IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD IN NHLANGANO REF NO: NHO 131/09

In the matter between;

David Dlamini Applicant

AND
VIP PROTECTION SERVICES Respondent

CORAM:

ARBITRATOR : VELAPHI DLAMINI
FOR APPLICANT : MBONGISENI MABUZA
FOR RESPONDENT : FAITH NTSHALINTSHALI

ARBITRATION AWARD

Date(s) of hearing : 15TH February, and 11th March, 2010

VENUE : NHLANGANO CMAC OFFICES FORMER SUPREME FURNITURES BUILDING

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The hearing of the matter was held on the dates and venue mentioned above.
1.2 The Applicant is David Dlamini, an adult Swazi male of P. 0. Box 1023, Nhlangano. He was represented by Mr Mbongiseni Mabuza, a consultant.

1.3 The Respondent is VIP Protection Services of P. 0. Box 591, Matsapha. VIP was represented by Ms Faith Ntshalintshali, an Attorney.

2. BACKGROUND FACTS

2.1 The Applicant reported a dispute for unfair dismissal at the Commission's offices in Nhlangano on the 4th September, 2009.

2.2 In his statement, Mr Dlamini mentioned that this dismissal was substantively and procedurally unfair and he claimed the following; Reinstatement or alternatively, notice pay E1311-49, Additional Notice pay E1614-14, Severance allowance E4035-20, Uniform balance E150-00 and 12 months compensation for unfair dismissal E15737-88.
2.3 The dispute was conciliated upon by the Commission, however it remained unresolved and a Certificate of Unresolved Dispute No: 619/09 was issued. The parties requested for arbitration under the auspices of the Commission and I was subsequently appointed to determine the dispute.

3. SUMMARY OF EVIDENCE

3.1 The Applicant was a sole witness in support of his case and he gave evidence on oath.

3.2 Respondent called two witnesses, namely; Mbongeni Prince Dlamini and Bhekumusa Dlamini. Both witnesses testified under oath.

3.3 After all the witnesses had given evidence, it was apparent that the facts of this case are common cause, except for two issues, namely; the Applicant's date of employment and whether he submitted complete uniform.

3.4 These are the facts that are common cause;

3.4.1 The Applicant was employed for the position of Security Guard, and at the time of his dismissal, he was earning E1311-49 per month as wages and he was based in Nhlangano.

3.4.2 During the period November, 2008 to February, 2009, the Applicant was posted to guard the Standard Bank ATM, Nhlangano Branch and he was working in night shifts.

3.4.3 On the 21st November, 2008, 13th December, 2008, 23rd December, 2008, and 2nd January, 2009, he was found by his supervisor sleeping on duty and was given final written warnings on all those occasions, except that one of the warnings was not signed by the Applicant.

3.4.4 On the 3rd January, 2009 the Applicant was again found sleeping on duty by his supervisor, but this time around the supervisor did not give Dlamini

a warning however he reported the offence to the Area Manager, who promised to take action.

3.4.5 No disciplinary action was taken by the Respondent until the 1st June, 2009, when a Manager at Matsapha Headquarters, opened his file and noted that the Applicant had three final warnings for the same offence and another offence which was never prosecuted.

3.4.6 When the Respondent noted the Applicant's record, the latter had gone to Matsapha to collect his new uniform following a grievance that had been lodged by the guards.
3.4.7 The Applicant then and there was served with a notice to attend a disciplinary hearing which was to be held on the 17th June, 2009, He was suspended without pay pending the hearing.

3.4.8 On the 17th June, 2009 the disciplinary hearing went ahead and the Applicant who did not have witnesses and a Representative, pleaded guilty to the charges of sleeping on duty, but pleaded not guilty for the offence of desertion.

3.4.9 He was found guilty as charged and was summarily dismissed; however he was advised to appeal within five (5) working days against the penalty imposed.

3.4.10 The Applicant appealed against the sanction and he was called by the Respondent to attend the appeal hearing at Matsapha Head Office, however he could not attend because of financial constraints.

3.5 These are the facts in dispute;

3.5.1 The Applicant alleged that he was employed on the 27th June, 2000, while the Respondent asserted that he was employed on the 26th May, 2001.

