



**IN THE CONCILIATION, MEDIATION AND ARBITRATION
COMMISSION (CMAC)**

HELD AT MBABANE

SWMB187/18

In the matter between:-

MDUDUZI SHABANGU

APPLICANT

And

SWAZILAND LUMBER

SECURITY SERVICES

RESPONDENT

CORAM:

Arbitrator : Lobenguni Manyatsi

For Applicant : Mr. E. Dlamini

For Respondent : Mr. P. Dlamini

ARBITRATION AWARD

{11/10/2019}

Venue : Inner City Offices, Mbabane

Nature of Dispute : Unfair Dismissal

1. Details of Parties and Hearing:

- 1.1 The Applicant is Mduduzi Shabangu, an adult Swazi male and a former employee of the Respondent. During the Arbitration hearing, Applicant was represented by Mr. Ephraim Dlamini, a Labour Consultant.
- 1.2 The Respondent is Swaziland Lumber Security Services, a company duly registered and incorporated in terms of the company laws of the Kingdom of Swaziland. During the hearing, the Respondent was represented by Mr. Phila Dlamini, a practicing attorney under Mbuso E. Simelane and Associates in Mbabane.
- 1.3 The arbitration hearing was held at CMAC Mbabane Inner City Offices between the 27th March 2019 and the 13th May 2019. Closing submissions were filed by the Applicant on 19th July 2019 and by the Respondent on the 9th July 2019.

2. Issue for determination:

- 2.1 The issue for determination pertains to whether or not the Applicant was unfairly dismissed by the Respondent.

3. Background to the dispute:

- 3.1 Applicant alleges that his dismissal from work was unfair both procedurally and substantively.
- 3.2 Respondent on the other hand denies Applicant's claims and disputes that Applicant was treated unfairly. Respondent contends that Applicant's dismissal was procedurally and substantively fair.
- 3.3 The dispute was reported by the Applicant to the Commission, conciliated upon and subsequently certified as unresolved. A certificate of unresolved dispute was issued at the conclusion of the conciliation proceedings.
- 3.4 The relief sought by the Applicant which was agreed upon by the parties during pre-arbitration is:
 - 3.4.1 Notice Pay = E2, 349.29
 - 3.4.2 Additional Notice = E361.40
 - 3.4.3 Severance Pay = E903.50
 - 3.4.4 Underpayments = E20, 712.78
 - 3.4.5 Leave Pay = E361.40
 - 3.4.6 Maximum Compensation for Unfair dismissal = E22, 426.56
- 3.5 I was appointed to arbitrate the dispute on the 8th March 2019 pursuant to an Industrial Court referral for the matter to be heard under the

auspices of the Commission as provided for by Section 8(8) and Section 85 (2) of the Industrial Relations Act, 2000 (as amended).

SUMMARY OF PARTIES' EVIDENCE AND ARGUMENTS

4. APPLICANT'S CASE:

4.1 In support of Applicant's case, Applicant himself was the only one who came to give evidence. A summary of the most important aspects of the evidence influencing my decision are detailed herein below;

Mduduzi Andrew Shabangu (AW1):

4.2 Applicant testified that he was employed by the Respondent as a Supervisor/Driver and sometimes worked as a Cash Security driver in Piggs Peak. He assumed the position of Supervisor/Driver in February 2016. He was dismissed on the 3rd May 2018. He earned a monthly salary of E2, 349.29 (two thousand three hundred and forty nine emalangeneni and twenty nine cents)

4.3 He stated that he thinks he was dismissed because the company suspected that he had influenced other guards to join a Union. However the company could not give him proof for that. What he was told was that he was

dismissed for coming to work late on the 16th December 2017.

4.4 He stated that on that fateful day he had called the office and told them that he was going to be late because he had trouble with transport. He informed the receptionist, Make Ngubeni about the delay. He eventually got to work at 6:30pm. When he got to work, no one spoke to him about his late coming; he just took the car and continued working.

4.5 The Applicant further stated that he was subsequently charged for late coming and a hearing held on the 4th January 2018. He was found guilty of the charge and given a final written warning. He did not recall when the letter informing him of the verdict was given to him. In the letter he was told that he had been found guilty of the offence and should not be found to have committed a similar offence for twelve months. He was then subsequently dismissed for something that had happened a long time before his disciplinary hearing.

