



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 787/2016

In the matter between:

CASH SECURITY SERVICES

Applicant

And

CMAC ARBITRATOR BONGANI S. DLAMINI N.O.

1st Respondent

MADODA DLAMINI

2nd Respondent

Neutral citation: *Cash Security Services v CMAC Arbitrator Bongani S. Dlamini N.O and 2 Others (787/2016) [2017] SZHC 222 (31st October 2017)*

Coram: **M. Dlamini J.**

Heard: **23rd August 2017**

Delivered: **31st October 2017**

review application - application to review arbitrator's award – review court should not be overzealous to substitute its own decision – it is only where an arbitrator in considering the circumstances could not have reasonably come to the challenged award that the review court can interfere – parity principle

discussed – applicant’s conduct consistent with parity principles.

Summary: In addition to the usual stay and costs orders, the applicant prays mainly for the review or setting aside and correcting the decision of first respondent, namely that the second respondent’s contract of employment was unfairly terminated and therefore compensation of six months in the sum of E18 000 is to be paid by applicant. The matter is opposed on the basis that the learned Arbitrator fully applied his mind to all relevant evidence.

The pleadings

Applicant

[1] Under the hand of its director Mr. Christopher Scott–Long, the applicant (Cash Security Services) deposed that on 10th April 2013, second respondent Mr. Madoda Dlamini reported a dispute to first respondent. The dispute was referred to arbitration. Mr. Bongani S. Dlamini (learned arbitrator) sat as arbitrator.

[2] Mr. Madoda Dlamini’s case was that he had been unfairly dismissed on ground of failure to wear protective clothing. Cash Security Services on the other hand maintained that Mr. Madoda Dlamini had lawfully been dismissed. Cash Security Services then analysed the finding of the learned arbitrator pointing out that the learned arbitrator found that:

- Mr. Madoda Dlamini did commit the misconduct charged with;
- That witnesses of Cash Security services corroborated each other on the misconduct by Mr. Madoda Dlamini.

[3] However, despite such finding by the learned arbitrator, he held that Mr. Madoda Dlamini was unfairly dismissed. He based his conclusion on the evidence of one of the witnesses to the effect that there were other witnesses who were found to have committed the same offence as Mr. Madoda Dlamini, but were only given a warning penalty. The learned arbitrator then applied the parity principle and awarded Mr. Madoda Dlamini six months compensation for unfair termination of contract.

Second Respondent

[4] Mr. Madoda Dlamini highly contested Cash Security Services review application. He averred that the witness relied upon by the learned arbitrator was for Cash Security. The learned arbitrator was obliged to consider all the evidence presented to him. He disputed that his termination was fair. The learned arbitrator did apply his mind to the issues before him. He directed this court to the learned arbitrator's query on why Cash Security Services waited for a period of three months before charging him. Cash Security Services was selective in his disciplinary procedure. In its reply, Cash Security Services maintained its grounds.

Issue

[5] The question for determination is whether the learned arbitrator did apply his mind on the evidence before him. Did he take into account relevant consideration in deciding the case?

Determination

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Evidence before the learned arbitrator

[6] Mr. Madoda Dlamini gave evidence on his behalf. He testified that he was employed on 8th August 2012 (as per page 4) or 8th August 2013 (as per page 5). At the end of his probation he wrote a letter to Cash security Services enquiring about the status of his employment. Cash Security Services apologized but in the same letter mulcted him with three charges viz., failure to wear protective clothing; refusal to take order to wear protective clothing and bringing into disrepute the dignity of Cash Security Services.

[7] He testified further that he was then prosecuted on the charges even though he was not given sufficient time to prepare for himself. Although there was a chairman in the proceedings, there was no initiator. Two witnesses were called to give evidence against him. He pleaded not guilty to all three counts. He then protested on count 1, stating that Cash security Services never provided him with any protective clothing. On count 2 he pointed out that he had never refused to take lawful instructions to wear protective clothing. Cash Security Services only gave him two shirts and two pairs of trousers. He then stated:

“What I can tell the Commissioner with regard to the charges laid against me is that I am upset by these charges because they arose from the company’s failure to provide me with the necessary gear. But I know what gave rise to these charges is my knowledge of my rights as an employee wherein I wrote to my employer regarding my probation.”¹

¹ see page 13 of the record of the arbitration proceedings

[8] He did appeal the termination of his services to the managing Director but never received any response. He then prayed for compensation to the total tune of E 49 608.

