



**CONCILIATION, MEDIATION & ARBITRATION COMMISSION
(CMAC)**

HELD AT MANZINI

SWMZ 474/14

In the matter between:-

BONGANI A. MAPHANGA

APPLICANT

And

V.I.P. PROTECTION SERVICES (PTY) LTD

RESPONDENT

CORAM:

Arbitrator

: Ms K. Manzini

For Applicant

: Mr. Z. Nhleko

For Respondent

: Mr. D. Hlophe

Dates of Arbitration

: 27\05\15, 18\06\15,
08\07\15, 27\07\15, 11\08\15,
18\09\15

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

- 1.1. The Applicant herein is Mr. Bongani Maphanga, an adult Swazi male, and resident of Logoba area within the Manzini Region. The Applicant was represented by Mr. Zwelakhe Nhleko, a Labour Consultant.
- 1.2. The Respondent herein is V.I.P Protection Services (Pty) Ltd, a company duly registered in terms of the laws of Swaziland, and having its principal place of business at the Matsapha Industrial Site, Manzini Region. The Respondent was represented by Mr. Douglas Hlophe, its Human Resources Manager.

2. ISSUES IN DISPUTE

- 2.1. According to the Certificate of Unresolved Dispute filed herein, No. 566/14, this is a matter of alleged unfair dismissal. The Applicant makes the following claims:-
 - i. Notice Pay - E1, 754.88
 - ii. Maximum compensation for unfair dismissal - E21, 058.56
- 2.2. The Applicant claims that he was dismissed in a manner that was both substantively and procedurally unfair. The Respondent alleged on the other hand, that the Applicant had deserted his work, and had therefore left on his own accord.

3. SUMMARY OF EVIDENCE

3.1. THE APPLICANT'S CASE

- 3.1.1. Mr. Maphanga testified under oath that he was employed by the Respondent company on the 17th of May,

2011. He stated that he was employed to work as a Security Guard and had been dismissed on the 3rd of April, 2013. He stated that at this time he had earned a salary of about E1,700.00 per month.

3.1.2. The Applicant testified that he is not entirely certain of how the employment relationship was terminated, but all that he does know is that the employment relationship was not severed in a lawful manner as he was not issued with a letter of dismissal. He stated that he had asked for some time off work as he had lost a relative, but his Supervisor had told him that management had not authorized the leave to go and bury his uncle. He was told to attend the night vigil, and to proceed to report for work the next morning. The Applicant stated that he had indeed done this.

3.1.3. The Applicant testified that he had proceeded to work on the Saturday and on that Sunday which was the 1st day of April, 2013. He stated that whilst he was on duty, at about 12 noon, he had received a call from home, and he was told that his uncle's family needed the money that had been collected as donations from his church. The Applicant stated that this money had been placed in a safe place at his place of abode. Mr. Maphanga stated that he had explained his predicament to one of the employees at the site that he had been guarding (a Water Service Corporation depot situated at Ka Shali, Manzini) and duly left the site so that he could collect the money from his home and take it to his uncle's home. According to the Applicant the employee of the Water

Services Corporation had said that he could go, and had undertaken to ensure that the guard who was meant to relieve him in the evening shift would arrive earlier.

3.2. The Applicant testified that he had been due to take some days off, and had been scheduled to resume work on the 3rd of April, (a Wednesday), hence he left on the 1st of April, 2013, only to return to work on the 3rd of April, 2013. He stated that upon his return he, found that a guard had been posted in his stead at his regular site. He stated that he could not even sign in for work, as the replacement guard had already signed in the designated slot.

