



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No.82/21

In the matter between:

SIPHO FAKUDZE

Applicant

And

**THE BIG SHOW INVESTMENT (PTY) LTD
t/a MAXIMUM SECURITY SERVICES**

Respondent

Neutral Citation:

Sipho Fakudze vs The Big Show (80/2021) [2022]
SZIC 02 (27 January, 2022)

CORAM:

K. MANZINI - ACTING JUDGE
(Sitting with Ms. N. Dlamini and Mr. D. Mmango)
(Nominated Members of the Court)

DATE HEARD

: 3 November, 2021

DATE DELIVERED

: 27 January 2022

Summary: Labour Law: - The Applicant herein claims that he was unfairly terminated from his employment with the Respondent. The Respondent on the other hand maintained that the Applicant deserted his employment, and was not dismissed.

Held: - The Applicant terminated his own contract of employment when he committed the act of desertion.

JUDGEMENT

[1] The Applicant approached the Court for determination of an unresolved dispute between himself and the Respondent in terms of the **Industrial Relations Act No. 1 of 2000** (as amended), read together with this **Court's Rules, 2007**.

[2] In this application before Court, the Applicant claims that he was dismissed by the Respondent from employment in a manner that not only unfair, but also unlawful. The Respondent denies the Applicant's claim. The Applicant herein claims the following:-

2.1 Notice pay:	E2303.60
2.2 Underpayments:	E4359.75
2.3 12 Months Compensation:	E 27 726.00
Total:	<u>E34 390.10</u>

[3] The Respondent in its reply contends that the Applicant is not entitled to the relief that he seeks because he was never dismissed from employment. The Respondent's position is that the Applicant absented himself from work for an inordinate period of time, and resisted the Respondent's endeavours to engage him about this turn of events.

[4] The evidence adduced by the Applicant before Court revealed that the Applicant is he was employed as a Security Guard on the 22nd of April, 2019. According to the testimony of the Applicant he earned a monthly salary of one thousand, nine hundred and ninety seven Emalangeni (1997.00). The Applicant testified that he was posted to different locations during the term of employment, where he worked

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he stopped working in or about August, 2020.

- [5] The testimony of the Applicant was to the effect that in or about August, 2020 he was posted to a site at the riverside of the Black Mbuluzi River. According to the Applicant, his duty was to guard some machinery owned by the Inyatsi Construction Company. The Applicant stated that he was told by his superior, Mr. Monday Masimula, that the officials of their client, being Inyatsi Construction Company, had requested that an elderly employee be placed at the site because in their view such an individual would be more reliable.
- [6] The Applicant in his testimony, expressed his discontentment at working at the said site at the river, because it was very cold there. The Applicant stated that he asked Mr. Masimula to get other security guards who could also guard the site on a rotational basis, so that he could be relieved from being subjected to the cold temperature continuously. The Applicant stated that Mr. Masimula told him that he was yet to consult his own superiors about the request made by the Applicant, and asked for time to deal with the issue. The Applicant stated that he told Mr. Masimula that if he failed to get a replacement for him at the riverside site, he would quit his job.
- [7] The Applicant testified that he spoke to Mr. Masimula on a Monday. He stated that when he spoke to Mr. Masimula, Mr. Sibusiso Kunene who works for Inyatsi Construction Company was also present. The Applicant stated that Mr. Kunene directed him to go back to his post at the riverside, and he duly obliged. The Applicant stated that he continued to perform his duties, and he would be picked up from Mpaka so that he could do his evening shift. He stated that on a Monday a few days later, he reported for duty for the evening shift on that day, his Supervisor, Mr. Masimula explained to him that since he had spoken harshly in Mr. Kunene's presence, and even threatened to hand in his notice, and would no longer report for work at the riverside site, this had led to the decision to remove him from the site.
- [8] It was the testimony of the Applicant that during this conversation, Mr. Masimula told him that he would have to wait to be redeployed to another site. The Applicant stated that he initially believed that he would be re assigned to go and work in Manzini, but Mr. Masimula told him that he would not be working at all on that day and to go home, and await a phone

call from him. The Applicant stated he proceeded back home, and waited for the phone call from his superiors regarding his redeployment. He stated after the lapse of two weeks without receiving such a call he then took the initiative to call Mr. Masimula, and he was told by him that he was yet to hear from his own superiors.

