

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 43/98

In the matter between:

THEMBA SIMON LUKHELE

APPLICANT

and

GUARD ALERT SECURITY SERVICES

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: O. NDZIMA

FOR RESPONDENT

: Z. JELE

JUDGEMENT

28/01/03

The Applicant claims maximum compensation and payment of terminal benefits emanating from alleged unfair termination of his employment by the Respondent Guard Alert Security Services.

In terms of the particulars of claim, the Applicant was employed by the Respondent on the 10th December 1993 as a security guard. He remained in continuous employment of the Respondent until the 27th November 1997 when he alleges he was verbally dismissed by the Respondent.

The Respondent in its reply admits employing and dismissing the Applicant as above said, save to state that the dismissal was in writing but not verbal.

1

The Respondent adds in its reply that the dismissal was because of sleeping on duty on the 20th November 1997 inspite of three written warnings for poor work performance in the period between June and November 1997.

That he was brought before a disciplinary hearing wherein he was found guilty for the alleged offences.

The Applicant testified under oath in court wherein he confirmed the particulars of his employment as contained in the particulars of claim. He denied that he had been sleeping on the 27th November 1997 stating that his radio call was not functional and so he could not receive nor respond to radio messages from the employer aimed at checking whether he was awake and alert while on duty. He told the court that he had previously reported the malfunctioning of the radio but instead he was blamed for the fault and no assistance was given to him to remedy the situation.

This was the reason why he was dismissed but not that he was not performing his duty nor was he ever found asleep on duty. As concerns the warnings, he says, he was coerced to sign them by Mr. Simon Dzimba or else he would be dismissed. The warnings were never discussed with him prior to the signing.

He insisted that he was unlawfully and unfairly dismissed.

At the time of dismissal he earned E647,40 per month. He was married and had two children who depended on him. He was still unemployed and had suffered loss of earnings and damage to his career.

Under cross examination he said one, Mr. Dzimba dismissed him for continuously sleeping on duty and for breaking a two way radio.

He reported the grievance to Mr, Meshack Mabuza a union official and to the office of the Labour Commissioner. The matter was discussed and not resolved. A certificate of unresolved dispute was then issued.

2

The Respondent called one, Mbuso Mandla Mavimbela to testify on the matter. He was the Operations Manager of the Respondent. He was employed in 1994. He was responsible for recruitment of security guards and to supervise their work. Before recruitment the employees underwent a security check with the Police. Upon getting Police clearance, a recruit was trained for 3 months. Deployment followed thereafter and a written contract was entered into. Though he was not employed in 1993 when the Applicant was employed, he told the court that the Applicant must have signed a contract of employment and in terms of Clause 15.4,7 thereof, a guard was liable to summary dismissal for sleeping on duty.

He did not personally deal with the case of the Applicant and the manager who had done so Simon Mandla Dzimba had since died. He was still alive when the hearing of the case was commenced.

The witness said that he worked in the administrative department when the Applicant was dismissed and he was aware the Applicant had a two way radio while on duty.

The guards including the Applicant were given a clocking device, to show from time to time that they were not asleep. The device would indicate what time the clocking was done. The results would be collected in the morning. He told the court that Themba's clocking record was very poor, hence he was given several warnings. In the last case, a disciplinary hearing was held for poor work performance upon which his services were terminated. The device was not produced before court.

He identified the warnings signed by the Applicant and were kept in his file.

He was not party to the decision to dismiss the Applicant nor was he involved in the disciplinary hearing.

3

The witness was not sure if the signatures on the warnings were those of the Applicant. He did not also attend the conciliation meetings at the Labour office. The witness solely relied on information he had been told by the late Mr. Dzimba who dealt with the case of the Applicant.

He had no personal knowledge of any disciplinary hearing conducted in case of the Applicant. Again he relied on hearsay evidence. He agreed he had no knowledge whatsoever of the circumstances leading to the dismissal of the Applicant. The Applicant denied that any hearing was conducted and denies sleeping at work at all.

Upon a careful consideration of the case, it is unsafe to rely on the evidence of Mr. Mandla Mavimbela as the same is purely hearsay. He admits lack of personal knowledge of the reasons for the dismissal of the Applicant other than what he heard from other people.

In terms of Section 42 (a) and (b) of the Employment Act, the Respondent bears the onus to prove that the Applicant was dismissed for a reason permitted by Section 36 of the Act. The Respondent further has the onus to show that it was fair and just to dismiss the Applicant in the circumstances of the case. The Respondent has failed in both these respects.

The Applicant was thus unlawfully and unfairly dismissed. Considering that he had served the Respondent for a period of four (4) years, that he had suffered financial loss and hardship as a result of the dismissal, that he had dependants who equally bore the blunt of the unfair decision and had not found alternative employment, and considering that this matter was brought to court when the 1996 Act was still in operation and thus the Act is applicable to the case in respect of compensation, the court awards him ten (10) months salary as compensation for unfair dismissal in the sum of E6,474.00.

4

The Applicant is further awarded:

Notice pay	E 647,40
Additional Notice	E 298,80
Severance Allowance	E 747,00
TOTAL	E8,166.40

No order as to costs. The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

5