IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 4050/2009

In the matter between:

NOMSA SIGUDLA	Applicant
And	
STANDARD BANK SWAZILAND LTD	1st Respondent
THE ATTORNEY GENERAL	2nd Respondent
Consolidated with	Case No.1717/15

In the matter between:-

JOSEPH SIBANDZE & 9 OTHERS	Applicants
And	
PREMIER SWAZI BAKERIES (PTY) LTD	1st Respondent
THE ATTORNEY GENERAL	2nd Respondent

Neutral citation: Nomsa Sigudla v Standard Bank Swaziland Ltd & Another, Case No. 4050/09 Consolidated with Joseph Sibandze & 9 Others v Premier Swazi Bakeries (Pty) Ltd Case No. *(1717/15)*[2016] *SZHC119 (23 September 2016)*

Coram: **J. P. ANNANDALE, N. J. HLOPHE AND T. DLAMINI J. J.**

Heard: 27 April 2016

Delivered: 23 September 2016

Summary: *Labour Law – Termination of employment of probationary employees – Applicants had their employment terminated before they finished their probationary period – The termination was however on the last day of the probationary period – Applicants filed applications for unfair dismissal and the Respondents based their defence on sections 32 and 35 of the Employment Act 5/1980 – Applicants challenged the constitutionality of these two sections and contended that they are inconsistent with sections 20 and 21 of the Constitution of Swaziland Act 1/2005.*

Held: These sections are not inconsistent with the aforementioned sections of the Constitution – Held further that section 35(1) of the Act is inconsistent with section 14(1) of the Constitution – Parliament to therefore amend this section – No order as to costs.

JUDGMENT

T. DLAMINI J

[1] This judgment is in respect of two matters that were referred to this court (High Court) by the Industrial Court. They both seek similar reliefs and had a striking similarity of the facts. They were therefore consolidated by this court. These are High Court Case No. 4050/2009 and Case No. 1717/2015.

[2] In both matters the relief sought is a declaration of sections 32 (1) and 35 (1) of the Employment Act No. 5 of 1980 (the Act) as null and void or that they be struck down, it being contended that these sections are inconsistent with sections 20 and 21 of the Constitution of the Kingdom of Swaziland Act 001 of 200 5 (the Constitution).

[3] The matters first appeared before the Industrial Court which, however, held that it, 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. That power lies with the High Court in terms of section 35 of the Constitution. These matters were therefore referred to this court for determination. The

proceedings before the Industrial Court were, as a result, stayed pending the determination of the issue by this court.

[4] The facts appear from the papers that were filed with this court. The Applicant in case no. 4050/09, Nomsa Sigudla, was employed by the Respondent, Standard Bank, on the 23rd May 2007 as a Bank Clerk. This position was permanent but subject to a successful completion of three months probationary period. The probationary period was to come to an end on the 23rd August 2007. The Applicant's employment was however terminated by the Respondent in writing one (1) day before she completed the probation, on 22 August 2007.

[5] No reasons were given for the termination nor was any notice given to the Applicant. A dispute for unfair dismissal was reported to the Commission for Mediation, Arbitration and Conciliation (CMAC) where it remained unresolved and the dispute was taken to the Industrial Court. The Applicant sought reinstatement or alternatively payment for notice and maximum compensation for unfair termination of his employment.

[6] The Respondent opposed the application and raised a point of law that it had no obligation to give reasons for the termination or any notice to the Applicant as she was still under probation as envisaged in terms of section 35 read with section 32 of the Employment Act.

[7] Section 32 of the Employment Act provides as follows:

> ***"32.(1) 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,"***
>
> ***(2) No probationary period shall, except in the case of employees engaged on supervisory, technical or confidential work, extend beyond three months.***
>
> ***(3) In the case of employees engaged on supervisory technical or confidential work, the probation period shall be fixed, in writing, between the employer and employee at the time of engagement.***

] Section 35, which prohibits the unfair termination of employees' employment, provides as follows:

"35. (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."

(2) No employer shall terminate the services of an employee unfairly.

