

IN THE INDUSTRIAL COURT



OF ESWATINI

CASE NO. 272/2013

In the matter between:-

THEMBA APOLLO SHIBA

Applicant

AND

FIDELITY SECURITY GROUP

Respondent

Neutral citation: *Themba Appollo Shiba vs Fidelity Security group (PTY) Ltd (272/13) [2019] SZIC 65 (August, 2019)*

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

Heard submissions:

Judgement delivered:

JUDGEMENT

1. The Applicant instituted legal proceedings against the Respondent by way of Notice of Motion and is seeking an order in the following terms;

- “1. *Declaring the failure, neglect and or refusal of the Respondent in paying the Applicant his terminal benefits and or severance allowance and Annual Leave, whilst sick, as being unfair, unlawful, wrongful, illegal and unreasonable.*
2. *Directing the Respondent to pay the Applicant his terminal benefits and or his severance allowance and the Annual Leave.*
3. *Ordering Respondent to pay or compensate Applicant for underpayments.*
4. *Granting and or Ordering Respondent to pay costs of this Application.*
5. *Granting Applicant Further and/or Alternative relief.*

2. The Respondent filed its answering affidavit in opposition thereto. Thereafter the Applicant filed his replying affidavit.

3. In its answering affidavit the Respondent raised certain points in limine, that;

3.1 *There is no prima facie case set out for the relief under prayer 3 as the Applicant did not refer to any Regulation of Wages in the Security Industry for the period in issue.*

3.2 *There are serious disputes of fact which the Applicant foresaw or ought to have foreseen which cannot be resolved on the papers which render the institution of Notice of Motion to be inappropriate and the matter falls to be dismissed on that account.*

4. In his replying affidavit the Applicant also raised points of law to the effect that;

4.1 *He does not know Connie Shabangu who deposed to the answering affidavit, that during his time at the Respondent's establishment the Operations Manager was one Patson Sibandze.*

4.2 *The answering affidavit consists of hearsay evidence as the Applicant had never seen or spoken to Connie Shabangu.*

5. In Court, the parties' representatives agreed that the points of law raised be argued simultaneously with the merits of the case. The Court will therefore issue a final judgement.

6. The evidence before the Court revealed that the Applicant was employed by the Respondent as a Security Guard on 26th December 2005. He remained in continuous employment until 16th April 2012 when he terminated the employment contract by resignation. In his letter of resignation (Page 19 of the Book of Pleadings) the Applicant stated that he was resigning due to ill-health. The Applicant attached a letter from a medical Doctor from Phocweni Military Clinic who made a recommendation that he be retired on medical grounds. (Page 18 of the Book of Pleadings). The Applicant stated in his founding affidavit that when he told the employer that the Doctor recommended that he be retired on medical grounds, the employer being represented by Patson Sibandze, told him to write a resignation letter first so that he could be paid his terminal benefits.

7. The circumstances leading to the Applicant's injury are that he was on night duty at Coates Valley in Manzini. Thugs attacked the house that he

was guarding and they pointed a gun at him and assaulted him and the owner of the house. The Applicant said he was highly traumatized and he fell sick and was hospitalized. He said his health condition deteriorated and one of the doctors that he consulted recommended that he be retired on medical grounds.

- 8.** The Applicant stated that after he tendered the resignation letter, he sent his wife to go to the Respondent's place to get his terminal benefits but the Respondent failed to give her the terminal benefits.
- 9.** The Applicant thereafter reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC") as a dispute. The dispute could not be resolved by mediation and a certificate of unresolved dispute was issued by the Commission.
- 10.** The Respondent in its answering affidavit disputed the Applicant's claims.
- 11.** The points of law raised by the Applicant in the replying affidavit will be dismissed by the Court. The fact that the Applicant does not know Connie Shabangu, the deponent to the answering affidavit does not disqualify her from deposing to the affidavit.

12. The Applicant's main argument is that he tendered the resignation letter because there was an agreement between him and the employer that he would be paid terminal benefits. The Applicant did not state what type of terminal benefits the employer promised to pay to him. The Applicant was not terminated by the employer. In prayer 1 of the Notice of Motion the Applicant mentions terminal benefits, severance allowance and annual leave. There is no evidence that the Applicant was terminated by the employer. Severance allowance is payable if it is proved that the services of the employee were terminated by the employer.

13. The payment of severance allowance is in terms of Section 34 (1) of the Employment Act No.5 of 1980 as amended. That section provides that;

“Subject to subsections (2) and (3) if the services of any employee are terminated by his employer other than under paragraphs (a) to (j) of section 36 the employee shall be paid as part of the benefits accruing under his contract of service, a severance allowance amounting to ten working days' wages for each completed year in excess of one year that he has been continuously employed by that employer.”

In casu, the Applicant's services were not terminated by the Respondent. The Applicant tendered a resignation letter.

14. Since the Applicant was not terminated by the Respondent, but he terminated his services on his own by resignation, the burden of proof was on the Applicant to show what kind of terminal benefits did the employer undertake to pay to him. The Applicant failed to do that. The terminal benefits that the Applicant says are due to him in paragraph 9 of the founding affidavit are terminal benefits payable in terms of the Industrial Relations Act when the employee is found to have been unlawfully terminated.
15. Looking at the pleadings as a whole, the Court is unable to reach any conclusion other than that the dispute of fact was reasonably foreseeable. In his founding affidavit the Applicant stated in paragraphs 6.11 to 6.12 he sent his wife to go and collect the terminal benefits but the Respondent refused to make any payment. In paragraph 6.12 the Applicant stated that,

“She told me that my Company was no longer willing to pay me my terminal benefits, stating that they were not under any obligation in law to pay me my terminal benefits.”
16. This shows clearly that the Applicant knew even before he reported the matter at CMAC that there was a material dispute of fact. The matter was

therefore not amenable to be brought to Court by way of Notice of Motion. Rule 14 (1) of the Industrial Court Rules f 2007 provides that;

“Where a dispute of fact **is not reasonably foreseen**, a party may institute an application by way of notice of motion supported by affidavit.”

17. In the event that a dispute of fact does arise in circumstances where it was not reasonably foreseen, the Court may make an order in terms of Rule 14 (13) (a) or (b) which provides that the Court may make an order;

“(a) referring the matter to oral evidence for the determination of a specified dispute of fact;

(b) referring the matter to trial and directing that it be enrolled in the Trial Register.”

18. In casu, the material dispute of fact was reasonably foreseen and the claim should not have been initiated in Court by way of Notice of Motion in the first place. The application is therefore liable to dismissal.

19. Taking into account all the circumstances of this case, the interests of justice and fairness, the Court will make the following order;

- (a) The point of law raised based existence of material dispute of fact is upheld.
- (b) The Applicant's application is dismissed.
- (c) There is no order as to costs.

20. The members agree.

N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicants: *Mr. Shadrack Masuku*
(Labour Law Consultant)

For Respondent: *Mr. Sabela Dlamini*
(Attorney at Magagula & Hlophe Attorneys)