

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI

SWMZ 074/09

In the arbitration matter between: -

SIMON M. DLAMINI

Applicant

AND

BLACK MAMBA SECURITY (PTY) LTD

Respondent

ARBITRATION AWARD

DATE OF ARBITRATION : 4TH June 2009

CORAM:

ARBITRATOR : Commissioner B.Ngcamphalala
FOR APPLICANT : Represented himself
FOR RESPONDENT : Mr. Justice Mavuso

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1. DETAILS OF PARTIES AND REPRESENTATION

1.1 The Applicant in this matter is Simon M. Dlamini, I shall refer to him as the Applicant or Employee.

1.2 The Respondent is Black Mamba Security (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland, of P. O. Box 185, Sidvokodvo. I shall refer to the Respondent as the Respondent or the Employer or the Company.

2. REPRESENTATION

2.1 During the Arbitration hearing the Applicant represented himself. The Respondent was represented by Mr. Justice Mavuso, an Attorney.

3. BACKGROUND OF DISPUTE

3.1 On the 3rd day of February 2009, the Applicant reported a dispute at the Commission's offices in Matsapha. The nature of the dispute was recorded as an unfair dismissal. The dispute is said to have arisen on the 14th July 2008, it

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being alleged by the Applicant that the Respondent had unfairly dismissed him.

3.2 It was alleged by the Applicant that his dismissal by the Respondent was substantively and procedurally unfair in that the Respondent charged and dismissed him for insubordination and dishonesty. Applicant alleged that the Respondent claimed that he had defied his supervisor by attending a relatives funeral after being refused permission, and further that he had been dishonest in that it was alleged that he had not upon investigation actually attended the funeral.

3.3 Applicant averred that in fact he had sought permission to attend a funeral on the day it was alleged he was absent from work, from his supervisor but was not given a response. Further that he had proceeded to attend the funeral and had not been dishonest to the Respondent.

3.4 The Commission then appointed a Commissioner to conciliate the dispute, however the dispute could not be resolved and a Certificate of Unresolved Dispute was issued.

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3.5 In terms of the Certificate of Unresolved Dispute, the issue (s) in dispute were recorded as;

- a) Re-instatement, alternatively
- b) Notice pay E1, 192.28 (one thousand one hundred and ninety two Emalangeneni and twenty eight cents);
- c) Additional notice pay E317.60 (three hundred and seventeen Emalangeneni and sixty cents)
- d) Severance pay E794.00 (seven hundred and ninety four Emalangeneni);
- e) Leave pay E1, 192.00 (one thousand one hundred and ninety two Emalangeneni);
- f) Pro rata bonus E695.30 (six hundred and ninety five Emalangeneni and thirty cents)
- g) Off days E397.00 (three hundred and ninety seven Emalangeneni)
- h) Public holidays E5, 359.50 (five thousand three

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hundred and fifty nine Emalangeneni and fifty cents)

- i) Damages incurred (10 days x E50) E500.00 (five hundred Emalangeneni)
- j) Twelve (12) months maximum compensation E14, 307.36 (fourteen thousand three hundred and seven Emalangeneni and thirty six cents)

3.6 The Applicant alleged that his dismissal was substantively and procedurally unfair whilst the Respondent on the contrary argued that the dismissal of the Applicant was both procedurally and substantively fair, taking into consideration the circumstances of the case.

3.7 As a consequence of the dispute remaining unresolved the parties requested for arbitration in terms of Section 85(3) of the Industrial Relations Act 2000 (as amended). I was accordingly appointed Arbitrator on the 26th of March, 2009.

3.8 A pre- arbitration conference was held wherein the following issues were discussed and agreed upon. It was

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agreed that the issues in dispute were the employment date and the substantive and procedural fairness of the dismissal. It was further agreed that the parties would exchange documents during the hearing, which documents would form part of their evidence.