(3) The termination of an employee's services shall be deemed to be unfair if it takes place for any one or more of the following reasons –

(a) the employee's membership of an organization or participation in an organization's activities outside working hours or, with the consent of the employer, within working hours;

(b) because the employee is seeking office as, or is acting or has acted in the capacity of an employee's representative;

(c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of any law or the breach of the terms and conditions of employment under which the employee is employed;

(d) the race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status of the employee;

(e) where the employee is certified by a medical practitioner as being incapable of carrying out his normal duties because of a medical condition brought about by work he has carried out for his present employer except where the employer proves that he has no suitable alternative employment to offer that employee;

(f) because of the employee's absence from duty due to sickness certified by a medical practitioner for a period not exceeding six months, or to accident or injury arising out of his employment, except where the employer proves that, in all the circumstances of the case, it was necessary for him permanently to replace the employee at the time his services are terminated.

[9] It was argued on behalf of the Applicants that sections 32 (1) and 35 (1) of the Act are inconsistent with the Constitution and are therefore unconstitutional. It was submitted that they allow the employer to terminate the employment of a probationary employee without giving notice and without any fair hearing. It was contended that these sections take away the employee's right to be heard simply because the employee is still on probation.

[10] It was further argued that sections 20 and 21 of the Constitution guarantee for every person equality before the law and the right to a fair hearing respectively.

[11] In case no. 1717/15 the Applicants are Joseph Sibandze and nine others. The nine other Applicants are Zweli Shabangu, Joseph Tembe, Wandile Matsenjwa, Richard Dlamini, Peter Simelane, Andile Mtsetfwa, Congo Simelane, Samson Gumbi and Vusi Nkambule. These Applicants were employed by the Respondent, Premier Swazi bakeries (Pty) Ltd, as packers and Loaders on the 1st April 2014. They worked for the probationary period of three months and were thereafter dismissed on the 30th June 2014. Their dismissal was, therefore, on the last day of the probationary period.

[12] The Applicants allege that the reasons for their dismissal included, but not limited to, non-satisfactory job performances and failure to establish a sound working relationship. They were dismissed without any disciplinary hearing being conducted against them.

[13] The also lodged a dispute of unfair dismissal or termination of their employment with CMAC where the dispute remained unresolved. They therefore took the dispute to the Industrial Court.

[14] At the Industrial Court the Respondent raised a point *in limine* to the effect that the dismissals were effected within the probationary period of employment and

the Applicants cannot therefore be said to have been unfairly dismissed when regard is given to section 35(1) of the Employment Act. The Applicants contended, on the other hand, that section 35(1) of the Employment Act is inconsistent with the Constitution and therefore ought to be struck down as void for the inconsistency.

[15] As already mentioned above, the Respondents' case is that in terms of section 35 (1) of the Employment Act the Applicants' employment cannot be held to have been unfairly terminated because the termination was effected during the period of probation. It was also contended that in terms of section 32(1) of the Employment Act the Applicants' services could be terminated anytime and without notice during the period of probation.

[16] It was further contended by the Respondents that when the Applicants' services were terminated the Applicants were not yet employees of the Respondents. It was therefore argued that the termination of their employment does not and cannot amount to an unfair dismissal or termination.

[17] In reply to these contentions the Applicants argued that sections 32(1) and 35(1) of the Employment Act are null and void because they are inconsistent

with sections 20(1) and 21(1) of the Constitution. They further argued that these sections are a violation of section 32(4) (d) of the Constitution. For these reasons, they submitted that these sections ought to be struck down or declared null and void for their inconsistency with the Constitution.

[18] Section 20 of the Constitution provide as follows:

> ***"Equality before the law***
>
> ***20. (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.***
>
> ***(2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.***
>
> ***(3) For the purposes of this section, "discrimination" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.***
>
> ***(4) Subject to the provisions of subsections (5) Parliament shall not be competent to enact a law that is discriminatory either of itself or in its effect.***

(5) Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society."

[19] Section 21 of the Constitution provide as follows"

"Right to fair hearing

21. (1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.

(2) A person who is charged with a criminal offence shall be –

(a) presumed to be innocent until that person is proved or has pleaded guilty;

(b)

(c)

(d)

(e)

(f)

(g) ..."

