IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

(REPORTABLE)

Case Number: C 367/06

In the matter between:

HARRY MATHEW CHARLTON **APPLICANT**

And

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA **RESPONDENT**

JUDGMENT

Ngcamu AJ

Introduction

[1] This court has been called upon to decide on the exception raised by the respondent to the applicant's statement of case which has been amended twice. The respondent raised the following six (6) grounds of exception:

(a) That the applicant's claim does not disclose a cause of action.

(b) The pleadings are vague and embarrassing, alternatively fails to make averments necessary to sustain a cause of action.

(c) The allegations made are bad in law and fail to disclose a cause of action under the PDA read with the LRA.

(d) The applicant fails to state whether the claim under section 5 (1) of the LRA is automatically unfair for reasons different to that which are referred to in the claim under section 187(1) (a) of the LRA and the pleadings are vague and embarrassing for this reason.

(e) The applicant failed to make a cause of action based on unfair discrimination on the grounds of religion, conscience, belief or an analogous ground.

(f) The court has no jurisdiction to entertain the dispute relating to the conduct of the applicant.

Background of the Dispute

[2] The applicant was employed by the respondent as the Chief Financial Officer on a three-year fixed-term contract from 1 May 2002. On 1 March 2004, he was permanently appointed. He held this position until his dismissal on 13 January 2006. It is not necessary to set out the applicant's responsibilities for the purposes of the exception.

[3] The applicant referred an unfair dismissal dispute to the CCMA. The dispute was not resolved. A Certificate of Outcome was issued. The applicant thereafter referred the dispute to this court for adjudication. The applicant alleged that the dismissal was effected on account or partly on account of him having made a protected disclosure or disclosures as envisaged in the Protected Disclosure Act 26 of 2000(PDA). He also alleges that the dismissal was unfair. The alleged disclosures relate to the improper travel benefits claim by members of the respondent. The disclosure was made to the

secretary of Parliament Mr. S. Mfenyana, senior presiding officers of the respondent being the speaker of the National Assembly and Chairperson of the National Council of Provinces. The applicant was later charged with acts of misconduct which resulted in his dismissal.

Grounds for the Exception

[4] The applicant has elected to pursue only grounds A and F. The other grounds have not been abandoned but no argument was submitted in respect of them.

Law on Exceptions

[5] The Rule of the Labour Court do not deal with the exceptions. The exceptions are allowed under Rule 11. Rule 23 of the High Court Rules provides for two classes of exceptions namely:

a) an exception on the basis that the pleading is vague and embarrassing and
b) an exception where a pleading lacks averments which are necessary to sustain an action or defence.

[6] The purpose of the exception was dealt with in *Barclays National Bank Ltd* v *Thompson* 1989(1) SA 547 AD. At 553 F-J Van Heerden JA stated:

> ‘‘It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff’s cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to part of a plea

> unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea….It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: *Dharumpal Transport (Pty) Ltd* v *Dharumpal 1*956 (1) SA 700 (A) AT 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him(cf *Welgemoed en Andere* v *Sauer* 1974 (4) SA 1 (A) an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of "unnecessary evidence."

Exception A

[7] The basis of the first exception is that the disclosures made by the applicant are not protected disclosures for the purposes of the Protected Disclosures Act 26 of 2000. This is based on the contention that the members of Parliament about whom the disclosures were made are neither the employer of the applicant nor the employees of the respondent for the purposes of the PDA.

Provisions of the PDA

[8] Section 1 of the PDA defines disclosure as meaning:

> "any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that information concerned shows or tends to show one or more of the following:

a) That a criminal offence has been committed, is being committed or is likely to be committed.

b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject,

c) That a miscarriage of justice has occurred, is occurring or is likely to occur;

d) That the health or safety of an individual has been, is being or is likely to be endangered;

e) That the environment has been or is likely to be damaged;

f) That any matter referred to in paragraph (a) to (f) has been, is being or is likely to be deliberately concealed."

