IN THE CONCILIATION MEDIATION AND ARBITRATION COMMISSION

HELD AT MANZINI **CMAC REF NO:** **SWMZ 481/09**

In the matter between:

STAWU: VELI KUNENE **APPLICANT**

AND

UNITRANS SWAZILAND LIMITED **RESPONDENT**

CORAM
FOR ARBITRATOR : VELAPHI DLAMINI
FOR APPLICANT : NKOSINATHI SIMELANE
FOR RESPONDENT : NO APPEARANCE

NATURE OF DISPUTE: AUTOMATICALLY UNFAIR DISMISSAL

DATE: 27TH OCTOBER 2009

DEFAULT JUDGMENT

1. DETAILS OF HEARING AND REPRESENTATION

1.1 On the 27th October 2009, the automatic arbitration hearing of this matter was held at the Conciliation, Mediation and Arbitration Commission offices (CMAC or Commission), situated at 4th Floor SNAT, Cooperative Building in Manzini.

1.2 The Applicant is Veli Kunene an adult Swazi male of P. O. Box 3362 Manzini. Kunene was represented by Mr Nkosinathi Simelane, an official of the Swaziland Transport and Allied Workers Union (STAWU), the Applicant's organization.

1.3 The Respondent is Unitrans Swaziland Limited, a company of P. O. Box 360, Manzini. There was no representation on behalf of the Respondent during the hearing.

2. BACKGROUND FACTS

2.1 The Applicant reported a dispute for automatically unfair dismissal about the 22nd September 2009.

2.2 The Commission processed the Report of Dispute on the 25th September 2009.

2.3 In the Report of Dispute, the Applicant recorded that he was employed by Unitrans on the 17th September 2007 as a heavy duty driver and at the time the dispute arose, Kunene was earning monthly wages of E3 280.16 (Three Thousand Two Hundred and Eighty Emalangeni Sixteen Cents).

2.4 Further the Applicant stated that on the 25th March 2009, he was dismissed by the Respondent following certain charges of misconduct being preferred against him by Unitrans on the 6th March 2009.

2.5 Kunene proceeded to summarise the facts giving rise to the dispute by stating that he took part in a lawful strike by employees of the company between the 19th January 2009 to the 24th February 2009.

2.6 It is further recorded in the Report of Dispute that after the strike which was for a wage increase, the

Applicant and nine of his colleagues who had taken part in the lawful strike, were charged for misconduct by the Respondent, it being alleged that they committed the misconduct on the 12th and 16th February 2009.

2.7 Kunene further states in the Report that he was subsequently dismissed on the 25th March 2009 for taking part in a legal strike.

2.8 The Applicant recorded that notwithstanding the fact that he appealed against his dismissal, the Respondent failed to hear same.

2.9 As recorded in the Report of Dispute, it is the Applicant's view that his dismissal was substantively unfair because the allegations against him were unsubstantiated.

2.10 Further Kunene considered that the termination of his services by the Respondent was procedurally unfair, because he was not allowed to state his case and the chairperson of the disciplinary hearing was biased.

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2.11 The Applicant claims one month's notice pay and twenty four month's compensation for automatically unfair dismissal.

2.12 I was appointed by the Commission on the 2nd October 2009, to determine the dispute.

2.13 On the 20th October 2009, the parties Respondent represented by Mr Dumsani Ngcamphalala, an Industrial Relations Consultant and Applicant accompanied by Mr Nkosinathi Simelane, by consent, postponed a conciliation meeting to the 27th October 2009 at 10:00 am.

2.14 The parties signed "CMAC Form 21" which was the agreement to postpone the conciliation and also signed "CMAC Form 3", the agreement extending the conciliation period. The CMAC Forms we endorsed with the Commission's official stamp dated 20th October 2009.

2.15 On the 27th October 2009, at 10:33 am, the parties were called for the matter, however, only the Applicant and his representative responded

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and there was no representation on behalf of the Respondent.