[9] Under cross examination the date of his employment was under issue. He maintained his ground that he was employed on 8th August 2012 at a salary of E3 000 plus E500 after bonus. The salary was to be increased after three months to E4 000.

[10] The operations manager, Venessa would address them every morning directing them on their assignment. She would tell them that there was shortage of uniforms such that he was never provided with bullet proof vest. He testified as follows in this regard:

“RC: I put it to you Nkhosi that you are not being truthful. The issue of the vests was talked about every day. I put it to you that the importance of wearing the bullet proof vests was mentioned every day. What do you say to that?”

AW1: I think I was being truthful when I said Vanessa used to talk about the shortage of uniform. She has never talked about the importance of the bullet proof vests.²

[11] It was pointed out to him that Venessa spoke about the importance of wearing bullet proof on a daily basis and that every gunner at Cash Security Services was either a former soldier or a police officer. It was further pointed out that Mr. Scott–Long, the managing director also spoke about importance of putting on the bullet proof.

² see page 31of the record

[12] He denied that Vanessa or any other person addressed them on wearing bullet proof vests. He contended that the morning addresses were meant to direct them to their duty stations and they were always told about shortage of uniforms at Cash Security Services. He also testified:

AW1: The bullet proof vest is a tool for war. I don't know if she has trained the army so that she could be in a position to elaborate on the use of bullet proof vests. Vanessa has never talked about bullet proof vests. She talked about the shortage of uniforms. If she had talked about the vests perhaps there are certain things I could have told her about as a person who has been trained in state defence and security.”³

[13] The cross-examination of Mr. Madoda Dlamini was lengthy on the issue of bullet proof vests. He detailed his answers as the cross-examination progressed. I shall revert to his answers under adjudication herein.

Cash Security Services' evidence

[14] The first witness on behalf of Cash Security Services was Christopher Scott-Long, the Managing Director. He pointed out that Cash Security Services' main duty is to transport money on behalf of its clients, namely banks, construction companies and other entities. The company having been established in 1987, recently they had incidents where three of their employees were killed in the line of duty. They use vests and helmets approved by SABS. A gunner, in the likes of Mr. Madoda Dlamini was the most vulnerable and targeted by criminals. They therefore put emphasis on the importance of wearing protective clothing. Mr. Madoda Dlamini was employed after Tsabedze was killed during operation.

³ see also page 31 of the record

[15] He refuted any shortages of vests and pointed out that vests and helmets were important part of the uniform. He had dismissed two people for not wearing bullet proof vests because insurance would not pay once a person died while not in protective vest. He was prepared to pay out one of his employees who had advised him that his doctor had instructed that he should not wear the vest provided. He asked him to give him the letter from the doctor but failed.

[16] The second witness on behalf of Cash Security Services was Nhlanhla Tsabedze, a tailor at Cash Security Services. He was responsible for issuing out uniforms to the employees. He testified under oath that in 2012 he gave a bullet proof vest to Mr. Madoda Dlamini. Although Mr. Madoda Dlamini took the vest, he complained and asked who had inspected the vest to verify if it was fit for its function.

[17] Mr. Middleton was the next witness. He was employed by Cash Security Services in 2005 as a driver. He testified that he would drive while Mr. Madoda Dlamini was the gunner in the same vehicle, conveying cash. He therefore worked with Mr. Madoda Dlamini most of the time. He testified that Mr. Madoda Dlamini did not wear a vest. Mr. Madoda Dlamini told him that he needed to get a letter from a doctor advising him whether to wear a vest or not.

[18] Mr. Ginindza testified under oath saying that he was employed by Cash Security Services in 2004. He knew Mr. Madoda Dlamini who was given a vest by the tailor. However, Mr. Madoda Dlamini did not use it. He then asked Mr. Madoda Dlamini to lend him the vest. One day, Mr. Scott-Long asked him if he had a vest. He replied that he was using Mr. Madoda Dlamini's vest. Mr. Scott-Long asked why Mr. Madoda Dlamini was not

wearing his vest. He replied that he heard Mr. Madoda Dlamini complaining about the weight, saying that it was not of the right weight to be worn by a person.

