IN THE LABOUR COURT OF LESOTHO

CASE NO LC 101/00

HELD AT MASERU

IN THE MATTER OF:

MAKOALA MARAKE **APPLICANT**

AND

THE NATIONAL UNIVERSITY OF LESOTHO
RESPONDENT

JUDGMENT

Applicant is a lecturer at the respondent university. He launched these proceedings on the 24th August 2000 seeking relief as follows:

1. That the respondent be ordered to pay him (applicant) Forty-Seven Thousand and Ninety Four Maluti(M47,094-00);
2. That respondent be directed to pay applicant's biannual gratuity as and when it falls due;
3. Directing the respondent to pay interest at the rate of 18.5% per annum from October 1998 to date of payment.

The matter was heard on Tuesday 18/06/02 and Monday 1st July 2002. Only one witness testified on each side. The applicant himself testified in support of his claim.

His evidence was briefly that he was first employed by the respondent in 1993. In terms of his contract of employment Annexure "MM1" of the bundle of documents handed by applicant ("ID1") his appointment was on a permanent and pensionable terms. In 1996 the Lesotho University Teachers and Researchers' Union (LUTARU) entered into negotiations with the University with a view, inter alia, to vary and improve the terms of employment of its members. The applicant was a member of LUTARU and held the position of Secretary in the union's executive committee. A deal was struck whereby LUTARU and the University agreed on a set of benefits which would apply to LUTARU's members which would also from part of the contracts of employment of the members concerned. On the 1st October 1996 the Registrar of the University published a circular notice, the contents of which are best reproduced in full. The notice read as follows:

"**NATIONAL UNIVERSITY OF LESOTHO**

CIRCULAR NOTICE

IMPLEMENTATION COMMETTEE

NEW TERMS OF SERVICE

FOR TEACHERS, RESEARCHERS, DOCUMENTALISTS AND SENIOR LIBRARY STAFF.

MEMBERS OF THE ACADEMIC STAFF (TEACHERS, RESEARCHERS, SENIOR LIBRARY STAFF AND DOCUMENTALISTS) WHO ARE OPTING TO TAKE THE NEW TERMS AND CONDITIONS OF SERVICE PROPOSED BY LUTARU, AND APPORVED BY COUNCIL ARE REQUESTED TO:

1. **INDICATE THEIR OPTION WITHIN OCTOBER 1996 BY SIGNING THE ENCLOSED CONTRACT.**

2. **PRODUCE/DUPLICATE THREE COPIES.**

3. **RETAIN A COPY OF THE ORIGINAL CONTRACT.**

4. **FORWARD TWO COPIES INCLUDING THE ORIGINAL CONTRACT TO THE REGISTRAR'S OFFICE (APPOINTMENTS) WITHIN OCTOBER, 1996.**

5. **IN ORDER TO FACILITATE RECEIPT OF THE CAR ALLOWANCES IN OCTOBER THEIR SIGNED CONTRACTS MUST HAVE BEEN SUBMITTED BY 8TH OCTOBER, 1996 AT THE LATEST.**
6. **RETROSPECTIVE PAYMENT MUST ONLY BE EFFECTED FOR THOSE WHO WILL HAVE SIGNED WITHIN OCTOBER, 1996.**

7. **ALL SIGNED CONTRACTS RECEIVED BY THE APPOINTMENTS OFFICE AFTER 31ST OCTOBER, 1996 WILL TAKE EFFECT FROM THE DATE OF THEIR RECEIPT.**

8. **THE ADDRESSEES ARE INVITED TO A MEETING TO BE HELD AT THE NETHERLANDS HALL ON THURSDAY 3RD OCTOBER 1996 AT 10.00 A.M. AT WHICH THE DOCUMENT WILL BE PRESENTED AND CLARIFICATION ON RELATED MATTERS CAN BE PROVIDED.**

A.M. MPHUTHING
REGISTRAR, NUL

1ST OCTOBER, 1996"
To facilitate this exercise new contracts of service were drawn by the respondent (Annexure "MM3" of "ID1"). In terms of the new contracts Clause 1.4(c) thereof, members of staff had to choose between two forms of terminal benefits namely; a non-contributory provident fund at the rate of 25% of basic salary payable in lump sum at the termination of employment. Alternatively a member could opt for gratuity at a rate of 25% of basic salary at the end of every twenty-four months.

On the 7th October 1996 the applicant duly exercised his option in accordance with "MM2**"**. He opted for payment of gratuity at the end of

every twenty-four months. He testified that he deposited the original plus an additional copy with the office of the Registrar as stipulated in Annexure "MM2". This new contract entailed that he was no longer permanent and pensionable, but now permanent and gratuiable the applicant testified.

Two years down, the applicant submitted his claim for gratuity in terms of the new contract. The letter of claim is "MM4" and is dated 29th October 1998. Not only did the University fail to respond, it also did not honour the claim. It is applicant's evidence that a contract to pay him gratuity every two years exist between him and the University and the latter must comply with it. He referred in his evidence to the case of Senior University Staff Union .v. National University of Lesotho CIV/APN/422/96 (unreported) where the applicant union was seeking to have the terms of the new contract extended to its members. He said that in that case the University said under oath that a valid contract existed but it was applicable only to members of LUTARU and the High Court confirmed that argument.

