

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 35/05

In the matter between:

PHINEAS SHONGWE

APPLICANT

And

GUARD ALERT SECURITY SERVICES

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. SELBY DLAMINI

FOR RESPONDENT: MR. DAMAZIO MADAU

JUDGEMENT -08.08.08

[1] The applicant is a former employee of the respondent. He was employed by the respondent in May 1993 as a Security Guard and was

in continuous employment as such until his dismissal on 3 June 2004.

[2] After his dismissal, the applicant reported the dismissal to the Conciliation, Mediation and Arbitration Commission ("CMAC") as a dispute as he considered it to be unfair and unlawful. The dispute was not resolved hence the applicant instituted the present proceedings for determination of an unresolved dispute in terms of the Industrial Relations Act of 2000 as amended.

[3] In his papers the applicant stated that the respondent accused him of sleeping on duty but no disciplinary hearing was held to prove these allegations before the respondent dismissed him. The respondent in its reply stated that the applicant was dismissed for sleeping on duty and after several warnings, and that he was dismissed after he appeared before a disciplinary committee which decided to terminate his employment.

[4] In his evidence before the court the applicant revealed that he was getting paid E1,030.50 a month. On the date of his dismissal he was paid for the days worked and also paid his money for leave. At the time of his dismissal he was guarding premises of Honourable Minister Mabili Dlamini at Sandla Township. He said when the inspector's motor vehicle came to the premises to check him, he did not go to the motor vehicle as per the practice because the motor vehicle did not dim the lights. He

said the practice was that the inspector would approach the duty station with the motor vehicle's bright lights on and would then dim the lights and put on the interior lights so that the guard would be able to see the driver and also see the colour of the motor vehicle as the one belonging to the respondent.

[5] The applicant said the inspector did not do that on that night thus he did not come near to the motor vehicle as he was not sure if it belonged to the respondent. The applicant said when the inspectors come to check a guard on duty, that guard is made to sign a certain document as proof that he was found at his post. He said that when he signed the documents that were presented to court as warning letters to him marked "R1-R14", he thought that he was signing those documents. He said he signed those documents as acknowledgement that he was indeed found on duty. He said that he was never shown the whole document that he was told to sign.

The applicant told the court that when the inspectors came to check him, they would slightly open the window of the motor vehicle and tell him to sign on a certain spot without showing him the whole of the document. The applicant also told the court that the inspectors that checked him were new on the job. He said he believes that they manufactured the documents marked "R1-R14" because they wanted to get rid of him because they were angry at him they said he was teaching them how to do their work.

During cross examination the applicant was asked if he reported to management that the inspectors were eager to get rid of him because they were saying that he was teaching them how to do their work, the applicant said he did report to Wandile Hlatshwako, who unfortunately also did not like that and also accused the applicant of trying to teach him how to do his work.

[8] It was put to the applicant that he was found sleeping on duty on the days that appear on documents "R1-R14" the applicant however denied that. None of the inspectors who issued the "warnings" was called to testify in court.

[9] The only witness who testified on behalf of the respondent was the Operations Manager, Mr. David Christie. Mr. Christie told the court that the applicant was dismissed for poor performance. He also told the court that an employee would be given three days to get

ready for a disciplinary hearing. He said an accused employee is given a chance to appear before a committee. He admitted that no hearing was held before the "warning" letters "R1-R14" were issued to the applicant. He also said although the charges do not appear on the notice and on the minutes marked "R15", the applicant was verbally told the charges at the hearing.

[10] As already pointed out in paragraph 8 above, none of the inspectors who supposedly found the applicant sleeping on duty gave evidence before the court. The applicant denied that he was ever found sleeping whilst on duty. The burden to prove substantive and procedural fairness should a dismissal be challenged lies with the employer. (See **Section 42(2) (a) and (b) of the Employment Act of 1980** as amended.) It is therefore clear in this case that the applicant having denied that he was found sleeping on duty, the inspectors who supposedly found him sleeping on duty having failed to give evidence in court, it cannot be said that the respondent has, on a balance of probabilities, established that it had a substantively fair reason to dismiss the applicant.

[11] The dismissal of the applicant was also procedurally unfair. The warning letters handed in by the respondent marked "R1-R14" were not warning letters at all. These documents were presented by the respondent as written warnings. The issuing of a written warning should

be preceded by a proper inquiry, during which the employee concerned should be allowed to state his case and produce witnesses, if necessary. (See **John Grogan: Workplace Law 8th edition at page 99**).

[12] Further, a warning should be followed by a genuine effort to help the employee to achieve the objectives of his employment, and not issued merely to satisfy procedure.

See: Priscilla Dlamini v. Credit Control Swaziland case No. 59/96A (I.C.)

Cyril Simelane v. Swazi Paper Mills case No. 115/97 (I.C.)

[13] The disciplinary hearing was just a sham as can be seen from annexure "R15", being the minute of the disciplinary hearing. There is no indication that the applicant pleaded to the charges. The charges that the applicant was facing also do not appear on this document or from annexure "A" of the applicant's application which is titled "Notification of a Dismissal Hearing." All these missteps committed by the respondent confirm the applicant's evidence that there was no disciplinary hearing held and that he appeared before the panel merely to be told by its chairperson Wandile Hlatshwako that he should go home and come

back after three months to work as a casual.

[15] There is no doubt, as it appears from the evidence in the foregoing paragraphs, that the dismissal of the applicant was also procedurally unfair.

[16] The respondent in this case should have;

16.1. given the applicant sufficient notice to prepare himself to appear before the committee, and

16.2. the notice to appear before the disciplinary committee should contain the charges that the accused employee is going to face in sufficient particularity to enable him to plead, and

16.3. the charges should have been read to the applicant in a language that he understands and asked to plead.

[17] The court taking into account all the evidence led before it and all the circumstances of the case, comes to the conclusion that the applicant was substantively and procedurally unfairly dismissed and accordingly enters judgement in favour of the applicant.

[18] *Relief:*

The applicant told the court that he is presently not employed. He is not married but has two minor children one of whom is attending school. He had worked for more than ten years when he was unfairly dismissed by the respondent. Taking all these factors

into account all the circumstances of the case the court will order the respondent to pay the following amounts as terminal benefits and compensation for the unfair dismissal;

1. notice pay	E1,030.50
2. additional notice	E1,585.38
3. severance allowance	E3,963.46
4. compensation (E1,030.50 x 10)	E10,305.00
TOTAL	<u>E16,884.34</u>

No order for costs is made.

The members agree.

NKOSINATHI KONYANE
JUDGE OF THE INDUSTRIAL COURT