



**IN THE CONCILIATION, MEDIATION AND
ARBITRATION
COMMISSION**

HELD AT MBABANE

REF NO. SWMB 348/12

In the matter between:

BONGANI MOTSA

APPLICANT

And

SECURITY SOLUTIONS

RESPONDENT

CORAM

ARBITRATOR

:

VELAPHI Z. DLAMINI

FOR APPLICANT

:

CELUMUSA BHEMBE

FOR RESPONDENT

:

PATRICK MAGANGANE

ARBITRATION AWARD

DATES OF HEARING

:

**23th January 2013 and 8th February
2013**

1. DETAILS OF PARTIES AND HEARING

- 1.1 The arbitration hearing was held on the aforesaid dates at the Conciliation, Mediation and Arbitration Commission (CMAC) premises, First Floor Asakhe House, Mbabane.
- 1.2 The Applicant is Bongani Motsa, an Adult Swazi Male of P.O. Box 112 Lobamba. The Applicant was represented by Mr. Celumusa Bhembe an attorney from Bhembe and Nyoni Attorneys based in Mbabane.
- 1.3 The Respondent is Security Solutions, a business entity of P.O Box D13 The Gables. The Respondent was represented by Mr. Patrick Magangane its Managing Director.

2. ISSUES FOR DETERMINATION

- 2.1 Firstly, whether or not the Applicant's services were terminated by the Respondent.
- 2.2 Secondly, if it is found that the Respondent terminated the Applicant's services, whether or not the dismissal was substantively and procedurally fair.
- 2.3 Thirdly, whether or not the Respondent owes the Applicant his full wages for the month of September 2012.
- 2.4 Lastly, whether or not leave pay is due to the Applicant.

3. BACKGROUND FACTS

- 3.1 The Respondent is a security firm whose principal place of business is at The Gables at Ezulwini in the Hhohho region.
- 3.2 The Applicant was employed on the 12th December 2010 as a security guard. Motsa rendered his services continuously until the 24th September 2012 when his services were disrupted. Whether or

not such interruption amounted to a termination of the employment contract is an issue for determination. At the time the Applicant ceased rendering service to the Respondent, his rate of pay was E63.08 per shift.

- 3.3 The Applicant reported a dispute for unfair dismissal, however the dispute remained unresolved after conciliation and a Certificate of Unresolved Dispute No. 540/12 was issued. The parties referred the dispute to arbitration for determination and I was appointed to decide same.
- 3.4 The Applicant no longer seeks reinstatement, but the following benefits; Notice pay (E1700.00), payment of September salary (E1700.00), Leave pay (E784.00) and maximum compensation for unfair dismissal (E20, 400.00). The Respondent opposes the Applicant's claim, save for the fact that it has offered the Applicant wages for twenty three (23) days in September 2012 in the sum of E1450.84. The Applicant rejected the offer and insisted on payment of the sum of E1700.00.

4. SURVEY OF EVIDENCE AND ARGUMENTS

- 4.1 Although I have considered all the evidence and arguments presented, I am only required to give brief reasons in support of my findings.
- 4.2 The Applicant was the only witness who gave evidence in support of his case. Simon Shabangu (Supervisor) and Patrick Magangane (Managing Director) gave evidence for the Respondent.
- 4.3 The following facts are common cause:
 - 4.3.1 On the 19th September 2012, the Applicant was found by the Managing Director kneeling down next to an adult female while on duty at his post at The Gables.
 - 4.3.2 The Managing Director ordered the Applicant to stand up and enquired from the latter three times why he had been kneeling

whilst on duty because such was prohibited, the Applicant did not offer any explanation. Mr. Magangane then instructed the Applicant to go to the office while he was to assign a replacement for him. The Applicant did not comply with the Managing Director's order.

4.3.3 Mr. Magangane then left the scene and at the time two security guards manned the post, the replacement and the Applicant who refused to leave the post. The Managing Director returned to the Applicant's post and issued a written warning for poor performance against him, the Applicant refused to sign the warning when requested to do so.

4.3.4 On previous occasions in September 2012, the Applicant was booked off sick having been certified unfit for duty by a medical practitioner.

4.3.5 The Applicant did not work after the 19th September 2012 except on the 22nd and 23rd of that month.

5. APPLICANT'S CASE

5.1 The Applicant testified that after he refused to sign the written warning, the Respondent's Managing Director instructed him to leave his post.

5.2 It was the Applicant's evidence that the Respondent knew about the injuries on his knees. It was his injury that made him kneel down. When the Managing Director found him kneeling and confronted him about that, he did not respond because Mr. Magangane knew about his injury.

5.3 According to the Applicant after being told to leave his post, he returned on subsequent days and tried to work, but was again informed by the supervisors that before he started working, he should first sign the written warning.

