IN THE LABOUR COURT

CASE NO LC24/98

HELD AT MASERU

IN THE MATTER OF

ABRAHAM MONOHALI **APPLICANT**

AND

ROADS IMPROVEMENT UNIT **1ST RESPONDENT**
THE ATTORNEY GENERAL **2ND RESPONDENT**

JUDGMENT

This is an application in which the applicant petitioned the court to grant him an award in the following terms;

1. Declaring the purported dismissal of applicant by 1st respondent void ab initio in that applicant was not accorded a hearing prior to his dismissal;
2. Reinstating applicant or paying out to applicant compensation this Honourable Court may deem fit and paying arrear salaries not paid in this period of unlawful dismissal;
3. Granting applicant costs;
4. Granting applicant such further and/or alternative relief.

Alternatively

Payment of terminal benefits in the form of severance pay, money in lieu of notice, leave pay (which includes 10% gratuity paid at the end of the year).

It is worth pointing out at this stage that at the close of the applicant's case Mr Letsie on behalf of the respondents applied for absolution from the instance, which the Court refused on the grounds that the Court is enjoined to consider the case on its merits so that it can discharge its function of

doing substantial justice between the parties (see Section 27 (2) of the Labour Code Order, 1992, (the Code).

Mr Letsie nevertheless closed the respondent's case without leading any evidence. As it was held in Gayscoyne .V. Paul & Hunter 1971 TPD 170, in such a case the enquiry then is' "*Is there evidence upon which the court ought to give judgment in favour of the plaintiff?"* (see also Herbstein & Van Winsen, the Civil Practice of the Supreme Court of South Africa, 4th Ed at P. 681). In Rex .V. Nsabimana Shabani & Others 1991-92 LLRLB 55 at p.57 Molai J. stated;

> ***"I must however, hasten to point out that where at the close of the crown case the court turns down his application for discharge the accused person is not bound to go into the witness box or call witnesses to testify in his defence. He is entitled to tell the court that he is closing his case without leading any evidence at all."***

We have relied on the Nsabimana Shabani case despite it being a criminal case, because as it has been said in Herbstein and Van Winsen Supra at P. 682 *"**an application for absolution from the instance stands on much the same footing as an application for the discharge of an accused at the close of the evidence for the prosecution in a criminal case."***

We come now to the consideration of the question whether there is evidence on which this court ought to find for the applicant in this case. Applicant's case on the papers is that on the 4th November, 1997 he was suspended. Following the said suspension, while legitimately expecting to be summoned to a disciplinary hearing he was confronted with a letter of dismissal dated 24th November, 1997. He averred that his dismissal was unlawful and unfair in that it was contrary to the law i.e. the code and it was against the basic principle of audi alteram partem. Since it was not specified in which way the dismissal contravened the code, we assume that it must have been applicant's intention to rely on Section 66 (4) of the Code which embodies the principle of audi alteram partem in that it provides that an employee shall be entitled to defend himself against the allegation made at the time of dismissal.

It is common cause that the applicant was dismissed for allegedly using first respondent's "....tippers to deliver material loaded from (the first respondent's) borrow pit by an excavator on hire to RIU (1st respondent) to

a private concern in Mafeteng." (See annexure "A" to the originating application). The activity was said to have been carried out on 24,25 and 27 October, 1997. The applicant for his part did not deny doing as alleged, but claimed that the activity was authorised by the former Senior Roads Engineer, Mr Bill Young who at the material time had since left Lesotho and gone back to his country.

The applicant devoted a lot of effort to show that he was authorised by Mr Bill Young to deliver the material which was allegedly meant to replace the material belonging to a Mafeteng company called Universal Development Company which they had mistakenly used in the building of Thabana Morena road. To this end he called DW 2 Mr Leuta who testified that first respondent had used his company's gravel material and that when they brought this to their attention, they promised to replace it. He further testified that the applicant later did so without any money changing hands.

The new Senior Roads Engineer who took over from Mr Young who is called Mr Wood has made a sworn affidavit. In the affidavit he has averred and this has not been denied in oral testimony by the applicant that in October, 1997 he "***went on leave, leaving applicant with written instructions regarding the activities to be performed in my absence."*** (See Paragraph 6 of the supporting affidavit). He goes on in paragraph 7 to state that he was surprised to learn upon his return "that RIU had been engaged in delivering gravel materials to a certain private business in Mafeteng."

