdrawal from the College.

6.5 A student who becomes pregnant for the second time whilst at College and is likely to break the continuity of her studies for the second time will be required to withdraw permanently.

6.6 Any student whose pregnancy ceases while enrolled at the College shall not be allowed to attend studies at the College or stay in a hostel unless she has been certified as medically fit by a licensed medical practitioner.

6.7 The Principal has the right to consider exceptional cases on their own merit."

Paragraph 28 of the SRC President's affidavit described this regulation as offensive in one or more of the following respects:-

"28.1 Female students are forced to disclose the status of their health.

28.2 Female students who become pregnant are forced out of College in an unevenly manner.

28.3 There is discrimination even between the female students. For instance, a student who becomes pregnant between December and April (both months inclusive) is required to leave the College immediately whereas one who becomes pregnant between May and November is allowed to continue with the course for the rest of the year."

Paragraph 29 of the affidavit complained that some female students who became pregnant had to be fined by the College authorities; that the fine was not uniform and was unevenly applied, and it gave five examples of female students who were obliged to withdraw from the College on various dates between August 1990 and March 1993 with fines imposed on them ranging from nothing to P1, 697.00 each.

Finally the affidavit submitted that regulation 6 was ultra vires Section 3 of the Constitution of Botswana "as it does not afford the students equal protection but discriminates others on the basis of sex". It asked for the fines paid by the students to

the College authorities to be refunded. It castigated the regulation as "vague, unreasonable and arbitrary."

The reply to these charges was given in paragraphs 17 to 25 of the answering affidavit of the Principal. Those paragraphs should be set out in full. They read as follows:-

> "17. Regulation 6 and sub-regulations thereunder, of the College Regulations, ... is a consequence of Regulation 22 (1) and (2) of the Teachers Training College Regulations, 1978 which provide that:-
>
> 22 (1) If at any time the Principal of any College has reason to believe that any student maybe pregnant, the Principal may demand that the student should produce a medical certificate from a medical practitioner to the effect that she is not pregnant, or failing such production the Principal shall remove the student from the College and her return to the College shall be subject to the approval of the Permanent Secretary.."
>
> 22 (1) If any student becomes pregnant the Principal shall be required to withdraw her from the College at which she is enrolled and her return to the College shall be subject to the approval of the Permanent Secretary."
>
> "These regulations and rules on pregnancy are uniform in all the Ministry of Education Teachers Training Colleges. Students of the

Teacher Training Colleges are invited to make valid suggestions regarding the regulations and their opinions are taken into account when the regulations are reviewed. Students at the Molepolole College of Education have been invited through their representatives in the College Advisory Board to contribute towards a review of the regulation on pregnancy. In particular at a meeting of the Molepolole and Tonota Colleges of Education Advisory Board held on 12th March, 1993 the students were asked to find out how the pregnancy regulation is applied at other tertiary level institutions and make a recommendation to the Board ... On 14th June, 1993 the Molepolole College of Education Administrative Affairs council met and resolved that the SRC should find information on the pregnancy regulations in other tertiary institutions as instructed under Item 7 and as previously decided and on 8th July, 1993 the said Administrative Affairs Council met again and decided that a deadline of 16th September, 1993 should be set for the SRC to present a report on their findings on pregnancy regulations in other tertiary institutions under Item 9 .... The students have as yet, not responded.

18. The regulations as they stand are not discriminatory. They were formulated positively by the College with the intention of providing a student with a well planned maternity leave. They are meant to protect the nursing mother and baby. The regulations applied are consistent with what happens in other departments such as the Civil Service where pregnant women are required to take 3 months' confinement leave.

19. Even though the regulations apply to women only, they expressly refer to female students and in any event only females can fall pregnant, and they single out an identifiable class of women for special treatment namely pregnant female students at Teachers' Training colleges. The regulations are not on these accounts invalid for there maybe good reason for a regulation which caters for pregnant female students at Teachers Training Colleges. There is no uniform sanction namely that pregnancy during the academic year always means suspension for the remainder of the

year. Whether pregnancy occurs early in the academic year or later does matter. The ability of the pregnant student to continue with her studies is a factor that is taken into consideration and so is the effect of suspension on her future.