4. ISSUES TO DETERMINE

4.1 The issues before me that I must determine is whether or not the dismissal of the Applicant by the Respondent was substantively and procedurally fair or unfair and whether the Applicant was employed on the date on which he alleges.

5. SUMMARY OF EVIDENCE

OPENING SUBMISSIONS BY BOTH PARTIES

5.1 The Applicant in his opening statements revealed that he was dismissed by the Respondent, after he had requested permission to attend a funeral. It was his submission that he sought permission from his supervisor on the 19th June 2008, however 3 days passed without him receiving a response from his supervisor. On the 26th June 2008, he again returned to his supervisor to establish whether he

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was being granted permission, and he was informed by his supervisor to call Mr. Maphalala the Managing Director to seek permission.

5.2 He submitted that he did not proceed to call the Managing Director but advised the supervisor that he should be the one to call Mr. Maphalala. The supervisor did not make the call, at that time he was in the company of Mr. Nhleko who is the second in charge. The Applicant accordingly advised the

supervisor that he would not be reporting to work the following day, because had he been informed earlier he would have approached the manager.

5.3 He submitted that indeed he did not report for work the following day and only reported for work on the 29th June 2008 a Sunday. On this day he proceeded to check the duty roaster and found that he was scheduled to be on duty at six (06:00hrs) a.m on the same date. He then proceeded to report to the second in charge (Mr. Nhleko) but was advised by him not to proceed with his duties, but to report to the supervisor, who in turn told him that he was to consult with the Managing Director, who after consultations, advised him to report for work.

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5.4 It was his submission that on the 14th July 2008 he was then charged with insubordination and dishonesty. This came as a shock because the supervisor had been to check whether he had attended the funeral, and discovered that he had. The issues in dispute are that he was then dismissed without being paid his notice pay, leave pay, and severance pay. His contention was that the Respondent failed to follow procedure when he was dismissed as he was not suspended first as per the company procedure, and further that he had never received a warning and believed that he should have at least received a warning instead of being dismissed.

5.5 In its opening statement, Respondent's representative stated that it would give evidence that the Applicant had been dismissed fairly, further that the law had been applied when the Applicant was dismissed. It was submitted by the Respondent that it would give evidence that the Applicant had been dismissed as a result of the Applicant leaving/absconding from work, without getting the necessary permission and that he had been denied permission by his supervisor and further that he had failed to go to the place he alleged he was going to. This is where the charges of insubordination and dishonesty emanate from.

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5.6 Lastly it was submitted by the Respondent that it would give evidence to prove that an individual dismissed in the manner in which the Applicant was dismissed is not entitled to payment of terminal benefits. Further that the Applicant had been paid leave and that in their evidence they would show that the Applicant was dismissed fairly and not entitled to any payment except leave which they paid.

6. THE APPLICANTS CASE

6.1 Simon M. Dlamini, the Applicant was the only person to give evidence in support of his case. I will not produce the evidence given by the Applicant word for word but will refer to the evidence that is relevant to the case at hand.

6.2 He testified under oath that he started working for the Respondent on the 2nd day of September, 2007 and not in 2005 as alleged in his papers as a Security Guard, and was dismissed on the 28th July 2008.

6.3 He stated that he failed to understand why he was dismissed by the Respondent as he had sought permission

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from his supervisor Mr. Mbuyisa to attend a relative's funeral and that he never at any time absconded from work or defied his supervisor's instruction. It was his evidence that the supervisor failed to give him a response when he requested permission to attend the funeral, and he advised his supervisor on the 26th June 2008, that he would not be reporting for work the following day, which was a Friday, as he would be attending the said funeral.

6.4 It was his evidence that he proceeded to attend the funeral at Bhekinkhosi on the 29th June 2008. It was the Applicants evidence that he was entitled to 4 days which the company said he would be entitled to when he was employed, and he was only requesting for 2 days, so he failed to understand why his supervisor failed to grant him permission, and further why he was dismissed as he was

entitled to 4 days. It was his evidence that a sum of E137.00 was deducted from his pay slip, a copy of the pay slip was given as evidence and marked "Annexure A".