4.6 When he got to work on the 3rd May 2018 at around 4pm, he was told not to touch the Company car and he should go back home. He appealed and his appeal was dismissed. Mrs.

Abrahams spoke to him on the day that he brought the appeal letter and told him that everything had been done correctly, the dismissal was an appropriate sanction therefore she was dismissing the appeal.

4.7 Applicant stated that while working for the Respondent he was being underpaid. He was earning E2, 349.20 while the other supervisors in Bhunya and in Mbabane earned E3, 500.00. He was desirous of being paid in lieu of that difference in earnings. He also wanted to be paid in lieu of leave days he had accumulated. He had taken leave for the previous year but he had since accumulated leave days for the New Year he had started.

4.8 The Applicant stated that he was not employed and has 16 children. He is 54 years old. He is desirous of being paid for underpayments, leave pay and all other monies due to a person who was unfairly dismissed.

4.9 Under cross examination, the Applicant admitted that he was late coming to work on the day he was charged for. He stated that he had come to work maybe once or twice. He was evasive when asked if he had been spoken to about late coming and instead stated that he

had reported that the roads were slippery, hence his late coming.

4.10 The Applicant was further asked if he had not been called for an appeal hearing and he confirmed that he did attend an appeal hearing. He was asked what he was supposed to earn according to the law. He stated that he was supposed to earn according to the Gazette. He was further asked if the letter of dismissal had reason for dismissal.

4.11 Closing submissions made on behalf of the Applicant were to the effect that the main relief sought by the Applicant was compensation for unfair dismissal. It was submitted that the Applicant was dismissed unfairly both procedurally and substantively.

5. RESPONDENT'S CASE

5.1 In support of Respondent's case, one witness came to give evidence. A summary of the evidence influencing my decision is detailed herein below;

Ncamsile Ndwandwe (RW1)

5.2 The witness testified that she is the Human Resources Manager of the Respondent. She stated that she knows the Applicant; he was an employee of the Respondent and was employed

as a Supervisor. The Applicant was dismissed on the 2nd May 2018.

- 5.3 She testified that prior to his dismissal; the Applicant had a lot of warnings for poor time keeping. A lot of disciplinary hearings had been held where the Applicant was charged with poor time keeping. Most of the time he came late to work. For his poor time keeping, he was given a 1st written warning, severe written warning and a final written warning. She also gave him one that was not in their procedure, a last chance written warning. He was told that he had to show that he was still willing to work.
- 5.4 She stated that before he was dismissed, the Applicant was taken through a disciplinary hearing and thereafter given a chance to appeal. The hearing was held on the 9th January 2018 and the appeal held on the 25th May 2018. In both hearings the Applicant was present.
- 5.5 She stated that the Applicant had been late for a countless number of times. He reported that he was running late on the 7th December 2017 that is where the company had to find a stand in for the Applicant. The Applicant was not charged for that offence because he had reported. In all the instances where he reported, the Applicant

was not disciplined, he was disciplined when he did not report his late coming.

- 5.6 Ms. Ndwandwe further stated that the Applicant was not owed any leave days, he had worked for 8 months into the year which had started in September 2017 and he had taken 8 days leave. He was entitled to one day per month.
- 5.7 Ndwandwe further stated that the Applicant was not underpaid. The Gazette stipulates that a supervisor should be paid E86.70 per day and that translates to E2, 297.55 per month. The Applicant was paid E2, 349.29 per month, which is above what the Gazette stipulates.
- 5.8 During cross-examination the witness reiterated that the Applicant had many warnings for poor time keeping, that is what led to his dismissal. He was given a final written warning on the 13th November 2017 and on the 27th December 2017 he was given a last chance warning. All these had not expired when he was terminated in May 2018.
- 5.9 The witness further stated during cross-examination that the Applicant did not commit an offence of poor time keeping after the last chance warning was given to him, up to the time he was dismissed in May 2018.