20. If the regulations were applied strictly and uniformly without consideration of the various conception dates some students would be required to withdraw from the College for approximately 2 years. For example, if a pregnant student's date of conception was in May and she was required to withdraw, she would have to spend eight months away from the College without completing the year of study. Since the anticipated date of delivery would be in February of the following year she would have missed the beginning of the year and would have to stay away from College for another year before rejoining the course. Thus she would have spent a total of 18 months away from the College.

21. Regulation 6.2 of the said College provides:-

"Any student whose conception date is confirmed to have occurred between December and April, will leave College immediately and will rejoin the college in the next academic year."

This regulation implies that the student will withdraw from college at the end of the first term or beginning of the second term, have the baby either in September, October, November or in December and return to the College in January. This would mean that the student has not withdrawn for more than one year from the College before returning and she would easily be able to resume her studies. The withdrawal period would not be inordinately long making it difficult for her to continue with her studies.

22. Regulation 6.3 of the said College regulation provides:-

"Any student whose conception date is confirmed to have occurred between May and November will continue her course for the rest of the year, but will miss the next academic year".

This regulation allows the student an opportunity to remain at College and complete the year, since the anticipated date of delivery is between February and August of the following year. When the student returns to College after the absence of one year, she does not have to repeat any year at College and proceeds to the following year at College.

23. The non-uniformity and unevenness in applying the regulations is actually advantageous to the pregnant student since all students are required to join the course at the beginning of the year and very few students are allowed to repeat a year at College.

24. Certain pregnant female students were charged in terms of Regulation 6.4 of the said College Regulations. This Regulation provides that:-

"Concealment of pregnancy will lead to being charged the equivalent of any extra expense incurred by the Government by the remaining at the College contrary to these regulations or may lead to permanent withdrawal from the College.

The charges imposed on pregnant female students were not uniform since the amount of the charges is determined by ascertaining the length of time a pregnant female student illegally remains at college. The longer they illegally remain at College, the larger the amount of the charge imposed on them is."

25. The charges imposed on pregnant female students in terms of the said Regulation 6.4 were and are not intended to be a form of disciplinary action or punishment but rather a method of obtaining a refund of the extra expenditure incurred by the Government on the student who remains at College contrary to the regulations."

On these grounds, the Respondent resisted the claims made with respect of gender discrimination in the appellant's motion.

The motion was heard by Mokama C.J.. Before him, the locus standi point raised by the respondent was raised in limine. But it was apparently agreed that the decision on it should be postponed to the end of the hearing. In his judgment at the end of case, the learned Chief Justice ruled in favour of the Appellants in these words:

> Section 13 (1) of the Constitution provides:-
>
> "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests."
>
> Order 18 Rule 2 of the High Court Rules clearly states the association may sue or be sued in its own name. In my judgment the Constitution of the SRC of Molepolole College of Education is not a draft but irrespective of what the College may say, it must be recognised as an exercise of a Constitutional right unless the College can show that it objects to the SRC Constitution under any of the listed reasons in Section 13 (2) of the Constitution. Certainly I cannot regard the right to sue or be sued in its own name to be offensive in any ways contemplated by that sub-section 2 of the Constitution. In my judgment therefore the Student Representative Council is capable and has locus standi to bring this application."

The Chief Justice then dealt with one of the matters arising out of the Open Day activities, namely, the allegation that the students who boycotted the Open Day were denied lunch on the 11th of September, 1993, and that such a denial of a meal was inhuman,

degrading and unlawful punishment and as a result the appellants sought compensation for the value of that meal. After reviewing the matter, the learned Chief Justice concluded as follows:-

> "I am therefore satisfied that the meals were available to all the students and albeit at various venues within the precincts of the College and that no students were barred from partaking of the meals. it appears to me that the students who boycotted the Open Day, went to the refectory their usual place of lunch and were unreasonable in not seeking alternative venues for lunch. I have no hesitation therefore in dismissing their claim that they were being punished by being denied meals. 2000 meals were prepared for the staff, students, guests and parents and at these 3 venues I have no doubt that they did not have an idea where they could get meals and decided to make no effort to seek meals at the appointed venues".

That finding thus disposed not only of the question of deprivation of lunch but as a consequence did dispose also of the question of compensation for the deprivation.

The learned Chief Justice also dealt with the deduction of P65.00 from the subsistence allowance of the students who did not take part in the Open Day activities. On this, his decision was favourable to the Appellant. The appeal therefore does not concern that matter, and there is no cross-appeal on it. I will on that account say no more about it.