6.5 He submitted that he did not understand why he was dismissed yet a sum of E137.00 had been deducted from his salary for being absent from work. It is important to state that the Applicant failed to indicate what the four

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days he alleged he was entitled to were for, whether same were days off, or leave days.

6.6 It was the evidence of the Applicant that a hearing was held, however he was not given a copy of the minutes, despite having requested same. I then requested the Applicant to explain the sequence of events that had led to the disciplinary hearing. The Applicant submitted that whilst at work about a month earlier he received a call that his sister had passed away, he advised them to take the deceased to Dups Funeral Palour, he then after duty proceeded home where he found that the body had been taken to Dups, where an amount of E150.00 was paid by him, and thereafter they began to make funeral arrangements.

6.7 It was his submission that his sister the deceased was totally dependant on him, and that she had been taken to Dups at his instruction and had stayed there for 71 days, because there was confusion as to where she would be buried. It was submitted by the Applicant that he had borrowed E700.00 from a shylock (money lender), to contribute to the burial of the deceased.

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6.8 It was his evidence that he attended the funeral and reported for duty on the 29th June 2008. On this day he was advised by his supervisor Mr. Mbuyisa not to report for work but to see the Managing Director, Mr Maphalala which he did. The Applicant testified that he explained the reason why he had left without seeking permission to the Managing Director, and thereafter he was advised to return to work.

6.9 The Applicant submitted that he continued to work without a problem until sometime in July 2008, when whilst off duty he was visited by Mr. Mbuyisa, who requested that he accompany him to the homestead at which he attended his sister's funeral, for purposes of establishing whether he had indeed attended the funeral. It was his evidence that he refused to accompany him as he was asleep and it was his rest day. He submitted that he gave his supervisor directions to the homestead at which he had attended the funeral and identified same as the Ngwenya homestead. He submitted that he even told Mr.Mbuyisa (supervisor) who he could talk to, which was his aunt who resided at the chief's homestead.

6.10 It was his evidence that it therefore came as a shock to

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him when he was charged for insubordination and dishonesty. He testified that after being charged he was called to a hearing and dismissed. He went on to state that he failed to understand why he was dismissed as this was his first offence. It was his evidence that he had never been convicted of a similar offence before, or charged for any offence. It was his view that he should have at least been given a warning for the offence committed. Further that he had requested permission from his supervisor, even though rightly he should have sought permission from the second in charge Mr. Nhleko who was his immediate supervisor.

6.11 It was his evidence that he believed that the supervisor Mr. Mbuyisa was out to get him, hence his dismissal. He testified that he had gone to the extent that he be placed on night duty in an attempt to try and change his shifts to ensure that he attended the funeral but the supervisor never gave him a response.

6.12 In conclusion it was submitted by the Applicant that he had attended the funeral and would not have gone into so much trouble attending to the arrangements to not attend the funeral.

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6.13 During cross examination, it was put to the Applicant that he had worked for only 10 months with the Respondent, to which he conquered. It was then put to him whether he knew that in terms of the law he was only entitled to leave after completion of a year, to which he did not agree to, as it was his evidence that in terms of his contract of employment this was not the case. It was further put to the Applicant that in terms of the law the first year of service was not considered when calculating ones terminal benefits, and since he had not completed a year with the Respondent he therefore was not entitled to payment of same. It was his evidence that he was not aware of such a law.

6.14 He was questioned on whether he had sought permission from his supervisor to attend the funeral, to which he answered to the affirmative. The Applicant was asked whether he understood that when seeking permission from his supervisor he could get two responses, which was to either be granted permission to leave or be denied permission. It was the Applicant's response that the supervisor did not respond to his request he just kept quiet. It was put to him whether his conduct of leaving

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after being denied permission was not being disrespectful to his supervisor. It was his response that the supervisor had not advised him that he was denying him permission to leave; he failed to give him any form of response.