The respondent adduced the eidence of the Registrar Mr. Maimela Hlalele, who confirmed the evidence of the applicant regarding the negotiations which culminated in the publication of "MM2". He also confirmed the decision in CIV/APN/422/96, but said there was another High Court decision which later contradicted the SUSU decision and held that the new contracts were invalid. He averred that as a result of that contradiction the conclusion of the new contracts in accordance with "MM2" was aborted. It was his evidence that although the applicant had signed the contract in accordance with "MM2" the respondent for its part did not sign and for that matter the so-called new contract does not exist in applicant's personal file.

In arguments Mr. Phafane for the applicant argued that the issue that falls to be determined is whether the University entered into new contracts with eligible staff pursuant to "MM6". He contended that the answer to this question must be in the affirmative because the University admitted as much in affidavits in CIV/APN/422/96. Mr. Molete for the respondent contended that judgment in the CIV/APN/422/96 proceedings must not be taken as evidence in this case because the learned judge in that case did not hear the evidence which this court has heard. He said, clearly from the evidence no contract of the kind being sought to be enforced by these proceedings existed between the parties. The process towards the conclusion of the new contracts started but stopped midway he submitted.

According to "MM2" the issue of the terms of the new contracts had already been approved by council, the supreme governing body of the University. What remained therefore was for them to be implemented in a form of a contract between the University and those eligible members of staff who would opt for the new terms. The University duly produced a new contract which encompassed the new terms. The Registrar who is admittedly the right person to do so duly issued the guideline for the implementation of the new contracts in the form of annexure "MM2". Applicant duly followed the guidelines and signed the contract on the 7th October 1996. Upon signature by the applicant the contract was valid and binding on the parties because Clause 2 of that contract provides:

> *"2 <u>AUTHORITY</u>*
> *These terms and conditions of service became operative from the first of July 1996."*

The High Court in CIV/APN/422/96 found as much at pp2-3 of the typed judgment of Ramodibedi J. Even though the issue in contention before him related to car allowance, it was however an issue arising out of the terms of the same contract this court is seized with in casu. In the SUSU case the Clause in issue was Clause 13(D) while in casu the relevant Clause is Clause 14(C). No evidence was adduced which can lead us to a different conclusion from that reached by the High Court in respect of the validity of the contract between applicant and the respondent. Accordingly, Mr. Molete's contention that this court should not take into account the findings of the High Court on the existence or otherwise of the contract cannot succeed.

It was contended that there is another judgment of the High Court which contradicted Ramodibedi J's finding in CIV/APN/422/96. Assuming that was so, that would not lead us to a different finding if the facts still remained as they are namely, that according to Clause 2 of the contract it(the contract) became operative on the first July 1996. It is significant however, that this so-called judgment which contradicted that of Ramodibedi J could not be availed. Mr. Hlalele said the decision was not reduced to writing. But he could not even avail us with the case number or the judge's notes showing the conflicting decision. We are of the view that

no such decision existed. Even if it did, not enough evidential material was put before us to prove its existence.

It was contended that on the strength of that decision the conclusion of the new contracts was aborted. This is clearly a misconceived submission, because according to exhibit "MM2" persons opting for the new contract had to sign the contract, retain a copy and forward the original and a copy to the Registrar. This the applicant did thereby concluding a binding contract between himself and the respondent retrospectively from the 1st July 1996. Any subsequent decision could not disrupt conclusion of the contract because it was already concluded. At best it could have resulted in the University seeking to rescind the contract, but as far as we are aware it did not do so.

It was further argued that there was no valid contract in the form of Annexure "MM3" because the University did not sign and infact there is no copy of that contract in applicant's file. The presence and non-presence of the contract in applicant's personal file is a phenomenon which cannot be blamed on the applicant. Once the applicant complied with the guidelines in annexure "MM2" and submitted the original of the signed contract to the Registrar, he had discharged his obligations. The safe keeping of the records was then the responsibility of the respondent through their Registrar. Its disappearance is therefore respondent's responsibility.

As regards the signing by the University it may well be true that they did not sign. The issue however, is that annexure "MM2" (the guidelines), did not make the respondent's signature of the contract a prerequisite to its enforcement. According to "MM2" the prerequisite was a member's signature of the contract and depositing of the original and a copy with the Registrar. Indeed "MM3" like its precusor "MM1", does not have a space for the University's signature. In both the old and the new contract the signature of the employee and that of a witness and returning the signed original to the respondent seem to be the requisite steps for the conclusion of a valid contract. All these the applicant did.

In the premises the answer to the question whether the University entered into new contracts pursuant to "MM2" must be answered in the affirmative. The applicant is clearly one of such persons who opted for the terms of the new contract. Upon his signing the contract it became a binding agreement

between him and the University and it will continue to bind the parties until it is changed, amended or lawfully rescinded as the case may be. Accordingly, we grant applicant's prayers as follows:

1. The respondent shall pay the applicant Forty-Seven Thousand and Ninety-Four Maluti as gratuity due for the period 1996-1998.
2. The respondent shall pay applicant's biannual gratuity for the subsequent periods as and when it falls due.
3. Respondent shall pay interest on the overdue amounts at the rate of 18.5% from the date that they were due to the date of payment.
4. Costs hereof are awarded to the applicant.

THUS DONE AT MASERU THIS 25TH DAY OF JULY, 2002.

L.A LETHOBANE
PRESIDENT

C.T. POOPA
MEMBER **I AGREE**

M.S. MAKHASANE
MEMBER **I AGREE**

FOR APPLICANT : **MR PHAFANE**
FOR RESPONDENT: **MR MOLETE**