3.3. The Applicant stated that he had then proceeded to go and enquire about this from the Supervisor Mr. Gamedze, who had told him to go and speak to the Manager, a certain Mr. Kunene. According to the Applicant the Supervisor had proceeded with his routine tasks of going to drop off other Security Guards at their respective posts. He stated that he had attempted to meet with the Manager to discuss his predicament, but he had refused to speak to him in the absence of his Supervisor. He stated that he had brought a letter with him that had sought to explain the unscheduled departure from his post on the 1st of April, 2013, but the Manager had refused to accept it; so he had left and had delivered the letter to the Respondent's Head Office in Matsapha. He stated that he had left the original letter with the Human Resources Officer, and had kept a copy for himself. He handed the copy in as part of his evidence. He did point out that he had

simply left the letter (original) in a box in the Human Resources Office as he had not found anyone inside the office. He stated that the box was usually used by them to leave any correspondence that they might wish to deliver to that office.

3.4. The Applicant testified that on the 19th of August, 2013, after a long wait without hearing from his employer, he had written another letter wherein he requested the employer to deal with his matter as he had been at home, and away from work during the four months period. He stated that he had given his employer seven days as an ultimatum, within which period, he expected some form of communication from them. He explained that he had never been called to a disciplinary hearing to answer to any charges of alleged misconduct. The Applicant lamented that the employer had not bothered to respond to this letter either. He stated that this had then led to his decision to lodge a dispute of alleged unfair dismissal. In his submissions he prayed for an award in terms of the claims in the Certificate of Unresolved Dispute, and further stated that he is a married man with a child who is 20 years of age, and has completed high school.

3.5. During cross-examination the Respondent's representative asked the Applicant why he alleged that he had not received any response at all from the employer when he attempted to engage them about his employment status? The Respondent's representative put it to the Applicant that he had been instructed that the Respondent had dealt with attorneys from the office of V.Z. Dlamini who had been acting on the Applicant's behalf. The

Applicant confirmed that he had instructed the attorney, Mr. Velaphi Dlamini, and stated that he also could not deny that Mr. Dlamini had actually attended a meeting at the Respondent's premises at his behest. He stated however, that he had experienced problems in that he had been unable to pay his attorney's legal fees.

3.6. The Respondent's representative also put it to the Applicant that he was in possession of copies of letters that had been written to the said attorney by a Mr. Mbonane who had been employed by the company as its Personnel Officer. He also put it to the Applicant that he had been instructed that there was only one letter that the Applicant had personally written to the Respondent. The Applicant stated that he could not deny any of this, but as far as he was concerned, he had left several letters at the Respondent's Head Office.

3.7. The Applicant was also asked what the company procedure was regarding entries that had to be made in the Occurrence Book (O.B.) when a Security Guard clocked in and out at a particular site? The Applicant acknowledged that the company procedures required that a Security Guard had to sign in when reporting for duty, and also sign out when knocking off. He acknowledged also that each Security Guard had to do a formal hand-over to the Security Guard who came onto the shift following his own, and conceded that on the 1st of April, 2013 he had not done any of this.

3.8. The Applicant also conceded that according to company procedures he was wrong to ask for permission to leave this post from the client (the employee of the Water Services Corporation). The Applicant was referred to a letter (dated 2nd April, 2013) which had been written by him to the Manager of the Respondent wherein he lamented that he had asked for unpaid leave to attend his uncles funeral, and the Supervisor, Mr. Gamedze had refused him such permission. He also stated in the said letter that on Sunday the 1st of April, 2013 he had left his post at 13:00 hrs after being released by Mr. Nkambule (the Water Services Corporation employee) as he had not been feeling well. The said letter also stated that the whole debacle had been caused by the Area Manager, Mr. Kunene. The Applicant acknowledged that indeed this letter had been written by him.

3.9. The Applicant conceded that the Government Gazettee for the Security Guard does not cover the death of an uncle as being one that entitled an employee to go on compassionate leave.

3.10. During re-examination the Applicant insisted that he had not only tried to explain his unscheduled departure from his post, but also that the employer had not taken any steps to meet with him so that he could explain his side of the story. He insisted that he had written letters, but the employer had not responded to these.

