



**CONCILIATION, MEDIATION & ARBITRATION  
COMMISSION (CMAC)**

**HELD AT MBABANE**

**SWMB 390/16**

In the matter between:-

**SIPHO DLAMINI**

APPLICANT

And

**SHISA BHE SECURITY SERVICES**

RESPONDENT

CORAM:

**Arbitrator** : Ms. N. Shongwe

**For Applicant** : Mr. S. Dlamini

**For Respondent** : Mr. M. Mkhonta

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**ARBITRATION AWARD**

**{05\10\17}**

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## **1. PARTIES AND REPRESENTATION**

The Applicant herein is Mr. Sipho Dlamini, a Swazi male adult. The Applicant's postal address is P.O. Box 6342 Mbabane. The Applicant was represented by Mr. Selby Dlamini in these proceedings.

The Respondent is Shisa Bhe Security Services; an entity duly registered in terms of the laws of Swaziland. The Respondent's postal address is P.O. Box 2680 Matsapha. The Respondent was represented by Mr. Mfanafuthi Mkhonta an attorney from Manyatsi and Associates based in Manzini in these proceedings.

## **2. ISSUES IN DISPUTE**

According to the Certificate of Unresolved Dispute No. 019/17; the nature of the dispute is one of alleged unfair dismissal. The Applicant claims the following:-

2.1 Notice pay = E2, 051.40

2.2 Compensation for unfair dismissal = E24, 616.80

## **3. SUMMARY OF EVIDENCE AND ARGUMENTS**

3.1 I have considered all the evidence and submissions by the parties but I have referred to the evidence and arguments I deem relevant to substantiate my findings

as required by Section 17(5) of the Industrial Relations Act, 2000 (as amended).

3.2 The Applicant was the only witness, who testified in support of his case.

The Respondent brought two witnesses. These were Nomsa Matsimbe and Velaphi Tsabedze.

#### 4. **APPLICANT'S CASE**

##### **THE TESTIMONY OF THE APPLICANT**

4.1. The Applicant testified under oath that he had been employed by the Respondent as a Security Guard on the 28<sup>th</sup> January 2016 up until he was dismissed on the 02<sup>nd</sup> October 2016. He was earning a sum of E1, 400.00 per month.

4.2. The Applicant further stated that he had taken his four (4) off days and went home on the 23<sup>rd</sup> September 2016 and came back on the 27<sup>th</sup> September 2016. On his return date the 27<sup>th</sup> September 2016, he came late due to transport problems since he was from home at Kaphunga. He stated that the off days had been authorized by his Supervisor.

4.3. He further stated that when he got to the post - his duty station he found one Muzi Sithole who told him that the

boss had asked him to tell him to go back home and return on the 02<sup>nd</sup> October 2016 wherein she would address him.

4.4. On the 02<sup>nd</sup> October 2016, he again found Muzi Sithole who told him to go for good as he had been dismissed; he then went home.

4.5. He further testified that on the 10<sup>th</sup> October 2016, his Supervisor, one Velaphi Tsabedze came to his place of abode and told him he had been sent by the Company to collect the Company Uniform.

4.6. He stated that when his supervisor came for the uniform, he asked him about his employment status since he had come for the uniform and the Supervisor's response was that since he had come for the uniform it meant that his employment had come to an end and he should do what he wanted or proceed to CMAC; may be the employer will learn from this incident. Thus he then came to CMAC.

4.7. It is Applicant's further testimony that a certain Mr. Wire Gama called him and asked that they meet to talk wherein he advised him to come to his place of abode as he was no longer an employee. The Applicant stated

that indeed Mr. Gama came to where he stays and offered him E600.00 to withdraw the case at CMAC.

4.8. According to the Applicant, he never took the money and Mr. Gama told him he will regret his decision as he was also from CMAC. He stated that the said Mr. Gama told him if he refused to take the E600.00, he would not get any money from the Respondent; and that was the last he heard from him.

4.9. He further stated that the said Mr. Wire Gama's name was given to him by his former Supervisor Velaphi Tsabedze, who also gave Mr. Gama his cell number. The Applicant stated that the company never preferred any charges against him for late coming, desertion and/or absconding. The company never convened a disciplinary hearing on any charges.