[20] I pose here to mention that this section is very long to quote in its entirety. It has fifteen (15) subsections that are themselves very detailed. It suffices, in my view, to mention that all the subsections speak to the court and other adjudicating authorities established by law when dealing with criminal offences.

[21] Section 32(4) (d) of the Constitution provide as follows:

"Rights of workers

32. (1) ...

(2) ...

(3) ...

(4) Parliament shall enact laws to –

(a)

(b)

(c)

(d) protect employees from victimisation and unfair dismissal or treatment."

[22] *In casu*, the Applicants' argument is that on the basis of sections 32 and 35 of the Employment Act, probationary employees are not given equal protection of the law with permanent employees as required by section 20 of the Constitution. They further argue that if the law fails to give equal protection it follows that there is discrimination. The submission made therefore is that

probationary employees are discriminated from permanent employees and the two sections of the Employment Act are therefore inconsistent with section 20(1) of the Constitution that requires equal protection of all persons. They also submitted that these sections are inconsistent with section 21(1) of the Constitution that provides for the right to a fair hearing.

[23] It was argued that the words **"All persons are equal before and under the law"** mean that the law must apply equally to all persons. It was also argued that the listed grounds in respect of which people must not be discriminated in section 20(2) of the Constitution are not exhaustive because of the used words, **"... and in every other respect..."**, in subsection (1).

[24] In support of this argument the Applicants' attorneys quoted **Masuku A.J.A. in SATELITE INVESTMENTS (PTY) LTD vs JOSEPH DLAMINI AND 2 OTHERS, INDUSTRIAL COURT OF APPEAL CASE NO.4/2010 where the Judge states:**

> ***"The question then is, if there is a type of discrimination, which is obviously untenable and totally unsupportable, should the courts, when approached by a litigant to distrain such conduct, turn a blind eye thereon for no other reason than***

that it is not specifically proscribed in either section. My answer is an emphatic No.!"

[25] The Applicants' attorneys also submitted that probationary employees, in terms of section 42 of the Employment Act, are precluded from presenting a complaint and this is discrimination *vis a viz* permanent employees.

[26] The attorneys for the Respondent submitted that the alleged discrimination does not fall to be dealt with under section 20 of the Constitution. They argued that this is not the type of discrimination which section 20 of the Constitution prohibits. The section proscribe, per their argument, discrimination that is based on the grounds mentioned in subsection (2) of the section. These are the same grounds that the Applicants'attorneys referred to as unexhastive.

[27] I wish to point out that Justice Masuku's view, in my considered opinion, as quoted in the **SATELITE INVESTMENTS'** case, is based on a general interpretation of the term 'discrimination' and not on an interpretation of the term in relation to a pleading that specifically refers to the violation of section 20 of the Constitution. I also agree that when you interprete the term in a general sense, the grounds mentioned in subsection (2) of section 20 are not exhaustive grounds for discrimination.

[28] Justice Masuku set out in great detail what constitutes discrimination. He makes reference to different authorities and I fully agree and align myself with him. I wish to extract from his judgment what he sets out about discrimination.

[29] First he quotes Grogan A.J. in **TRANSPORT AND GENERAL WORKERS UNION AND ANOTHER vs BAYETE HOLDINGS (1999) 20 ILJ 1117 (LC)** who states as follows:

> ***"However, the mere fact that an employer pays one employee more than another does not in itself amount to discrimination … Discrimination takes place when two similarly circumstanced individuals are treated differently. Pay differentials are justified by the fact that employees have different levels of responsibility, expertise, skills and the like."***

[30] Then he quotes a definition of discrimination by Black's Law Dictionary which states that it is a ***"Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."*** He goes on to state that ***"a mere disparity in treatment of similarly circumstanced persons is not per se discrimination. <u>It assumes the tenor of discrimination if it is accepted that there is disparate treatment but which crucially has no acceptable justification or underlying acceptable cause or reason</u>."*** *(own emphasis)*

[31] Counsel Nkomondze who appeared for the Applicants conceded and submitted that there would be danger in the submission that permanent employees should be treated exactly in the same manner as probationary employees. Probation is important in the work place because it is meant to test the employee for fitness or suitability to the work he is to be permanently engaged in, per Mr. Nkomondze.

