CIV/APN/422/96

IN THE HIGH COURT OF LESOTHO

In the matter between

SENIOR UNIVERSITY STAFF UNION — **APPLICANT**

and

NATIONAL UNIVERSITY OF LESOTHO — **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On 18th day of February, 1997.

In this matter the Applicant seeks an urgent relief in the form of declaratory orders couched in the following terms:

"(a) Dispensing with periods of notice required by the rules on the account of urgency of this matter;

(b) Declaring that the current Senior Administrative Staff of the University are entitled to be paid the car allowance in terms of the new contract which spells out the academic terms and conditions of service;

(c) Declaring that the current Senior Administrative Staff of the University are for all intensive purposes to be treated in the same manner as all other members of staff who are on academic terms and conditions of service.

(d) Directing Respondent to pay the costs hereof;

(e) Granting Applicant such further and/or alternative relief as this Honourable Court may deem it fit."

According to the papers before me there are two types of contract of employment which are the subject matter of the litigation here. They are the following:

(a) One is entitled "National University of Lesotho TERMS OF SERVICE FOR ACADEMIC LIBRARY AND SENIOR ADMINISTRATIVE STAFF."

Clause 1 of this contract reads thus:-

"1. AUTHORITY:

These terms and conditions of service became operative from 1 July, 1977."

This contract is Annexture "C" in the papers before me and I shall hereinafter refer to it as "the Old Contract."

(b) The other contract is entitled "NATIONAL UNIVERSITY OF LESOTHO TERMS OF SERVICE FOR ACADEMIC STAFF.

Clause 2 thereof is to the following effect:

"2. AUTHORITY

These terms and conditions of service became operative from

the First of July 1996."

This contract is Annexture "B" in the papers before me and I shall hereinafter refer to it as "the New Contract."

I should mention at this stage that the New Contract was brought about as a result of negotiations of a Union called Lesotho University Teachers and Researchers Union (LUTARU) with the University Council.

The bone of contention as far as this application is concerned is that unlike the old contract, the New Contract contains a provision for Car Allowance in terms of clause 13 D thereof which reads as follows:-

"13

D. CAR ALLOWANCE

A member shall be entitled to 10 percent 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 word "member" referred to in the above mentioned clause obviously means a member of the Academic Staff as defined in Clause 1 of the New Contract. That clause reads thus:-

"1. DEFINITION

The term academic shall denote all members of staff in the Teaching, Research, Extension and Senior Library Cadre."

Clauses 4 and 5 of the New Contract are also significant as they provide as follows:-

"4. NATURE OF APPOINTMENT

All appointments are governed by provisions of the National University Act and Statutes, and any Ordinance or Regulations made thereunder (as shall be amended from time to time).

5. GRADES

Appointments under these terms of Service shall be in one of the following grades:

(I) Professor

(ii) Associate Professor

(iii) Senior Lecturer/Senior Research Fellow/Senior Extension Educator/Senior Documentalist/Senior Librarian.

(iv) Lecturer/Research Fellow/Extension Educator/Documentalist/Librarian.

(v) Assistant Lecturer/Assistant Research Fellow/Assistant Extension Educator/Assistant Documentalist/Assistant Librarian.

(vi) Teaching Assistant/Research Assistant/Extension Educator Assistant/Documentation Assistant/Teaching Assistant/Graduate Library Trainee."

What is obvious from the definition of the term "academic staff" and the grades in the New Contract is that members of Senior Administrative Staff for whom the Applicant herein claims to represent are excluded. The latter members are still included in the Old Contract under Clauses 2 and 4 thereof which read thus:-

"2. NATURE OF APPOINTMENTS

All appointments are governed by the provisions of the National University Act and Statutes, and any Ordinances or Regulations made thereunder.

4. GRADES

Appointments under these Terms of Service shall be in one of the following grades or their equivalent:

(a) Academic: Appointments shall be of six grades, namely:-

(I) Professor
(ii) Associate Professor
(iii) Senior Lecturer
(iv) Lecturer
(v) Assistant Lecturer
(vi) Administrative/Research/Teaching Assistant.

(b) Senior Administrative and Library Staff:

Appointments shall be of six grades, namely:-

(I) Registrar, Librarian
(ii) Bursar
(iii) Deputy Registrar, Deputy Librarian, Director of Works
(vi) Senior Assistant Registrar, Senior Assistant Librarian, or Senior Assistant Bursar, Deputy Bursar.
(v) Assistant Registrar, Assistant Librarian or Assistant Bursar or Dean of Student Affairs.
(vi) Administrative Assistant or Senior Library Assistant."