4.10 The Applicant further stated that ever since he was dismissed he has not been able to secure any alternative employment to date. He stated that he is married and has 6 children of which 3 are schooling. He therefore, prays to be paid his notice pay and maximum compensation for unfair dismissal as claimed on the Certificate of Unresolved Dispute.

4.10. During cross - examination, the Applicant was asked when his off days began. The response was they started on the 23<sup>rd</sup> September 2016. It was then put to the Applicant that his off days were supposed to start on the 27<sup>th</sup> September 2016 and he was expected to resume his duties on the 29<sup>th</sup> September 2016. The Applicant denied that assertion and stated that he knows what he stated - that he took four (4) off days because he was entitled to those off days.

4.11. He was also asked what time he reported for duty as he had stated that he came late on the day in question. The response was he arrived at the post at 6:30pm instead of 6:00pm and he found Muzi Sithole who told him to go home on that day as per Nomsa's instruction.

4.12. He was also asked if he had bothered to go in person to the person in charge to explain why he was late on that day. The response was he went to his Supervisor.

4.13. He was further asked if he told his Supervisor why he came late for work and the response was in the affirmative. Further to that he was asked to state the reason. The response was that he had had transport difficulty as he was from home - KaPhunga on that day.

4.14. It was put to the Applicant that the reason he put forth was not correct that he was from home yet in his evidence in-chief he stated that he stays in Manzana. The Applicant in response stated that he is renting at Manzana and on the off days in question he went home at KaPhunga and there transport is scarce.

4.15. The Applicant was also asked why he decided to return from home to work on the last day. The response was that since this was his first off since joining the company in January 28<sup>th</sup> 2016; hence he had to exhaust the whole four days at home.

4.16. It was put to the Applicant that he was never late but he absented himself or absconded. Mr. Dlamini responded by saying it was Mr. Mkhonta's opinion.

4.17. It was further put to the Applicant that he was never dismissed as there is no evidence from Shisa Bhe Security Services in a form of a document that states that he had been dismissed. Furthermore there was nothing communicated to him by the employer, all is hearsay.

4.18. Mr. Dlamini responded by stating that there are many ways the dismissal was communicated to him i.e. his reliever told him of Nomsa's instruction (the General Manager), the company came for its uniform and

moreover his Supervisor also told him and that was sufficient proof that he had indeed been dismissed.

4.19. He was further asked what his Supervisor said and the response was his Supervisor had been sent by the company for the uniform and to him that was sufficient evidence of his dismissal.

4.20. It was put to the Applicant that his employer was not Velaphi Tsabedze as such a dismissal cannot be effected by his immediate Supervisor. Further to that, it was put to the Applicant that he was supposed to approach the person he knew as his employer to appeal his dismissal and what hindered him from doing that.

4.21. Applicant's response was that on the 27<sup>th</sup> September 2016, he was told Nomsa would come to him to talk and she never came up until they came to collect the uniform. Furthermore Mr. Gama came not to ask him to go back to work but came to offer him the said E600.00 so that he could withdraw the case from the Commission.

4.22. The Applicant further stated that had Mr. Gama come to tell him to go to the office, he would have gone there. Furthermore, he had also asked him if that meant if he withdrew the case he would go back to work and he said no as he had already been 'erased' from the



company. The Applicant was asked what that meant. The response was he took it to mean he no longer had a position.

4.23. The witness was asked why he thought he had been dismissed when they came for the uniform because the company is still small as such the uniform is shared; it was supposed to have been used by others as he was no longer coming to work.

4.24. The Applicant responded by stating that he did not know that as nobody bothered to tell him when he was employed that they would be sharing the uniform; as such he had never shared his.

4.25. It was put to the Applicant that the collection of the uniform did not mean he had been dismissed but it was for purposes of re-using it. Mr. Dlamini responded by asking what purpose did Mr. Gama's visit serve then?

4.26. The witness was asked who was introduced on the 28<sup>th</sup> January 2016 as his employer. The response was Nomsa and even when his Supervisor came for the uniform Nomsa's name came up, as Velaphi said he had been sent by Nomsa.

