IN THE CONCILIATION MEDIATION AND ARBITRATION COMMISSION

HELD AT MANZINI CMAC REF NO: SWMZ 260/09

In the matter between:

MUSA CARLTON NXUMALO APPLICANT

AND

THE HUB SPAR RESPONDENT

CORAM:
ARBITRATOR : VELAPHI DLAMINI
FOR APPLICANT : IN PERSON
FOR RESPONDENT : NO APPEARANCE

NATURE OF DISPUTE : UNFAIR DISMISSAL

DATE OF HEARING: 8TH JULY 2009

DEFAULT JUDGMENT

1. BACKGROUND FACTS

1.1 The Applicant reported a dispute for unfair dismissal on or about the 1st June 2009.

1.2 In the Report of Dispute which was processed by the Commission on the 10th June 2009, the Applicant stated that he was employed as a Baker and his gross salary was El 410.00 per month.

1.3 It was the Applicant's statement that he was dismissed on the 17th March 2009 following charges of misconduct being preferred by the Respondent on the 24th February 2009.

1.4 The Applicant continued to record on the Report of Dispute that the charges emanated from a report made by his supervisor against him that he had threatened the supervisor.

1.5 In the Report of Dispute, the Applicant proceeded to state that the Respondent failed to investigate the incident leading to him being charged and instead resorted to notifying him to attend a disciplinary hearing on the 4th March 2009.

1.6 At the end of the disciplinary hearing held on the 4th March 2009, he was found guilty and dismissed and he appealed against the decision to terminate his services.

1.7 It is his statement that he considered the dismissal to be procedurally and substantively unfair, because the Respondent did not investigate the matter before he was charged and that he did not break any rule that would warrant a dismissal taking into account the circumstances of the case.

1.8 The Applicant now claims terminal benefits, which include Notice Pay, Additional Notice Pay and Severance Allowance. In addition to the terminal benefits he is claiming a pro rata bonus, Overtime payment and eighteen months compensation for unfair dismissal.

1.9 I was appointed by the Commission on the 15th June 2009, to determine the dispute.

1.10 On the 22nd June 2009 the Commission issued invitations to the parties to attend the case on the 8th July 2009.

1.11 According to proofs of service, the Respondent received its invitation on the 26th June and one Judy Mahluza whose designation is Admin Officer signed on the "CMAC Form 20" to acknowledge receipt thereto.

1.12 The Applicant received his invitation on the 24th June 2009 at 12:30 pm as appears **ex** facie CMAC Form 19.

1.13 On the 8th July 2009, at 12:30 pm, the parties were called for the matter, however, only the Applicant responded and there was none on behalf of the Respondent.

1.14 Before ascertaining the Applicant's view on the next step that he would take, I brought it to his attention that it appeared that one Judy Mahluza was served with the invitation to attend conciliation, he confirmed that the said

-4-

Judy Mahluza was known to him and was an employee of the Respondent.

1.15 I then enquired if he had anything to say, the Applicant moved an application in terms of Section 81(7) (b) of the Industrial Relations Act 2000 (as amended).

1.16 After considering the matter in his presence, I then ordered that the matter be automatically referred to arbitration. I shall set out later my reasons for doing so.

2. SUMMARY OF EVIDENCE

2.1 The Applicant elected to give sworn evidence. In his evidence, which was electronically recorded, he stated his full names.

2.2 Musa Nxumalo testified that he was charged by the Respondent with offences of misconduct, that were namely; poor work performance and gross misconduct of threatening a supervisor by informing him that he would assault him.

-5-

2.3 According to the Applicant, he was employed by the Respondent as a Shop Assistant on the 18th September 2004.

2.4 It was the Applicant's evidence that the charges for poor work performance emanated from events that happened early in the day, where he was serving customers at the display section of the Respondent's confectionary department.

2.5 Nxumalo testified that he observed two colleagues who were also working at the display engaging in horseplay; these employees were Ndumiso and Mshumayeli, in the process Mshumayeli fell down.