2.16 I then enquired from the Applicant and his representative the next step they wanted to take in light of Unitran's non representation. Mr Simelane moved an application in terms of Section 81 (7) (b) of the Industrial Relations Act 2000 (as amended).

2.17 After considering the application in the presence of the party in attendance, I ordered that the matter be automatically referred to arbitration. I shall later set out my reasons for doing so.

3- <u>SUMMARY OF EVIDENCE</u>

3.1 The Applicant was the sole witness for his case and he testified under oath. His evidence was recorded both electronically and in longhand.

3.2 In his evidence, Veli Kunene repeated what he had recorded in the Report of Dispute, which statement has been outlined above, with some additions.

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3.3 The Applicant testified that on the 7th March 2009 he was accused by Unitrans' management, in particular Simphiwe Sihlongonyane, of having intimidated one Ambrocte Mlotshwa on the 16th February 2009, whilst Kunene was on strike and Mlotshwa on duty.

3.4 It was Kunene's evidence that he was charged by Sihlongonyane who furnished him with a charge sheet, calling upon him to appear at a disciplinary hearing.

3.5 The Applicant testified that at the disciplinary hearing, which was chaired by Attorney Mr Zonke Magagula, he was prevented from stating his side of the story; however, he was denying the fact that he had intimidated Ambrocte Mlotshwa. He stated that on the 16th February 2009, he never went near Mlotshwa, but he stood afar next to a certain motor vehicle.

3.6 The Applicant's statement was that he was shocked by the verdict of guilty and as such could not make any submissions in mitigation of

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sanction. Kunene then handed in the charge sheet and ruling as part of his evidence and these were marked exhibits "A" and "B" respectively.

3.7 Kunene stated that his dismissal was substantively and procedurally unfair and as such, he claimed one months notice pay and twenty four month's compensation for automatically unfair dismissal.

4. ANALYSIS OF EVIDENCE AND LAW

4.1 As a precursor to the analysis of the evidence, I wish to return to state the reasons and legal justification for ruling that the matter be automatically referred to arbitration.

4.2 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 an v employee in respect of his dismissal, employment, re-instatement or re-engagement, the

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Commissioner appointed under Section 80 (1) may - ... (b) refer the matter to arbitration and the arbitrator may grant default judgment against any other party that fails to attend a conciiiation meeting: (emphasis added).

4.3 It is my view that the provisions of Section 81 (7) (b) gives the appointed Commissioner discretionary powers in two sequential stages of the default judgment proceedings.

4.4 In the first instance, the Commissioner has to exercise his discretion in determining 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 in favour of the party in attendance.

4.5 The foregoing opinion is strengthened by the use of the words "and the arbitrator may grant default judgment", after the words "the commissioner appointed under Section 80

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(1) - may refer the matter to arbitration" in the provisions of Section 81 (7) (b) of the Industrial Relations Act 2000 (as amended).

4.6 In my view, the use of the words in Section 81(7) (b) suggests that the discretion is exercised in one sitting.

4.7 The foregoing is premised on the following language used in the section under review,

> "and the arbitrator may grant default judgment against any other party that fails to attend a

conciliation meeting".

4.8 The remedy provided by Section 81 (7) (b) is complemented by Rule 18 (1) and (2) of the Commission's rules, which outlines the procedure to follow when contemplating judgment by default.

4.9 Rule 18 (1) and (2) provides that;

> "if a party is not present at the date and time advised by the Commission for the commencement of the conciliation, the
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> commissioner shall first be satisfied that the party was property notified of the conciliation. Once the Commissioner is satisfied that the party was properly notified, the Commissioner shall wait for at least a period of 30 minutes from the scheduled time for the conciliation to give the absent party an opportunity to arrive".

4.10 Rule 18 (3) provides that in the event the Commissioner has observed the procedural requirements stated in sub-rules (1) and (2), however the other party fails to attend, then depending on who the party not in attendance is, the Commissioner may reject the dispute or grant default judgment.

