



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

**HELD AT MANZINI**

**SWMZ 53/08**

In the matter between:-

**BONGANI SHABANGU**

APPLICANT

And

**GUARD ALERT SECURITY SERVICES (PTY) LTD** RESPONDENT

CORAM:

**Arbitrator** : Fanile Ginindza

**For Applicant** : Mr. Ephraim Dlamini

**For Respondent** : Mr. Mbuso Dube

**Nature of Dispute** : Unfair Dismissal

**Dates of Hearing** : 19/11/14, 5/12/14, 16/01/2015,  
27/02/15, 6/03/15, 26/03/15, 15/04/15,  
24/04/15, 30/04/15

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**ARBITRATION AWARD**

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## **1. DETAILS OF HEARING AND REPRESENTATION**

- 1.1 The Applicant is Bongani Shabangu an adult male of Ngculwini in the Manzini region and was duly represented during these proceedings by Mr. Ephriam Dlamini, a labour Consultant.
- 1.2 The Respondent is Guard Alert Security Services (Pty) Ltd a company registered in accordance with the company laws of Swaziland and having its principal place of business in Mbabane and was duly represented during these proceedings by Mr. Mbuso Dube, its Human Resources officer.
- 1.3 The arbitration hearing was held at CMAC-Manzini Office situate at KaLankhosi Building on the dates mentioned above.

## **2. ISSUE TO BE DECIDED**

- 2.1 The issue for determination pertains to the fairness or otherwise of the Applicant's dismissal from the Respondent's employ.

### **3. BACKGROUND TO THE ISSUE**

- 3.1 The Applicant is an ex-employee of the Respondent, having been employed as a security guard on the 1<sup>st</sup> March, 2007 and dismissed on the 11<sup>th</sup> January, 2008. His monthly wage was E1, 096-73. He is claiming compensation for unfair termination of his services.
- 3.2 The Respondent admits the former employment relationship between the parties as well as its material terms. It, however, denies the alleged unfair dismissal and contends that the Applicant was dismissed fairly after he pleaded guilty in a disciplinary hearing.
- 3.3 This dispute was conciliated on the 20<sup>th</sup> may 2008 and a certificate of unresolved dispute was issued on the 27<sup>th</sup> May 2008. The matter then went to the Industrial Court where it was referred back to the Commission on the 28<sup>th</sup> October 2014 for arbitration. I was then appointed as the arbitrator on the 5<sup>th</sup> November 2014.

#### **4. SUMMARY OF THE EVIDENCE AND ARGUMENTS**

##### **The Applicant's Version;**

- 4.1 The first and only witness to lead evidence on behalf of the Applicant was the Applicant himself and I shall refer to him as such in these proceedings. He told the Commission that he was from Ngculwini area in the Manzini region.
- 4.2 Even though he could not recall the exact dates when the issue giving rise to this dispute occurred, it was the Applicant's evidence that it was a Friday in the year 2008 when he reported for duty at his post at Kwaluseni Campus of the University of Swaziland. The Applicant testified that he was then told by his Supervisor Mr. Magagula that he has been transferred from his post to Swazi Paper Mills on a permanent basis.
- 4.3 It was the Applicant's evidence that he then requested for some time to prepare for the change and to move nearer to his new work station. And his Supervisor refused. At all material times herein the Applicant testified that his Supervisor was with a certain Mr. Dvuba another Supervisor.

- 4.4 The Applicant testified that he then requested permission to go to Mbabane Head Quarters to request permission to be given time to prepare for the transfer from Ms Bianca Scotlong his Manager, and Mr. Dvuba agreed and he proceeded to Mbabane.
- 4.5 It was the Applicant's testimony that upon reaching Mbabane he was told by certain Mr. Chris that the said Bianca Scotlong and Mr. Scotlong were in the Republic of South Africa and would return the following Monday. The Applicant then went back to report to Mr. Dvuba and Mr. Magagula what had transpired, whereupon he was told by Mr. Dvuba that there was no work for him at the University.
- 4.6 On the following Saturday and Sunday the Applicant testified that he did no report for duty and on Monday he proceeded to Mbabane where he found Ms Bianca Scotlong and Mr. Scotlong. It was his testimony that Bianca told him that she did not sanction his transfer, and thereafter Mr. Scotlong instructed him to write a report of what happened. He was then told by Mr. Scotlong to report at the University the following Thursday and he would be there to solve the matter.

4.7 On that Thursday the Applicant testified that he reported to the University as instructed but Mr. Scotlong did not show up. It was the Applicant's testimony that he was then ordered by Mr. Dvuba to report to Matsapha office the following day for a hearing. When he reported to the Matsapha office he was told that he was guilty of refusing to go and work at Swazi Paper Mills and for being absent for three (3) days and was dismissed. The Applicant testified that he then wrote a letter to the Head Quarters but there was no response forthcoming even after the lapse of fourteen (14) days.