For the avoidance of doubt I should mention that it is common cause in this case that Applicant's alleged members namely the Senior Administrative Staff have not signed the New Contract but have signed the Old one.

It proves convenient at this stage to refer to relevant legislation in the matter.

The National University of Lesotho (the Respondent) was established as a body corporate by the National University Act No. 13 of 1975.

The term "academic staff" as far as the National University of Lesotho is concerned was first defined in Section 2 of the National University of Lesotho Act No. 10 of 1976 as follows:-

> "2. In this Act unless the context otherwise requires -
>
> "Academic staff" means the Vice-Chancellor, Pro-Vice-Chancellor, and members of the teaching and research staff of the University."

It is obvious to me therefore that members of Senior Administrative Staff were not included in the term "academic staff" in terms of the National University Act 1976.

Section 2 of the National University of Lesotho Order No.19 of 1992 however introduced Senior Administrative Staff into the term "academic staff" in the following words:-

> "2. In this Order unless the context otherwise requires, "academic staff means the Vice-Chancellor, the Pro-Vice-Chancellor, the Teaching and Research staff, Senior Administrative staff, Senior Library staff, documentalists and other members of staff of the National University appointed on academic terms of service."

The application before me is based on the above mentioned section. It is Applicant's contention that because members of Senior Administrative staff have been statutorily defined as members of the academic staff therefore they are automatically entitled to enjoy the benefits that are contained in the New Contract more particularly car allowances notwithstanding the fact that they have not signed the New Contract. It is also sought to persuade the court to invoke the constitutional principles of equality of treatment and the principle against discrimination.

In paragraph 2 of her answering affidavit 'MASEFINELA MPHUTHING who is admittedly the Registrar of the Respondent University and as such Secretary of the University Council states as follows:-

"POINTS IN LIMINE

The following points of law will be taken in lemine (sic) by the respondent's counsel at the hearing hereof:-

1. This is a matter that falls within the jurisdiction of the Labour Court, and therefore this Honourable Court has no jurisdiction to entertain this matter.

2. There is no urgency in this matter, and there is no reason why applicant did not serve the papers upon the respondent in the normal way.

3. Applicant has no locus standi to enforce prayer (b) in as much as no legal enforceable right in respect of the said prayer exists at the instance of applicant."

At the commencement of the hearing of the matter before me Mr. Mosito for

the Respondent withdrew the first point in limine based on jurisdiction. The points in limine were therefore restricted to the question of urgency and locus standi only.

Purely as a matter of convenience I directed that the points in limine be argued along with the merits of the application. In doing so I recalled the remarks of this court in Basotho National Party v The Management Board, Lesotho Highlands Revenue Fund and 2 others CIV/APN/335/95 (unreported) where in dealing with a similar situation I had occasion to state:-

> "It is therefore necessary to examine the entire body of evidence from all the affidavits and documents before me to determine whether despite lack of specific averments thereto the Applicant nevertheless does have the required locus standi. It was partly for this reason that the court ruled that the question of locus standi be argued together with the merits of the case as deposed to in the affidavits and having regard to the law and any relevant statutes. The other reason of course was in case I found myself unable to make an immediate ruling on the point in limine which might have the effect of concluding the matter in favour of either party without the necessity of going into the merits. I find myself in very good company in this approach as it has become increasingly common for the question of locus standi to be considered together with the merits of the claim. See Kendrick v Community Development Board 1983 (4) S.A. 532. See also The Administrator, Transvaal and The Firs Investments (Pty) Ltd. V Johannesburg City Council 1971 (1) S.A. 56 (A) in which the question of locus standi was raised for the first time in the appeal."

I discern the need to adopt the said remarks herein as indeed they are apposite to the case before me.

I proceed then to deal with the remaining points in limine.

1. That there is no urgency in this matter.

In paragraph 4.3 of his founding affidavit JOSEPH MAEMELA HLALELE deposes as to urgency as follows:

> "This matter is urgent in that the other members of staff who are on academic terms and conditions of service continue to enjoy this benefit (car allowance) to the exclusion of the current Senior Administrative Staff. The University Council had to attend to the needs of Lesotho University Teachers and Researcher Union to avoid an imminent strike which was threatened by the members of that union. It is my genuine belief that unless this matter is attended to urgently members of Applicant may go on strike as they have been very patient thus far."