4.11 I have already alluded to the fact that the parties signed "CMAC Form 3" and CMAC Form 21" being extension and postponement of the conciliation from the 20th October 2009 to the 27th October 2009. I am satisfied that both parties were properly notified of the date and time of the conciliation.

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4.12 The Respondent, who was the party not represented during the conciliation was given thirty three minutes to attend, but to no avail.

4.13 It is for the reasons stated above that I referred the matter to automatic arbitration. I now turn to evaluate the evidence and facts before me to determine if default judgment should be granted in favour of the Applicant.

4.14 As part of his evidence, the Applicant tendered his charge sheet and the disciplinary chairperson's ruling.

4.15 According to the charge sheet dated 6th March 2009, the Applicant was charged with two counts; first gross misconduct it was alleged that "on or about 16th February 2009, while engaged in a strike action and while you were by the entrance to the Unitrans Matsapha depot, you intimidated Ambrocte Mlotshwa who was on duty by saying the following words to him, "sitokutfola, ungeke ufele la edepot".

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4.16 On the second count, Kunene was charged with the offence of intimidation. The particulars of the count were in all material respects similar to the first one.

4.17 Before proceeding, one needs to remark that there appears to have been an unnecessary duplication or splitting of charges. As stated above, the counts of gross misconduct and intimidation have similar particulars.

4.18 However, nothing turns on this procedural irregularity, as will be showed later.

4.19 According to the ruling delivered by Mr Zonke Magagula, who was the chairman of the disciplinary inquiry, the Applicant's conduct during the hearing was disturbing because he is alleged to have first walked out of the boardroom, stating that his case had already been predetermined.

4.20 Mr Magagula further comments however that, after much persuasion by his representative, who had been requested by the Chairman, the Applicant returned to answer the charges. It is

recorded that Kunene pleaded not guilty when the charges were read to him.

4.21 In terms of the ruling, the evidence led by the initiator during the disciplinary hearing was that of Ambrocte Mlotshwa who was called as a witness, who was alleged to have been threatened and insulted by Kunene by stating to him that "utfwele ligolo lapha enhloko, sitakutfola, ungeke ufele laedepot".

4.22 According to the ruling, when Kunene and his representatives were afforded an opportunity to cross-examine Mlotshwa, the Applicant demonstrated a cavalier attitude and no substantive questions were poised. Further when Kunene was given an opportunity to state his side of the story, he declined despite pleas by his representatives to do so.

4.23 Mr Magagula states that in the circumstances he was left with no alternative but to consider the evidence of the complainant as unchallenged and accepted same as true, consequently, he found Kunene guilty of uttering the insult and

threatening Mlotshwa and ordered that the Applicant be dismissed forthwith, because the offence carried the ultimate penalty of dismissal for a first offender.

4.24 Ex facie the ruling, the chairman seems to have failed to consider any mitigating and aggravating factors before ordering the Applicant's dismissal. However, as will be shown later that nothing turns on this observation.

4.25 I then poised a few questions to the Applicant, in order to clarify certain issues that had a bearing and were critical to the determination of the matter.

4.26 When it was enquired from the Applicant if he challenged the evidence of Ambrocte Mlotshwa especially whether or not he refuted uttering the insult and threat, Kunene said he did not and his reason was that he was shocked or taken by surprise by the witness' evidence which was untrue. Further because in his entire life, he had not uttered an insult and could not have done so

to Mlotshwa, consequently, he saw no point in rebutting his testimony.

4.27 Kunene further stated that none of his representatives challenged Mlotshwa's evidence in the form of cross examination.

4.28 On the question of mitigation, the Applicant stated that even though he was given the opportunity to do so, he saw no point in mitigating as that would have meant he was apologizing for having committed the misconduct, yet he pleaded not guilty. Even when Mr Simelane, his representative during the arbitration simplified the definition of the principle of mitigation, the Applicant stated that he did not make any submissions in mitigation.