On the question of gender discrimination, the learned Chief Justice took the view that regulation 6 of the Molepolole College of Education Regulations was not ultra vires Section 3 or 15 of the Botswana Constitution. His reasoning in this regard was:-

> "In paragraph 18 the Principal states that the College regulations and rules of pregnancy are uniform in all Teachers Training Colleges. Further that the students of the colleges are invited to made suggestions regarding regulations and their opinions are taken into account when the regulations are reviewed. In paragraph 18 the Principal states that the regulations were formulated positively by the College with the intention to provide the student with a well planned maternity and that the regulations were made to protect the nursing mother and the baby and all the paragraphs 17 to 25 of the answering affidavit of the Principal indicate to me an attempt on the part of the Principal to formulate rules that are made to take care of the welfare of the mother as well as the baby. I am particularly impressed that the student body through the SRC, had been invited to contribute towards the better formulation of these regulations to take account of both the mother and the baby. It would be very difficult for me to imagine what would be an ideal situation. If the regulations were declared null and void, it could cause considerable harm and the mother and the baby or both could become the victims of such a free for all attitude. All I can do is to express a satisfaction to the extent that the College is in negotiations with the SRC and that some regulations would be formulated that would be the benefit of the mother and the baby. I therefore consider that the rules are not ultra vires Section 3 or 15 of the Botswana Constitution".

The Chief Justice finally ruled that the fairest way was that each party should bear its costs.

In the event, the appellant was successful on the locus standi issue raised in limine by the respondent and on the request for a declaration that the sum of P65.00 deducted from the students' subsistence allowance for not participating in the Open Day activities was unreasonable, arbitrary and unlawful. The appellant, however, failed in its request for a declaration that

the students who boycotted the Open Day activities were denied lunch, or that the denial of lunch in the circumstances was unreasonable and arbitrary as well as inhuman and degrading punishment, and that as a consequence the affected students were entitled to compensation. The appellant also failed in its bid to have regulation 6 of the College Regulations declared null and void as contrary to sections 3 and 15 of the Botswana Constitution.

The appellant appealed on the issues that it lost and the respondent cross-appealed on the question of locus standi and on costs.

The grounds of appeal presented by the Appellant were:-

"2.1 That the learned Judge erred in finding that Regulation 6 (and sub-regulations thereunder) of Molepolole College of Education Regulations is not unfair, unreasonable and null and void.

2.2 That the learned Judge erred in finding that Regulation 6 (and sub-regulations thereunder) of Molepolole College of Education Regulations is not ultra vires Section 3 and/or 15 of the Constitution of Botswana by reason of its discriminatory effect against female students.

2.3 That the learned Judge erred in not holding that the Principal did not have power to make the regulations in question.

2.4 That the learned Judge erred in finding that the 11th September, 1993 - Open Day - was a prescribed day in terms of condition 2 (a) of the Memorandum of Agreement.

2.5 That the learned Judge erred in holding that students who did not participate in the open day activities were not denied lunch meal on the 11th September, 1993.

2.6 That the learned Judge erred in not finding that such denial of food was inhuman, degrading and unlawful.

2.7 That the learned Judge erred in finding that the students who were denied the meal were not entitled to be compensated by payment of the value thereof."

Of the seven grounds, the first three attacked the decision of the High Court with respect to the gender discrimination issue; the other four were on the alleged denial of lunch on Open Day.

The grounds of appeal in the cross-appeal of the respondent were simply:

"3.1 The learned Judge was wrong in law in holding that the Student representative Council was capable and had locus standi to bring the application.

3.2 The learned Judge wrongly exercised his discretion making no order for costs.

Although the locus standi point in the cross-appeal was not argued before the Repondent's submissions were presented to us, I think it is convenient for me to deal with it first. Besides, if the Respondent's argument succeeds, that would be the end of these appeal proceedings and there would be no need for me to deal with the other questions raised.

It was submitted by the Respondent that the Appellant had no standing either under clause 25 of its constitution or under Order 18 Rule 2 of Rules of the High Court because it did not have a valid constitution, which was a sine qua non entitling an association or society of persons to take legal proceedings in its own name. According to the submission, the protection of

freedom of association given by section 13 of the Constitution of Botswana cannot be used to avoid the requirments of laws regulating associations.

