CIV\T\533\92

IN THE HIGH COURT OF LESOTHO

In the matter of :

RAMPUTI PITSO **Plaintiff**

vs

LESOTHO HIGHLANDS PROJECTS CONTRACTORS **Defendant**

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 24th day of October, 1997

The plaintiff sues the defendant in this action based on a claim for

(1) the sum of M11 944-32

(2) interest thereon at the rate of 18% with effect from 14th April,1992 to date of judgment,

(3) Costs of suit

(4) further and\or alternative relief.

In elaborating on his claim the plaintiff highlights by way of his declaration that the defendant is a body corporate duly registered as an external company with the

principal place of business in Lesotho at Hlotse.

The declaration further reveals that on or about 26th August, 1991 the plaintiff was employed by the defendant as its driver for a fixed period of sixteen months.

The plaintiff is aggrieved that on or about 14th April, 1992 before the expiry of the period of the contract the defendant terminated the said employment which termination the plaintiff says he duly accepted without prejudice to his right.

The plaintiff further states that the contract of employment between the parties was governed by the Employment Act 1967.

He further says that in terms of Section 14(4)(a) of the Employment Act 22 of 1967 upon termination of the contract the defendant was obliged to pay the plaintiff a sum equal to all wages and other remuneration that would have been due to him if he had continued to work until the end of the contract.

At paragraphs 7 and 8, he breaks down and indicates his entitlements and computes his total claim as follows :-

(a)	Monthly salary.....	M1 247-04
(b)	Travelling allowance.....	136-00
©	Transport	50-00
(d)	Accommodation	60-00
		= M1 493-04

Having calculated that the remaining period to the contract at time of termination thereof is eight months he concludes that in terms of section 14(4)(a) of the above Act he is entitled to M11 944-32 calculated by multiplying Ml 493-04 by 8 as follows :-

M1 493-04 x 8 = M11 944-32.

He charges that despite demands the defendant, refuses, fails and neglects to pay the above sum. Thus he prays that it be enforced by judgment of this Court.

The brief reaction of the defendant to these claims is of denial of paragraphs 3 and 4 : further of 5 and 6 insofar as plaintiff alleges his entitlement to sums alleged or any other remuneration , and it pleads that plaintiff was found guilty of misconduct in a disciplinary action taken. Likewise it denies paragraphs 7 and 8.

At the conclusion of the hearing of evidence and submissions in this case the

Court sought to be supplied with certain authorities by counsel. But to date such have not come forth.

Be that as it may the plaintiff gave oral evidence on oath wherein he testified that he is suing the defendant.

He indicated that on 26th August, 1991 he was employed by the defendant as a driver for sixteen months. He said the contract of employment was in writing. However he said he didn't have a copy because "they (employers) didn't give me a copy at all".

He further indicated that in the written contract there was no provision for extension. He said he was paid by the hour and got his payment at the end of the month. He explained that at the end of month he earned one thousand and something but could not be certain because this was based on hours.

He stated that apart from the salary he earned M136 travelling allowance, M60 for accommodation and M50 for transport.

He told the Court that he didn't work for the entire sixteen months as he was

dismissed before that period expired.. He had been working for eight months when dismissed and thus had a further eight months outstanding.

The plaintiff postulates that he was dismissed on the allegation that he had misused the vehicle allotted to him by the company. He says the complaint against him was that the vehicle was not at its place of work that day.

He elaborates and in the process seeks to denounce the basis for the complaint against him by pointing out that in fact the vehicle

> "was not supposed to go to work that day because it was supposed to transport a white man who told me they would use alternative transport it being on a Sunday. This was a Sunday.
>
> I used the vehicle to transport the gentleman even on Sundays. It was my duty to do so on Sunday. On this Sunday it was on use because the white people said I could rest that day as they would use vehicles they usually use when they were off duty".

I wish to emphasise that the plaintiff is in no doubt that the date in question was a Sunday. His assertion that this was on a Sunday is further shown by his clarification which is in perfect consistence with this contention as he went on to say

> "They had told me on Saturday the previous day not to transport them on Sunday following".

But the ease with which *Mr Molete* put it to the plaintiff that despite the facile manner in which the plaintiff had made it appear that his contention was true, couldn't be so was indeed revealing not only about the plaintiff's lack of trustworthiness but the impropriety arising from the uncertainty of the interest claimed that would follow should the plaintiff succeed in this proceeding and calculation of interest be reckoned from 14-4-92 till date of judgment as alleged in paragraph 2 of the plaintiff's summons.

At page 6 of my notes the text goes :

DC: "You say this day of events was 14-4-92.....? Yes

Are you certain it was a Sunday.....? Yes.

Why are you so sure it was a Sunday.....? Because on weekdays we work from Monday to Saturday, then on Saturday we would discuss what was to happen on the following day which is Sunday.