4.27. The witness was asked how Mr. Gama featured in this issue and the witness's response was he also does not

know but what Mr. Gama said was that he got his number from his Supervisor.

4.28. It was put to the Applicant that he was never dismissed as there is nothing from his boss to that effect in a form of a letter. Furthermore, there are no witnesses to support his version; no Muzi Sithole, Velaphi Tsabedze and the said Mr. Wire Gama. Mr. Dlamini responded by saying that when he was employed the company never gave him any documentation.

4.29. The witness was further told that his former employer will parade witnesses that he was never dismissed from work. Mr. Dlamini responded by stating that the fact that he was turned back from work and the collection of the uniform is equivalent to taking his working tools which he can interpret it to mean dismissal.

4.30. It was further put to the Applicant that the company ever since its inception has never dismissed anyone, as such there was no document that communicated his dismissal. Furthermore, the said uniform was company property to be used whilst still in employment and as he was no longer working for that company there was no need to continue to keep it.

4.31. On re-examination he was asked if he was not an employee protected by **section 35 of the**

**Employment Act 1980 (as amended).** Mr. Dlamini responded by stating that he was working from 6:00 p.m. to 6:00 a.m. for 7 days in a week. He was further asked if he had been employed on a fixed term contract. The response was that he was not and that his Supervisor had told him he was employed on a permanent basis.

4.32. He was also asked that when he started working for Shisa Bhe Security Services had he been made to sign any Form – Second Schedule. The response was in the negative. He was also asked for how many months had he worked for the company and the response was that he had worked for nine months.

5. **THE RESPONDENT'S CASE**

**THE TESTIMONY OF NOMSA MATSIMBE (RW1)**

5.1 The witness testified under oath that she is the General Manager of the Respondent. She stated that she knew the Applicant as their former employee, who had been employed by George Dlamini; the then General Manager. The witness further testified that the Applicant had started working for the Company on the 27<sup>th</sup> January 2016 until he disappeared on the 26<sup>th</sup> September 2016 when he took his two (2) off days on the 27<sup>th</sup> and 28<sup>th</sup> September 2016 and never came back.

- 5.2 She testified that they had expected the Applicant to resume his duties on the 29<sup>th</sup> September 2016 but never came back. The witness further stated that the Applicant never called to inform her why he never came back. She further stated that even though she had heard from Velaphi Tsabedze, Applicant's Supervisor that he had told him he was going to work at Annadale Primary School; nonetheless she tried calling him to find out if he had really resigned but the Applicant never answered her calls.
- 5.3 It was Ms. Matsimbe's testimony that she heard from Muzi Sithole (who had relieved the Applicant when he went on his off days) that the Applicant had come to the post on the 03<sup>rd</sup> October 2016.
- 5.4 The witness testified that the said Muzi Sithole called her to tell her that Sipho was at the post and she instructed him to tell the Applicant to report to the office since he was not answering her calls. All this was in a bid to try and find out from Applicant why he was not coming to work. The witness stated that even after that the Applicant did not come to the office and he also did not call her.
- 5.5 Ms. Matsimbe further stated that there was nothing ever communicated to the Applicant written or

- otherwise with regard to his absenteeism but she had on a number of occasions sent Velaphi, his Supervisor to go to his place (home) to look for him so he could state his side of the story why he was not coming to work.
- 5.6 Furthermore, the witness stated that she was convinced that the Applicant had started working at Annadale as he had not come to work for many days and with that in mind the witness stated that she then asked Velaphi to go to the Applicant and ask for the uniform since they are a small establishment; uniforms are shared between staff.
- 5.7 Ms. Matsimbe also stated that ever since its inception the company has not dismissed an employee, they believe that dialogue is the best in resolving issues and every employee who left, left on their own accord.
- 5.8 On cross-examination, the witness was asked if the Applicant was made to sign the Second Schedule in terms of **section 22 of the Employment Act 1980 (as amended)**. The response was that the Applicant was not employed by the witness; she had just resumed operations when the Applicant disappeared.
- 5.9 Moreover, the person who had employed the Applicant stated that each time the Applicant was engaged on

