-IN THE LABOUR COURT OF LESOTHO LC/73/05

HELD AT MASERU

IN THE MATTER BETWEEN

QHALEHANG LETSIKA	**1ST APPLICANT**
KARABO MOHAU	**2ND APPLICANT**
DOMIC METLAE	**3RD APPLICANT**
PALESA KHABELE	**4TH APPLICANT**
LIBAKISO TSOHO	**5TH APPLICANT**

AND

NATIONAL UNIVERSITY OF LESOTHO RESPONDENT

JUDGMENT

Dates: 10/03/06, 29/03/06

The Higher Education Act No.1 of 2004 – sec. 27(2) – "May" in the section discretionary.
Statute 40 of NUL statutes and new terms and condition of service compliant with NUL Order 1992 – Higher Education Act not amending NUL Act 1992. –
Intention of higher legislature – deductable in the long title – Higher Education Act to be read in conjunction with NUL Act and not against it.
Unfair discrimination – applicants denied increase because they refused to sign acceptance of the new terms and conditions of service – Act amount to unfair discrimination – sec.5 of the Code and Convention No.111 of 1951.
Council supreme governing body of NUL not authorized the discriminatory treatment of applicants.

The five applicants are law lecturers at the respondent University. The present case is one of a number of cases that have been filed against the respondent by its employee either individually, as a group or duly represented by one or both of the two major unions organizing and having members at the respondent. This matter was preceded by the application of LUTARU and NAWU against the respondent herein (LC02/06 unreported) which was dismissed on the 23rd February 2006.

The present matter raises two issues for the determination of the court. The matter of LUTARU and NAWU is only relevant because the issue that it raised for determination is also raised by the case at hand. That is the issue of the validity of some of the clauses of the new terms and conditions and the disciplinary code which the respondent adopted on the 27th and 28th June 2005. It is common cause that the merits of that application were not determined as the application was dismissed on the ground of lack of urgency.

June 2005 would appear to have experienced a hive of activity at the respondent's administration department and the Council; for on the 28th and 29th June the Council resolved to adopt a new salary structure based on the Paterson Scale. This resulted in a considerable improvement in NUL staff remuneration which was meant to compete and compare favourably with remuneration offered by other tertiary institutions in the region. On the 1st July 2005 the Vice Chancellor addressed the University congregation about the changes in the staff terms and conditions of service, and the Disciplinary Code and the new remuneration strategy. The copy of his address is attached to applicants' Originating Application and it is marked Annexure "C".

In his address the Vice Chancellor mentioned inter alia, that the new terms of service, the Disciplinary Code and the "Decision Band Remuneration Method popularly known as the Paterson system (will come into effect) from 1st July 2005." (See page 2 of Annexure "C"). Paragraph 4 on page 3 of the address is where the applicants' complaint is grounded. It will be helpful to quote its relevant parts.

> *"Council has also approved the new terms and conditions of staff. This means that the existing terms and conditions of service will be abandoned and will not be improved. The new salaries will only apply to people who will opt to cross over to the new conditions of*

> *service. Individual letters will be issued to all staff members in the next week or two requesting them to opt. For those who opt for the new benefits and wish to get paid at the new rates, they will have to do so on a date that will be specified in their letter of offer."*

On the 7th July 2005, the five applicants were written letters which appear to be a standard letter written to all staff as the Vice Chancellor had said in his address. It read in part as follows: "you are advised that should you opt for new terms and conditions of service which you have already received, you will convert to Grade D2 of the Paterson pay scale." The letter required the addressee to append their signature at the bottom as proof of acceptance of the new terms and conditions. It is common cause that many of the members of staff of the respondent appended their signatures accordingly. The five applicants declined to sign the undertaking. This resulted in them not being paid in terms of the improved salary structure while those who had signed acceptance of the new terms and conditions were rewarded with benefits of the new salary scale.

The five applicants have refused to sign acceptance of the new terms and conditions to this day. The reason they put forward is that the new terms and conditions are unlawful in as much as their enactment has not complied with the mandatory provisions of The Higher Education Act No.1 of 1994. They contend further that their denial by the respondent to enjoy the improved pay structure like those of their colleagues who signed acceptance of the new terms and conditions; is an unfair labour practice in that it is discriminatory, irrational, unlawful, and grossly unreasonable.