- [9] The Applicant testified that after a while, he then proceeded to the Manzini main office of the Respondent, where he spoke to Ms. Zinhle Dlamini. He stated that the said Zinhle also told him to go home, and undertook to call him after speaking to Mr. Masimula. He stated that after another week elapsed without receiving a call from the Human Resources Manager, he then realized that his employment was under threat, hence, he opted to report a dispute at the Conciliation Mediation and Arbitration Commission (CMAC). He stated that he deemed the treatment that he received from the employer to be tantamount to unfair dismissal.
- [10] The Applicant stated that despite the fact that Mr. Masimula had accused him of speaking harshly to Mr. Sibusiso Kunene, he had not received a formal reprimand whether verbal or in written form for this. He stated that he was simply told to go home, without being given solid reasons. He testified that upon employment, he did not receive any written particulars of employment, although he did sign a written contract. He stated that he was also not subjected to a disciplinary hearing prior to his decision to report a case of unfair dismissal to CMAC.
- [11] The Applicant testified that apart from seeking relief from this Honourable Court relating to the alleged unfair dismissal, he also claimed underpayments. According to the Applicant he had earned a monthly salary of E1997.00, and yet according to the government gazette, he ought to have been paid a sum of E2303.60. The Applicant submitted the relevant Government Gazette as part of his evidence.
- [12] The Applicant testified that he is fifty-eight years old, and has a wife and seven children who rely on him for support. He stated that since his employment with the Respondent was terminated, he has not been able to secure alternative employment, making it difficult to provide for himself and his dependents. The Applicant referred to page 8 of the Applicant's Book of Pleadings which contains a Certificate of unresolved Dispute from CMAC. He stated that he is seeking an order from this Court in terms of claims made in this Certificate.

- [13] During cross-examination the Applicant confirmed that when he was employed he was he was told that if he had any work-related problems, he should direct these to his supervisor, and if he was not satisfied with the manner in which the supervisor handled the matter, he was told to escalate the issue to the Human Resource Manager. He was asked if he is aware that the Director at the Respondent Company is a gentleman named Joseph Mlambo. The Applicant stated that although he knows that such individual, nor his exact designation in the company.
- [14] The Applicant was also asked if he knows of an individual named Mr. Zinhle Mlambo who is the Operations Manager at the Respondent's establishment ? The Applicant denied any knowledge of such an individual. It was put to the Applicant that at the time of employment, a lady known as Ms. Zanele Dlamini, was the Human Resources Manager who spoke to him, and informed him about the order of rank within the company, and how to go about lodging grievances at the workplace. The Applicant stated that he only knows of a lady known as Zinhle Dlamini who is employed as the Human Resource at the Respondent enterprise, and had never heard of Zanele Dlamini. He was asked if the Zinhle that he alleged to know was male or female? The Applicant stated that the Zinhle Dlamini that is known to him, and that he had dealt with is female. It was put to the Applicant that the Human Resource Manager that he had dealt with at the office is Ms. Zanele Dlamini, and not Ms. Zinhle Dlamini. It was also put to the Applicant that Mr. Joseph Mlambo was the Company's Director. The Applicant pointed out that he could not comment on any of the assertions put to him because he had no knowledge of these.
- [15] The Applicant was referred to the contract of employment which he had already acknowledged signing. In particular, he was referred to clause no. 11 of the contract. He acknowledged that he was aware of the contents of the provision contained in the contract which stated that any grievances or requests, a particular chain of command, and procedures for reporting such issues in as follows:-
- (i) Supervisor
 - (ii) Manager
 - (iii) Senior Management
- [16] Although he acknowledged that he had signed the contract of employment.

He stated that he did not know that in terms of this agreement he was entitled to report any grievance to his supervisor first, and then escalate to the Manager, and Senior Management if he was not satisfied. It was asked of the Applicant if he was aware that the Respondent Company was just one of several other security companies engaged by the Inyatsi Construction Company. The Applicant stated that he was aware that the Inyatsi Company also hired the security services of Tidvumo Security Company, as well as ANPED Security Company. It was also put to the

[17] The Applicant agreed that he had been instructed by his own supervisor, after a request was made by Mr. Kunene from Inyatsi construction, to go and guard the machinery by the river. He did not agree that this was in March 2020, and did not agree that he had duly been at this post up until the 23rd of May, 2020 when he complained about the cold temperature by the river. The Applicant stated that he did not recall the date as put to him by the Respondent's attorney. He further stated that he did not recall that his supervisor told him that he was yet to report the complaint made by the Applicant to the Manager, Mr. Zinhle Mlambo. It was put to the Applicant that because he had spoken in the presence of Mr. Kunene, and told both his supervisor, and the said Mr. Kunene that he would not report for work the following day if his issue was not dealt with immediately, Mr. Kunene then replaced the Respondent Company at the post. It was put to the Applicant that his actions of speaking out of turn, and making threats of abandoning his post, had led to the said Mr. Kunene, to give the post to ANPED security, and thereby, caused the Respondent Company to lose the post. The Applicant stated that he was not aware of this development. It was put to the Applicant that the replacement of the Respondent by ANPED security was effected on the 24th of May, 2020. The Applicant stated that he was at home by that time so he had no knowledge of this.