[32] Counsel Jele who appeared for the Respondents made a similar submission and argued that probation is a trial period in which the employer is to determine whether the employee is fit and suitable for the work he is to be engaged in.

[33] Per Rooney A.C.J., as he then was, in the matter of **BARCLAYS BANK SWAZILAND vs MABUZA ADELAIDE, 1987 – 1995 (3) SLR 44** at p.46;

> ***"When an employee is on probation, his employer is entitled to assess all aspects of his work and his suitability for permanent employment."***

[34] In dealing with the issue of discrimination in the **SATELITE INVESTMENT CASE** (supra), Justice Masuku first stated as follows:

"It is the argument that <u>the only basis for discrimination</u>, and which the courts are by law to discountenance, <u>are to be found exclusively in section 20 of the Constitution of Swaziland</u> and the provisions of section 29 of the Employment Act, 1980." (own emphasis)

[35] It is clear, in my view, therefore that what Justice Masuku referred to were grounds for discrimination generally. He accordingly held that the grounds listed in section 20 are not exhaustive.

[36] *In casu* however, reference it not being made to discrimination generally. The discrimination referred to is one that is alleged to violate section 20 of the Constitution. A discrimination that violates section 20 of the Constitution is specifically defined in subsection (3) of section 20 as follows:

"(3) <u>For the purposes of this section</u>, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability."(own emphasis)

[37] The above quoted definition is not an open ended one and has not used any words that can allow the import of other grounds that are not mentioned therein. The definition is therefore confined to the grounds that are therein mentioned or listed. I am therefore of the considered view that discrimination in terms of section 20 of the Constitution is to be founded on the grounds listed in subsection (3) of that section.

[38] It find it apposite to mention that discrimination can also arise on the basis of section 14 (1) (a) of the Constitution. This section provides as quoted below:

> ***"Fundamental rights and freedoms of the individual***
>
> ***14.(1) The fundamental human right and freedoms of the individual enshrined in this chapter are hereby declared and guaranteed, namely –***
>
> ***(a) respect for life, liberty, right to fair hearing, <u>equality before the law</u> and equal protection of the law;"*** (own emphasis)

[39] In my view, it is therefore discrimination that is based on section 14 (1) of the Constitution that cannot be confined to the grounds of discrimination listed in section 20. It is my finding and view that the reasoning of Judge Masuku quoted

from the **SATELITE INVESTMENT CASE** relates to discrimination grounds generally, including discrimination that violate section 14 (1) of the Constitution and not section 20.

[40] The Applicants' other argument is that sections 32 and 35 of the Employment Act fail to give equal protection to the employees. It is being contended that permanent employees are afforded protection that is not afforded to probationary employees. It was argued that a permanent employee's employment cannot be terminated for an unfair reason whereas a probationary employee's employment can be terminated for an unfair reason, and that the reason need not even be given. It was further argued for the Applicants that in terms of section 20 of the Constitution, all people are equal before the law and the differential treatment of probationary employees viz permanent employees is inconsistent with the constitution because it is discrimatory.

[41] It is not, in my view, every discrimination that is being proscribed by section 20 of the Constitution. Subsection (5) for instance allows Parliament to enact laws that are necessary for implementing policies that are aimed at redressing economic, educational or other imbalances in society. One imbalance in the work place is that probation is meant for assessing the suitability of the employee for a permanent engagement or employment whereas the permanent

employee has gone past that stage and passed the assessment. These categories of employees cannot therefore be treated equally in every aspect of their employment.

[42] In the words of John Grogran, in his book "Dismissal Discrimination and Unfair Labour Practices", **"Employers are entitled to place newly appointed employees on probation for a period so that they can 'prove' themselves."** (p55). He also states that **"the purpose of probation is to evaluate the employee's performance before confirming his or her appointment."** (p.56).

[43] It was argued for the Respondents, and I agree, that placing new employees on probation and giving them differential treatment with permanent employees is a universally applied principle that is in line with international labour standards, in particular ILO Convention No. 158 of 1982, Article 2 (2) (b). The article provide as follows:

> ***"A member may exclude the following categories of employed persons from all or some of the provisions of this Convention:***
>
> ***(a)*** ...