6.15 He was then questioned on his knowledge of the ways/types of communication namely, verbal communication, communication by way of conducts and sign language. In response the Applicant stated that the supervisor used none of the three forms of communication.

6.16 It was put to the Applicant that on the first day he sought permission being the 19th June 2008, the fact that the supervisor had not responded to his request, should have been an indication to him that he was being denied permission. The Applicant in return stated that the supervisor should have told him that he was being denied permission, in order for him to seek permission else where, because he was not the only one from which permission could be obtained. Applicant stated that Mr. Mbuyisa should have advised him to seek permission elsewhere as there is the second in charge, and the Managing Director.

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6.17 The Applicant under cross examination acknowledged that he had failed to ask Mr. Nhleko the second in charge for permission on the 19th June 2008, because Mr. Nhleko was not there, he submitted that the second in charge only returned on the 26th June 2008.

6.18 The Applicant was questioned on why he failed to proceed and ask the Managing Director for permission as he had stated in his evidence, that had the supervisor advised him that he was being denied permission he would have proceeded to ask the Managing Director. The Applicant denied that he had said he would have proceeded to the Managing Director, but submitted that he would have proceeded to the Managing Director had the supervisor denied him permission, not that he would skip the supervisor and go to the Managing Director as per the assertion that he now believed was being made.

6.19 The Applicant was questioned on whether he could interpret what one was saying or thinking by their conduct, in particular what would he read if someone does not respond to a question but instead walks away. In response the Applicant submitted that such action would

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to him indicate that the individual was being disrespectful by not responding, because as supervisor that individual should either grant or deny one permission and not just keep quiet.

6.20 It was put to the Applicant that he had failed to seek permission from the Managing Director

when the supervisor failed to give him a response, when it was his evidence that the silence of the supervisor was viewed by him as disrespect.

6.21 He was further cross- examined on his knowledge of the law in particular that the law makes provision for the entitlement of leave (compassionate) for attending to the burial/ mourning of certain relatives. In response the Applicant stated that he was aware of such a law. It was further his testimony that the deceased was his sister, one Thembi Lulane and that she was not his biological sister, but had been raised by his parents.

6.22 It was put to the Applicant that the Respondent was not obligated to grant the Applicant leave, as the deceased was not the Applicants biological sister. Further that the Applicant had not attended the funeral and had been

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dishonest to his employer. The Applicant who averred that he had attended the funeral denied this, and further stated that there was no reason for him not to attend or lie about attending the funeral.

6.23 He further averred that he was entitled to 15 days leave as he was told that by the Respondent when he was employed, and it was further contained in his letter given to him by Respondent (which letter the Applicant did not submit as evidence), that he was entitled to those days off, and that when he left he was using those days. The Applicant after cross-examination indicated that he would be calling no further witnesses and was closing his case.

7. THE RESPONDENTS CASE

7.1 The Respondent advised that it would be calling one witness Mr. John Mbuyisa, the Applicants supervisor. It was this witness's evidence under oath that he was employed by the Respondent as a Supervisor. He submitted that he knew the Applicant as an Employee of the Company, however he was dismissed. The witness was then asked to elaborate on what had led to the dismissal of the Applicant.

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7.2 It was his evidence that in June 2008 the Applicant was transferred from Matsapha to Sidvokodvo. It was further his evidence that on the 25th June, 2008 the Applicant came to him and asked that he be released to go home to attend a relative's funeral. He testified that he had not been informed of anything by the Applicant's supervisor in Matsapha, and told the Applicant that he could not go. The Applicant returned on the 26th June, 2008 again he told him that his immediate supervisor had not told him anything, and therefore the Applicant could not go and was expected to report for work.

