REPORTABLE

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

LAC Case No: CA2/08

In the matter between

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA Appellant

and

HARRY MATHEW CHARLTON Respondent

JUDGMENT

PATEL JA

INTRODUCTION

[1] Harry Charlton ('the respondent') served as the Chief Financial Officer to the appellant ('Parliament') from 1 May 2002 and was permanently appointed to the position on 1 March 2004. After the respondent made allegations about misconduct by some Members of Parliament ('MPs') in relation to their alleged misuse of travel benefits, a disciplinary enquiry ensued, following which he was

dismissed on 13 January 2006. The respondent approached the Labour Court on the basis that the disclosures were '*protected disclosures*' as envisaged in the Protected Disclosures Act 26 of 2000 ('the PDA') and that his dismissal was consequently automatically unfair. He also contended that his dismissal was unfair.

[2] In the court *a quo (*decision reported as *Charlton v Parliament of the Republic of SA* (2007) 28 ILJ 2263 (LC)), Parliament raised six grounds of exception but chose to pursue just two. For completeness I set out these two exceptions as pleaded by Parliament as follows:

'GROUND A

1. In his Statement of Claim the applicant contends as follows :

1.1. that his suspension and eventual dismissal were effected by the respondent on account, or partly on account, of the applicant having made a protected disclosure or disclosures as envisaged in the Protected Disclosures Act 26 of 2000 ("PDA") (para 20);

1.2. the protected disclosures are alleged to concern the disclosure of information which showed or tendered to show that "hundreds" of Members of Parliament and "a [unnamed] staff member of the Parliamentary Service" improperly benefited from or were otherwise implicated in the travel fraud (paras 30 – 31);

1.3. it is not alleged that the applicant suffered any occupational detriment for purposes of section 3 of the

PDA in the period up to April 2004 in consequence of any protected disclosures allegedly made before that date (para 34), nor is it alleged that the applicant suffered any occupational detriment in consequence of the protected disclosures allegedly made concerning the unnamed member of the Parliamentary staff;

1.4. the applicant accordingly alleges that he was subjected to an occupational detriment by his employer on account, or partly on account, of having disclosed information regarding :

1.4.1. the criminal conduct of his employer, and that each member of the respondent constitutes the "employer" for purposes of the PDA and for purposes of the applicant's claim (para 40A);

1.4.2. alternatively, and if the respondent is for legal purposes a body apart from its members, the criminal conduct of employees in the employ of the employer and that it was the Members of Parliament who constituted respondent's employees for purposes of the PDA (para 41).

2. Members of Parliament are neither the employer of nor the employees of the respondent for purposes of section 1, read with section 3 and section 6 of the PDA.

3. Section 47 (1) (a) of the Constitution provides that anyone who is appointed by or is in the service of the state and receives remuneration for that appointment or service (other than certain specified persons not relevant for present purposes) may not be a Member of Parliament. Members of Parliament are persons holding public office. Employees of Parliament are "*staff*

members". (See Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004).

4. The applicant's claim as referred to in paras1.1 to 1.4.2 above accordingly fails to disclose a cause of action.

GROUND F

30. In the alternative to his claim that his dismissal was automatically unfair by operation of section 187 (1) (h) of the LRA, the applicant alleges that his dismissal relating to his conduct was a substantively and procedurally "other" unfair dismissal in the sense envisaged in section 188 (1) (a) and section 188 (1) (b) of the LRA (see paras 185.3 and 185.5 read with paras 51 to 184).

31. Section 195 (5) (a) requires that such dispute be resolved through arbitration and the above Honourable Court accordingly has no jurisdiction to entertain this claim.'

As is evident from the above, the first exception taken was that the respondent did not have a case for an automatically unfair dismissal in terms of s 187 (1) (h) of the Labour Relations Act 66 of 1995 ('the LRA') because the disclosures made by him were not '*protected disclosures*' for purposes of the PDA. In amplification of the argument Parliament contended that the MPs were neither employers nor employees for purposes of the PDA. The second exception pleaded was that the court *a quo* did not have jurisdiction to entertain the unfair dismissal dispute and that such dispute should be resolved through arbitration.

