



CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT MBABANE

DSPT 004/02

In the matter between:-

SIPHO DLAMINI

APPLICANT

And

BUFFALO SOLDIERS ACADEMY

RESPONDENT

CORAM:

Arbitrator	:	Ms K. Manzini
For Applicant	:	Mr. S. Dlamini
For Respondent	:	Mr. S. Dlamini

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

- 1.1 The Applicant herein is Mr. Sipho Dlamini, a Swazi male adult of Elangeni, next to the Lobamba Umphakatsi, Manzini Region. The Applicant was represented by Mr. Siyabonga Dlamini, an attorney from the office of Mkhwanazi Attorneys.
- 1.2 The Respondent is Buffalo Soldiers Academy, a business duly registered in terms of the laws of Swaziland, and carrying on business at the Industrial Site, Mbabane, Hhohho Region. The Respondent was represented by Mr. Sabela Dlamini, an attorney with the law firm of Magagula, Hlophe Attorneys.

2 ISSUES IN DISPUTE

- 2.1 The Applicant reported a dispute of alleged unfair dismissal wherein he claims the following:-
 - i. Notice pay
 - ii. Additional notice
 - iii. Severance allowance
 - iv. Maximum compensation for unfair dismissal
 - v. 10 days public holidays
 - vi. Leave
 - vii. 12 days for unlawful suspension
 - viii. 100 off-days not paid
- 2.2 These claims are listed in the Certificate of Unresolved Dispute No. 094/02.

2. SURVEY OF EVIDENCE

- 2.1 The Applicant was the only witness who testified in support of his case whilst the Respondent's representative called Mr. Themba Nsibande to testify in support of the Respondent case.

3.1 THE APPLICANT'S CASE

3.1.1 THE TESTIMONY OF MR. SIPHO DLAMINI

3.1.1.1 The Applicant testified under oath that he is a married man, who is resident at Elangeni within the Manzini Region. According to his testimony the Applicant was employed by the Respondent in or about 1999 as a Security Guard. He stated that he had been stationed at a post in Matsapha. The Applicant testified that he had been dismissed in a manner that was substantively unfair, since he had been charged and dismissed for absenteeism, an offence which he had not committed. He stated also, that he was dismissed for poor work performance.

3.1.1.2 The Applicant stated that he had not absented himself from work because he had taken official leave. He stated that the practice at the workplace had been such that whenever an employee was due to take leave that employee would apply for leave at the Respondent's company's Human Resources office, which had been manned by a lady named Joy. He stated that in this instance he had duly received his leave pay, and this had been clearly reflected in his payslip. He stated that the leave pay had covered a period of only twelve days (12 days), and yet as far as he was concerned he had been entitled to twenty-two days (22 days) of leave. He cited the Government Gazette as his authority (**Legal Notice No. 191 of 2001**).

3.1.1.3 The Applicant explained that he had duly taken the twelve days of leave, which the law permitted that he should take, but had stayed an extra two days in protest. He stated that he had done

this to show the employer that as far as he was concerned, this was infact what was due to him. He testified that he had been one of the workers representatives at the Wages Council, and these additional two days had been a bone of contention, which had still been on the table for discussion, but had not been finalized.

3.1.1.4 The Applicant testified that his employer had later on charged him with the offence of absenteeism, and had alleged that he had been absent without lawful permission for a period of about five to six (5-6) days, and he had eventually been found guilty of the said offence as well as poor work performance and dismissed thereafter. The Applicant maintained that he had actually absented himself for a period of two (2) days over and above the twelve days of leave that he had taken. He explained that he had also taken time to attend a Wages Council meeting at the Swaziland National Association of Teachers (SNAT) Building in Manzini on another day and this had been well known to his boss Mr. Mackenzie. He explained further that the other days were those that formed part of his official leave (his entitlement, according to him, being 12 days).

