



CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI

SWMZ

328/16

In the matter between:-

MBHEKENI VILANE

APPLICANT

And

V.I.P. PROTECTION SERVICES

RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini

For Applicant : Mr. M. Manana

For Respondent : Mr. D. Hlophe

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

- 1.1 The Applicant is Mr Mbhekeni Vilane, a Swazi male adult who is a resident of Logoba, Matsapha, within the Manzini Region. The Applicant was represented herein by Mr Mathokoza Manana.
- 1.2 The Respondent is V.I.P. Protection Services, a company duly registered in terms of the laws of Swaziland. The Respondent's principal place of business is at the Matsapha Industrial Site, Manzini Region. Mr Douglas Hlophe, the company's Human Resources Manager appeared on behalf of the Respondent.

2 ISSUES IN DISPUTE

- 2.1 The Certificate of Unresolved Dispute filed herein (No. 310/16) states that this is a matter of alleged unfair dismissal. The Applicant alleges that he was charged and dismissed for offences that he did not commit; whilst the Respondent contends that the Applicant was dismissed fairly. The Applicant herein claims the following:-

a) Reinstatement; alternatively

b) Leave pay - E 1,584.00

| | |
|-----------------------------------|---------------|
| c) One month notice | - E 1,869.00 |
| d) Additional notice | - E 2,304.00 |
| e) Severance allowance | - E 5,760.00 |
| f) 12 Months maximum compensation | - E22, 428.00 |
| | ----- |
| | - E33,945.00 |
| | ===== |

3 SURVEY OF EVIDENCE

3.1 The parties relied on oral testimonies as well as documentary evidence to support their respective cases.

-

3.2 THE APPLICANT'S CASE

3.3 THE TESTIMONY OF MR MBHEKENI VILANE

3.3.1 The Applicant testified under oath that he was employed as a Security Guard by the Respondent company in the year 2007. He stated that he earned a monthly remuneration of E1,700.00. He explained that he generally did not have a permanent post and would be assigned anywhere depending on the employer's instructions.

3.3.2 The Applicant testified that he had been unfairly dismissed subsequent to a disciplinary hearing.

He stated that the employer served him with a notice to appear at a disciplinary hearing on the 23rd of March, 2016. He stated further that he was charged with the following offences:-

- a) Failing to take instructions:- In that on the 14th of March, 2016, he did not follow and do his area Supervisor's instruction.
- b) Desertion: - In that on the 14th March, 2016, he deserted work and went to his house without permission from his supervisors.

3.3.3 The Applicant testified that he was dismissed after a finding of guilt had been made by the Chairperson of the hearing, and the employer terminated his employment via a letter dated 19th of April, 2016. He stated that although he did appeal against his dismissal, the Chairperson of the appeal hearing simply upheld the dismissal. He explained that the dismissal was substantively unfair because he did not commit any of the offences that he was accused of.

3.3.4 He explained that on the 14th of March, 2016 he had reported for duty at the Manzini office of the Respondent, and his Manager; Mr Magagula had

found him there because he did not have a post to go to on that day. He stated that he had reported to Mr Magagula that he was not feeling well, hence the Manager had told him to just clean the office, and thereafter to go home and recuperate. He explained that the said Mr Magagula told him that he indeed did not look well. He stated that Mr. Magugala was already aware that he had been suffering from a bout of illness ,because he had personally driven him to the hospital at the Raleigh Fitkin Memorial Hospital about two days prior. He explained that despite having taken him to the hospital, Mr Magagula had not called him or taken any kind of initiative to find out how he was feeling thereafter.

3.3.5The Applicant stated that he had not deserted his work, and neither had he failed to follow any of the instructions issued to him by the Area Supervisor. He testified that as far as he is concerned, he had cleaned the office as per his Manager's directives, and then he proceeded to go home to rest. He pointed out as well that his disciplinary hearing had also not gone according to his expectations; hence he deemed it to be procedurally flawed. He stated that the

Chairperson had asked him too many questions, yet as far as he is concerned, the Chairperson was only meant to listen to the evidence of the parties to the proceedings. He stated that the Chairperson had asked him if one Mpendulo Nhleko had told him to remain at the office on the day in question (Mpendulo was a company witness at the disciplinary hearing, and was employed as a fellow security guard at the Respondent Company). He stated that the Chairperson had also asked him if anyone had been present when Mr Magagula allegedly gave him permission to go home. He stated that to add to this, the Chairperson had produced a written statement which was purportedly prepared by the said Mpendulo Nhleko, and the statement detailed what was Mpendulo's account of the events of the 14th of March, 2016.