Even if it may be assumed in favour of the applicant that Mr Young had authorised that the gravel material which was erroneously used be replaced, his successor Mr Wood ought to have been informed of that decision. There was just no way the applicant could carry out the exercise of that magnitude without informing those in authority and just be allowed to get away with it on the flimsy excuse that a previous supervisor had authorised it before his departure. Quite clearly this was an underground activity because the applicant waited for Mr Wood to be away on holiday before carrying it out. Furthermore, it was an exercise outside the scope of activities which Mr Wood had in writing instructed that they be performed during his absence. It was therefore, an irregular and anauthorised activity for which the applicant was liable for disciplinary action. Accordingly we find that evidence abound on which this court ought to dismiss applicant's claim of unfair dismissal. This however, is in respect only of the substantive fairness of applicant's dismissal.

On the procedural side, the applicant claimed that he was dismissed without a hearing. It is common cause that the letter which informed the applicant of his suspension also invited him to ***"....attend for an interview at Road Branch Headoffice in Maseru at 10 am on Wednesday 5th September, 1997."*** During cross-examination it was clarified that the month of September, is an error, the correct month ought to be November. In his answering affidavit Mr Ramashamole who is the Principal Road Engineer avers in paragraph 8 that "***on the 5th November, the applicant attended a hearing in which both the senior Resident Engineer Mr David Wood and the PRE were present..... The applicant produced his written statement, a copy of which is attached on his founding papers and marked "C".***

In his evidence the applicant said when he was suspended he was also told he would be called. However, contrary to this promise he was confronted with a letter of dismissal on the 28th November, 1997. He expressed surprise that the respondents never gave him chance to defend himself on the allegations levelled against him. It must be stated right away that this evidence is at variance with annexure "A" to applicant's originating application. Nowhere does annexure "A" mention that applicant would be called. Accordingly, we are convinced that this version is applicant's fabrication. On the contrary annexure "A" clearly invites applicant to an interview/hearing on the 5th November, 1997.

The applicant was asked in chief to comment on respondents' claim that they gave him a hearing. His response was that after receiving the letter of suspension he wrote annexure "C" in which he explained what happened. He went to the office on his own on the 5th November to deliver the statement, but he was there and then cornered and called for the interview. He met with Messers Ramashamole and Wood in a hall like room. He handed them his statement. Mr Ramashamole asked him if what he had said in his statement was the truth, he answered in the affirmative. Mr Wood then said they were not aware that the situation was as he had explained in the statement. Mr Wood then allegedly said the issue should be closed and he should return to work, but Mr Ramashamole refused and said he was continuing with investigations. After sometime he was handed a letter of dismissal at his home.

We must again state unequivocally that the applicant is continuing to be untruthful and in the process mislead this court deliberately. It simply is not

true that the applicant had come to the office on his own on the 5th November and was there and then cornered to attend a hastily arranged hearing. Annexure "A" to his originating application which he confirms receiving on the 4th November, is the one that called him to attend the interview on the 5th November. What he seeks to project as some meeting short of a pre-arranged disciplinary hearing is clearly an arranged disciplinary hearing to which he had been invited and which he duly attended.

In his orchestrated plan to mislead the court, the applicant, when asked under cross-examination if he attended the interview on the 5th November as invited by annexure "A" he says he did not. Rather he wrote annexure "C" immediately after he received annexure "A" and took it i.e. annexure "C" to the office of the PRE the same day i.e. 4th November 1997. This is a contradiction of what applicant said in chief when he was asked to comment on respondents' claim that they gave him a hearing. Then he said he had gone to the office on the 5th November to deliver his statement when he was there and then called into the PRE office for some interview. Applicant is clearly a fabricator and the most untruthful witness. As regards the hearing we are convinced that he was given ample chance to defend himself. He even wrote annexure "C" in which he explained what happened. On the 5th November a formal disciplinary enquiry was conducted in which the applicant participated. He cannot therefore, be heard to say he was dismissed without a hearing. In the circumstance we are convinced that there are no merits in this application and it is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 6TH DAY OF OCTOBER, 2000

L.A LETHOBANE
PRESIDENT

G.K. LIETA **I CONCUR**
MEMBER

M.S. MAKHASANE
MEMBER **I CONCUR**

FOR APPLICANT: **MR MAIEANE**
FOR RESPONDENTS: **MR LETSIE**