[19] Mr. Ngwenya was the fifth witness who worked for Cash Security Services since 2006 as a gunner. His evidence was along similar lines as the other witnesses. All the witnesses on behalf of Cash Security Services were cross examined. I shall refer to their relevant cross examination later in this judgment.

Adjudication

[20] From the evidence adduced on behalf of both Mr. Madoda Dlamini and Cash Security Services, it is clear that Mr. Madoda Dlamini was charged with failure to adhere to the company's policies and procedures. He was said to have failed to wear a bullet proof vest, refused to take instructions to wear such vest and as third charge thereby brought disrepute to the company.

[21] As borne out by the record of proceedings, the learned Arbitrator conducted the proceedings very well. He analysed the issues and the evidence of all the witnesses metrically.

[22] Mr. Madoda Dlamini, having narrated how after he was employed, wrote a letter to the company calling upon it to confirm him, instead received correspondence advising him of three charges. It was his evidence that the company did not provide him with a vest. He testified in this regard:

“AW1: *What I can tell the Commissioner with regard to the charges laid against me is that I am upset by these charges because they arose from the company’s failure to provide me with the necessary gear. But I know what gave rise to these charges is my knowledge of my rights as an employee wherein I wrote to my Employer regarding my probation.*”⁴

[23] Under cross examination, it was put to him that he was provided with a vest and further every morning of the parade, Ms Vanessa would talk to them about the importance of wearing the vests. The evidence proceeded as follows:

AW1: *The bullet proof vest is a tool for war. I don’t know if she has trained in the army so that she could be in a position to elaborate on the use of bullet proof vests. Vanessa has never talked about bullet proof vests. She talked about the shortage of uniforms. If she had talked about the vests perhaps there are certain things I could have told her about as a person who has been trained in state defence and security.*”⁵

[24] The response by Mr. Madoda Dlamini would, not be surprising following what the company’s witnesses had to say thereafter. He was then confronted with his evidence before disciplinary hearing as follows:

RC: *Let’s go to where you talk about the bullet proof vest at page 3, you say, ‘I talked about the bullet proof vest at the parade that due to my knowledge and understanding you have to take the individual’s weight in order to prepare a vest and helmet for that individual. It must be in line with the person’s weight and how long a length of time he is going to ware it.’ You said at the hearing that you talked about this at the parade. Do you recall saying that at the hearing?*”⁶

[25] He then clarified:

⁴ see page 13 of the record

⁵ see page 31 of the record

⁶ see page 43 of the record

“RC: You said before a person is issued with a vest they should first be weighed and the weight of the vest should also be measured and the length of time it will be worn should also be known. That is what you said. Isn’t it?”⁷

[26] Mr. Scott-Long testified that he received a report that Mr. Madoda Dlamini was declining to wear his protective vest. He decided to launch an investigation. Mr. Madoda Dlamini’s colleagues, some gunners while others drivers who executed the company’s duties with him all testified that Mr. Madoda Dlamini complained that the vests were not authenticated. They all corroborated each other in this regard. All the witnesses on behalf of the company were cross examined by Mr. Madoda Dlamini’s Counsel on who had weighed Mr. Madoda Dlamini in order to ensure that the vest given to him was commensurate to his weight. Mr. Scott-Long was cross examined on where he sourced the vests and the expertise of the source. Mr. Middleton was cross examined on the level of protection of the vests.⁸ This line of cross-examination viewed against the evidence presented on behalf of Cash Security Services to the effect that Mr. Madoda Dlamini was always critical of the vests provided by the company establishes that Mr. Madoda Dlamini declined the use of the vest.

[27] It is therefore my considered view that the learned Arbitrator was correct in finding that Mr. Madoda Dlamini was guilty of the charge of failing to wear protective vests.

⁷ see pages 46 – 47 of the record

⁸ at page 127 of the record

Main issue

The main issue is, whether the learned Arbitrator misdirected himself in having found that Mr. Madoda Dlamini was guilty as charged, that is on count 1, but for the parity principle.

