IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNSEBURG)

CASE NO: JS623/07

In the matter between:

MATTHEW CHIZUNZA	**APPLICANT**
AND	
MTN (PTY) LTD	**1ST RESPONDENT**
PUTHUMA NHLEKO	**2ND RESPONDENT**
NEWSHELF 664 (PTY) LTD –	
THE ALPINE TRUST	**3RD RESPONDENT**
MTN GROUP SHARE TRUST	**4TH RESPONDENT**

JUDGMENT

AC BASSON, J

1] Argument and evidence were presented to this Court on 12 June 2008 in respect of two points *in limine* raised on behalf of the First Respondent. At the conclusion of the proceedings I indicated that I will prepare a judgment and deliver my ruling on the points *in limine* the following day. Herewith brief reasons for my decision.

[2] The First Respondent in this matter is MTN (Pty) Ltd, a company that carries on business as a telecommunication services provider (hereinafter referred to as "the Respondent"). The Applicant, Mr. Matthew Chizunza was formerly employed by MTN as a Manager: Legal Action. It is common cause that the Applicant was suspended during September 2006 pending the outcome of an investigation into alleged acts of misconduct. On 18 December 2007 the Applicant was charged with the following three charges:

"Charge 1

Dishonesty alternatively theft in that on the 27 September 2006 you

submitted a petty cash claim to which you alluded that the money was spent on the supervisors lunch on 25th July 2006. It has been further established upon investigation that the lunch meeting with supervisors never took place.

Charge 2.

Fraud alternatively Misrepresentation/falsification of a document with the intention to benefit yourself in that you submitted the above mentioned invoice which was tampered with. Upon investigation it was established that the invoice which you submitted claiming that it was for supervisors lunch was actually for dinner because it was issued at 8H00 at night. There was a signature on top of the time printed on the invoice, which is viewed to be a deliberate act to mislead the company.

Charge 3

Abuse of company resources alternatively dishonesty in that on the 3rd August 2006 you purchased alcohol and other drinks from Grayson wine and liquor without your manager's authorization. The

company has no record of such match taking place."

[3] It is common cause that a disciplinary hearing was held on 21 December 2006. The chairperson of the disciplinary hearing was a one Mr S Jugwanth. It is common cause that the chairperson of the disciplinary hearing issued his written findings on 11 January 2006. The Applicant received the written ruling of the chairperson on 16 January 2006. The chairperson found the Applicant guilty on charges one and two and not guilty on charge three. More in particular, it was the chairperson's finding that the Applicant had intended to misrepresent the actual chain of events in respect of the invoice submitted for a petty cash claim because he (the Applicant) knew that it would be difficult to justify a petty cash re-imbursement for an expense incurred outside business hours. The chairperson concluded that the Applicant had intended to misrepresent to the company the time of the incurrence of the expense and that he had therefore acted dishonestly.

Points in limine

[4] The Respondent raised two points *in limine.*

(i) The first point is that the Applicant was dismissed on 16 January 2007 for fraud and abuse of company resources and that the aforesaid dismissal for misconduct does not constitute an automatically unfair dismissal and therefore not justiciable by this Court. It was further argued that the CCMA has the necessary jurisdiction to arbitrate the dispute.

(ii) The second point *in limine* deals with the date of the Applicant's dismissal. It is the Respondent's contention that the Applicant was dismissed on 16 January 2006 being the date upon which he received the outcome of the disciplinary hearing. It is the Applicant's contention that he was dismissed on 5 April 2007 being the date upon which he received a letter confirming the termination of his employment. I must, however, point

out that the letter merely confirms that the Applicant's services were terminated on 17 January 2007 and that the reason for his dismissal was the fact that he was found guilty of dishonesty and fraud. I pointed out to the parties during argument that it was, in my view, not necessary for this Court to decide the dispute on the date of the dismissal. I am particularly of that view in light of my finding that this Court does not have the necessary jurisdiction to decide the dispute that was referred to it. I accordingly will leave this point for the CCMA arbitrator to decide as the date of dismissal is, in my view, part and parcel of the dismissal dispute. For reasons that will become clear it is, of course necessary for this Court to determine whether it has the necessary jurisdiction to adjudicate the dispute that was referred to it.