3.11. **THE RESPONDENT'S CASE**

3.11.1. **THE TESTIMONY OF MR. MELUSI MBONANE**

- 3.11.2. The witness testified under oath that he had been employed as the Respondent's Personnel Officer from the 1st of March, 2013, up until November, 2013 when he left to take up employment elsewhere.
- 3.11.3. The witness referred to a letter which he had written for the attention of Mr. Velaphi Dlamini of V.Z Dlamini Attorneys, which letter is dated the 11th of September, 2013. He explained that he had been instructed by the Respondent's Managing Director, Mr. Grobler to work on the matter, as the Applicant had written to the employer. The witness stated that he had then conducted an investigation so as to get to the bottom of the matter and had requested the Area Manager, Mr. Kunene as well as the Supervisor, Mr. Gamedze to write reports on the issue of the Applicant.
- 3.11.4. According to the witness, he had been informed in the respective reports, which he handed in as part of his evidence that the Applicant had deserted his post at the Water Services depot which is situated at KaShali in Manzini. He stated that as he was working on the matter, he had received a telephone call from the office of the attorney Mr. V.Z. Dlamini, and Mr. Dlamini had informed him that he was acting on the Applicant's behalf. He stated that he had informed Mr. Dlamini that the Applicant had deserted his post, and had disappeared, only to resurface much later.

3.11.5. The witness testified he had also tried to convene a meeting with Messrs Maphanga, Kunene as well as Gamedze. He stated that he had been told by Mr. Kunene that he (Kunene) had tried and failed to locate the Applicant on numerous occasions beforehand. He stated that he had then tried to reach the Applicant telephonically, and had used his own mobile phone, as well the company landline, but the Applicant had not answered any of these calls.

3.11.6. The witness stated that these calls were made on the 9th of April, 2013 when he had been trying to arrange a meeting with all the parties concerned. The witness stated that the calls on the 9th of April, 2013 had been just a means of reminding the Applicant of the meeting but earlier he had spoken to him, and he had agreed to avail himself for the meeting which was scheduled for the 9th of April, 2013.

3.11.7. The witness stated that after this, the Applicant had completely disappeared, and the company had not heard from him until they received communication from the office of V.Z. Dlamini. He stated that he was no longer sure of the exact date, but he did recall that he, as well as a Mr. Msibi, who also worked for the Respondent had attended a meeting with Mr. Dlamini, at his chambers which are situated opposite Mandlenkhosi Building in Manzini. He stated that this had taken place sometime between April and November, 2013.

3.11.8. The witness stated that he had then left the employ of the Respondent company, and at this time (November, 2013) there had been no further communication from either Mr. Velaphi Dlamini, nor the Applicant himself. He stated that it was not true that the Applicant had been ignored by the company. He explained that the Applicant has actually disappeared, and efforts to reach him telephonically had reaped no positive results. He stated that when the attorney, Mr. Dlamini had contacted the company, and had sought to deal with the issue on behalf of the Applicant, he had been relieved that the whole issue could finally be disposed of as they now had a means of contacting, and communicating with the Applicant. He stated that however, this method also eventually fell through as Mr. Dlamini also ceased to represent the Applicant. He stated that he had every reason to believe that Mr. Dlamini had been instructed by the Applicant to act on his behalf as he was an attorney of good repute, and would not, in his opinion bother him with issues that were not his affair.

3.11.9. During cross-examination the witness was asked what efforts he had employed to reach the Applicant apart from the letter dated 11th September, 2013, as well as the phone calls to the Applicant that took place prior to the 9th of April, 2013 ? The witness explained that the office of the Human Resources where he was based worked through the immediate Supervisors of each member of the employment force. He stated that he had then instructed the Area

Manager, Mr. Kunene, as well as the Supervisor, Mr. Gamedze to tell the Applicant to contact his office should he resurface, or if they managed to locate him.