3.1.1.5 The Applicant further gave testimony that he believed that he was dismissed in a manner that was substantively unfair because he had not committed the offence he had been charged with. He stated that it was his desire to abandon some of the claims that appear in the Certificate of Unresolved Dispute. It was the case of the Applicant that prayers numbered 5,7 and 8 were no longer being pursued by him in this matter. (these being the claims for 10 days public holidays, 100 off-days, 12 days for unlawful suspension). It was also his testimony that most of the documentation that pertains to this matter were no longer available since his previous legal representative had

passed away, and he could not access his file. The said letters according to him were the following:-

- i. Invitation to disciplinary hearing
- ii. Letter of suspension
- iii. Letter of dismissal

3.1.1.6 The Applicant stated that he could no longer recall the exact dates of the events since they took place approximately fifteen years ago. He stated that he is quite advanced in age, and his memory is not so good, but he could recall that he was dismissed on the 12th of November, 2001, and that he had taken leave from the 21st to the 22nd of October, 2001 (annual leave), whilst on the 6th of October, 2001 he had been engaged in a meeting of the Wages Council. He changed his story in the same breath, and said that he could no longer recall when exactly he had proceeded to take the twelve days of annual leave. He stated that he did recall that he had taken his entitlement of twelve days (12 days), and had added the 21st and 22nd of October, 2001 to those leave days, thus he had returned after fifteen (15) days. The Applicant stated that he had not, in his opinion, flouted the law since the government gazette (**Legal Notice No. 191 of 2001 for the Security Industry**) actually entitled him to a total of twenty-two (22) days of leave per annum, and he had only taken twelve days, plus the additional two days which he took in protest.

3.1.1.7 During cross -examination, the Applicant was asked what he had been dismissed for exactly? He stated that he had been dismissed for absenteeism, in that he took two extra days over and above his twelve day official leave, and then he had taken another day to attend a Wages Council meeting where he represented his co-employees at the Respondent's company. The Respondent's representative asked the Applicant if he had

formally applied for the leave that he alleged he had taken officially? The Applicant stated that he was aware that the official procedure for applying for leave entailed the filling in of forms and also the applicant-employee would be required to sign the leave forms. He stated that he did not however recall whether Joy in this given case did actually fill in the requisite forms on his behalf, and neither did he recall signing the said leave application forms. He stated that he did however, recall that he did receive a separate sum of money which was leave pay over and above his normal salary in that given pay-period. He explained that the days when he was due to take leave were well known to him, as well as Joy, and according to him he had been entitled to take twenty-one (21) days as his leave. In the same vein, he stated that he was entitled to twelve days since he had completed a year in the employ of the Respondent.

3.1.1.8 The Applicant under cross-examination explained that he could not recall when exactly he had proceeded to go on leave as all this information had been contained in the documents that had been in his legal representative's custody, but he could no longer access these because he had passed away. He emphasized that he did not recall signing leave application forms, but he did remember quite well that he had signed for his salary and leave pay that month. He stated that in his understanding the leave pay he had received was money which he receive whenever he proceeded to go on leave, and then when the leave pay had all been spent by him this was an indication that he should return to work as his leave was over. He stated that he received leave pay for twelve (12) days.

3.1.1.9 The Applicant confirmed that he had taken the twelve days of leave, inspite of having received the leave pay together with his monthly salary, and had stayed an additional two days over and above this. The Respondent's representative put it to the

Applicant that the legal position is that once money is paid to an employee in lieu of leave, this means that the said employee is no longer entitled to proceed to go on leave, or to take the relevant days off from work. The Applicant stated that this was news to him, and stated further that he had genuinely believed that he was entitled to accept the leave pay, and also to go on leave.

3.1.1.10 The Applicant was asked to clarify about the number of days he had been said to have been absent from work? He stated that he could not recall when exactly he had returned from leave, but stated that he had stayed an additional two days, and stated further that on another occasion he had also taken a day off to go to a workers' council meeting. He stated that he could not remember if he had asked for permission to go to this meeting from the employer. He stated that he was almost certain however, that this day had fallen during the period before he had gone to ask for leave from Joy at the office.