The dispute that was referred to the Labour Court

[5] In the referral to conciliation, the dispute that was referred to the CCMA is characterized as on falling within the ambit of "*section 191 of the LRA [the Labour Relations Act 66 of 1995] and section 10 of the EEA [the Employment Equity Act 55 of 1998]"*. In this referral the Applicant further states that his dismissal was substantively unfair for the following reason:

> " It *was unfair as it is a form of indirect discrimination based on harassment disguised as some form of misconduct relating to fraud which the employer had just thumbsucked as there is no proof of any fraudulent act of conduct on Chizuna's [the Applicant] part*."

[6] The certificate of outcome issued by the CCMA characterizes the dispute as "*alleged unfair discrimination – related to unfair discrimination*". It is this dispute that was referred to the Labour Court.

[7] Mr. Sebola on behalf of the Applicant strongly argued that this Court

has jurisdiction by virtue of the fact that the certificate of outcome issued by the CCMA characterizes the dispute as one relating to unfair discrimination. In essence it was his argument that, because the certificate of outcome has not been reviewed by the Respondent, it therefore stands. In argument I pointed out to Mr. Sebola that this Court has the duty to determine its own jurisdiction irrespective of the characterization of the dispute by the CCMA Commissioner and irrespective of the characterization of the dispute by the Applicant and referred to the CCMA in terms of the LRA7:11. Mr. Sebola strongly disagreed and insisted that this Court is bound by the characterization of the dispute. I have also pointed out to Mr. Sebola with reference to the Labour Appeal Court decision in *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 *ILJ* 1042 (LAC), that the legal principles are clear on this point: The Labour Court must determine the true nature of the dispute irrespective of the characterization of the dispute by the Applicant. Mr. Sebola again strongly disagreed and argued that this Court is not bound by any decisions and more in particular that this Court is not bound by the decision of the Labour Appeal Court in

Wardlaw v Supreme Mouldings (Pty) Ltd (2007) 28 *ILJ* 1042 (LAC) in which this principle was confirmed. Mr. Sebloa is, of course, wrong. It is trite that the Labour Court is bound to follow decisions by the Labour Appeal Court in respect of the interpretation of a certain legal principle or in respect of the interpretation of a certain section of the Labour Relations Act. This is referred to as the principle of *stare decisis* in terms of which a court (especially a lower court) is bound by previous judgments in respect of specific legal principles or the application of legal principles to similar or comparable factual situations especially where those principles have been interpreted by a higher court such as the Labour Appeal Court.

[8] In disputes where unfair dismissal on the basis of *misconduct* (or *incapacity*) has been alleged, once the *employee* has discharged the onus to prove that he or she was dismissed, the *employer* bears the onus to prove that the dismissal was for a fair reason and in accordance with a fair procedure (see section 192(2) read with section 188(1) of the LRA). Where the reason for the dismissal is for a reason

which renders the dismissal *automatically unfair* in terms of section 187 of the LRA, then the *employee* will be entitled to the remedies provided for in section 194 and more specifically compensation as provided for in section 194(3) of the LRA (provided that the employee was able to prove that the reason for his dismissal was automatically unfair). The employer is, however, not prevented from disputing the allegation that a dismissal was for an automatically unfair reason. The question which arises is whether this Court is bound by the characterization of the dispute as one relating to an automatically unfair dismissal and, if so, whether this Court should assume jurisdiction simply on the basis that that is the dispute that was referred to it? The answer to this question has far reaching consequences. If the dispute is characterized as an automatically unfair dismissal, this Court will assume jurisdiction in terms of section 191(5)(b) of the LRA. However, if the reason for the dismissal is characterized as one not contemplated for in terms of, *inter alia*, section 187 of the LRA, this Court will not have jurisdiction to adjudicate the fairness of the dismissal and the dispute will have to be

referred to arbitration. This is so by virtue of the provisions of section 157(1) of the LRA which provides as follows in respect of the jurisdiction of this Court:

> *'"57 Jurisdiction of Labour Court. - (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."*

It is therefore clear that the Labour Court does not have jurisdiction in respect of disputes that must be referred to the CCMA. See also the *Wardlaw*-decision where the Labour Appeal Court confirmed this principle as follows:

> "[17] It is clear from s 157(1) that the Labour Court does not have exclusive jurisdiction where this Act provides otherwise'. It

has 'exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined' by it. However, all of this is subject to the Constitution and s 173 of the Act. Section 173 of the Act deals with the jurisdiction of this court and is of no relevance to the issue before us. Section 157(5) is very important. It provides:

> *'(5) 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.'*

This provision lays down a general rule to which there is only one exception. The general rule is that '[t]he Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration'.