4.29 In my view the evidence of the Applicant given during the arbitration corroborates materially, the conclusion reached by Mr Zonke Magagula that Kunene "showed little interest in the proceedings and no substantive question were raised" by him and his representatives in challenging the

evidence of Ambrocte Mlotshwa during the disciplinary hearing.

4.30 I consider that the Applicant's evidence that he was nowhere near Ambrocte Mlotshwa on the 16th February 2009, because he was standing next to a certain motor vehicle far from the scene of the alleged insults and threats, is an afterthought and a contrived story, which is rejected.

4.31 There was nothing preventing the Applicant from putting the foregoing defence during the disciplinary hearing to enable the chairman to test it against Mlotshwa's statement.

4.32 Kunene attempted to explain his lackadaisical attitude to the fact that he was shocked about the allegations leveled against him by Mlotshwa.

4.33 I am unable to give credence to his explanation in view of the fact that he was furnished with the charge sheet, which contained the alleged insults and threats, on the 7th March 2009, some three days prior to the hearing. Assuming that he was shocked, he should have recovered by the 10th

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March 2009, so as to prepare adequately for his defence.

4.34 I reject the Applicant's assertion that he was prevented by the chairperson to state his defence. Further it is my view that given his cavalier attitude, Mr Magagula's conclusions and findings were fair, reasonable and proper in the circumstances.

4.35 The foregoing argument was premised on the fact that, at first, ten employees were charged with gross misconduct and intimidation, but charges against four were withdrawn, and six remained charged.

4.36 From the remaining six employees, one was given a final written warning and another received a second written warning. The last four were dismissed, which included the Applicant.

4.37 Kunene's submission was that because Mr Magagula did not issue a final warning or dismissal for all ten, then the disciplinary rules were not

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applied consistently. Mr Simelane cited the case of SACTWU & OTHERS V NOVEL SPINNERS (PTY) LTD (1999) 8 LC.

4.38 In the SACTWU case, the learned Zondo J propounded that it was inappropriate for an employer to take into account warnings given for individual action when it considers an appropriate penalty in respect of collective action.

4.39 His Lordship in the SACTWU case then found that the dismissal of workers who had been charged with absenteeism, when others who faced a similar offence were given warnings, was unfair, because the employer had considered previous individual records in disciplining them on a differential basis.

4.40 I do not think the SACTWU judgment is of any assistance to the Applicant, as it is distinguishable. Firstly, the offence that was under review in the learned Zondo J's decision was work stoppage and in this matter, it was threatening or intimidating a fellow worker.

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4.41 Secondly, Zondo J had been appraised of the reasons that led the employer to issue different sanctions, yet the employees were charged with a similar offence, but it is not so in this matter.

4.42 Thirdly, the learned Judge in the SACTWU case was appraised of the charges of all the employees who were involved in that matter, I have only been showed the Applicant's charge sheet.

4.43 Mr Simelane submitted that the chairman of the disciplinary hearing committed a procedural irregularity, in that he was dealing with a case of collective misconduct, however, he imposed different sanctions yet the evidence and charges were similar.

4.44 In my view, it would be tantamount to a shot in the dark if one were to apply the principle laid

down in the judgment by Zondo J, in the Applicant's favour. I cannot follow the decision in the SACTWU case.

5. CONCLUSION

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5.1 Having found that the Applicant failed to challenge the allegations leveled against him when he was given the opportunity to do so and having rejected his explanation as it amounted to an afterthought, it is my further finding that on the facts and evidence before me, the Respondent proved that the Applicant's dismissal was for a reason permitted by Section 36 (b) of the Employment Act 1980.

5.2 I make the following order.

6. AWARD

6.1 The application is dismissed.

DATED AT MANZINI ON THIS ..... DAY OF NOVEMBER 2009

VELAPHI DLAMINI

CMAC COMMISSIONER

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