Do you know days of the week.....? I know days of the week

I have a 1993 Calendar showing that 14-4-93 was Wednesday. No way could the previous year's 14-04-92 have been Sunday .....? Sunday was a day the whites said I shouldn't go to work.

You say you were told not to go to work on Sunday.....? Yes

So are you saying because on 14-04-92 you didn't go to work it must have been on Sunday .....? I was not relying so much on the date. But I know the day in question was a Sunday.

Meaning you say it may not have been 14-04-92 but it was a Sunday .....?

Yes.

It is because your allegation in Summons relates to 14-04-92. Interest is to run from 14-04-92 till Court gives judgment.....? Yes for it was Sunday when I was not at work. On following Tuesday was day of hearing case for misconduct"

I have satisfied myself that 14-04-92 was indeed a Tuesday and not a Sunday.

The question now is if 14-04-92 was not a Sunday why did plaintiff insist so much that it was? If the day appearing in the summons as the day constituting the origin of the cause of action is wrong inasmuch as it happens not to be a Sunday from which the running of interest is to be reckoned, then from which Sunday is the running of interest to be reckoned? Surely the onus is on the plaintiff to establish this and not on the defendant. On this ground alone it would seem to me that the heart has been taken out of the matter constituting the prayer in paragraph 2 of the plaintiff's Summons; and accordingly the prayer for interest running from 14-04-1992 must fail. Otherwise to let the plaintiff's evidence stand despite this major defect would amount to letting a clear inconsistency in his evidence unfairly hold good against the opposing party's own interest.

The plaintiff said that despite that members of his car pool had told him the previous day not to transport them the following day, he nonetheless on meeting

others who were intending to go to Ngoajane where he was working, acceded to their request to drop them at Ngoajane in defendant's vehicle.

When the plaintiff arrived at Ngoajane a white man asked him to take a worker called Seekane to Khukhune. From Khukhune the plaintiff says he went to Butha Buthe.

The plaintiff said he couldn't go back to Ngoajane that day because he was not on duty but had just taken these people at their request.

He said further that because he was not feeling well he handed the vehicle to one Tibisi to drive. Tibisi was a fellow employee who had already been employed in a different department when the plaintiff came to be employed by the defendant.

Along the way from Khukhune to Butha Buthe lies a place called Marakabei. It was while Tibisi was behind the steering wheel that he stopped the vehicle and alighted saying that he wanted to get some food. When Tibisi came back where he had stopped the vehicle with the plaintiff sitting in it as a passenger, the site agent for Ngoajane one Pierre Bourgeoise (DW1 in this proceeding) pitched on the scene and inquired where the plaintiff was bound for. The plaintiff said he was going to

Butha Buthe which is the place where he was staying. DW1 pointed out that the vehicle ought to have been at the working site. The plaintiff told him that the people he worked with had told him not to fetch them as that Sunday was his day off; suggesting further to the plaintiff that they would use alternative means of transport.

DW1 then told the plaintiff to go back to work. The plaintiff protested saying he was not even feeling well. Then DW1 asked why it was that Tibisi was driving the company vehicle. The plaintiff indicated that he was sick but DW1 pointed out that, if so, the plaintiff should have reported his indisposition (to the senior authorities) at Ngoajane. DW1 ordered the plaintiff to drive back. He complied.

The plaintiff said he didn't meet with any people might who have taken his place at work that day because he had decided with them that they would not meet that day being a Saturday. I must confess my inability to comprehend the proper meaning intended to be conveyed by the plaintiff in the above sentence.

He is aware that the defendant charged him with misconduct arising from his misuse of the defendant's vehicle. He however denies this charge. He denies the defendant's allegation that he was liable for misconduct arising from his refusal to

obey lawful instructions. He denies that he failed to comply with company rules. He dubs as untruthful any allegation to that effect. He asserts that in relation to the vehicle in question he had used it without breaching any of the company regulations.

He however points out and admits that he was told in what manner he was said to have misused the company vehicle. In short he indicates without comment that his misuse of the company vehicle was said to have centred on the fact that he had handed the vehicle to Tibisi to drive.

The plaintiff told the court that according to company practice if he fell ill and felt it would not be safe to drive he had to report that he was ill.

But if he fell ill along the way and while driving and is nowhere near where he could report then if he is alone he would have to seek help from passing vehicles.

He reiterated that he was said to have misused the company vehicle by allowing Tibisi to drive it. He expressed his bewilderment that under such circumstances his employers should say he had no right to hand over the vehicle to a fellow employee. He was quick to indicate that his bewilderment was based on common sense as there were no rules governing this particular situation. He

testified that the defendant nonetheless insisted that he had misused the company vehicle and dismissed him "the same day 14-4-1992".