[18] It was further put to the Applicant that Sunday, the 24th of May, 2020 is the day that he reported for work, and he was told to return home because the Respondent had lost the post at the Mbuluzi river-side. It was further the contention of the Respondent's attorney, and this was put to the Applicant, that he should return home on that day (Sunday, 24th May, 2020), but to report to the office of the Respondent in Manzini the following day (Monday) so that he could be re-assigned to a different post. The Applicant denied knowledge of all of this. It was also put to the Applicant that the supervisor, Mr. Masimula actually directed him to

prepare and submit a report to him on the verbal exchange he had engaged in with Mr. Kunene from Inyatsi. The Applicant denied this as well. It was put to the Applicant that after this date (24th May, 2020) he had failed to report for work, be it on site and/or the main office of the Respondent.

[19] It was put to the Applicant that since he was aware of a Senior Manager, named Mr. Joseph Mlambo, as well as the grievance procedure of the company in terms of the contract of employment, it was his responsibility to ensure that he followed all the proper channels of reporting his grievance. The Applicant acknowledged that he was aware of the grievance procedure at the workplace, and further conceded that he had a duty to follow it when he was experiencing cold temperatures at the site where he was stationed. It was further put to him that he only made an appearance at the Manzini main office on the 11th of June, 2020. The Applicant stated that he did not remember that it was in June, 2020 when he went to the office in Manzini. It was also put to him that the Human Resource Manger asked him to wait for the Operations Manager who was out of the office at that time, or to return the next morning if he was unable to wait. The Applicant stated that he did not recall the Human Resource Manager saying any of that to him.

[20] It was also asked of the Applicant to clarify when he was allegedly dismissed by the Respondent. The Applicant stated that he deemed himself to have been dismissed on the 25th of August, 2020. He stated that this was the last day when he was at work. It was put to the Applicant that the employer did not know his exact place of residence, save for that he was meant to report for duty. The Applicant acknowledged that this was true. It was also put to him that the employer made several efforts to call him on his mobile telephone, but he could not be reached as the line was unavailable. The Applicant stated that as far as he is concerned the employer did not bother to call him. It was put to the Applicant that he voluntarily terminated his own contract of employment by serving a letter of resignation at the Manzini main office in or about June, 2020. The Applicant conceded that he had indeed written a letter of resignation, which he delivered by hand at the Manzini office of the Respondent, but stated that he could not recall when he wrote the letter.

[21] During re-examination the Applicant was asked if he had actually

written a letter demanding his terminal benefits from the Respondent,
and he was

mistaking this letter for a resignation letter ? The Applicant was very clear in his response and clarified that he had written and served upon the Respondent, a letter of resignation through which he ended the employment relationship between himself and the Respondent. The Applicant further confirmed that he did indeed sign the contract of employment that was submitted into evidence.

- [22] The Respondent's witness gave a contrary version to that of the Applicant.

The Testimony of Mr. Msombuluko Fana Masimula (R.W.1)

According to the testimony of R.W.1, he is currently employed as a Security Guard, and is presently the supervisor at the Respondent Company, and currently stationed at Malindza. He testified that he knows the Applicant quite well because the Applicant was under his supervision since he started working for the Respondent in 2019. He explained that in 2020, in or about March, the Applicant was posted at the Inyatsi Construction Site. He explained that at the site in question, apart from the Respondent Company, there were two other security companies who were providing services of a similar nature to this client.

- [23] According to the testimony of R.W. 1 the Chief Security officer of the Inyatsi Company, Mr. Patson Sibandze had approached him directly and requested that the Applicant should be assigned to go and guard the Inyatsi Company's machinery that was situated at the river side (Black Mbuluzi River). The testimony of R.W. 1 was that Mr. Kunene stated that he required that a guard of mature age should be assigned to the post, because older guards are more reliable, and would not abandon their post on a whim, and leave the machine unattended. The witness stated that Mr. Kunene had hand-picked the Applicant himself, but he (R.W. 1) had also been instrumental in the selection of the Applicant as being a suitable candidate for the post.