The Respondent's answer to this allegation is contained in paragraph 5 of the answering affidavit of 'MASEFINELA MPHUTHING who avers as follows:

> "5.
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> :
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> :
>
> 4.3 There is no urgency in this matter. This Honourable Court will be taken at ransom through intimidations of strikes. If such a strike takes place to which it is submitted employees are by law entitled to resort to the respondent will take appropriate steps and\ counter measures to protect itself against the damaging of its business by employees who would in breach of their contracts. (sic). Anyway the respondent will cross that bridge when it comes to it."

It is also important to bear in mind that in paragraph 3.5 of his founding affidavit JOSEPH MAEMELA HLALELE himself states that the recommendation to separate the cadres in the academic staff was approved by the University Council as far back as November 1995. Yet there is no evidence before me that the Applicant ever took up the matter with the Respondent nor did it resort to the Labour Code 1992 to have the matter resolved. In this regard Section 225 of the

Labour Code Order, 1992 provides thus:-

"225. Settlement of trade disputes

(1) where there is a trade dispute and the Labour Commissioner is of the opinion that suitable means for settling the dispute already exists by virtue of the provisions of any agreement reached between the parties, he or she may refer the dispute for settlement in accordance with those provisions.

(2) Where the Labour Commissioner does not refer the dispute for settlement under subsection (1) or where upon such reference there has been a failure to reach a settlement, the Labour Commissioner shall immediately:-

(a) inquire into the causes and circumstances of the dispute; and

(b) take such steps as seem expedient to promote a settlement of the dispute."

Furthermore, as earlier stated the New Contract providing for car allowances to the members thereof came into operation on the 1st day of July, 1996. Yet the present application was only filed with the Registrar of this Honouranble Court on the 18th November, 1996 which is a delay of full four (4) months.

JOSEPH MAEMELA HLALELE alleges in paragraph 3.9 of his founding affidavit that the Applicant protested against the aforesaid payment of car allowances and that "the University Council has refused to deal with the said protest or has decided to ignore it completely." I observe however that the deponent merely makes bare unsubstantiated allegations herein. Once more no resort was made to Section 225 of the Labour Code Order, 1992.

But even assuming that the Applicant had in fact unsuccessfully protested against the said payment of car allowances I do not then see how that in itself could suddenly turn the matter into one of urgency.

In my view the real reason that was advanced for the perceived urgency in the matter is that stated by JOSEPH MAEMELA HLALELE in paragraph 4.3 of his founding affidavit namely that:-

> "Unless this matter is attended to urgently members of Applicant may go on strike as they have been very patient thus far."

Once more this allegation remains unsubstantiated. There is no evidence before me that members of Applicant will (as opposed to may) in fact go on strike. This statement therefore is speculative.

There is no doubt in my mind however that the above mentioned statement clearly amounts to threats by the Applicant that its members may go on strike unless the court hears their case as a matter of urgency.

In my opinion this is a classical case of a litigant creating its own urgency. That cannot be tolerated. I consider therefore that the perceived urgency is not genuine at all.

What is more, it must be recorded that this court takes a very dim view of the above mentioned threats which amount to intimidation of the court by the Applicant. The Applicant was ill advised to employ this type of arm twisting tactic which can only bring our justice system into disrepute if it is tolerated. Consequently this court disapproves of this type of attitude in the strongest possible terms. I shall return to

this aspect later.

Suffice it to say that the Legislature in its own wisdom has set up a machinery in terms of the aforesaid Section 225 of the Labour Code Order 1992 for settlement of labour disputes. It is my considered view therefore that until the Applicant has exhausted his remedies in terms of the Labour Code Order it cannot be said that the matter is urgent. There must first be a dead-lock reached in the dispute in question after the intervention of the Labour Commissioner. This has not been done in the present case.

In the circumstances as aforesaid I have come to the conclusion that there is no urgency in the matter.

2. That Applicant has no locus standi to enforce prayer (b) in as much as no legal enforceable right in respect of the said prayer exists at the instance of the Applicant.

In Mars Inc v Candy World (Pty) Ltd 1991 (1) S.A. 567 (A) at 575 Nestadt JA had this to say:-

> "In accordance with the general rule that it is for the party instituting proceedings to allege and prove that he has locus standi, the onus of establishing that issue rests upon the Applicant. It is an onus in the true sense; the overall onus (South Cape Corporation (Pty) Ltd. V Engineering Management Services (Pty) Ltd. 1977 (3) S.A. (A) at 548 B)."

