LAC/CIV/A/03/2006

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT

AUTHORITY (LHDA) APPELLANT

AND

MOTUMI RALEJOE RESPONDENT

CORAM: THE HONOURABLE MR ACTING JUSTICE K.E.MOSITO

ASSESSORS: MR. MAKHETHA

MRS M. THAKALEKOALA

Hearing Date: 29 JANUARY 2007

Delivery Date: 2ND FEBRUARY 2007

SUMMARY

Condonation for the late noting of the cross-appeal – Court ordering condonation to be argued with the merits.

Appeal against judgement of Labour Court – Appellant holding disciplinary case against a retrenched employee- effect of retrenchment and subsequent dismissal.-Appeal dismissed with cost.- Cross-appeal allowed with costs.

Whether employment policies can operate parallel –Such permissible on Employment Law.

JUDGEMENT

MOSITO AJ:

1. This is an appeal from the decision of the Labour Court in LC 36/2006. The facts of this case are not in dispute. They are that, the

appellant employed the respondent on 1 July 1988 on permanent and pensionable terms. On 15 November 2005, the appellant gave respondent a notice of termination of contract. The reason cited therefore was one of retrenchment, effective from 31 January 2006. Respondent was one of the managers of the appellant. On the evening of the 27th day of January 2006, a farewell party was held in honour of respondent at Likileng in the Botha-Bothe district. Amongst the people who attended the party was the appellant's Chief Executive, Mr Potloane. As the party was progressing, the Chief Executive, Mr Potloane, handed to respondent a letter calling respondent for a disciplinary hearing to be held on 31 January 2006. The said letter did not however, reflect the time at which the hearing was to be held. On 30 January 2006, management realised this defect in the letter and issued another letter informing respondent of the time of the hearing, which was to be 8:30 am on 31 July 2006.

2. Respondent turned up on the date and time of the said hearing. At the hearing, Appellant's disciplinary panel's chairperson asked respondent whether he had received a notification for the hearing, and respondent confirmed that he had on 27 January 2006 received such a notification, but that he did not have enough time to prepare himself for the hearing. The respondent further requested that before the proceedings could proceed, he be permitted to make a statement, but the chairperson refused the request and preceded to explain how she was going to conduct the hearing. The respondent interjected and demanded that he be allowed to make a statement before the chairperson could proceed, but all in vain. The chairperson forged ahead with her preliminary explanations. Respondent did ultimately

get what he was asking for, and made a statement that, the time period given to him to prepare was too short, and in violation of the appellant's Human Resources Management Manual. The panel then adjourned for some 32 minutes, and on resumption, it agreed with respondent that the time was too short to enable him to prepare himself for the hearing. Quite strangely, the foregoing notwithstanding, the chairperson insisted on reading the charges to the respondent, and there and then called upon the respondent to plead, whereto the latter pleaded not guilty. The effect of this was that, the respondent had to plead notwithstanding that he had admittedly, not been afforded an adequate opportunity to prepare for this case. The proceedings were thence adjourned to the 8th day of February 2006.

3. On the 8th day of February 2006, before the proceedings resumed, respondent pointed out that he came to the hearing just to show respect to the committee and out of courtesy for the employer. He went on to point out that, appellant no longer had authority over him as he was no longer its employee. He therefore enquired as to what the regulations of appellant said in this regard. He was apparently not told what the regulations of the appellant said in this regard, but was told that, the misconduct and the hearing in respect of the misconduct started when he was an employee of the appellant, and it was clearly indicated to him that the hearing would proceed as appellant wanted to give him a fair hearing. He was told that, it was up to him to decide whether to remain in attendance or not, but that, the hearing would proceed regardless of his decision. Faced with this predicament, he decided to stay on. The proceedings continued for several days, being the 8th, 9th, and 10th February 2006.

