



**IN THE CONCILIATION, MEDIATION AND ARBITRATION  
COMMISSION**

**HELD AT MBABANE**

**REF NO.SWMB 199/11**

In the matter between:

**JACOB MATHOBELA**

**APPLICANT**

AND

**GRIDLOCK SECURITY SERVICES**

**RESPONDENT**

Coram

ARBITRATOR : VELAPHI Z DLAMINI  
FOR APPLICANT : Mr. LESLIE MAGONGO  
FOR RESPONDENT : Ms NOLWAZI MSIBI

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**ARBITRATION AWARD**

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DATE OF ARBITRATION : 27<sup>TH</sup> FEBRUARY 2012  
VENUE : CMAC OFFICE  
1<sup>ST</sup> FLOOR ASAKHE  
HOUSE,  
MBABANE

## **1. DETAILS OF PARTIES AND HEARING**

The arbitration hearing was held on the abovementioned date at the aforesaid premises of the Commission (CMAC).

The Applicant is Jacob Mathobela, a Swazi Male Adult of P.O. Box 70 Mhlambanyatsi. The Applicant was represented by Mr. Leslie Magongo, a Labour Consultant.

The Respondent is Gridlock Security Services. A business entity of P.O Box A80 Swazi Plaza Mbabane. The Respondent was represented by Ms Nolwazi Msibi, its Human Resources Officer.

## **2. ISSUE TO BE DECIDED**

The first issue for determination is, whether or not the Applicant's dismissal was substantively and procedurally unfair.

Secondly, whether or not the Applicant was underpaid by the Respondent.

Finally, whether or not payment in lieu of four (4) leave days is due to the Applicant.

### **3. BACKGROUND OF THE DISPUTE**

The Respondent is in the business of providing security services and is based at Sidvwashini Industrial site in Mbabane.

The Applicant commenced service with the Respondent on the 12<sup>th</sup> January 2011 as a Security Guard. Jacob Mathobela was in continuous employment with the Respondent until the 20<sup>th</sup> June 2011 when his services were terminated.

The termination of the Applicant's services followed a disciplinary inquiry which found him guilty of absenteeism and insubordination. Applicant was earning E1112.80 per month as wages.

The Applicant reported a dispute for unfair dismissal to the Commission, however the dispute remained unresolved and a Certificate of Unresolved Dispute No.449/11 was issued. The parties then referred the dispute to arbitration and I was appointed to decide same.

The Applicant seeks the following claims: notice pay = E1431.30, underpayments = E318.50, leave pay = E220.20 and compensation for unfair dismissal = E17175.60.

### **4. SURVEY OF EVIDENCE AND ARGUMENTS**

I have considered all the evidence and arguments made by the parties, but because Section 17(5) of the IRA 2000 (as amended) requires concise reasons, I have only referred to the evidence and arguments I deem relevant to substantiate my findings.

The Applicant was the only witness who gave evidence in support of his case. On the other hand Nolwazi Msibi was a sole witness who gave evidence in support of the Respondent's case.

The following facts are common cause:

- (a) On the 14<sup>th</sup> May 2011, the Applicant stopped rendering his services to the Respondent.
- (b) By the 16<sup>th</sup> May 2011, the Applicant had not been paid his wages for the month of April 2011.
- (c) The Applicant's last pay day was supposed to be the 10<sup>th</sup> May 2011.
- (d) On the 16<sup>th</sup> May 2011, the Applicant approached Respondent's Manager to demand his wages but was not paid.
- (e) That the Applicant was charged for misconduct and a disciplinary hearing was held on the 15<sup>th</sup> June 2011. Following the hearing he was found guilty and his services were terminated on the 20<sup>th</sup> June 2011.

The following issues are in dispute:

- (a) The Respondent alleged that the Applicant refused to obey a lawful instruction given to him by Mr. Dlodlu to leave the Managers' office. He refused such that he had to be escorted out of the premises by other security guards. This was denied by the Applicant.
- (b) The Respondent stated that the Applicant breached procedure by approaching the manager directly to demand his wage.
- (c) It was the Applicant's version that he was only charged for unbecoming behavior and not insubordination. According to Respondent Mathobela was charged with two counts of misconduct and was found guilty and dismissed for both.

