

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 483/08**

In the matter between:

**NOMSA SIGUDLA**

**APPLICANT**

And

**STANDARD BANK LIMITED**

**RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE DAN**

**JUDGE**

**MANGO GILBERT NDZINISA**

**MEMBER**

**MEMBER**

**FOR APPLICANT FOR  
RESPONDENT**

**T. DLAMINI V.  
DLAMINI**

**RULING 23.09.09**

[1] The applicant instituted an application for determination of an unresolved dispute between herself and the respondent in terms of the provisions of the Industrial Relations Act No.1 of 2000 as amended.

[2] The respondent raised a point of law that the applicant is not entitled in law to bring the present application before the court as she was not an employee to whom Section 35 of the Employment Act, 1980 as amended applied, as she had not completed the probationary period when she was terminated by the respondent.

[3] The brief facts of this application show that the applicant was employed by the respondent in terms of a written contract of employment on

23.05.07 as a Bank Clerk. This position was permanent, subject to a successful completion of three months probationary period. The probationary period was to come to an end on 23.08.07. The applicant's contract of employment was however terminated by the respondent in writing on 22.08.07, one day before she completed the period of probation.

[4] No reasons were given, nor was any notice given to the applicant. The respondent's argument before the court in its point of law raised was that it had no obligation to give reasons or any notice to the applicant as she was still under probation as envisaged by Section 35 read together with Section 32 of the Employment Act.

[5] On behalf of the applicant it was argued that the conduct of the respondent was unlawful and was in breach of the fundamental rights of the applicant as guaranteed by the Constitution of the country and also the basic common law principle of *audi alteram partem*. It was argued that these two provisions of the

Employment Act have the effect of taking away the basic right of the applicant to be heard before the adverse decision was taken against her.

**Section 32(1) of the Employment Act** provides that;

*"During any period of probationary employment as stipulated either in the form to be given to an employee under Section 22, or in a collective agreement governing his terms and conditions of employment, either party may terminate the contract of employment between them without notice."*

**Section 35(1)** which is titled "EMPLOYEE'S SERVICES NOT TO BE UNFAIRLY TERMINATED" provides for the following exceptions;

"(1) This section shall not apply to -

- (a) *An employee who has not completed the period or probationary employment provided for in Section 32;*
- (b) *An employee whose contract of employment requires him to work less than twenty-one hours each week;*
- (c) *An employee who is a member of the immediate family of the employer.*
- (d) *An employee engaged for a fixed term and whose term of engagement has expired.*

[7] The arguments raised on behalf of the applicant that these provisions of the law are unconstitutional have not been raised in this court before. A survey of local cases shows that the interpretation of Sections 32 and 35 was brought to the fore in the cases of **Abner Kunene v. Parmalat Swaziland (Pty) Ltd case No. 139/2001** and that of **Gerard Shields v. Carson Wheels (Pty) Ltd t/a Carson Wheels case No. 237/2006**.

[8] In both these cases the court pointed out that the effect of Section 35 read with Section 32 is that an employer may terminate the service of an employee who has not completed his probationary period without giving notice and without any fair reason. The constitutional issue was never raised in these two cases. In any event the **Abner Kunene** case was decided in 2003 before the coming into effect of the Constitution. In the **Gerard Shields** case the court had to decide the question of the effect of a renewed or extended probationary

period. The court held that to extend or renew a probationary period amounts to contracting out of the provisions of the Employment Act and therefore null and void.

[19] **Section 2(1) of the Constitution** provides that;

*"This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void."*

It was argued on behalf of the applicant that Section 35 as read together with Section 32 of the Employment Act takes away the employee's right to be heard just because that employee is still on probation. It was further argued that the constitution guarantees equality before the law and the right to fair hearing under Sections 20 and 21 respectively.

[10] This court does have the power to determine labour disputes before it involving Constitutional issues.

See:- **Thembeni Simelane V. Chairman of the  
Civil Service Commission case no.8/2007**

**SAPWU v. Usutu Pulp company t/a SAPPI  
Case no. 423/2006**

**Nhlanhla Hlatshwako v. Swaziland Government Case  
no. 398/2006.**

[10] The question whether this court has jurisdiction to deal with questions of labour law involving the interpretation of the Constitution was put to rest by the Industrial Court of Appeal in the case of **The Attorney-General v. Stanley Matsebula Appeal Case No. 4A2007** where the argument that the Industrial Court, being a court of law is enjoined to enforce the laws of Swaziland and the Constitution being the supreme law of the land cannot be excluded from enforcement by the court was upheld.

[11] In this present case however, the applicant is not only asking the court to find that the conduct of the respondent was unconstitutional but also that the provisions of Section 32 read together with Section 35 are inconsistent with the Constitution especially Sections 20 and 21 and should therefore be declared null and void. Our view in this matter is that this court, being a court that is subordinate to the High Court, has no power to strike down or declare null and void a provision or section of an Act of Parliament.

[12] This matter is therefore taken care of by Section 35 of the Constitution and the questions raised herein must be placed before the High Court which has the power to grant the relief sought.

[13] As an aside, the court will note that indeed the position in South Africa has changed. Employers in South Africa are now required to justify the dismissal of probationary employees in much the same way as they are required to do in the case of any other employees, though the courts may be disposed, in the case of the dismissal of a probationary employee, to accept reasons slightly less compelling than they would require in the case of employees of longer standing.

See:- **John Grogan: "Workplace Law" eighth edition (Juta and Company) p. 209.**

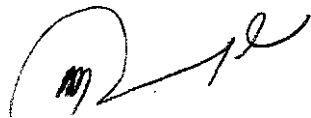
[13] Taking into account all the foregoing observations and also all the

circumstances of the case, the court will make the following order;

**(a) The present proceedings are stayed pending referral of the Constitutional questions raised in this matter to the High Court within a period of twenty-one days of the handing down of this ruling.**

**b) No costs order is made.**

The members agree.



**NKQ SINATHI NKONYANE**  
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