This contemplates, for example, a dispute concerning the fairness of a dismissal where the reason for the dismissal as alleged by the employee is misconduct or alleged misconduct on the part of the is of the view that reasons other than those employee. This means that as a general rule the Labour Court has no jurisdiction to adjudicate such a dispute."

[9] To recap: Does the mere characterization of a dispute as one which falls within the ambit of jurisdiction of this Court bind this Court? Put differently, is this Court prevented from investigating the true nature of the dispute notwithstanding the fact that the referring party has characterized the dispute differently?

[10] This question was pertinently raised and decided in the *Wardlaw*-case. In that case the Appellant alleged that she was dismissed on the basis of pregnancy and that her dismissal therefore constituted an automatically unfair dismissal and hence the dispute had to be adjudicated by the Labour Court. The Respondent in that case disputed that that was the reason for her dismissal and contended that her dismissal was for misconduct and hence that the dispute had to be referred to arbitration. At the commencement of the proceedings the Respondent took the point that the Labour Court did not have jurisdiction to adjudicate the dispute because, as far as it was concerned, the reasons for the Appellant's dismissal related to her conduct and fell under section 191(5)(a) of the LRA. The Appellant,

however, insisted that the Labour Court had jurisdiction. In this appeal the question was specifically raised what should be done by the Labour Court when the reason for dismissal alleged by the *employee* falls under section 191(5)(b) of the LRA, which means that the dispute should be referred to the Labour Court for adjudication, and when the reason for dismissal alleged by the *employer* is one that falls under section 191(5)(a) of the LRA, which means that the dispute would have to be referred to arbitration (ad paragraph [7] of the judgment). In coming to a conclusion the Labour Appeal Court referred to two approaches or schools of thought.

(i) The first one is the so-called *formalistic school of thought* in terms of which the Court will adopt an attitude that the LRA requires that the forum is to be determined by the reason for the dismissal as alleged by the *employee*:

"[11.1] This school of thought entails that the employee would allege what the reason for the dismissal is and the reason he would allege would be a reason that falls under s 191(5)(b) of the Act. That would mean that the dispute should be referred to the Labour Court for adjudication. Once such an allegation has been made, the Labour Court would have jurisdiction to adjudicate the dispute up to the end even if during the adjudicatory process or trial the court became convinced that the reason for dismissal is not the one alleged by the employee but is a different one and that reason falls under s 191(5)(a) of the Act. Of course, a reason for dismissal alleged by the employee which falls under s 191(5)(a) would in terms of those provisions have required that the dispute be referred to arbitration."

(ii) In terms of the so-called *substantive school of thought* the Labour Court will

only provisionally assume jurisdiction until the true reason for the dismissal has been established:

"[8] … In terms of this school of thought, if an employee has alleged a reason for dismissal that falls under s 191(5)(b) of the Act, the Labour Court assumes jurisdiction in respect of the dispute provisionally pending its decision whether the true reason for the dismissal is the one alleged by the employee or another reason which falls within s 191(5)(b) or another reason that falls under s 191(5)(a) of the Act. If at a later stage the Labour Court concludes that the true reason for dismissal is one contemplated in s 191(5)(b), it proceeds to adjudicate the dispute to finality. If, however, it concludes that the true reason for the dismissal is one that falls under s 191(5)(a), the court declines jurisdiction and either it or any interested party may then refer the dispute to the forum with jurisdiction for arbitration. For convenience we shall refer to this school of thought as 'the substantive school of thought'.

[11] The Labour Appeal Court came to the "*inescapable*" conclusion that the formalistic school of thought is *not* one that enjoys the recognition of the LRA and that the approach to be followed is the one advanced by the *substantive school of thought* namely that this Court only *provisionally* assumes jurisdiction until it makes a finding as to the true reason for the dismissal. If the reason for the dismissal is the same as the one alleged by the employee, the Court will adjudicate the dispute on the merits. However, if the reason for the dismissal is not the one alleged by the employee but a reason that falls under section 191(5)(a) of the LRA, then the Court will refuse to adjudicate the dispute and let it be referred to arbitration (see paragraph [13] of the *Wardlaw*-decision). At paragraph [18] the Court explains as follows:

> *"[18] The exception to the general rule referred to above is the one provided for in s 158(2). Section 158(2) of the Act provides:*
>
> *'(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.'