4.8 It was the Applicant's evidence that ever since his dismissal he has been depending on piece jobs. He testified that he had three (3) dependents which are his wife and two children.

4.9 Lastly he testified that he was claiming;

- (a) Compensation for unfair dismissal – E13, 260-76
- (b) Notice pay – E1, 096-73
- (c) Boots refund – E125-00
- (d) 15 days salary – E590-00

- 4.10 Under cross examination the Applicant confirmed that he was dismissed on the 11<sup>th</sup> January 2008. The Applicant stuck to his evidence that he was dismissed and the reason given was that he absented himself for three (3) days and refused to go and work at Swazi Paper Mills.
- 4.11 The Applicant confirmed that he did not report for duty for three (3) days and that he did not go to work at Swazi Paper Mills. He contended, however, that his dismissal was unfair because he was instructed to report to the Matsapha office whereupon he was told on arrival that he has been dismissed for absenting himself for three (3) days.
- 4.12 The Applicant testified that he was told on a Monday to report for the hearing on Friday. When asked if he was now changing his evidence since he testified in chief that he was told on Thursday to come to a hearing on Friday, the Applicant testified that he never said that in his evidence in chief. It was also the Applicant's evidence that he pleaded not guilty to the two (2) charges brought against him.

- 4.13 It was put to the Applicant that in his evidence in chief he testified that he was told on a Thursday that on Friday the following day he must attend his disciplinary hearing, and he refuted that.
- 4.14 The Applicant was asked why he said he never absented himself from work because he said he did not go to work for three (3) days. He testified that on the Friday he was given permission to go to Mbabane where he was told the Scotlongs would return on Monday and he returned on Monday to Mbabane where he was told to report to Uniswa Kwaluseni campus on Thursday. He testified that on Monday he reported to Dvuba and Magagula about his journey to Mbabane.
- 4.15 When he was pressed on why he did not report for duty on Friday, Saturday and Sunday the Applicant testified that on Friday he came back from Mbabane and reported to Dvuba and Magagula about his Mbabane trip and he was told that he would not be given any work.
- 4.16 The witness disputed that there was no post for him to report to at Kwaluseni because he had been transferred, he testified that he did not see anyone who



had replaced him and that is why he asked for some time to prepare for his transfer

4.17 It was put to the Applicant that he had already been replaced and that he could not be transferred without a replacement. The Applicant insisted that he did not refuse to go to Swazi Paper Mills but requested time to prepare for the transfer.

4.18 The Applicant testified that he did not know if he was going to travel on foot to Swazi Paper Mills or he was going to use a car. It was put to the Applicant that the Respondent's employees are transported by company cars to work and that he was no exception to that rule.

4.19 It was the Applicant's evidence that Swazi Paper Mills was in Matsapha. It was then put to the Applicant that he was not going to suffer any prejudice as both the University and Swazi Paper Mills were in Matsapha and he was going to be transported by company car. The Applicant testified that he was employed to work in Universities.

4.20 The Applicant testified that the Respondent was his employer and that when he was employed he was

posted to UNISWA Kwaluseni campus. His testimony was that he did not have an answer to the question whether transfers are frequent in the security industry for security reasons.

- 4.21 It was put to the Applicant that he was not being candid with the Commission since he knew very well that transfers are done regularly and sometimes at the request of clients. The Applicant said he did not know that.
- 4.22 It was the Applicant's testimony that since he started working at the UNISWA Kwaluseni campus there has never been any changes in the security personnel there. It was put to the Applicant that he was not telling the truth.
- 4.23 The Applicant confirmed that he was the Chairman of the Workers' Council Committee but refuted that during the disciplinary hearing he testified that was the reason he stated for his refusal to be transferred.
- 4.24 The Applicant was referred to paragraph 2 of his application to the Industrial Court and was asked if he was aware of those allegations. The Applicant testified

that it is not the truth that he objected to his transfer because he was the Chairman of the Workers' Council.

4.25 The Applicant was again referred to paragraph 5.3 of his Report of dispute (CMAC Form 1) and asked if there was any other reason he told the Court for objecting to his transfer except that he was the Chairman of the Workers' Council Committee, and he said there was none.

4.26 It was the Applicant's evidence that he was not advised to report for duty at Swazi Paper Mills then lodge a dispute with the Respondent. It was put to the Applicant that he was advised to take the instruction then lodge a grievance but he chose to go to Mbabane. The Applicant said he was not advised but was given an order.

4.27 The Applicant also testified that he appealed against his dismissal but it was put to him that he did not appeal but lodged a grievance.

4.28 Under re-examination the Applicant testified that the reason he went to Mbabane was that he did not know the reason why he was being transferred and further he

did not know the terms of his transfer so he wanted to get an explanation.