7.3 It was his testimony that he advised the Applicant to take the phone and call the Managing Director, but he refused and stated that he had no money, it was further his evidence that the Applicant advised that he would not be reporting for duty the following day, and indeed he did not show up. It was his testimony that the Applicant did not report for duty for a period of three days.

7.4 The witness submitted that the Applicant returned to work on Monday and was asked where he was from, and in response he stated that he was from where he said he

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was going to (the funeral). He stated that he advised the Applicant that he could not allow him to resume his duties as he had defied him, and left without permission. He submitted that he then reported the incident to the Managing Director, wherein it was agreed that the Applicant resume his duties whilst an investigation was conducted to determine whether indeed the Applicant had been at a funeral.

7.5 The Applicant was advised of the investigation and the witness requested the Applicant to accompany him to the place where the funeral was held. The Applicant however refused and told him that he would go with him if he produced a letter from his chief (Applicant's chief) giving him

permission to do so. The Applicant only agreed to give him directions to the place. It was his evidence that he proceeded to the Area called (Bhekinkhosi) with the Driver one Mduduzi Madvonsela.

7.6 He testified that when they got there they proceeded to the area's Umphakatsi where they were given an individual who led them to the Ngwenya homestead. There they spoke to one Khonkholo Ngwenya and his mother, who advised that the burial had proceeded on

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Sunday in the late afternoon, as they had collected the body the same morning. When asked whether the Applicant had been in attendance, he was advised that the Applicant is unknown to them. It was his evidence that they were advised that only three people from Ekudzeni from where the Applicant is from were in attendance.

7.7 The witness was asked by his representative what his response had been when the Applicant approached him. The witness submitted that the Applicant approached him on the 25th and 26th June 2008. Further that he denied him permission and scolded him, it was his evidence that on the second day he was in the company of the second in charge Mr. Nhleko when the Applicant approached him, and again he denied him permission, and instructed him to report for duty.

7.8 It was his evidence that the Applicant was disrespectful and undisciplined and untrustworthy. Further that the Applicant could have approached the Managing Director had he felt he was not happy with his decision as supervisor. It was his evidence that he would not have stopped the Applicant from approaching him. In closing it

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was his evidence that there were no personal grudges he held against the Applicant, and further that he treated the Applicant as he would any employee, but the Applicant had defied him and thus charged accordingly.

7.9 It was further his evidence that the Applicant had a tendency of not returning on his off-days, and then would call and advise that he would not be able to return to work. They would then be left with the task of finding a replacement, and that would often cause friction between them.

7.10 Under cross-examination the Applicant put it to the witness that he had approached him on the 19th June 2008, which was denied by the witness. The witness was questioned on why he had denied him (Applicant) permission to approach the Managing Director. The witness denied ever denying the Applicant permission

7.11 He was further questioned on why he failed to give the Applicant a response. He testified that he had given the Applicant a response by denying him permission to leave.

7.12 When the witness was questioned on who had provided

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him with directions and whom he had spoken to when he got to the homestead he was directed to. His evidence was the same as his evidence in chief, in that the Applicant had given him directions, and he had spoken to Khonkholo Ngwenya and Khonkholo's mother.

7.13 The Applicant then put it to the witness that if he was dishonest and had not attended the funeral then he would not have given them the correct directions, but because he had attended the funeral he had provided them with the correct directions. In response the witness stated he did not know why the Applicant had showed them the directions, but that did not mean he was trustworthy at work. The Applicant further asked that if he was untrustworthy, did it occur to the witness that he would have called, the Ngwenya homestead before they got there and told them what to say. In response the witness stated that he would not know that.

