



INDUSTRIAL COURT OF ESWATINI
JUDGEMENT

Case No.:214/15

In the matter between

ALFRED SHABANGU

Applicant

And

SWAZILAND SECURITY GUARDS (PTY) LTD

Respondent

Neutral citation: Alfred Shabangu vs Swaziland Security Guards (Pty) Ltd
(214/2015) SZIC 89 (2020)

Coram: K, MANZINI A.J.
(Sitting with Nominated members of the Court Mr
E.L.B. Dlamini & Mr D.P.M Mmango)

Last Heard: 30th June 2020

Delivered: 23rd July 2020

Summary: Labour Law – Application for determination of unresolved dispute - Applicant alleging that his services were terminated in a manner that was automatically unfair. The Applicant alleged that he was dismissed under the pretext of having reached retirement age, when in actual fact he was dismissed for being a Worker’s representative.

Held: The burden was upon the Respondent to prove on balance of probabilities that the Applicant’s contract was terminated because he had attained the statutory age of retirement. The Court finds that on the evidence presented before Court, the Respondent was able to discharge the burden of proof.

JUDGMENT

1. The Applicant applied to the Court for determination of an unresolved dispute between him and the Respondent in terms of the Industrial Relations Act No. 1 of 2000 (as amended), read together with this Court’s Rules, 2007.
2. The Applicant in his application claims that he was unlawfully and unfairly dismissed by the Respondent. The Respondent denies the Applicant’s claim. The Applicant is claiming the following:-
 - 2.1 Reinstatement and/or alternatively.
 - 2.2 Overtime – E43 667.10.
 - 2.3 Maximum compensation for automatic unfair dismissal – 44 853.12.

3. The Respondent in its Reply stated that the termination of the Applicant's Service was Lawful and fair is that he had reached the statutory age of retirement, and this was only discovered by Respondent in October, 2014 when the employer discovered his age.
4. The evidence led before the Court revealed that the Applicant was employed by the Respondent as a Security Guard in or about October, 2010. He stated that he was already above the age of sixty years of age at this time. He stated that he was born in 1942, and he performed his functions as a Security Guard up until his services were terminated in 2014. The Applicant confirmed his identity number featured in the copy of the Report of Dispute (page 10 of the Applicant's book of pleadings). The said identity number being; 4210106100259.
5. The Applicant testified that he could not recall his exact salary at the time that his contract of employment was terminated. He stated that his duties involved ensuring that the property at his post remained secure. He stated also that he reported to work at 5:15 pm, and had to be at the Respondent's head office in Matsapha at this time, and then proceed to his usual post where he was on duty from 6:00 pm until 6:00 am the following morning. He stated that he was also a member of the Workers Committee, and represented his colleagues

during disciplinary proceedings. He opined that this is the reason that the Respondent decided to place him on retirement. The Applicant stated that the employer did not like the fact that he spoke up for employee's rights at the workplace, hence the decision to orchestrate the termination of his contract, under the guise of a retirement.

6. According to the Applicant, the employer had been well aware that he was already above the age of sixty when he was employed, and that is why he believed that he was being victimized for being a worker's representative. It was the Applicant's testimony that at the time of his retirement. There were other employees who were above the age of sixty years, but these were not made to retire. He stated that he is aware that even though other employees did retire because they were above sixty years old, but some remained, and are still employed at the Respondent's Company to date. The Applicant referred to page 7 of the Applicant's book of Pleadings which contains the letter through which the employer communicated to him that he was being given a month's notice that his contract was to be terminated on account of his being past the age of retirement. The same letter, dated 5th September, 2014, further informed the Applicant that he would be paid his terminal

benefits in the amount of E2, 012. 64. He stated that he reported a dispute at CMAC after receipt of the letter.

7. The Applicant stated that he deemed himself to have been dismissed in an unfair manner, and further insisted that the employer owed him overtime payments because he had reported for work at 5:15 pm each day instead of 6:00 pm. He lamented that since he had not been able to secure alternative employment since the Respondent terminated his services, he was therefore unable to support himself and his three dependents.
8. During cross examination the Applicant told the Court that he could not recall the exact posts that the Respondent had deployed him to guard, but stated he did remember being stationed at the Swaziland Posts and Telecommunications Corporation (now Eswatini Posts and Telecommunications Corporation) depot in Matsapha. He further informed the Court that although all other colleagues who were over sixty years of age had since retired, but he is aware that one Mantente Nkambule, and a certain Mr Tsabedze are still in the Respondent's employment dispute being above the age of statutory retirement. He further testified, under cross examination, that he was seventy-two years old when he was retired from employment by the Respondent. It was put to the Applicant that the Respondent has a contract

with St Michaels High School in Manzini that specifically requires the deployment of elderly guards at this post because it is an all girls' school. The Applicant stated that he is not aware of this, and further pointed out that he had not been posted at this school at any point during his tenure of employment with the Respondent.