2.6 Applicant stated that after this episode, a supervisor by the name of Jethro accused him of neglecting a customer and playing games, but he had denied that he was involved in the horseplay.

2.7 It was Nxumalo's testimony that after the evidence was led to prove the charge of poor work performance at the disciplinary hearing, the chairperson acquitted him of this charge.

-6-

2.8 The Applicant stated that on the 2nd count of threatening to assault the supervisor, he also denied that he committed this offence. It was his defence at the hearing that, he had only asked the supervisor if he was aware that the Applicant was not the one who had been playing when the customer sought assistance.

2.9 The Applicant testified that following the investigation of the second count, he was found guilty of threatening the supervisor and he was dismissed, however he appealed against that sanction.

2.10 It was Nxumalo's evidence that at the appeal, the chairperson confirmed the decision of the disciplinary hearing chairperson.

2.11 The Applicant submitted that there was no evidence that was led to prove that he had uttered the threat. He further argued that the dismissal was procedurally unfair because the Respondent failed to deal with the matter at departmental level first before preferring charges against him.

-7-

2.12 He was praying for terminal benefits, overtime for eighteen months, **pro rata** bonus and compensation for unfair dismissal.

3. ANALYSIS OF EVIDENCE AND LAW

3.1 Before I analyze the evidence by the party in attendance, together with any annexures that were filed by him when reporting the dispute, it behoves me at this stage to state the reasons and legal justification for ruling that the matter be automatically referred to arbitration.

3.2 Section 81 (7) (b) of the Industrial Relations Act 2000 (as amended) provides;

> "if the dispute concerns the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement or re-engagement, the Commissioners appointed under section 80 (i) may-
>
> **-8-**
>
> ...(b) refer the matter to arbitration and the arbitrator may grant default judgment against any other party that fails to attend a conciliation meeting".
> (My emphasis).

3.3 In order to decide whether to refer a matter to automatic arbitration, I have to consider the following issues; whether or not the is proof of service and if it appears ex facie that service was properly made, whether or not the time limits stipulated by the rules of the commission were observed. I also have to peruse the file to see whether or not any request for postponement was made in terms of rules of the Commission.

3.4 Now Rule 8 (1) provides that;

> "a party shall serve a document on the other party or parties to the dispute-
>
> (a) by handing a copy of the documents to-
>
> **-9-**
>
> ... (iii) a person who appears to be at least sixteen (16) years old and in charge of a party's place of residence, business or employment".

3.5 The Commission served the invitation to conciliation on one Judy Mahluza an Admin Officer on the 26th June 2009 and the Form 20 appears to have been signed to acknowledge receipt. The Applicant confirmed that Mahluza was known to him and she was working for the Respondent at the Administration Office.

3.6 In my view "admin" is a shortened word for "administration" or "administrative", which ever suits the particular context at that time. It is my opinion that Mahluza was a fit and proper person to be served the invitation and qualified to be said to be in charge of the Respondent's undertaking at the time.

3.7 When Rule 8(1) (a) iii of the CMAC Rules states that the person to be served should appear to be

at least sixteen (16) years old and in charge, does not mean that he should actually be in charge.

-10-

3.8 In my view, the foregoing Rule has the same application as Rule 4 (2) (b) of the High Court Rules, which latter Rule provides;

> "service under sub rule (1) shall be effected in one or other of the following manners;
>
> ... (b) by leaving a copy thereof to the place of residence of business or such person, guardian tutor curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age". (my emphasis).

3.9 The learned Judge H J Erasmus et al in SUPERIOR COURT PRACTICE, Juta (2004) pg B1 - 23 in their commentary on the South African Rule 4 which is in pari materia with the High Court of Swaziland Rule 4, state that in the context of the rule "apparently" means "seemingly" as opposed to "actually".

-11-

3.10 In my view in the context of Rule 8 of the CMAC Rules "appears" means "seemingly" but not "actually", in other words Judy Mahluza may not have actually been in charge of Hub Super Spar, but at the time CMAC effected service, she was seemingly in charge.