7.14 Several more questions were posed by the Applicant but same are not relevant to the case at

hand, and had already been posed to the witness and answered by him. After cross- examination there were no further witnesses called by the Respondent and accordingly closing

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submission were made by both parties

7.15 In his closing submission the Applicant submitted that his dismissal had been unfair, as he had been dismissed for days he was entitled to in law and he prayed that he be paid all terminal benefits due to him as a result of his unfair dismissal. He prayed for payment of his notice pay, leave pay, severance pay as well as payment for unfair dismissal. Whilst the Respondent submitted that the Applicant was employed in September, 2007 and dismissed on the 28th July, 2008. Further that at the time of his dismissal the Applicant had not completed a year of service with the Respondent.

7.16 The Respondent's submission in closing were that the manner in which terminal benefits are paid is that a year is subtracted before any calculations are made, therefore the Applicant was not entitled to same as he had not completed a year of service. It was further Respondents' submission that the Applicant was dismissed for two offences namely insubordination and dishonest, which are dismissible offences in terms of section 36 of The Employment Act 1980. It was the Respondent's submission that the Applicant's dismissal was therefore

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fair both procedurally and substantively and prayed that Applicant's claim fail.

8. ANALYSIS OF THE EVIDENCE

8.1 In terms of our law an Employee' services shall not be considered as having been fairly terminated unless the Employer proves

- a) That the reason for the termination was one permitted by Section 36 of the employment Act 1980;and
- b) That, taking into account the circumstances of the case, it was reasonable to terminate the services of the employee.

See Section 42(2) of the Employment Act 1980

8.2 The Applicant was charged and dismissed for insubordination and dishonesty. Grogan in his book Workplace Law, 9th edition 2007, distinguishes between insolence and insubordination. He defines insolence as the repudiation by an employee of his duty and insubordination as the refusal to obey an employer's instruction. These two offences are related even though

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insubordination is considered to be graver than insolence.

8.3 The first question that I am called to answer is whether the Applicant did refuse to obey or take a lawful instruction from his supervisor, and if he did whether such action is misconduct warranting the termination of the Applicant's services. Further whether taking into account the circumstances of the case, the Respondent had no other reasonable alternative but to dismiss the Applicant.

8.4 The Applicant from his own admission has under oath stated that he requested permission to attend a funeral from his supervisor, he submitted further that he did not make the request once, but several times, and on each attempt he was not given a response by the supervisor Mr. Mbuyisa. It was his evidence that on the last attempt after further not getting a response, he advised his supervisor that he would not be reporting for duty the following day.

8.5 It is further common cause that the Applicant indeed did not attend work on the 27th June 2008. From his own admission no permission had been granted to him to leave by his supervisor, and further it was his defence that he had not been denied permission either, as his

supervisor had not responded to his request.

8.6 From the evidence adduced the Applicant did not attend on Friday the 27th June 2008 to the 29th June 2008. The Respondent's submissions are that the Applicant was denied permission and advised to report for work, whilst the Applicant alleged that his supervisor gave no reply to him. The question that then arises is did the Applicant not get a response from his supervisor, and if no response was given did that give him the right to leave, without getting the necessary permission? Permission, which could have been received from the Managing Director whom the Applicant knew, was senior to his supervisor and he could approach.

8.7 Whilst giving evidence the Applicant tended to contradict himself, and was very emotional and tended to be aggressive towards the Respondent's witness. It was evident that he lacked an understanding of the law in particular, internal work procedures and his entitlements in terms of the law. He made several references to sections in law, and no reference to the Act he was referring to. This made it difficult for me as an Arbitrator to understand what his defence really was, as from his own admission he had not attended work on Friday the

29th June 2008, and had not been granted permission to be away on the said date.

8.8 The Respondent in its defence called the supervisor Mr. Mbuyisa to give evidence. It was his evidence under oath that the Applicant had approached him seeking permission to attend a funeral. It was his evidence that he advised the Applicant that he had not received any communication from the Applicant's immediate supervisor about such a request, as the Applicant had only recently been transferred. It was further his evidence that he advised the Applicant that permission was being denied and that he was expected to report for duty. It was further his evidence that the Applicant was advised to talk to the Managing Director if he was not happy, but he refused to do that. It was submitted that the Applicant did not attend work on the 27th June 2008 and only returned to work on the 29th June 2008.