3.5.2 The Applicant claimed that he submitted all uniforms to the Respondent, however the latter stated that there was no record that he did.

4. ANALYSIS OF EVIDENCE AND LAW

4.1 It is common cause that the Applicant was permanently employed; consequently he has discharged his onus imposed by Section 42 (1) of the Employment Act, 1980.

4.2 The Respondent had a burden to prove that the Applicant's dismissal was fair and that taking into account all the circumstances of the case it was reasonable to terminate his services. See section 42 (2) of the Employment Act 1980.

4.3 In attempting to discharge its onus, the Respondent produced the notice to attend a disciplinary hearing, minutes of the enquiry and the letter of dismissal.

4.4 Despite Mr Mabuza's blissful cross-examination of the Respondent's witnesses to force them to admit that the Applicant had not slept on duty sleep on these occasion, it is clear that his line of questions flew against the Applicant's own admission that indeed he was found by his supervisor sleeping on duty, on all those occasions.

4.5 The Applicant's admission during the arbitration was consistent with his plea of guilty that he

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made at the disciplinary hearing with respect to the offence of sleeping on duty.

4.6 The Respondent submitted that, it dismissed the Applicant in terms of Section 36 (a) of the Employment Act 1980, which provides that, "it shall be fair for an employer to terminate the services of an employee, because the employee's conduct or work performance has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him".

4.7 The fact that an employer is successful in proving that the employee's dismissal was in terms of Section 36 of the Employment Act 1980, is not the end of the enquiry.

4.8 In the case of Paul Mavundla v Royal Swaziland Sugar Company Ltd (IC Case No: 266/02), the learned Judge President Nderi Nduma opined as follows;

"For a dismissal to be in terms of Section 36 it must not only be for an offence itemized therein, but the decision to terminate must be fair and just."

4.9 It is common cause that the Respondent instituted a disciplinary inquiry some five (5) months after the Applicant committed the offence. I then requested the parties to address me on whether the delay in holding the inquiry did not infact vitiate the dismissal.

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4.10 The Applicant's representative did not advance any argument. However the Respondent's counsel contended that since there was no provision in the Respondent's disciplinary code and procedure, stipulating a time bar for instituting a disciplinary inquiry.
4.11 Although Respondent's counsel argument is glossy, I am of the view that the question transcends beyond a disciplinary code and procedure.

4.12 In Usuthu Pulp Company (Pty) Ltd v Jacob Seyama & 4 Others (ICA Case No: 1/04) the learned P2. Ebersohn AJA referred to South African case law when examining the principle of waiver in the labour law contest.

4.13 The following cases were referred to with approval; UPMW v Stasraad Van Pretoria 1992 ILJ 1563 (NH), North Eastern District Assn (Pty) Ltd v Surkhey Ltd 1932 WLD 18 and NEHAWU v University of Cape Town 2003 (2) BCCR 154 (KH).

4.14 In UPMW v Stadsraad van Pretoria (SUPRA) De Kock J at 1567-1568 B remarked as follows;

"Delay is not by itself waiver. Delay is an element in determinings whether the conduct of the innocent party was such that a reasonable person would conclude that he has maimed his accrued right to cancel. A mental reservation does not avail..."

4.15 Kranse J in North Eastern District Assn (Pty) Ltd v Surkhey Ltd (Supra) commented that;

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"It is not by mere delay that a man loses by his rights, even if he is aware of the fact that another has infringed his rights. Delay or 'standing by', as it is called may be taken into consideration by the court in arriving at the conclusion as to whether or not the man did or did not lose his right".

4.16 Ngcobo JA stated the following, in NEHAWU v University of Cape Town (Supra);
"By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly".

4.17 In the UPMW case (Supra) the Court opined that;

"It is a general principle of the law that a party to a contract including a contract of employment to whom a right to cancel has accrued by virtue of the other party's breach must elect whether or not he will avail himself of it and that the election must be made within a reasonable time or else the victim loses his right to cancel".

4.18 Further at 1569 A-C the Court in UPMW (Supra) opined,

"Fairness; however, dictates that disciplinary steps must be taken promptly. Both the staff regulations and the recognition agreement echo the need for prompt action as all time-limits must be adhered to strictly and time-limits are provided for in para. 5.2.5 and 8.3.1".

