



IN THE INDUSTRIAL COURT

OF ESWATINI

CASE NO. 135/2010

In the matter between:-

**BHEKITHEMBA MAMBA**

Applicant

AND

**MAX ENTERPRISES (PTY) LTD  
T/A SWAZILAND SECURITY ACADEMY**

Respondent

**Neutral citation:** *Bhekithemba Mamba vs Max Enterprises (PTY) Ltd t/a Swaziland Security Academy 135/2010 [2018] SZIC 137 (06 December, 2018)*

**Coram:** **N.NKONYANE, J**  
(Sitting with **G. Ndzinisa** and **S. Mvubu**  
Nominated Members of the Court)

Heard submissions: 28/12/18

Judgement delivered: 06/12/18

SUMMARY---Labour Law---Applicant was employed by the Respondent as a security guard---Applicant was found sleeping on duty during the night on two occasions in one month---Applicant

charged, disciplined, found guilty and dismissed---Applicant claims that his dismissal was unlawful because he already had E60.00 deducted from his salary as punishment---No evidence from the record of the disciplinary hearing that the chairman or the Respondent issued any fine of E60.00---Applicant pleading guilty to two charges of sleeping on duty---Applicant admitting in Court that he was found sleeping on duty---Respondent applying for absolution from the instance.

Held---The Applicant having pleaded guilty to the charges and having admitted during cross examination that he was found sleeping on duty on two occasions in one month there will be no need for the Respondent to lead further evidence to prove the commission of the offence, application for absolution from the instance granted accordingly.

### **JUDGEMENT ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE**

1. The Applicant was employed by the Respondent as a Security Guard on 13 April 2001. He remained in continuous employment until he was dismissed on 06 October 2008 after he was found guilty of sleeping on duty during the night on two occasions during the month of July 2008.

2. The Applicant did not accept the Respondent's decision. He reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC) as a dispute. During conciliation the parties were unable to resolve the dispute amicably. The Applicant obtained a certificate of unresolved dispute and thereafter instituted the present application for determination of the unresolved dispute by the Court.
3. The Applicant's application was opposed by the Respondent on whose behalf a Reply was duly filed. In his application the Applicant stated that the termination of his services was grossly unfair, unlawful and unreasonable in all the circumstances. The Respondent in its Reply denied that the termination of the Applicant's services was unfair or unlawful. The Respondent stated that the termination of the Applicant's services was subsequent to a verdict of guilty that was handed down by the chairman of the disciplinary hearing who found the Applicant guilty on two charges of sleeping on duty. The Respondent further stated that the termination of the Applicant's services was in accordance with the company disciplinary code and for a fair reason as contemplated by Section 36 (l) of the Employment Act number 5 of 1980 as amended.
4. The Applicant testified before the Court. He was cross examined and re-examined. At the close of the Applicant's case, the Respondent's

attorney moved an application for absolution from the instance on the basis that the Respondent did not need to lead any evidence as the Applicant admitted that he committed the offences on which he was found guilty and dismissed.

5. Indeed, in his evidence before the Court the Applicant admitted that he was found sleeping on duty on two occasions during the month of July 2008. The first instance was on 06 July 2008 when the Applicant was guarding the premises of a Matsapha based company by the name of Swazi Poultry Processors (SPP). The second instance took place when the Applicant was posted at Tuntex 2 to guard the premises during the night on 24 July 2008.
6. The Applicant's main argument was that his dismissal was unfair because he suffered double jeopardy at the hands of the Respondent. He told the Court that the Respondent made him to pay a fine of E60.00 for the offence of sleeping on duty, but thereafter subjected him to a disciplinary hearing where he was found guilty and dismissed for the same offence.
7. In its Reply, the Respondent stated that the amount of E60.00 was deducted from the Applicant's salary by mistake and tendered refund of same to the Applicant. The record of the disciplinary hearing was filed

in Court and was part of the book of pleadings, but there is nowhere in the record showing that the Applicant was ordered to pay a fine of E60.00 after a disciplinary hearing as a sanction for the offence of sleeping on duty.