It is apposite to start with this long standing dispute concerning the legality of the enactment of the new terms and conditions and the new disciplinary code by the council of the respondent. The applicants referred to section 27 of Act No.1 of 2004 which provides as follows:

> *"27(1) The Council may make an institutional statute, subject to sub-section (2) to give effect to any law relating to the higher education public institution and to promote the effective management of the institution in respect of matters not expressly prescribed by any law and may make institutional rules to give effect to the institutional statute or statutes.*

> *"(2) Any institutional statute may be submitted to the Minister for approval, and if so approved shall be published in the gazette."*

It was contended that the clauses in the new terms and conditions which deal with disciplinary matters and the Disciplinary Code; fail to comply with provisions of section 27(2) in as much as they were not submitted to the Minister for approval and they have not been published in the gazette.

The respondent admitted that it adopted new terms and conditions and a Disciplinary Code with effect from 1st July 2005. Respondent went further to aver that the Disciplinary Code;

> *"...was authorized by respondent's Council pursuant to its powers in terms of section 10(2)(q) of the National University of Lesotho Act, 1992 and was brought into operation pursuant to statute 40 of respondent."* (See paragraph 8 of Answer as amended).

Section 10(2)(q) of the NUL Act, 1992 provides that:

> *"(2) Subject to this Act 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; subject to this Act, to make statutes, ordinances and regulations and to confirm any regulations drawn up by the Senate in pursuance of its powers and under this Act."*

Statute 40 establishes "A University Notice Board" which must be named as such by the Registrar. Statute 40(2) goes further to provide that:

> *"Any Ordinance, Regulation or Bye-law made pursuant to any statute or any revocation or amendment to any Ordinance, Regulation or Bye-law shall be promulgated by the University by being exhibited on the University Notice Board for at least fourteen days."*

Nowhere does the statute mention that such regulation shall be published in the gazette; as suggested by counsel for the applicants.

It is not disputed that the University promulgated the Disciplinary Code pursuant to the University Act, 1992 and Statute 40 of the Statutes of the

University. The contention rather is that the NUL Act 1992, has been superceded by section 52(1) of Act No.1 of 2004 which provides that, "this Act shall prevail over any other law dealing with higher educational except the Constitution." It was further contended that with the enactment of Act No.1 of 2004, all university Statutes are to be promulgated in terms of section 27, 28 and 30 of that Act. In the circumstances it was argued that even Statute 40 itself is unlawful because it prescribes a procedure for enactment of ordinances, regulations and bye-laws which is inconsistent with the provisions of the Higher Education Act.

Mr. Moiloa for the respondent raised two pertinent arguments. Firstly, he argued that the provisions of the Higher Education Act, on which applicants place reliance in particular section 27(2) are couched in permissive terms in as much as the term "may" is used. He went further to submit that it is only where an institution of higher learning has opted to submit its statute to the Minister and it has got ministerial approval that it shall be published in the gazette.

Mr. Mohau for the applicants countered this argument by pointing out that "may" in this instance must be read and interpreted contextually. He went further to say that the contextual interpretation of that word in section 27(2) will show that what the legislature intended was "shall". He impressed on us to read "may" in this instance as meaning "shall". He relied on the case of Hall .v. Military Pensions Appeal Tribunal 1963(3) SA 407. This was a case of a coloured woman who had been married to a European husband who had been a military volunteer and as such was earning a "…pension at the rate applicable to Europeans in terms of the War Pensions Act 44 of 1942 as amended."

The widow remarried and as a result she became entitled to a gratuity in terms of section 17 of the Act which provided that any pension granted to the widow of a volunteer shall cease on her remarriage and she shall then be awarded a gratuity on the following scale:

(a) one hundred and thirty two pounds in the case of European
(b) Fifty pounds in the case of a non-European other than a native and
(c) Twenty-five pounds in the case of a native.

The applicant who was a coloured was awarded fifty pounds gratuity. She on the other hand demanded to be paid one hundred and thirty pounds

because her deceased husband was a European. The award was made by the Military Pensions Board.

