IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 386/2005**

In the matter between:

ERIC MANDLA MAMBA **APPLICANT**

and

GUARD ALERT SECURITY SERVICES LTD **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE DAN **JUDGE**

MANGO GILBERT NDZINISA **MEMBER**

MEMBER

FOR APPLICANT FOR RESPONDENT **MR. L. SIMELANE MR. N.D. JELE**

JUDGEMENT 30.04.09

[1] The applicant is a thirty-year old male adult of Matsapha area in the Manzini District. He is a former employee of the respondent having been dismissed by the respondent on 22nd April 2005. He was employed by the respondent as a security guard on 1st

April 2004. He was dismissed by the respondent after having been found guilty on charges of consistently sleeping on duty.

[2] The applicant averred in his papers that his dismissal was procedurally and substantively unfair because;

2. 1 There was no evidence adduced during the disciplinary hearing which supported the charges preferred against him; the respondent did not call witnesses and that that the respondent relied on warning letters.

2. 2 The respondent did not follow the proper procedure when issuing the warnings as there was no hearing before the warnings were issued.

2. 3 The applicant was never given a final warning.

2. 4 The applicant was never called to an appeal hearing despite the fact that he lodged an appeal against the dismissal.

[3] The respondent denied that the dismissal of the applicant was unfair. It averred that a fair disciplinary hearing was held where the applicant was given an opportunity to state his case and that the applicant admitted the charges preferred against him. The respondent stated further that the applicant was given a final warning before the final disciplinary hearing was held.

[4] The evidence led before the court revealed that the applicant was found sleeping whilst on duty on several occasions by two of the respondent's inspectors namely, RW1 Mshurnayeli Aaron Dlamini and RW2 German Dlamini. The evidence revealed that one night the applicant was on duty at Swaziland Electricity Company substation at Matsapha. During that night RW1 came to check on the applicant if all was still well as was the

procedure at the respondent's undertaking. RW1 parked the company car that he was driving near the gate of the premises of the client. The applicant did not show up as per procedure. RW1 then decided to look around for the applicant and he found him asleep inside a structure that looked like a cupboard. RW1 led the applicant to the car where he made the applicant to sign a certain document acknowledging that he had been found asleep whilst on duty.

[5] The applicant denied that he was sleeping in that cupboard-like structure. He said he was merely hiding there as he had seen some thugs popularly known as "Kamdodi boys" committing a crime at an adjacent property and he was fearing for his life. The evidence of the applicant was clearly false and an afterthought. If indeed the applicant was hiding and not sleeping, why did he not simply tell that to RW1 and refuse to sign the document that he was made to sign. The applicant said he signed the document under duress. The applicant however failed to challenge the respondent's evidence that a security guard was entitled to refuse to sign and report the matter at the workplace in the morning.

[6] The second instance when the applicant was found asleep was when he was on night duty at Agrimech in Matsapha. Again RW1 said as per the procedure he parked the company car near the gate but the applicant did not show up. RW1 then called the applicant through the two-way radio but there was no response. RW1 contacted the office and asked the person on duty to raise the applicant through the two-way radio. RW1 was able to hear the sound of the applicant's two-way radio and proceeded in that direction with his torch in hand. He proceeded to a police motor vehicle known as a 'hippo' that was parked there and found the applicant sleeping in the driver's seat. RW1 shone the torch light to the applicant whose eyes were closed and it was only then

that the applicant woke up.

[7] The applicant denied that he was asleep. - If the applicant was not asleep as he claimed, why did he not respond when called through the two-way radio? The only reasonable inference is that the applicant did not respond because he was asleep. On a balance of probabilities RWTs evidence is more probably than that of the applicant.

[8] The third occasion when the applicant was found asleep whilst on duty was when he was found by RW1 sleeping on some

concrete slabs at Swaziland Electricity Company substation in Matsapha and having his transistor radio on. RW1 said when the applicant failed to show up, he jumped over the fence of the premises and looked for the applicant. He found the applicant asleep with his transistor radio on. He shone the torch light in his face and stirred him and it was only then that the applicant woke up. The applicant failed to explain why he did not hear or see the company car when approaching the duty station if it were not for the fact that he was asleep.

[9] The fourth instance of sleeping on duty by the applicant took place at a certain Mr. Foster's premises at Malkerns where the applicant was found sleeping inside a motor vehicle. This time the applicant was found asleep by RW2 German Dlamini. RW2 said he drove into the premises and waited for about five minutes for the applicant to show up, but that he did not show up. RW2 said he found the applicant sleeping inside the motor vehicle. RW2 shone the light through the window of the motor vehicle and hit the window before the applicant could wake up. After waking up the applicant he led him to the respondent's car where he made him to sign a document in acknowledgement of

the fact that he had been found asleep whilst on duty.

