



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 370/10

In the matter between:

BONGANI SHABANGU

Applicant

and

ITALIAN SCORPION SECURITY

Respondent

Neutral citation : Bongani Shabangu vs Italian Scorpion Security
[370/2010] [2018] SZIC 128

Coram : **L. MSIMANGO – ACTING JUDGE**
[Sitting with Mr. P.S. Mamba and Mr. E.L.B.
Dlamini Nominated Members of the Court]

Date Heard : 22nd August 2018

Date Delivered : 21st November 2018

SUMMARY: The Applicant was dismissed by the Respondent without a hearing, after challenging his transfer by the Respondent from the position of Training Officer to that of Security Guard. The Applicant appealed the dismissal however, the Respondent did not entertain the appeal.

JUDGEMENT

- [1] The Applicant has applied to the Honourable Court for determination of an unresolved dispute, claiming against the Respondent compensation for unfair dismissal and salary underpayment.
- [2] The Respondent filed a Notice of Intention to oppose the application and a reply to Applicant's statement of claim.
- [3] The matter was to be heard on the 22nd and 23rd August 2018. However, the Respondent did not appear in Court on the allocated dates, and there is proof in the file that the Respondent was served with a notice of set down by Applicant's representative on the 17th August 2018. The matter was then referred to ex parte trial.
- [4] The Applicant testified that he was employed by the Respondent as a Training Officer on the 28th April 2008, and was in continuous employ of the Respondent until he was dismissed on the 20th October 2009. His duties were that of a Training Officer, which he performed from Monday to Friday, and on weekends he worked as a Security Guard, after being

requested to assist by the Respondent on the basis that the company was understaffed.

[5] The Applicant wrote a letter to the Respondent complaining about not being paid for the extra duties which he performed. The letter is annexure “BSI” on Applicant’s bundle of documents.

[6] After being served with the letter by the Applicant, the Respondent then transferred the Applicant from the position of Training Officer to that of Security Guard. The Applicant did not accept the transfer, and requested that he be given time to consult with the Department of Labour, where he was advised to write a letter to the Respondent requesting that the transfer be made in writing to incorporate the changes in the employment terms and conditions. The letter is annexure “BS3” on the bundle of Applicant’s documents.

[7] When the Applicant served the Respondent with the letter, the Applicant was verbally advised to go home and come back on the 14th October 2009 to face a disciplinary hearing. When the Applicant came back on the said date, the disciplinary hearing was postponed to the 22nd October 2009.

- [8] On the said date the Applicant was served with a dismissal letter by the Respondent. He was dismissed for being absent from work for a period of 9 days between the 6th and 14th October 2009. The letter is annexure “BS5” of Applicant’s bundle of documents.
- [9] The Applicant testified further that, at the time of his dismissal he was earning a monthly salary of E900-00 (Nine Hundred Emalangeni) and that since the commencement of the position of Security Officer, Applicant was underpaid by E31-76 per shift having been paid E30-00 for each shift instead of E61-76 per shift. The Applicant did bring forward the issue of the underpayment to Management but there was no response.
- [10] The burden of proof lies on the Respondent to prove that the Applicant was fairly dismissed. The cause of Applicant’s action is based on a substantively and procedurally unfair dismissal. On the Applicant’s unchallenged evidence, the Applicant testified that the Department of Labour advised him to write a letter to the Respondent challenging the demotion, which he did. When the Applicant served the Respondent with the letter, he was told to go home and come back on the 14th October 2009 to face a disciplinary hearing. When he came back on the said date the hearing was then postponed to the 22nd October 2009, wherein the

Applicant was served with a dismissal letter without being afforded a hearing.