- [24] R.W. 1 further testified that the other security guard companies who serviced the Inyatsi client were ANPED Security and Tidvumo Security at the material time. R.W.1 further stated that from March, 2020 the Applicant duly performed his duties at the said site, and did so diligently. He stated that trouble only "reared its ugly head" on the 23rd of May, 2020 when the Applicant approached him to say that it was too cold at

the site by the river, and no longer wished to be stationed there. The testimony of R.W.1 was that he told the Applicant that he understood that it was indeed quite cold at that site, and asked the Applicant to go to work, and give him time to report the issue to his superiors, and to further await their response. The testimony of R.W. 1 was that despite his request to the Applicant, the Applicant simply informed him that he would not report to work the next day if he was made to go back to this site. It is the testimony of R.W. 1 that he tried to explain to the Applicant that the client had selected him specifically for the job, and that he still needed to consult his own bosses on the matter, but this fell on deaf ears because the Applicant went as far as to threaten to resign if he was sent back to the post in question.

[25] R.W.1 testified that he then called his Manager, Mr. Zinhle Mlambo and related the Applicant's grievance about the cold at the Inyatsi river-side site, and he further informed Mr. Mlambo to consider re-deploying the Applicant, more so because he had threatened to resign immediately if this was not done. It was the testimony of R.W. 1 that the following day (Sunday 24th May, 2020) the Applicant's name was not called at the parade, and it was explained to him that the client, being the Inyatsi Construction Company, had decided to replace the Respondent Company with another Security Company because the Applicant had threatened to abandon the post by not returning to work if he was called upon to return to the post at the riverside. According to the testimony of R.W.1, he then told the Applicant to return home, but to ensure that he went to the Manzini main office the next morning so he could speak to the Respondent's Operations Manager. The witness further stated that this was the last time that he saw the Applicant again. He further explained that the Applicant would be collected from Mpaka with other security guards, and then proceed to other pick up points before they would be taken to be posted to various sites.

[26] During cross-examination, R.W. 1 confirmed that it was the Chief Security Officer of Inyatsi Construction that had specifically requested that the Applicant should be posted at the Mbuluzi river-side to guard their machinery. He explained that before the Applicant was officially posted at the said site, the Applicant was called, and this was explained to him in the presence of Mr. Patson Sibandze (Inyatsi Chief Security Officer). R.W.1 also confirmed that the Applicant stayed at this post for about two or three months. He pointed out that when the Applicant

asked

him to arrange another security guard to alternate with him at the river side on a rotational basis, he had understood this, and asked the Applicant to give him time to seek further guidance and instruction from the management of the Respondent on the matter. It was put to R.W.1 that he had dragged his feet in the hope of frustrating the Applicant into quitting his job because of the bitterly cold weather conditions he was faced with at the post at the river. The witness denied this and insisted that the Applicant was posted there only because the client actually hand picked him.

[27] The testimony of R.W.1 still under cross-examination, was that he told the Applicant to report to the main office of the Respondent on Monday, but when he did a follow up at the office, he was told that the Applicant had failed to make an appearance there. R.W.1 also stated that the Manager at the main office even called him (R.W.1) after seeing that the day was almost over, and the Applicant had still not arrived. He pointed out that he even tried calling the Applicant on his mobile telephone, but his phone was switched off. He stated that he did receive a call from the main office some time way after this date, and was informed that the Applicant had finally made an appearance at the office. The Applicant's attorney enquired of the witness if he is aware of the details surrounding the Applicant's alleged unfair dismissal. R.W. 1 pointed out that he had no knowledge that the Applicant was dismissed at all. He stated that he thought that the Applicant had been re-deployed because the Respondent had lost the site where the Applicant was stationed at when Inyatsi Construction Company replaced them with another security company. It was put to the witness that the Applicant was dismissed in an unfair manner because he was never subjected to a disciplinary hearing. R.W. 1 maintained that he had absolutely no knowledge of this.