9. The Applicant further revealed, when it was put to him that he had not revealed his age at the time of employment, that the current employer did not know him well as he was not engaged by the current management. The Applicant stated that he was employed by the Managing Director's Father who is since deceased. He admitted that the current incumbent of the position may not have known his age until 2014. The Applicant was asked why he believed that his employment contract was terminated because he was an active representative of worker's rights at the workplace. The Applicant stated that he knew that his participation in the Worker's committee did not sit well with the employer. He admitted that the letter notifying him of the impending termination of his contract (on page 7 of the Book of pleadings) did not state that this was the reason for his termination from the employment of the Respondent. He admitted further that he does not have any other written

document and/or proof that he was terminated from employment because he was a worker's representative.

10. The Applicant further stated under cross examination that although he could not recall well, he did think that he did indeed receive payment of his terminal benefits in terms of an agreement reached at CMAC (totaling an amount of E3018.96). He was referred to a copy of a Memorandum of Agreement, as well as a receipt which ostensibly bear the Applicant's signature, and which all have the CMAC letterhead. The documents according to the Applicant, seemed vaguely familiar to him, and he was candid to say that he could recall seeing these, and receiving some monies from the Respondent, but could not recall the precise amounts.
11. The Applicant was further asked about his overtime claim, and how he had arrived at the figure that he claimed. He could not say with certainty who had instructed him to report for work at 5:15 pm instead of 6:00 pm. It was only when he was pressed for a response by the Respondent's attorney that he stated that his Supervisor at the time, who was a certain Mr Gamedze had insisted that all the guards should assemble at the Respondent's head office in Matsapha at 5:15 pm on each working day. He stated that this was done so that the Supervisor could ensure that they were in a good state to proceed to

their respective posts, and possibly to get replacements for those guards who were not able to report for duty. The Respondent's Attorney enquired what it was that they were doing for the forty –five minutes at the Head office? The Applicant stated that he had always waited for instructions on where he could be posted on that shift. The Respondent's Attorney put it to him that as a permanent guard, it did not make sense for him to be reminded on a daily basis of his work station. The Applicant admitted that he had always had a post, and knew where he was meant to be stationed. It was put to the Applicant that it further did not make sense for the guards to assemble at the head office at 5:15 pm, and only leave for their respective workstations at 6:00 pm because that is the time that they were expected to report for duty at their various posts. The Applicant insisted that this was indeed the case.

12. During re-examination the Applicant stated that it was his firm belief that he was relieved of his duties by the Respondent only because he was a workers representative and was viewed as being troublesome since he was a Shop Steward, and not because he had reached the statutory age of retirement. The Court *mero motu* enquired of the Applicant when he would have deemed it time for him to retire from work? The Applicant stated that when he was made to retire in 2014, he still felt strong enough to perform his duties, he

stated that he would have approached the employer of his own accord when he felt that he was too old to do his work effectively, and asked to be allowed to retire from work.

13. The Respondent's sole witness, Mr Guy Fawcett, who is the Respondent's Managing Director gave a contrary version in his evidence. He testified that he is currently at the helm of running the Respondent Company, a business which he took over from his late father in or about 2012 to 2013. He stated that when he started the job of managing the company he realised that most of the employees did not have personnel files, hence he started a process of compiling these, and thereby getting the personal information of the various Security Guards in the Respondent's employ. According to the evidence of this witness he was advised by an official from Labour Department in Manzini, by the name of Mr Maseko to consider retiring some of his elderly employees. He stated that it became clear as he compiled the various employee's files that a good number of guards were above the statutory age of retirement which is sixty years. He testified that the Applicant herein was retired after it came to his attention that he was seventy- two years of age at the time.

14. The witness further testified that he ensured that all of the elderly guards were retired, save for those that had been requested specifically by his clients. He explained that St Michaels' High School has always required mature guards, preferably over sixty years of age, whilst Swazi Candles and Kitwe also insisted on keeping their elderly guards because they had developed a strong bond with them over the years. The witness stated that the Respondent has adopted a policy to retire all guards who attain the age of sixty years unless they are specifically required by the client. He stated that in the Applicant's case, he had not been at one of these posts. He stated also that the said Mantente that had been referred to by the Applicant was actually based at Swazi Candles. He explained that the Respondent currently retains thirteen guards who are over sixty years of age, including relievers who service the three clients that require mature guards.
15. The witness proceeded to explain that the decision to retire the Applicant was taken by him, but he instructed the Respondent's Personnel Officer to deal with him, and to communicate the decision to the Applicant. He explained that the Respondent's Management had been motivated to retire the Applicant not only because of his advanced age, but also on account of a number of other considerations. The Witness stated that the Applicant worked only during the

night shift, and since the EPTC Management had complained about the rampant theft of copper-wire at their depot, he had decided that the Applicant's life was in peril because of the frequent burglaries there.