[10] The applicant said he was threatened to sign the documents. RW1 and RW2 however denied that they made the applicant to sign under duress. The applicant did not dispute the evidence that a security guard had the right to refuse to sign and that if he had any query he was entitled to report it to management in the morning. The applicant did not report to the workers' committee or management that he was being falsely accused of being found asleep whilst on duty and that he was being threatened to sign the documents showing that he had been found sleeping whilst on duty. The court therefore comes to the conclusion that the respondent has proved on a balance of probabilities that the applicant did asleep on duty on several occasions. The occupation of an employee is an important factor to be taken into account in determining the fairness of any dismissal. By sleeping on duty the applicant was failing to do his job as he was employed to guard the premises in which he was found asleep.

See; Sibisi v Gelvenor Textiles (Pty) Ltd (19850 6 ILJ 122 (IC)
P.A.K. Le Roux & Andre Van Niekerk "<u>The South African Law of Unfair Dismissal</u>" 1994 at page 147

[11] The applicant was called to appear before a committee to face the charges of sleeping on duty. The person who chaired the disciplinary hearing was RW3, David Christie. This committee's proceedings represented everything that is unjust. It was the epitome of the proverbial kangaroo court. The chairman was both the prosecutor and judge. No witnesses were led, yet the applicant was found guilty at the end of the day. RW3 said the applicant pleaded guilty to the charges and that there was therefore no need to lead any evidence.

[12] There is no evidence on the record of the disciplinary hearing that the applicant was asked to plead to the charges. RW3 said when asked to plead the applicant simply began to apologize. That evidence however is not supported by the record of he disciplinary hearing. The apology by the applicant appears on page three of the record. It clearly does not make any legal sense that someone could plead well into the middle of the hearing. The record supports the applicant's evidence that he was never asked to plead. During cross examination RW3 admitted that the applicant mitigated before the verdict was delivered.

[13] The court is alive to the fact that the employer is not expected to hold a disciplinary hearing to the standard of a court of law. There are however basic ingredients of a fair hearing which the employer is expected to adhere to like putting the charge to the accused employee, leading of evidence by the initiator, cross examination of the witnesses and mitigation before the passing of sentence.

[14] The respondent referred to the documents that the applicant signed as written warnings. These documents are clearly not written warnings. They are merely records of the oral warnings issued to the applicant by RW1 and RW2. The fact that an oral warning is recorded does not make it a written warning. Reducing an oral warning to writing simply enables the employer to prove that the warning was given if such evidence is necessary in a subsequent disciplinary hearing. A written warning is one that is preceded by a proper enquiry during which the employee is allowed to state his case and produce witnesses if necessary.

See: **John Grogan: "Workplace Law" 8th edition At page 99.**

A written warning must also inform the employee of the seriousness of his misconduct and that subsequent misconduct could result in dismissal. In this case the applicant was never given a written warning, but was only given oral warnings which were recorded on paper by his supervisors.

It was also argued on behalf of the applicant that since he was dismissed for poor work performance, the dismissal was substantively unfair as there was no prior written warning as envisaged by section 36 (a) of the Employment Act, 1980. The applicant's attorney also relied on the case of Harpet Van Seggelen v Swazi Spar Holdings Ltd, case No.390/2004 for this argument. We do not agree with this argument. The failure to give a written warning can only affect the procedural aspects of the dismissal. In this case the substantive reasons for the dismissal of the applicant have been proved, namely that he

> was a poor performer as he consistently slept whilst on duty. The failure to give the applicant a written warning therefore means that the employer failed to meet a specific requirement of the law, namely that such dismissal must be preceded by a written warning. The result is that the applicant's dismissal was procedurally defective.

[16] The applicant said he did file an appeal but he was never called to any hearing. RW3 said he did not recall the applicant filing an appeal. In its reply the respondent said the applicant appealed to the Managing Director and that he was given an opportunity to come and work in Mbabane but he refused. The respondent however failed to produce the$_s$ record of the appeal hearing nor did it call the Managing Director to give such evidence. The court will therefore accept the applicant's evidence that he filed

an appeal, exhibit "C", but was never called to a hearing.

[17] As an aside, the respondent is represented by a firm of attorneys consisting of senior legal practitioners. The respondent is advised to request its attorneys to draft for it a guideline for the holding of disciplinary hearings. All cases involving the respondent before the court will invariably fall foul of the law because of the way that the respondent presently conducts disciplinary hearings at its workplace.

[18] There is no doubt to the court from the evidence presented before it that the dismissal of the applicant was unfair because there was no fair disciplinary procedure that was followed during the hearing.

[19] Relief: -

The applicant had only worked for one year when he was unfairly dismissed by the respondent. From the evidence led before the court, he was clearly not suitable to the job that he was employed to perform. He was earning a salary of E959:00 per month. He is thirty years old and has three children. In the circumstances of the case the court will award him an equivalent of four months' pay as compensation for the unfair dismissal.

[20] Taking into account all the circumstances of the applicant, the court will enter judgement in favour of the applicant and order the respondent to pay the following amounts to the applicant;

A)	**NOTICE PAY**	**E959:00**
B)	**COMPENSATION**	**E3.836.00**
	TOTAL	**E4,795:00**

The respondent is to pay the costs of suit.

The members agree.