- 5.4 The Applicant stated that on some days after the 19th September 2012, he was attending hospital and had given his employer the sick sheets confirming that on those occasions he was sick.
- 5.5 It was the Applicant's evidence that when he came to collect his wages on the 30th September 2012, he discovered that his employer had effected deductions on his wages. He refused to take the money he was offered because he believed that he was entitled to his full wage.
- 5.6 The Applicant testified that the written warning was not preceded by a disciplinary hearing. By instructing him to leave the workplace if he failed to sign the warning, the Applicant deemed that to be a dismissal.
- 5.7 According to the Applicant, no disciplinary hearing was held prior to the termination of his services.
- 5.8 The Applicant's counsel submitted that by forcing the Applicant to sign a written warning before affording him an opportunity to be heard offended against the principles of natural justice. Mr. Bhembe referred to the case of *Ndoda H. Simelane v National Maize Corporation (PTY) Ltd(IC Case No. 453/06)* in support of the principle that an employee charged with misconduct is entitled to a fair disciplinary hearing.
- 5.9 Mr. Bhembe also argued that it was wrong for the Respondent to withhold part of the Applicant's wages for September 2012 because it was the Respondent's Director who had driven the Applicant away from work. Even if the Respondent had a right to withhold the Applicant's wages it should not have withheld the wages for the 25th September 2012, because the Applicant produced a medical certificate indicating that he was in hospital on that date.

6. RESPONDENT'S CASE

- 6.1 Patrick Magangane testified that when he summoned the Applicant to the office on the 19th September 2012, his intention was to have a discussion with him before the written warning was issued. However the Applicant refused to go to the office, the Managing Director then returned with the written warning to the Applicant's post.
- 6.2 According to the Managing Director when he ordered the Applicant to sign the warning, the Applicant stated that he would rather leave work than to sign it. The Applicant then left immediately thereafter.
- 6.3 Patrick Magangane testified that because the 20th and 21st September 2012, were Applicant's off days, he was not at work. On the 22nd and 23rd September 2012 the Managing Director was away, however the Applicant was at work. Patrick Magangane then called the day shift supervisor, Alex Mavuso to inform him that when the Applicant reported for work, he should sign the warning before resuming his duties.
- 6.4 It was the Managing Director's evidence that the Applicant continued to work on the 22nd and 23rd September 2012 without having signed the warning. On the 24th September the Managing Director returned and found the Applicant working but the warning had not been signed, he then called the Applicant to the office. He instructed the Applicant to sign, however the Applicant refused and again stated that he would rather leave than sign the warning Applicant then left.
- 6.5 According to the Managing Director he received information that the Applicant had discussed the issue of warning and his health condition with the company's other director on the 25th September 2012. On the 26th September 2012 the Applicant came to work and submitted a medical certificate, he still refused to sign the warning, however Patrick Magangane advised the Applicant that he would respond to the medical certificate on the 30th September 2012 when the Applicant had come to collect his September 2012 wages.

- 6.6 The Managing Director testified that on the 30th September 2012, the Applicant arrived at 2:00 pm. Patrick Magangane informed the Applicant that his wages for 25th, 26th, 27th and 28th would be withheld because he was not at work and he failed to submit the medical certificate booking him unfit for duty on those dates.
- 6.7 According to the Managing Director the medical certificate dated 25th September 2012 did not certify the Applicant unfit for duty on that day, but was simply an attendance form.
- 6.8 The Managing Director clarified that the Applicant would not have been permitted to resume his duties before he signed the written warning as that would have breached the company's disciplinary code and procedure.
- 6.9 Patrick Magangane submitted that the Applicant's attitude towards him on the 19th September 2012 when he was found kneeling, demonstrated that he had no regard for the job. It was argued by the Managing Director that it was difficult to believe that the Applicant was injured on the knee because of the position he was found in. Kneeling would have accelerated the injury, not to mention the pain he would have felt.
- 6.10 The Managing Director submitted that the Applicant was not dismissed at all, but left of his own free will. Further more the Applicant wanted his full salary yet he did not render any services on some days in September 2012.

7. ANALYSIS OF EVIDENCE AND ARGUMENTS

- 7.1 In terms of Section 42 (1) of the Employment Act 1980(the Act), an employee who challenges the termination of his services, must first prove that Section 35 of the Act applies to him. It is common cause that the Applicant was in continuous employment for twenty one (21) months before he stopped working; consequently he has discharged his onus.