3.11.10. The witness was referred to two letters which had been written by the Applicant, and addressed to the employer. One of the letters is dated the 2nd of April, 2013 and is typed, whilst the other also bears the very same date, and is handwritten. The Applicant's representative put it to the witness that the Applicant had taken steps to explain his absence through these two letters. Mr. Mbonane explained that he had only ever seen the typed letter which had been brought to him by the Managing Director (to whom it had been addressed), and Mr. Grobler had asked him to work on the matter.

3.11.11. The witness was asked if the act of desertion of a post was deemed to be a grave offence by the employer, and what steps had been taken by the witness' office to charge the Applicant with this offence. Mr. Mbonane explained that the offence of deserting a post is indeed viewed as a very serious offence by the company. He explained that at the time he heard of the matter, the company had regarded him still to be an employee who had some issues that had to be addressed, hence the attempt on his part to convene a meeting with the Applicant in the presence of Mr. Kunene as well as Mr Gamedze who were the Applicant's immediate Supervisors. He stated that when this meeting failed to take

off, since the Applicant failed to make an appearance, he had left it in the hands of the Area Manager to charge him. The witness lamented that the Applicant had by disappearing, and failing to attend the meeting, deprived him of the opportunity of being of assistance to him. He stated that he had left the employ of the Respondent in November, 2013 before even getting any positive feedback from Mr. V.Z. Dlamini who had been asked to help the office of the Human Resources office to locate the Applicant. The witness lamented that even this endeavour had borne no fruit.

3.11.12. The witness was asked why it had taken him so long to act upon the issue of the Applicant? The witness stated that he had become aware of the issue in April 2013 and had tried, but failed to sort it out because of the Applicant's non-availability. He stated that it was only when Mr. Velaphi Dlamini contacted his office about the matter that he had again handled the matter since he had been informed by Messrs Kunene and Gamedze that they had tried in vain to find the Applicant. He stated that Mr. V.Z. Dlamini had only sent correspondence to their office in the month of September, 2013, but this contact had been short lived as the attorney had told them later on that he was no longer acting on behalf of the Applicant as he could no longer locate him.

3.11.13. The witness explained that the disappearance of Security Guards from the Respondent's workplace was quite

a common occurrence. He stated that over and above the efforts they had made to locate the Applicant, he certainly did not think that there was more that the Applicant, he certainly did not think that there was more that he had particularly held high hopes of putting finality to the issue when the office of Mr. V.Z. Dlamini had contacted them, and they had actually met with the said attorney, but it seemed that the Applicant had also lost contact with his own legal counsel.

3.11.14. **THE TESTIMONY OF MR. BONGINKHOSI GAMEDZE**

3.11.14.1. The witness testified under oath that he is employed as the Area Supervisor of the Respondent. He stated that he is based in Manzini. He stated that he had been the Applicant's immediate Supervisor when he was employed by the Respondent. The Applicant was based at a Water Services Corporation Depot in Ngwane Park.

3.11.14.2. The witness explained that the last time the Applicant was on duty he had abandoned his post at the KaShali Water Services Depot. He stated that he had received a phone call from the personnel at the said site, who were employees of the Swaziland Water Services Corporation (SWSC), and he was informed that the guard that had been stationed there had disappeared, and the site had been left totally unguarded. He stated that when he arrived at the post he had asked the employees of

SWSC who had been there if the Applicant had informed them that he was leaving, and where he was going? According to the witness, none of the people who had been at the site had known where the Applicant had gone to as he had not told any of them.

3.11.14.3. The witness testified that he had then proceeded to call the Security Guard who had been scheduled to assume the evening shift, to come earlier so as to finish off the Applicant's shift, and to work his own shift as well. The witness stated that he had also asked the substitute Security Guard to get an explanation from the Applicant about his unauthorized departure should he return to the post. According to the witness the Applicant had disappeared from his post in the early afternoon, and at about 3:00 p.m. he had arranged for the site to be guarded by the substitute guard.