The applicant appealed to the Military Pensions Appeal Tribunal which confirmed the award of the Board. The applicant sought to get the Appeal Tribunal to state a case for consideration by the Supreme Court in terms of section 33(4) of the Act which provided;

> *"where any decision of the Appeal Tribunal rests, wholly or partially on a point of law, the Appeal Tribunal may on application by the appellant or the commissioner, state a case for the determination of such question of law by the provincial division of the Supreme Court having jurisdiction over the area within which the sitting of the Appeal Tribunal was held."*

The Appeal Tribunal refused to state the case on the ground that the Act gave it a discretion whether to do so or not. The court referred to the speech of Lord Cairns LC in the English case of Julius .v. The Bishop of Oxford 5 AC 215 at p.225 where the following was said;

> *"where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."* (emphasis added).

This passage was relied upon in a number of Appellate Division decisions in SARH .v. Silverton Estate Ltd. 1946 AD 830; CIR .v. King 1947 (2) SA 196 (AD); SARH .v. Transvaal Consolidated and Exploration Co. Ltd 1961 (2) SA 467 (AD). The learned judge also referred to the speech of Lord Blackburn in the same case who stated the principle thus:

> *"... but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right when requested on their behalf."* At p.241;

and at p.242 his Lordship went further;

> *"But there are cases in which the authority or power is not to do a judicial act and yet there is a duty on the donee to exercise the power*

> *if it appears to be given to the donee for the purpose of making good a right and he is called upon by those who have that right to exercise the power for their benefit."*

He goes further:

> *"The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."*

The principle is clear that "may" will be construed as mandatory if a public officer empowered by it to act, is to give effect to a legal right of specified persons. If the person sought to be benefited by the right so conferred petitions the officer to effectuate that right the public officer ought to act and if he does not, the court will order that he acts to give effect to the right notwithstanding that the word "may" is used. In that situation it is construed as mandatory. The facts of the Hall case on which applicants relied fit hand in glove with the principle as enunciated by their learned Lordships Lord Cairns and Lord Blackburn. Thus the learned judge in the Hall case concluded:

> *"It seems to me therefore that all the factors enumerated in the case of Julius .v. The Bishop of Oxford, sup. Cit; and so frequently adopted in our courts are present here, i.e. a power, namely to state a case, is given to the respondent for the purpose of being used for the benefit of persons specifically pointed out i.e. an appellant or the Commissioner. The conditions which entitle those persons to call for the exercise of the power are defined, namely, a point of law involved in a decision of the respondent."*

On the contrary, none of the factors ably summarised above exist in the present case to lead the court to the conclusion that "may" as used in section 27(2) of Act No.1 of 2004 should be construed as mandatory. The first two stages of that sub-section namely; submission to the Minister and approval by the Minister are entirely discretionary. The third stage namely publication in the gazette is dependent upon the positive exercise of powers in both of the first two stages. Once that has been done, that is, the institution has opted to submit a statute to the Minister and the latter has decided in his discretion to approve it, then the stage of publication of that statute in the gazette is mandatory. If subsection (2) has been satisfied as explained then subsection (3) imposes a duty on the Minister to place a statute which he would have approved before parliament. If the question of submission of a statute to the Minister under section 27(2) is optional, it goes without saying that applicants' attack on the legality of the new terms

and conditions, the Disciplinary Code and Statute 40 of the respondent on account of failure to comply with sections 27, and 30 is without merit and as such it falls to be dismissed. It is accordingly dismissed.

Mr. Moiloa's second argument was that the Higher Education Act of 2004 merely provides a regulatory framework for institutions of higher learning which may be established by private treaty or by Parliament as envisaged by section 18 of the Act. He argued that the Higher Education Act does not purport to amend or replace the NUL Act of 1992 which preserves, continues in existence and constitute the respondent as a body corporate with perpetual succession and a common seal.