[28] **The Testimony of Mr. Zinhle Ndumiso Mlambo (R.W.2)**

The testimony of R.W.2 was that he is employed as the Respondent's Company's Operations Manager, and is stationed at the Manzini Main Office. He explained that he has held this position since 2010, and knows the matter surrounding the application before Court. He stated that the Applicant was posted to one of their sites where they were servicing Inyatsi Construction Company by providing security services. He explained that the client had experienced problems at the Mbuluzi River site where their machinery situated, because several

items of their

property there was going missing. The testimony of R.W. 2 was that the Chief Security Officer of Inyatsi then attended a parade of the security guards, and chose the Applicant to go and guard the Mbuluzi river site. The testimony of R.W. 2 was that the Chief Security Officer of the client, Mr. Patson Sibandze gave the management of the Respondent an instruction not to change and/or remove the Applicant from the site unless of course he was on a day off. It was the testimony of R.W. 2 also that the Chief Security Officer further asked that they should be consulted on the choice of person to replace or stand in for the Applicant when he was off duty.

[29] According to R.W.2 he received a phone call from the Respondent's supervisor, Mr. Masimula on Saturday the 23rd of May, 2020 where it was related to him that a complaint was lodged by the Applicant regarding the assignment at the Mbuluzi river site. He stated that Mr. Masimula told him that the Applicant wanted another security guard to be assigned to alternate with him at the post on a rotational basis. The testimony of R.W.2 was that the report he received from Mr. Masimula was to effect that despite his efforts to pacify the Applicant, and to inform him that he would work on the matter, the Applicant threatened not to return to work the next day. R.W. 2 testified that R.W.1 told him that this entire exchange had unfortunately taken place in the presence of Mr. Sibusiso Kunene, the Inyatsi supervisor.

[30] According to R.W.2, he then asked R.W.1 to come and see him the next day, but on that very day, being the 24th of May, 2020, he (R.W.2) received a call from Mr. Patson Sibandze from Inyatsi. The testimony of R.W.2 was that Mr. Sibandze informed him that the management of the client company had deemed it appropriate to re-assign the post at the river to another security company because the Applicant had refused to return to the post. According to R.W.2 he tried to plead with Mr. Sibandze to afford him time to iron the issue out, but Mr. Sibandze was adamant that they could not risk the safety of their property by waiting to see if the Applicant would report for work, despite his threats to quit his job if he was made to return to the post. According to R.W.2, indeed, that very evening during the parade, it turned out that the Applicant had not been included in the work roster for that day, and the post had been re-assigned to ANPED Security Company.

[31] It was the testimony of R.W.2 that he told Masimula (R.W. 1) to ask the

Applicant to report to the main office in Manzini so that he could be redeployed to another site. R.W.2 stated that the Applicant did not turn up at the main office the next day, and he asked the Human Resource Manager to call him as they had his number, as well as that of his next of kin, being his wife on file. R.W.2 testified that he was told that neither of the numbers were available. According to R.W.2, after about two to three weeks thereafter, he received a call whilst he was on an official errand at Mhlume, from Human Resources Manager, who informed him that the Applicant was at the Manzini office. He stated that he asked the Human Resource Manager to tell the Applicant to wait for him, and he would be back by 3:00 pm that day, or to return the following morning so they could all speak to the Applicant together (R.W.2 and the Human Resource Officer). R.W.2 stated that he was informed that the Applicant stated that he could not wait until 3:00 pm, and elected to return the next morning.

[32] The testimony of R.W.2 was that, the Applicant, despite what was agreed upon, failed to turn up at the office again the following day. He stated that it was about a week or so later, that the Human Resource Manager called him again while he was away from the office, to tell him that the Applicant had stopped by to drop off a resignation letter at the office. He stated that soon thereafter, they received more correspondence from the Applicant wherein he alleged unfair dismissal, and the Respondent was summoned to appear at CMAC (Conciliation Mediation and Arbitration Commission). The testimony of R.W.2 was that this surprised them because the Respondent had never dismissed the Applicant at all.

[33] During cross-examination the Applicant's representative challenged the authority, and fairness of the decision of the Respondent's management to move the Applicant from the post that he worked at before, and stationing him by the site at Mbuluzi river. R.W.1 pointed out that the Applicant's employment contract contains a clause that permits the employer to deploy, and to redeploy security guards at will, depending on the exigencies of the job (he referred to clause No. 6 of the contract). The testimony of R.W.2 when he was asked, was that the client, Inyatsi Construction, had opted to replace the services of the Respondent with those of the ANPED Security Company because the Applicant had threatened not to go back to guard the post. He stated that the threat of the Applicant was made in the presence of Mr. Sibusiso Kunene who

deemed the threat serious enough such that he was concerned for the safety of the Respondent's property, hence the decision to re-assign the post to another security company.