With regard to the disability arising from the SRC's constitution, the Respondent's argument was predicated on the fact that regulation 22.2 of the Non-Academic Regulations of the College required the constitution to be approved by the College Administration, and that this approval has not been given. The Respondent agrees that the constitution was submitted for approval some time ago. The reason for the delay in approval is the objection of the College Administration to some clauses which have not been modified in a manner acceptable to it. The clause which gives most offence to the College Administration is the provision which declares the SRC to be autonomous, with a right to own property and capacity to sue and be sued. Insofar as regulation 22.1 of Non-Academic Regulations of the College provides that the "SRC shall function under the authority of the College Administration" its Constitution cannot claim that the SRC is autonomous. And insofar as regulation 22.2 requires that the Constitution of the SRC be subject to the approval of the College Administration, which approval has not been given, the SRC cannot claim to have a constitution. The Respondents accordingly referred to the Constitution which was submitted by the SRC to the College Administration throughout the proceedings as a draft constitution. If the SRC has no approved constitution, the argument went, it cannot claim to be empowered by any clause in a mere draft to sue.

When confronted with the fact that although the SRC, according to the Respondent's argument, had no constitution, the College Administration had given recognition to, and been dealing with it, over the years as the representative of the student body of the College, Counsel submitted that the SRC had de facto, but not de jure, existence. It turned out that the real objection to the approval of the Constitution submitted was not a claim to autonomy, whatever the consequences of such claim may be, but a fear on the part of the College Administration that if the SRC's right to sue and be sued is approved, the SRC would use the right to sue the Administration.

The Respondent also argued that Order 18 Rule 2 which gave a right to partnerships or associations to sue and be sued in their own name did not apply as the SRC could only be recognised as a legal association by registration or exemption under section 6 of the Societies Act (Cap 18:01). Approval of the SRC constitution in terms of the College Regulations would gain the SRC exemption under the Societies Act, but failing that, only registration can save the association from being an illegal association under section 20 of the Societies Act.

I find merit in the argument that the protection of freedom of association in section 13 of the Constitution does not permit persons to disregard provisions in laws regulating associations. There is also merit in the argument that the Societies Act which declares an association illegal unless registered under or exempted by it, must be complied with if an association is not to be visited with the consequences of illeglity. It seems to

me that were it not so, no association of persons, whether companies, partnerships, societies, charitable or not, trade unions etc., would be subject to regulation by law. All such associations could claim protection under section 13 of the Constitution for non-compliance with any such laws or regulations.

What must be accepted, however, is that in this case, the Societies Act would recognise a body like the SRC an an exempted body if it has a Constitution. That position is agreed by the Respondent. The authority to approve the SRC constitution and thereby to set the final seal to its legal existence is the College Administration. For years the College Administration has formally refused to approve the SRC's constitution while at the same time dealing with the SRC in all matters in which the Administration needed to work with a representative body of the students of the College. Learned Counsel for the Respondent did not refute the statement from the Appellant's side that the supposed draft constitution was submitted to the College Administration as far back as 1985. For eight years the College Administration accepted the SRC as the student representative body in all matters. For eight years the SRC has functioned as a body having all the attributes of an association with the consent of the authority having the right too confer legality to it. Its office bearers must have changed in accordance with the unapproved constitution. The College Administration must have done business with each successive group of office bearers as if everything was regularly done. The SRC ordered goods, and held stocks, in short it had property which it could transfer and

which could be stolen. How could the rights of ownership of the SRC be protected by law if it were to be met every time those rights were infringed by the objection that it had no existence in law? Counsel for the Respondent's response to this question was, if I understand him correctly, that the SRC had all the legal rights available against the world but not against the College Aministration. Its constitution continued to lack the final seal of approval from the College Administration for all these years because, as Counsel frankly conceded, the Administration was afraid of the SRC using its right to sue and be sued to bring actions in court against the Administration. Apart from the College writing a letter formally stating that the SRC constitution was approved, it did everything which by conduct implied this approval. It makes no difference that the College authorities continued to maintain that the constitution was not approved because of outstanding matters. If the SRC was not a body properly representing the students in its affairs within the College framework, the College Administration should have ceased doing business with it many years ago. The Administration should have insisted that it would not do any more business with the SRC until the SRC rectified the defects which the Administration thought necessary in its constitution. And when it appears that the real reason for withholding approval is to protect the College Administration from legal action by the SRC, as we have heard, then the action of the College Administration becomes questionable indeed.

