

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 287/2002**

In the matter between:

**NKOSINATHIDLAMINI**

**APPLICANT**

and

**TIGER SECURITY (PTY) LIMITED**

**RESPONDENT**

**CORAM:**

**NDERINDUMA: PRESIDENT**

**JOSIAH YENDE: MEMBER**

**NICHOLAS MANANA: MEMBER**

**V. DLAMINI: FOR APPLICANT**

**Z. JELE: FOR RESPONDENT**

**J U D G E M E N T - 04/04/05**

This is an application for the determination of an unresolved dispute in terms of Section 85 (2) of the Industrial Relations Act of 2000, hereinafter (the Act)

The Applicant in the particulars of claim seeks re-instatement to the employ of the Respondent from which he alleges he was terminated on the 4<sup>th</sup> June 2002. He

further alleges that he was employed on the 8<sup>th</sup> August 2000 as a security guard and had worked continuously until the termination.

In the alternative he seeks maximum compensation for unfair dismissal and payment of notice pay, additional notice pay, severance allowance. A claim for overtime was abandoned in midstream.

The Applicant states that he was unlawfully and unfairly dismissed for sleeping on duty. That he was denied a hearing prior to the dismissal. No appeal hearing was held. The dismissal was therefore substantively and procedurally unfair.

The Applicant reported a dispute to the Commissioner of Labour in terms of Section 76 (1) of the Act. The dispute was referred to the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute was not resolved hence the application before court.

At the time of dismissal, the Applicant earned E709.00 (Seven Hundred and Nine Emalangeni) per month plus overtime allowance.

In his testimony before the court, the Applicant said that the terms of his employment were not put on paper. He was employed verbally by one Clement Dlamini.

That Clement promised him permanent employment. He worked as a watchman at the company premises and at the residences of the company's managers. He worked 12 hours a day and worked continuously for 22 months.

He said that he was alleged to have slept on duty when in fact he had been at the toilet on the 2<sup>nd</sup> June 2002. He was on night shift at the Breweries premises at the material time. He went out of the perimeter fence to relieve himself because he had a running stomach.

He was confronted by Induna - Zwane who claimed that he was not at his duty station, and he was then transferred to the Managing Director's home at Malkerns. His attempt to explain that he was at the toilet was in vain.

The following morning he was told by One Mr. Ndzimandze, Shift Manager, that his services were terminated because he was asleep while on duty.

He was not formally charged nor did he appear before a disciplinary tribunal prior to the dismissal. He approached Clement Dlamini to discuss the matter but Clement upheld the dismissal. The Applicant was paid for days worked only.

He said he was 25 years old, was married but had no children.

The Applicant called one Vusi P. Dlamini in support of his case. He was a security guard employed by the Respondent on the 1<sup>st</sup> April, 1997. He no longer worked for the Respondent. He said that the Applicant was employed by the Respondent on or about July 2000 and was with him for about 4 months before he left the employ of the Respondent. He did not know whether the Applicant was a temporary employee or a permanent one. His testimony was not helpful to the Applicant's case.

### RESPONDENT'S CASE

In its reply the Respondent avers that the Applicant was employed for a fixed term and that his employment had lapsed on effluxion of time.

The Respondent denies that the Applicant was employed continuously from the 8<sup>th</sup> August 2000 to the 4<sup>th</sup> June 2002 as alleged by the Applicant.

The Applicant was according to the Respondent not an employee protected by Section 35 (2) of the Employment Act No. 5 of 1980.

Clement Dlamini testified as RW1 for the Respondent. He was presently the Loss Control Manager for Swaziland Breweries. Previously he was the Managing Director of the Respondent.

The Respondent was a small enterprise employing about fifteen employees who served the Breweries as security guards. The company expanded with time and offered services to other companies. The company retained a pool of temporary employees who it deployed as and when work became available.

The Applicant was one such employee recruited from time to time on a temporary basis.

The company would give such recruits first priority whenever a permanent vacancy arose.-

The witness produced exhibit B1 and B2, a sample contract for permanent employees and exhibit B3, a sample contract for casual employees. Indeed this was a temporary contract for the Applicant between the 26<sup>th</sup> November 2001 and 23<sup>rd</sup> December 2001.

He also produced cheque request vouchers for payment of the Applicant's monthly salary whenever he was engaged as a casual security guard.

On the 30<sup>th</sup> May 2002, the Applicant wrote a letter to the Respondent applying for employment as a permanent security guard. This was produced as exhibit 'B15'. Clement Dlamini told the court that as at the time the Applicant was in the pool of personnel from whom the company recruited casual guards from time to time.

The Applicant's application was however not successful.

The operation of the Respondent eventually was disbanded.

Clement denied that the Applicant was ever employed by the Respondent on permanent and pensionable basis. He further denied that the Applicant was disciplined for sleeping on duty. His employment simply terminated by effluxion of time.

He was therefore not entitled to any compensation or payment of terminal benefits. He could also not be reinstated because the operations of the respondent folded.

Section 35 (1) (d) of the Employment Act recognizes an employee who is engaged for a fixed term and whose term of engagement has expired does not have recourse to Section 35 (2) of the Act.

See Thando S. Dlamini vs Swaziland Liquor Distributors - Industrial Court of Swaziland Case No. 240/2002.

In the matter of Sarah Ndwandwe vs The Principal Secretary of the Ministry of Works & Construction Court of Appeal Case No. 6/1997; the Swaziland Court of Appeal held that there is nothing in the Employment Act or in any other law which makes it illegal for a person to be employed on a temporary basis in order for a specific job to be undertaken.

Such employment must however be for a specific period, otherwise, if not, upon expiry of the statutory permissible period in which an employee may be kept on probation, the employment becomes permanent and subject to protection by Section 35 (2) of the Act.

From the papers filed of record, and the evidence adduced before court, the Applicant was employed for a fixed term from time to time, and did not work continuously for more than three (3) months without a break.

He has failed to prove that he was an employee entitled to protection under Section 35 (2) of the Employment Act.

The provisions of Section 36 and 42 (2) (a) and (b) did not apply to him.

The application fails in its entirety.

No order as to costs.

The members agree.

**NDERI NDUMA**

**JUDGE PRESIDENT- INDUSTRIAL COURT**