[19] It seems to us that the effect of s 157(5) read with s 158(2) is in part that the only situation where the Labour Court has jurisdiction to deal with a dispute that is otherwise required to be referred to arbitration in terms of this Act is a situation that falls within the ambit of s 158(2). Leaving out s 158(2)(a) which does not seem to contemplate the Labour Court adjudicating such a dispute, that scenario seems to be

> *only the one contemplated by s 158(2)(b) of the Act. Even if both parties to a dispute were to agree to ask the Labour Court to resolve a dispute which ought to have been referred to arbitration, for example, a dispute concerning a dismissal for misconduct that would not be enough to confer jurisdiction on the Labour Court to resolve such a dispute. In addition to the consent of both parties, it would have to be shown that it is expedient for the court to continue with the proceedings but, even then, it will not sit as a court but its judge will have to sit as an arbitrator."*

[12] It is thus clear from the aforegoing that this Court will only *provisionally* accept jurisdiction until the real reason for the dismissal has been established. I should, however, also point out at this stage that the parties have not consented to this Court assuming jurisdiction should it be concluded that this Court does not have jurisdiction. If this Court therefore come to the conclusion that the reason for the dismissal falls within the ambit of section 191(5)(a), the dispute will

have to be referred back to the CCMA for arbitration.

True nature of the dispute

[13] Having come to the conclusion that this Court must determine the true nature of the dispute irrespective of the characterization of the dispute by the referring party or by a CCMA Commissioner, I will now proceed to determine the true nature of the dispute.

[14] As point of departure reference should be made to the statement of claim filed by the Applicant with this Court. In various paragraphs in the statement of claim the allegation is made that the Applicant was unfairly discriminated against and that he was victimized and harassed. The Applicant also alleges that he was automatically unfairly dismissed and that his dismissal was arbitrary. Under the heading "**STATEMENT OF LEGAL ISSUES"** the following is stated:

> " 3.1 The Applicant states that his right of not to be unfairly dismissed arising from the allegations the Applicant raised during

the Disciplinary Enquiry relating to challenge of the Applicant's Delegation of Authority and conduct in the performance of Applicant's duties in having had a meeting over dinner with Pickering on the 25*th* *July 2006 by the First Respondent's managers (that is Moyce, Mukewa and Ishwardeen) was an arbitrary conduct and victiminsation of the Applicant both procedurally and substantively*."

Further at 3.6 the Applicant states as follows:

"The Applicant's dismissal by the First Respondent was purportedly based on planned and subtly executed act or conduct by First Respondent's management for the disguised reason of misconduct while the real reason was an arbitrary challenge of Applicant's execution of Applicant's delegated powers, duties and responsibilities as a manager in the department, as contractually appointed by the First Respondent."

[15] I have debated at length with Mr. Sebola in order to determine what exactly the Applicant alleges the reason for his dismissal was as it is not clear on what basis discrimination is alleged in the Applicant's statement of claim. Mr. Seblola strongly disagreed with the Court's view that a claim of discrimination can only be sustained if arbitrary treatment (or a differentiation) is grounded or linked to one of the listed grounds in section 6(1) of the EEA which reads as follows:

> *"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth"*

[16] If I understand Mr Sebola's argument correctly it is his argument that an arbitrary challenge of the Applicant's delegated powers and duties as a manager constitutes discrimination. In this regard he referred the

Court to section 6(3) of the EEA which provides for a prohibition of harassment of an employee. I have pointed out to Mr. Sebola that harassment will only constitute unfair discrimination, if the harassment is based on any one or more of the grounds for unfair discrimination listed in subsection (1) of section 6. Mr. Sebola disagreed and persisted with his argument that the mere arbitrary treatment of an employee constitutes discrimination as contemplated by the EEA.