[11] In the circumstances, and in the absence of any explanations or justification for the Applicant's dismissal by the Respondent, the Court finds that the termination of the Applicant's services was substantively and procedurally unfair for the following reasons:-

- (a) The Respondent failed to formally charge the Applicant with the charge of unjustifiable absenteeism.
- (b) Failed to convene a hearing on the charge preferred against the Applicant, whereat the Applicant was to present his side of the story either by himself or through his representative in line with the rules of natural justice (in particular the audi alteram partem rule).
- (c) Failed to allow the Applicant the chance to appeal his conviction and consequent dismissal.

[12] The Applicant submitted that he was dismissed for being absent from work for a period of 9 days, between the 6th and 14th October 2009. It was Applicant's evidence that he was not absent on those days as alleged by the Respondent. It was the period where the Respondent told him to go home to await a disciplinary hearing. The Applicant testified that even though he was told to go home by the Respondent, he used to come

to work but was not assigned any duties because another Security Officer had been employed to replace him.

[13] In terms of Section 42 (2) of the Employment Act, it is stated that:

“The services of an employee shall not be considered as having been fairly terminated unless the employer proves;

(a) that the reason for the termination was one permitted by Section 36 and

(b) that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

[14] While the offence of absenteeism is provided for by Section 36 (f) of the Employment Act, the Respondent failed to adhere to the requirements of Section 42 (2) (b) of the same Act.

[15] A fair labour practice on the part of the Respondent should have been to formally charge the Applicant under Section 36 (f) of the Employment Act, then later call the Applicant to attend a disciplinary hearing on the charge preferred against him, and if found guilty, allow the Applicant to appeal the sentence meted against him.

[16] In the case of THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION VS DLAMINI AND ANOTHER – INDUSTRIAL COURT OF APPEAL CASE NO. 14/2015, Mamba A.J.A. opined that:

“A hearing is always a must or pre-requisite where the decision to be taken would adversely affect or impact on the rights of a person to a dispute or decision making process. The principle is grounded on the notion of natural justice or procedural fairness, namely that; a person may not be condemned before he is given the opportunity to be heard on the issue under consideration.”

[17] In the case of WALIGO ALLEN VS NATIONAL EMERGENCY RESPONSE COUNCIL ON HIV AND AIDS – INDUSTRIAL COURT OF APPEAL CASE NO. 10/17, FAKUDZE A.J.A. quoted His Lordship Maphalala M.C.B. (as he then was) stating that:

“it is well settled that procedural fairness is the yardstick to determine whether the employer has conducted the hearing fairly and justly before imposing the penalty. The requirements of procedural fairness were developed by the Courts from the rules of natural justice, and they have nothing to do with the merits of the case. Procedural fairness requires the employer to act in a semi-judicial manner before imposing a disciplinary penalty on the employee. This involves an investigation by the employer to

determine whether grounds exist for dismissal and whether the employee was notified of the allegations against him. The employee should be allowed the opportunity to state his case before an impartial presiding officer or tribunal.”

[18] Given the facts of this case a justifiable conclusion can only be that, under the circumstances Section 42 (2) of the Employment Act was not adhered to, thus the consequent dismissal of the Applicant from work by the Respondent was not only arbitrary, but was also substantively and procedurally unfair. The Respondent opted not to attend Court in order to dispute that the dismissal was not executed in the spirit of the Employment Act, and was also not in accordance with fair labour practices.

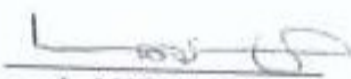
[19] The Applicant was not paid any terminal benefits and as a result of the unfair dismissal of the Applicant by the Respondent, the Applicant suffered financial loss resulting in hardship to himself and his dependents.

[20] We therefore enter judgement against the Respondent for payment to the Applicant as follows:-

5 Months Compensation	-	E9 264-00
1 Month Notice Pay	-	E1 852-80
Unpaid Salary for October 2009	-	<u>E2 468-80</u>
Total	-	<u>E13 585-60</u>

[21] The Applicant is awarded costs at an ordinary scale.

The Members agree.



L. MSIMANGO
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. Z.K. Mnisi
(S.P. Mamba Attorneys)

For Respondent : No Appearance