4. On the 10th day of February 2006, the committee found respondent guilty as charged and decided that he be dismissed. The decision was communicated to respondent verbally at the same sitting, and respondent was informed that he could appeal to the Chief Executive within five (5) working days thereof if he was not satisfied. The hearing ended at 15:30 hrs. Apparently, the chairperson wrote to respondent on the same day of the 10th of February 2006 informing him of the aforesaid decision, which is reflected in the chairperson's letter as summary dismissal. This letter was however served on the respondent on the 15th day of February 2006. The letter also shows that a summary of proceedings is attached for respondent's information. The said summary was however signed on the 13th day of February 2006 by the members of the committee, thus ruling out the probability that the letter of the 10th February 2006 could have been communicated to respondent on the 10th February 2006. The minutes themselves were only signed by the different committee members on the 22nd, 23rd and 24th of February 2006.
5. On 21st February 2006, respondent lodged an appeal with the Chief Executive against his dismissal. On 1st March 2006, the Chief Executive wrote to respondent informing him that, in terms of section Regulation 27.6.1 of the Manual, the appeal should be submitted in writing within five (5) working days of being advised of the decision made by the committee. He went on to say that, since the committee had advised respondent on the 10th February 2006 of his dismissal, the appeal was out of time and could not be entertained. The appeal was therefore never entertained at all thereafter. We should for the sake of completeness mention that, on the 16th March 2006, appellant

informed respondent that the latter would not get severance pay as he had been dismissed for misconduct.

6. It was against the foregoing background that the respondent approached the Labour Court for an order in the following terms:
    a. That the Appellant be and should be ordered to pay the respondent severance pay and leave pay in the sum of M263, 265.35 together with all his outstanding terminal benefits in accordance with the law.
    b. Declaring the so-called disciplinary proceedings held by Appellant against the Respondent to be null and void.
    c. Directing the Appellant to pay Respondent's special severance in accordance with the provisions of Appellant's Staff separation policy 1998.
    d. Directing the Appellant to pay costs of this application.
    e. Granting the respondent herein further and alternative relief.
7. The originating application was opposed by means of an answer by the LHDA. The first complaint by the respondent was that, he was not given his terminal benefits on the 31st January 2006. The Appellant met this complaint by denying liability for severance pay on the basis that, in terms of section 79(2) of the Labour Code Order 1992 respondent had been summarily dismissed for misconduct, and was as such, not entitled to severance pay. Regarding the prayer that the Appellant be directed to pay Respondent's special severance in accordance with the provisions of Appellant's staff separation policy 1998, Respondent contended that, in terms of the Appellant's staff separation policy 1998, he is entitled, in addition to the statutory severance pay, to receive special severance of additional two weeks

salary for every year of completed service. He further alleged that on or about the 2nd day of November 2003, Appellant revised the said Staff separation policy 1998, and purported to change the special severance clause 18.1 to reflect that all employees including Respondent, would get special severance calculated at 60% of cost to company. He then alleged that, computation of special severance at 60% of Respondent's cost to company was less favourable to Respondent, and it was done without consultation and without Respondent's consent at all contrary to the Labour Code Order 1992. In answer to these very serious allegations, Appellant answered that:

> Contents herein are vehemently denied and Applicant is put to proof thereof. Our submission is that this issue is irrelevant to the present proceedings and is being introduced to cloud issues. In any event this Court does not have jurisdiction to interfere with matters of management's lawful prerogative including change of policies.

8. Respondent further alleged that, the Chief Executive did write on the 10th day of April 2006, that, the reason for termination of Respondent's employment was retrenchment effective from January 2006. He contended that he could not be dismissed on 10th February 2006 because he was no longer an employee of Appellant. Respondent also further alleged that even in his memo of the 27th day of January 2006, the Chief Executive did indicate that respondent had to depart at the end of January 2006. In answer to these challenges, the Chief Executive answered that: "the contradiction that seems to be present was brought about by my inadvertent signing of the Applicant's Termination Clearance Form together with many forms of a similar nature. The actual termination of employment of Applicant

is not retrenchment, but dismissal for committing misconduct." In relation to the allegation that, even in his memo of 27 January 2006, the Chief Executive did indicate that respondent had to depart at the end of January 2006, the Chief Executive contents himself with saying that, "contents are not clear to the Respondent [LHDA] and it is therefore impossible to respond to them."