- (d) The Applicant stated that he traveled to work using public transport as he was staying at Mantabeni, some twenty one (21) kilometres west of Mbabane. The Respondent could neither admit nor deny this fact.
- (e) According to the Applicant it was not possible to report for work because he did not have bus fare since he had not been paid his wages for April 2011. These wages were due on the 10<sup>th</sup> May 2011.
- (f) The Respondent averred that Applicant should have called to advise that he had a problem with bus fare, so that it could assist. Moreover he was not the only one who traveled everyday to work.
- (g) The Respondent stated that the Applicant was only entitled to three (3) leave days as he had worked for only three (3) months. On the other hand Applicant claimed four (4) days for having worked for four (4) months.
- (h) It was alleged by the Respondent that no underpayment were due to the Applicant as he was paid according to the Wages Regulations for the Security Industry.

The Applicant argued that his dismissal was unfair because the reasons for terminating his services were invalid. He submitted that he was dismissed for reporting a grievance.

The Respondent submitted that it was fair and reasonable to terminate the Applicant's services because he had committed dismissable offences.

## 5. ANALYSIS OF EVIDENCE AND ARGUMENTS

- 5.1 It is common cause that at the time the Applicant was dismissed, he had completed his probationary period. He has discharged the onus of proving that he was protected by Section 35 of the Employment Act 1980 (the Act). See Section 42(1) of the Act.
- 5.2 Section 42(2) of the Act, provides that the employer has the burden to prove that the dismissal is one permitted by Section 36 of the Act. The employer also has to prove that it was reasonable in all the circumstances of the case to terminate an employee's services.
- 5.3 In the case of **Alpheus Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (IC case no. 125/05)** at Para 24, the learned **Dunseith J P** made these remarks;
- “Absenteeism is merely an unexplained and unauthorized absence from work”***
- 5.4 Section 36 of the Act provides that it shall be fair for an employer to terminate the services of an employee because the employee has absented himself from work for more than a total of three (3) working days in any period of thirty (30) days without either the permission of the employer or a certificate signed by a medical practitioner.
- 5.5 The Applicant has tendered an explanation for his absenteeism, what remains to be decided is whether his explanation justifies his conduct.
- 5.6 **Grogan Workplace Law (2005)** 8<sup>th</sup> Ed at pg 63 states that;
- “The payment of remuneration by employers in return for the performance by employees of their duties is so fundamental to the employment contract that the courts will assume, where there has been no agreement on remuneration, either that the contract is not a contract of employment or that the parties impliedly intended the payment of a reasonable sum according to the custom and practice of the industry and locality. The corollary of “no work no pay”***

***maxim is “no pay no work” Workers who refuse to work if their employer fails to pay them are therefore not deemed to be on strike or otherwise in breach of contract” (my emphasis).***

- 5.8 Section 2 of Act provides that an employee is any person to whom wages are paid or are payable under a contract of Employment.
- 5.9 In terms of Section 64 of the Act, failure to pay wages to an employee when those wages are due and payable shall be an offence.
- 5.10 By failing to pay the Applicant his wages on the 10<sup>th</sup> May 2011, not only did the Respondent breach the employment contract, but it also committed an offence. The Applicant was entitled to refuse to work for the simple reason that he had not been paid his wages.
- 5.11 The Respondent did not gainsay the Applicant’s assertion that, he stayed far away from work and that he used his income as bus fare. The fact that other security guards also traveled to work and did report for duty despite not being paid, cannot be a reasonable ground for judging the Applicant’s conduct.
- 5.13 Firstly, the fact that other employees reported for duty despite that they were not paid their wages, does not mean that the Applicant was legally bound to follow suit. Secondly the Respondent failed to prove that the personal circumstances of all the guards, including the Applicant’s were similar.
- 5.14 I find that the Respondent failed to prove that the Applicant committed the offence of absenteeism, however that was not the only charge for which the Applicant was dismissed, he was also charged with insubordination.
- 5.16 **Grogan Rekerts Basic Employment Law 2<sup>nd</sup> Ed** p45.states that insubordination is a serious offence because it presupposes a calculated breach by an employee of his duty to obey his employer’s instructions. The gravity of the offence will depend on a number of factors, including the action of the employer prior to the