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;"

(See also **MAKGATO vs SA QUALIFICATIONS AUTHORITY 2010 VOL 31 ILJ 2208 CCMA)**

[44] For the above mentioned reasons, the differential treatment given to probationary employees viz permanent employees does not therefore, in my view, constitute discrimination. There is therefore nothing wrong and unconstitutional in placing probationary employees in a differential treatment with permanent employees.

[45] It appears to me that what appears to be the offending aspect in sections 32(1) is the condition to the effect that the employment of a probationary employee can be terminated **"without notice"**. That is what is being misconstrued, in my view, when interpreting section 32 (1) of the Act.

[46] The term **"without notice"** in section 32(1) refers to the time or date in the future when the employment relationship between the employer and the employee will be considered to have come to an end.

[47] A proper interpretation therefore, in my view, is that the employment of a probationary employee will come to an end on the day when it is decided that he has failed the assessment for suitability that he was being subjected to.

[48] The determination of a notice period is linked to the period of service of the employee at the work place. It is for this reason, in my view, that in terms of section 33 of the Employment Act, the notice period is one week for an employee who has provided his services for more than one month after the probation period but less than three months of service. An employee who has provided continuous service for a period that is between three months and twelve months the notice period is increased by two days for each completed month up to and including the twelfth month. If the period of continuous employment or service is more than twelve months, the notice period is one month plus four days for each completed year of continuous service.

[49] Taking into consideration the forementioned rational for determining the notice period to be given, there is absolutely nothing untoward, in my considered view, about the 'without notice' condition in respect of probationary employees because they are being tested for suitability.

[50] As afore stated, I find nothing inconsistent with section 20 of the Constitution when analyzing section 32 of the Employment Act.

[51] The only section which I find to be inconsistent with the Constitution and is therefore in need of amendment is section 35 (1) of the Employment Act. This section is not inconsistent with sections 20 or 21 but with section 14 (1) that guarantees and requires that all persons should be afforded the right to a fair hearing. Section 14 (1) of the Constitution is quoted in paragraphs 38 above.

[52] The court has in numerous cases interpreted section 35 (1) to mean that the employee's services can be terminated without requiring that such termination be for a fair reason. **Justice Rooney A.C.J.**, as he then was, stated the following:

> ***"I therefore find that the Respondent falls within the exception outlined in section 32 (3) of the Act and her period of probation extended to six months and not three months in accordance with the contract of employment. The appellant was entitled to terminate the services of the respondent for any reason during that period."*** *(own emphasis)* ***BARCLAYS BANK SWAZILAND V MABUZA, ADELAIDE*** (supra) *at p.47*

(See also **GERALD SHIELDS vs CARSON WHEELS, INDUSTRIAL COURT CASE NO. 237/2006 and BONGANI MASUKU vs TIGER SECURITY, INDUSTRIAL COURT CASE NO. 394/2003)**

[53] In the unambiguous and clear wording of section 35 (2) of the Employment Act, no employer is to terminate the services of an employee unfairly. This prohibition does not, however, apply to probationary employees in terms of section 35 (1) (a).

[54] As a result of the exclusion that probationary employees are subjected to in terms of section 35 (1) (a), they are not protected against the unfair termination of their services for the unfair reasons that are set out in section 35 (3) of the Act.

[55] This position has changed with the coming into force of the Kingdom's Constitution, 2005. Section 14 (1) of the Constitution declares and guarantees to every person the right to a fair hearing. This right, in my view, extends to probationary employees as well.

[56] The question then becomes, what constitutes a fair hearing? According to Hoexter Cora in his book **"Administrate Law in South Africa,"** 2nd ed, Juta and Co., 2012, the ideals of a fair hearing are reflected in two ancient common-law maxims, namely, *audi alteram partem* which means that hear the other side, and *nemo iudex in sua causa*, which means that no one is to be a judge in his cause. The minimum requirements, the author states, of a fair hearing are that the person should be given adequate notice of the nature and purpose of the proposed administrative action, reasonable opportunity to make representations and a clear statement of the administrative action taken.