9. Respondent further alleged that he was receiving net cost to company (CTC), of M14, 777.38 per month as reflected in his payslip. He further alleged that he had 36 leave days due and not taken. He alleged that he suffered serious loss as a result of what he call "Respondent[LHDA]'s behaviour" and that Appellant is liable to pay him as follows:

a. Statutory severance : calculated as $\frac{210 \text{ months}}{12} \times 2 \times \frac{177,328.56}{52}$ = M119,355.95

b. Special severance calculated as $\frac{210 \text{ months}}{12} \times 2 \times \frac{177,328.56}{52}$ = M119, 355.95

c. Leave pay 177,328.56 x 36 days =M M24,553.95

Total =M 263.265.35

10. In answer to the above allegations on computations, Appellant answered by saying: "Contents hereof are vehemently denied and Applicant is put to the proof thereof, in particular Appellant denies being indebted to Applicant in any manner."

11. At the hearing of the application before the Labour Court, the counsel for the parties informed the Labour Court that, they had agreed that "the issues – there is no dispute on the facts. And the parties have agreed to stand and fall by the papers as filed in Court." The Court was also informed that, issues had been identified for the Court as

being: (a), whether the respondent was subject to the Appellant's HR Manual as of the date of his alleged dismissal which was February 10th, 2006. In this regard, it appears from the record that, this point was directed at determining the fairness of the disciplinary proceedings against respondent held on the 8th and 9th days of February 2006, culminating in the disciplinary decision of 10 February 2006. (b), Whether the retrenchment package of the Respondent has to be computed in accordance with the provisions of the 1998 staff separation policy, or the 2003 Personnel Separation policy, only in so far as it deals with the clause relating to severance. The Court was then addressed on those agreed issues. The Court then found that the said disciplinary proceedings against respondent were null and void. It also directed Appellant to pay respondent his terminal benefits in accordance with the contents of "MR1" to the originating application, which was a letter terminating the respondent's contract on the basis if the 2003 policy. It also ordered Appellant to pay two-thirds of the costs of the proceedings.

12. On 11th October 2006, Appellant noted an appeal against the judgement of the Labour Court to this Court. On the 3rd November 2006, respondent filed a cross-appeal in the matter. Appellant filed a notice of intention to oppose the cross-appeal. It also filed an affidavit in which it raised an objection that the cross-appeal was out of time by some three days. It seems the respondent did not consider that appellant was serious that it was going to object that the cross-appeal was out of time. The cross-appellant did not file an application for condonation until a day just before the hearing of this appeal. This was an unacceptable attitude. This court wishes to emphasise its

attitude that, whenever it becomes clear that there has been a failure to comply with the Rules of this Court, the defaulting party must move with reasonable speed to apply for condonation for such failure. As was said in ***Saloojee and Another, NNO v Minister of Community Development 1965 (2) SA 135 (A)*** at p.141:

> [a] litigant… who knows…. that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney …. and expect to be exonerated of all blame.

13. Whenever an appellant realises that he has not complied with a Rule of Court he should apply for condonation without delay. ***See Croeser v Standard Bank 1934 AD 77 at 79; Reeders G v Jacobsz 1934 AD 77 at 397; Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449G - H; Meintjies v D Combrinck (Edms) Bpk 1961 (1) SA 262 (A) at 264B.*** This principle applies with equal force to a cross-appellant as well. See also ***Telcom Lesotho (Pty) Ltd v Teboho Mafatle LAC/CIV/APN/08/05 and LAC/CIV/APN/05/06***. In the interests of convenience, we directed that the application for condonation be heard together with the merits of the appeal in order to enable us to also consider the prospects of success. The explanation for the late noting of the cross-appeal by three days was rather flimsy, but as will appear herein below, the explanation was compensated for by the strong prospects of success.

14 For the reasons appearing in paragraphs 21 to 28 below, we have decided that condonation must be granted for the late noting of the cross-appeal.

15. The first complaint by the appellant is that, the Labour Court erred by not taking into account the actions of the present respondent of requesting an adjournment from the Disciplinary Committee which went beyond the 31st of January 2006, thereby, in effect, extending both the date of termination of his contract of employment as well as the contract of employment itself. The ground goes further to say that, the respondent thus acquiesced in the Disciplinary Committee's having jurisdiction over him. May be we should start with the latter aspect of the ground, which is by asking for an adjournment from the Disciplinary Committee which went beyond the 31st of January 2006, respondent thereby acquiesced in the Disciplinary Committee's having jurisdiction over him.