3.11.14.4. The witness testified that he had also engaged the boss at the SWSC depot, and he had found out that the Applicant had told him that he was going home to get some money, but had become worried when he did not return to the post within a reasonable time. He testified further that the Applicant knew fully well that he was his immediate Supervisor, and it was only proper that he should report directly to him. He stated that at the Respondent Company there is a set chain of command, where the officers hold different ranks, and this was well

known to the Applicant as he had been trained on these issues.

3.11.14.5. The witness testified that he had spoken to the Applicant when he eventually resurfaced, and he had directed the Applicant to wait for him whilst he delivered other Security Guards directed respective posts. He states that he had informed the Applicant that it was important that they should both go and speak to Mr. Kunene, the Area Manager as he had reported the alleged desertion to his own Superior. He stated that he had thought that the Applicant would wait for him so that he could be given a hearing by his Superiors, and an opportunity to explain his actions.

3.11.14.6. The witness testified that he had asked the substitute Security Guard to write a report, and had asked the same of the Applicant. He stated that the substitute's name is Israel Langwenya. He testified that he had written his own report and had requested that the Applicant should also prepare such a report on the incident, but this did not occur.

3.11.14.7. The witness further testified that it was normal company procedure and a thing which was known by all the Security Guards that they should always make entries in the Occurrence Book (O.B.) which is kept at each post. He stated that it was the duty of each guard to write

down each and every incident that took place at the post which was out of the ordinary. He pointed out that the most important thing was that each guard had to sign in when they reported for duty, and also sign out when they left at the end of their shift. The witness testified that on the day in question, the Applicant had simply abandoned his post and had not written anything in the O.B, but had simply walked away from his post.

3.11.14.8. It was the testimony of the witness that the Applicant had known the chain of command at the workplace, and had no justification whatsoever to then claim that he had informed the superiors at the SWSC depot that he needed to leave his post and go home. He pointed out that the Applicant should have reported this to him, as his immediate Supervisor. He pointed out that at the time of the Applicant's abandonment of the post, he had already buried his uncle, so it was not justifiable for him to simply disappear from work. He stated that the Applicant had not been granted the unpaid leave he had asked for because, it had been his responsibility, as Supervisor to try and find a way of re-working the schedule of the Security Guards, so as to allow him time off. The witness testified that he had been unable to find a way of re-arranging the work-schedule, hence he had not allowed the Applicant to go on unpaid leave.

3.11.14.9. During cross-examination, the witness confirmed that the Applicant had asked him for unpaid leave, but this had been done verbally, and no forms were filled by the Applicant. The Applicant's representative put it to the witness that since the company viewed the abandonment of a post to be a serious offence, they ought to have taken appropriate steps to charge the Applicant with the offence of desertion, but it appeared that nothing was done in this regard. The witness stated that the issue had indeed been serious as even the Management of the SWSC had been aware of it, hence their contract with the client had been on the line. He stated that the Applicant had disappeared from work after he had been specifically asked by him to prepare a written report, and to wait for him to return from delivering the other Security Guards to their respective posts so that they could both speak to the Area Manager. The witness stated that he and the Area Manager had made several attempts to call the Applicant on his phone, and also sent other Security Guards who lived in the same home-area to locate the Applicant so that his issue could be dealt with in a formal manner. The witness lamented that all these efforts had proved futile. He explained that as a result the matter had not been finalized as the Applicant proved difficult to find.

3.11.14.10. The Applicant's representative put it to the witness that in 2010 he had driven the Applicant to his

home after he had been released from hospital, where he had been treated for injuries sustained after being beaten up by thugs whilst on duty. He put it to the witness that he had known very well where the Applicant lived, so he could have simply gone to the Applicant's home if he had been keen to finalise the matter. The witness stated that he could not deny that he had dropped the Applicant at his home in 2010 since that was his job. He did however, point out that the time lapse of three years had affected his memory because he had totally forgotten in 2013 that he had taken the Applicant to his home. He explained that he dropped many guards at their homes, and dealt with quite a large number of them, hence he could not recall their individual homesteads as the guards came and left the employ of the Respondent quite often.