[3] The court, per Ngcamu AJ, found that the MPs were both an employee and employer in terms of the PDA. The respondent was therefore afforded protection by the PDA. The court further found that it could not dismiss the dispute based on unfair dismissal as the reason for the dismissal had to be established by evidence. Only after hearing the evidence would the court be in a position to decide whether it had jurisdiction or not and whether the unfair dismissal dispute had to be referred to arbitration.

[4] Parliament submitted that both issues were appealable and referred o the test for appealability as being that the parties intended the court to make definitive preliminary rulings, which will not be considered at any later stage. Counsel for the respondent, Mr Rodgers, on the other hand, argued that the dismissal of the two exceptions was not appealable. I accordingly deal with this issue first since if I am in agreement with this submission, then *cadit quaestio,* the appeal must fail. I accept that s 166(1) of the LRA read together with s 167(2) thereof must ineluctably be read as 'final judgment or final order' of the Labour Court before any appeal may serve before us.

[5] Clearly the first exception raised by Parliament does not go to jurisdiction but is instead an attack on the respondent's cause of action. According to Mr Rodgers, the issue whether Parliamentarians are employers or employees is an issue which must proceed to trial. The court *a quo* in a reasoned judgment made a final determination that Parliamentarians are both employers and employees for the purpose of the PDA. This decision is final in effect and not susceptible to alteration by the court *a quo* and at

least finally disposes of this problem and will not be revisited by the court a quo (see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J-533A). To that extent, this decision is appealable. As regards the second exception it was submitted on behalf of the respondent that in dismissing the exception the court did not find that it had jurisdiction and therefore the order of the court was not determinative of the issue of jurisdiction. This, in my view, is a makeweight argument since the court in dismissing the exception made a finding that it had jurisdiction. Hearing of evidence would make no difference to this finding. Thus applying the test in *Metlika Trading Ltd and others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) at 11C-12H, I am of the view that both issues are appealable.

ISSUE

[6] Two issues remain for determination. The first is whether the PDA is applicable to MPs and, if not, then, whether the Labour Court has jurisdiction to hear the unfair dismissal dispute.

PARLIAMENT'S CASE

[7] Counsel for Parliament, Mr Gauntlett, submitted that one must first look at the Constitution of the Republic of South Africa, 1996 ('the Constitution') to find out if Parliamentarians are in law 'employees' for the purposes of the PDA. A Member of a legislature, he argued, holds an office, not a job: their attributes of independence; the lack of contractual relationship; their occupation

of an office; and, their lack of subordination to any cognisable employers could all be regarded as factors used to indicate that Members of the legislature are not 'employees'.

[8] He further argued that the PDA has replicated the definition of employee as set out in the LRA. If the PDA wanted to include Parliamentarians into the definition of employee then it would have specifically done so. It therefore can not be contended that the word '*employee*' under the LRA includes a Parliamentarian.

[9] As regards the issue of whether Parliamentarians are an 'employer' under the PDA, it was submitted that according to s 42(1) and 44(1) of the Constitution, Parliament is a body with a legal personality apart from its Members. It was therefore illogical to conclude that lawmakers could be regarded as employers. Reference was made by Parliament to the South African Law Commission's Report (SALCR) wherein it was recommended that the PDA should be amended to extend the list of persons and entities to whom protected disclosures may be made.

[10] Mr Gauntlett also contended that a possible reason for the respondent invoking s 187 of the LRA could be that in the event of him being successful then he would receive up to a maximum of two years compensation as compared to a maximum of one year compensation awarded to an employee whose dismissal is found to be unfair. Whatever the reasoning may have been, at the end of the day, according to Mr Gauntlett, the respondent had no cause of action for an automatically unfair dismissal.

