CIV\APN\23\97

IN THE HIGH COURT OF LESOTHO

In the Application of :

LESOTHO UNIVERSITY TEACHERS & RESEARCHERS UNION **Applicants**

vs

NATIONAL UNIVERSITY OF LESOTHO **Respondent**

REASONS FOR JUDGMENT

Filed by the Hon Mr Justice M.L. Lehohla on the 5th day of January, 1998

On 19th February, 1997 this Court, immediately upon the completion of addresses by respective Counsel made an order discharging with costs the Rule which had been granted in terms of prayer 3 on 23rd January, 1997 returnable on the 10th of the following month.

The Court undertook to give reasons for discharging the Rule. Here do those

reasons follow below.

The applicant had moved this Court *ex-parte* on 23rd January, 1997 for a *Rule Nisi* calling upon the respondent to show cause, couched in the following terms, (apart from the order sought for dispensation with ordinary Rules pertaining to the modes and periods of service as outlined in prayer l):

why; 2 (a) the respondent shall not be interdicted forthwith from freezing the car allowances of applicant's in breach of the said members(*sic*) contracts pending finalisation of this application;

(b) the respondent shall not be interdicted from breaching the said contracts

© the respondent shall not be ordered to pay costs of this application only in the event of opposition hereto.

(d) applicant shall not be given such further and\or alternative relief as this Honourable Court may deem fit.

Finally the applicant sought an order under 3 that prayers 1 and 2(a) should operate with immediate effect as an interim order.

Following on preliminary objections raised by *Mr Mosito* for the applicant in the matter relating to contempt of Court allegedly committed by the Vice Chancellor of the respondent and the respondent itself this Court made three orders as follows

:

"(1) that in relation to the notice in terms of Rule 8.18 filed by respondents, this Court orders that this is an irregular step and resolves the point in favour of the applicant; costs will be costs in the cause.

(2) No costs order be made in favour of the applicant; consequently no costs for contempt are granted to the applicant in respect of the contempt that has been purged in any case.

(3) Because of the fact that the rule was snatched in the main application as dawns to the Court's horror costs are awarded to the respondent in this regard. See letter dated 11-2-97. Letter handed back to Mr Woker".

In the founding affidavit filed on behalf of the applicant by one Khabele Matlosa a member of the applicant and at once lecturer at the respondent, the deponent avers that he is the applicant's President; and that he has been authorised to depose to the founding affidavit by the applicant.

The applicant i.e. (LUTARU) for short is a labour union duly established and registered in terms of the laws of Lesotho.

At a meeting held on 20th January, 1997 the applicant resolved by unanimous vote to institute the instant proceedings.

The applicant has annexed to its affidavit a copy of its constitution marked "A" appearing at page 8 of these proceedings.

The applicant's deponent avers as the basis for this application what has been set out as follows :

(a) (that) on or about 18th August, 1995 the parties herein entered into a collective bargaining agreement, a copy of which is marked "B" among the attached papers.

The deponent specified that it was a material term of the said agreement that the contracts of members of the teaching and research staff would be substituted by operation of novation with the result that Annexure "C" would be replaced by Annexure "D".

(b) In terms of Clause 13(d) of Annexure "D" a member shall be entitled to 10% of basic salary as car allowance. Members shall normally be expected to use their vehicles for official and approved purposes without mileage claim within a radius of 35 Km.

© The term "member" means a member of the applicant.

(d) The provisions of Clause 13(d) took effect from September, 1996. The respondent did pay car allowances to members of the applicant and other members of the teaching and research staff who had signed Annexure "D".

(e) On 11th December, 1996 the Acting Vice Chancellor of the respondent called officials of the applicant to inform them that the respondent's Council had decided in its meeting of 9th December, 1996 to allow payment of car allowances for December, 1996 only and freeze them thereafter and to immediately approach the applicant to renegotiate some of the aspects of the newly approved and signed contract. The invitation was followed by Annexure "E" the substance of which was in brief a clear indication that the respondent due to the fact that *the sources would not have had enough money to see us through this year* there was a limp in the agreement.

Annexure "E" was a letter written by the Acting Vice Chancellor addressed to the President of LUTARU.

It appears from Annexure "E" that payment to meet car allowances was effected from internal sources. When it dawned on the respondent that these would not go far, the respondent approached the Ministry of Education which required time to consider the request made by the respondent to see to the financing of the new commitment the respondent had gone into with the applicant without the Ministry's involvement yet it appears that when it comes to financing the agreement the Ministry's involvement is desperately sought by one party with encouragement of the other.