3.3.6 The Applicant referred to the minutes of the disciplinary hearing (VIP 10), and particularly to pages 6-8 and stated that this reflected the fact that the Chairperson had over-stepped his mandate by asking him questions at the hearing. He referred to the findings of the Chairperson of the disciplinary hearing (VIP 16), and he stated

that he had not even been afforded the opportunity to make any submissions in mitigation against the dismissal. The Applicant also submitted his letter of appeal (VIP 12) as part of his evidence, as well as the minutes of the appeal hearing (VIP 14). He stated that as far as he is concerned the Chairperson of the appeal hearing did not apply his mind to his grounds of appeal, and had just simply upheld the initial decision to dismiss him. He referred to the confirmation of the Appeal findings (VIP 15).

3.3.7 He testified that he would like the Commissioner to award him the claims made in his Report of Dispute form, and explained that although the employer had undertaken to pay him his leave pay, and that it would be deposited into his bank account. He stated however that he was not sure if this amount was paid because he had an outstanding loan that he owed to the bank, so perhaps the said leave pay had been deducted to pay off this loan. He stated that he would make efforts to obtain a bank statement, and also to make the necessary enquiries at the bank.

3.3.8 During cross-examination the Applicant acknowledged that he is acquainted with, and did

append his signature to the Company's Code of Conduct when he was employed in the year 2007 (VIP 5). He further acknowledged that he is aware of clause number 8 of the said Code which pertains to the offences of desertion of duties and/ or post. The Applicant was also referred to a "Final Written Warning" which was issued to him after a disciplinary hearing where he had been charged with "desertion" as well as "negligence". The said warning states that it was to be valid for 12 months from the date of issue; being the 24th June, 2015 (VIP 1). He admitted that he had been found guilty of the said offences. It was put to him that he had wrongfully signed the parade sheet on the 14th of March, 2016 because he did not get instructions from his Supervisor to do so. He admitted that he did not have an assigned post on the day in question, and had simply signed in because he saw his name on the parade sheet on the morning in question. He stated that he did this in the presence of Mpendulo Nhleko. He stated that he received a message from Nhleko on the given day when he reported for work, and the gist of the message was that his supervisor Mr Gamedze had said that he should sign in and then wait at the office for him.

3.3.9 He stated that he signed the parade sheet, with the expectation that he would knock-off work at or about 6:00 p.m. He was referred to a report that he had prepared (VIP 7). He was referred to the portion where he referred to the message from (ECO 6) Mr Gamedze. The Applicant acknowledged that the report did not state that Gamedze (ECO 6) told him to sign in for work. He explained he had asked someone else to write it out for him, but insisted that he was told to sign in. The Applicant was asked why it had taken him an inordinately long time to write the report that Mr Magagula, his supervisor had asked for? It was put to him that he had been told to write the report on the 15th of March, 2016, and according to his report he had been at work on the 19th and 20th of March, 2016, but had still not bothered to furnish his boss with the report. It was also put to him that he failed to inform his boss of the reasons for not submitting the report. The Applicant stated that he had asked someone else to write the report for him because he is illiterate, and also stated that the report that he had prepared had been immersed in water, and was thereby ruined. He stated that on the 21st of

March, 2016, Mr Magagula had given him the last opportunity to write the report, hence he submitted it on the 22nd of March, 2016.

3.3.10 It was put to the Applicant that it is not true that he was not afforded an opportunity to submit a statement in mitigation after the finding of guilt had been made by the Chairperson of the disciplinary hearing. He was referred to page 10 of the Minutes of the Disciplinary Hearing (VIP 10). The Respondent's representative pointed out that statements in mitigation had been made on the last paragraph by the accused when he and his representative were given the opportunity to make closing statements. Applicant pointed out that these were not submissions in mitigation, but ordinary closing submissions.

3.3.11 The Respondent's representative put it to the Applicant that when the Applicant signed in for duty on the 14th of March, 2016, and then proceeded to leave the workplace and go home, this constituted desertion because he did not wait until 6:00 p.m. which was the time he was supposed to knock off at.

3.3.12 The Respondent's representative put it to the Applicant that the prosecutor at the hearing had handed the Chairperson a number of documents which were used as part of his evidence (including the report by Mpendulo). The Respondent's representative stated that on page 3 of the minutes the Prosecutor made reference to this report and the other documents in his statements to the Chairperson. The Applicant stated that he had not seen the Prosecutor handing the report to the Chairperson. The Respondent's representative put it to the Applicant that he had not been paying sufficient attention at the relevant time, and the Applicant admitted that this may be the case.

3.3.13 The Applicant was also asked about his allegations that he had appealed against his dismissal without having been afforded the opportunity to peruse the recommendations of the Chairperson of the disciplinary hearing. The Applicant acknowledged that this document had actually been handed over to his representative, one Jethro Seyama, but he had lost it. He conceded that the employer had furnished this document to him, but through the negligence of his own representative these had been lost.