[57] The latter requirement (of being given a clear statement of the administrative action taken) requires that the **"affected person should at least be able to tell from the statement what has been decided, when, by whom, and on what legal and factual basis."** (own emphasis) at p.376. It is therefore very clear that the termination of services must be within the confines of the law. The confines of the law with regard to the termination of services are set out in sections 35 (3) and 36 of the Employment Act.

[58] For the foregoing reasons, section 35 (1) of the Employment Act is unconstitutional and must be amended in order to align with the constitution.

[59] It was also argued that section 32 and 35 of the Employment Act are inconsistent with section 21 of the Constitution. In my considered view, section 21 of the Constitution is being misconstrued and misplaced at the work place. The fair hearing provided for in this section is required from the courts and other adjudicating authorities that are **"established by law"** and not the adjudicating forums that are established by employer in their work places. When reading the section in its entirety, it is clear that it speaks to the courts when determining matters brought before them.

[60] Sections 32 and 35 of the Act speaks to employers and the administrative structures that are established by employers to deal with disciplinary and other issues of the employees. Section 21of the Constitution therefore has, in my view, no application in the work place. It only applies to the courts and other adjudicating authorities established by law and not employers.

[61] It was further argued that sections 32 and 35 of the Act are inconsistent with section 32 (4) (d) of the Constitution. In so far as section 32 (4) (d) of the

Constitution enjoins Parliament to enact a law or legislation that protects employees from unfair dismissals and treatment, I am convinced that the employment Act, although enacted in 1980, is such a law when considering the transition clause of the Constitution, namely Section 268. The corollary of Section 32 (4) (d) of the Constitution was to effectively outlaw unfairness or put differently, unfair treatment to employees. There can be little doubt that to terminate the services of an employee for whatever reason without having heard him amounts to an unfair treatment of such an employee.

[62] Any law which purports to legitimize an unfair treatment of an employee would therefore be inconsistent with Section 32 (4) (d) of the Constitution which required that laws enacted or in place since the advent of the Constitution advocate for or ensure a fair treatment of employees. I am therefore convinced that in so far as the services of the employees in question were terminated without them being accorded fairness supposedly because the operative law allowed that, then such a law is not consistant with Section 32 (4) (d) of the Constitution and is to that extent null and void.

[63] For the aforementioned reasons, I find that only section 35 (1) of the Employment Act is inconsistent with the Constitution, particularly with

sections 14 (1) and 32 (4) (d) of the Constitution. Parliament ought to therefore amend section 35 (1) of the Act to align it with section 14 (1) and Section 32 (4) (d) of the Constitution.

[64] In the result this court makes the following order:

(1) Parliament is ordered and directed to amend section 35 (1) of the Employment Act of 1980 in order to align it with sections 14 (1) (a) and 32 (4) (d) of the Constitution within twelve (12) months from the date of this judgment.

(2) The Industrial Court is ordered, in the interim period pending the amendment, to interpret and construe section 35 (1) of the Employment Act with such modification and adaptation as is necessary to bring it into conformity with section 14 (1) (a) and Section 32 (4) (d) of the Constitution. For the avoidance of doubt, the court is to enforce the right to a fair hearing in respect of all employees, or to ensure that all employees are treated fairly including probationary employees.

(3) The above consolidated matters are referred back to the Industrial Court for determination in accordance with the above order issued by this court.

(4) This being a matter that required the interpretation of constitutional provisions in order to enable the court ceased with the determination of industrial disputes to properly determine a dispute before it, each party is ordered to bear its own costs.

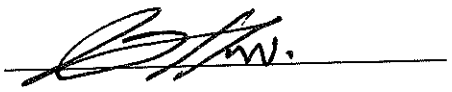
T. DLAMINI

JUDGE OF THE HIGH COURT

I agree

J. P. ANNANDALE

JUDGE OF THE HIGH COURT

I also agree 

N. J. HLOPHE

JUDGE OF THE HIGH COURT

For the Applicants: M. Nkomondze

I. Mahlalela

For the Respondents: M. Sibandze

N. D. Jele

For 2nd Respondent: Ms. N. Xaba