He told the Court that when thus being summarily dismissed he received his full monthly salary for the whole of April. He confessed his forgetfulness of one of the headings under which he was laying his claim against the defendant.

He however went on to say he was suing the defendant for terminating the contract before the end of its due course. He explained that he ought to have been paid for the remaining eight months in terms of the Employment Act.

He indicated that there was no company regulation governing circumstances he found himself in but is aggrieved that he was nevertheless dismissed on the allegation of having misused the company vehicle. He said that he considered the dismissal unlawful and therefore claimed salary in respect of the remaining eight months, interest thereon calculated from 14-4-92 and costs from the defendant.

I have already dealt with the aspect of the cross-examination revolving around the date 14-4-1992 and the telling effect *Mr Molete's* cross questioning of this witness had on this aspect of the plaintiff's case. That was not the end of the story.

Mr Molete's cross-examination of the plaintiff further exposed the vagueness of his knowledge and recollection of things which one would ordinarily expect the plaintiff to show his dependable acquaintance with. Surely a man should show a fair amount of familiarity with the facts surrounding his case.

The vagueness of the plaintiff's response to the cross-examiner's questions was thoroughly exposed in the following text reflected at page 7 of my notes :-

> "You were employed as what exactly.....? A driver.
>
> Were there specific people you were assigned to. You have been saying whites told me this, whites told me that.....? There were specific such people.
>
> How many were they .....? I never counted.
>
> How big was the vehicle.....? A kombie. A Super 14.
>
> How many people does it carry.....? I don't know. But when these people were in there there would be empty seats.
>
> You worked with these people who didn't fill the kombie yet you can't even estimate how many they were.....? I would say about ten in my estimation".

That at long last he should come by this answer betrays the tendency on the plaintiff's part to avoid giving straight answers to simple questions. This can only detract from his credibility as a witness.

The plaintiff agreed that his payment was based on the hour as the unit of time he did his work in. However he pointed out that, contrary to the suggestion that he wouldn't be paid if he didn't take his passengers anywhere, on no occasion would a day pass without him taking them some place.

The plaintiff conceded that even though he said no day would pass without him carrying his passengers some place, the proper understanding is that because he didn't carry them that particular Sunday then he would not clock any hours; and therefore would not expect to be paid for that Sunday.

Asked what his hourly rate of pay was he answered : R4-33. Asked if he could say with certainty what his monthly salary would be his answer was not to the point. In the result *Mr Molete* concluded by putting to the plaintiff :

"So you can't know exactly how much you earn per month....? True".

The plaintiff readily claimed he saw a real good basis for laying a claim of M1 247-04 as his monthly salary. Asked how he came to this amount he said that was the amount he was given the previous month.

Again when it was put to him that he simply assumed this amount to be his

salary because he had been paid an equal amount the previous month he didn't give a straight answer to this question but instead chose to say "It was money I was paid when I was dismissed".

Apparently he had overlooked the fact that he had earlier told the Court that in this amount had been included not only his salary for the month but some allowances. It was due to this posture of the plaintiff's understanding of the position and in turn what he portrayed before the Court as true that *Mr Molete* very properly put to him

> "So you just took that to be your monthly salary and that it be paid for the remaining eight months .....? Yes".

The plaintiff was indeed perplexed when told that his understanding of the position makes no sense.

In order to bring home to the plaintiff the nature and extent of his misapprehension *Mr Molete* proceeded for the benefit of the plaintiff as follows :

> "Your claim for M1· 247-04 was money you were paid when you were dismissed and you use it as your salary which ought to be paid for eight months remaining .....? Yes.
>
> You see that doesn't make sense.....? To me it makes sense for this was

money paid when I was dismissed. I didn't.....

This doesn't make sense. This is dismissal money. Why should your claim regard this as your monthly salary yet you were paid per hour .....? I so understand and rely on this one for the ones I worked because they didn't calculate for me".

It is apparent to me that what the plaintiff is trying to say in the answer he has given immediately above is that because in the past the management didn't calculate for him the break down of his earnings for a month, nor did they do so in respect of the instant payment he received on dismissal, he then relied for making his calculations on the amount he last received for the month which was dismissal money.

Proceeding then to the question of breach of regulations, cross-examination elicited the fact that according to the contract that the plaintiff claimed was written, if he breached the regulations then the company would not have to wait until eight months to dismiss him. See page 8 of the Court's notes.

The plaintiff conceded that according to the contract he signed the company is entitled to dismiss him for misconduct in his misuse of its vehicles. He however was quick to qualify this by adding "but I would be entitled to my benefits".

Asked if on that Sunday he was on duty or not he said he was not.

It is difficult to see how the plaintiff can avoid liability for misuse of the company vehicle in view of the fact that he concedes that he was not on duty that day. If he was not on duty then it is only logical that the company vehicle should have remained at its parking place.