16. This ground seems to be based on a misconception that a party to a contract can extend the contract between him and another without the latter's involvement, and or consent. Assuming without deciding, that the respondent's conduct constituted an offer to extend his contract beyond the 31st of January 2006, there are further difficulties as to whether such offer was ever accepted by the appellant. As was said in ***Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 422,*** a conduct to constitute an acceptance must be an unequivocal indication to the other party of such acceptance, and it is not clear to us that the appellant's Disciplinary Committee's conduct in granting an adjournment satisfied those requirements. Quiescence is not necessarily acquiescence and one party cannot, without the assent of the other, impose upon such other a condition to that effect (See ***Felthouse v Bindley (11 C.B.N.S. 869***)). There is a further problem that renders appellant's contention untenable, it is this, that, there was

neither an iota of evidence before us, nor before the Labour Court that appellant had conferred upon the Disciplinary Committee, power to enter into a contract of extension of the employment contract beyond the 31st of January 2006. There can therefore be no substance in contending that both the date of termination of his contract of employment as well as the contract of employment itself were extended by the adjournment. We also do accept in principle that 'quiescence is not necessarily acquiescence' (***McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A)*** at page 10). Furthermore, it does not rain but it pours. There is neither a principle of law, nor is there a provision in the regulations of the appellant, let alone in the parties' contract of employment, that would justify both the Labour Court and/or this Court in arriving at the conclusion that, by applying for adjournment of the disciplinary proceedings, respondent was thereby extending both the date of termination of his contract of employment as well as the contract of employment itself.

17. Another complaint by appellant is that, the Labour Court misdirected itself by holding that, the appellant ought not to have instituted the disciplinary proceedings against the Respondent, but rather should have approached the Courts of law for recourse against the respondent. The issue presented by this ground of appeal, is whether at the time of prosecuting disciplinary proceedings against respondent, the latter was still subject to the disciplinary authority of the appellant as his employer. Section 3 of the ***Labour Code Order No.24 of 1992,*** defines an *employer* as follows:

> "employer" means any person or undertaking, corporation, company, public authority or body of persons who or which employs any person to work under

a contract and includes:

(a) any agent, representative, foreman or manager of such person, undertaking, corporation, company, public authority or body of persons who is placed in authority over the employee; and

(b) in the case of:

(i) a person who has died, his or her executor;

(ii) a person who has become of unsound mind, his or her Curator Bonis;

(iii) a person who has become insolvent, the trustee of his or her insolvent estate;

(iv) a company in liquidation, the liquidator of the company; (underlining added)

18. The Labour Code Order also defines an *employee* as follows:

"Employee" means any person who works in any capacity under a contract with an employer in either an urban or a rural setting, and includes any person working under or on behalf of a government department or other public authority. (Underlining added)

19. The term *contract* appearing in this section is also defined as follows in the section:

"Contract" means unless otherwise stipulated in the Code a contract of employment;

20. In terms of the section, a "contract of employment" means a contract, whether oral or in writing, express or implied, by which an employee enters the service of an employer. The employer's duties *inter alia,* include the duty to receive the employee into service. This obligation is the corollary of the employee's duty to enter and remain in service. As a general rule, the employer discharges its obligation by tendering remuneration for the work actually done or tendered to be done.(See

Whitehead v Woolworths (Pty)Ltd (1999) 20 ILJ 2133 at 2137). The existence of a relationship of authority between the employer and employee is an important feature of this contract. It has been held that, some of the important legal characteristics of the contract of service (*locatio conductio operarum*) are: (i), the rendering of personal services by the employee (*locator operarum*) to the employer(*conductor operarum*); (ii), According to a contract of service the employee (*locator operarum*) is at the beck and call of the employer (*conductor operarum*); (iii), Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion decide whether or not he wants to have them rendered, (iv) the employee is in terms of the contract of service subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done.(v), A contract of service also terminates on expiration of the period of service entered into. The services or the labour as such is the object of the contract. (See ***Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at p. 61***.) In the present case, there is no evidence that any of the above features continued to exist as from the 31st January 2006 between the parties. Appellant therefore no longer had disciplinary authority over the respondent as the contract had terminated on the 31st January 2006 when the purported disciplinary action was taken against respondent on the 31st January, 8th, 9th and 10th February 2006. The disciplinary committee therefore, no longer had jurisdiction over the respondent.