3.11.14.11. The Applicant's representative put it to the witness that he had been instructed that the witness often visited the Applicant's mother's homestead to purchase Baganu (traditional marula alcoholic drink). The witness stated that he had no idea who the Applicant's mother was, and even if he went to her homestead to purchase this drink, he would have no reason to associate the Applicant with the lady from whom he purchased the drink. The witness maintained that he believed that he had employed sufficient means to locate the Applicant after his disappearance as he had called his phone, and

has asked his neighbours who worked at the Respondent company to locate him, but to no avail.

3.11.14.12. The witness was asked if he had told the Applicant to wait for him to return on the 3rd of April, 2013 when he returned to work after allegedly deserting his post, or if he told him to go and see Mr. Kunene, the Area Manager? The witness explained that he had actually asked the Applicant to not only write a report about his unscheduled departure from the post, but also to wait for him so that they could go and meet with Mr. Kunene together. He stated that he had been surprised when he returned from his errands to find that the Applicant had not only failed to write the report, but had also disappeared. He maintained that he had even been told by Mr. Kunene that he had seen the Applicant, but had told him to wait until he had returned from delivering the other Security Guards so that they could all talk together in one meeting, but the Applicant had still disappeared. He stated that to this very day he did not understand what had stopped the Applicant from waiting for him to return as he had been asked to do.

3.11.14.13. The witness stated that he had even given the Applicant a Report Form to complete and had expected to find a full report from the Applicant on his return, but this had not been the case.

3.11.14.14. During cross-examination, the Respondent's witness maintained that he and the Applicant had previously had a very good working relationship, such that he did not believe that the Applicant would not be able to tell him if he had problems that led to his desertion of his post. He stated that even upon his return to work, they had spoken in a cordial manner, and he just could not comprehend why he had failed to write the report he had asked for, and further why he failed to wait for him when he asked him to do so. He further stated that all of the Security Guards were in possession of his cellphone number, hence the Applicant could have contacted him at any given time either before the actual desertion of the post, and even after he had gone missing without a trace.

4. **ANALYSIS OF EVIDENCE AND ARGUMENTS**

4.1. The matter at hand requires a determination on the issue of the alleged unfair dismissal of the Applicant. He alleges that his dismissal was substantively and procedurally unfair. The Respondent's representative on the other hand averred that the Applicant deserted his work, and left the employ of the Respondent of his own accord.

4.2. The evidence of the Applicant is that he did indeed leave his workstation, totally unattended, on the 1st of April, 2013. He said that he did this so as to get some money from his house, to

hand over to his uncle's family. According to the Applicant he had obtained the permission of the bosses at the SWSC depot that he was guarding. He also testified that he proceeded to go on his scheduled off-day and only returned on the 3rd of April, 2013. He stated that he wrote a letter to explain his absence and had brought it along to work with him. He stated that he had been told to see the Area Manager, Mr. Kunene, by his Supervisor Mr. Gamedze, but Mr. Kunene refused to speak with him (and told him he was untrained).

4.3. The Applicant submitted two letters in his evidence as alleged proof that he had tried to reach his employers to explain his absence (one handwritten, and the other typed). Both these letters state that the Applicant did indeed leave his post. He states in the handwritten letter that he had obtained permission to do so from the personnel at the SWSC depot, and that this was occasioned by the fact that he was not feeling well. Both of the letters are dated 2nd April, 2013, whilst one is addressed to the "Managing Director", and the other is simply addressed to the "Manager".

4.4. It is common cause that Mr. Mbonane testified at the arbitration proceedings, and this evidence stood unchallenged that he only dealt with the letter which was addressed to the Managing Director. He testified that through his subordinates, being Mr. Gamedze, and Mr. Kunene, means were employed to find the Applicant, but to no avail. The Personnel Officer (Mr. Mbonane) stated also that he also had occasion to deal with Mr.