To me it seems ridiculous that, when asked how he came by the company vehicle that day and under those circumstances, he should say "I was helping those who were on duty at their request while I was not on duty". The plaintiff failed to come straight also in respect of the question whether it was within the scope of his work and operation of the kombi that day to assist those people who indeed were not the ones he regularly conveyed and who had told him on the previous day that they would not need his transport.

Characteristic throughout this proceeding, of the plaintiff to resort to irrelevance as a means of escape from questions which laid bare his irresponsibility, his response bears out this aspect in the following text :-

> "Who overruled that (i.e. the position that you were not required to convey them) and why did you accept it .....? I was doing that because the ones I was to take were not there and I was taking those who were going to work".

Apart from the fact that this answer begs the question, it is no answer at all to the essence of what is clearly conveyed to the witness by the question.

But because patience pays, a true and proper answer at times pops up where one hardly expected it especially after all the evasions that a witness has embarked on. For instance :-

> "Under whose authority did you take these people when the ones you were to take had asked you not to .....? Co-workers. Moreso because their vehicle was late.
>
> You were authorised by co-workers even when you were off duty.....? There it was my volunteer action".

At last now the Court hears what is the main source of all that was set in motion till the stage was reached when this matter came before this Court. I have perused all the pleadings including minutes of pre-trial conference but find that somehow this significant point was either over-looked or side-stepped.

From this point on *Mr Molete's* cross-examination was greeted with even greater rewards. For instance :-

> "You volunteered to violate company regulations and complain when company takes action against you .....? I don't think I breached rules for these were company people I was taking.

When off duty you are not supposed to touch that vehicle. You drive it when on duty doing what you are employed to do .....? Repeat that please.

You are not authorised to touch it, worse still, to drive people who you are not authorised to take .....? I believe I am authorised. These people were going to the same place where the others went.

You were volunteering, for you were told the previous day you would be off duty. Then you volunteered to take people whom you were not authorised to transport .....? Yes, for nowhere is it agreed that when they are off I can't take other people to work.

Court:By 'when *they* are off' you mean people you regularly transported .....? Yes

D.C.: These people whom you normally transported had authority on you and you said previous day they said you shouldn't take them .....? Yes.

Now you mean by taking these ones who have no authority on you and contrary to orders of those with authority you acted correctly to do so .....? It was for I was taking them to work".

Given the above responses to compound and reckon with, it escapes me and defies my sense of logic how the plaintiff hopes that the two sets of factors deriving from two opposed considerations can lead to the same result. Suffice it therefore to say, in my view, there is no way instructions given by legitimate authority can be thwarted in favour of instructions by unauthorised persons nor that the two sets of instructions can amount to one and the same thing. The instruction "drive car" and the instruction "don't drive car" emanating from opposed sources cannot lead to the same result, yet this is what the plaintiff would have this Court believe and accept as possible and tenable.

The Court learnt that the plaintiff had not previously indulged in this practice of helping people when he was not on duty and conveying people whom he was not authorised to transport in the company vehicle.

The plaintiff reiterated that his intention after dropping his passengers at Ngoajane was to park the vehicle at camp. When he left Ngoajane he was with a co-worker called Seekane who was going to Khukhune. While at Ngoajane he had been asked to take Seekane by a white man whose name he did not know. The plaintiff was not responsible to this white man either. The plaintiff didn't bring to that white man's attention that he was not on duty and that all he was to do from that moment was go and park the company vehicle. The plaintiff chose to dodge the question why he didn't ask the whiteman to direct his request to someone to whom the plaintiff was responsible in an endeavour to help him avoid breaching the company regulations. He glossed over the question by saying the person I was travelling with was to be dropped at Khukhune along the way to Butha Buthe.

He said he experienced stomachache while travelling with Seekane. It was at Khukhune junction where he met Tibisi that he asked the latter to take the wheel. Tibisi was going to Butha Buthe. But then Tibisi went to do some shopping at Marakabei where DW1 found the vehicle parked with the plaintiff in it.

Having initially said DW1 was wrong to indicate to the plaintiff that he was not supposed to be where he was at the time he later conceded that DW1 was correct in asking what the plaintiff was doing with the vehicle there. He however denied that according to company rules he was not supposed to be where he was. His reason being he was there because he had to convey people who had asked him to take them to work.

He further felt that there was nothing wrong in him letting someone drive the company vehicle in the event that he felt ill and had decided against leaving the vehicle by the wayside to find himself a lift.

The plaintiff chose to duck and weave instead of responding to a direct challenge put to him by *Mr Molete* that he was not ill and that he handed the vehicle to Tibisi because the plaintiff knew he was not supposed to drive it. His answer was "you were not with me".