3.3.14 The Applicant during re-examination insisted that he had not deserted his post on the 14th of March, 2016. He said he had stayed at the workplace and had been assigned cleaning duties by his boss, Mr Magagula. He stated that the said Mr Magagula gave him permission to go home as soon as he had finished cleaning the office because he could see for himself that he was unwell.

3.3.15 The Applicant further referred to the warning (Final Written Warning) that had been issued to him. He pointed out that the charge that he had been dismissed for, and those pertaining to the warning were quite different. He pointed out that he had received a warning for “Desertion and Negligence”, but had been dismissed for “Desertion and Failing to take instructions from his supervisors”.

3.3.16 He further pointed out that he had not been charged for abscondment and failure to produce a report timeously, hence these issues that had been raised by the Respondent’s representative were not relevant to the present case. He further emphasized that on page 8 and 9 of the minutes

of the hearing, what was reflected there were closing submissions and not statements in mitigation. He pointed out that at that material time, the Chairperson had not as yet made a finding of guilt against him.

3.3.17 The Applicant also pointed out that the fact that Mr Hlophe, the company's current representative had chaired his appeal hearing was a cause for concern for him. He stated that this meant that even when he was chairing the appeal, he was still on the company's side and therefore was biased. He pointed out that even on page 2 of the minutes of the hearing, it is clear that he was not given an opportunity to lead evidence or to call witnesses in his defence. He stated that he was simply given an opportunity to make his submissions regarding the events of the 14th of March, 2016.

3.4 **THE RESPONDENT'S CASE**

3.5 **THE TESTIMONY OF MR BONGINKOSI GAMEDZE**

3.5.1 The Witness testified under oath that he is employed as the Area Supervisor at the Respondent company, and had the opportunity to work with the Applicant who reported to him. He pointed out that he had written the report submitted by the company's representative as VIP 8, and applied that it should be made part of his evidence.

3.5.2 The Witness testified that on the 14th of March, 2016, he had reported for work, and received a report from his Manager, Mr Dennis Magagula, which message was to the effect that he should not allow the Applicant to proceed to his post until he had an opportunity to speak to him. The Witness stated that the report he received was to the effect that Mr Magagula wanted to discuss certain issues that occurred at the Applicant's post. He pointed out that he was not sure of what had actually taken place, mostly because he had not been at work on the previous day (13 March, 2016).

3.5.3 He explained that on the 14th of March, 2016, the Applicant missed the daily parade, because he was late for work, and he had proceeded to go

and deliver the other Security Guards to their respective posts. He stated that he then decided to leave a message for the Applicant with one of the Security Guards who was remaining at the office, one Mpendulo. He stated that he told Mpendulo to tell the Applicant to wait at the office until his return, and that he was not to leave until Mr Magagula got the opportunity to speak to him. He pointed out that upon his return however, he found that the Applicant had signed the parade sheet without being authorized to do so, and had proceeded to leave the office contrary to his instructions. He stated that when he enquired from Mpendulo where the Applicant was, and whether he had relayed his message to him, Mpendulo told him that he had indeed told the Applicant to remain at the office until his (Gamedze's) return and further that Mr Magagula needed to speak to him. The Witness further testified that he had returned from delivering the Security Guards at their posts at or about 7:00a.m. and Mpendulo told that the Applicant had told him that he had forgotten his medication at home, and was going to rush home to collect it and return to the office. The Witness stated that he continued with his other duties until about

8:30 a.m. when he had to go to the Matsapha office to collect a casual (worker) Security Guard, to go and fill in for the Applicant because the client where the Applicant was meant to be guarding at, complained telephonically that they did not have a guard stationed there.

3.5.4 The Witness stated that when Mr Magagula arrived at the office he asked where the Applicant was, and he told him that he was still waiting for him to return from collecting his medication at his house. He pointed out that he explained to Mr Magagula that when he had returned to the office at 5:30 a.m. after delivering the guards he had found that the Applicant had signed the parade sheet, but had left the office despite receiving a message not to leave. He pointed out that he had spoken to Mr Magagula at or about 9:00 a.m., after going to deliver the casual at the Applicant's designated post. He stated that he left the office yet again to perform other duties, and returned at or about 12:00 noon, and at that time, the Applicant had still not returned to the office.

3.5.5 He testified that on the day in question he had not seen the Applicant at the workplace at all despite that he had signed the parade sheet. He stated

that by signing the parade sheet, according to the company policy, this meant that a guard was on duty. He pointed out that in the Applicant's case, he had not been authorized to sign the said sheet on the day in question, and he further defied instructions to wait for him and Mr Magagula at the office. He was asked how long an employee had, according to the company policy, to submit a written report if his supervisor required such a report?. The Witness stated that an employee was expected to submit a report to his supervisor within twenty-four (24) hours. He pointed out that he had only seen the Applicant on the 15th of March, 2016 when he reported for work, after having failed to return to the office the previous day.