In due course the Ministry of Education advised the respondent not to implement the terms of Clause 13(d) of Annexure "D" before authorisation could be obtained from government. Meantime the respondent did not stop the implementation which it had started of paying car allowances. However up to this point the disregard of the Government's advice didn't seem to matter much because funding to meet requirements of Clause 13(d) came from redeployment of internal sources of the respondent. The crunch came when Government was asked in earnest to help but could not see its way to doing that.

(f) The officers of the applicant went to the Vice Chancellor's offices apparently following the substance of Annexure "E". The applicant's delegation after discovering that the situation was far from favourable to its members went back to the generality of its members whereupon a meeting scheduled for 17th December, 1996 was subsequently held concerning the contents of Annexure "E". A reply to this letter was formulated in terms of Annexure "F".

Annexure "F" in sum expresses the applicant's dissatisfaction with the respondent's Council decision to freeze Car Allowances after December 1996. The applicant indicated that it was looking forward to considering the Council's earlier desire "to approach LUTARU to renegotiate some of the aspects of the newly approved and signed contract....."

The applicant further expressed in Annexure "F" its perplexity at the

respondent's request to renegotiate the contract given that the new contract was a product of long and arduous process of negotiations.

The applicant expressed its dissatisfaction with the fact that in deciding to freeze the car allowances the respondent had acted unilaterally and therefore manifested lack of good faith, a factor which in its view defeated the purpose for requesting renegotiation of some aspects of the newly approved and signed contract.

The applicant in response to Annexure "E" further noted its observations that part of the explanation for the financial crisis afflicting the University at the time was the University's failure to implement the recommendations of the World Bank Study on Cost-Containment. As a remedy to this supposedly irrelevant consideration by the University, the applicant proposed an alternative option couched in the following terms i.e. "What needs to be done is not to renegotiate the newly approved and signed contracts but to work together in implementing measures that are likely to bring a sound management and utilisation of University funds.

It should be borne in mind that while all this was going on the University was in a particularly unenviable position in which it had by negotiating clause 13(d) of Annexure "D", embarked on something it appears to me to have lacked the proper

authority to do.

The illustration of this concern is plainly expressed in head II of Annexure "E" styled **NUL BUDGET PROPOSAL FOR 1997\98** saying "In October, NUL submitted the 1997\98 budget proposal to the MOE (Ministry of Eduction), the item "New Allowances" was one of the new items included in the budget. The overall budget had gone up by 38%. The Government's directive that all budget proposals should not go beyond 12% ceiling, was communicated to NUL as per the attached copy.

The MOE insisted that the NUL budget had to come down to the approved level. Among the major items that got removed from the budget following intensive consultations over the budget with the MOE were the "New allowances" built into the new contract for Academic staff. Management was advised that because of the general concern in Government, at the "MANY" allowances that NUL employees have, inclusion of new allowances in the budget proposal would jeopardise the chances of approval of our submission. It was, therefore, agreed that a separate submission should still be made so that it can be considered on its own - and if approved, the necessary adjustments would be duly made to the main budget"

The applicant's deponent went further at (g) and (h) to aver that on 17th December, 1996 at a meeting convened for the discussion of Annexure "E" it was resolved to reply in terms of Annexure "F". He states that on 7th January, 1997, the new Vice - Chancellor called the Executive Committee of the applicant to a meeting to discuss the contents of Annexure "F". After that meeting the applicant says it received Annexure "G" a letter dated 8th January, 1997 addressed by the Vice-Chancellor to Dr M. Ntimo-Makara (till recently the Acting Vice-Chancellor). The letter reads :

> "re: LUTARU'S Communication of 3rd January, 1997
>
> As per my response to LUTARU in our meeting yesterday 7 January 1997 with the Union please forward the said correspondence to Council for further deliberations. Be kind enough to communicate to Council that my period for studying the relevant events and issues fails me to have direct input at the moment.
>
> Sincerely yours
>
> Prof. Dr R.I.M. Moletsane
> Vice-Chancellor
>
> c.c. Chairman of Council
> University Management
> LUTARU - Secretariat".

The applicant has attached Annexures "I" and "J" being letters written to and from the Labour Commissioner respectively.

Apprehensive of the likely delay in having the applicant's grievances redressed by the Labour Commissioner it opted to approach this Court instead as it feared that should the respondent effect its unilateral decision to freeze applicant's member's car allowances, the said members would suffer irreparable harm.