- these things he would say he did not know how to read and write; as such he should be cut some slack as he was only interested in providing guarding services.
- 5.10 The witness further stated that at one time, she went to the site and found certain things that Siphon had not written and when she asked they said Siphon had told them he never went to school and he also told her.
- 5.11 Ms. Matsimbe was asked who the Directors of the Company are. She stated that there were many.
- 5.12 The witness was asked why the Applicant was not charged for absenteeism as she had stated that the Applicant never came back to work on the 29<sup>th</sup> September 2016 but re-surfaced on the 03<sup>rd</sup> October 2016. Ms. Matsimbe responded by stating that the sole reason she called the Applicant was for that purpose but the Applicant never answered her calls.
- 5.13 Ms. Matsimbe was further asked why on the day when Muzi called to inform her that Siphon was at the post she did not ask to speak to Siphon. The witness gave various contradicting responses to that question; she first stated that when Muzi called her, Siphon had already left. She also said she never told Muzi to talk to Siphon. She also said that this incident happened a long time ago she cannot remember properly.

5.14 Furthermore, she also said since Siphos was not answering her calls, she then left messages with Muzi that he should call or come to the office; something he never did and that was before the 03<sup>rd</sup> October 2016.

5.15 The witness was asked where the company's office was situated as the Applicant had stated that there was no office. Ms. Matsimbe responded by stating that the office was at Eteteni in Matsapha and in August 2016 it then re-located to Christian Media Centre in Manzini; nonetheless the Applicant knew the mode of communication when he had to see her on any other issue.

5.16 The witness was again asked what steps she took to address Applicant's issue from the time of his disappearance to the time she sent Velaphi to collect the company's uniform. Ms. Matsimbe maintained that she had tried calling Siphos who did not answer her calls. At one point it was answered by Siphos's wife whom she had asked to convey the message for Siphos to get in touch with her.

5.17 She also stated that she sent Velaphi to go look for him at his house and he used to come back with a negative response and the last time was when she asked Velaphi to ask him to give back the uniform if he found him and

to also ask him to call her (since his phone had got to a point where it was not available on the network) or come to the site.

5.18 The witness was again asked what she sent with Velaphi when he went to Sipho's place for the uniform i.e. charge sheet. The response was nothing. It was suggested to Ms. Matsimbe that she knew where the Applicant was staying or how to get him yet she failed to charge him. The witness stated that she did not know only the Supervisor knew.

5.19 The Applicant's representative maintained that the company knew where to find Sipho for purposes of serving him with a charge sheet and a notice to attend a disciplinary hearing through Velaphi but elected not to; moreover if he did not attend the said hearing they would have proceeded in absentia. Ms. Matsimbe responded by stating that since Sipho was not answering her calls, she believes she was the only one who had to do that (lay charges to Sipho).

### **THE TESTIMONY OF VELAPHI TSABEDZE (RW2)**

5.20 The witness testified under oath that he is employed by the Respondent as a Security Guard/Supervisor. He



knew the Applicant as a former employee of the company who had absented himself from work.

5.21 He further testified that after the Applicant had not come to work for days (as he had told him that he had found work somewhere - at Annadale as a Grounds man) the General Manager then asked him to go to Applicant to collect the company uniform so that it could be used by someone else.

5.22 On cross - examination, the witness was asked why he never charged the Applicant for absenteeism when he came back as he was his Supervisor. The witness's response was he did, he told him to call the office to state where he was on the days he had been absent. The witness was further asked if he wrote down the charge. The answer was in the negative.

5.23 Mr. Tsabedze was asked if anyone from the office asked him why Siphon never called or went to the office and the response was in the negative.

5.24 He was also asked if he had never met Siphon prior to him going to collect the uniform on the 10<sup>th</sup> October 2016. The witness responded in the affirmative and stated that he went to the Applicant's house on three occasions and he could not find him.

5.25 Mr. Tsabedze was further asked how true is the issue of Mr. Wire Gama who had taken the Applicant's number from him had approached the Applicant and offered him E600.00 to withdraw his case at CMAC. The witness stated that he knew nothing about that issue.