[9] A Protected disclosure means a disclosure made to an employer in accordance with section 6 of the PDA. Section 6 provides that:

"Protected disclosure to employer-

1) Any disclosure made in good faith-

a) and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned, or

b) to the employer of the employee, where there is no procedure as contemplated in paragraph (a), is a protected disclosure.

Section 3 of the PDA provides that:

"No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure."

[10] In paragraph 30 of the Statement of Case, the applicant does not only rely on disclosure relating to the members of Parliament but also on the disclosure relating to a member of the parliamentary staff.

[11] In terms of the definition of “disclosure”, the disclosure must be regarding the conduct of an employer, or an employee of the employer. It must be made by an employee. The disclosure has to be in good faith and made to the employer.

[12] The respondent submitted that the members of Parliament are not employers of the parliamentary staff and are not employees of Parliament. The question raised is not an easy one. The applicant’s contention is that the members of Parliament fulfil two characteristics, that of being employers and that of being employees. The basis of the contention is that the members of Parliament collectively constitutes an employer in terms of the PDA. This is also based on the fact that it is the numbers of Parliament who constituted the respondent’s employees for the purposes of the PDA. The respondent’s case is that the applicant’s claim which relies on the PDA fails to disclose a cause of action.

[13] If the respondent’s contention is correct, it would follow that even that part of the claim that relates to unfair dismissal under the LRA would have been brought against the party that was not the employer of the applicant.

Are the Members of Parliament Employees of Parliament?

[14] The applicant’s case is not that the members of Parliament are employees as defined in the Labour Relations Act. His case is that they are employees for the purposes of the PDA. The definition of an employee in the PDA is wide. The employee is defined as

meaning:

> "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer."

[15] Mr. Trengrove for the respondent submitted that the members of Parliament hold constitutional positions and are entitled to participate in Parliament. He submitted that the members of Parliament are free agents who owe no allegiance to Parliament. The Members of Parliament hold their positions in terms of sections 46, 47, 60, 61 and 62 of the Constitution. They hold constitutional positions and not as a result of any contract of employment.

[16] Besides the above, members of Parliament are not allowed to be employed by the State. They also receive remuneration. This remuneration is a Statutory right in terms of section 3 of the Remuneration of Office Bearers Act 20 of 1998. It was submitted that the members of Parliament render no service to Parliament in the carrying of its business. It was further submitted that Parliament has no business.

[17] Mr. Rogers for the applicant submitted that every member of Parliament assist Parliament in the carrying out of its business. It was submitted that Parliament does have business. I do agree with this submission made by Mr. Rogers. Section 45(1) of the Constitution provides as follows:

> "Joint rules and orders and joint committees-

1) The National Assembly and the National Council of Provinces must establish a joint rules committee to make rules and orders concerning the joint business of the Assembly and Council, including rules and orders-

a) to determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process.

b) To establish joint committees composed of representatives from both Assembly and the Council to consider and report on Bills envisaged in section 74 and 75 that are referred to such a committee;

c) To establish a joint committee to review the Constitution at least annually; and

d) To regulate the business of-

i) The joint rules committee

ii) The Mediation Committee

iii) The Constitutional review; and

iv) Any joint committees established in terms of paragraph (b)."

[18] The section I have referred to talks of the business of the Assembly and the National Council of Provinces. It is this National Assembly and the Council of Provinces that constitute Parliament. Each of these two entities has members elected in terms of section 46 and 60 of the Constitution. In terms of section 43(a) of the Constitution, the legislative authority of the national sphere of government is vested in Parliament. Section 44 sets out what powers are vested in the National Assembly (section 44 (1) (a), National Council of Provinces (Section 44 (1) (b)). Section 44 (2) sets out when parliament may intervene. Accordingly, Parliament has the legislative powers and that is its business.

[19] If there is no business conducted by Parliament, there would be no need of setting out rules as contemplated in section 45 of the Constitution. The business of Parliament is not similar to that of an ordinary enterprise. Its business is *sui generis* and defined in the Constitution.