3.1.1.11 The Applicant was asked how many days he had worked per week, and how many he take off? The Applicant stated that he had worked six (6) days per week from Monday to Saturday. He was asked if he was afforded any other days off besides the Sundays by the Respondent? The Applicant stated that he could not remember but suspected that he had received a day off at the end of the week. He stated that the position had been that he had been paid for thirty days per month, but later the position had changed since his contract had been transformed from entitling him to a monthly rate of pay, to a daily rate. He stated that he did not have his contract of employment with him as he surmised that the employer still had it in his personal file. He pointed out that the employer had been wrong to dismiss him for absenteeism because the government gazette actually entitled him to twenty-one (21) days of leave. He said this

provision was designed to compensate security guards for the many hours that they worked. The Respondent's representative put it to the Applicant that he did not seem to have the correct grasp of the provisions of the gazette in terms of their contract because this was not the case at all. The Applicant insisted that he did indeed understand the provisions well, and pointed out that he had taken a total of fifteen days leave in that he returned to work after fifteen days.

3.1.1.12 The Respondent's representative put it to the Applicant that an inordinately long time had elapsed since the cause of action had arisen, and the dispute reported before the matter could be dealt with, hence the employer no longer had his personal file and many of the crucial documents that pertained to this matter could no longer be found. It was further put to him that most of the individuals who had been employed by the Respondent at the material time no longer worked there and could no longer be traced, he gave the example of the said Joy who had been in the employ of the Respondent at the material time no longer worked there and could no longer be traced, he gave the example of the said Joy who had been in the Human Resources department. The point that was made by the Respondent's representative was that it was very difficult to find and to adduce the pertinent documents at the arbitration proceedings as part of the Respondent's evidence, and to call the relevant witnesses to testify. The Applicant stated that even though a period of approximately fourteen to fifteen (14-15) years had elapsed, he believed that the documents were still at the Respondent's premises, but these were being concealed by the employer. When asked who could have concealed the documents, he stated that it was the management of the Respondent who had done this.

4 THE RESPONDENT'S CASE

4.1 THE TESTIMONY OF MR THEMBA NSIBANDE

4.1.1.1 The witness testified under oath that he is a resident of the St Phillips area, in the Lubombo Region. He explained that he was now retired, but used to work as Human Resources Manager for a certain company, and as such had been asked to preside over a number of disciplinary hearings during the period between the year 2001 and 2002.

4.1.1.2 The witness stated that he had also presided over the Applicant's disciplinary at the Respondent's behest. He stated that although he could not recall most of the dates involved, but he was able to remember that the said hearing had taken place around the latter part of the year 2001. He stated that he had not had occasion to refer to minutes of the proceedings, but he was able to testify that the Applicant had been charged with absenteeism, and that the Applicant had not been permitted to be away from work by the employer. He stated that the Applicant, had in his defence stated that he had been ill, but had not submitted any kind of medical certificate or sick sheet from a medical practitioner. He stated that he could not recall the exact dates of absence, but he did recall that it had been more than three days, but not more than ten days.

4.1.1.3 The witness denied that he had had any kind of dealings with the employer since around the year 2002. He stated that the employer had managed to track him down about a month prior to the date when he testified at the arbitration proceedings. He stated that he was blessed in that he had a very good memory, so he was not prone to forgetting most of the facts that involved the cases he dealt with, even though the precise dates did manage to escape him.

4.1.1.4 The witness testified that he had presided over the disciplinary hearing, and had ultimately made a determination where he found that the Applicant had indeed been guilty of the offence of absenteeism after he had duly weighed all of the evidence adduced before him. He stated that he was confident that his findings had been fair and reasonable, and that the recommendation of a dismissal had been a just one in the circumstances.

4.1.1.5 It was put to the witness that the Applicant in his own evidence had stated that he had been absent for only two days. The witness stated that this was not true. He stated that if the Applicant had been absent for only two days he would never have found him guilty of absenteeism unless he had been warned on three separate occasions of a similar offence. He stated that the employer had not brought any warnings to his attention in respect of same. He was also informed that the Applicant had testified that he had been on official leave, and had been away from work with the permission of the employer. The witness stated that none of the parties before him had submitted a leave form as part of their evidence.