It further stated that as a trade union it has a clear right in this matter because it is its members' contractual rights that are about to be violated.

The applicant sought to show further and emphatically that the harm apprehended is imminent inasmuch as its members are usually paid on or around the 25th day of each month and was afraid that judging from the turn of things it was likely that its members' rights will have been violated.

The applicant accordingly indicated that because its members' contracts were about to be infringed its plight was all the more deserving of urgent attention.

In the respondent's opposing affidavit sworn to by the respondent's Registrar Anne Masefinela Mphuthing the deponent averred that the respondent objected to the manner in which the applicant had obtained the interim order.

Indeed the Court was aware that these proceedings had been launched *ex-parte* and without notice to the other side.

The respondent maintained that the applicant had snatched the interim order in disregard of the *Audi Alteram Partem* rule. The reasons furnished by the Chairman of Council in the answering affidavit sufficed to substantiate the embarrassment and prejudice suffered by the respondent in the process.

Indeed in paragraph 4 of the Council's Chairman Mr Likate at page 75 of the paginated record emphatically states :-

> "I wish to stress that the respondent, when it undertook to pay the car allowance, the subject of these proceedings, it (*sic*) did so on the understanding that initially this allowance would be paid out of redeployed funds until these were exhausted. Thereafter the obligation to continue to pay would fall away unless the University could procure further funds from the Government. If the government did not provide the funds then it was understood that the obligation to continue to pay would fall away".

In response to this striking and crisp averment by the official of no mean stature in the respondent the applicant's deponent contends himself with merely saying at page 91 of the paginated record:

> "I reply hereto as I have to the relevant portions of Mphuthing's affidavit, and wish to incorporate contents thereof as if specifically

averred herein. I therefore deny contents thereof and put deponent to the proof thereof".

Surely the applicant cannot hope to ride off on the above and hackneyed statement to avoid a direct challenge such as contained in the Council Chairman's statement.

It must have been clear to the applicant that the respondent's statement plunged the proceeding even on this point alone into serious dispute of fact which would require resolution not on mere papers but either by oral evidence or action proper but the applicant opted for neither of these alternatives, and in doing so was running a risk which would always adhere to it and never to the other party.

The salutary rule in applications brought *ex-parte* is that the applicant's version will be accepted where it is common cause but will be rejected in favour of the respondent's version where there is a serious and genuine conflict of fact in respect of which the law takes the view that because the applicant must have known of such conflict and that it would be incapable of resolution on papers the applicant must therefore bear the consequences.

In this connection I view with favour the extract from ***Supreme***

Furnishers(Pty)Ltd and Anor vs L.H. Molapo C. Of A. (CIV) 13 of 1995 at p.6 submitted on behalf of the respondent that

> "..... in the absence of facts or circumstances which cast doubt on the acceptability of a respondent's version, where an applicant institutes procedures (*sic*) by way of Notice of Motion the version of the facts deposed to by the respondent shall be accepted as correct".

See also ***National University of Lesotho Students' Union vs National University of Lesotho and Ors*** C. Of A. (CIV) 10 of 1990 at 19 where the Lesotho Court of Appeal expressed the position in Law without any equivocation.

Mr Likate's averment at paragraph 5 page 75 (of the record) "that it was an implied term of the contracts of employment of the applicant's members who signed the new contract (Annexure "D") that the University's obligation to pay car allowance would endure for as long as it was able to make these payments" ties in with the undisputed averment by Miss Mphuthing the Registrar's averment in paragraph 14 page 64 of the record that the applicant's negotiators....."urged that the University should find the money and suggested that the respondent even sacrifice moneys budgeted for other items to cover the cost of paying the car allowance".

To me it appears plain that there could be no hope of sustaining the payment

for car allowance if the obviously undependable scheme suggested by the applicant's negotiators fell through as ultimately it did. It is for this reason that I come to the view that it seems the financing of the car allowance scheme was conditional upon certain conditions being met i.e. funds being available as aptly stated by the Chairman of Council and corroborated by the Registrar's undisputed averment.

It is not disputed also what the Registrar averred that it had been brought to the applicant's negotiators' attention that even if an alternative means of procuring funds was attempted by, for instance, redeployment of moneys to pay car allowances this source of funds would not last long; the estimate being that such funds would have been exhausted by March 1997.