[20] What seems to lend support to the notion that Parliament does have business contrary to the respondent's submission is section 9 of Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No. 4 of 2004. The section provides:

> "Attendance of members before court-
>
> (1) When a member is required to attend a court as a witness in a civil or criminal proceeding, the Speaker or the Chairperson or a person designated by the Speaker or Chairperson may issue a Certificate stating that the member is required to attend to business in Parliament.
>
> (2) Such a Certificate is sufficient proof that the member is in attendance in Parliament, and the member shall be absolved from attending the Court pending completion of that business."

[21] I am satisfied that Parliament does have business, which is to legislate for the Republic of South Africa. I accordingly reject the submission that Parliament has no business.

[22] The members of Parliament fit into the definition of "employee". They perform duties for Parliament being an Organ of the State. They are entitled to and do receive remuneration. The

remuneration they receive is not in terms of the Basic Conditions of Employment Act. The Act does not define the type of remuneration or whether it is statutory or otherwise. What cannot be disputed is that the salaries, allowances and benefits payable to members of Parliament are a direct charge against the National Revenue Fund. They are not paid by the parties who elected them into Parliament. It is not a requirement that remuneration is only payable in terms of the employment contract. The payment to members of Parliament is a reward for services rendered to Parliament. The members are even absolved from attending court if they are still rendering the service to Parliament. I reject the submission that members of Parliament do not owe any allegiance to Parliament.

[23] The members of Parliament assist in the legislation which is the business of Parliament. The second part of the definition of the "employee" does not require that payment to be made to a person for him or her to qualify as an employee. What is required is that that person must be assisting in carrying on or conducting the business of an employer. I have mentioned that the business of the legislature is the legislation. That is what the members of Parliament are doing. That places them within the definition of employees. My conclusion, is that the members of Parliament are employees in terms of the Protected Disclosure Act 26 of 2000.

Are members of Parliament Employers?

[24] I have mentioned that the members of Parliament occupy a position which is *sui generis*. The PDA defines an employer as any person-

> "(a) who employs or provides work for another person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or
>
> (b) who permits any other person in any manner to assist in the carrying on or conducting of his or her business."

[25] Parliament is a body constituted by the National Assembly and the National Council of Provinces. Besides having members of Parliament, it has the support staff. Both the National Assembly and the National Council of Provinces have defined functions but together, they form what is known as Parliament. Parliament exist as a result of the Members of Parliament.

[26] The parliamentary staff of which the applicant was, supports the operation of Parliament as carried out by the members of Parliament. The parliamentary staff do the work of the members of Parliament. If there are no members of Parliament, the staff would not have work to perform. It therefore follows that it is the members of Parliament that provide work to the parliamentary staff. The members of Parliament permit the staff to assist in the carrying on of their business.

[27] For the members of Parliament to be employers in terms of thee PDA, they do not have to employ or remunerate the support staff. They however satisfy the definition of being employers by providing work and by permitting other persons to assist in the carrying on of their business.

[28] It was submitted on behalf of the respondent that Parliament is a body with legal personality apart from its members. This is based

on the continuity of employment of staff members when new members are elected. Accordingly, it was submitted, this would not be possible if Parliament was not a legal entity separated from its members as the identity of persons making up the employer could also change while Parliament is sitting.

[29] I do not consider it necessary to decide whether Parliament is an entity separate from its members as this does not answer the question whether the PDA applies to members of Parliament. There is however no merit in the submission that because members of Parliament keep on changing, members collectively cannot be employers. At any given time, the members of Parliament are identifiable. What is more, is the last part of the definition of the "employer" which defines the employer as:

> "Including any person acting on behalf of or authority of such employer. "

[30] Any member of Parliament who is performing his functions, does so on behalf of Parliament or on the authority of Parliament. Viewed from the perspective of a staff employee, a member of Parliament is an employer in terms of the definition in the PDA. A staff member gets instructions from members of Parliament. Parliament is none other than the name given to the members of the National Assembly and the National Council of Provinces sitting together for the purpose of legislation.