On this aspect of the matter *Mr Molete* finally rammed the point home in the following text :

> "But your story is incredible for you had driven the vehicle to Ngoajane and on your way back you find someone to drive it for you, for you were so sick as not to reach Butha Buthe from Khukhune. You just chance on a reason to

hide behind .....? It is incredible for it did not happen to you".

The next and last leg of the cross-examination concentrated on the question of the hearing for misconduct.

The plaintiff admitted that he was given a hearing. He conceded that he was given an opportunity to go to correct authorities in accordance with his contract. He was quick to say this proper authority was "Mr Bourgeoise" DW1 giving the impression that Bourgeoise was the only such person. Consequently *Mr Molete* was prompted to ask :

"(Did you go) to him alone .....? And others.

Why try to hide these others .....? (silence)".

The Court is satisfied on evidence led that on his own admission the plaintiff was called before Bourgeoise and others and that he was represented by two people and that his matter was discussed in a fair manner though the plaintiff seeks to qualify this last bit by saying "they were just listening when I was talking". He also denied that his representatives had an opportunity to put his side of the story.

But this contention immediately disintegrated when considered side by side with his answer following the next question at page 17 of the record.

Court: "Were your representatives given an opportunity or were they denied an opportunity .....? They were not denied".

Plainly speaking it should be clear that it cannot amount to one and the same thing: to be denied an opportunity on the one hand and not to use the opportunity that has not been denied on the other hand.

The plaintiff appeared puzzled when it was put to him by *Mr Molete* that the disciplinary committee did not believe him in the same way the learned counsel didn't. He was stunned to learn that he was dismissed because he was not believed. He however didn't appeal even though he was dissatisfied with the verdict. He didn't ask the project manager to look at the matter once more.

The plaintiff maintains that he was wrongly dismissed because the vehicle was used for the good of the company and not his own personal good even though the learned counsel had indicated to him that on its own the plaintiff's evidence shows he misused the vehicle when not authorised to drive it and gave it to someone not authorised. Further that the plaintiff didn't complain that his matter was not dealt with fairly.

The plaintiff said that he was not given a copy of his written contract. He

said he had asked for it but was denied this at Hololo.

It was put to him that this was not true for the learned counsel's instructions were that after signing the contract its original remains with the company while the employee gets a Sesotho translation.

The re-examination was largely devoted at making calculations of the amount of money claimed in relation to the number of hours spent at work per given time. A further aspect of importance that emerged under re-examination is that the plaintiff was aware of the charge and the manner in which he was alleged to have misused the company vehicle. Much was made of the fact that DW1 was presiding at the inquiry into the plaintiff's misconduct,

It is significant that in his evidence-in-chief the plaintiff merely said he didn't have his contract with him and only under cross-examination did he seek to explain that this was not released to him. Even then his answer is somewhat garbled *c)f*

Court:"At a later stage under cross-examination you said they(company) refused to release it to you .....? Yes.

Why didn't you say that in your evidence-in-chief .....? The contract form stage hadn't been reached then".

Indeed I recall distinctly DW1's reaction (to the suggestion at page 25 of the Court's notes that the plaintiff says he was refused a copy of his contract) expressed in a mixture of puzzlement and disbelief that I was able to gather from his face. DW1 expressed himself as follows :

> "This sounds very strange to me because he signs the contract at Butha Buthe Training Centre and the copy is given to the employee and the original is kept at Leribe which is the Head Office. On top of that this is a very standard contract. Everybody signs this contract. To my knowledge this happens to every employee".

The evidence of the plaintiff therefore on this aspect of the matter is bound to set the Court's mind thinking along the following lines : if the company denied the plaintiff copy of his contract how did they know he would need it on a day like this and thus succeed in disobliging him this way? If they were certain a day like this would dawn on him why did they bother employing him? Why did they treat him differently from everyone else from the very beginning if they didn't wish for him that a day like this should come? These are questions one is bound to ask oneself if the plaintiff's story is to register as something worthy of credit. But as will later be illustrated none of the sort of things that would so set my mind thinking as I have indicated took place at all.

As early as January 1993 the defendant lodged with the plaintiff's attorneys a request for further particulars as follows :

1 ad para 3: "Was the employment contract written or oral. If written a copy is required and if oral details of :-

(i) where it was entered into

(ii) who represented the parties

(iii) what was the rights (sic) of each party regarding termination"

In response to the above a copy of further particulars date stamped 7-7-93 shows in paragraph 1 Ad Para 1: (a) In writing

(i) Butha Buthe Training Centre

(ii) Plaintiff and Mr Tibisi

(iii) contract of fixed duration".