- 5.10 It was put to the witness that the Applicant took the last chance warning very serious, as such he was not late after that. The witness wondered what the Applicant should have been given as a sanction after the last chance warning. Applicant's representative wondered why it had taken so long for the matter to be finalised. The witness testified that they were busy with other things and the Applicant went to work in Piggs Peak for a long time.
- 5.11 The witness denied that the Applicant had reported to Phindile that he was late on the 16th December 2017. She stated that Phindile would have written in the occurrence book.
- 5.12 In the closing submissions the Respondent stated that the dismissal of the Applicant was both substantively and procedurally fair and prayed that the Applicant's claim be dismissed.

6. Analysis of the evidence and arguments:

- 6.1 I have in this award considered all the evidence and arguments by the parties. In view of the requirements of **Section 17 (5) of The Industrial Relations Act 2000 (as**

amended), I herein below set out concise reasons to substantiate my award.

6.2 The question to be decided is whether or not the dismissal of the Applicant was fair and reasonable in terms of the standards considered to be acceptable in employment matters. When the assessment is made as to whether a dismissal is fair or unfair, reasonable or unreasonable, attention is paid to two important factors namely, the **procedure** adopted by the Employer in terminating the services of the employee as well as the **substance** or the grounds for the termination of the employee in question.

6.3 The first port of call in the matter before me would be to look at the issue of substantive fairness or lack thereof, as the case may be. Without being exhaustive, the kind of conduct prescribed in Section 36 of the **Employment Act, 1980 (as amended)** constitutes fair reason for dismissal. Section 36 of the Employment Act, lays out the fair reasons for the termination of an employee's services; however every case must be assessed on its own merits.

6.4 Decided cases (see ***Hadebe and Chubb Electronic Security (2004) 13 CCMA 8.4.3***) and the ***Code of Good Practice, 2005*** lay down the considerations to be made when determining whether a dismissal for misconduct was fair or not. Any person making that determination should consider:-

(a) Whether the employee contravened a rule or standard regulating conduct relating to employment

(B) If a rule or standard was contravened, whether;

(i) the rule is a valid or reasonable rule or standard.

(ii) The rule is clear and unambiguous.

(iii) The employee was aware, or could reasonably be expected to have been aware of the rule or standard;

(iv) The rule to have been consistently applied by the employer; and

(v) Whether dismissal is an appropriate sanction for the contravention of the rule or standard.

6.5 **John Grogan** in his book **Dismissal, Discrimination and Unfair Labour Practices, 2007 at page 237** states that Employees have a fundamental duty to render

service, and their employers have a commensurate right to expect them to do so. A basic element of this duty is that employees are expected to be at their workplaces during working hours, unless they have an adequate reason to be absent.

6.6 Grogan goes on to state that absenteeism can be divided into late coming, absences from an employee's work station and absence from the workplace itself.

6.7 The elements of the offence of absenteeism are that the employee must have been absent from work at a time when the employee was contractually obliged to render service and that the employee had no reasonable excuse for his absence.

6.8 Disciplinary codes normally treat absenteeism on a graduated scale when it comes to penalties. Dismissal is normally justified only if the employee fails to heed the final warning. Termination of services is considered where a related offence is committed during the validity of the final written warning.

6.9 The Respondent's witness testified that the Applicant had a number of warnings and she

was even lenient enough to give him an off the book last chance warning after he had been given a final written warning. The last chance warning was still valid at the time of the Applicant's dismissal. The Applicant himself did not dispute the fact that there was a valid warning in his favour.

6.10 The argument raised by the Applicant was to the effect that he did not commit any offence after the last chance warning was issued out to him because he had taken the warning seriously and mended his ways. The offence he was dismissed for had happened prior to him being issued with the warning. The Respondent's witness on the other hand stated that the reason why the disciplinary hearing took a while to be concluded was because the Applicant had been deployed to work in Piggs Peak for some time. The hearing could only be concluded when he came back.

6.11 In the case of **Paul Mavundla v Royal Swaziland Sugar Company Ltd (IC Case No: 266/02)**, the learned Judge President Nderi Nduma opined as follows;
"For a dismissal to be in terms of Section 36 it must not only be for an offence itemized

therein, but the decision to terminate must be fair and just."