4.19 In Patrick Ngwenya & Another v Swaziland Development and Savings Bank (IC case No:

536/08), the court dismissed a preliminary point which was that the Respondent was time barred from instituting a disciplinary inquiry against the Applicants, because the bank had not done so within 30 days as provided by the law disciplinary code and procedure.

4.20 In the finding of the Court in the case of Patrick Ngwenya case was that the Respondent gave a modifiable explanation for the delay.

4.21 Returning to this case, the Respondents witnesses and counsel, did not prefer any explanation at all for the delay a part from arguing that nor bar would hit them because of the absence of such a provision in the disciplinary code and procedure.

4.22 The Respondent has aware on the 3rd January, 2009 that the Applicant had committed a gross misconduct; there is no justification for the Respondent taking five months to bring charges and a disciplinary hearing against the Applicant. A question that begs an answer is what would have happened if the Applicant had not gone to Matsapha to collect his Uniform?

4.23 Respondents officers appeared stumped by the presence of the Applicant, because it is after he announced this name that pending charges against him.

4.24 I do not think that it is fair and just for an employer to know that an employee has committed an offence, and then go into hibernation, then after some time rem3ember the offence because the employee's file has to be used for some other purpose.

4.25 Why should the Applicant be prejudiced by the Respondent's fairness and ineptitude. On three previous occasions when the Applicant had committed the same offence the Respondent acted promptly by giving him written warnings. The Respondent's conduct of not acting swiftly regarding the offence committed on the 3rd January, 2009 would justify an expectation that it let deliberately the incidents go.

4.26 In the words of Ngcobo JA in the **NEHAWU** case, the Respondent should have expeditionary resolved and brought to finality the issue and not let the Applicant organize his affairs' and be comfortable thinly that the had turned a blind eye in the incident.

4.27 A period of five months is sufficient time for an employee to plan his affairs for the long term without any apprehension that this employment may be in jeopardy.

4.28 In the circumstances of this notwithstanding the fact that the Respondent proves that the Applicant committed an offence itemized in section 36 of the Act, the decision to terminate his services is vitiated by the undue delay in holding a disciplinary inquiry, in the result, the Applicant's dismissed was unfair.

4.29 I also hold that in all the circumstances of the case, it was unreasonable of the Respondent to summarily dismiss the Applicant.

4.30 Although there was a dispute regarding his date of employment, even if one have to consider the date suggested by the Respondent, still the Applicant was in employment for 8 years and in

the eight years his disciplinary record of his employment.

4.31 Whilst the offence for which he was dismissed was a serious one and his case was aggraded by three written warnings. I do not think that a balance was struck with his circumstances.

4.32 Although the Applicant did not state the reason for such a request, he testified that he made a request to be charged from night shift to day shift. I am alive to the fact that an employer has a discretion an posting and working scheduled of its employees, the Respondent did not deny that the Applicant made this request, her have argued that it was unreasonable.

5. PROCEDURAL FAIRNESS

5.1 The Applicant submitted that he was denied presentation; bring witnesses and his right of appeal, because the Respondent appoint a venue for the disciplinary hearing which was too far from his normal duty station. S that he could not paid for the traveling expenses of his witnesses and representative.

5.2 The Applicant continued to support his argument by counseling that when the Respondent preferred charges against him on the 1st June, 2009, it suspended him without pay and then state of affair prevailed right up to his dismissal and appeal stage.

5.3 It was further contends by the Applicant that, ... Be been pad his wages during the suspension, he would have afforded to cater for the prevail costs of his representative, even though in principle he

objected to Respondent's taking the venue to Matsapha when he was employed in Nhlangano.

5.4 The Respondent argued that since the Applicant was able to go to Matsapha for his disciplinary hearing after harmony funds to travel, he should borrow more money to cover his case well as his representative's cost.

5.5 Regarding the Appeal, the Applicant did not turn up at all because of lack of funds to travel to Matsapha.

5.6 The Respondent's response was that he should have approached his area manager, who generosity assisted the Applicant to reach Matsapha.