3.11 The next question to determine is whether or not the Respondent was given sufficient notice of the conciliation. The conciliation was to be held on the 8th July 2009, a Wednesday. The invitation to attend same was received by the Respondent on the 26th June 2009, a Friday.

3.12 Rule 7 of the CMAC Rules proves that;

"The commission shall give the parties at least seven (7) days notice in writing of a conciliation hearing, unless the parties agree to a shorter period of notice".

3.13 There was no such agreement to shorten the period of notice, however, the number of CMAC days excluding both the 26th June and the 8th July 2009, is exactly seven days.

-12-

3.14 It is my view that the notice given to the Respondent was in terms of Rule 7, thus proper.
3.15 There is no correspondence from the Respondent to the Commission nor is there any inscription on the file cover, that indicates that the Respondent made or attempted to make a postponement of the conciliation.

3.16 The Respondent did not even send any one to make an application for a postponement at the conciliation. It is not necessary to quote the provisions of Rule 15 that governs how a conciliation may be postponed.

3.17 It is for the above reasons that when the Applicant moved the application to refer the matter to automatic arbitration, same was granted.

3.18 It is my view that although the dispute was automatically referred to arbitration, the granting of a default judgment is not equally automatic.

-13-

3.19 On a careful observation of CMAC Form 2, the form for inviting parties to Conciliation, paragraph 3 that informs the parties about the legal consequences that follow if a party fails to attend. It appears that it does not state the correct position of the law as provided by Section 81(7) (b) of the Industrial Relations Act 2000 (as amended).

3.20 The Ipmssisima verba rendering at paragraph 3 of Form 2 states;

> "failure to attend the conciliation meeting without any reasonable explanation by the parties may result in the following;
>
> 3.2 the dispute being automatically referred to arbitration and default judgment being entered against the defaulting party in terms of Section 81 (7) (b) of the Act if any other part fails to attend".

-14-

3.21 Section 81 (7)(b) of the Industrial Relations Act 2000 (as amended) has been cited and quoted extensively above.

3.22 In my view, the provisions of Section 81 (7) (b) gives the Commissioner powers to exercise a discretion in two sequential stages. First the Commissioner has to exercise his discretion to determine whether or not the dispute should be referred to automatic arbitration. Secondly, the Arbitrator after hearing the evidence and considering the facts before him has to decide whether or not default judgment should be granted.

3.23 The foregoing view is strengthened by the use of the words "and the Arbitrator may grant default judgment" after the words "the Commissioner appointed under Section 80(1) may - refer the matter to arbitration".

3.24 Furthermore, according to the wording of Section 81 (7) (b), when the Commissioner has to determine whether or not to refer the matter to arbitration, he occupies the office and sits as a

-15-

Commissioner, however, when he arbitrates, he executes the function of the office of Arbitrator.

3.25 Again, the foregoing opinion is supported by the nomenclature of the provisions of Section 81 (7) (b) which are the words "the Commissioner appointed under Section 80 (1) may- refer the matter to arbitration", before the words "and the arbitrator may grant default judgment.

3.26 In other words, once the Commissioner decides to refer the matter to arbitration, he becomes functus officio**,** and he ceases to be a Commissioner, but thereafter becomes an arbitrator for purposes of the granting of default judgment.

3.27 In my view, the use of the words in Section 81 (7) (b) suggests that the discretion I mentioned above is exercised in one transaction and or event.
3.28 The foregoing is premised on the words "and the arbitrator may grant default judgment against any other party that fails to attend a conciliation meeting."

-16-

3.29 If there was a requirement for inviting the Respondent to an arbitration, it is my view that the Industrial Relations Act 2000 (as amended) would have made such a provision.
3.30 Having arrived at the conclusion that Section 81 (7) (b) of the Industrial Relations Act 2000 (as amended) gives me a discretion to grant default judgment, I now look at the evidence and facts before me to determine if I should exercise that discretion in favour of the Applicant.