3.5.6 He explained during cross-examination that he had not seen the Applicant at all on the 14th of March, 2016 because he missed the morning parade, and had even missed the transport to the various sites. He stated that he had received a message in the late afternoon of the 13th of March, 2016 from his Manager that he was to ensure that the Applicant did not leave the office until Mr Magagula got the chance to speak to him. He stated that he received the message

telephonically. He explained again that he had left a message with Mpendulo Nhleko to this effect before he left to go and deliver the guards at their posts on the 14th of March, 2016, and emphasized that he told Mpendulo to tell the Applicant to wait for him.

3.5.7 He pointed out that he had seen Mr Magagula after he returned from getting a casual guard from Matsapha, at or about 9:00 a.m. on the given day, and explained that the Applicant had left the office contrary to his instructions. It was put to him that what Mpendulo said was incorrect because the Applicant had left because he was unwell, and not because he had gone to collect his pills and return to the office thereafter. The Witness acknowledged that he had not been there when the two gentlemen spoke, but he had good reason to believe what he said because he was the person with whom he had left a message for the Applicant.

3.5.8 The Witness confirmed that according to his knowledge the Applicant had not returned to the office, and had not spoken to Mr Magagula at all on that day. He pointed out that he was certain of

this because he had asked Mr Magagula specifically about this when he returned from securing a replacement for the Applicant. He stated that the Applicant had not been seen at the office at any point in time during the time that Mr Magagula reported for work on that day.

3.5.9 The Witness was asked if he had bothered to call the Applicant to find out why he failed to return to work on that day? The Witness stated that he did not call because he expected the Applicant to return to work on the very same day, or else to call to tell his supervisor of the reasons why he was unable to return to work. The Witness was asked where the Applicant had been posted on that day? The Witness stated that the parade sheet reflected that the Applicant had been posted/ assigned to the Swaziland Milling post, and he had signed the sheet to reflect that he had indeed reported for duty and was going to be at the post for that particular shift. He explained that the Swaziland Milling post is quite near to the Respondent's office, hence the Applicant could have simply walked there, hence he told Mpendulo to tell him not to go anywhere, but to wait for him on the day in question.

3.6 **THE TESTIMONY OF MR DENNIS MAGAGULA**

3.6.1 The Witness testified under oath that he is employed as the Branch Manager at the Respondent's Manzini office. He pointed out that the Applicant had worked as a Security Guard at the branch that he managed. The witness referred to the report that he had prepared (VIP 9), he applied that it should be made a part of his evidence.

3.6.2 The Witness testified that on the 11th of March, 2016 he had received a call from the Applicant whilst he was at his post at Swaziland Milling, and he reported that he was feeling ill, and asked to be allowed to go to hospital. The Witness stated that he asked the Applicant why he had not reported that he was ill during the morning parade, but he told him that the sickness had just started (at about 8:00 a.m. when he called Mr Magagula). The Witness stated that it took him a while to get someone to relieve the Applicant, but at 10:00 a.m. on that day he secured a guard to relieve the Applicant, and he personally drove him to the Raleigh Fitkin Memorial and left him there.

He pointed out that he is aware that the Applicant was given two days off by the doctor, hence he did not report for work on the 12th and 13th of March, 2016. He pointed out that he was also not at work on the 13th, but he received word from the Site Supervisor (Mr Mamba) that the client, being the Management of Swaziland Milling, had requested that the Respondent should send another guard to the site because they no longer wanted the Applicant there. He stated that, he then telephoned the Supervisor, Mr Gamedze in the late afternoon, and told him to ensure that the Applicant did not proceed to Swaziland Milling as per the usual arrangement, but was to remain at the office the following morning (14th March, 2016) until he (Mr Magagula) had an opportunity to speak to him.

3.6.3 The Witness testified that he reported for work at or about 7:00 a.m. on the 14th of March, 2016, and he did not find the Applicant at the office. He stated that Mr Gamedze had relayed to him that he had left the Applicant a message with Mpendulo Nhleko, and he was told to wait at the office until Mr Gamedze returned. Mr Gamedze told him that he was told by Gamedze that he had

been told by Nhleko that the Applicant had received the message, but he had told Nhleko that he needed to go and collect his medication at home, and would return soonest. The Witness testified that he and Gamedze left the office at or about 8:30 a.m., and returned at around 12:00 noon, and the Applicant had still not returned to the office at that time. He explained that the casual who had gone to relieve the Applicant earlier, had also left his own post vacant, hence they had to get another Trainee Guard from the Matsapha Office where trainings for new guards were on-going to fill that void left by the casual. He pointed out that Gamedze left yet again to deliver invoices to their clients, and returned to the office at about 4:00 p.m. He stated that Gamedze asked him if the Applicant has made an appearance, and he told him that the Applicant had not returned to the office at all. The Witness testified that the Applicant only made an appearance the following day, being the 15th of March, 2016, and had not bothered to give an account about his whereabouts either on the 14th March, 2016, nor on the 15th of March, 2016.