What is totally ignored in the above response is the clear request that if the contract, as it turns out to be, is in writing the defendant be furnished with a copy. The reason for its absence today as advanced in evidence sounds really hollow because if in fact the plaintiff was refused copy of such contract as he would have the Court believe, then there would have been no reason for not revealing this state of affairs in response to the request by the defendant for further particulars. It was all the more plausible for the plaintiff to respond that way because it would have hoisted the defendant on its own petard or let the plaintiff have the last laugh at the defendant's expense for refusing in the first place to let the plaintiff have a copy of

the contract only to come begging it of him later.

Contrary to the plaintiff's story that he was not on duty on the day in question DW1 says the plaintiff was in fact on duty. This ties up with the question put to the plaintiff under cross-examination that "When off-duty you are not supposed to touch that vehicle. You drive it when on duty doing what you are employed to do." Needless to say the plaintiff's response to this clear question and its clear implications was unsatisfactory in the highest degree (see page 11 of Court's notes). So in keeping with ***Small vs Smith*** 1954(3) SA 378 the defendant cannot be heard to say he didn't get a forewarning of what DW1 would have to say later on the issue. In short, the defence did put its case regarding the question whether or not the plaintiff was on duty on the day in question. DW1 goes further to say that the plaintiff works directly under him and he is the one who is entitled to give him instructions regarding where to go and who to convey. There was thus no question of any white men going to give the plaintiff any instructions behind DW1's back.

DW1 said the plaintiff was supposed to transport a very small team of workers from Butha Buthe to site and back from Ngoajane where a special job was to be done there. While at Ngoajane one Arnaud asked the plaintiff to transport somebody to Khukhune and come back afterwards.

Ngoajane, according to DW1, is not far from Khukhune - the two are 12 km apart. DW1 expressed concern that the plaintiff who was expected to drop a passenger at Khukhune and come back appeared to have spent the whole morning without arriving here where he had expected him. Moreso because this was the only vehicle on site and was required for emergency evacuation of people.

It occurred that DW1 went back home to Butha Buthe and on his way home he found the vehicle in question parked in front of a shop at Marakabei. DW1 testified that on the way to Khukhune the plaintiff didn't have to pass through Marakabei. Though Marakabei is between Khukhune and Butha Buthe one doesn't have to get to Marakabei from camp because Marakabei is beyond Khukhune. It seems to me therefore that from camp to Butha Buthe one would first go past Khukhune then Marakabei and finally reach Butha Buthe.

It should be observed that DW1's story to the extent that the plaintiff was supposed to go from Ngoajane to Khukhune and come back to Ngoajane, is in sharp conflict with the plaintiff's story that from Khukhune he was supposed to proceed to Butha Buthe where he would park the company vehicle.

DW1 said apart from someone who was sitting in the driver's seat there was

also a lady in that vehicle. He impressed upon the Court that the company's strict instructions to drivers were not to take anybody in the vehicle who was not an employee of the company.

DW1 testified that the plaintiff didn't explain why the lady was in the company vehicle. He didn't explain why he was not driving the mini bus. But he did suggest he was ill though what struck DW1 as strange was why if the plaintiff was not feeling well he was headed for Butha Buthe and not returning to Ngoajane which was much nearer, given also that there was also a nurse who would easily have attended to his ailment or complaint. In any event because the plaintiff didn't look at all ill to DW1 he rejected his explanation and ordered him to return to the site.

DW1 also told the plaintiff to come to his office and warned him that there would be a disciplinary hearing following this incident.

DW1 testified that as chairman of the inquiry he recommended that the plaintiff be dismissed and the Project Manager one Dauban confirmed DW1's decision. DW1 stressed that it would not be acceptable if one of the plaintiff's colleagues said he needed to go on duty so the plaintiff should take him there. If it

is the plaintiff's decision it is not acceptable either.

He finally told the Court that none of the plaintiff's representatives complained about the manner DW1 went about the whole procedure of the hearing till the recommendation.

This witness was subjected to lengthy and very close cross-examination which in my opinion he stood quite well.

The tenor of the cross-examination was geared at showing how unfair it was that the defendant as chairman of the inquiry had also been a witness to some of the elements of the charge preferred against the plaintiff. But all this was sufficiently neutralised by *Mr Molete's* re-examination which revealed that at the disciplinary hearing the plaintiff did not deny that he was at Marakabei on the day in question. At that hearing the plaintiff didn't deny that he had given the vehicle to someone to drive.

The suggestion that the discussion between DW1 and Arnaud held in the absence of the plaintiff was prejudicial to him, was also watered down by the revelation that with the exception of Arnaud's mentioning that he had sent the

plaintiff to Khukhune and back to site nothing of importance was said in that discussion.

To the charge that DW1 had relied on his own evidence to reach a decision the heart was taken out of the matter by revelation of the fact that the plaintiff did not disagree with the observations DW1 had made on the day he had met the plaintiff at Marakabei.

With reference to the record and some extracts to which he was referred DW1 testified in re-examination that he was certain that the record contains all important things and nothing more.