The applicant makes a merit of saying the Registrar by saying funds are available to finance only the medical aid benefits and not car allowance, and the Bursar by saying there are no funds to finance both car allowance and medical benefits must be lying. But whichever way the respective officers' averments are looked at, they do not to me amount to positively saying funds are available to finance car allowance. In any case whatever other university staff members' statements are, on the state of finance the more dependable would always be that

of the Bursar whose business it is, more than anybody else's, to deal with the question of finance.

Another crucial averment made by the Registrar but which the applicant didn't bother responding to is at page 64 paragraph 16 where Anne Mphuthing said :

> "The redeployment of funds would mean other University uses and services would have to be sacrificed. Applicant's negotiators were not overly concerned. They demanded that funds be redeployed and that in the period between the strike and the time that the redeployed funds ran out the respondent approach the government to procure more funds".

In this regard alone one sees a callous attitude being adopted by the applicant which seemed to have particularly relished the inconvenience to which the two-fold forms of pressure i.e. the strike and the unrelenting demands by the applicant on the respondent to ensure that the car allowance be sustained against all odds, the respondent was subjected.

What is even more distressing about this matter is that it was clear that without the Government advancing any funds to finance car allowance for the applicant nohow with the current state of finances in the respondent's control or custody could the respondent meet the insistent demands on it by the applicant

which at the time had gleefully twisted the respondent's arm. On this alone the applicant cannot be said to have discharged the onus of proving that the money was enough and available to finance car allowances sought to be established in papers and arguments on the one hand and hotly disputed by the respondent and their counsel on the other.

A peculiar feature of the applicant's replying affidavit which is reproved in evidence by affidavit is that it is argumentative and scarcely addresses itself to the matter on hand. Compare and contrast Mphuthing's opposing affidavit at paragraph 17 with the rambling and captious two pages of Matlosa's replying affidavit ad para 17 and 18 (so styled though confining itself to paragraph 17 only) at pages 83 and 84 of the paginated record before me. Contents ad paras 21 and 23 on page 85 merely serve to render issues which the Court strives hard to understand more and more obscure.

It would be beneficial to bear in mind the requirements of the law with regard to an applicant's affidavit to the extent that it is intended to support an application moved *ex-parte*. First it must disclose grounds for dispensing with *dies induciae* and breaching the *Audi ulteram partem* rule. Otherwise such an application runs the risk of being turned down as irregular.

Indeed in ***Emiram (Pty) Ltd vs New Woodhole Hotel*** 1967(2) SA 491at 493(F) Eksteen J's salutary phrase calls for special attention; namely :-

> "I regard it as desirable that an applicant seeking to dispense with the ordinary procedure should set out in his affidavit that he regards the matter as one of urgency and should refer explicitly to the circumstances on which he bases this allegation and the reasons that he claims he could not be afforded substantial relief at the hearing in due course".

Notwithstanding the above statement consideration of the applicant's affidavit shows that scant attention was given thereto. Consideration of Annexure "F" at page 51 of the paginated record also leaves me in no doubt that the applicant knew as early as 11th December, 1996 that the respondent intended freezing car allowance by the end of January. Matlosa's averment at page 5 paragraph 4(f) also serves to throw light on this contention.

What this Court is seeking to emphasise here is the importance of observing provisions of Rule 8(22) by parties moving applications on the basis of urgency before it.

In the instant case I note with bewilderment that although the applicant perceived the urgency of bringing this application way back; meaning that some forty three days before launching this application the applicant knew of the

respondent's intention to freeze car allowance, the applicant nonetheless waited till 21st January, 1997 to launch it *ex-parte*. In the circumstances I would view with favour the submission that urgency was self-inflicted therefore the adverse results of such mischievous act should recoil upon the author's head and not at all be visited on the respondent.

While dealing with applications of this nature, I may just add, it is important to heed the words of Coetzee J. in ***Luna Meubel Vervaardigers vs Makin and Another*** 1977(4) SA 135 at 137 to the effect that

> "Practitioners should carefully analyse the facts for the purposes of setting cases down for hearing, whether greater or lesser relaxation of Rules and ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirement of Rule 12(b) (Analogous to our Rule 8(22)(b)) will not do, and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down".

In similar vein the dictum of Beck J. in ***Republic Motors vs Lytton Service Station*** 1971(2) SA 516 at 518 provides a welcome caution that

> "The procedure of approaching the court *ex-parte* for relief that affects the rights of other persons is one which.....is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of *audi alteram partem*.

> It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of a respondent who if informed beforehand that resort will be had to the assistance of the Court, that the course of justice stands in danger of frustration unless temporary curial intervention can be unilaterally obtained".