[11] The final argument raised by Parliament was that the respondent's alternative claim of an unfair dismissal may not be pursued in the Labour Court by virtue of s 191(5)(a) of the LRA. Such a claim had to be decided by arbitration. In support of this argument Parliament referred to the decision in *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 ILJ 1042 (LAC) where this court held that when it became apparent to the Labour Court that the applicant had wrongly characterised her claim as being automatically unfair then the Labour Court was at that stage obliged to consider referral of the matter to the CCMA. The court *a quo* could not have referred to the *Wardlaw* decision as this decision was handed down after the court *a quo* handed down its judgment.

RESPONDENT'S CASE

[12] Mr Rogers, for the respondent, on the other hand submitted that when interpreting the PDA regard must be had to the preamble of the Act and its purpose. He used, as an example, the Constitutional Court's decision in *Fraser v Childrens Court, Pretoria North, and others* 1997 (2) SA 261 (CC) where the court referred to the preamble of the Constitution without first requiring the language to be unclear or ambiguous. Therefore, Mr Rogers submitted that the PDA should be purposively interpreted.

[13] It was further submitted that the PDA should be interpreted in a manner that encourages the disclosure of irregular conduct in the workplace. In *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and another* (2003) 24 ILJ 305 (CC)

the Constitutional Court emphasised that if a statute is capable of being interpreted in a manner that does not limit fundamental rights, then that interpretation should be preferred. Therefore, the PDA must be read in a manner that does not limit the right to fair labour practices.

[14] Mr Rogers then went on to deal with the submission that MPs should be regarded as employers. He said that Parliament is the sum of its constituent parts, namely the MPs: the parliamentary staff support the ongoing operation of Parliament as carried out by the MPs. One could therefore say, according to Rogers, that the staff perform work for the MPs and the MPs must be regarded as an employer of the staff members.

[15] Respondent's further submission was that even if one accepts that Parliament was regarded as a separate legal entity MPs could fall within the definition of an 'employer' by virtue of the following words contained in the definition, '*including any person acting on behalf of or on the authority of such employer*'.

[16] Mr Rogers contended that the finding of the court *a quo* that MPs are employers in terms of the PDA was correct and that there was no basis to disturb the court *a quo's* finding that MPs constituted employees of Parliament. Even though neither the LRA nor the Basic Conditions of Employment Act 75 of 1997 defined an '*employer*' each Act must be interpreted in light of its particular purpose.

[17] The respondent's argument can be summarised briefly as follows:

17.1 It is not the respondent's contention that MPs are State employees in contravention of s 47 of the Constitution;

17.2 Irrespective of whatever provisions are applicable to MPs, they still work for Parliament and assist in carrying on the business of Parliament;

17.3 Even though the LRA and PDA contain the same definition of '*employee*', one has to look at the purpose of the LRA instead of trying to achieve consistency between the statutes.

[18] With regards to the SALCR, Mr Rogers argued that it did not have relevance to the proper interpretation of the PDA. Accordingly there was no statutory *lacuna* in the law.

[19] With regards to the second exception raised by Parliament respondent submitted that the Labour Court obtained jurisdiction to hear the present matter by virtue of s 191(5)(b) of the LRA. Mr Rogers argued that a dispute about the fairness of a dismissal is a single dispute for purposes of the LRA. The respondent, Rogers said, has merely alleged alternative reasons for his dismissal but it was all one dispute and when a matter is before the Labour Court then it can determine all aspects of the matter. He referred to the matter of *National Union of Metalworkers of SA v Driveline Technologies (Pty) Ltd* (2000) 21 ILJ 142 (LAC) where it was held that regardless of the reasons alleged for the dismissal, there is only

ever one dispute, namely an unfair dismissal dispute, and therefore the appeal against the second exception must be dismissed.

[20] Mr Rogers argued that the *Wardlaw* case did not deal with the issue that this court is facing. In *Wardlaw* the employee and employer alleged different reasons for the dismissal. In the present matter the respondent stated reasons for his dismissal, which were not mutually exclusive. Furthermore, *Wardlaw* did not deal with the situation where an employee alleges several reasons for his dismissal. If this court finds that *Wardlaw* does apply then the misconduct claim would have to be stayed and referred to the CCMA; but if the court finds that *Wardlaw* does not apply then this court will have jurisdiction to decide all claims. Respondent finally submitted the court *a quo* did not hold that it did have jurisdiction to hear the matter. It merely indicated how it would deal with the matter.