13. There is another reason why the Labour Court judgement should in our view not be disturbed on this point. That reason is this, that, as indicated above, on the 27th night of January 2006, the Chief Executive, Mr Potloane, handed to respondent a defective notice of disciplinary hearing calling respondent for a disciplinary hearing to be held on 31 January 2006.We have underlined the word *defective* in order to underscore the importance that according to the disciplinary code of the appellant, should be attached to a notice of an intended disciplinary hearing. The said letter did not reflect the time at which the hearing was to be held. On 30 January 2006, management realised this defect in the letter and issued another letter informing respondent of the time of the hearing, which was to be at 8:30 am on 31 July 2006.

14. In **Pascalis Molapi v Metro Group Limited & 2 Others LAC/CIV/R/09/03** at para 8, this Court:

> Indeed as the Court of Appeal of Lesotho said in **Makara v OK Bazaars (Pty) Ltd LAC (1990-1994) 517** at **522** in line with **Heatherdale farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T)** at **486**, the person concerned must be given a reasonable time in which to assemble the relevant information and prepare and put forward his representations. He must be put in possession of such information as will render his right to make representations a real, and not an illusory one. In our view, it is to render an employee's right an illusory one if their court would accept that, when an employee happens upon some allegations in a situation other than one in which he is himself disciplinarily charged, then he must be taken to have had notice within the foregoing formulation. As Mohamed P said in **Makara's** case *(supra)*:
>
> > *Fundamental to the proper application of the audi rule are two requirements: Firstly, notice of the intended action to the party*

> *affected; and secondly, a proper opportunity for him to present his case.*

15. In paragraph 10 in Molapi's case, the Court went on to say that:

> The importance of the *audi* rule in our employment law is one that cannot be overemphasised. The principles have been summarised by Gauntlett JA in the Court of Appeal of Lesotho's decision in **Matebesi v Director of Immigration and Others LAC (1995-1999) 616** at pp **621I- 626,** with which exposition of principles we are in respectful agreement. Needless to say, all courts of law in this country, including the Directorate of Dispute Prevention and Resolution as well as similar tribunals have to observe these principles. Failure to observe these principles will certainly result in the superior courts in this country interfering in the decisions of the inferior courts and tribunals. The *audi* principle sits at the heart of the employment relationship in our law.

15. Regulation 27.4.9 of the Disciplinary Code of the appellant provides that a formal notice of hearing shall be prepared. Regulation 27.4.11 provides that the "notice must contain the time and place where the hearing will take place. The employee should be granted at least two (2) working days to prepare him/herself for the hearing." We have underlined the words *shall* and *must* in order to underscore their peremptoriness. The said notice was clearly defective, as it did not contain the time. Again, it was given on Friday night at a party at 21.00hrs. Thus no two working days were accommodated in the notice. Worst still, the date on which the hearing was to be held was the date on which respondent would no longer be an employee of the appellant. Even the purported amendment itself indicated that the hearing was to be held 8:30 a.m.

16. The respondent then lodged an appeal after his dismissal to the man

that gave him a notice of hearing at a party at night. The Chief Executive again refused to accept the appeal under the guise that it was out of time. This Court takes judicial notice that, the 15th of February 2006 was a Wednesday. In terms of Regulation 27.5.15, respondent was obliged to appeal within five (5) working days to the Chief Executive. He appealed on the 21st day of February 2006, which was the fourth (4th) working day since he received the written notification of his dismissal. In our view the refusal to entertain the appeal constituted a further breach of the appellant's Disciplinary Code.

17. As Davis AJA said in C***ounty Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*** **(2003) 24 ILJ 355 (LAC)** at p.361

> [23] in the present case appellant acted without recourse to the express provision of its disciplinary code and on the basis of no precedent.