The power to approve or disapprove the SRC constitution like all powers conferred on public authorities must be properly

exercised. I do not think that in the circumstances of this case, it has. Having regard to the conduct amounting to tacit approval by the College Administration, it hardly lies in its mouth to say that it does not approve of the SRC as a representative associatiion. The Administration should not be allowed to escape the consequences of its own conduct by the mere device of a refusal to issue a formal letter of approval. Call this estoppel by conduct or the conferment of interim or provisional approval. It does not really matter. A court should not endorse the conduct of a person in authority who exercises power improperly only to save himself from being questioned before the very same court. Justice demands that the College Administration should not be permitted to blow hot and cold at the same time. Because to permit such conduct is to confer on it a licence to act without being questioned by the courts. Such a licence should not be allowed to be self-endowed or else the rule of law would certainly be set at nought.

In my view the cross-appeal on locus standi should be dismissed.

That leaves us with the appeal on the grounds relating to the denial of the lunch on Open Day and on gender disrimination. I shall address the question of costs at the end of this judgment.

The appeal on the denial of lunch on Open Day can be disposed of quickly. I find it to be singularly unconvincing and without merit. The students decided to boycott the Open Day. I am not called upon to pronounce on whether that boycott was legal or not. The fact that they boycotted the activities is common cause. In my view, whether the Open Day appeared on the College

calender or not, the College Administration was entitled to organise and to hold it, and exercised its powers properly in doing so. It seems inconceivable to me that the students could be unaware of this Open Day or the arrangements made for it. If the boycotting students ignore these arrangements, they should be made to bear the consequences. Had the submission been made that the rule in the College was that students should eat nowhere else than in the College dining hall or refectory, I would have understood their complaint better, even if I was not sympathetic to it. The arrangements for the Open Day necessitated that lunch should not be served in the dining hall or refectory but at three different venues temporarily established to meet the Open Day demands. In my opinion, those arrangements were reasonable and fair. Students who went to any of these venues were served with lunch that day. In a College campus of the size indicated to the Court, even if no formal notice was given - and I find it difficult to believe that that was what happened in this case - I am unable to accept that news of the places where lunch was being served that day would not have spread among the student population, or could not have been discovered by ordinary inquiry. The Appellant and the students supporting the boycott chose to look for their lunch at the dining hall or refectory and nowhere else. Had they gone to any of the venues where lunch was being served, I am sure they would have been served, as was held by learned Chief Justice. They chose of their own free will not to go to the other venues, presumably because such conduct would have been inconsistent with their boycott of the Open Day activities. Choosing not to have the lunch offered is surely

different from being denied lunch to which a person is entitled. It cannot amount to a denial of lunch.

In the circumstances, I agree with the learned Chief Justice that the Appellant failed to make its case on this issue and its appeal in that regard must be dismissed.

The case on gender discrimination is the final point of substance. We have already recited regulation 6 of the College Regulations which is the regulation challenged by the Appellant. We have noted the reasons for the decision of the learned Chief Justice in ruling that the regulation is not ultra vires section 3 or 15 of the Botswana Constitution. Our attention has been drawn by the Respondent to the case of Mfolo and Others v. Minister of Education, Bophuthatswana, and Another 1992 (3) S.A.L.R. 181, especially to the passage of the judgment of Comrie J. at page 187 which says:-

> "The regulation applies to women only. It expressly refers to female students and in any event only females can fall pregnant. It singles out an identifiable class of women for special treatment, namely pregnant female students (at teacher training colleges). In my view the regulation is not on that account invalid. It seems to me that there may be a reason for a regulation which caters for pregnant female students at teachers training colleges."

Based on this pronouncement the Respondent submits with force that regulation 6 of the College Regulations is valid because it is made for the benefit of the pregnant mother and child. That was what the Principal of the College deposed to in the Respondent's answering affidavit. In my view, that assertion by

the Principal cannot be accepted at face value without an examination of the content of the regulation complained of.

A regulation or rule of law which provides for women alone is not necessarily discriminatory on the ground of sex. That is what the passage from the Mfolo case quoted above says. That is agreed. It should be observed that in that case, which bears a remarkable similarity to the case before us, in spite of the statement above cited, the Court decided that the regulatiion complained of was invalid.