16. Regarding the claim for overtime payments made by the Applicant, this witness refuted that this was due to the Applicant at all. He firmly refuted that the Applicant reported for work at 5:15 pm at the Respondent's depot in Matsapha. He explained that the Applicant had no need to go to their head office at all due to the fact that he had been expected to simply go to his post so as to relieve the guard who had been on the day shift at 6:00 pm every day. He stated also that the Applicant had never made a demand for such overtime payments during the entire duration as an employee of the Respondent.
17. During cross-examination the witness confirmed that the Applicant was employed before he joined the company. He stated that he had introduced a new recruitment system where prospective employees filled in their details in employment forms. He stated that if the candidate's application was considered favourable they were employed on a temporary basis, pending the completion of a six hour training programme. He stated that the trainee guards were engaged in a three months temporary basis. It was put to the witness that the Applicant had provided his Identity card and graded tax number to the

employer when he was hired. The witness stated that he doubted the truth of this because he had required the Applicant to provide this information when he took over the running of the company, and started compiling detailed employee's files. The witness stated that before this time the Applicant did not even have a personnel file.

18. It was put to the Witness that the Applicant's case was that his contract was terminated because he was an active member of the Worker's Committee, which they put him in a bad light with the Employer. The Witness stated that the Respondent Company respects the worker's rights to representation, and it is presently unionized as the workers are members of the Swaziland Amalgamated Trade Union (SATU). He stated that the Employer would have had no problem at all with the Applicant's active participation in the protection of worker's rights at the workplace.

19. The Witness further clarified that the Personnel Officer of the Respondent had been acting on his instructions when he advised the Applicant that the Respondent had decided to retire him. He stated that he had taken into consideration the fact that the Applicant was elderly, and his advanced years did not augur well in view of the arduous nature of the Applicant's duties as a security guard. He explained that besides the danger he faced when he was

on night duty at the EPTC depot, the Applicant was also expected to patrol around the post for about twelve hours. He stated that this was not suitable work for a man as old as the Applicant. It was put to the witness that the Personnel Officer had not explained to the Applicant the reasons for keeping other similarly aged guards in its employ (such as Mantente and Tsabedze), and yet he was being retired. The Witness stated that although the said Personnel Officer had been instructed by him to engage the Applicant, he could not however account for each word spoken between the two gentlemen. He explained that he was not even sure if they even spoke about this issue at all.

20. The Witness further confirmed at the time of the Applicant's retirement he had been seventy-two years old, whereas Mantente had been sixty-three years old, and Tsabedze was below sixty years of age. He stated that he had opted not to retire these employees, together with all the others who were still with the company because the clients that they were servicing had specifically asked for elderly security guards. He stated that on retirement, the Respondent Company pays severance allowance to its employees, although they are aware that the law does not specifically require them to do so.

ANALYSIS OF EVIDENCE

21. It is common cause that the Applicant at the time of his retirement in 2014 was seventy-two years of age. It was further the evidence of the Respondent's witness that the policy of the company was that the employees of the Respondent undertaking are required to retired at the age of Sixty years. This was not controverted by the Applicant's representative even during cross – examination. Infact it was the evidence of the Applicant that apart from Mantente and Tsabedze, to the best of his knowledge other guards who had reached the age of sixty had also been required to retire from the employ of the Respondent. Indeed, it also came to light from the Respondent's evidence that the current Managing Director only came to know of the Applicant's age in 2014 when he undertook the task of compiling employee files, and requesting the employees to supply him with their personal details. It was not the evidence of the Applicant that he provided such evidence to the employer when he was initially employed, indeed this detail only arose when the Respondent's witness was being cross – examined.

22. It was only the Applicant's representative who put it to the Respondent's witness that the Applicant provided his graded tax number, as well as his identity card and number to the employer when he was employed. This version was vehemently refuted by the Respondent's witness. This version was further not pleaded in the Applicant's papers before Court. Indeed, the Applicant in his own evidence did not dispute that the present Managing Director did not know him well, as he was initially employed by the said Managing Director's late Father. It is for these reason that the Court rejects the evidence of the Applicant with regards to this.
23. **Section 36(k) of the Employment Act, 1980 (as amended)** clearly sanctions the termination of an employment contract on the basis of retirement when the said employee reaches the normal age of retirement for employees holding that position within a particular undertaking. From the evidence led before Court by the witness for the Respondent, the normal age of retirement for Security Guards at the Respondent Company is sixty years. The Applicant's own evidence supports this in as far as he stated that he is aware that other guards of similar age retired at the time he did apart from Mantente and Tsabedze. These two guards from the evidence of the Respondent were kept on, only because of specific client requests. This evidence was not

controverted by the Applicant in any way. It is for this reason that this evidence must stand.