In the instant proceeding it has not been indicated how the course of justice stood in danger of frustration at the respondent's instance had the applicant not precipitated urgency in the matter. I accordingly must emphasise that the rationale of Rule 8(22) is that *ex-parte* orders obtainable on a unilateral basis are not just there for the picking.

The applicant's founding affidavit made no attempt to enlighten this Court that there was a strike staged by the applicant which strike it now turns out had a lot of bearing on the negotiations geared at implementing the terms of Annexure "D" which itself was conceived without proper arrangements having been made let alone securing and ascertaining the preparedness of government to allocate funds specifically to cover the car allowance. This factor i.e. government's preparedness appears to me to have been a *sine qua non* were the terms of Annexure "D" to be regarded as having been properly determined between the parties. What seems to have been overlooked by the applicant is that even though the contract seemed on the face of it to have been concluded its vital terms still depended, according to at

least the understanding of the other party, on terms being negotiated with government to meet the aspect of car allowance in Annexure "D". The meeting of this term appears to me to have been of such vital importance that the so-called contract would remain a mere condition between the parties as long as there was no certainty that government would come up with the necessary funding. Assuming that Annexure "D" was properly signed by all parties concerned and therefore had some semblance of validity the situation here would not be very different from where parties contract that certain amount of Cargo of say Tunisian horse beans, carried in the high seas at the time of the contract between the parties would pass to one of the parties. Even though this would seem a valid contract the fact that the parties were not aware immediately after concluding the contract that the ship would sink or had in fact sunk cargo and all; and rested at the bottom of the ocean would imply that the contract could only be conclusive on the fulfilment of the implied term that the ship shall have made the shore intact. Of importance in this regard is that the law itself reads the implied term into that contract. Likewise in the instant case for as long as the vital aspect of finding source for the funding of the contract concluded without prior ascertainment of that source, the conclusion becomes irresistible that the procuring of such source is an implied term without the fulfilment of which the contract would not be valid. To that extent the enforcement of the agreement would be conditional upon the implied term coming into operation.

If my view of the matter above proves wrong, then the next difficulty that the applicant is faced with, which is even more formidable than any other is that concerning the fact that enforcement of the contract spoken of would result in the respondent breaching the law of the land.

Order No.19 of 1992 **The National University of Lesotho Order, 1992** Was passed by the highest law making body of the land at the time.

Section 38 of the above order provides that :-

"The Council shall,

> (a) in each year adopt for the next following year, commencing of (*sic*) the first day of July, a budget for all funds of the University other than those to which paragraph (b) of this section relates, and shall approve all amendments to the budget and shall control expenditure of the University so that it confirms (*sic*) as nearly as practicable to the approved budget; and
>
> (b) review annually funds available to the University by way of bequest, donation or special grant, and the expenditure thereof and shall, subject to the terms of any trust and before any such expenditure is made, approve the proposed disposition of those funds".

I am satisfied that there is nothing in the present University budget which allows for the payment of motor car allowances to staff. Page 71 of this paginated

record amply shows that the Bursar "repeatedly advised the members of the two negotiating teams that there were no funds in the University budget to pay for these benefits".

The applicant seems to show great irritation and stock reaction in response to the mention by the respondent of the respective parties' negotiators. In this attitude the applicant seems to be blissfully oblivious of the fact that its so called contract i.e. Annexure "D" on which the proceeding is based is not signed by any of the parties thereto. *Mr Mosito* in response to this challenge stated that Annexure "D" is a specimen of the contract. But in civil proceedings a party should come to court bearing in mind the vast distinction between basing its case on proper documents and the risk it takes in failing to furnish such document which in my view would constitute acceptable evidence. The fact that no attempt in the affidavit has been made to say why a specimen has been substituted for a proper document compounds the baselessness of the applicant's optimism. Had the matter been brought in the ordinary way perhaps the court would have looked at this infraction of the Rules differently in the rare event that it could have occurred at all. In the circumstances it would seem the applicant has rashly cooked its own goose. I need hardly dwell on the embarrassment that the respondent is said to have gone through by being told that it should answer the case by members of the applicant whose