[34] It was put to R.W.2 that the Applicant was not given a clear instruction regarding the expectation of the company's management for him to go to the main office in Manzini after he was no assigned work at the parade. The testimony of R.W.2 was clear on the point that the Applicant was expected to avail himself at the office so that he could be redeployed, and his contract of employment also provided that he had a right to seek recourse from his supervisors' superiors if he was not content with the manner in which he handled issues brought to him. It was also put to R.W. 2 that the Applicant had waited for the call of the supervisor, but he did not call him, and according to instructions given to the Applicant's representative, the supervisor had not taken the Applicant's calls when the Applicant tried to call him. R.W.2 clarified that there were attempts to call the Applicant, and the Applicant was still paid his salary at the end of May, 2020. He explained that normally, the Respondent's policy is that where a security guard either resigns or is dismissed, their salary is only paid to them when they have returned the company's uniform. He explained that in the case of the Applicant, since they still expected him to return so that he could be redeployed, they had not demanded the return of their uniform. He stated that up until the issue was conciliated at the Simunye branch of CMAC, the Applicant was still in possession of the said uniform.

[35] The testimony of R.W.2 remained steadfast under cross-examination in so far as he insisted that the Applicant was asked to either wait for him, or to come to the office the following day when he finally resurfaced, but he failed to come to the office the next day. It was put to the witness that the Applicant had concluded that he had been dismissed when he was asked to remain at home, and await a call from Mr. Masimula, which call never materialized. The testimony of R.W.2 remained unchanged, and he maintained that the Applicant was never dismissed, and evaded his efforts to engage him about a possible re-deployment to any of the many sites that the Respondent has around the country. R.W.2 stated that the Applicant had obviously opted to terminate his own employment relationship with the Respondent when he wrote the letter of resignation.

R.W.2 insisted that he had been deprived of the opportunity to re-deploy

the Applicant to an alternative post because the Applicant failed to make

an appearance at the office for the much anticipated meeting.

[36] The Respondent's third and last witness also testified at the proceedings.

The Testimony of Ms. Zanele Dlamini (R.W.3)

It was the testimony of R.W.3 that she is the Human Resource Manager of the Respondent Company, and has occupied this position since 11th January, 2016. She explained that her job entails looking after the welfare of the employees of the Respondent, as well as dealing with all grievances that may be brought to her attention. She explained that the Applicant was employed by the Respondent in April 2019. She stated that she explained the provisions of the contract to him before he signed it, both in English and Siswati. She stated that thereafter, the Applicant proceeded to sign it.

[37] According to the testimony of R.W. 3, the contract, a copy of which was produced in evidence, was the one signed by the Applicant at the time of employment. She pointed out the most important clauses within the agreement, one of which is clause No. 11 which relates to the grievance procedure, and how to go about reporting such a grievance at the Respondent workplace. She pointed out that she had explained to the Applicant at the time of employment, that apart from the supervisor, the grievance could be escalated to the Human Resource Manager and the Operations Manager. She also referred to clause No. 13 which provides that should an employee be absent from work for three days without properly notifying the supervisor or the office, this was regarded as desertion.

[38] The testimony of R.W.3 was that she was aware that their client Inyatsi Construction, had through its Chief Security Officer, Mr. Sibandze earmarked the Applicant as a suitable candidate to guard their machinery at the Mbuluzi river-side. She explained that the rationale for choosing the Applicant was that Mr. Sibandze believed that a more mature guard was required for the job because they were less likely to desert the post. She stated that the Applicant undertook this assignment in March, 2020, and on the 23rd of May, 2020 Mr. Masimula, the supervisor reported that the Applicant had asked that he should be provided with another security guard with whom to take rotational shifts because it was very cold at this site. R.W.3 explained that Mr.

Masimula reported to the

office that he explained to the Applicant that he could not unilaterally effect this change without consulting his superiors, but the Applicant threatened to resign from his job.

[39] The testimony of R.W.3 was that Mr. Masimula was instructed to advise the Applicant to report to the office in Manzini so that another site could be found for him, and they expected him to appear around the 24th and the 25th of May, 2020. The witness explained that the Applicant only came to the office on the 11th of June, 2020, after several attempts were made to call him and his wife, but their phones were not answered, or were switched off. She stated that on the 11th of June, 2020 when the Applicant finally resurfaced she was on her own in the office, and she asked the Applicant to await the return of the Operations Manager at 3:00 pm, or to return the next day. She explained that the Applicant stated that he could not wait until 3:00 pm, and chose to return the next day, but even then he did not make an appearance as anticipated. The witness stated that whenever she tried to call the Applicant his phone was consistently off, whilst that of his wife would ring unanswered. She pointed out that the Applicant's last day of work was the 23rd of May, 2020, and on the 24th he was told to return home, but to proceed to the Manzini main office on the 25th May, 2020. The witness denied that she even told the Applicant to go home and to await a call from her when he came to the main office. She stated that the Applicant came on the 11th of June, 2020, and she asked him to wait for the Operations Manager, or to return the next day when he would be in the office, but he did not do this.