3.31 The Applicant's evidence is well articulated in the summary above. When reporting the dispute, the Applicant also annexed the following documents to his Report of Dispute; Notice to attend a disciplinary hearing, the minutes of the disciplinary hearing, the minutes of the appeal hearing and the letter of termination of employment.

3.32 The letter of termination of employment confirms that the Applicant was dismissed for the offence of threatening to assault the supervisor, because

it cited Section 36 (b) of the Employment Act 1980 as the reason for dismissal.

3.33 According to the minutes of the disciplinary hearing chaired by one Zamani Tsabedze held on the 11th March 2009 at 10:00 am, the Applicant was advised of his rights, but elected not to have a representative. The chairperson appears to have enquired if the Applicant had made all means to secure one.

3.34 The evidence of Jethro Magagula was central in proving the misconduct charge, which was threatening a colleague and supervisor that Applicant would beat him.

3.35 The minutes recorded that Jethro asked the Applicant why he was playing at the display, the Applicant is recorded to have replied by enquiring why Jethro was targeting him as the others were also playing.

3.36 During the course of the conversation, Jethro said that the Applicant said to him that he, the Applicant could see that Jethro was after him and he would get what he wanted from him.

3.37 Jethro said he then left and the Applicant had a conversation with one Anthony Mhlanga and Sabelo, but Jethro was within earshot and heard the Applicant saying were it not for the fact that they were at work, he, the Applicant would have slapped Jethro with an open hand. Jethro stated that the words he used were (ngabe ngimhlaba ngemphama).

3.38 According to the minutes, the Applicant was given an opportunity to cross examine Jethro Magagula. However, the minutes do not show that the Applicant challenged or refuted Jethro's damning evidence in relation to the threat.

3.39 Whilst evidence attributed to a witness by minutes of a disciplinary hearing, constitutes hearsay if not confirmed at a subsequent trial, however, it is of certain circumstantial value.

See ZEPHANIA NGWENYA V RSSC (IC NO: 262/01)

3.40 The Applicant having submitted and volunteered all the documents in the file, must have read the minutes of the disciplinary hearing and was aware of the evidence of Jethro Magagula and the fact that it was recorded that he did not challenge Jethro's evidence.
3.41 However, the Applicant did not raise any issue concerning the authenticity of the minutes of the disciplinary hearing.

3.42 On a balance of probability based on the facts and evidence before me, it seems the Applicant was dismissed for a reason that is permitted by Section 36 (b) of the Employment Act 1980.

4. <u>OVERTIME AND BONUS CLAIMS</u>

4.1 regarding the Applicant's claim for overtime and pro rata bonus, it was his evidence that for eighteen months prior to his dismissal, despite working overtime the Respondent failed to pay him for such with respect the bonus he stated that it was not paid at the time of his dismissal.

4.2 The Applicant has not been forthright with the Commission. In his Report of Dispute, he annexed a copy of his pay slip for November 2008. For the month of November 2008, he was paid E177.00 as overtime. At the bottom portion of the pay slip, just before the column for net pay, there is a table for "year to date earning".

4.3 In the "year to date earnings", the table reflects that the Applicant has been paid E1 057.46 overtime and E286.31 as special bonus. Nxumalo's evidence is that he was never paid these entitlements at all, not that there was a short payment. Information on the slip contradicts his assertions and as such, he ought to

-21 -

also fail in his claim for overtime and pro rata bonus.

5. CONCLUSION

5.1 Having found that according to the minutes of the disciplinary inquiry and appeal hearing, which prima facie the Applicant did not challenge the Respondent's termination of the Applicant's services was for a reason permitted by Section 36 (b) of the Employment Act 1980.

5.2 It is my finding that the Applicant has failed to make a case for his claims for overtime and pro rata bonus.

5.3 I make the following order.

6. AWARD

6.1 The application is dismissed.

DATED AT MANZINI ON THIS 17th DAY OF AUGUST 2009

-22-

VELAPHI DLAMINI

CMAC COMMISSIONER

-23-