5.26 It was put to the witness that he met with the Applicant and told him about Wire Gama's name. The witness stated that Sipho knew Gama and the fact that he was one of the Directors and also that he did tell him about Wire Gama.

5.27 On re-examination, the witness was asked if he had believed Sipho on the issue of him securing a job at Annadale and why? Mr. Tsabedze responded in the affirmative and stated that because he was absent from work for a long time.

5.28 He was also asked if it was part of his duties as a Supervisor to charge an employee if that employee had committed a misconduct. The witness stated that it was not his job; it was done by the Directors.

## 6. **CLOSING SUBMISSIONS**

### 6.1. **THE APPLICANT'S SUBMISSIONS**

Mr. Dlamini's representative stated that his dismissal was unfair both procedurally and substantively. Procedurally unfair in that if he had committed misconduct the Respondent had a duty to first suspend him pending investigations and then call him before a disciplinary hearing, chaired by an independent chairperson who will then issue a recommendation for management.

Mr. Dlamini's representative further stated that all the above legal requirements were not observed in Applicant's case; he was never charged for the alleged absenteeism and/or desertion. Furthermore, his Supervisor knew where he stayed but did not take any legal action to punish him for his absence from duty even when he came to collect the company uniform. Therefore, the *audi alteram partem* rule was defeated by the Respondent who failed to observe such a vital basic natural justice rule.

Substantively unfair in that the Applicant argued that he never committed the alleged offence. Moreover, when the Applicant reported a dispute to the Commission, he was approached by one of the many Company Directors, one Wire Gama who offered him E600.00 on condition he withdraws his case from CMAC.

On Desertion, such alleged misconduct is not true as all this time the Respondent knew where he was (as communicated to one Muzi whom he found at the post that he should come back on the 02<sup>nd</sup> October 2016 to meet with Nomsa Matsimbe) but decided not to prefer charges thus the company is on a fishing expedition.

Thus the Applicant avers that for a dismissal to be fair, equitable and just both procedurally and substantively it is mandatory to comply with **Section 36 read together with section 42 of the Employment Act 1980 (as amended)** which was not done in the case at hand wherefore they pray that the Applicant be compensated as follows;

Notice Pay = E2, 051.40

Compensation for unfair dismissal E26, 668.00

## 6.2. **THE RESPONDENT'S SUBMISSIONS**

The Respondent's representative argued that the success of the Applicant's case largely borders on two aspects; was he an employee to whom **section 35 of the Employment Act 1980 (as amended)** applied and also that his employment was indeed terminated both procedurally and substantively unfairly by the Respondent.

He stated that it is common cause that the Applicant was an employee to whom **section 35 of the Employment Act 1980(as amended)** applied.

On the second aspect of the issue to be proven, Mr. Mkhonta argued that the Applicant seeks to prove on hearsay evidence by one Muzi Sithole whom he alleges acted as the Respondent's mouth piece in as far as conveying the message of dismissal. Furthermore he failed to bring him forth to corroborate his evidence.

He went on to state that according to the Law of Evidence, hearsay evidence is inadmissible since it is often uncorroborated and lacks probative value or force see **LH Hoffmann and DT Zeffert, The South African Law of Evidence, 4<sup>th</sup>Edition at page 170;** as such the Applicant failed to prove his dismissal.

Mr. Mkhonta also argued that according to the Managing Director's evidence the Applicant was never dismissed by the Respondent but unceremoniously left Respondent's employ without permission nor did he report his absence.

Further to that the Managing Director had made several phone calls to the Applicant and the Applicant's phone would ring unanswered. Moreover, the Managing Director had instructed one Muzi Sithole who was at the post to tell Applicant when he eventually reported for work to come to her office to explain his absence. She also instructed Velaphi to look for him to no avail and Applicant never called nor went to the office.

Mr. Mkhonta also argued that in the Managing Director's evidence it transpired that no letter of dismissal or invitation to a hearing came forth from the employer since the Respondent still awaits a call or report from Applicant regarding his mysterious disappearance.