He also said the question raised by the plaintiff and the explanation he gave that he was not well therefore he relied on the help of this other driver was investigated and it was found that the plaintiff was not so sick as not to be able to walk to site.

DW1 finally informed the Court that he followed his own regulations in the proceedings that took place on the day in question.

In his submissions *Mr Pheko* for the plaintiff stated that the applicable law is the Employment Act 22 of 1967 section 14(3) and (4)(a).

Section 14(3) reads :

"No notice of termination shall be required in the case of -

(a) contracts specifically expressed to be for one period of fixed duration and not renewable;

(b) contracts under which specific task or work is to be executed or services are to be rendered during a specific journey for an agreed remuneration".

Section 14(4)(a) reads :

"Either party may terminate a contract -

(a) in the case of a contract under subsection (3) by payment to the other party of a sum equal to all wages and other remuneration that would have been due to the employee if he had continued to work either until the end of the contract period, or, if the contract is of the kind to which subsection (3)(b) refers, until the completion of the contract".

The Court was also referred to Section 15 which reads :

"(1) A contract shall be terminated, notwithstanding the agreed period of employment has not expired or that due notice of termination has not been given, by termination for unlawful cause by either party.

(2) Termination of a contract for lawful cause means -

(a) in the case of termination by an employer, summary dismissal

in the circumstances set out in subsection (3);

(b) .....

(3) An employer may dismiss an employee summarily in the following circumstances and no other -

(a) where an employee is guilty of misconduct, whether in the course of his duties or not, inconsistent with the fulfilment of the express or implied conditions of his contract, which would entitle the employer under the common law to dismiss him summarily;

(b) for wilful disobedience to lawful orders given by the employer;

© for habitual or substantial neglect of his duties; or

(d) for absence from work without the permission of the employer and without other reasonable excuse.

(4) ....."

I need pause here and once more observe that in paragraph 3 of the defendant's request for further particulars the question was asked : "On what basis is it alleged that the contract is governed by the Employment Act 1967?"

The response to this is in paragraph 3 ad para 3 of the plaintiff's further particulars reading -

"This is a matter of law and not strictly necessary to enable defendant to plead"

In this reaction I see a further indifference to the fact that the plaintiff is obliged in law to produce the documents on which his case is based. Surely the repeated reference on his behalf to this contract placed the plaintiff under the necessity to place the contract at the Court's disposal. In my view, the plaintiff has failed to fulfil this obligation. I hardly stress also that the law looks with disfavour at any resort to the extra-ordinary when the ordinary would avail. I look upon reliance on the Employment Act 22 of 1967 as resort to the extra-ordinary when it would be perfectly in order if the contract of employment that the plaintiff said was written had been placed before Court.

I accept *Mr Molete's* submission therefore that the question whether the plaintiff has proved his case on balance of probabilities depends on evidence.

On the evidence and circumstances referred to surrounding this case, even though the plaintiff said he was denied a copy of his contract it is most probable that he got it.

It cannot be over-emphasised that omission of this document is very important for without it the Court is left without the very foundation of the plaintiff's case. It is thus necessary that before considering applicability of the 1967 Employment Act

the contents of the contract should be advanced and explored.

I am under no illusion that if the plaintiff is relying on the Employment Act to the exclusion of the Contract, then oral evidence shows that the action by the defendant was not unlawful. This seems to be so even if I were to take either party's evidence in isolation. The Court has seen that there was indeed a misconduct as a result of which a hearing was conducted leading to the plaintiff's dismissal. I am of the firm view that without a contract this is the case.

The plaintiff admitted that there was a hearing. The question then is whether the defendant was entitled to do anything as a result of the misconduct which under the Common Law is recognised as warranting dismissal.

The Court was at the beginning amazed by the plaintiff's good sense of duty that even though he was off duty he took some of his co-workers to some sub-station. But later it became clear that even this he would have had to do with the management's approval. Thus what I find more likely to have been the case is that he was on duty. From this point it becomes clear that by saying he was off duty there is something he is running away from namely that his services were required at the site where operations were effected and where people effecting them would

require to be evacuated speedily.

It is common cause that the plaintiff gave the vehicle to someone else to drive. Even though he says he did this innocently common sense dictates that before giving a company vehicle to someone else a man has to ask himself if doing so is not in breach of company regulations. I accept the evidence that company policy and regulations required that a driver report his distress to his manager in order for the latter to set about replacing him.

I see in the plaintiff's eagerness to impress the Court with the fact that he suffered from such a bout of stomachache that he couldn't even drive, an attempt to cover up an act of handing over the company vehicle that is not entirely innocent. This comes into sharp relief when viewed against the credible evidence of DW1 who showed that the company has a nurse at a place where duty did not only require his presence but which was also nearer than the other for which the plaintiff said he was bound.