[40] During cross-examination the witness affirmed that in terms of clause 13 of the Applicant's disappearance from work for the period in excess of three days amounted to desertion. It was put to R.W. 3 that the evidence led before Court was to the effect that the Respondent lost the post to ANPED Security Company, hence the Applicant had no work station to report to. The testimony of R.W.3 remained steadfast in that she maintained that the Applicant told his supervisor that he would rather resign than to return to his post, hence this amounted to deserting the post. She stated that the fact that the Applicant also refused to come to the main office when he was directed to do so, not only by his supervisor but by herself when he came to the main office on the 11th June, 2020.

R.W 2 stated that she told him to return the next day to speak to the Operations Manager and he failed to do so, thereby solidifying her

position that the Applicant deserted his employment.

- [41] The Applicant's representative asked R.W.3 why she did not see to it that the Applicant was charged, and disciplined for this alleged desertion if indeed she believed that he had committed this offence? R.W.3 testified that she had hoped that the Applicant would make an appearance at the office so that they could try and arrange for an alternative post around Manzini. She explained that the employer still entertained a hope that the situation could be salvaged at that point, and she in particular, did her best to try and call the Applicant to the office, but she was not successful. She maintained also that on the 11th of June, 2020, when the Applicant eventually resurfaced, she asked him, and tried to coax him into agreeing to return the next day to speak to her and the Operations Manager, but these efforts proved futile. She stated that disciplining the Applicant seemed rather premature in her view, since the management of the Respondent intended to talk things over with the Applicant, and redeploy him to a different post. She vehemently denied that the Applicant was dismissed from the employment of the Respondent. She explained that the Applicant took it upon himself to submit a resignation letter to the Respondent's main office on the 18th of June, 2020. She stated that when she tried to engage the Applicant about this letter, and to try to dissuade him from taking this drastic step, the Applicant refused to discuss the matter with her, and simply "closed the door behind him when he left the office".

ANALYSIS OF EVIDENCE

- [42] The crisp question that is the subject of determination herein is whether or not the Applicant was unfairly dismissed as he alleges in the Application he lodged before Court. Indeed, the claims made by the Applicant in the application for determination of an unresolved dispute, are ones that he would, in law, be entitled to where he is able to prove once balance of probabilities that he was dismissed in an unfair manner by the Respondent.
- [43] The Respondent's case on the other hand is simply that the Applicant was not dismissed from work, but he absented himself from work for an inordinate period of time, and this was contrary to the terms of his employment contract. It was further the case of the Respondent that the Applicant terminated his own employment contract when he served a

resignation upon the employer in June, 2020. Indeed, the evidence of the Applicant who was fraught with inconsistencies, and this rendered it very unreliable. On the other hand he alleged that he deemed himself to have been dismissed because the employer asked him to remain at home, and did not call him to discuss his redeployment. On the other hand he acknowledged that he did sign the employment contract which in clause 11, provides for a very clear grievance reporting procedure, where the employees are at liberty to report their work-related problems to their supervisor, and to escalate these to the Manager, and to senior manager. The Applicant did not pursue any of these avenues.

[44] The Applicant also did not make any allegations relating to him forced to resign from employment because of the employer's failure to redeploy him. The applicant although ably represented in Court, admitted under cross-examination that he did resign, and further affirmed this during his re-examination. Despite the fact that the Applicant was indeed ably represented, the case he made out in his evidence was oddly reminiscent of a case of constructive dismissal, in terms of **Section 37 of the Employment Act, 1980 (as amended)**, but this was not at all the case that the Applicant presented before Court.