Any constitutional challenge in our courts on the basis of sex discrimination must begin with an examination of this Court's decision in The Attorney General v. Unity Dow (Court of Apppeal Civil Appeal No. 4/1991) (unreported). It was in that case that this Court held that discrimination based on sex is repugnant to sections 3 and 15 of the Constitution of Botswana. In that case, however, my judgment pointed out at page 43 that, "Of course, treatment to different sexes based on biological differences cannot be taken as discrimination in the sense that Section 15 (3) prescribes." It was recognised in that judgment that there might be a need to regulate the lives or affairs of one gender in a manner which was inapplicable to the other. And it is in that sense that the case of pregnant students at teacher training colleges is dealt with in the extract in the judgment in Mfolo's case quoted above. But when such a situation occurs, the law or regulation under consideration must be reasonable and fair, made for the benefit of the welfare of the gender, without prejudice to the other; it must not be punitive to the gender in

question. As I said earlier, the bare statement by the party responsible for the enactment of the legislation or regulation that it is for the benefit of the persons affected is not sufficient for acceptance or endorsement by the Court. The law or regulation itself must be examined.

Looking at regulation 6 of the College Regulations in this case, I find myself at a loss to understand how its real intention could be described as for the benefit of pregnant women students. Paragraphs 2 and 3 of the regulation ensure that a student who becomes pregnant must necessarily suffer an enforced withdrawal from the College for at least one year. The period could be longer depending on the point in time when the pregnancy occurs. For ease of reference, I repeat those paragraphs:-

> "6.2 Any studuent whose conception date is confirmed to have occured between December and April will leave College immediately and will rejoin the College in the next academic year.
>
> 6.3 Any student whose conception date is confirmed to have occured between May and November will continue her course for the rest of the year but will miss the next academic year."

Why should the student be away for a whole year? The answer of the Principal of the College is that the "regulations as they stand are not discriminatory. They were formulated positively by the College with the intention of providing a student with a well planned maternity leave. They are meant to protect the nursing mother and child". But why should this well planned maternity leave be enforced for at least one whole year? The Principal does not deal with that point. Surprisingly, she

rather finds that "the regulations applied are consistent with what happens in other departments such as the Civil Service where pregnant women are required to take three months confinement leave." How any one can compare an enforced leave of one year with a 3 months' confinement leave and declare without reservation or further explanation that the two treatments are consistent is puzzling to me. That is so, especially, as in African societies, families arrange to look after the children of members from an early age in order to enable the mothers to pursue their careers, whether in studies or at work, or employment. I must confess that I find the explanation unconvincing. It seems to me that those two provisions quoted were designed primarily not with a view to benefit the pregnant female student but to ensure that she stays away from College for at least a year. That must be so because the provisions of the regulation do not allow the student to make a case that she need not stay away for so long and that she had made arrangements for the care of the child while she continues with her studies. It is true that in paragraph 7 of regulation 6, the Principal is given the right to consider exceptional cases on their merits. But why should the situation posited earlier be categorised as exceptional in order to merit individual consideration by the Principal?

On a reading of the regulation as a whole, I am forced to the conclusion that the purpose of the regulation was purely punitive. It is recalled that when Mr.Chamme was asked what would happen if a married student got pregnant, whether she would

be required to stay away from College for a year, his answer was that her situation would be treated as an excpetional case by the Principal. Why should her position be different from the unmarried student? Clearly it is because in the view of the College Administration the umarried student's conduct calls for punishment and the regulation is to enable this purpose to be achieved. No further confirmation of this intention seems to me necessary. The conclusion I have reached, however, is re-inforced by paragraph 5 of the regulation which reads:-

> "6.5 A student who becomes pregnant for the second time whilst at College and is likely to break the continuitity of her studies for the second time will be required to withdraw permanently."

Now, it is impossible to justify this provision as a regulation meant positively for the benefit of the mother and child. The Principal does not attempt to explain the intention behind it; and learned Counsel for the Respondent concedes that he is unable to justify it. If there was any doubt why the regulation was made, and I find it difficult to entertain such doubt on the face of the other provisions, this provision puts such doubt beyond question and reveals the real intention behind the regulation as simply punitive.