I respectfully associate myself with these remarks.

It is also important to bear in mind the remarks of Tebbutt J in AAIL (SA) v

Muslim Judicial Council 1983 (4) 855 at 861 to the following effect:-

> "It is quite clear that in order to determine whether an association possesses the characteristics of a universitas the court has to consider the nature and objects of the association as well as the constitution. The constitution is clearly, the most important."

I entirely agree.

In paragraph 2 of his founding affidavit JOSEPH MAEMELA HLALELE deposes as follows:-

> "Applicant is **SENIOR UNIVERSITY STAFF UNION** a trade union duly established under Part XIII of the Labour Code 1992 carrying on business at the Roma Campus of the National University of Lesotho in the Maseru district which consists of staff members appointed on academic terms and conditions of service and members of staff appointed on Senior Administrative terms and conditions of service by the National University of Lesotho as well as interested senior staff."

It is significant that nowhere does JOSEPH MAEMELA HLALELE allege and prove that Applicant has locus standi.

What is worse the constitution of the Applicant union has not been attached to the papers before me. In the absence of the constitution this court is therefore unable to determine the powers and rights of the Applicant and whether such powers and rights include representation of the interests of members of the Senior Administrative Staff. In this regard I further attach significance to the fact that none of the ordinary members of the Senior Administrative Staff has sworn a supporting affidavit to this application.

Mr. Pheko for the Applicant has tried to overcome this hurdle by arguing that because it is not disputed that Applicant is a trade union therefore it has the right to represent its members. Mr. Pheko further submits that it is not disputed for that matter that Applicant is in fact representing its members in this matter. I do not agree. In fact I observe that there is no allegation altogether in the papers before me that Applicant is representing its members in this matter.

Nor do I think it suffices for the Applicant merely to show that it is a trade union. In my opinion a trade union is not necessarily relieved from alleging and proving that it has locus standi to sue in the absence of a constitution to that effect.

In this regard it is necessary to bear in mind the definition of the term "trade union."

Section 3 of the Labour Code Order, 1992 defines the term trade union as follows:-

> "Trade union means any combination, either temporary or permanent, of ten or more employees or workers, the principal purposes of which are, under its constitution, the representation and promotion of employees' interests and the regulation of relations between employees and employers, or between employees, whether such combination would or would not, if the code had not been enacted, have been deemed to have been an unlawful combination by reason of its purposes being in restraint of trade" (my underlining).

In my judgment the rights and powers of a trade union are derived from its constitution. I am fortified in this view that I take by the fact that apart from the definition of the term "trade union" in Section 3 of the Labour Code nowhere are rights and powers of a trade union specifically spelt out in the Code.

In the circumstances I have come to the conclusion that the Applicant's failure to attach its constitution to the application before me is fatal and that consequently the Applicant has failed to establish locus standi.

I turn now to consider whether the Applicant has locus standi in the sense of having a direct and substantial interest capable of legal enforcement in the subject matter of the application and in the outcome thereof.

As earlier stated Applicant's case rests solely on the statutory definition of the term "academic staff" as defined by Section 2 of the national University of Lesotho Order, 1992. The question that immediately arises therefore is whether this definition automatically embraces the terms and conditions of employment of members of the Senior Administrative Staff.

The Learned author Gibson: Mercantile and Company Law states as follows on page 222:-

"In general statutes do not provide a contract for the parties."

I entirely agree.

In Casserly v Stubbs 1916 TPD 310 at 312 Wessels J stated the following principle:-

> "It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the ordinance must be such that we can come to no other conclusion than that the legislature did have such

an intention."

The Appellate Division also decided in the same vein in Dhanabakium v Subramanian & Another 1943 A.D. 160 at 167 where Tindall JA held:-

> "It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law."

I entirely agree with the principles enunciated in these cases.

What then is the common law in this matter? In my judgment the terms and conditions of service in individual employment relationships are derived from the common law of contract.

I proceed then to determine whether the National University of Lesotho Order, 1992 has altered the common law of contract in the matter.

As a starting point I observe that the definition of the term "academic staff" does not prescribe that members of academic staff shall hold identical contracts or terms of service, rights or benefits nor does it attempt to regulate such terms and conditions of service of members of the academic staff.