6.12 Ngcobo JA stated the following, in **NEHAWU v University of Cape Town 2003 (2) BCCR 154 (KH)**:

"By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly"

6.13 However in **Patrick Ngwenya & Another v Swaziland Development and Savings Bank (IC case No:536/08)**, the court dismissed a preliminary point which was that the Respondent was time barred from instituting a disciplinary inquiry against the Applicants, because the bank had not done so within 30 days as provided by the law disciplinary code and procedure.

6.14 The finding of the Court in the Patrick Ngwenya case was that the Respondent gave a modifiable explanation for the delay. Coming back to the case at hand, the Respondent's submission was that the Applicant had been working in Piggs Peak for a while and the hearing was concluded when he came back to work in Mbabane.

- 6.15 I find that the Respondent's explanation is a sufficient explanation for the delay in concluding the Applicant's hearing. The fact that he did not commit the offence of late coming after being given the last chance warning does not take away that he still had a pending disciplinary matter and after being found guilty, the logical step would be to terminate the services of the Applicant.
- 6.16 The Applicant failed to convince me that he had reported that he would be late on the 16th December 2017. The Respondent's witness stated that the Applicant was not disciplined when he had reported his late coming but was disciplined if he did not report. I am inclined to believe the Respondent that the Applicant had not reported on this fateful day.
- 6.17 It is my finding that the Applicant the employee did contravene the rule of not coming late to work. The Applicant knew about the rule and it was a reasonable rule. The rule was clear and unambiguous. Dismissal was an appropriate sanction for the breach of this rule, seeing as the Applicant had a valid last chance warning.
- 6.18 The employee also places procedural fairness of his dismissal in dispute. The Applicant stated that he had not been called for an appeal

hearing, instead he was told by the Director when he came to bring his letter of appeal that she was upholding the decision taken at the disciplinary hearing.

6.19 During cross-examination it transpired that the Applicant had in fact been given a letter on the 23rd May 2018 inviting him to an appeal hearing on the 25th May 2018 and he attended that hearing. The Director's decision was communicated to him on that same day. This then puts paid to the assertion of the Applicant that he was not called for an appeal hearing.

6.20 Consequent to these aforementioned authorities and analysis, I am inclined on a balance of probabilities to find that the dismissal of the employee was substantively and procedurally fair.

6.21 The Applicant put in a claim for four leave days for the year 2018. He stated that he had been on leave in 2017. The Respondent witness testified that Applicant completed his leave cycle in September of each year. In one year he was entitled to twelve days, which translated to one day per month. Out of his leave cycle he had worked eight months, which entitled him to

eight days leave. The witness stated that he had taken those eight days leave.

6.22 Since the Applicant was employed on the 29th September 2014, his leave cycle is indeed completed at the end of September of each year. In his testimony the Applicant stated that he had taken his 2017 leave but not his 2018 leave, hence his claim for the four days. However he made as if the leave was for a fresh cycle, he had exhausted the previous year's leave, which was not the case. The Applicant failed to prove that he was owed any leave days by the Respondent.

6.23 The Applicant also alleged that he was underpaid by the Respondent. He was paid E2, 349.29 but other supervisors were paid E3, 500.00. The Respondent on the other hand stated that the Applicant was paid even more than the Gazette that was applicable at the time.

6.24 In his closing submissions, the Applicant's representative directed the Commission to the case of **Bheki Mhlongo & 160 others vs T.Q.M. Textiles (Pty) Ltd CMAC SWMZ 013/10** in support of their submission that the Applicant was discriminated against because

other Supervisors in the same company earned E3, 500.00 and he earned E2, 349.29

6.25 The Applicant merely made an allegation that other supervisors were paid E3, 500.00 but failed to bring proof to the Commission that this was the case. This version was not even put to the Respondent's witness in order for her to comment on and clarify.

6.26 The Applicant and Respondent's witness both testified that the Applicant was not paid less than what is stipulated in the **Regulation of Wages (Security Services Order), 2017**, instead he was paid slightly more than that.

6.27 I accordingly find that there was no discrimination proved by the Applicant, he was paid according to what the law stipulates.

7. Award:

7.1 The Applicant's unfair dismissal claim is hereby dismissed.

7.2 There is no order as to costs

DATED AT MBABANE ON THE __ DAY OF OCTOBER 2019.

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LOBENGUNI Y. MANYATSI

CMAC ARBITRATOR