4.1.1.6 During cross-examination the witness was asked if he was aware that the Government Gazette which was in force at that time had provided in terms of the number of leave days that Security Guards had been entitled to? The witness stated that it had not been a point of interest for him at the time because the number of leave days, and the issue of leave had not been brought up at the hearing. He confirmed when he was asked that the employer's representative at the hearing had produced before him a register which reflected the number of days that the Applicant had failed to clock in and thereby failed to report for duty. He stated that the said register had reflected that the Applicant had been away from work, without being given official leave, for a period in excess of three consecutive days. The

Applicant's representative quizzed the witness on the sequence of these days, but the witnesses remained firm, and stated that the three days were not spaced within a calendar month, but had been one after another.

- 4.1.1.7** In the re-examination, the witness further clarified that the days had actually exceeded three days, but had been less than ten days. He confirmed that the issue of leave had not been pertinent at the disciplinary hearing because none of the parties (neither the employer, nor the Applicant) had brought this issue up. He stated that at the hearing the Applicant had not alleged that he had been away on leave, but had simply alleged that he had been ill, but failed to produce a sick note from a medical practitioner. He further clarified that the issue of poor work performance had not at all been raised at the disciplinary hearing, and he had made a finding of guilt simply on the absenteeism charge which had been the only offence that the employer had leveled against the Applicant.

5 ANALYSIS OF EVIDENCE

- 5.1** The matter at hand calls for a determination on whether the dismissal of the Applicant was substantively fair, and reasonable in view of the evidence duly adduced before the Arbitrator at the proceedings. In the evidence led by the Applicant he alleged that he had been dismissed after a disciplinary hearing had been held, wherein he was found guilty not only of absenteeism, but also for poor work performance.
- 5.2** It is important at this juncture to note that although the Applicant had reported a case of alleged unfair dismissal wherein he made a number of claims, he did proceed to abandon three of the said claims. The claims stood as follows:-

i.	Notice pay	=	E	850.00
ii.	Additional notice	=	E	130.76
iii.	Severance allowance	=	E	326.90
iv.	Maximum compensation	=	E20	400.00
v.	10 days public holidays	=	E	653.80
vi.	Leave pay	=	E	588.42
vii.	100 off-days not paid	=	E	3,269.00
viii.	12 days unlawful suspension	=	E	392.28

5.3 The Applicant duly abandoned claims 5,7 and 8 being for the 10 days public holidays, 100 off-days not paid, as well as the 12 days of unlawful suspension.

5.4 It was the Applicant's evidence that he had not absconded from work because he had taken lawful leave of twelve (12) days and had added two (2) extra days to this leave. This testimony would at times change, and he would aver that he had stayed an extra three days. He stated that he could not remember the exact dates of his leave, and those extra days he had added to his leave because all this had taken place about fifteen years ago. He no longer had most of the pertinent documentation such as the suspension letters, notice to appear for the disciplinary hearing, dismissal letter as well as his contract of employment. He attributed the loss of these to the demise of his previous representative, a certain labour consultant by the name of Mr. Magongo.

5.5 He stated that he had actually been entitled to twenty-two (22) days of leave and had actually been protesting when he stayed the additional days which were in excess of the twelve days that the employer had given him as leave. He testified that he had been paid leave pay, but had proceeded to go on leave despite this payment. It was not clear how many days precisely that he had extended his leave by as he at times said it was two days, and on other instances he stated that it was actually three days.