Learned Arbitrator's reasoning

[28] The learned Arbitrator reasoned:

“6.3 *The only disturbing elements of the evidence relate to the questions of firstly, why the Respondent had to wait for 3 months before launching the charge against the Applicant and, secondly, why the charges were preferred against the Applicant after the latter had written a letter of complaint regarding the status of his employment. The Respondent's conduct in this regard is highly suspect.*

6.4 *Whatever the case may be, the evidence by Themba Ngwenya places the Respondent's conduct at precisely the wrong side of the law. This witness who was the Respondent's witness stated in no uncertain terms that he and other employees committed the same offence as the Applicant by not wearing their helmets when they were performing their duties recently. The organization however did not terminate their contracts of employment but instead they were ordered to pay fines.*

6.5 *Since the Applicant committed the same offence as that committed by Themba Ngwenya and his colleagues, it cannot be fair that Applicant's case be treated differently. There has to be consistency in the application of discipline at the workplace. In addressing this issue, Grogan J, Workplace Law (9th Ed) at p. 162 states that:*

'The fourth general requirement for a fair dismissal is consistency. The Labour courts have for many years stressed the principle of equality of treatment of employees – the so called parity principle. Other things being equal, it is unfair to dismiss an employee for an offence which the employer has habitually or frequently condoned in the past (historical inconsistency) or to dismiss only some of a number of employees guilty of the same infraction (contemporaneous inconsistency).'

6.6 *It is difficult to imagine how Themba Ngwenya’s case could differ from that of Applicant. Both parties were required to wear their protective clothing and both did not. However, some were fined and yet some, like the Applicant had to be dismissed. The unfairness is glaring and cannot be ignored. One is left to conclude that perhaps Applicant’s case was treated differently because he raised the issue of probation with his employer.”⁹*

[29] Mr. Ngwenya was the last witness at the behest of the company. He testified as follows:

“RC: *Would you say not wearing your bullet proof vest was a serious offence in the company?*

RW5: *It is a serious offence and not only the vest but the helmet as well. You had to wear these when carrying out your duties. It’s a serious offence. We went to Pick n’ Pay recently without our helmets and we were disciplined for that.”¹⁰*

[30] He was cross examined in that regard:

“RW5: *They deducted a certain amount of money from our salaries. Once they talk to you and it happens again they will deduct money from your salary because you are unable to follow instructions.*

AC: *Is there anyone who was dismissed for not wearing their helmets in the Pick n’ Pay incident?”*

RW5: *No.”¹¹*

[31] It is this piece of evidence that the learned Arbitrator relied on. From the evidence of Mr. Ngwenya, it is clear that a once-off incident by them for failure to wear their helmets, led to a disciplinary hearing and a verdict of a

⁹ see page 23 book of pleadings paras 6.3 – 6.6

¹⁰ at page 151 of record of proceedings

¹¹ see page 160 to 161 of record of proceedings

fine. The learned Arbitrator held that Mr. Madoda Dlamini ought to have been sentenced likewise.

Legal principles

[32] The parity principle is to the effect that like cases must be treated alike. The court held in **Herholdt v Nedbank (Cosatu as amicus curiae) 2016 (3) SA 224 (SCA)** at para 13 on the procedure to be followed by a review court:

“while the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid “judicial overzealousness” in setting aside administrative decisions that do not coincide with the judge’s own opinions. ...A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.” (my emphasis)

[33] **Ndlovu JA**¹² faced with the parity principle, espoused:

*“[35]. It is trite that the concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law, which are fundamental pillars of administration of justice. In Australian decision in **Green v The Queen [17]** it was said that “the parity principle is an aspect of the systematic objectives of consistency and equality before the law – the treatment of like cases alike, and different cases differently*

*[36]. This principle, also referred to as the ‘parity principle’, was aptly enunciated in **National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd (1994) 15 ILJ 1257 (A)** where the court stated at 1264 A-D:*

‘Equity requires that the courts should have regard to the so-called “parity principle”. This has been described as the basic tenet of fairness

¹² in **ABSA Bank Ltd v Naidu & Others (DA 14/12) [2014] ZALAC 60 [2015] 1 BLLR 1 [LAC]; (2015) 36 ILJ 602 (LAC) 24 October 2014** at para 35

which requires that like cases should be treated alike (see Brassey “The Dismissal of Strikers” (1990) 12 IJL 213 at 229-30). So it has been held by the English Court of Appeal that the word “equity” as used in the United Kingdom statute dealing with the fairness of dismissals, comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment” (Post Office v Feennell (1981) IRLR 221 at 223). The parity principle has been applied in numerous judgments in the Industrial Court and the LAC in which it has been held for example that an unjustified selective dismissal constitutes an unfair labour practice’.”

[35] The learned Justice proceeded:

“[36] However, it ought to be realized, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:[19]

“[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.’

