



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 84/20**

In the matter between:

**FORTUNE DLAMINI**

**Applicant**

and

**CUBA NORA RESTAURANT**

**Respondent**

**Neutral citation:**

**Coram:**           **X. Hlatshwayo, AJ**  
(Sitting with N. Dlamini and D Mmango  
Nominated Members of the Court)

**Heard submissions       :     13/05/20**

**Delivered judgement    :**

**SUMMARY---** unresolved dispute certified by CMAAC. Claim for unfair dismissal. Point of law raised that the Applicant is not an employee as envisaged by s35 Employment Act 1980 (as amended).

**Held- the status of whether or not the Applicant was serving probation will be dealt with at trial, thus point of law raised is dismissed.**

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**RULING**

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1. Before court is an opposed Application for the Determination of an Unresolved Dispute.
2. The Applicant reported a dispute with the Conciliation, Mediation and Arbitration Commission herein after referred to as (CMAC) and a Certificate of Unresolved Dispute was issued.
3. The Applicant filed an application before this Court seeking the following;-

- a.) Re-instatement

**ALTERNATIVELY**

- b.) Notice Pay E7 000. 00
- c.) Maximum Compensation for Unfair Dismissal E84 000. 00
- d.) Costs of suit
- e.) Further and/or alternative relief

4. The Respondent in its replies raised a point of law in which it avers that the Applicant does not derive any right in law to file the Application

before this Court since he was not a recognized employee to whom *Section 35 (1) (a) of the Employment Act of 1980 (amended)* applied which reads as follows;-

*This section shall not apply to-*

(a) *An employee who has not completed the period of probationary employment provided for section 32;*

(b).....

5. The Respondent further submitted that the Applicant was at all material times a probationary employee between the period August 3<sup>rd</sup> 2019 and 3<sup>rd</sup> November 2019.
6. The Respondent argued that the *Section 32 of the Employment Act of 1980 (amended)* defines the probationary period and in the present application the Respondent was within the law to terminate the Applicant since he did so within the three (3) months' probation period as allows by the **Employment Act of 1980 (amended)**.
7. The Respondent submitted the *Offer of Employment* given to the Applicant stated that the employment was on a probationary basis and upon the completion of the probationary period the Respondent will make a decision on continued engagement of the Applicant.
8. The Applicant argued that he was an employee to which Section 35 of the Employment Act applies. He further argued that ~~during~~ his termination was procedural unfair in that he was called upon to appear in a disciplinary hearing only to be given a termination letter.
9. The Applicant argued that the reasons stated for his termination were not formally presented to him nor was disciplinary hearing convened so as to afford him an opportunity to plead his case.

10. The Applicant further argued that he was not given an opportunity to appeal the Respondent's decision to dismiss him and therefore had no alternative but to report a dispute to CMAC.
11. The court considers that the Respondent has presented a Letter of Engagement which provides for a probationary period of three months.
12. However, the Applicant avers that he was never served with the letter of Appointment presented in court, and was at all times unaware that that he was, at any point serving probation.
13. These two versions of the relationship go to the crux of the matter and cannot be flippantly decided. The court finds that there would be an injustice in deciding the point raised without the oral evidence deserved in such a matter. The point is dismissed and matter will be determined in its entirety at trial.
14. The Respondent suffers no prejudice in having the matter heard in its entirety at trial, whereas the Applicant would suffer irreparably if the court were to strictly apply the law of evidence to the end that the written letter is conclusive evidence of the contents, especially because of Applicant's stance that he never had the letter.
15. Costs will be costs in the course.

Members agree.



**XOLISA HEATSHWAYO**

**ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND**

*For Applicant* : *SIBUSISO B. SHONGWE & ASSOCIATES*

*For Respondent* : *MANYATSI AND ASSOCIATES*