18 In summarily dismissing the respondent, appellant ought to have complied with its own disciplinary code, but it did not. In **DENEL (PTY) LTD v VORSTER (2004) 25 ILJ 659 (SCA)**, the respondent employee had been summarily dismissed in September 1996. There had been proper substantive grounds for summarily terminating his employment. Only the procedure adopted by the appellant employer was disputed, the employee contending that it was flawed and did not comply with the employer's disciplinary code. The employer submitted that, even though the procedure followed did not comply fully with that stipulated in the disciplinary code, it had respected the employee's constitutional right to fair labour practices with the result

that it would be an infringement of the employer's right to fair labour practices if the dismissal were to be regarded as unlawful. At p. 660, the court found that the procedure provided for in the employer's disciplinary code was clearly a fair one - it would hardly be open to the employer to suggest that it was not - and the employee was entitled to insist that the employer abide by its contractual undertaking to apply it. It was no answer to say that the alternative procedure adopted by the employer was just as good. It held at p.662, para 5 that:

> "The procedures that had to be followed when disciplinary action was taken against an employee, and the identities of the persons who were authorized to take such disciplinary action, were circumscribed in the appellant's disciplinary code. The terms of the disciplinary code were expressly incorporated in the conditions of employment of each employee with the result that they assumed contractual effect."

19. In our view, it is to render an employee's right to a fair hearing, an illusory one if this Court would accept the present kind of practice.

Regarding the third ground, we have already held above that, there was no acquiescence here. The respondent could not acquiesce in being subjected to proceedings outside the disciplinary authority of the appellant. We find no justification to interfere with the judgement of the Labour Court on this ground either.

20. We now turn to the cross-appeal. The first and third complaints by the Cross-appellant are related. The first is that, the Labour Court erred in not holding that clause 18.1 of the LHDA 2003 was unlawful. This issue was not pleaded in the originating

application in the Labour Court. The Labour Court was not addressed on the lawfulness or otherwise of this clause. Even if it had been so addressed, there would be no basis for holding that clause unlawful on the facts before us. We have already indicated that, there is no basis upon which to hold clause 18.1 of the LHDA 2003 unlawful. It may be that that clause does not apply to respondent. However, this is a different issue from saying it is unlawful. That being the case, the issue of exhaustion of local remedies would not even arise where the issue of the lawfulness on which it is based was not addressed in the Labour Court.

21. Ground 2 of the cross-appeal says that the Labour Court erred in holding as it did that, the employer has a prerogative to apply any policy which is less favourable to employees without the consent of such employees as established by evidence. This is not exactly what the Labour Court said. What the labour Court said was that, in ordinary administrative practice, there are no parallel administrative policies. A latter policy always replaces the old policy unless a contrary intention is indicated. It held that, neither is an employee entitled to choose which one policy is to apply to them, and which one will not. It went on to hold that it is the prerogative of the employer to determine an applicable policy. It then went on to observe that it is now three years since the 2003 policy was adopted. It held that, since there is no evidence that the respondent ever challenged the policy, he couldn't belatedly be heard to challenge its applicability, when he failed to do so when he was an

employee.

22. It will be remembered that the aforegoing remarks were said against the background that the cross-appellant was complaining that his terminal benefits be worked on the basis of the 1998, as opposed to the 2003 policy. His contention is that he was employed before the 2003 policy came into being. He contends that his contract is governed by the policy that preceded the 2003 policy, which is the 1998 policy. It was argued that, the policies, once promulgated, become part of the contracts of employees, and cannot just be taken away without either the employees' consent, or consultation before the rights ushered into the contracts of employees by the relevant policy are interfered with.

23. We have had grave difficulties in understanding the Labour Court's argument on this point. The Labour Court was here dealing with a separation policy. It said that, in ordinary administrative practice, there are no parallel administrative policies. A latter policy always replaces the old policy unless a contrary intention is indicated. If what the Labour Court intended to say is that, employers can change employment policies as and when they please, without the consent and/or consultation with their employees whose contracts are likely to be affected by such change of policy we disagree with this proposition.