8.9 Insubordination is a more serious offence than insolence because it presupposes a calculated breach by the employee of the duty to obey the employee's instructions. The code requires that defiance must be gross to justify dismissal. This means that the insubordination must be

serious, persistent and deliberate.

See the case of Chemical Workers Industrial Union & Another v AECI Paints Natal (Pty) Ltd 1988 ILJ 1046 (IC)

8.10 Further the employer should adduce proof that the employee was in fact guilty of defying an instruction. The gravity of the insubordination (or indeed whether the refusal to obey the an instruction amounts to insubordination at all) depends on a number of factors including the action of the employer prior to the alleged insubordination, further the defiance must be willful on the part of employee and lastly the reasonableness or otherwise of the order that was defied. See Haywood and Combo Track 13 (Pty) Ltd t/a Powerman (2004) 25 ICJ 2247(BCA) and Building Construction & Allied Workers Union v E Rodgers & C Buchel CC & Another (1987) 8 ILJ 169 (IC). Grogan Workplace Law 9th edition.

8.11 In my view I find it difficult to believe that on each occasion the Applicant approached the supervisor no

indication was given to him by the supervisor whether permission was being granted or denied. I come to this reasoning on the basis both Applicant and the supervisor gave evidence that the

Applicant was told to call the Managing Director to seek permission. The Applicant refused to call the Managing Director under the reasoning that he had no money, and he believed that the supervisor should be the one to call the Director, as he was the one with the problem.

8.12 I therefore come to the conclusion that the parties did communicate and the Applicant was denied permission to attend the funeral, and that he disobeyed the supervisor's order, and did not report for duty on the said Friday.

8.13 The Applicant willfully defied his supervisor, but the question remains was the order that was defied a reasonable one. Was it fair for the Respondent's supervisor to deny the Applicant the permission requested to attend a funeral?

8.14 The Applicant testified that his relation to the deceased was that it was his sister. However what complicates the matter is that the sister is not blood related, however is someone that was raised within his household. No

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reasonable explanation was given by the Respondent as to why the Applicant was denied permission, except to state the fact that no indication had been received from the supervisor in Matsapha that the Applicant would need to attend a funeral (as he had recently been transferred).

8.15 To deal with the issue of reasonableness I will refer to Legal Notice No.166/08, The Regulation of Wages (Security Services Industry Order 2008). This notice makes provision for compassionate leave under section 9 which reads

"an employee who has completed a period of probation shall be entitled to compassionate leave as follows-Widow 37 working days with full pay Widower 7 working days with full pay Natural father or mother 4 working days with full pay Natural child 4 working days with full pay Married woman's mother and father

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in law 4 working days with full pay"

8.16 It makes no provision for sisters or brother whether biological or not. So the Respondent had the discretion to deny the Applicant permission or not, in this case permission was denied. Further, the Respondent has the discretion to grant the Applicant permission with or without pay, in this instance the Applicant was not paid for the days he was absent.

8.17 I therefore find that the Applicant did defy the Respondent and as such was guilty of the offence charged, and that it was not double punishment not to pay him for the days absent, and later dismiss him, because the deduction made had no bearing on any disciplinary measures to be taken against him.

8.18 The second charge was that of dishonesty in that, it was alleged that the Applicant did not attend the funeral. From the evidence adduced by the Respondent's witness their investigations into whether the Applicant attended a funeral led them to the Ngwenya homestead where the funeral was held. There he spoke to Khonkholo and Khonkholo's mother who advised him that the Applicant had not attended the funeral and that only three people

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from Ekudzeni had attended, this is where the Applicant is from. Further the funeral had been conducted late in the afternoon, and they were not so many people so they were able to see who was in attendance.