The Court found it improbable that Tibisi would just ignore the plight of a colleague who is ill and go and spend his time shopping without much regard to the need to rush him to a place where he would receive medical attention. The stunning

reply was that Tibisi didn't know how the plaintiff felt. The question is why wouldn't the plaintiff tell him how he felt in order to make Tibisi know this. I accept *Mr Molete's* submission that all this was an attempt to cover up misconduct that warranted discipline.

One peculiarity of this proceeding initiated by the plaintiff deserves great attention. The important aspect that should be put in its proper perspective is that this proceeding is not a review of the hearing complained of at inquiry.

It is in this ill-conceived context that the chairman's conduct was called in question by the plaintiff. As it seems this is a misconception and therefore wrong. A trial cannot be a substitute for an appeal or review. It stands to reason that I accept *Mr Molete's* submission that the plaintiff should have brought his case by way of review in respect of whatever procedural irregularity, gross unreasonableness, failure to observe natural justice or some such aspects of the case for which a review is a proper remedy.

Hebstein and Van Winsen in **The Civil Practice of the Superior Courts in South Africa** second Ed. Page 670 say

"It is, of course, quite possible that the ground of complaint may

> support proceedings by way of appeal or review equally well. Where illegal evidence has been admitted either procedure can be adopted. If, on the other hand, the court rejects competent evidence, appeal proceedings are appropriate only if the record discloses the nature of the evidence tendered. When there is nothing on the record to show that the evidence was entered, the proceedings may be brought on review".

Needless to say the proceedings before this Court have been brought without paying heed to either of the permissible procedures set out above.

I thus accept *Mr Molete's* submission that the tribunal whose handling of inquiry is complained of is neither statutory nor even quasi-judicial. It is purely administrative and as such not strictly required to comply with procedural rules. In administrative tribunals there are procedures which are not required to be strictly adhered to. Subject to the qualification that as long as this body is in breach of broad principles of natural justice or regulations it cannot be scrutinised to the same degree as judicial or quasi-judicial bodies are to be.

Failing the adoption of a procedure suited to remedy the wrongs complained of by the plaintiff it would be inconceivable to favour his side in judgment. Moreover to a large extent, as submitted by *Mr Molete*, the hearing seems to have complied with rules of natural justice.

The criticism levelled against the hearing that DW1 was at once the Chairman and the complainant is neutralised by the fact that apart from the fact that what was dealt with at that hearing was a straightforward matter it is also something that was accepted by the "accused".

Mr Molete indicated that the person who observed the event happened to be the chairman who said the culprit was being sought by his foreman. For reasons advanced earlier I accept the proposition that even in a proper proceeding by way of review it would be arguable that the fact that DW1 did observe the event does not totally disqualify him or reduce the hearing into a nullity. But here we are dealing with an action brought by way of summons and which should be handled in just that sense. If in bringing the matter by way of summons when there are proper and alternative means the plaintiff was running a risk then the nature of the case is such that this Court cannot be of any help to him.

The fact that Arnaud was not called according to *Mr Molete's* submission, may appear to be a breach of natural justice. The learned counsel however was quick to point out in a manner satisfactory to the Court that there was no denial that the plaintiff was sent from point A to B and back by Arnaud. So in my view it would even be superfluous to call Arnaud to come and testify to this point. It would

thus be beneficial to bear in mind that superfluity is reprobated in law.

I accept the submission highlighting the fact that the plaintiff's evidence is not believable on points where he disputes the defendant's case. First, there was the aspect that the plaintiff volunteered to go and transport workers against the rules. Next, he meets somebody whom he allows to drive the company vehicle contrary to the rules.

With regard to the claim the Court was shown that it is composed of a monthly salary and allowances multiplied by 24 days at the rate of M4.33 per hour. However, the amount arrived at in the summons is so uncertain as to be unreliable in calculating the monthly salary due to the plaintiff.

There was a disagreement between the plaintiff's side of the calculation based on 24 days and DW1 who showed the days would at best come to 22 plus some fraction in number.

One has to reckon with the fact that there would be weekends, public holidays, and days off - meaning since no deductions were made certainty of the amount due to the plaintiff would be doubtful were he even to succeed in the action.

I need but make a reminder that there is a well known principle that where the amount is not certain the Court is not there to calculate. So it should be borne in mind that what is involved in this case is not a claim for damages for injury but a liquid claim, which as such, is and should be arithmetically calculable. As it is, it is not known what tax the plaintiff would be liable to pay even

Consequently, I have come to the conclusion that the plaintiff has failed to discharge the onus placed on him that his dismissal was unlawful. I therefore dismiss his claim and summons with costs.

JUDGE
24th October, 1997

For Plaintiff : Mr Pheko
For Defendant: Mr Molete