[31] Neither the Constitution nor the Powers, Privileges and Immunity of Parliament Act I have referred to above expressly recognise Parliament as a separate legal entity. The existence of staff when

Parliament is dissolved does not give an answer to its legal entity separate from its members.

[32] It was submitted that section 77 of the Labour Relations Act reflects the recognition of the legal entity of Parliament as an employer classified as essential services for the purposes of the LRA. This section is not relevant to the dispute as it deals with protest action and there is no reference to Parliament as a legal entity.

[32] The respondent further submitted that if Parliament is not a body apart from its members, then the members would be liable for debts and the delicts of Parliament. I agree with Mr. Rogers that the answer to this is found in section 23(1) of the PPI Act I have referred to. The section provides that:

"(i) In any civil proceedings against Parliament or a House or Committee, the State Liability Act, 1957(Act no. 20 of 1957), applies, with the necessary changes."

[33] In terms of the State Liabilty Act, the liability of Parliament is to be paid out of the National Revenue Fund just like that of the salary of the members of Parliament.

[34] I am unable to find any acceptable reason for excluding the members of Parliament from the definition of "employer" for the purposes of the PDA. I do not consider it necessary to decide whether the members of Parliament are "employees" for the purposes of the LRA. That is not an issue before the court. I am also unable to find any justification for following the definition of the employee as laid down in the Labour Relations Act. The difficulty stems from the fact that the DPA and the LRA were enacted for

different purposes. It therefore becomes necessary to look at the purpose of the DPA.

Purpose of the DPA 26 OF 2000

[35] The purpose of the PD Act is stated in the Act as follows:

> "To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers to provide for the protection of employees who make a disclosure which is protected in terms of this Act, and to provide for matters connected therewith.

[36] In the Preamble of the Act, the Parliament of the Republic of South Africa recognise that:

> "…criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage."

[37] The Act also recognises that "every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the work-place and that every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure."

[38] Submissions were made on behalf of the respondents relating to the parliamentary privilege. I do not regard that argument as relevant as it does not answer the question before the court. The fact that the members of Parliament enjoy unique constitutional rights that cannot be interfered with by the courts is also not an answer to the question. The applicant is not suing members of Parliament in their individual capacities. The members of Parliament are guaranteed against civil liability in terms of section 58(1) of the Constitution. The reference to *Canada (House of Commons)* v *Vaid* 2005 SCC 30 has no relevance in the present issues. That case deals with parliamentary privilege.

[39] The respondent relied on paragraph 75 of the *Vaid* judgment where the court stated:

> "I have no doubt that privilege attaches to the House's relations with some of its employees, but the applicant's have insisted on the broadest possible coverage without leading any evidence to justify such a sweeping immunity or a lesser immunity, or indeed any evidence of necessity at all."

[40] The respondent relied on the above extract for the submission that the PDA should not be interpreted in any way which might characterise members of Parliament as either being employers or employees for the purpose of the Act.

[41] The crux of the respondent's case is that members of Parliament are not covered by the PDA. The respondent however, recognises that the members of Parliament can act as whistleblowers but that

in so doing, they do not operate under the protection of the PDA.

Does the PDA apply to MP's?

[42] The essence of the respondent's defences is that Parliament makes the law and places an obligation to employees and employers to disclose criminal or other irregular conduct relating to other people employed in the organs of the state and in private bodies. It provides the law that protects the people who disclose the information. On the other hand, Parliament says, if the disclosure concerns the members of Parliament, any person disclosing such information is not protected. That is an absurd situation. Was this what the legislature intended?

[43] It is the members of Parliament who make legislation. The legislation defines who the employee is and who the employer is in relation to the PDA. It does not say in uncertain terms that the members of Parliament do not constitute employers or employees. Parliament was however satisfied with the wide definition given to "employee" and "employer."

[44] The state is concerned with criminal activities in the organs of the state. How does the state seek to root out the criminal activities committed by members of Parliament if people who disclose information relating to the members of Parliament would be subjected to occupational detriment?