### **The Respondent's Version;**

- 4.29 The first witness to lead evidence on behalf of the Respondent was Ms Bianca Scotlong whom I shall refer to as the witness or "RW 1" herein. She testified that she was the Operations Manager for the security personnel at the University.
- 4.30 "RW 1" testified that there were inspectors for both the day and night shifts and these were Themba Dvuba and Mr. Magagula. Her testimony was that previously they were posted elsewhere and when the Respondent got a contract at the University they were posted there. The witness's testimony was that they were not employed for UNISWA.
- 4.31 It was the witness's further evidence that the security guards were employed as such and could be posted anywhere where they were needed, and that means they could be move elsewhere.

- 4.32 On the evidence by the Applicant that he was employed for UNISWA the witness testified that being a security guard does not mean that you are permanently employed at a certain post and that you could be moved elsewhere for many reasons.
- 4.33 The witness testified that she did not recall her conversation with the Applicant about his transfer. She went on and testified that Supervisors do not have the authority to transfer personnel without the express authority of the Manager. "RW 1" testified that Supervisors only make recommendations. It was the witness's testimony that if the Applicant was transferred to another place it could only be done by her authority.
- 4.34 It was the witness's further testimony that they did not receive any letter of appeal but a grievance letter after the Applicant was dismissed.
- 4.35 Under cross examination the witness reiterated that employees are transferred after a recommendation from Supervisors whereupon the concerned employee is advised of the transfer after consultation.

- 4.36 Upon receipt of the recommendation it was the witness's testimony that the employee is then transferred after a few days. Her testimony was that the employee should be notified a few days before the transfer and not the same day since that was not how the Respondent operated. The witness however confirmed that if an employee absented himself/herself for three (3) days he/she would be dismissed.
- 4.37 Under re-examination the witness testified that normally an employee is given one (1) to two (2) days depending on where they live, before they are transferred, but if they are transferred to a place in close proximity they are not given any days.
- 4.38 The second witness to give evidence on behalf of the Respondent was Gcina Magagula whom I shall refer to as the witness or "RW 2" herein.
- 4.39 The witness testified that he knew the Applicant as he once worked with him when they were employees of the Respondent at UNISWA Kwaluseni and he was his Supervisor. The witness clarified that he was employed as a Supervisor not specifically for UNISWA Kwaluseni.

- 4.40 It was the witness's testimony that before he was posted to UNISWA Kwaluseni he was the Matsapha area Supervisor. His testimony was that he was again transferred from UNISWA Kwaluseni back to being Supervisor of Matsapha area.
- 4.41 "RW 2" testified that transfers were a normal thing in the Security industry and that you could be transferred anytime and that he was not the first one to be transferred.
- 4.42 The witness refuted that the Applicant was employed to work at UNISWA Kwaluseni campus and testified that in this industry you are not employed to work in one place but you can be posted to where there is a need, and this was normal.
- 4.43 It was the witness's testimony that he did not transfer the Applicant but Management did and further that he did not have the powers to transfer but only recommend to Managers who then effect the transfer.
- 4.44 The witness also refuted that he gave permission to the Applicant to go to Mbabane and lodge a complaint.

- 4.45 The witness testified that security guards deployed at Swazi Paper Mills were transported to and from work.
- 4.46 Under cross examination the witness testified that he told the Applicant on the same day that he was being transferred and he refused to go and said he would rather return to his house.
- 4.47 "RW 2" preferred not to comment on "RW 1"s testimony that procedure dictates that you don't inform an employee of his/her transfer on the same day.

## **5 ANALYSIS OF THE EVIDENCE AND ARGUMENTS**

- 5.1 I have considered all the evidence adduced and arguments advanced by both Parties before the Commission. In view of **Section 17 (5)** of the **Industrial Relations Act 2000** (as amended), I herein below set out concise reasons to substantiate my findings.
- 5.2 It is common cause that at the date of his dismissal the Applicant was an employee to whom **Section 35 of the Employment Act 1980** (as amended) applied, having been employed by the Respondent on the 1st



April 2007 and dismissed on the 11<sup>th</sup> January 2008. In the circumstances prior to dismissing the Applicant, the Respondent had the onus of ensuring that;

- (a) The reason for the dismissal / termination was one permitted by **Section 36 of the Employment Act 1980**; and
- (b) That taking into account the circumstances of the case it was reasonable to terminate the services of the employee. See **Section 42 of the Employment Act 1980**.