individual identities was never disclosed. In the result there was no application for condonation of the absence of the contract on which the case is based and needless to say none was granted. The unexplained absence of a signed version of as vital a document as Annexure "D" leads to an irresistible inference that in effect the document was never signed by the parties because if it was it would have brought real grist to the applicant's mill. How then could such an important document which constitutes the very foundation of the applicant's case be not attached to its papers. This absence in turn lends credence to the view that Annexure "D" in fact couldn't have been signed while the University was hoping to get the green light which never came from government. Annexure "D" constitutes lack of admissible evidence to make the simple case that was sought to be made. See C. Of A. (CIV) No.4 of 1984 ***Lawrence Matime vs Arthur Vincent Moruthoane*** by Schutz P. Far be it from me therefore to be so gullible and credulous as to incline to the view that any amount of eristic oratory can undo or fill this gaping hollow in the applicant's case. This disregard of the need to do things properly seems to be in defiance of the generality of the remarks by Ackermann J.A. in C. of A.(CIV) 17 of 1990 ***Makenete vs Major General Lekhanya & 2 Ors*** (unreported) at p.4 that :

> "..... The attitude evinced seems to be that the rules are unimportant, can be overlooked or condonation granted as a matter of course and right. It is time that practitioners' minds were disabused of this much mistaken impression and the misconceived idea that their disregard of the rules will be overlooked because of the prejudice their clients might suffer. Clients who suffer loss because of omissions on

> the part of their legal representatives may, in appropriate circumstances, have remedies against their advisers".

I am painfully aware that our rules impose no requirement on practitioners, in the name of giving assistance to the Court, to file heads of arguments in application proceedings. It may well be that the applicant's counsel failed to file any because of this. The Court thus appreciates the effort of the respondent's Counsel in finding it his duty to be serviceable to it regard being had to the fact that naturally the respondent has far shorter time than applicant to prepare heads and file them in time to be of any meaningful help to the Court. It is to be hoped that all practitioners as officers of Court will see merit in being of assistance to the Court by filing heads. But before letting *Mr Mosito* off the hook I stumbled upon the decision of Ramodibedi J dated 11th February, 1997 i.e. delivered just nine days before the order that was to come in the instant matter. It appears that *Mr Mosito* was after all representing one of the parties in that proceeding.

It escapes me therefore how in the instant case he could have overlooked the learned Ramodibedi J's unequivocal laying down of the law on the question of heads of argument notwithstanding the absence of rules in that regard in the High Court. The case in point is CIV\APN\475\96 ***'Mabataung Moletsane vs David Mohapi Moletsane*** (unreported) at page 12 where the learned Judge said :

"There is however one aspect that I should mention as *guidance for the future*. It is this.

At the commencement of the hearing of the matter before me I inquired from both counsel why they had not filed heads of argument in the matter. *Mr Mosito* promptly *apologised and undertook to file heads of arguments in future.*

Mr Lesuthu's response however left me dumfounded and shocked. He informed the court that he has never known that heads of arguments are filed in civil cases. He added that he has always been under the impression that heads of argument are only filed in criminal cases.

What was shocking was that as I looked at counsel he appeared genuinely ignorant. I immediately worried over whether this might be a reflection of the standard of our legal profession.

It must never be forgotten that judges depend largely on the Bar and the Side Bar for assistance in dispensing justice. That is how it should be ....."

I agree with the learned judge entirely.

It stands to reason that in the light of the decision cited above and the undertaking at the time by then respondent's counsel it is unpardonable that no heads of arguments were filed on behalf of the applicant in the instant matter. A suitable order will be made to suit the action to the word at the end of this judgment for purposes of giving remedy to this rather irritating act of indiscretion and deliberate indifference to clear imports of judgments of this Court.

I accept *Mr Woker's* submission that to confirm the Rule and direct the University to continue to pay car allowances would be to direct that institution to contravene section 38(a) of the University Order. A court will never direct a litigant to break the law.

Even though this matter when it came before me appeared to be highly contested the Court was nonetheless able to distill from the disputations the fact that taken together the affidavits of the Registrar, Bursar and the Vive Chancellor show that the University redeployed a sum of M610 210-00 of the University's budget away from other cost items in that budget to use to pay the car allowance and a medical aid benefit. It seems that all concerned recognised that these funds being limited would not last. But even so the attitude was that these funds should be used for as long as possible.

Acceptable evidence makes it clear that by December 1996 these funds were virtually depleted and that if the University continued to pay both the car allowance and the medical aid benefits then the monies would be exhausted by March 1997.

Bearing in mind that the government was not forthcoming with further funding it seems to me that the University acted prudently by not risking to lose both car and

medical aid benefits and instead opting to sacrifice one benefit to save the other. In the result Council which is a supreme authority in the University voted to freeze the car allowance so as to save the medical aid benefits. The applicant seeks to unduly emphasise the World Bank factor and its threats while choosing to cast a blind eye on the practical approach adopted by the University faced with the choice either to lose both benefits or sacrifice one to save the other. It is this decision by Council that the applicant seeks to challenge.