[37] *In SACCAWU and Others v Irvin and Johnson (Pty) Ltd [20] this court (per Conradie JA) stated: [21]*

‘In my view too great an emphasis is quite frequently sought to be placed on the principle of disciplinary consistency, also called the ‘parity principle’ ... There is really no separate principle involved. Consistency must be measured by the same standards... Discipline must not be capricious. It really is the perception of bias inherent in selective discipline that makes it unfair. Where, however one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercise his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of

wrong decision. In a case of plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy. ...Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. ...If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not ... necessarily mean that the other miscreants should escape. Fairness is a value judgment'."

[36] It is the above principles that are at the backdrop of my mind as I set to determine the issues raised in the case at hand.

Sub issue

The question for determination was whether Madoda's case was similar to Ngwenya's who forgot to put on the helmet once when going to Pick n' Pay.

Determination

[37] Firstly, the five witnesses arraigned before the learned Arbitrator by the company were in unison that Mr. Madoda Dlamini declined to wear the vest from the onset. The first witness Mr. Scott-Long testified:

"293 knew and they had spoken to him about it and he just ignored it. He just ignored it. And, like I said, I just could not understand why somebody who has three children and a family to support doesn't want to wear proper protective clothing because if there was a problem, he would not be covered by insurance. He would not get paid out and then his family would sue me for not making sure that he was wearing a vest."

[38] The second witness gave evidence as follows:

“RW2: *I recall it was in 2012 I gave Madoda Dlamini a vest. It’s a bullet proof vest.*

RC: *Did Madoda take the bullet proof vest?*

RW2: *He took it sir. There are certain things he said when he took the vest.*

RC: *What did he say?*

RW2: *He was the kind of person who liked to complain. He complained about the vests in particular and wanted to know who had inspected them. I advised him to take the vest and use it. He did take it but he wanted to know who had inspected the vests to make sure they were fit for their function.”¹³*

[39] He maintained his evidence under cross-examination. The third witness testified:

“RC: *As a person you worked with him most of the time, could you please tell the Commission if he wore a vest?*

RW3: *He wasn’t wearing a vest because he said he needed to get a letter from the doctor first stating the weight of the vest would accommodate the weight of his body. He also stated at one time that he wasn’t feeling well. And that he would get a letter from the doctor stating whether he should or should not wear the vest.*

RC: *Were there any other reasons he advanced for not wearing the vest?*

RW3: *He said the vest was not good enough for him. He said if he had to wear the vest without a letter from the doctor, he might as well resign.”¹⁴*

[40] The fourth witness stated under oath:

“RW3: *Dlamini had been given a vest by the tailor. Unfortunately Dlamini didn’t use it. I had just arrived at the time and didn’t have a vest. I then asked Dlamini to borrow me his vest because he wasn’t using it. One morning, I cannot recall when it was exactly,*

¹³ at page 100 to 101 of record or proceedings

¹⁴ at pages 119 – 120 of record of proceedings

I came across the Director, Mr. Scott-Long while we were leaving the premises. He asked me if I had a vest. I told him I didn't have a vest but at the moment I was using Mr. Dlamini's vest. He asked why Dlamini wasn't using the vest. I told him I don't know why he didn't use it but I once heard him complain about the weight. He would say the weight was not the right weight to be worn by a person. That was it.

RC: Who did he complain to?

RW3: He was just talking to us.

RC: In short when you got to Mbabane you used Madoda's vest. Is that your evidence?

RW3: Yes.

RC: Did he tell you personally why he would not wear the vest such that you asked if you could use it?

RW3: He would say he would not wear the vest because it had not been tested to make sure it could be worn. In fact he complained a lot about the weight.”¹⁵

[41] The fifth witness, Mr. Ngwenya himself testified:

“RW5: We would travel in one vehicle. He used to complain about his vest and would say these vests should be weighed according to a person's body weight. He would say he was unable to wear his because it had not been weighed.

.....

RC: Who did he tell he would not wear the vest as far as you know?

RW5: Those of us who worked with him and it became well known until it eventually got to management. He would often tell us that he would not wear the vest because it had not been weighed. We would just wear the vest as we had been instructed to do so by

¹⁵ at pages 131 – 132 of record of proceedings

management. We didn't know that it had to be weighed first before you could wear it.