24. Appellant is an employer exercising a public function and as such, a public employer (See ***Koatsa Koatsa v National University of Lesotho LAC (1985-89) 335 at 340-341***).It is

therefore enjoined by the law to always act fairly. A reference to the policy in this regard, is a reference to its regulations. The 1998 separation policy was first introduced into the contract of employment of the respondent. It introduced into the contract of respondent, the kind of separation benefits that respondent claims he is entitled to herein. It is common cause in neither the present case that when the 2003 separation policy was introduced, respondent was neither consulted nor his consent secured. In employment law, an employer who is desirous of effecting changes to terms and conditions applicable to his employees is obliged to negotiate with the employees and obtain their consent. A unilateral change by the employer of the terms and conditions of employment is not permissible. (See ***Mazista Tiles (Pty) Ltd v National Union of Mineworkers & Others (2004) 25 ILJ 2156 (LAC)*** at 2171 at para 48).

25. His contract was therefore to be governed in terms of the 1998 separation policy. While we may observe as this stage without deciding that, it may probably be correct that in ordinary administrative practice, there are no parallel administrative policies (a statement the correctness of which we doubt very much), but surely, it cannot be correct that it is the prerogative of the employer to determine an applicable policy to an employee's contract when there is a previous policy that has already become part of the employee's contract, more so if such an existing policy confers rights upon the employee. In ***Minister of Home Affairs and 3 otheres v 'Mampho Mofolo, C of A (CIV) No.2 0f 2005,*** the Court of Appeal of Lesotho

held that,

> It may be observed that in cases of procedure an established practice or policy has been held to be sufficient to give rise to a legitimate expectation that a decision-maker should act fairly. (See the authorities quoted in Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A) at 756G to 757E and remarks of Cobertt CJ at 761 to762).

26. Once a right has been ushered into a contract of employment of an employee, an employer cannot be permitted in employment law to take that right away without the consent or consultation with the employee. To permit an employer to do so would be tantamount to giving the employer a blank cheque over the contracts of employees. It is not clear what the Labour Court intended by the words: "there are no parallel administrative policies." If what it meant is that, there can be no parallel employment policies in an employer applying to different employees, we are unable to agree with this view. We in fact agree with the judgment of the High Court of Lesotho in ***Senior University Staff Union v National University of Lesotho CIV/APN/422/96*** (unreported) that, it is in the nature of Labour relations that differences in the terms and conditions of service among individual employees are bound to occur where they hold different contracts or where they do not perform identical or same type of work or even where they differ in terms of seniority, experience and qualifications.(see also the decision of this L***esotho Highlands Development Authority (LHDA) v Maile Maile LAC/CIV/R/1/2005).***

27. In our view therefore, the separation policy that applies to the respondent is the 1998 policy, not the 2003 policy, as his

contract is governed by the former and not the latter policy. There is another reason why we are of the view the former and not the latter policy applies. It is clear to us that the 2003 policy offers less advantageous benefits to the respondent as appears in his pleadings outlined above. He ought therefore to have been heard before appellant could take away his rights under the former. Employers are entitled to run parallel policies. The 2003 policy does not operate retrospectively. It applies to employees who entered into service with appellant after it was introduced, or those who may have opted to have their contracts governed by that policy.

28. The last complaint by the cross-appellant is that the Labour Court erred in awarding only 2/3 of the costs in the light of the fact that there was substantial success in the application. It is clear that the Labour Court awarded costs basing itself on the principle of the extent of success of the application before it. This was apparently largely influenced by the cross-appellant's failure on the separation policies argument, which the Labour Court did err, on which this Court has corrected. Consequently, that order as to costs should accordingly be corrected.

29. In the result, the order of this Court is that:

(a), the appeal by the appellant fails with costs

(b), the application for condonation for the late noting of the cross-appeal succeeds with costs.

(c), The Cross-appeal succeeds in respect of grounds 2, 4 and 5 with costs. Ground 1 and 3 of the cross-appeal

cannot succeed.

d) The Labour Court judgement is amended to read that: "The application is granted with costs."

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K.E. MOSITO

JUDGE OF THE LABOUR APPEAL COURT

For Appellant : Ms T. Matshikiza

For Respondent : Mr. H. Sekonyela