Such an intention in the making of a law or regulation specifically for women is unreasonable and unfair. The question then is, does that lead to such law or regulation made being struck down as contrary to the provisions in sections 3 and 15 of the Botswana Constitution? In my view it does. We have here

a regulation made ostensibly for the benefit of women, which if that claim is correct would fall into the class of "treatment of different sexes based on biological differences" and would therefore be taken as not amounting to discrimination on the ground of sex as stated in the case of Attorney General v. Unity Dow. Were the regulation not made for the benefit of the female students of the College, I would have said without hesitation that prima facie the regulation was discriminatory. My reading of the provisions of the regulation leads me to the conclusion that the reason given by the College Administration for the regulation is incorrect and unacceptable. The regulation is held in terrorem over the head of the female student. Her male counterpart can be responsible for any number of pregnancies in the College during his course and suffer no such liability or punishment.

For the above reasons, I am of the opinion that regulation 6 is discriminatory against women students and cannot stand. In this connection, I should mention that I am not unaware of the fact that the unsatisfactory nature of regulation 6 is now recognised by the College Administration and that discussions are under way to change it. I do not, however, think that that knowledge should influence my decision. The Court is not part of negotiating process for the amendment of regulation 6. The Court is therefore in no position to influence the outcome of the discussions. The Court does not know the nature of the defect recognised by the College Administration. What is before the Court is a challenge to the constitutional legality of the

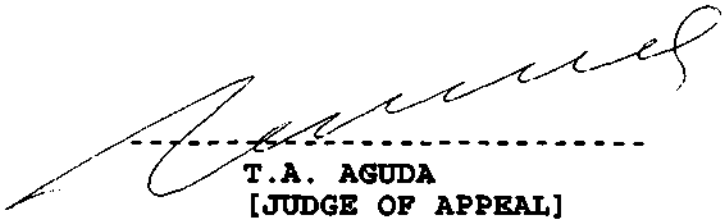
regulation as it stands. The College Administration resists that challenge. That is the issue for decision before the Court. I think that the Court's duty is to declare its own opinion on that issue and no more. I would allow the appeal of the Appellant on the issue and declare that regulation 6 of the Molepolole College of Education Regulations is illegal and contrary to section 3 and 15 of the Constitution of Botswana.

I have given consideration to the cross-appeal on costs. As is well known, costs are a matter within the discretion of Court. The learned Chief Justice ruled that in the circumstances of the case before him, each party should bear its own costs. I see no reason to interfere with that decision, and would dismiss the cross-appeal on costs.

In the result, the Appellant in my opinion, succeeds in its appeal against the decision of the High Court with regard to the validity of regulation 6 of the Molepolole College of Education Regulations, and fails in its appeal against the High Court's decision on the deprivation of lunch on Open Day on 11th September, 1993. The Respondent fails in its cross-appeal on locus standi and on costs. I would make an order in those terms. I would also make an order awarding the costs in this Court to the Appellant.

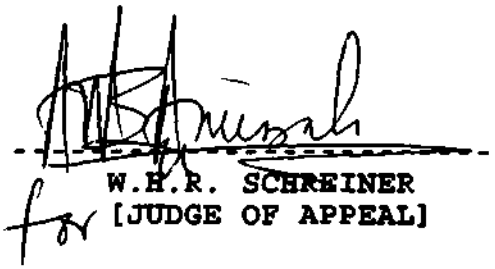
DELIVERED IN OPEN COURT AT LOBATSE THIS 31TH DAY OF JANUARY, 1995.

A.N.E. AMISSAH
[JUDGE PRESIDENT]



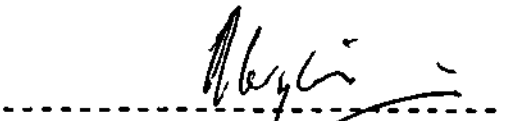
I agree

T.A. AGUDA
[JUDGE OF APPEAL]



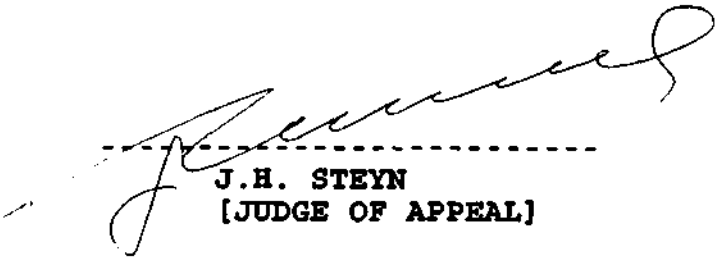
I agree

W.H.R. SCHREINER
[JUDGE OF APPEAL]



I agree

LORD WYLIE
[JUDGE OF APPEAL]



I agree

J.H. STEYN
[JUDGE OF APPEAL]