Also, that Applicant could not be charged since his whereabouts could not be readily ascertained albeit diligent search through phone and physically.

On desertion, Mr. Mkhonta argued that the Applicant actually deserted the Respondent's employ; alternatively his conduct amounted to absenteeism at its highest degree as he never advanced or explained his reasons for his absence instead he argued he came

late for work on the flimsy ground that he stays at kaPhunga yet he submitted that he resides at Manzana.

On the issue of collecting the uniform, Mr. Mkhonta argued that Applicant's allegation that when Velaphi came for the uniform on the 10<sup>th</sup> October 2016 his interpretation was it meant his services were being terminated is incorrect, in the sense that it took Respondent sometime to fetch the said uniform. The Respondent was hoping the Applicant would come to explain himself.

Furthermore, the uniform was fetched for the sole reason that it was shared. Wherefore, the Respondent prays that Applicant's Application be dismissed.

## **7. ANALYSIS OF EVIDENCE**

- 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 nine (9) months before he stopped working; consequently he has discharged his onus.

7.2 In terms of **Section 42 (2) of the said Act**, the Respondent bears the onus of proving that:-

7.2.1 The reasons for termination of the Applicant's services was one permitted by **Section 36 of the Employment Act**; and

7.2.2 That taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicant.

7.3 The key question that is up for determination herein is whether or not the Applicant was dismissed by the Respondent. Furthermore, it was in a manner that was substantively and procedurally unfair?

7.4 The Applicant's case was that he was dismissed by the Respondent through a message relayed verbally by one Muzi Sithole (his reliever) on the 02<sup>nd</sup> October 2016 that there was no more work for him.

7.5 In his evidence the Applicant stated that he had come late to work on the 27<sup>th</sup> September 2016 and found the said Muzi Sithole already at his post who told him that the General Manager had asked him



to tell the Applicant to go home on that day and come back to the post on the 02<sup>nd</sup> October 2016 for the General Manager to address him.

7.6 True to the instruction, the Applicant came to the post on the 02<sup>nd</sup> October 2016 only to be addressed by the same Muzi Sithole and not the General Manager; that he should go home for good as there was no work for him. Applicant's evidence was not challenged during cross - examination.

7.7 Also, no witness was paraded by the Applicant to corroborate his evidence. But what came out from RW1's evidence was that she did ask Muzi to convey a message to the Applicant. It's a pity that the Respondent also failed to parade the said Muzi Sithole whom she left a message with to corroborate her assertions.

7.8 On the other hand, the Respondent denied that it terminated the Applicant's services but instead the Applicant absented and/or deserted thus terminating his services.

7.9 In determining which version is more probable, I have taken into cognizance the position taken by **Wessels JA** in the case of **National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 199**, wherein he stated as follows; **“Where there are two stories mutually destructive, before the onus is discharged the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false”**.

7.10 **Grogan** in **Dismissal, Discrimination and Unfair Labour Practices, 2<sup>nd</sup> edition, 2008 at page 209** states that **“onus in this context (of dismissal) means that if the employer denies that the employee was dismissed, the employee must produce evidence to prove that the dismissal occurred”**.

7.11 From evidence adduced, which was not challenged during cross -examination; the Applicant testified that one of the Company Directors by the name of Wire Gama (which RW1 acknowledged him to be one of the Directors during her cross-examination) approached and offered him money to withdraw his unfair dismissal case at CMAC.

7.12 The question that begs my mind is, if the Applicant had not been dismissed; why did Mr. Gama offer him money to withdraw his case from CMAC and what did he hope to achieve by asking the Applicant to withdraw his case. Further to that, RW2 during his cross - examination seemed to have had an idea that the said Mr. Gama did contact the Applicant after the dismissal. Notably, the Respondent did not lead any evidence to contradict the evidence led by the Applicant.

7.13 Furthermore, from evidence led, the Applicant testified that Mr. Gama told him there was no position for him anymore when he asked if he could go back to work.

7.14 The Respondent was of the view that the Applicant absented and/or deserted thus terminating his services. If the Respondent held the view that the Applicant left of his free will, as his conduct was tantamount to absconding or desertion as they alleged.