RELEVANT LEGISLATIVE PROVISIONS

[21] I set out herein below the applicable provisions of the LRA:

21.1 Section 187 - Automatically unfair dismissals

> '(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is-
>
> …

(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an *employee* having made a protected disclosure defined in that Act.'

21.2 Section 158 - Powers of Labour Court

'…

(2) If at any stage after a *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.'

[22] The important provisions of the PDA are as follows:

22.1 The purpose of the PDA 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.'

22.2 An '*employer*' is defined as any person-

'(a) who employs or provides work for any other 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, her or its business, including any person acting on behalf of or on the authority of such employer.'

22.3 An '*employee*' means-

'(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*.'

22.4 A '*disclosure*' means '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 the 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, is being or is likely to be damaged;

(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or

(g) that any matter referred to in paragraphs *(a)* to *(f)* has been, is being or is likely to be deliberately concealed.'

22.5 A '*protected disclosure*' means a *disclosure* made to-

(a) a legal adviser in accordance with section 5;

(b) an *employer* in accordance with section 6;

(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;

(d) a person or body in accordance with section 8; or

(e) any other person or body in accordance with section 9, but does not include a *disclosure*-

(i) in respect of which the *employee* concerned commits an offence by making that *disclosure*; or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5.'

22.6 In terms of s 3 of the PDA, '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*.'

EVALUATION

[23] This case raises a novel issue as to whether parliamentarians are 'employees' or 'employers' as defined by the PDA. The outcome of this case will not only have an impact on the parties involved, but it will also affect the public. This court is mindful of the

doctrine of separation of powers, which holds that the judiciary's function is to interpret the law and apply it even if the conclusion may lead to reprehensible conduct escaping scrutiny. Ultimately, this case hinges on statutory interpretation. In essence, this court must decide whether or not the application of '*employer*' or '*employee*' as defined in the PDA should be extended so as to include MPs.

Presumptions of interpretation

[24] The process of statutory interpretation is greatly assisted by presumptions of interpretation. The presumption that the State is not bound by statute requires brief discussion. Part of the court *a quo*'s reasoning in dismissing exception A was that it would be nonsense to hold that lawmakers are not bound by the legislation that they pass. In para 45 Ngcamu AJ stated as follows:

> '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 [reprisals] as a result of such disclosure. It is the same parliament which denies the protection. It does not make sense that the members made a law that does not or was not intended to apply to them. This in my view make a mockery to the whole legislation.'

[25] The presumption that the State is not bound by statute has come under academic criticism (see G E Devenish, 'The State is not Presumed to be Bound by Statute - A Constitutional and Jurisprudential Anachronism' (2009) *Obiter* 17 para 45). This presumption will have to be developed in line with the new

constitutional order, which is premised on governmental accountability and transparency. To hold that the provisions of the PDA bind MPs would hamper the execution of their duties and functions. In any event Parliament has its own mechanism to deal with MPs whose conduct fails to pass muster.

Parliament's structure and powers

[26] Parliament consists of two Houses, namely the National Assembly and the National Council of Provinces. Section 42(3) of the Constitution provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government as stated in s 42(4) of the Constitution. Section 43 of the Constitution further provides that legislative authority vests in Parliament.

Are lawmakers '*employees*'?

[27] To subject MPs to the PDA may, in practice, run the risk of frustrating the democratic process. An extension of the application of '*employee*' under the PDA to include MPs might cause statutes to become more complex. MPs ought to be entirely independent.

[28] Parliamentarians hold an office. In terms of s 48 of the Constitution they take an oath whereby they affirm their faithfulness to the Republic and obedience to the Constitution. MPs have a statutory

right to remuneration under the Remuneration of Public Office Bearers Act 20 of 1998. Parliamentarians, like judges, are subject to their own codes of conduct. MPs are elected into office. It could never be suggested that a MP could have recourse to the Labour Courts if he or she lost his or her seat after an election. MPs also enjoy certain privileges that do not extend to ordinary citizens. All of these features further support the contention that MPs are not bound by the PDA.