[45] The Parliament is the employer of the applicant. In terms of the Preamble to the PDA, the employer has a responsibility to take all

necessary steps to ensure that employees who disclose information are protected from any refusal as a result of such disclosure. It is the same Parliament which denies the protection. It does not make sense that the members made law that does not or was not intended to apply to them. This in my view make a mockery to the whole legislation.

[46] There is no reason why the members of Parliament would be excluded from the operation of the PDA. In interpreting the PDA, the purposive approach has to be adopted. Such interpretation will not violate the constitutional principles as well as the purpose of the PDA.

[47] Mr. Trengrove referred the court to paragraph 2.16 of the Discussion Paper 107 of the South African Law Commission. This clause reads:

> "In drafting the legislation, the Justice Portfolio Committee was not persuaded to expand the ambit of the law beyond the strict employer, employee relationship. As noted above, the present investigation is concerned with the possibility of extending the ambit of the DPA in this and other respects."

[48] The reference was made for the submission that the applicant is not currently protected by the PDA for blowing the whistle on members of Parliament. I do not believe that I am bound by the interpretation of the DPA made by the Law Reform Commission for the reason that the discussion does not add anything to whether the members of Parliament are employers or employees or whether the applicant is protected by the PDA. The Discussion Paper was not concerned with the extension of the definition to members of

Parliament. The issues considered were whether the definition of "employee" is to be clarified and to be extended to protect members of the public.

[49] The Law Reform Commission also proposed the change of the definition of "employee" to "worker" as well as the addition of people to whom a disclosure could be made. This would be an addition to section 8 of the PDA. It was in that context that a suggestion was made that where matters relate to a member of Parliament, disclosures should be made to the Speaker of Parliament. This was suggested in my view in regard to the Disclosure by people who are not employees. In the present matter, the applicant is an employee.

[50] I should point out that although the Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997 and the PDA have the same definition of employee, it is only the PDA which has the definition of "employer". In my view, the definition of "employer" in the PDA covers the members of Parliament.

[51] The conclusion I have come to accords with the purpose of the Act to root out corruption. The applicant is protected by the PDA. To hold otherwise, would deal a blow to the government intentions and would be a National embarrassment.

[52] The applicant was entitled to disclose irregularities in terms of his job description as well as the PDA. As the applicant is an employee of the respondent, he is entitled to protection. In the result, exception A stands to be dismissed.

[53] The second point to be dealt with is the exception raised in F. This relates to the jurisdiction of this court. M. Kahanowitz presented argument on behalf of the respondent on this point. He submitted that because the applicant has alleged unfairness of the dismissal in paragraph 154 and 155 of the Statement of Case as well as the procedural unfairness in 186 (paragraph 157 to 184), this court has no jurisdiction as that dispute falls within the jurisdiction of the CCMA.

Jurisdiction of the Labour Court

[54] Section 157(5) provides that:

> "Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration."
>
> It is on the basis of this section that the respondent argued that the dispute relating to unfair dismissal has to be arbitrated.

[55] What the respondent is suggesting is that if one dispute result in the dismissal being automatically unfair as well as substantively and procedurally unfair, a party can go for the arbitration for the unfair dismissal and then approach the Labour Court for the automatically unfair dismissal.

[56] While I accept that unfair dismissal has to go for arbitration, the answer is not that easy if the same facts result also in the automatically unfair dismissal. Besides the fact that the LRA requires speedy resolution of disputes, there are problems connected with this. The first one is that if the split resolution of

dispute is adopted, the applicant can go for arbitration and obtain an Award in his favour. If he or she gets compensation, such compensation would be limited to 12 months compensation. Secondly, the applicant would then be entitled to approach the Labour Court on the same facts to prove that the dismissal was automatically unfair. I have great doubts that the respondent would be able to raise *res judicata* on the basis of the CCMA Award. Similarly, if the applicant's case is dismissed by the CCMA, he can proceed to the Labour Court and allege that the dismissal was automatically unfair.