7.15 The question that begs my mind is; why did the Respondent not prefer charges of desertion

against the Applicant when he reported for work on the 02<sup>nd</sup> October 2016 or even when his Supervisor came for the uniform? Clearly the Applicant's conduct did not manifest his intention no longer to be bound by his contract of employment.

7.16 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.”**

7.17 From the proven facts, it is clear that the Respondent did not prefer any charges for desertion and/or absenteeism against the Applicant when they were supposed to. Thus, the Respondent failed to observe a vital basic natural justice right.

7.18 Furthermore, Respondent’s argument that the Applicant had left to work at Annadale does not hold any water in that, if the Applicant had an intention of resigning or had resumed working at Annadale; why did he bother to come to work on the 02<sup>nd</sup> October 2016 as told by Muzi Sithole.

7.19 Moreover, from adduced evidence through RW1 who testified that she left messages with Muzi Sithole, who at one point called to tell her that Sipho was at the post. It is not clear why the General Manager did not seize the opportunity to talk to Sipho then, as she testified that she had

tried to call Siphon on numerous occasions and those calls rang unanswered.

7.20 I am not truly convinced that the Respondent through RW1 who is the General Manager, did everything in her powers to get in touch with the Applicant. She could have sent a charge sheet with Applicant's supervisor when he went to fetch the company uniform on the 10<sup>th</sup> October 2016.

7.21 Furthermore, Respondent's flimsy excuse that they could not prefer charges against the Applicant, because they did not know where he stays does not hold any water; in that Applicant's supervisor knew where Mr. Dlamini resided and as such they had a duty to prefer charges against the Applicant.

7.22 The Applicant has given a probable explanation for the absenteeism and/or desertion, in that he says he had been "suspended" by the General Manager through one Muzi Sithole and later dismissed on the 02<sup>nd</sup> October 2016. Applicant's absence was not unexplained and unauthorized. The termination of the services for absenteeism and/or desertion was therefore unfair because the reasons for terminating his services were invalid in

that he could not reasonably be expected to have been at work because of the “suspension”.

7.23 **Section 36 of the Employment Act No5 of 1980 Act (as amended)** provides that it shall be fair for an employer to terminate the services of an employee because the employee has absented himself from work for more than a total of three (3) working days in any period of thirty (30) days without either the permission of the employer or a certificate signed by a medical practitioner.

7.24 It is common cause that there were no charges preferred against the Applicant for absenteeism and/or desertion which then culminated into a dismissal, a dismissal which was not preceded by a disciplinary inquiry. In our law a dismissal is said to be procedurally unfair where the dismissal has not been preceded by a properly formulated disciplinary inquiry.

7.25 **John Grogan** in his book **Dismissal, Discrimination and Unfair Labour Practices** at page 268 states that; **“procedural fairness is the yardstick by which the employers’ pre-dismissal are measured”**. He goes on to further state that the **“requirements of procedural fairness require employers to act in a semi**

**judicial manner before imposing a disciplinary penalty on an employee.”**

7.26 Fair procedure was also emphasized 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 is certainly clear that the above outlined principles were not observed in *casu*.

7.27 Form the above; I find that the Applicant has proven that his services were terminated by the Respondent. As a result, I accordingly find that the Applicant’s dismissal was unfair both procedurally and substantively.

## 8. **AWARD**

8.1 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.

8.2 The Respondent is hereby ordered to pay the Applicant the following:-

- |     |   |              |
|-----|---|--------------|
| i)  | Notice pay                                      | =E2, 051.40  |
| ii) | Compensation for unfair dismissal<br>(3 months) | =E 6, 154.20 |



**TOTAL**

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**=E8, 205.60**

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8.3 The total sum of **E8, 205.60** should be paid at CMAC offices in Mbabane not later than the 31<sup>st</sup> October, 2017.

**THUS DONE AND SIGNED AT MBABANE ON THIS  
.....DAY OF OCTOBER 2017.**

\_\_\_\_\_  
**NOMCEBO SHONGWE  
CMAC ARBITRATOR**