- 7.2 Section 42(2) of the Act provides that the employer shall prove that the reason for dismissing an employee was one permitted by Section 36 of the Act; and that taking into account all the circumstances of the case, it was reasonable to terminate the employee's services.
- 7.3 The Respondent has denied that it terminated the Applicant's services. The genesis for the chain of events that have culminated in this arbitration is a written warning.
- 7.4 The learned author *John Grogan Workplace Law 8th edition* at page 99 remarks as follows about written warnings:

“A written warning is a more formal act than an oral warning. Reducing a warning to writing enables the employer to prove that the warning was given if subsequent disciplinary action proves necessary against that employee. An employee is usually required to sign a written warning and some employers also require a signature by a witness or witnesses (often a shop steward, now styled a union representative). By so doing, the employee does not admit guilt, but merely acknowledges receipt of the warning. An employee's refusal to sign a written warning does not affect its validity. The issuing of a written warning should be preceded by a proper inquiry, during which employees concerned should be allowed to state their cases and produce witnesses, if necessary”
(Emphasis added).

See *Phineas Shongwe v Guard Alert Security Services (IC case no. 35/05)*.

- 7.5 The Respondent failed to produce the rule in its disciplinary code and procedure which made it compulsory for an employee to sign a written warning. Even assuming that it existed and was produced during arbitration, that rule would still be unlawful and unreasonable.

7.6 Forcing an employee or any person for that matter, to append his signature on a document offends against his or her constitutional right of freedom of conscience.

See Constitution of the Kingdom of Swaziland Act of 2005.

7.7 The written warning was not preceded by a disciplinary inquiry. The Respondent argued albeit half-heartedly that it gave the Applicant an opportunity to explain why he had been kneeling down during working hours. Well that may be so, but does that qualify as a proper inquiry? Emphatically no.

7.8 In the case of *Christopher H. Dlamini v Inter Africa Supplier (SWD) Ltd (IC Case no55/97)*, a case that has been consistently followed by the Industrial Court, it was held that a proper inquiry entails:

“(i) *The employer should advise the employee in advance of the precise charge that he or she is to meet at the hearing. This requirement is tied up with the need for adequate preparation. (ii) The employee should be advised in advance about his right to representation and the representative must be a representative of his or her choice, not imposed by the employer or other person. (iii) The chairman or presiding official should be impartial. That is to say he or she must weigh up the evidence presented before him or her and make an informed and thought-out decision. There should be no grounds for suspecting that his or her decision was based on erroneous factors or considerations. (iv) The employee must be given ample opportunity to present his or her case in rebuttal of the charge or charges preferred against him or her and to challenge the assertions of his or her accusers. (v) The employee must be present at the hearing, and it is essential that everything possible is done to enable him or her to understand the proceedings. (iv) There should be a right of appeal and this should be explained to the employee”.*

7.9 In the case of *Nkosinathi Ndzimandze and another v Ubombo Sugar Limited (IC Case No 476/2005)* the Court observed as follows:

“Even in situations where management is convinced of the guilt of the employees, it is still obliged to ensure that fair disciplinary process is observed. The disciplinary process is not merely a means to enable management to establish the facts and impose an appropriate disciplinary sanction. It is also essential as a means to achieve fair and equitable labour relations. Irrespective of the merits of the disciplinary charges, the requirement of a fair disciplinary hearing is an end in its own right.”

See *Ndoda H. Simelane v National Maize Corporation (Pty) Ltd (IC case No. 453/06)*.

- 7.9 Based on the reasons that are given below, I find the Respondent’s version that, the Applicant left his job of his own free will not credible. I also find that the Respondent dismissed the Applicant:
- 7.9.1 From the Respondent’s own evidence, it is clear that the Applicant was not only physically prevented by the Respondent from discharging his duties, but was expressly told not to work before signing the written warning. The Managing Director instructed the day shift supervisor that the Applicant was not to perform his duties if he had not signed the warning.
- 7.9.2 Apparently the Applicant did not comply with the order, because he came to work when the Managing Director was away on Saturday and Sunday. Then on Monday the Applicant reported for duty and this time the Managing Director had returned. The Managing Director again confronted the Applicant and tried to force him to sign the warning but the Applicant left again.
- 7.9.3 From the proven facts, it is clear that the Applicant was given a choice, either he signed the written notice or left the workplace. Why would the Managing Director persistently state that the Applicant said he would rather leave than to sign the warning if he did not give the Applicant an ultimatum?