3.6.4 The witness stated that on the 15th of March, 2016, he had arrived at or about 7:00 a.m. at the office, and called both Mr Gamedze, and the Applicant to a meeting in his office. He stated that he asked the Applicant about the allegations made against him by one of the Managers at the Swaziland Milling site, that he had been sleeping on duty on the 11th of March, 2016. He stated that the Applicant told him that this bout of sleepiness had been brought about by his illness, hence he called Mr Magagula to ask for permission to go to the hospital.

3.6.5 The Witness testified that when he was asked about his absence from work on the 14th of March, 2016, the Applicant had admitted to him that Mpendulo Nhleko had told him to wait for Mr Gamedze, and not to leave until he had spoken to him (Mr Magagula). He stated that the explanation that the Applicant gave to him was to the effect that he had rushed to his house to get his medication because he had forgotten to bring it to work with him. He pointed out that the Applicant's version had been similar to that which he had received from the said Mpendulo. The Witness stated that he asked the Applicant why

he had signed the parade sheet without authorization, but he had not received an answer to this question. The Witness stated that he had, in Mr Gamedze's presence, asked the Applicant to write a report on these incidents, and printed out the company's report form, and handed same to the Applicant.

3.6.6 The Witness stated that he expected the Applicant to return with the written report the following day (16th March, 2016) as per their discussions but this did not occur. The Witness stated that the Applicant was meant to take the 16th and 17th off in any event. He stated that he received a report that the Applicant was ill. He stated that on the 19th and the 20th the Applicant did make it to work, and he did not send or submit the written report, and neither did he give a reason for failing to do so. The Witness testified that it was only on the 21st of March, 2016 that the Applicant reported for work, and he found him at the office at 7:00 a.m. on that day.

3.6.7 The Witness stated that on the 21st of March, 2016 he had yet again asked the Applicant to submit the report, but he (the Applicant) informed

him that the report had been ruined when he washed his shirt whilst it was still in his pocket. The Witness stated that he once again printed another standard report form and asked the Applicant to write out another report, and submit it soonest. The Witness stated that the Applicant was once again absent the next day (22nd March, 2016), and returned to work on the 23rd with the report. The Witness stated that upon reading the report he decided to follow the provisions of the company's code of conduct, and suspended the Applicant. He stated that he furthermore charged him, and gave him a date when the hearing would be held.

3.6.8 The Witness testified that since the Applicant had gone ahead to sign the parade sheet on the 14th of March, 2016, without the necessary authorization to do so, and then proceeded to go home without returning, this amounted to desertion of his work. He explained that the parade/posting sheet is a document that reflects the area where a particular guard is posted to provide security services during a particular shift. He stated that the posting of the guard is to be effected by the employer.

3.6.9 The Witness referred to the Applicant's written report once again (VIP 7), and pointed out that at page two (2) of this document, the Applicant stated that he (Mr Magagula) had been the one who had told him to sign the posting sheet. The Witness stated that according to the report he had allegedly spoken to the Applicant on the morning on the day in question, and had asked about his health, and when he found out that the Applicant was still not feeling well, he told him to clean the office, and then to go home thereafter. The Witness clarified that on the 14th of March, 2016, he had not seen nor had spoken to the Applicant at all. He refuted the allegations that he had told the Applicant any of the things that he is purported to have said to him. He referred also to the company's code of conduct and employment forms (VIP 5). He pointed out that this document was well known to the Applicant. He stated that this is evidenced by the fact that the Applicant received these documents, and duly signed them respectively on the 30th day of October, 2007. He stated that it is clear that the Applicant read and understood what was contained in the two documents before proceeding to append his

signature, and also to print his full name on each document.

3.6.10 The Witness referred to the charge sheet that had been issued by him against the Applicant (VIP 6). He noted that the Applicant had been charged with “Failing to take Instructions”, “Desertion”. He stated that this document contains the provision in the code of conduct which details that the sanction for the offence of desertion of post or duties as being:-

- i) A final written warning for a first offence
- ii) Dismissal for a second offence

3.6.11 He pointed out that the Applicant had been found guilty of desertion by the Chairperson of the disciplinary hearing, and he also had a valid final written warning (VIP 1) which he had signed in June, 2015. He stated that the warning was said to be valid for 12 months from that date, and the common factor between the two instances was that the Applicant had been found guilty of the offence of desertion in both.