RC: Madoda told the Commission that he was never issued with a vest. He never had one that is why he didn't wear it.

RW5: No he did have a vest. It was eventually given to someone in Matsapha, a fellow employee because it was not being used.”¹⁶

[42] From the above, it is clear that Mr. Madoda Dlamini refused to put on the vest from the onset. In fact, he never intended to wear the vest according to the evidence herein. The refusal by Mr. Madoda Dlamini to wear the vest was not a once off incident as that defined by Mr. Ngwenya. In fact, Mr. Ngwenya's testimony on the Pick n' Pay incident was meant to emphasise management's importance on wearing a protective gear during operation.

[43] In the result, it was erroneous of the learned Arbitrator to hold that parity principle was applicable in the present case as Mr. Madoda Dlamini and Ngwenya's cases were at disparity in terms of their aggravation. It is noteworthy that it was common cause that Mr. Madoda Dlamini never wore his vest from the day of his employment. The evidence both from cross-examination of the company's witnesses (see para 26 herein) and Mr. Madoda Dlamini's responses (see para 46 herein) cumulatively demonstrates clearly that Mr. Madoda Dlamini never intended to use the protective gear at all while under the employ of the company. In this regard, the parity principle does not apply.

[44] Secondly, the learned Arbitrator ought to have considered that from the onset, the company's version was that all employees who failed to wear their vests were dismissed as that was considered a serious misconduct.

¹⁶ see pages 150–151 of record of proceedings

[45] Mr. Madoda Madoda was cross examined:

“RC: *It transpired that the driver of the vehicle, Peter Dlamini, company number 1007 on that particular Saturday was not wearing a vest whereby E105,000 was stolen from us. And he was dismissed for the offence of not wearing a vest. Do you Remember?*

AW1: *We were informed that that incident had occurred. As to who was wearing or not wearing we do not know. We were not told about that. We were just informed that such an incident had occurred.*

RC: *But you are aware that Peter Dlamini was dismissed from Cash Security. He was dismissed after you had been employed. I think it was around November?*

AW1: *I don’t recall. As I have mentioned that I did not take note of certain things.”¹⁷*

“RC: *You heard about these incidents Nkhosi. About the Grow More incident yes he did submit a reason for not wearing his vest which he said he had washed, and indeed it was at the office it had been washed. Didn’t the occurrence of these incidents prompt you to try to get your own vest if you were not given a vest? These people were dismissed after you were employed and you heard about it. Didn’t it prompt you to get your own vest?”*

[46] Mr. Madoda Dlamini responded to the last question:

“AW1: *I didn’t look for a vest. Just as I explained that I will not follow up with a person who knows what should be done. And just because someone had been killed or whatever then that means it would frighten me into running around looking for a vest. And yet you know very well as the Employer that you are supposed to provide me with this.*”¹⁸

[47] Mr. Scott-Long revealed:

¹⁷ at pages 55 – 56 of record of proceedings

¹⁸ at page 57 of record of proceedings

“RW1: I’ve seen Fidelity guards wearing them. And I am pretty sure I’ve seen Swaziland Security Services wear vests. So it’s the norm. It’s not something that is abnormal. It’s normal. Because you must understand that for insurance if you’re not wearing the protective clothing, then you are not eligible for the cover. So at the end of the day you will not be paid out. If you are injured or killed you would not be paid out if you are not wearing a vest. And that is why I’ve been so tough and so stringent on the fact that I wanted the vests to be worn at all times. And I don’t know if Mr. Dlamini is aware of it but I’ve dismissed two people before him for the same offence; for not wearing a bullet proof vest. I dismissed them. And one of them told me he had doctor’s orders. I said alright bring me the letter and I’ll pay you out because you are not going to work for me.”¹⁹

[48] Mr. Middleton also testified:

“RC: Are you aware of any employees that have been dismissed for not wearing a vest at Cash Security?

RW3: Yes I am.

RC: How many do you recall?

RW3: Two.

RC: Would the MD address you during the parades?

RW3: Yes he would.

RC: Madoda told this Commission that the issue of the vest was never emphasised at the parades. What can you say about that?