I am satisfied that if the Legislature had intended that members of the academic staff should be treated equally irrespective of seniority, qualifications, experience, merit, efficiency etc. it would have said so expressly. As an example I cannot imagine that it could have been the intention of the Legislature to treat the man at the top of the academic staff namely the Vice-Chancellor equally with the

man at the bottom of the cadre.

In the circumstances therefore I have come to the conclusion that the National University of Lesotho Order, 1992 particularly Section 2 thereof has not altered the common law of contract of service. Accordingly I find that the terms and conditions of service of employees of the National University of Lesotho are to be found in the contracts of employment.

In this regard Section 56 (5) of the National University of Lesotho Order, 1992 preserves existing contracts of employment as follows:-

> "All members of the academic staff and other officers and servants of the University appointed or continued in office under the National University Act 1976 and in office at the commencement of this order shall subject to this Order, continue to hold their offices in terms of their appointments thereof respectively under and for the purposes of this Order and shall, without further or other appointment be deemed to be appointed under this Order." (My underling).

The use of the word shall in this section clearly indicates that the section is peremptory. I consider therefore that the old contracts are still valid and that in order for any employee to wriggle out of such contract and enter into the current contract he/she must first negotiate with the employer namely the Respondent University failing which he/she must follow the trade dispute machinery of the Labour Code as above stated.

Section 10 of the National University of Lesotho Order, 1992 provides in part as follows:-

"10. (1) The Council shall be the supreme governing body of the University.

(2) Subject to this Order and the Statutes, the Council shall manage and control all the affairs, concerns and property of the University and may act in all matters concerning the University in such manner as appears to it best calculated to promote the interests and functions of the University and in particular and without limiting the generality of the foregoing shall have and may exercise the following powers,

(a) regulate its own procedures;

:

(c) enter into, vary, carry out or rescind contracts on behalf of the University;

:

:

(k) establish such administrative or service sections or units as it deems fit and from time to time abolish or vary the constitution of any such administrative or service section or unit;

(n) provide for the welfare of all persons in the employment of the University including the

provision of pension and retirement benefits.

:

(q) subject to this Order, to make statutes, ordinances and regulations and to confirm any regulations drawn up by the Senate in pursuance of its powers and under this Order."

I am satisfied therefore that in order to discharge its functions as above stated the University Council was given carte blanche to regulate its own procedures by statutes, ordinances and regulations.

See Sehloho Mokapela v The Minister of Home Affairs and 4 others C of A (Civ) No. 16 of 1995 (unreported).

Statute 24 (4) of the Respondent University significantly provides that:

"4. Every member of the academic staff holds office under the terms of this Statute and of any Ordinances and Regulations made under it, and of any Resolution of the Council, and upon such terms of his contract of employment as are not inconsistent with this Statute and any such Ordinances, Regulations, and Resolutions." (my underlining).

Sub-section 23 of Statute 24 is also instructive and it provides that :-

"23. The Council may make Ordinances or Regulations with respect to the terms, conditions of services, and manner of appointment

> of the Members of the Academic Staff of the University, and may from time to time vary or revoke any such ordinances or Regulations, albeit not to the disadvantage of any Member of the Academic Staff with respect to the terms and conditions of his current period of employment."

From the foregoing I am satisfied that the Respondent University has unfettered power and/or discretion to enter into any contracts with individual employees. Accordingly I find that both the Old Contract and the New Contract are valid contracts as between the Respondent University and the individual employees who are signatories thereto. I cannot then see how a person who is not a signatory to these contracts can validly claim benefits arising therefrom. Yet in essence that is precisely the Applicant's case before me.

In Dalrymple v Colonial Treasurer 1910 T.S. 372 Innes CJ observed at page 379:-

> "The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence. It is not confined merely to the civil side .... And the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals."

I entirely agree with these remarks which are apposite to the case before me.

In his book on Administrative Law, Lawrence Baxter states as follows at page 652:-

"In order to establish his standing, the challenger must claim that:

1. Some legal right or recognized interest is at stake,
2. The right or interest is direct; and
3. The right or interest is a personal (and possibly special) one."

In this regard the remarks of Aaron JA in Lesotho Congress of Free Trade Unions v Ts'eliso Ramochela and 3 others 1982-84 LLR 442 are apposite in this case. This is what he stated at page 447 on the question of locus standi:-

"......the Appellant is not a member of the LFTU: It is a rival federation..... Appellant's interests may be affected by a decision on these matters, but it has no legal rights capable of enforcement arising therefrom."