In support of his argument that the Higher Education Act provides a regulatory framework, Mr. Moiloa referred to the long title of that Act which reads:

> *"An Act to provide for the regulation of higher education in Lesotho; for the establishment, composition and functions of a Council for Higher Education, for the governance and funding of higher education public institutions, for the registration of higher education private institutions, for quality assurance and quality promotion in higher education and for incidental matters."*

It is significant that there is no mention of either the NUL as an institution of higher learning or its constituting Act No. 19 of 1992. We agree fully that if the legislature had the intention to amend or even replace the NUL Act of 1992 with the Higher Education Act of 2004, it would have specifically stated so. The intention is clear from the long title that the Act seeks to regulate institutions of higher learning which either do not have a regulatory framework, or which are yet to be established and which for some reason would not have such a framework. The intention is again clear that this is meant to ensure and promote quality in higher education. We find good company in relying on the long title to deduct the intention of the legislature in the book by D.E. Devenish, Interpretation of Statutes; Juta & Co. 1996 at p.105 where the following is said;

> *"The long title is today considered to be part of the statute for interpretative purpose and it is permissible to have regard to it. This was not always the case in English law when at one time the long title was not regarded as part of the statute. It is set out at the head of the*

> *statute and often furnishes a fairly full description of the general purpose of the Act and can be regarded as a surrogate for a preamble. The courts therefore examine the long title to discover the intention of the legislature since it is now settled law that in the process of ascertaining the intention it is permissible to have regard to the title of the Act. The long title must be used in interpreting a statute in its entirety and in particular in ascertaining its scope."*

There is no doubt in our minds that the scope of the Higher Education Act as contained in the long title does not cover the replacement or even amendment of the previous Acts of Parliament which established existing institutions of higher learning like the respondent. It is a general Act while the NUL Act is a specific Act which establishes the NUL. The two statutes must therefore be read in conjunction with each other and not against each other. There is no doubt that where there is inconsistency between the two statutes consistency should be sought, for the NUL Act must not conflict with the Higher Education Act. That is the spirit of section 52(1). However as at present there is no inconsistency that we are aware of between the two statutes which necessitates the invocation of the supremacy of the Higher Education Act as provided under section 52(1). The two are currently consistent. Applicants' arguments in this regard must also fail.

The second issue to be decided by the court concerned the alleged unfair discrimination of the applicants. It is common cause that the five applicants refused to sign acceptance of the new terms and conditions and the Disciplinary Code that went with them. This resulted in their not being paid in accordance with the new salary structure which came into effect on the 1st July 2005, while those who signed were paid in accordance with the new structure. Applicants contend that the respondent's act of treating them differently for the reason shown, amount to an unfair discrimination and that it is in any event an irrational, unlawful and grossly unreasonable act of discrimination.

The respondent contended that all employees of the respondent are free to opt for the new salary structure with terms and conditions which attach to it (the salary structure). They contend further that the offer remains open to them to accept and the discretion is theirs. They aver further that the respondent respects applicants' right to exercise their discretion as they like, but the respondent must not be blamed for the manner in which applicants choose to exercise their discretion. They accordingly deny that there is any

discrimination or an unfair labour practice arising out of such unfair discrimination.

The applicants referred to two instruments of the International Labour Organisation (ILO) which they said respondent's practice violate. These were the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (C. No.100 of 1951) and the Convention concerning Discrimination in respect of Employment and Occupation. (C. No.111 of 1958). They also referred to section 5 of the Labour Code Order 1992 which outlaws discrimination. Quite clearly Convention No.100 of 1951 has no relevance to this matter as it clearly deals with gender based discrimination at work. Similarly Convention No.111 of 1958 would appear not to have a holistic or general relevance in as much as it deals with equality of opportunity in employment which is not the applicants' case. It however, has relevance in so far as it deals with equality of treatment in employment and occupation. Section 5(1) of the Code too outlaws any application of any distinction, exclusion or preference which "has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation."

Article 3 of Convention No.111 of 1958 provides in part as follows:

> *"Each member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice:*
> *(a) to seek the cooperation of employers and workers organisations and other appropriate bodies in promoting the acceptance and observance of this policy.*
> *(b) To enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy.*
> (c) *To repeal any statutory provisions and modify any administrative instruments or practices which are inconsistent with the policy.*
> *(d) …….*
> *(e) …….*
> *(f) …….*

It is common cause that Lesotho has ratified this convention. It is also common cause that Lesotho has acted in accordance with Article 3(b) which requires the enactment of legislation, vis section 5 of the Code. It was also brought to our attention by the submission of the copy of the inspection

report of the Labour Officer Mr. Mako that the Government also acted pursuant to Article 3(a) and (c). In his report the labour officer pointed to the respondent that one of his findings was that "there was salary discrimination." The report of the labour officer also pointed out that the "question of what method of pay is adopted, is the prerogative of the employer and it cannot be an issue where employees are asked to make choices."