[57] Section 191(5) of the LRA provides for the arbitration of the dispute where the applicant has alleged that the dismissal is unfair. Section 191(5) (b) provides for the adjudication of the dispute by the Labour Court where the applicant has alleged that the dismissal is automatically unfair.

[58] Mr. Rogers for the applicant contended that this court has jurisdiction on the basis that there is one dispute. He relied on the judgment in *National Union of Metalworkers of South Africa* v *Driveline Technologies (Pty) Ltd* (2000) 21 ILJ 142 (LAC). That case dealt with the amendment of the pleadings. The court did not deal with whether it had jurisdiction. Having said that, Zondo JP, at paragraph 37 of the judgment stated that in section 191(1) the dispute about fairness of a dismissal is not described with reference to the reason for the dismissal. It is simply referred to as 'a dismissal about the fairness of a dismissal.' At par 38, he further stated that:

> "Whether a dispute will end up in arbitration or adjudication it must

> first have been referred to conciliation before it can be arbitrated or adjudicated…..It depends on the reason for dismissal as alleged by the employee whether a dispute should be referred to arbitration or adjudication.

[59] What is however important is that in Driveline, the court found that the allegation of dismissal for operational requirement is a reason for dismissal. The fairness of which may be in dispute. The same situation was found to be applicable where the employee alleges that the same dismissal constitutes automatically unfair dismissal. In the present case, two reasons are alleged for the unfairness of the dismissal. The dispute remains the same.

[60] In *Mawisa* v *Commission for Conciliation, Mediation and Arbitration & Others* (1998) 19 ILJ 1194 (LC), the court had to deal with the issue where the employee had alleged an unfair dismissal based on misconduct and further alleged an automatically unfair dismissal regarding the same dispute. In dealing with the jurisdiction of the Labour Court and the CCMA, Basson J, at paragraphs 17 and 18 stated the following:

> "(17) As mentioned above (at para 7), the one dispute about the unfair dismissal of the applicant by the respondent cannot be arbitrated in one forum and at the same time be adjudicated in another forum as this would lead to intolerable results, and this could clearly not have been the intention of the legislature. I therefore am of the view that the applicant's allegation to the effect that the reason for this dismissal was automatically unfair, placed this unfair dismissal dispute squarely within the jurisdiction of the Labour Court, in terms of the provisions of section 191(5) (b) (i) of the Act (quoted above at Para (5).

(18) The fact that the applicant has also alleged that the reason for the (allegedly unfair) dismissal is related to his (mis)conduct does not mean that the CCMA now also has jurisdiction in regard to this unfair dismissal dispute(in terms of section 191(5)(a)(i) of the Act). The very same unfair dismissal dispute namely stands to be adjudicated (also) by the Labour Court and, in the absence of a clear and unequivocal election on the part of the applicant, the CCMA therefore does not acquire the necessary jurisdiction to arbitrate this dispute.

[61] In the light of the Mawisa judgment, an unfair dismissal dispute had to be adjudicated by the Labour Court if the employee has also alleged an automatic unfair dismissal. The position would however be different if the employee had made an election to rely only on unfair dismissal.

[62] The reasoning in *Mawisa w*as accepted by Stelzner AJ in *Maarten & Others* v *Rubin No & Others* (2000) 21 ILJ 2656 (LC). In *Wardlaw* v *Supreme Mouldings (Pty) Ltd* (2004) 25 ILJ 1094 (LC) Jammy AJ came to a different conclusion. The court in its judgment did not make any reference to *Maarten* and *Mawisa* judgments. In the *Wardlaw* matter, the employee had alleged that the dismissal was unfair and further that the dismissal was automatically unfair and in breach of section 187(1) (e) and (f) of the Labour Relations Act. The court ruled that the issue relating to unfair dismissal fell outside the jurisdiction of the Labour Court. Accordingly, the court confined itself to the dispute relating to automatically unfair dismissal. At the end of the trial and after hearing the evidence, the court ruled that the dismissal was not automatically unfair and that the court had no jurisdiction.