Velaphi Dlamini of V.Z. Dlamini Attorneys, in September, 2013 who had been instructed by the Applicant. He stated, however that, the Respondent Company lost track of the Applicant's whereabouts after Mr. V.Z. Dlamini lost track of his own client, and told him that he was no longer representing the Applicant on account of this.

4.5. It is important to note that the Applicant had lamented that the employer had simply ignored him for months on end, and did not even call him for a disciplinary hearing. This is quite interesting, in view of the fact that he did not in his own evidence in chief, even make any kind of mention of the fact that in the month of September, 2013 he had instructed Mr. Dlamini, to act as his legal representative, and that, at his behest, the said attorney had even met with the Management of the Respondent. It is clear that the Applicant, had he not been confronted with this in cross-examination, would have quite gladly left this important piece of puzzle out of the scenario that he sought to portray. The said scenario being that from the period of April, 2013 to the time he reported the dispute the Respondent had not made any efforts to deal with his issue.

4.6. It is common cause that the Applicant did indeed leave his post on the 1st of April, 2013. He himself testified to this fact. It was further confirmed by his Supervisor at the time, Mr. Gamedze. Mr. Gamedze stated that the Applicant had not bothered to alert him of his impending departure from the SWSC post, even though he had his cellphone number. It is mind

boggling why the Applicant decided to report his departure to the personnel of the SWSC depot, with whom he had no employment relationship. He as an employee of the Respondent company, and ought to have notified his own Supervisor of the need to leave the site, so that a replacement could be positioned in his stead even before he left the post.

4.7. It is without a doubt that the Applicant did indeed desert his post. The Applicant knew quite well who his employer had been and, he had no legitimate reason for informing the SWSC personnel, and not his own Supervisor when he left the post. The evidence of Mr. Gamedze, went unchallenged that he had only learnt of the fact that the post had been abandoned by the Applicant when he had been called by the personnel of the SWSC depot to report this fact. This without doubt put the relationship between the Respondent company, and their client being the SWSC, in jeopardy. It is also clear that the reason for leaving the post by the Applicant was not one that was so major as he stated in his evidence that he had left to get some money to hand over to his relatives. It is not clear what the emergency was, and why this whole transaction could not have waited such that it could be completed when the Applicant was off-duty? It is clear also that there is a lot of untruth that is fraught in the entire story, as the letter submitted by the Applicant states that he had left because he was feeling unwell. The evidence of the Applicant in this regard left a lot to be desired, and cannot be trusted.

- 4.8. It is also clear that the Applicant did disappear from the workplace as from the 3rd of April, 2013. Although the Applicant's representative went to great lengths to paint a picture of efforts that were made to get in touch with the employer on the part of the Applicant, this is not evidently the case. The only evidence the Applicant could point to were the two letters which both bore the date of 2nd April, 2013. The Applicant did not bother to shed light on what stopped him from writing the report that Mr. Gamedze required of him, given the fact that he was handed a Report Form. It is also not clear what constrained the Applicant from waiting for Mr. Gamedze to return from delivering the other guards to their various work stations, so that they could go and meet with Mr. Kunene, the Area Manager together.
- 4.9. It is in itself surprising that the Applicant walked away from his post on the 1st of April, 2013 without his employer's knowledge, and proceeded to take his "off-day" and returned to work two days later being the 3rd of April, 2013. This was obviously a man who did not take his work very seriously. It is also clear that the issue of taking the money to his relatives could have been taken care of on his "off-day" which according to the Applicant, was on the 2nd of April, 2013 which is the very next day.
- 4.10. The Applicant proved to be quite elusive to the Respondent in that he managed to evade their efforts to get hold of him either telephonically or by way of sending his neighbours to look

for him. It was the evidence of Mr. Mbonane that he did in fact get a hold of the Applicant once, and did set up a meeting which had been scheduled for the 9th of April, 2013, but he failed to attend the said meeting.