- 7.9.4 The Managing Director in unequivocal terms stated that the Applicant would not have been permitted to resume his duties before signing the warning.
- 7.9.5 Evidently, the Applicant was ready and willing to work, after there was an attempt to force him to sign the warning on the 19th September 2012, he left and came back to work on the 22nd and 23rd September 2012. He was confronted again on the 24th September 2012. On the 25th September when he came to submit his sick sheet, he also tried to appeal to the other Director. His actions were consistent with someone who was ready to work.
- 7.9.6 If the Respondent held the view that the Applicant left of his free will, then his conduct was tantamount to absconding or desertion. Why did the Respondent not prefer charges of desertion against the Applicant when he reported for work after the 19th September 2012, especially when he came to collect his wages on the 30th September 2012? In the case of *Alpheus Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (IC Case No. 123/05)* at page 10, the learned Judge President observed as follows:
- “Absenteeism differs from absconding or, as it is more often described, desertion from work. Absenteeism is merely an unexplained and unauthorized absence from work whereas desertion means an unauthorized absence with the intention never to return. Both absenteeism and desertion are breaches of the contract. In other words, the employee’s desertion manifests his intention no longer to be bound by his contract of employment. This repudiation does not by itself bring the employment to an end. The employer has an election whether to accept the repudiation and bring the contract to an end or to hold the employee to the contract. From this perspective it is not the act of desertion which terminates the contract of employment, but the act of the employer who elects to terminate the employment by accepting the repudiation.”*** Emphasis Added.
- 7.9.8 Clearly the Applicant’s conduct did not manifest his intention no longer to be bound by his contract of employment. Conversely

though the Respondent demonstrated that it was not bothered whether or not the Applicant discharged his primary obligation to work. The company's only obsession was that he sign the warning, if he did not then adios.

- 7.10 I also find that the Applicant's dismissal was not for a fair reason and was unreasonable, consequently the termination of the Applicant's services was substantively unfair. Terminating the services of an employee simply because he refuses to sign a written warning is unfair. An employee's refusal to sign a warning letter does not constitute misconduct.
- 7.11 I further find that the Applicant's dismissal was procedurally unfair. It is common cause that the termination of the Applicant's services was not preceded by a disciplinary inquiry.

8. UNPAID WAGES

- 8.1 According to the Respondent's records, in particular the time sheet for the month of September 2012, the Applicant was absent from the 24th to the 30th September 2012. However the proven facts are that the Applicant was at work on the 24th September 2012, but the Managing Director again instructed him to leave since he had not signed the warning.
- 8.2 The fact that the Applicant brought what purported to be sick sheets for the 25th September 2012 and subsequent days is immaterial. The Applicant was prevented from working by the Respondent's action. In the case of *Enock Shongwe v Silver Solutions Investments (Pty) Ltd (IC Case no 235/04)* at page 12 the learned **Dunseith JP** made the following remarks:
- “When an employee is paid a fixed monthly wage, a presumption arises that he is entitled to that wage provided he tenders his services and is available, willing and able to work. The “no work no pay” rule does not normally apply when the failure to work is not attributable to the employee”.***
- 8.3 I find that the Applicant is entitled to his full wages for September 2012. The Respondent offered the Applicant the sum of E1450.84, which was

for twenty three (23) days, including seventeen (17) days worked, one (1) public holiday and five (5) days on sick leave.

- 8.4 According to the time sheet, the Applicant was not paid for the 25th, 26th, 27th and 28th September 2012. At the pay rate of E63.08 per shift, the Applicant's wages for the four days is E252.32. When E252.32 is added to the sum of E1450.84, the total wage due to the Applicant is the sum of E1703.16. However the Applicant has claimed the sum of E1700 as full wages for September 2012 and I will accordingly make that order.

9. **LEAVE PAY**

The Applicant did not lead any evidence in support of his claim for leave pay in the sum of E784.00, accordingly this claim is dismissed.

10. **RELIEF**

In awarding the Applicant compensation for unfair dismissal, I have taken into account the following factors:

- 10.1 That the Applicant had only worked for the Respondent for twenty – one (21) months.
- 10.2 That the Applicant is currently unemployed and has a newly born baby who is dependant on him.
- 10.3 That the Applicant is relatively young thus still employable.
11. I hold that an award of six (6) months compensation to the Applicant is fair and equitable in all the circumstances of the case and I will make that order.
12. The following order is made:

13. **AWARD**

13.1 I find that the Applicant's services were terminated by the Respondent. I also find that the termination of the Applicant's services was substantively and procedurally unfair.

13.2 I further find that the Applicant is entitled to his full wage for September 2012.

13.2 The Applicant's claim for leave pay is dismissed.

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

13.4.1	Notice pay	E1700.00
13.4.2	September 2012 wages	E1700.00
13.4.3	Six (6) months compensation for unfair dismissal (E1700 x6)	E10200.00

13.5 The Respondent is directed to pay the Applicant the sum of E13, 600.00 at CMAC offices Asakhe House, Mbabane not later than the 28th April 2013.

13.7 There is no order for costs.

DATED AT MBABANE THIS 14th DAY OF MARCH 2012.

VELAPHI Z DLAMINI
(CMAC ARBITRATOR)