In view of the fact that neither the Applicant nor its alleged members have signed the New Contract then I have come to the conclusion that the Applicant has no right capable of legal enforcement arising from such contract. It cannot claim car allowances on behalf of its members because such allowances only arise from the signing of the New Contract. Accordingly I have come to the conclusion that Applicant has no locus standi to sue in this matter.

Nor does this court find that there is any merit in Mr. Pheko's submission

based on the so called discrimination. I consider that such is the nature of labour relations that differences in the terms and conditions of service amongst individual employees are bound to occur where they hold different contracts or where they do not perform identical or the same type of work or even where they differ in terms of seniority, experience, qualifications etc. The list is not exhaustive.

In this regard the decision of the Industrial Court of the Republic of South Africa in National Union of Mine Workers v Henry Gould (Pty) Ltd. & Another (1988) ILJ 1149 is very instructive. The court held as follows at page 583 :-

> "Where a system of plural representation is in existence as in this case, it necessarily holds within it the possibility that the principle of equality will be sacrificed. ..... where the members of a labour unit of equals elect to belong to different groupings they, in fact, elect to go their separate ways and this at the expense of former equality. The result is that it becomes legitimate for the employer to bargain or deal separately with these two or more groups. It follows that equals performing the same work may be subject to different terms and conditions of employment.
>
> In these circumstances one group cannot be heard to complain about the absence of equality between their terms and conditions of employment and that prevailing as regards the other group. The potential for inequality and unfairness is inherent in their arrangement."

I respectfully agree with these principles which apply with equal force in the case before me.

In the result therefore I have come to the conclusion that both points raised in limine as aforesaid must succeed.

Since I have heard full arguments on the merits as well I should mention that this application further falls to be dismissed for the following reasons:

(1) Since the power of the court to grant a declaratory order is discretionary I feel that it would be setting a dangerous precedent if this court acceded to the intimidations and threats made by the Applicant to the court as earlier stated. The court therefore marks its displeasure at this type of attitude by refusing to exercise its discretion in favour of the Applicant in the circumstances.

(2) There is a material dispute of fact on whether all members of the academic staff were appointed on same terms and conditions of service and entitled to the same benefits.

In this regard JOSEPH MAEMELA HLALELE deposes as follows in paragraph 3.2 of his founding affidavit:-

> "All members of the academic staff were appointed on same terms and conditions of service and entitled to the same benefits depending on whether or not one was employed on the permanent establishment or on contract."

The Respondent's answer to this allegation is contained in paragraph 4 of the

answering affidavit of MASEFINELA MPHUTHING in the following words:-

> "I deny categorically that all members of academic staff were appointed on the same terms and conditions of service and entitled to the same benefits and put deponent to the proof thereof.
>
> I wish to inform this Honourable Court that there exists a collective bargaining agreement between **LUTARU** as the representative of its members and the respondent herein. A copy of the same is hereunto attached and marked "A". Pursuant to the said agreement some of the members of **LUTARU** opted for new terms and conditions of service which they now hold appointments. A copy of the said contractual terms and conditions is hereunto attached and marked "B". This Honourable Court will realise that members of applicant hold contracts terms of service different from "A". They hold terms and conditions of service as reflected on Annexure "C" above. Contracts are different and it cannot therefore be correct to say that members of academic staff hold same terms and condition, and that they are entitled to the same benefits. I have been legally advised and verily believe same to be true and correct that benefits, rights and privileges arise out of a contract of employment, not definitions in the University Order, 1992. Consequently, contents hereof are denied and applicant is put to the proof thereof."

In Mahomed v Mahomed and others 1976 (3) S.A. 151 at 154 Marais J stated as follows:-

"The position now is that the courts would entertain (not necessarily grant) an application for a declaratory order if neither an infringement nor a concrete dispute exists, the only condition precedent being that the declaratory order, if granted, would bind one or more interested parties as well as the Applicant, who must be a party "interested" in a decision on a contingent right or obligation".

With respect I find that these remarks are apposite to the case before me.

(3) On the principle of the rule laid down in Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) S.A. 623 (A) I assume the correctness of the version of the Respondent University on the aforesaid dispute of fact. See also National University of Lesotho Students Union v National University of Lesotho and 2 others C of A (Civ) No.10 of 1990.

In the circumstances therefore I have come to the conclusion that this application ought not to succeed and it is accordingly dismissed with costs.

M.M. Ramodibedi

JUDGE

18th day of February, 1997.

For Applicant: Mr. Pheko
For Respondent: Mr. Mosito