5.3 The evidence of the Applicant is filled with many inconsistencies. It was his evidence in chief that he was given permission to go and see his Manager in Mbabane whom he did not find and came back on the same day to report to his Supervisor what transpired in Mbabane. Under cross examination he testified that he went to report about his Mbabane trip on Monday after seeing Ms Bianca Scotlong and Mr. Scotlong. In his evidence in chief the Applicant also testified that on the Thursday when he was supposed to meet with Mr. Scotlong at UNISWA Kwaluseni Campus and after the latter had not shown up, he was told to come to a disciplinary hearing

the following day (Friday). Under cross examination he changed tunes and testified that he was told on Monday that he should come for his disciplinary hearing on Friday. In his examination in chief he testified that he reported about his trip to Mbabane on Friday and under cross examination he said it was on Monday.

- 5.4 However, it is common cause that the Applicant did not take an order of transfer to the post at the Swazi Paper Mills when he was told by his Manager. It is also common cause that the Applicant did not provide his services for three (3) days and the Applicant conceded to that under cross examination.
- 5.5 The Applicant was then charged for insubordination for refusing to take an order and absenteeism for failure to report for duty for three days.
- 5.6 It was stated in the case of **Thuli Nkambule v Juries Manufacturers I.C. case no. 176/2008** that; *"Insubordination and offensive behavior fall under the definition of poor work conduct. In terms of Section 36 (a) of the Employment Act 1980 it is only fair to terminate the services of an employee for poor work performance **after written warning.**"*

- 5.7 No evidence was led in this matter to demonstrate that the Applicant has been previously warned for insubordination. Therefore my finding is that the verdict of guilty was not in line with Section 36 (a) of the Employment Act 1980 (as amended).
- 5.8 The Applicant was also dismissed for being absent for three days, and the Respondent through "RW 1" testified that it was a dismissible offence in the Respondent undertaking.
- 5.9 **Section 36 (f)** of the **Employment Act 1980** (as amended) states clearly that it shall be fair to terminate the services of an employee, *"because the employee has absented himself from work for more than a total of three (3) days in any period of thirty days without either the permission of an employee or a certificate signed by a medical practitioner certifying that he was unfit for work on those occasions."*
- 5.10 The wording of this piece of legislation is clear and unambiguous, the employee must have been absent for a total of more than three (3) days in any period of thirty days. This means therefore that the employee

must have been absent for at least four(4) days. I find therefore that the Applicant's dismissal was not in line with **Section 36 (f)** as it was not proved that the Applicant had been absent for more than three days. See the Case of **THE UNIVERSITY OF SWAZILAND v THE PRESIDENT OF THE INDUSTRIAL COURT AND VUSI HLATSHWAYO** Swazi Court of Appeal Case No. 16/02 where Beck J.A. (as he then was) stated the following, **"If the Court was of the view that absence for more than three working days had not been proved, then *caedit questio* – Section 36 (f) does not operate to render the termination of the Respondent's services fair, and no further enquiry by the Industrial Court would have been called for. If, on the other hand, the Court was of the view that absence for more than three working days had been proved, then the Court was tasked with the further duty of taking into account all the circumstances of the case in order to decide whether, despite the provisions of Section 36 (f), it was nevertheless reasonable to terminate the Respondent's employment."**

- 5.11 It is the Applicant's uncontroverted evidence that he was told verbally that he by his supervisor Mr. Dvuba to

report to the Matsapha office for a hearing. There was no evidence adduced that the Applicant was notified of the charges he was facing. He was further not advised about his rights with regards to such hearing. Furthermore it was the Applicant's testimony that on the hearing date he was told that he was guilty of refusing to go and work at Swazi Paper Mills and being absent from duty for three day. There is no evidence of how the Applicant pleaded and the witnesses who were called, if any, and whether the Applicant was given an opportunity to cross examine them.

5.12 John Grogan in his book, **"Workplace law" 9<sup>th</sup> Edition 2007 at page 122 states:** *"A dismissal must not only be for a fair reason, but also that it must be effected in accordance with fair procedure."*

5.13 In light of the above evidence it is my finding that the Applicant's dismissal was both procedurally and substantively unfair.

5.14 No evidence was led in respect of the boots claim and the fifteen (15) days' salary and therefore these claims shall fail.

5.15 I have taken into consideration the personal circumstances of the Applicant in reaching my conclusion herein, that he had worked for the Applicant for nine (9) months with an unblemished record, and that he does not have a stable source of income at present, further that he has two (2) children and one (1) wife.

5.16 In the circumstances therefore I find that four (4) months compensation would be adequate.

## **6 AWARD**

6.1 Payment of notice pay in the sum of E1, 096-73;

6.2 Compensation for unfair dismissal in the sum of E4, 386-92;

6.3 The above total sum of **E5, 483-65** shall be paid at CMAC offices in Manzini on or before the 29<sup>th</sup> February 2016.

**DATED AT MANZINI ON THE 15<sup>th</sup> DAY OF JANUARY, 2016.**

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**FANILE B. GININDZA**  
**CMAC COMMISSIONER**