3.6.12 He pointed out that as far as he was concerned the Applicant's dismissal had been substantively fair. He pointed out further that according to company practice if a client rejects a Security Guard, the duty of the Manager in question is to redeploy that guard to another site whilst the allegations made by the client are investigated. He clarified that if the guard is cleared by the investigation, and he is without a permanent post, he is then kept as an extra who will relieve other guards who need to be off duty. He testified that it is quite unheard of for a Manager to then require a Security Guard to clean the office. He pointed out that he has worked for the Respondent for about five (5) years, and has risen through the ranks to his present position, after having started out as a Security Guard himself.

3.6.13 The witness submitted a copy of the posting sheets which reflected that the Applicant did append his signature thereto. He explained that the document had been printed before the day in question (14 March, 2016), and as the system had been pre-programmed to reflect that the Applicant was to be stationed at Swaziland Milling

for that day, by signing it, the Applicant effectively placed himself at this site for the day in question, but failed to assume guarding duties there. The witness also referred to the company's payment schedule, reflecting that an amount of E1, 570.63 had been electronically paid into the Applicant's Standard Bank Account on the 31st of May, 2016. A copy of the Applicant's bank statement dated 4th November, 2016 was also submitted. This document reflected that the said sum of E1,570.63 was credited to the Applicant's bank account, but was then deducted by the bank in a loan recovery process. The two transactions are reflected to have taken place on the 31st May, 2016. The Witness applied that the documents should be admitted as part of the Respondent's evidence. He pointed out that the Applicant had duly been paid the leave pay which he now claimed.

3.6.14 During cross-examination, the Witness was asked how he had allegedly communicated with Mr Gamedze (ECO 6) on the 13th of March, 2016, since the said Gamedze had testified that he had not been on duty on the day in question?. The Witness stated that he could only recall that he

himself had not been on duty on that day, and further pointed out that he had telephonically relayed the instruction to Gamedze regarding his need to speak to the Applicant the next day, and that he was to remain at the office and not proceed to the Swaziland Milling site. The Witness was asked why exactly he had deemed it necessary to charge the Applicant for the incident of the 14th of March, 2016. He was asked whether his concern was that the Applicant failed to return to the office as expected? The Witness listed his concerns in the following manner:-

- i) That the Applicant received a message from Mpendulo which was from his supervisor on what was expected of him on that day, but he failed to comply with it. He stated that he was meant to wait for Gamedze, and also to remain at the office until he (Magagula) spoke to him.
- ii) That the Applicant duly acknowledged receipt of the message as can be borne out by his own written report.

- iii) That the Applicant wrongfully, and without authorization, signed the posting sheet, purporting to be a person who was at work, and yet he went back home and did not return.

- iv) That the Applicant caused the company serious inconvenience because they had to find a casual and a Trainee guard to fill in the posts that were left vacant by the fact that the Applicant abandoned his duties on that day.

3.6.15 The Applicant's representative put it to the witness that the Applicant had received the message, not from his Supervisor, but from his peer, Mpendulo. He stated also that he told Mpendulo about where he was going, and that he would come back when he had collected his pills. The Applicant's representative stated that the Applicant had therefore not left the Respondent's premises unlawfully. The Witness stated that the message clearly relayed that it had been issued by the Applicant's supervisor, and not the person (Mpendulo) who delivered it. He pointed out that the Applicant was well aware of company policy,

and that he should have asked for permission to leave from his superiors and seeing that Mpendulo was merely his peer, he should have waited to speak to Gamedze. He pointed out that this was exacerbated by the fact that the Applicant had also signed in for duty; hence he could only be properly released by his Supervisors.

3.6.16 The witness was asked exactly what “desertion” was, because the Applicant had left to go and collect pills? The witness stated that desertion, as a workplace offence can be defined as a signing in for duty and then leaving the designated post, or workplace without proper permission from the concerned employee’s supervisor. It was put to the witness that since the Applicant had received permission to leave from Mpendulo, the more appropriate charge that the Witness could have leveled against the Applicant is that of “negligence”. The Witness stated that the Applicant had effectively not sought permission, because his superiors did not know about this, and had not given him leave to go home. He stated that he deemed the offence

of desertion to have been the most appropriate charge in the given circumstances.

3.6.17 The Applicant's representative put it to the Witness that the Applicant had been instructed to clean the office and then to leave thereafter. The Witness stated that he had not issued such an instruction, and he had been at the office most of that day, and no one had cleaned the offices. He emphasized that he did not actually see the Applicant at all on that day. He stated that he had been told by Mpendulo that the Applicant had told him that he was going to collect his medication from his house, and was going to return soonest, which thing did not take place.

3.6.18 During cross-examination the witness referred to the Applicant's written report (VIP 7), and pointed out that there was a discrepancy between the contents thereof, and the allegations now being made that the Applicant had gone to collect medication. He stated that the report stated that he had been told by him to clean the offices and then leave, and yet the Applicant's representative had said that the Applicant had gone to fetch his medication. He maintained that

he had not seen the Applicant at all on the 14th of March, 2016, and certainly did not instruct him to clean the offices and then leave. He stated that he had received a word from Mpendulo, that the Applicant had gone to collect his medication, but the Applicant failed to return to the office, and did not call to explain his absence to his superiors.