- 5.6** It is a trite position of the laws that once money is paid to an employee in lieu of leave, this automatically means that the said employee may no longer proceed to go on leave because the money is paid in order to compensate that employee for the fact of not going on leave. In the case at hand, the Applicant not only accepted the leave pay, but also took days in excess of the official leave days being twelve days.
- 5.7** From the evidence adduced in this case, this is a clear case of an employee who breached the employment contract between himself and his employer. The Court in ***Alpheous Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (I.C. Case no. 382/04)*** categorically outlined the legal position on absenteeism. It was stated that absenteeism is an unexplained and unauthorized absence from work where the employee is said to reflect or to manifest his intention no longer to be bound by his contract of employment. This statement of the law merely buttress the position which is laid down in the **Employment Act, 1980 (as amended)**, where Section 36 (f) it is clearly provided therein that where an employee absents himself for more than a total of three (3) working days within a period of thirty days without the permission of the employer, or a medical certificate, this constitutes a fair reason to dismiss the offending employee.
- 5.8** The Applicant by his own admission stayed away from work in excess of three days. He stated that the two days he had stayed away in protest, whilst the other day had been one where he had attended a workers' council meeting. Even for this day he could not provide proof that he had sought and obtained permission from his employer to be away from work. It was the testimony of the Respondent's witness, Mr. Nsibande that he recalled that the Applicant had been said to be away for a period in excess of three days, but not more than ten (10) days. Mr. Nsibande was by far, a more impressive witness as he did not waver, and spoke confidently, thereby exhibiting clarity of mind and stated that he had seen the register from the work place that showed

the time away from work, even though he could not recall the precise number, nor the dates. In comparison, the Applicant vacillated from saying he had been entitled to twenty-two days, twenty-one days, and even twelve days leave. He also alleged that he had been absent for two days or even three days. He was not clear of the precise number.

5.9 The Respondent's witness also clarified that the Applicant had never been charged with, nor had he been dismissed for poor work performance. He was also helpful in that he shed light that the issue of leave had never been an issue at the disciplinary hearing, as the Applicant had never raised this in his defence, but had merely stated that he had been ill, though he failed to submit a sick-sheet to the employer. It is trite position of the law however, that the Industrial Court (as well as the Arbitrator, by extension) does not sit as a Court of Appeal or Review of internal disciplinary hearings. The court must conduct its own enquiry on the allegations, and make its own findings of fact **(See: Central Bank of Swaziland V Memory Matiwane Case No. 110/93 ICA)**.

5.10 The Applicant in his allegation that he was entitled to about twenty-one or twenty-two days of leave, relied on the Wages Regulation of 2001 (Security Industry). Upon perusal of this document, it was established that according to Section 7 of the said gazette it provides that employees are entitled to twelve days leave plus ten (10) days in compensation of public holidays worked where they have completed twelve months in employment. It is further provided that where the employee has completed the said period in employment the twelve days is to be with full pay, In casu it is clear that the Applicant was only entitled to twelve days leave since he abandoned the claim for public holidays worked. He had no right to then believe that he was entitled to the additional ten days as compensation for public holidays worked. He infact, had no real right to take even the twelve days of leave, if his version that he had been paid in lieu of leave is to be believed.

5.11 The Applicant's testimony was fraught with inconsistencies and was largely quite perplexing. This is because he was not able to recall most facts clearly, and those which he seemed to recall, did not make any legal sense, or even common sense. According to the Applicant he had been paid the leave pay to facilitate his stay at home whilst on leave, and when the said money had been used up, that would be the determinant that it was time to go back to work. The Applicant it is clear, stayed away from work for a period of three days, without official leave, and without a sick sheet. In making this finding I am persuaded by the evidence and testimony of the Respondent's witness whose candour and demeanour was by far more impressive than that of the Applicant. It is a well respected position of the law that where there are disputed facts, in order to come to a conclusion a Court must make findings based on three guiding factors(**see Abel Kunene vs. Swaziland Security Guards (Pty) Ltd I.C Case No. 280\01**)

5.12 In casu, the evidence as adduced by the Respondent's witness, was by far the most impressive and contained logic, as well as coherence. All these qualities were sadly lacking in the testimony of the Applicant. In light of the foregoing I find that I am unable to find the dismissal of the Applicant was in anyway unfair. What emerges from the evidence is that the Applicant did infact commit the offence of absenteeism.

6 AWARD

6.1 Having heard all of the evidence from both parties, I hereby hold that the application for unfair dismissal is dismissed in its entirety.

THUS DONE AND SIGNED AT MBABANE ON THISDAY OF FEBRUARY, 2016.

**KHONTAPHI MANZINI
CMAC ARBITRATOR**