8. It was argued on behalf of the Applicant that the Court must not grant the application for absolution from the instance because the burden of proof is on the Respondent. It is correct that in an application for determination of an unresolved dispute where the Applicant claims that his dismissal was unfair, the burden of proof is on the employer to show that the dismissal of the Applicant was for a fair reason. **(See:- Section 42 (2) (a) & (b) of the Employment Act No.5 of 1980 as amended).**
9. In casu, the Applicant was charged with two counts of gross misconduct because he was found sleeping whilst on duty on two occasions during the month of July 2008. Photographs of the Applicant which were taken whilst he was asleep were presented to the Court. During the disciplinary hearing the Applicant pleaded guilty to the charges. In Court, during his evidence in chief and during cross examination, the Applicant admitted that he was found sleeping whilst on duty on those two occasions. There is therefore no longer any duty resting on the Respondent to prove that the Applicant was found sleeping whilst on

duty as the Applicant has already admitted the commission of the offences. In short, before the Court, there was evidence that the Applicant committed the offences with which he was charged because the Applicant himself told the Court that in his evidence in chief. Secondly, the Respondent was able to elicit further evidence of the commission of the offences through cross examination. By eliciting the evidence of the commission of the crime through cross examination, the Respondent discharged the burden of proof that rested on it in terms of the law.

10. The Industrial Court had the occasion to deal with an application for absolution from the instance in the case of ***Pinky Toi Mngadi V Conco (Pty) Ltd t/a Coca Cola Swaziland (Pty) Ltd, SZIC 03/2014***. The principle applicable to such application was discussed and applied in that case by Dlamini J. The leading case on this subject is that of ***Gascoyne V Paul & Hunter, 1917 TPD 170*** where the position of the law was stated as follows;

*“At the close of the case for the plaintiff, therefore the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff?.....The question therefore is at the close of the case for the plaintiff was there a prima facie case against the defendant Hunter, in other words, was there such evidence*

*before the Court upon which a reasonable man might, not should, give judgement against Hunter?”.*

11. In casu, the Applicant pleaded guilty to the charges before the chairman of the disciplinary hearing and also admitted that he was found sleeping on duty. Before the Court, the Applicant again admitted that he was found sleeping on duty on two occasions in one month.
12. As a security guard, the Applicant's core duty was to keep watch over the customer's property. It is therefore a material term of the employment contract that the Applicant be always awake and alert at all times whilst on duty. The Applicant's conduct of sleeping on duty was therefore a breach of a material term of the contract of employment.
13. Assuming for one moment that the Applicant's evidence was correct that he was fined the sum of E60.00 in respect of one of the charges that, however, does not address the second charge of sleeping on duty. As already pointed out herein, the Applicant's story of the E60.00 fine was not supported by the documentary evidence presented in Court.
14. From the evidence before the Court, there was a breach of a material term of the contract justifying the dismissal of the Applicant. (***See:- Graham Rudolph V Mananga College, case number 94/2007 (IC)***).

The Applicant was employed as a guard. He admitted that he slept on duty on two occasions during the month of July 2008.

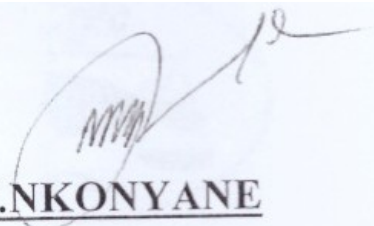
15. Dealing with the issue of dismissal as the result of breach of a material term of the employment contract, the Labour Appeal Court of South Africa in the case of ***De Beers Consolidated Mines LTD v CCMA & 11 Others (2000) 21 ILJ 1051 at 1058 (G)*** stated the following;

*“Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. This is why shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society’s moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer’s enterprise.”*

Similarly, in the present case the employer’s core business is to provide guarding services to customers. The conduct of the Applicant of sleeping on duty therefore constitutes a material breach of the employment contract and justified the decision of dismissal as the Applicant’s misconduct had everything to do with the operational requirements of the Respondent’s enterprise.



16. As already pointed out herein, during his evidence in chief the Applicant admitted the commission of the offences for which he was dismissed. During cross examination he again admitted that he was found sleeping on duty on two occasions in one month. Consequently, there will be no need for the Respondent to lead evidence to prove that the Applicant was dismissed for sleeping on duty as that evidence is already before the Court and is not in dispute.
  
17. In the circumstances, the Court will come to the conclusion that the Respondent be absolved from the instance. The Court will accordingly make the following order;
  - a) The application for absolution from the instance is granted.
  - b) The Applicant's application is dismissed.
  - c) There is no order as to costs.
  
18. The members agree.



N.NKONYANE

**JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

For Applicant:                      Mr. .M. Mbonane  
(Labour Law Consultant)

For Respondent:                      Mr. S.K. Dlamini  
(Attorney at Magagula & Hlophe Attorneys)