IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 259/99**

In the matter between:

PAUL MKHATSHWA **APPLICANT**

And

INYATSI CONSTRUCTION LTD. **RESPONDENT**

CORAM N.

NKONYANE G.	**ACTING JUDGE**
NDZINISA D.	**MEMBER**
MANGO	**MEMBER**

FOR THE APPLICANT: **MR. DAVID MSIBI FOR THE**

RESPONDENT: **MR. DAMAZIO MADAU**

J U D G E M E N T 13.10.05

The applicant filed a claim for payment of terminal benefits and compensation for unfair dismissal against the respondent.

The claim was filed in terms of the Industrial Relations Act No.l of 1996. It is accordingly accompanied by a certificate of unresolved dispute.

In his statement of claim the applicant stated that he was employed by the respondent on 02/03/94 as a security instructor. His salary was E2,151:24 per month. He was dismissed on 11.08.98 after he was found guilty of having assaulted three security guards whom he found asleep whilst on duty.

The applicant stated that he was unfairly dismissed because the disciplinary hearing against him was not conducted in terms of acceptable standards.

The applicant's papers were not elegantly drafted. In his evidence before the court the applicant told the court that his duties involved hiring, training and allocation of duties to the security officers of the respondent. He said on 03/12/97 he was on duty and was patrolling the posts where the security guards of the respondent were stationed. He was in the company of a driver of the respondent by the name of Milton Dlamini.

He said they went to one of the sites called Kilometre 15. There, four security guards were on duty. They found that only one guard was awake, and the three were asleep. The applicant said he threw himself on the ground next to them and shouted for help. He said the guards then woke up and upon realizing that they had been caught sleeping on duty, they asked for forgiveness. The applicant said he refused to forgive them because he realized that the three guards were taking advantage of the guard that was not asleep because he was a newcomer.

The applicant then contacted the office and made a report of the incident. At the office there was the Chief Security Officer, Jerry Dlamini. Jerry gave an instruction that the

three guards should report to him in the morning. The three guards did not do that, but instead reported to the Security Manager that they were assaulted by the applicant. A preliminary investigation was conducted. The personnel officer, Edwin Mbingo carried out that exercise. Mbingo found that there was no sufficient evidence to warrant anyone to be disciplined. Mbingo issued an order that the parties go back to work as normal.

The applicant was however later called to a disciplinary hearing. The chairman was Mr. M.P. Tuson, the Contracts Manager. The applicant was found guilty. He appealed. The applicant was never invited to attend the appeal hearing. The appeal was however dismissed by Mr. M.P. Tuson, the same person who was chairing the disciplinary hearing.

Two witnesses testified for the respondent. RW1, Edwin Mbingo told the court that he conducted the preliminary investigation. He said the workers concerned did not come out clearly as to what had happened. He said he told them to go back to work and work as a team. He said he later learnt that the guards were not happy about the way the investigations were conducted. He said the guards revealed that they were scared of being victimized because Jerry Dlamini was the applicant's friend.

RW2, Milton Dlamini told the court that he was in the company of the applicant on the night of 03/12/97. His evidence however differed from that of the applicant as he said they found one guard asleep. During cross-examination RW2 said he did not see the applicant assaulting any of the guards. RW2's evidence was clearly not helpful but only added confusion.

From the evidence presented before it, the court will find proved that three guards were found asleep by the applicant, and not one as RW2 told the court.

Edwin Mbingo told the court that Jerry Dlamini asked him to conduct the investigations. Mbingo said Dlamini did that because he wanted the exercise to be fair as the three guards knew that he (Dlamini) was a friend of the applicant. It is not clear to the court therefore why did the guards later said they were not happy about the way the investigation exercise was carried out.

It is also confusing why did Mbingo say he found no substantial evidence upon which to charge anyone. From the evidence presented in court, the three guards were not denying that they were found asleep on duty. They were only accusing the applicant of having assaulted them. It is not clear to the court therefore why were they not charged for sleeping on duty.

The three guards did not appear before the court to give evidence of the alleged assault on them by the applicant. The court was also told that during the disciplinary hearing, the applicant did not have a chance to cross-examine the security guards. The applicant was outside the room when the guards gave their evidence. That was clearly a serious procedural flaw of the disciplinary hearing process. The applicant clearly did not have a fair hearing.

The applicant, after he was found guilty by the Chairman of the hearing filed an appeal. He filed his appeal to the Director. He was never called to present his case. He only got a response in writing by Mr. M.P. Tuson that the decision of the committee was final. That was also a gross violation of procedure that the same person who was the chairman of the hearing also dealt with the appeal by the applicant. He dismissed the appeal without having heard the applicant.

The applicant having denied that he assaulted the three guards, it was incumbent upon the respondent therefore to have them testify before the court. That however did not happen.

It cannot be said therefore that the respondent has discharged the onus of proof resting on it in terms of Section 42 (2) (a) of the Employment Act No.5 of 1980. The applicant has proved that he was an employee to whom Section 35 of the Employment Act applied.

The respondent has further failed to show that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the applicant as required by Section 42(2)(b) of the Employment Act.

The applicant's application therefore must succeed.

Relief: -

The applicant served the respondent for a period offour years and five months. He is presently not employed. He is fifty-six years old. He is married and has nine children. His wife is working. He said they also operate a small market.

In his application, the applicant wants the court to make an order for payment of notice, severance allowance and compensation. During submissions the applicant's representative said the applicant was also claiming additional notice. This court has no power to entertain a claim that was not dealt with during conciliation.

In the certificate of unresolved dispute the list of issues in dispute are defined on page one as notice, severance allowance and 24 months compensation. On page 4, the final issues in dispute are again listed as they appeared on page one. On page 5 of the certificate however, the Labour Commissioner lists the additional notice as a fourth item. The court will assume that when the application was drafted the applicant had the certificate of unresolved dispute with him. It is not known why the claim for additional notice was not included. The applicant's representative did not apply for an amendment of the prayers.

The court will therefore consider the three prayers as they appear in the applicant's application. Taking into account all the personal circumstances of the accused, the court will make an order that the respondent pays to the applicant the following:

1.	**NOTICE PAY**	**E2,151:24**
2.	**SEVERANCE ALLOWANCE**	**E2,490:00**
3.	**24 MONTHS' WAGES AS COMPENSATION FOR UNFAIR DISMISSAL**	**E51,630:00**
	TOTAL	**E56,271:24**

No order for costs is made.

The members agree.

N. NKONYANE

ACTING JUDGE - INDUSTRIAL COURT