[63] In coming to such a conclusion, the court relied on the unreported *judgment of the Labour Court of Fick & Others v Midi TV (Pty) Ltd (*case no. C96/2002) in which the court stated that:

> "This court, unlike the High court, does not have a general inherent jurisdiction to adjudicate upon matters before it. Albeit that this court has the same status as the High court, it remains a creature of statute. Absent the criteria enumerated in section 191(5)(b) and (13) of the Act, the court would therefore not have jurisdiction to entertain a dispute relating to unfair dismissal, other than in the circumstances envisaged by section 158(2) of the Act, in which case this court would sit as an arbitrator."

[64] It will be noted that in *Wardlaw* case, the court did not decide on the fairness or otherwise of the dismissal as it considered that that dispute fell outside the jurisdiction of the court.

[65] The question whether the dismissal is automatically unfair requires evidence to be led. Without such evidence, the court cannot conclude that the dismissal was not automatically unfair. A dismissal that is not automatically unfair may well be unfair.

[66] Section 158(2) of the Labour Relations Act provides that:

> "If at any stage after the dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the court may-
>
> (a) stay the proceedings and refer the dispute to arbitration or
>
> (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the court sitting as an arbitrator, in which case the court may only make any order that a commissioner or arbitrator would have been entitled to make."

[67] As I understand this section of the Act, if the dispute raises two different reasons for the dismissal, the court can proceed with the adjudication. What it would be required to do is to find first if the automatic unfair dismissal has been proved. If there is evidence to establish an automatic unfair dismissal, the question of the jurisdiction would no longer arise. If on the other hand, the court finds that there is no evidence to establish an automatically unfair dismissal, the question of the jurisdiction will still remain in relation to the allegation of unfair dismissal. Once the court has that question at hand and finds that the matter ought to have been referred to arbitration, it has to act either in terms of section 158(2) (a) or (b).

[68] That stage has not been reached in this matter whether one follows the *Wardlaw* judgment or *Mawisa*. This court cannot simply dismiss the dispute based on unfair dismissal at this stage when it is coupled with the allegation that the same dismissal is automatically unfair. The true reason has to be established by evidence. It is only after hearing the evidence that the court would be in a better position to decide if the unfair dismissal has to be referred to arbitration.

Should the Exception be Upheld?

[69] The next question is whether on the basis of the two grounds raised, the exception should be upheld.

[70] I have already found that the members of Parliament fall within the definition of “employer” in terms of the PDA and that they also have

the characteristic of “employees”. In the light of this finding, I reject the submission that the applicant’s claim does not disclose a cause of action.

[71] Grounds (b) to (e) were not argued by the respondent. As there were no submissions in this regard, I take that the respondent accepted that there are no merits in these allegations. In any event the dismissal would be automatically unfair if it was effected in contravention of section 187 (1) (h) of the LRA.

[72] With regard to ground (e), I find that this ground cannot dispose of the whole or part of the applicant’s case. I say that on the basis that evidence still has to be led to establish the true reason for the dismissal. It is only where such evidence has been led that it can be said whether the court has jurisdiction or not. To allow the exception at this stage, will have undesirable consequences as the applicant would be able to proceed with two disputes in different fora at the same time. The arbitration would then have to deal with the unfairness of the dismissal while this court is dealing with automatic unfair dismissal. The applicant may end up obtaining relief from both fora in respect of one dispute. In other words, if the arbitrator decides to award 12 months compensation and this court awards 24 months compensation, the applicant would receive 36 months compensation in total. That is not what was intended by the statute.

[73] In the light of what I have stated, I conclude that the exception stands to be dismissed. I see no reason why the costs should not follow the results.

[74] The following order is made:

(a) The exceptions raised by the respondent are dismissed.
(b) The respondent is ordered to pay the costs.

_____

NGCAMU AJ

Date of Hearing: 23 March 2007

Date of Judgment:

For the Applicant: Adv. O. L. Rogers SC with Adv M. W. Janish instructed by Herold Gie Attorneys

For the Respondent; Adv. W. Trengrove SC with Adv C. S. Kahanowitz instructed by Jan Theron Attorneys.