[45] The Applicant's evidence, which he did not deviate from was that he did in fact submit a letter of resignation in. This letter was unfortunately not presented before Court. The Applicant on the one hand alleged that he was dismissed from the Respondent's employment in August, 2020. The other version of the Applicant was that he himself wrote a letter resigning from work, and submitted the same to the Respondent's main office in Manzini. These two versions are inconsistent, and cannot both stand. The Applicant also stated under cross-examination that he could not deny that the Respondent lost the site to ANPED security in May, 2020 because he was at home by then. This is a further contradiction because he initially stated that he the last time he was at work was in August, 2020. The testimony presented by R.W.2, and duly corroborated by that of R.W. 3 was that the Applicant was not dismissed at all, and the Respondent's aim had never been to terminate his services at all. Even under robust cross-examination, the testimonies of these two witnesses did not waver. The two witnesses remained steadfast in their position that the employer still had a desire to re-assign the Applicant to any other site around the Manzini area. The two witnesses maintained that the Applicant failed to come to the office so that the discussions

relating to this proposed re-assignment could take place. The witnesses, in unison, testified that they made attempts to contact the Applicant telephonically by calling him, and his wife on their mobile phones but neither could be reached.

[46] There is clearly no justification for the Applicant's failure to follow the provisions of his own employment contract by going to the Manzini main office to speak to the Manager, and/or the Senior Manager as provided therein. The Applicant stated that he only went to the office after he had spent a number of weeks at home without being called by the supervisor. The Applicant displayed a very odd lack of patience with his supervisor, Mr. Masimula even when he first reported that he was desirous of being relieved at the Inyatsi site on account of the very cold temperatures that he was enduring there. He did not give Mr. Masimula an opportunity to report his grievance to his superiors, and to liaise with the Inyatsi Chief Security Officer who had actually hand-picked the Applicant for the job. Instead, the Applicant, by his own admission, told Mr. Masimula that if he failed to get someone else to relieve him, he would abandon the post, and resign on the spot. These words were uttered within ear shot of, if not in the presence of Mr. Siboniso Kunene who is a supervisor at Inyatsi Construction. As a result the client opted to give the post to ANPED Security Company, seeing that they feared for the safety of their machinery which is situated at the Mbuluzi river side.

[47] All of the evidence presented herein by the Respondent point to a willingness by the employer to retain the services of the Applicant. It is trite that an offer of reinstatement on the same terms and conditions by the Respondent to the Applicant, obliterate an earlier dismissal (*In casu* the Applicant has not even been able to prove on a balance of probabilities that he was even dismissed in the first place). See **Usher v Linvar (Pty) Ltd 1992 (LC) and United People's Union of South Africa B.O. Phiri v Meshrite (Pty) Ltd 2006 27 ILJ 43**

[48] As far as the Respondent in this case is concerned, the Applicant herein simply walked away from his own job when he resigned. This stance is certainly supported by the evidence presented herein, as well as the Applicant's admission that he did indeed resign. In the case of **Alpheus Thobela Dlamini v Agricultural Holdings (Pty) Ltd I.C case No.**

382/04 at pages 9-10, the Court explains that desertion means

unauthorized absence from work with the intention never to return to work. The Court further explained that the act of desertion on its own does not terminate the contract of employment, but it is the employer who elects to terminate the employment by accepting the repudiation. In casu, the Applicant did not only terminate his employment by deserting his job, but he took it a step further by resigning therefrom. This left the employer, without even the option of accepting the repudiation by applicant, since the applicant concretized his position by the overt act of resigning. The Court herein finds that the Applicant has failed to make out a case of unfair dismissal.

[49] The Applicant made a claim relating to alleged underpayments. He testified that he was paid a monthly remuneration of E1997.00. He stated that he was made aware that the Government Gazette provided that he ought to have been remunerated at the higher scale of E2303.60. The relevant **Regulation of Wages for the Security Services Industry Order No. 85 of 2018** was submitted by the Applicant's legal representative as part of his evidence. Indeed in terms of the Gazette security guards who fall within the category Group B are to be paid a sum of E88.60 which works out to E2303.60 per month. As a result the Court does find that the Applicant was indeed underpaid by a sum of E306.60. It also worthy of note that none of the Respondent's testimonies even touched on this issue, and therefore the version of the Applicant must stand.

[50] Taking into account all the evidence before Court as well as the submissions by the parties' legal representatives, the Court makes the following order:

- (a) The application for unfair dismissal is hereby dismissed in its entirety.
- (b) The Court orders that the Respondent is to pay the Applicant for the underpayments claimed in the sum of E4359.75.
- (c) There is no order as to costs

[51] One member does not agree.


.MANZINI

K. MAN

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT: Mr. F. Vilakati
(Kush Vilakati and Associates)

FOR RESPONDENT: Mr. W. Maseko
(Waring Attorneys)