In a caustic language clearly unworthy of appearing on Court papers the applicant seizes on the World Bank factor and in the process blinds itself to the real issues at the bottom of this proceeding. See page 90 paragraph 13.

It was strenuously argued for the applicant that there are striking contradictions in the respondent's affidavits, but as I indicated earlier I found none. I therefore accept *Mr Woker's* submission that given the background referred to earlier there are no contradictions in the respondent's answering affidavits. "In fact the Vice-Chancellor explains the position exactly in the terms deposed to by the other deponents". See head 10 of respondent's heads of argument.

I further accept the respondent's submission that to suggest that the various

affidavits have contradictions in them is to adopt too simplistic an approach to the real issue in this application; and that what in fact has happened is that the Council has tried to act wisely and for its trouble it is being challenged in these proceedings.

It is amazing that the applicant should emphatically deny the University is out of funds but in the same breath at page 51 Annexure "F" item 4 say in its list of observations :

> "That it is clear that part of the explanation of the *financial crisis currently afflicting the University* is its failure to implement the recommendations of the World Bank Study on Cost-Containment".

and also at (b) that the applicant unanimously agreed

> "To give the Executive a mandate to meet with the University management with a view to examine (*sic)* globally the *financial crisis afflicting* the University.....".

That the applicant at once denies and recognises the existence of the situation set out above is a typical example of blowing hot and cold; a factor which at all times fails to meet with the light of the Courts of law's countenance.

The Court takes cognisance of the fact that the University Council is the supreme governing body of the National University of Lesotho. Where such a body has exercised its discretion in a manner that, taking all circumstances into account,

seems unimpeachable it would not ordinarily be wise for a Court of law to interfere lightly with the exercise of that body's discretion and the financial wisdom that seems to have been properly attendant throughout the hard choices that the University Council found itself having to make. See Section 10(1) of Order No. 19 of 1992.

The Court stresses the Council's proper exercise of its discretion and wisdom in the light of the fact that when the University submitted its budget for 1997\98 to the Ministry of Education which included an allocation to cover the car allowance, the Ministry rejected this budget and in particular the car allowance. See page 67 paragraph 25(i) and (ii). The University subsequently withdrew the car allowance from the budget. See page 69.

The applicant's callous and nonchalant attitude to all this is that "the issue that the Council has withdrawn the car allowance from the 1997\98 budget is irrelevant and nonsensical". See page 90. It seems that the applicant's only concern is to have the allowance paid for the months of January to March 1997 as there are funds available for that purpose. See page 87.

This contention however deliberately if insensitively overlooks provisions of

Section 38(a) of the University Order 19 of 1992.

The applicant complains that the decision to freeze payment of the car allowance was unilateral. In response thereto *Mr Woker* made the following submission which I found very persuasive namely that

(a) the decision was not unilateral *in effect* because although the decision was taken in December 1996 it would only be effective at the end of January 1997 when the next allowance fell due for payment. In the interim the Union was invited to negotiate (see page 50). **Alternatively** it didn't do so in good faith. Instead it took the University to Court *ex-parte*. Had they negotiated in good faith they would have realised and accepted that the position was hopeless. Instead they demanded a further redeployment of funds. See pages 51 and 52. It follows from the above that the applicant cannot complain about the manner in which the decision was taken;

(b) the decision could never be unilateral because it was part of the agreement between the Council and the applicant. In effect the University was performing one of the terms of the agreement;

© the Council is by virtue of section 10(1) of the University Order, 1992 the supreme governing body of the University. ..... The statute by implication excludes the need for Council to consult. This is necessary to enable the Council to govern the University effectively.

> With regard to the oral application by *Mr Mosito* for the applicant that paragraphs 17 and 18 of the Registrar's affidavit be struck out on the basis that they are hearsay in so far as the Registrar deposes to whether the University has no money factually, it seems to me that page 63 paragraph 11 of the Registrar's founding affidavit provides the answer by informing this Court in the same paragraph that '..... As University Registrar and Secretary of the Council I was at all times involved in the negotiations. I have personal knowledge of the facts deposed to hereinafter'".

Needless to say paragraphs 17 and 18 fall within the category covered by the word *hereinafter*. The Registrar was accordingly a witness to the agreement thus the contents of the paragraphs complained of can accordingly never be hearsay.