24. It is trite Law that for a termination of employment to qualify as being fair in terms of the Law, it must comply not only with **Section 36 of the Employment Act (supra) but also with Section 42 (2) (a) and (b)** of the same piece of legislation. This provision places the onus of proving that the termination of the employee was not only permitted by Section 36, but also that taking into consideration of the circumstances of the case, that it was indeed reasonable to do so. The Respondent's witness stated that he had considered not only that the Applicant had reached the age of sixty, but also the fact that patrolling for twelve hours around the client's premises was too arduous a task for a man of the Applicant's mature age. It was further the evidence of the Respondent that it had also been considered that the safety of the Applicant was placed in jeopardy as he worked the night shift at a premises that was plagued by incidents of criminals breaking in to steal copper-wire. This evidence was also not disputed, or disproved in any way by the Applicant's representative.
25. The fact that the Respondent's witness decided to put "*his house in order*", so to speak, when he took over the running of the business by compiling detailed

personnel files, and requiring each security guard to provide their personal information is to be lauded. He cannot be faulted for having done so. It was only reasonable in the circumstances. Indeed the Respondent can also not be faulted for keeping on mature guards who had passed the age of sixty if the clients that are being serviced by the Respondent specifically require these. It was not the evidence of the Applicant he even enquired from the Personnel Officer, or from the Managing Director himself, why the likes of Mantente and Tsabedze were not similarly being made to retire, and this information was unreasonably, or maliciously not disclosed to him. In light of this it is clear that even the parity principle was observed to an extent, because other guards who reached the age of sixty, and were not specifically requested to remain did indeed retire at the material time.

26. The Applicant was not able to make out a case of automatic unfair dismissal in the case at hand. It was not clear where the perceived victimization for being a worker's representative on his part emanated from. Indeed, the Respondent's Witness pointed out that the management of the Respondent fully supports the rights of workers when it comes to their rights being protected at a union level. The same can be said of the Applicant's claim that he is owed overtime because he was required to report for work at 5:15 pm on each day. He was not able to state what it is he would be doing at the

Respondent's main office at this time, since he was well aware of where his post was. It was further the evidence of the Respondent's Witness, which evidence was not controverted under cross examination, that the Applicant was expected to simply proceed to his normal post at 6:00 pm in order to relieve the guard who was on the day shift. Clearly the Applicant would not make it to his post on time if he only left the Respondent's depot at 6:00 pm. The parties herein paraded two witnesses each in support of their cases, each giving inconsistent versions in this regard.

27. According to the case of **STELLENBOSCH FARMERS WINERY GROUP LTD AND ANOTHER VS MARTELL ET CIE AND OTHERS 2003 (1) SA 11 (SCA)**, in the face of inconsistent versions, a particular technique must be employed by the Courts in resolving such factual disputes. The Court in this case concluded that on disputed issues, findings must be made based on the credibility of the various factual witnesses based on their:-

- a) reliability
- b) the credibility of the witnesses
- c) the probabilities

to this end the Court advised that factors such as the witnesses candour, and demeanor in the witness box, the probability and improbability of particular aspects of their version should be taken into account.

28. In casu, the version of the Respondent was the most cogent. The Applicant was not able to lead evidence to substantiate the claim of victimization, and his version regarding the overtime allegedly worked was also not very convincing. Indeed the improbabilities far outweighed the probabilities in view of the fact that he was not able to explain why he was required to report for work at 5:15 at the Respondent's depot, and how he could possibly have made it to his post in good time to relieve the day shift at 6:00 pm. It is therefore the finding of the Court that the Respondent herein has been able to discharge the onus of proving on a balance of probabilities that the Applicant's termination from employment was indeed sanctioned by Section 36 (k), read together with Section 42 (b (a) and (b) of the Employment Act (supra), and was therefore fair. The claim for overtime payments must also fail due to the inability of the Applicant to prove in a balance of probabilities that he is entitled to the amount claimed because he reported for work forty-five minutes earlier than the official time for the start of work.

CONCLUSION

29. The Court finds herein that the Applicant has failed to make out a case of automatic unfair dismissal. The application herein is therefore dismissed in its entirety.
30. There no order as to costs.

The members are in agreement



K. MANZINI

ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant:

Mr E.B. Dlamini
(Ephraim Dlamini Labour
Consultant)

For Respondent:

Mr. S. Mnisi
(Of S.S. Mnisi Attorneys)