4 ANALYSIS OF EVIDENCE

4.1 The case at hand requires a determination on the issue of whether or not the Applicant was dismissed in a manner that was substantively and procedurally unfair as he alleged. It is trite that the Applicant was dismissed after a disciplinary hearing where he was charged with the following offences:-

- a) Failing to take instructions: In that on the 14th of March, 2016, he did not follow and do his Area Supervisors' instructions.
- b) Desertion: In that on the 14th of March, 2016, the Applicant deserted work and went to his house without permission from his superiors.

Substantive Fairness

4.2 The gist of the case of the Respondent against the Applicant is that on the 14th of March, 2016, the

Applicant failed to remain at the office and wait for his supervisor (Mr Gamedze; also known as ECO 6) as per the instruction given to him by way of a message delivered to him by one Mpendulo Nhleko. The Applicant in his own evidence did not dispute that he did receive this message. This is further evidenced by the statement which he authored (as he did not in his evidence deny that the document was prepared by him) wherein he stated that indeed he did get a message from the said ECO 6 to wait for him. According to the statement, he did wait for him. The said statement however does not detail whether or not the Applicant did eventually see the said supervisor, ECO 6 on that day.

- 4.3 It was the evidence of ECO 6(Mr Gamedze), at the arbitration proceedings that the Applicant defied this instruction, by failing to wait for him. He stated that he was informed by the said Mpendulo Nhleko, that the Applicant had proceeded home to collect his forgotten medication, and would hastily return. The evidence of Mr Gamedze, was that the Applicant did not at any point return to the office, and did not telephone him to explain why he had so failed.

4.4 It is quite clear that the Applicant on this day failed to take instruction to wait at the office for the Supervisor. It is also apparent that he did receive the message, and even though it was delivered to him by Nhleko, who was his peer, but he knew that it was an instruction that had been issued to him by his Superior, Mr Gamedze. It is also clear that the Applicant was also aware that the message also required him to await a meeting between himself and the Manager, Mr Magagula. So in essence, the Applicant was fully aware that by failing to wait at the office, or at least to go quickly to his house and hastily return to the office, he was in fact defying two of his superiors. The Applicant clearly committed the offence of failing to take instructions from his superiors.

4.5 Regarding the offence of Desertion of duties and/ or work on the 14th of March, 2016. This is an offence created by the Company's Disciplinary Code. The Applicant in casu did not at any stage successfully dispute his knowledge of this document. He acknowledged that he also had indeed signed the Respondent's Code of Conduct which provides that an employee may for a second offence be dismissed. This is an offence listed as part of a list of offences which the said code terms as "very serious". The Applicant signed

for both the Code of Conduct and the Disciplinary Code on the 30th day of October, 2007 when he was first employed by the Respondent.

- 4.6 It is a trite position of the law that a dismissal is considered fair if it is in keeping with Section 36 of the **Employment Act, 1980 (as amended)**. In the case of ***Gerald Dube v Public Service Pension Fund (I.C. Case No. 604/06)***, the Court explained that misconduct can be instituted by the breach of a workplace rule. The Applicant on the day in question signed the parade/posting sheet, and thereby confirmed that he was indeed reporting for duty at the Swaziland Milling site, or at any other post that the Respondent may have deigned to post him. The Applicant, despite being ostensibly on duty, proceeded to disappear from the workplace without the authority of his superiors. It was the Applicant's evidence that he was told to clean the office and then to go home on the day because Mr Magagula thought he did not look well enough to go about his guarding duties. It boggles the mind why a man who was supposedly visibly ill, would then be asked to clean the office, seeing that this manual task is in itself quite laborious. In any event, Mr Magagula in his own evidence denied that this had taken place at all. Both Mr Gamedze and Mr Magagula

testified at the arbitration proceedings that none of them had even seen the Applicant on the day in question because he did not return to the office, after he allegedly went to collect his medication.

4.7 Indeed this evidence went uncontroverted despite rigorous cross-examination. It became difficult to follow the case of the Applicant because his representative would at times put it to the Respondent's witnesses that the Applicant had been made to clean the office, and was later released to go home by Mr Magagula. On the other hand it was the assertion of the Applicant's representative that the Applicant had actually sought permission from Mpendulo Nhleko to go and collect his medication from home. These two assertions are contradictory because not only was Nhleko, as a fellow Security Guard, not in a position to lawfully give such permission, but also for the simple fact that the Applicant could not have done the two at the same time. He either left to go and collect the medication, or remained and cleaned the offices.