[29] One of the reasons for the court *a quo* arriving at its decision was that to exclude MPs from the application of the PDA would make a 'mockery of the whole legislation'. The court *a quo* was of the opinion that applying an interpretation that would exclude MPs would be contrary to the Legislature's intention. I cannot agree with this reasoning. Parliament has submitted that the Legislature's use of the same definition of '*employee*' in both the LRA and the PDA clearly shows the intention to create a single statutory scheme. There is merit to this submission. In *Barras v Aberdeen Steam Trawling and Fishing Co. Ltd* 1933 AC 402, the House of Lords held that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute, which incorporates the same word in a similar context, must be interpreted according to the meaning that was previously given to it. This occurs where the Legislature has repeated the word without alteration. This principle is applicable to the present case. Both the LRA and the PDA are firmly set within the employment law context. The PDA primarily concerns disclosures made within an employment relationship. MPs are excluded from the provisions of the LRA and therefore are also excluded from the PDA.

[30] The Supreme Court of Appeal provided some clarity regarding the definition of '*employee*' in terms of the Labour Relations Act, 1956. In *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ 752 (SCA) the court held at 753I than an employee at common law undertakes to render a personal service to an employer. The court further held, by drawing a distinction between a contract of work and a contract of service, that the appellant was not an '*employee*' in terms of the second part of the definition of '*employee*', which read: '…any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer.' Streicher JA held that the appellant, who was an agent contracted to canvass insurance business for the respondent, was carrying on and conducting his own business. The appellant was not assisting in the carrying on or conducting of the business of the respondent. However, the court did not have the benefit of argument on the second part of the definition of '*employee*'. The court's finding was primarily based on an application of the first part of the definition ['…any person who is employed by or working for an employer and receiving or entitled to receive any remuneration…'] to the facts of the case.

[31] Parliament has also submitted that the insertion of s 187(1)(h) into the LRA, by s 42 of the Labour Relations Amendment Act 12 of 2002, is a further indication that the Legislature intended to create one system of legislation. I agree with this submission. Section 187(1)(h) specifically refers to the PDA. Accordingly, it is clear that if MPs are excluded from the LRA, which they must be, then logically they are also excluded from the provisions of the PDA.

Are lawmakers '*employers*'?

[32] The definition of '*protected disclosure*' in the PDA specifically mentions certain categories of persons to whom the PDA applies. One specific category is a member of Cabinet or the Executive Council. If Parliament had intended to include MPs within the ambit of this definition then it would have clearly done so.

[33] Parliament submitted that parliamentary staff are answerable to the Secretary of Parliament and not to MPs. This point is important. Parliamentarians must be allowed to focus on their constitutional duty to make law. A MPs portfolio ought not to be cluttered with the additional and onerous responsibilities of being an '*employer*' of parliamentary staff. This would hinder the effective performance of their duties and functions. This court accordingly finds that MPs are not included in the PDA.

Labour Court or arbitration?

[34] The final point requiring determination is that of jurisdiction. Grogan (see Grogan, *Workplace Law,* 10th ed, 172) has observed as follows:

> 'Where, as in *Wardlaw*, the employee claims that the reason for the dismissal was one that placed the dispute within the jurisdiction of the Labour Court but it turns out that the true reason was one that should be referred for arbitration, or *vice versa*, the correct procedure is for the court or arbitrator, as the case may be, to hear sufficient evidence to identify the true reason for the dismissal.'

Therefore, once it is apparent to the court that the dispute is one that ought to have been referred to arbitration, the court may stay the proceedings and refer the dispute to arbitration or it may, with the consent of the parties, and if it is expedient to do so, continue with the proceedings sitting as an arbitrator. It cannot deal with the dispute outside the ambit of these provisions. Accordingly, it has no power to proceed to adjudicate the dispute on the merits simply because it is already seized with the matter. To do so would be in conflict with the provisions of s 157(5) and s 158(2) of the LRA.