Despite all the advises and clear policy guidelines regarding the desirability for uniformity in salary payment policy, the respondent has remained adamant and continues to pay the five applicants differently from other workers. The respondent may not have consciously and intentionally resolved to discriminate the five applicants. The respondent has however, boxed itself into a corner by seeking to couple the promotion of the new terms and conditions with the increased salary structure. The unfortunate and undesirable result is precisely what has happened to the five applicants. Their refusal to sign has resulted in their being denied increases like the rest of the staff. Now that cannot be allowed in the light of the conventions and statutory provisions referred to above which outlaw discrimination in employment and call for modification of administrative policies and practices which are inconsistent with the policy of non-discrimination. The respondent has to accept that its strategy of seeking to promote acceptance of the new terms and conditions by tagging them to the salary increases has failed. The continued discriminatory treatment of the applicants in order to achieve such administrative policies cannot be allowed to continue and it must stop.

It has also to be noted that the tagging of the new terms and conditions to the new salary structure is the creation of the head of the Administration i.e. the Vice-Chancellor. The adoption of the new salary structure was by resolution of the Council which is the supreme governing body of the University. The resolution of the Council has not made provision for the options the administration presented to the staff. The resolution envisaged universal application of the new salary structure as well as the new terms and conditions to all staff without favour or any distinction. This is why at its meeting of the 27th and 28th June 2005, the Council resolved, inter alia, that:

> *"All staff discipline cases shall be governed and regulated under the Terms and Conditions of Service and that the NUL Disciplinary Code approved by Council on the 27th and 28th June 2005 shall be the only Code which will have the force of law on disciplinary matters."* (emphasis added).

We have emphasized the word "only" to show that as far as Council is concerned there is no dualism in the disciplinary processes. It follows that the issue of staff choice whether to accept or not to accept the new terms and conditions does not arise. By the same token the Registrar's letter of 7th July 2005 inviting applicants to opt for the new terms and conditions was superfluous. For these reasons the applicants contention that "the respondent's act of purporting to implement a salary increment for its staff members by making such increase subject to the signature for and acceptance of terms and conditions of employment creates a disparity amongst employees of respondent, which is irrational, unfairly discriminatory, unlawful, irregular and grossly unreasonable must succeed.

The applicants seek to be paid in line with the improved salaries which commenced on the 1st July 2005. In particular they want to be paid in accordance with the grades as shown in the Registrar's letter of 7th July 2005 (Annexure A1 – A5 of the Originating Application.). It was argued on behalf of the first applicant that he must also be paid at the top notch of a lecturer scale in accordance with the letter of 13th March 2005 (Annexure "B" to Originating Application.).

The first applicant was advised by that letter that the "Academic Appointments Committee agreed that you be awarded accelerated increment with effect from 1st July 2005. This extra notch will put your salary at the top notch of Grade 3 of the Academic Salary Structure." The contents of this letter clearly conflict with the contents of the letter of 7th July 2005 written to the applicant by the Registrar (Annexure "A1"). The letter of 7th July 2005 states in clear terms that; the new salary structure "…is not a notch based pay scale, but movement will be determined by performance." It follows that there can no longer be talk of notches in the new salary structure. It is accordingly ordered that the respondent pays each of the five applicants in accordance with the new salary structure as more clearly shown in Annexures "Al – A5" being letters written to each of the applicants showing them the standing of their respective salaries after the new pay structure came into force. The respondent is further ordered to backdate the

said payments to the 1st July 2005 which is the date the new salary structure came into operation. Given the degree of success of each side, which is infact fifty fifty, I find it equitable that each side must bear its own costs. It is so ordered.

THUS DONE AT MASERU THIS 25TH DAY OF APRIL 2006

L. A. LETHOBANE
PRESIDENT

R. MOTHEPU **MEMBER**	**I CONCUR**
J.M. TAU **MEMBER**	**I CONCUR**
FOR APPLICANTS:	**MR. MOHAU**
FOR RESPONDENT:	**MR. MOILOA**