Again what the Court is able to distil from the applicant's contentions in the averments and arguments for the view that the University can continue to pay the car allowance is that these appear to be reposed on the Council minute at page 97 reading

> "A question was asked to determine if the financial position of the University would allow payment of the Car Allowances in December, 1996 and if that would not annoy the Government of Lesotho to think that the University is diverting funds from all the programmes to pay allowances.
>
> A response indicated that the allowances from the internal sources that had been approved by the Board of Finance and Council were

> sustainable up to March 1997 when the Government would hopefully absorb the expenses in the Budget. This was a tolerable expenditure under the prevailing circumstances.
>
> Another member expressed grave concerns that this unilateral recommendation to freeze the allowances will place the University in a predicament because of a series of extensive and intensive consultations\negotiations that went on between LUTARU and the Council\University Management. All these pressures compelled the University to implement the allowances".

As *Mr Woker* properly indicated what the minute does say is that *allowances* from internal sources can be paid "up to March 1997". The minute goes on to suggest in a following paragraph 3 that a lot of debate ensued regarding the merits and demerits of paying the car allowance. It is not stated in the minute what this debate entailed. What is interesting is that even the member who expressed grave concern about unilateral freezing of the car allowance by Council lends credence to the Registrar's emphatic averments that the University was faced with hard choices. Pressure by the strike action of the Union which resulted in students not being taught, the unwholesome atmosphere that continued to present an intolerable gloom in the University Campus in the result, and inavailability of resources to sustain the demand for Car allowances. All these considerations lend credence to the view that there was never any firm undertaking that the Car allowance would be sustainable or at best subsist beyond March 1997 failing Government's preparedness to provide funding. It cannot have been the negotiators' contention that the car allowance

would be wholly and always dependent on re-deployment of internal resources for that would amount to reposing trust of such a big scheme, for its success, on robbing Peter to pay Paul!

It seems then to be true that the factual issue in dispute in this application which goes to the heart of the matter is whether or not the respondent had the money to pay the car allowance. It appears to be common cause that if it can pay it can only do so until the end of March 1997 as can be gathered from page 87 paragraph 6. It should stand to reason that if factors show that the respondent has no money to pay then it would be worthless to expect that it could afford to pay and continue to exist as an entity.

I wish to round off by reference to Rule 8(22)(b) once more in conjunction with local authorities on the issue. In CIV\APN\106\93 ***Lesotho Medical and Pharmacy Council vs Domitilla Musoke*** it was emphasised that this Rule is mandatory and non-compliance with it is fatal. I observe that the applicant's founding affdavit at page 6 paragraph 5(f) is the only paragraph that touches upon urgency yet it has not dealt *in detail* with the circumstances which render the application urgent as the Rule requires. Nor is there anything in the affidavit to show *why the applicant could not be afforded substantial relief in a hearing in due*

course if the periods prescribed by this Rule were followed. See also ***Khaketla vs Malahleha & Ors*** C. Of A. (CIV) No. 18 of 1991.

It thus becomes clear to me that had the applicant given consideration to this Rule it would have realised that the harm it contends is not irreparable for the applicant was at large to and could sue for damages, or obtain back pay or even sue for specific performance.

There is merit also in the argument that the applicant, in deference to the requirement of the rule that the applicant should show that it could not secure substantial relief in a hearing in due course, was at large to have resorted to the Labour Court bearing in mind that the Labour Code was created specifically for the type of dispute this court is dealing with presently.

Mr Woker under mistaken belief that the rules in Lesotho are the same as those in the foreign jurisdiction where he normally practices, argued for the discharge of the rule which in effect implied that the relief granted then would be of a temporary nature according to practice in that foreign jurisdiction. In Lesotho however in urgent applications the discharge of a rule amounts to dismissal of the application in its entirety.

costs.

In line though with the stern warning sounded in ***Moletsane*** above at p.13 that to ensure that proper standards are maintained by practitioners appearing before this Court and that irrespective of whether matters to be argued before Court are criminal or civil "something drastic" should be done, and that pronouncements by any branches of this Court are taken seriously; I have considered however to impose a nominal penalty upon the applicant's legal representative personally in the sum of M100-00 three quarters of which is suspended with the result that the learned Counsel shall be required to pay M25-00 in the form of revenue stamps which the Registrar of this Court shall attach on the reverse side of the last page i.e. p.130 of the paginated record and cause the same to be defaced and proper entries made in the stamps register.

JUDGE
5th January, 1998

For Applicant : Mr Mosito
For Respondent: Mr Woker