RW3: It’s said to us almost every day that we must make sure we wear our vests.”²⁰

[49] Mr. Ginindza also testified:

¹⁹ see page 71 of record of proceedings

²⁰ at pages 121 – 122 of record of proceedings

“RC: *If you can recall was the importance of wearing the vest ever talked about the parade?*

RW4: *Yes it was talked about a lot especially after the death of a colleague of ours who was stationed at Matsapha. He was shot at. The issue of wearing vests was strongly emphasized.*

RC: *Are there any other employees of Cash Security that have been dismissed for not wearing the vest at work?*

RW4: *Even if I cannot recall them all but I do not recall two or three. There was Peter Dlamini who was based at Manzini. Another one was based at Matsapha his name was Bernard Dlamini.”²¹*

[50] Had the learned Arbitrator considered the above evidence, he would have appreciated that the company dismissed employees who failed to wear vests because they posed a risk to the company. He would have considered that the verdict of dismissal was therefore appropriate and did not violate the parity principle but was rather consistent with the parity principle as demonstrated above.

[51] Thirdly, the learned Arbitrator considered that Mr. Madoda Dlamini did not put to use his vest from date of employment and wondered why the company waited for such a prolonged period before charging him. What was critical in the period of charge is when the company became aware of the misconduct of Mr. Madoda Dlamini.

[52] Mr. Scott-Long testified in respect of when he became aware of Mr. Madoda Dlamini’s refusal to use the vest:

“RW1: *I’ve known Brian for many years and I transferred him from Nhlangano to Mbabane. They leave the equipment there, the vest and helmet stay in Nhlangano they came down here and they then take a vest or helmet here. They don’t walk around with a vest and*

²¹ see page 133 of record of proceedings

helmet you understand. So when I saw him I said that vest looks a little bit big or something and he said, 'no I got it from Madoda Dlamini'. I said 'what? 'what is he wearing'? You see, that is how I personally found out.

RW1: I think I dismissed him in January. Didn't I dismiss him in January for not adhering to my, I believe we had a hearing. We did have a hearing.

AC: Yes that is correct Mr. Scott-Long. I am saying do you remember the date when you saw 1075 wearing Mr. Madoda's vest?

RW1: No look it must have been sometime in January or February sometime early February I don't know. It's when I became aware of the problem because up until then I wasn't aware there was a problem. I then wanted to find out why was this happening, what was going on? That is when I found out but I don't know the dates or anything. I can't remember."²²

[53] From Mr. Scott-Long's evidence, as soon as he learnt that Mr. Madoda Dlamini was not using his vest, he jumped into action. It so happened that it coincided with the receipt of the letter by Mr. Madoda Dlamini demanding that he be employed permanently. The witness clarified:

"RW1: I am not sure. I wouldn't have thought so because here I'm responding by apologizing for the overweight on our part and that's when I brought up this because I would have gone to operations and said 'what about a contract'? And they would have said 'but Mr. Scott-Long he's not following operations procedures. So why give him a contract?' So that is why I put this in here.

AC: So Mr. Scott-Long it is your evidence now before the Commission that in response to this letter you issued out the ...

RW1: The following letter on the 24th January, one day later. He was suspended from duty without pay indeed because I'm going to investigate this allegation that he's not wearing a vest."²³

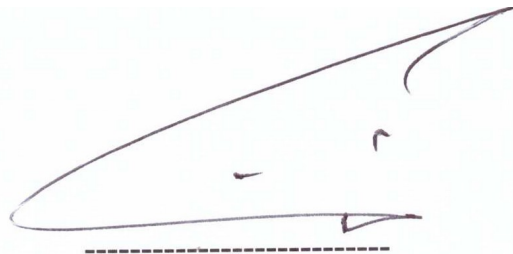
²² at pages 87 – 88 of record of proceedings

²³ at pages 90 – 91 of record of proceedings

[54] In the result, the company cannot be faulted. The learned Arbitrator misdirected himself in this regard.

[55] In the result, the following orders are entered:

1. The applicant's review application succeeds;
2. The learned Arbitrator's award dated 12th January 2016 is hereby reviewed, corrected and set aside;
3. The learned Arbitrator's verdict is to read as follows:
 - 3.1 Madoda Dlamini is hereby dismissed;
4. Each party to bear its own costs.

A handwritten signature in dark ink, appearing to be 'M. Dlamini', written over a light blue background. The signature is fluid and cursive, with a long horizontal stroke at the bottom.

**M. DLAMINI
JUDGE**

For Applicant: W. Maseko of Warring Attorneys

For Respondents: H. Mkhabela of Mkhabela Attorneys