[35] In resolving labour disputes a clear line must be drawn between the different fora that have been set up by the LRA. In *NUMSA v Driveline* supra the appellant employees' retrenchment was referred for conciliation by the relevant bargaining council. The council issued a certificate of outcome in which it was stated that the dispute relating to the unfair termination of services remained unresolved. A pretrial conference was held and the parties agreed that the Labour Court would be required to decide whether the retrenchment was unfair. The appellant then attempted to amend its particulars of claim to provide that the dismissal had been automatically unfair. The Labour Court refused the amendment resulting in an appeal. The Labour Appeal Court upheld the appeal, but for different reasons. Conradie JA held that in exercising its discretion the court asks itself as to whether the dispute has been submitted to conciliation. The idea behind the LRA is that the parties should have an opportunity to discuss their differences before going to court. Conradie JA allowed the amendment because he was of the opinion that the legal characterisation of a

particular set of facts is irrelevant. Zondo AJP held that the amendment did not introduce a new dispute between the parties. The learned Judge also held that the dispute was about the fairness of dismissal and that the amendment would merely introduce a different reason for dismissal. Zondo AJP found that further statutory conciliation of the amended claim (automatically unfair dismissal) is not required. However, Zondo AJP's reasoning is qualified: 'Therefore, provided the alleged reason is one referred to in s 191(5)(b), the Labour Court will have jurisdiction…' [**my emphasis**]. The court allowed the amendment because it included a reason for dismissal, which, in the ordinary course, is required to be referred to the Labour Court for adjudication. The inclusion of the automatically unfair reason did not upset the clear line between the adjudication and arbitration functions of the Labour Court and the CCMA respectively.

[36] In this case the claim over which the court has jurisdiction, which is the automatically unfair reason, discloses no cause of action for the reasons set out above, and the remaining reason for dismissal must therefore be referred to arbitration. In *Wardlaw* supra the appellant alleged that the reason for her dismissal was a result of her pregnancy while her employer alleged that misconduct was the true reason for the dismissal. The issue was whether the LRA requires the forum to be determined by the employee's alleged reason for dismissal and that, once the allegation has been made, the court has jurisdiction right up to the finality of the matter despite the fact that it becomes apparent that the employee's alleged reason for dismissal is not the true reason. The court at para 14 favoured the approach that:

> '…gives effect to the different processes to which different disputes are subject in terms of the Act and does not blur the distinction between disputes that should go to different processes and fora.'

Zondo JP and Basson AJA held that the Labour Court should only provisionally accept the employee's allegation as to the reason for dismissal until it makes a finding as to the true reason for dismissal. To that extent the court *a quo* may have been correct in finding that it had to hear evidence prior to making a decision about jurisdiction but once the respondent's cause of action based on automatic unfair dismissal falls away the court is bound to stay the proceedings and refer the unfair dismissal dispute to arbitration.

[37] This is a matter of some complexity and the respondent was armed with a decision in his favour and therefore his opposition was justified. The dictates of fairness and justice require that I make no order as to costs both of the appeal and of the costs in the court below.

ORDER

[38] In the result I make the following order:

38.1 The appeal is upheld.

38.2 There will be no order as to costs.

38.3 The order of the Labour Court is set aside and replaced with the following order:

"Respondents exception based on ground A and F succeeds. The proceedings are hereby stayed in terms of s 158(2)(a) of the Labour Relations Act 66 of 1995 and the dispute is hereby referred to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration. There is no order as to costs."

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Patel JA

I agree

_____

Waglay ADJP

I agree

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Tlaletsi AJA

Appearances:

For the Appellant: J J GAUNTLETT SC
ADV. C S KAHANOVITZ

Instructed by: CHENNELLS ALBERTYN ATTORNEYS

For the Respondent/s: O ROGERS SC
ADV. M W JANISCH

Instructed by : HEROLD GIE ATTORNEYS

Date of Judgment: Wednesday, 21 July 2010