5.7 Having conducted itself in a tardy and incept manner in the disciplinary inquiry, the Respondent further compounded the Applicants prejudice by suspecting him without pay for a further three weeks pending the inquiry and then knowing that the Applicant was out of pocket, insisted on its policy that the venue for disciplinary hearing are at Matsapha, his case would be no emption.

5.8 In James Board v YKK Southern Africa and An (IC Case No: 386/07), the Court held that in much as an employer has a right to decide on a venue for holding a disciplinary inquiry, it must strike a balance between that right and the employee's right to a fair hearing.

5.9 I do not think that the Respondent's conduct afforded the Applicant affair hearing. The circumstances that I have alluded to cause the

Applicant to be denied his representation and appeal.

5.10 Although the Applicant pleaded guilty to offence of sleeping on duty, there are other aspects of the enquiry that reinforce my holding that the hearing was irregular.

5.11 The Respondent charged the Applicant with an offence for which he had already been given a final written warning thereby subjecting him to double jeopardy.
5.12 When he was asked to plead, instead of the Chairman rectifying the irregularity, he read all the particulars of the charge of misconduct and as expected the Applicant pleaded guilty on that charge.

5.13 Following the finding of guilty on the first charge, the chairman acquitted him on the second one of desertion; however in the letter of termination, the same chairman wrote that the Applicant was found guilty on both charges, which was false.

6. DATE OF EMPLOYMENT

6.1 The Applicant did not deny that it was his signature on the employment forms and he did not refute the contents thereof.

6.2 It is my finding that his correct date of employment is 26th May, 2001.

7. UNIFORM DEPOSIT REFUND

7.1 The Applicant stated that he brought the full uniform but the Respondent denies that.

7.2 The Respondent witnesses wanted to know if the Applicant signed a certain form indicating that he had brought all five uniforms.

7.3 However, the Respondent who was the custodian of these forms did not produce any record showing the uniform that Applicant submitted and the one that was outstanding.

7.4 Although the Applicant could not recall the name of the officer he gave the uniform, It is more possible than not that he did submit all uniforms he had in his possession before he was paid the E450-00.

7.5 The Applicant come across as an honest and or candid person, even in the time of his representative's uncharacteristic approach which was alien to the decorum and etiquette, he continued to certify honesty.

7.6 Secondly in his letter of termination, the Respondent writes that as soon as he had returned the company uniforms, he would be paid any money due to him.

7.7 Now, the Respondent's witness said he did not submit the trouser and shirts. I do not think it would be in the interest of the Respondent to pay him anything when he owed such many items. What criteria was used in arriving at the decision that those missing items cost E150-00 as opposes to E450-00.

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8. CONCLUSION

8.1 I have found that the Applicant's dismissal was unfair because the Respondent unduly delayed in instituting a disciplinary hearing against him.

8.2 Further it is my finding that in all the circumstances of the case it was unreasonable for Respondent to dismiss the Applicant.

8.3 I have held further that the disciplinary hearing was irregular.

8.4 Now, in arriving at a fair and equitable compensation to award to the Applicant, I have taken into account the following factors;

(a) The Applicant was employed by the Respondent for 8 years before he was dismissed.
(b) The circumstances of his dismissal.
(c) He is currently employed, having been out of employment for only three months.
(d) The Applicant has twelve (12) dependants.
(e) The seriousness of the misconduct he committed.

8.5 I hold that four (4) months wages as compensation is fair and equitable in the circumstances of the case.

8.6 The following order is therefore made;

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9. AWARD

9.1 The Respondent is ordered to pay the Applicant the following;

(a)	Notice pay	-	E1311-49
(b)	Additional notice pay	-	E1412-12
(c)	Severance allowance	-	E3530-80
(d)	Uniform balance	-	E150-00
(e)	4 Months wages (compensation	-	E5245-96
	TOTAL		Ell, 650-57

9.2 The Respondent is ordered to pay the sum of Ell, 650-57 at CMAC office at Nhlangano former Supreme Furniture Building by the 30th June, 2010.

9.3 There is no order as to costs.

DATED AT NHLANGANO ON THIS ...DAY OF MAY, 2010
VELAPHI DLAMINI CMAC ARBITRATOR

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