4.11. This is clearly a case of an employee who terminated his own employment with the Respondent. According to the Court in ***Alpheous Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (I.C. Case No. 382/04)*** at pages 9 -10, para 24;

"Absenteeism differs from absconding or, as it is more often described, desertion from work. Absenteeism is merely an unexplained and unauthorized absence from work, whereas desertion means unauthorized absence with the intention never to return. Both absenteeism and desertion are breaches of the contract of employment, but desertion is a repudiation of the contract. In other words, the employee's desertion manifests his intention no longer to be bound by his contract of employment. This repudiation does not by itself bring the employment to an end. The employer has an election whether to accept the repudiation and to bring the contract to an end, or hold the employee to the contract".

4.12. From this statement of the law, it is clear that it is the act of the employer who elects to accept the repudiation that bring the contract of employment to an end. The said Court also stated at page 10 paragraph 25 that the intention of the employee of never returning to work, must be determined from

the surrounding circumstances. The Learned Judge President in this case stated that the employee must exhibit a “deliberate and unequivocal intention no longer to be bound by the employment contract”. **(See also the case of *Street v Dublin 1961 (2) SA (w)* at page 10, and *Christie: The Law of contract (4th edition)* at 601.)**

4.13. In casu, it is clear that the Applicant did show an unequivocal intention, which was also deliberate in nature, to terminate his own contract of employment by disappearing from work not only on the 1st of April, 2013, but also for the extended and indefinite period between the 3rd of April, 2013 up to date. The Applicant not only defied a direct order to wait for Mr. Gamedze so that they could go and meet with Mr. Kunene together, but he also did not write the report that he was required to prepare . The Applicant disappeared and remained absent from work without leave and at no time did he ever return to the workplace. It is also clear that the Respondent has clearly accepted the repudiation by Applicant. The Applicant, by failing also to appear at the meeting scheduled for the 9th of April, 2013 is indicative of a desire never to return to his workplace, and to meet with his employers.

4.14. To say that the employer ought to have tried harder to find the Applicant so as to charge him with desertion would be putting too onerous an obligation on the shoulders of the Respondent. This is a clear case of an employee who chose to make himself as scarce as possible. It cannot even be said that

Mr. Gamedze who had been tasked with delivering an untold number of Security Guards to their homesteads ought to have remembered where just one such employee lived. This is particularly unreasonable seeing that there had been a three year lapse between that time and the time when the Applicant disappeared from work. It would be pushing this unreasonableness to the extreme to say that Mr. Gamedze ought to have known that the lady from whom he purchased marula drink was indeed the Applicant's mother.

4.15. The Respondent did not expressly dismiss the Applicant herein, but did so by electing to accept the latter's repudiation. It cannot therefore, be said that the Applicant's dismissal was substantively unfair. It cannot also be said that it was procedurally unfair either. The Court in the **Alpheous Thobela Dlamini case (supra) at page 11 para 27 stated that:-**

"..... there is no need for the employer to hold an enquiry. It may simply accept the employee's desertion as a repudiation of the employment contract, and thereby terminate the contract".

4.16. The Applicant by failing to return to work, and also in proving to be so elusive in the face of the several attempts to get a hold of him, renders the Respondent being justified in simply accepting his desertion as a repudiation of the employment contract. This of course had the effect of terminating the said contract without the need for the employer to hold a disciplinary hearing. I find therefore that the dismissal was not procedurally unfair as alleged by the Applicant.

5. AWARD

5.1. Having heard the evidence of both parties, I find that the termination of the Applicant's services was substantively and procedurally fair. The Applicant's claims for Notice pay and Compensation for unfair dismissal are hereby dismissed.

**THUS DONE AND SIGNED AT MANZINI ON THIS 23rd DAY
OCTOBER, 2015.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**