- alleged insubordination and the fact that the employee has to be repeatedly committed the offence.
- 5.17 Mr. Dlodlu who is alleged to have given the Applicant an instruction to vacate the Administration office was not called as a witness during arbitration. The Applicant has disputed that he disobeyed Dlodlu's instruction. The evidence given by Nolwazi Msibi concerning what transpired between the Applicant and Dlodlu is inadmissible because it is hearsay evidence. The Respondent has failed on a balance of probabilities to prove that the Applicant committed the offence of insubordination.
- 5.18 It was argued by the Respondent that in the alternative, the Applicant's insubordination manifested itself in the fact that he approached the office directly to demand his wages. This, it was contended was contrary to procedure because security guards are not allowed to jump the chain of command to report a grievance to the Manager.
- 5.19 The Respondent did not produce a written policy which provided that there is a chain of command for reporting a grievance. Neither was it proved that the Applicant knew or ought to have known about this policy.
- 5.20 I find that the Respondent did not have a fair reason for terminating the Applicant's services and that the Applicant's dismissal was substantively unfair. I also find that in all the circumstances of the case, it was unreasonable for the Respondent to terminate the Applicant services.
- 5.21 I however find that the Applicant's dismissal was procedurally fair. The Applicant disputed the fact that he was charged for committing the offence of absenteeism. However, the documents that were produced by the Respondent demonstrated the following; he was timeously served with a notification to attend the disciplinary hearing; he was given the charge sheet; evidence was led to try and prove both offences.



5.22 In awarding compensation to the Applicant for the substantively unfair dismissal, I have considered the following factors:

- (a) The Applicant was in service for only five (5) months.
- (b) The Respondent was at fault in failing to pay Applicant's wages and this resulted in the misunderstanding between the parties.
- (c) The Applicant does not wish to be reinstated;
- (d) The Applicant was still unemployed at the time of arbitration.

5.23 I hold that an award of five (5) months compensation for the substantively unfair dismissal is fair and equitable in all the circumstances of the case.

## **6 LEAVE**

I have held that the Applicant was justified in law by not working after the Respondent had breached the employment contract. The Respondent submitted that it would only be liable to pay the Applicant for three (3) leave days because he only rendered his service for three months.

The proven facts are that the Applicant started working on the 12<sup>th</sup> January 2011 and stopped rendering service on the 14<sup>th</sup> May 2011. The Applicant was not at fault when he ceased rendering his services. He was dismissed on the 20<sup>th</sup> June 2011.

I find that the Applicant is entitled to payment in lieu of five (5) leave days because he was in employment for (5) months before his services were terminated by the Respondent

## 7. UNDERPAYMENT

7.1 The Applicant is only claiming the sum of E318.50 as short payment for the month of May 2011. The aforesaid sum is the difference between the wages he was supposed to earn on the fourth month in service and the wages he was actually paid.

7.2 It is common cause that in the fourth month of continuous service the Applicant would have been entitled to the sum of E1431.30 per month as wages. However the dispute is that, on the one hand the Respondent submitted that the Applicant only worked for ten (10) days in May 2011 and was paid for that.

7.3 In **Enock Shongwe v Silver Solutions Investments** (IC case co. 235/04) at paras 39-40, learned Dunseith J P stated as follows;

***“When an employee is paid a fixed wage, a presumption arises that he is entitled to that wage provided he tenders his services and is available, willing and able to work. The “no work no pay” rule does normally apply when the failure to work is not attributable to the employee”.***

7.4 The Applicant has not claimed his wage for May 2011; it is therefore inconceivable that he can claim underpayment for that month. This claim is dismissed.

7.5 The following order is therefore made:

## 8. AWARD

8.1 I find that the Applicant’s dismissal was substantively unfair, but procedurally fair.

8.2 The Applicant’s claim for underpayment is dismissed.

8.3 The Respondent is ordered to pay the Applicant the following terminal benefits and compensation:

(a) Notice pay = E1431.20

(b) Leave pay  
 $E1431.30/26 \text{ days}=55.05 \times 4$  = E220.20

(c) five (5) months wages as compensation  
For unfair dismissal  
( $E1431.30 \times 5 \text{ months}$ ) = E7165.50

Total = E8816.90

8.3 The Respondent is directed to pay the Applicant the sum of E8816.90 at CMAC Office, 1<sup>st</sup> floor Asakhe House Mbabane not later than the 31<sup>st</sup> May 2012.

8.4 I make no order for costs.

DATED AT MBABANE THIS \_\_\_\_ DAY OF APRIL 2012

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VELAPHI Z DLAMINI  
CMAC ARBITRATOR