4.8 In light of the foregoing, it is clear that the Applicant did in fact desert his work on this day. It is true that in order to establish misconduct in the workplace, the trier of fact has to ask the following questions:-

- i) Was there a workplace rule regulating conduct at the workplace?
- ii) Is the rule reasonable and valid?
- iii) Was the employee aware of the rule, or reasonably expected to be aware of it?
- iv) Was the dismissal appropriate as a sanction for the contravention of this rule? **(See J. Grogan. “Workplace Law”, 10th ed - pg 132).**

4.9 In casu, it is clear that there is a workplace rule relating to desertion of work and/ or duties as is borne out by the Disciplinary Code, which the Applicant was well aware of. The rule is clearly reasonable bearing in mind that the Respondent is a security company, and if its Security guards are a law unto themselves, and willy nilly leave their jobs this would prove to be detrimental to the security which the Respondent seeks to provide to its clients. The evidence of Mr Magagula clearly displayed that the Applicant’s failure to appear for work on the day in question certainly cost the Respondent in terms of arranging for replacement for the post that he had meant to assign him to guard.

4.10 The Applicant acknowledged that he had indeed received a final written warning on the 24th of June,

2015. He did however assert that the offences for which he received the warning, which was valid for twelve (12) months, were different from the ones for which he was dismissed. I am unable to agree with this assertion for the simple reason that both the warning and the dismissal feature the offence of “desertion”. The Applicant’s dismissal was therefore fair because he had been found guilty for the second time of the offence of desertion. What exacerbates the issue is that the final written warning was still valid in March 2016, when the Applicant yet again deserted his work. The Applicant’s dismissal was therefore fair and reasonable in the circumstances.

Procedural Fairness

4.11 The Applicant decried the procedural fairness of the disciplinary hearing held against him. He listed the following to be the reasons for this:

- i) The Chairperson asked too many questions
- ii) The Chairperson produced a statement made by Mpendulo Nhleko at the disciplinary hearing.
- iii) The Chairperson did not afford him to make submissions in mitigation after the finding of guilt was made against him.

4.12 The concern that the Chairperson asked too many questions was not one that was sufficiently substantiated by the Applicant's concerns. However, the gist of the concerns was that the Chairperson was not impartial in that he posed questions and further proceeded to produce a statement that had been prepared by Mr Nhleko. The Respondent's representative put it to the Applicant that the company representative had actually handed the said statement to the Chairperson. The Applicant admitted that this may have escaped his attention, and he did not deny that indeed the statement probably had been submitted by the company's representative. The Applicant's representative did not produce any authorities that point to the fact that a chairperson may not ask questions during disciplinary hearings. In the absence of legal authority to this effect, I am not able to find that this amounted to a procedural flaw.

4.13 The concern that the Applicant was not afforded to make submissions in mitigation at the disciplinary hearing is indeed a valid ground for challenging the procedural fairness of the hearing. The Respondent's representative referred to VIP 8, being the Minutes of the hearing; and stated that at page 8 the Applicant

had in fact made submissions in mitigation. Upon perusal of the said section of minutes, it came to light that this page merely contains closing submissions, and not submissions in mitigation. This was at a stage where the Chairperson had not even made a finding of guilt.

4.14 It is a trite position of the law that an employee ought to be afforded the opportunity to make such submissions (**see J. Grogan, “Workplace Law, 10th edition, page 242**). The purpose of these submissions is to enable the employee who has been found guilty to try and advance reasons that would tend to help to reduce his moral blameworthiness in the given circumstances. In casu this did not take place. As a result the disciplinary process was definitely flawed in this regard, (**see also Afrox Ltd v National Bargaining Council for the Chemical Industry & Others (2006) ILJ 1111 (LC)**).

4.15 **CONCLUSION**

4.15.1.1 The Applicant in terms of **Section 16 (4) of the Industrial Relations Act, 2000 (as amended)** is entitled to compensation on account of the procedural unfairness. This compensation, as is

provided by the said section may be varied where it is found that the dismissal is unfair only because the employer did not follow fair procedure. The Court and/ or the Commission is given the discretion to award, or even not to award compensation, depending on what the presiding officer deems to be just and equitable in the circumstances.

4.15.1.2 The Applicant did not at the arbitration proceedings display any signs that he was at all remorseful about his behavior or conduct. In fact he went all out to weave a web of deceit by alleging that he was given permission to leave the office, and in the same breath he sought to paint a picture of having left to go and collect medication. He further did not make any submissions that might reflect that his attitude towards his work might have been positively altered in any way, or that he had valued the job that he had lost. In view of this I have decided not to award any kind of compensation to him.

5 **AWARD**

5.1 Having heard the evidence of both parties, I have arrived at the conclusion that the Applicant's claims

herein must fail in all aspects. The claims made by the Applicant are hereby dismissed.

**THUS DONE AND SIGNED AT MANZINION THIS
DAY OF JUNE , 2017.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**