8.19 I find it difficult to believe that at a funeral one can have knowledge of the entire individual who attended, but the distinguishing factor in this case is the Applicant submitted that he contributed to the burial of the deceased. It therefore becomes difficult to comprehend why they would say he was not at the funeral, further to not know he was in attendance having played such a vital part in the

proceedings. The Respondent's witness appeared to be a credible witness and whose evidence I find difficult to disregard.

8.20 The Applicant did not do much in his defence in respect of this issue. Maybe had he shed some light about the statements made by the witness, one would have considered his evidence, instead he was emotional to the detriment of his case. In fact he acknowledged he advised the witness to question his relatives. The only submission made by the Applicant in his defence quoted verbatim were" Mbuyisa ngabe nginemanga yini nangitsi wean

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wafike wafuna sigebengu".

8.21 This statement did not do much for his case as he then stated that there was a thief called Simon Dlamini, who had since died and maybe they had confused him and the thief. No concrete questions were asked by the Applicant to lead me to doubt the witnesses evidence, I find on the evidence given by the parties that the Applicant was rightly found guilty, as from the evidence it is apparent that the Applicant did not attend the funeral, and no evidence has been adduced by him to lead me to believe otherwise.

8.22 Dishonesty is a serious misconduct and destroys the employment relationship, and has the effect of undermining the trust that the employer has in the employee. In *Nedcor Bank Ltd v Frank & Other* (2002) 7 BLLR 600 (LAC) AT PAGE 60 Justice Willis JA commented that dishonesty entails a lack of integrity, straightforwardness and in particular a willingness to steal, cheat, lie or act fraudulently. See *Toyota S.A Motors (Pty) Ltd v Radebe & 3 Others* (2000) 21 ID 340(LAC).

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8.23 The learned author Grogan, in his book Dismissal at page 116 remarks that dishonesty is a generic term embracing all forms of conduct involving deception on the part of a person. He comments further that an employer has to establish that an employee, acted with intent to deceive. The learned Judge in Nkosinathi Ndzimandze and Another v Ubombo Sugar Industrial Case No. 476/05 at page 16 shared the same sentiments.

8.24 I am satisfied that the Respondent did prove that the Applicant had been deceitful about his whereabouts for the reasons stated above. Applicant by his dishonest act has broken the trust bestowed upon him by the Respondent. The Respondent cannot be expected to employ a person who deliberately disregards rules and procedures, and be dishonest.

8.25 Taking into account the Respondents case, I am satisfied that the Respondent has discharged the onus burdened on it. I find that the Respondent has proven that the dismissal was substantively fair.

8.26 Whilst giving evidence the Applicant did not make submissions regarding the procedural unfairness of his dismissal. I am therefore lead to believe that the hearing

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held was fair and there were no procedural flaws, as same would have been raised by the Applicant whilst giving evidence.

9. CONCLUSION

9.1 Our law on dismissal is governed by section 42 of the Employment Act of 1980 in conjunction with section 36 of the same Act. In terms of section 42(2) of the said Act, the onus to prove that an employee's services were fairly terminated rests with the employer. It does not end there but further the employer must prove that such termination is one permitted by section 36.

9.2 It is well considered view that in this case the inherent probabilities support the Respondent assertions that the dismissal of the Applicant was both procedurally and substantively fair.

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10. AWARD

10.1 I accordingly find that the dismissal of the Applicant by the Respondent was procedurally and substantively fair and therefore Applicant's application should fail, and is accordingly dismissed. However I further rule that the Applicant should have been paid his pro-rata leave for the 10 months worked in the sum of E 458.50.

10.2 The Respondent is advised to make this payment as no proof was submitted by it to prove that same has been paid. This is the award I make.

The Respondent is ordered to make payment within 30 days upon receipt of the award.

DATED AT MANZINI ON THIS THE 29th DAY OF July, 2009

COMMISSIONER BANELE NGCAMPHALALA

ARBITRATOR

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