[17] It is, however, trite that although the existence of a differentiation is a precondition for discrimination, the mere fact that there is a differentiation or an arbitrary treatment of an individual, one could not equate a mere differentiation with discrimination (see for a general discussion EML Strydom et al *Essential Employment Discrimination Law* (2004) page 33 *et se* and Ockert Dupper and Christoph Garbers *"Employment Equity Act 55 of 1998: Employment Discrimination: A Commentary"* in Thompson and Benjamin *South African Labour Law* Volume I at CC1-1 *et seq*.) Discrimination has a decidedly negative or pejorative connotation. A differentiation only becomes discrimination

once a differentiation takes place for an unacceptable reason. These unacceptable reasons are all listed in section 6(1) of the EEA and are usually referred to as the listed grounds for unfair discrimination. See *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC) at paragraph [31] where the Court emphasizes the pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them:

> "*[31] The proscribed activity is not stated to be 'unfair differentiation' but is stated to be 'unfair discrimination'. Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short,*

they were denied recognition of their inherent dignity. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view, unfair discrimination, when used in this second form in s 8(2), in the context of s 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."

The Constitutional Court in *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) at 325A explains how discrimination is established:

> *"Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and*

> *characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparable serious manner…*
>
> *If [the differentiation] has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant ant others in his or her situation, if at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation…"*

What is clear from the aforegoing is that only once a link is shown to exist between differentiation and one or more of the listed grounds, will discrimination be established. If differentiation is alleged on an unlisted grounds, the employee will bear the onus of proving that the "*differentiation"* amounts to "*discrimination"*.

[18] I have pointed out to Mr. Sebola that no allegation of unfair discrimination as contemplated by section 6 of the EEA is made in the statement of case and that the mere allegation of arbitrary conduct (even in the context of an employment practice such as a dismissal) does not constitute or support a claim of discrimination. There is no clear allegation made in the papers that the Applicant was discriminated against on the basis of his nationality/ethnic origin or xenophobia as this type of discrimination is normally referred to.

[19] Because of the particular reprehensible nature of this type of discrimination, I have, notwithstanding the vagueness of the claims made in the statement of claim and notwithstanding the vagueness of the Applicant's evidence, in the interest of justice investigated whether or not the Applicant's dismissal was not motivated or prompted by the fact that he was of Zimbabwean origin as this fact may give rise to a claim of automatically unfair dismissal as contemplated by section 187(1)(f) of the LRA.

[20] Before turning to the particular facts of this case, it must be pointed out that it is trite that the *employee* must not only prove the existence of a dismissal, he or she must also prove the existence of an *automatically* unfair dismissal. In this regard the Labour Appeal Court in *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC) pertinently pointed out that an applicant (the employee) has an evidential burden to produce sufficient evidence which may lead to the conclusion that he was automatically unfairly dismissed:

> *"[28] In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal.*
>
> *[29] The further question then arises as to the approach to*

> *the evidence led by the respective parties. The answer can be illustrated by way of the following example: Assume that an employee can show that she was pregnant and dismissed upon the employer gaining knowledge thereof. The court would examine whether, upon an evaluation of all the evidence, pregnancy was the 'dominant' or most likely cause of the dismissal. Within the framework of this approach, it is now possible to return to the facts of this case and the key finding of the court a quo, that the argument that appellant was dismissed for union activities was completely without merit."*

[21] Where the facts show that more than one reason may have been the reason for the dismissal, the Court will have to examine whether an automatically unfair reason was the "*dominant*" or "*more likely*" reason for the dismissal (see *Kroukamp* ad paragraph [29] *supra*). The following extract from *Kroukamp* (*supra*) explains the approach in respect of automatically unfair dismissals:

"[26] Mr Snyman placed considerable emphasis upon the judgment of this court in SA Chemical Workers Union & others v Afrox Ltd (1999) 20 ILJ 1718 (LAC) at para 32 where Froneman DJP set out an approach in respect of an enquiry relating to an automatically unfair dismissal in terms of s 187(1)(a) of the Act as follows:

> *'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual two-fold approach to causation, applied in other fields of law should not also be utilized here (compare S v Mokgethi & others 1990 (1) SA 32 (A) at 39D-41A; Minister of Police v Skosana 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the*

dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare S v Mokgethi at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue. . . . Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected

strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a) . If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.'

[27] The question in the present dispute concerned the application of this test. The starting-point of any enquiry is to be found in chapter VIII of the Act. Thus, if an employee simply alleges an unfair dismissal, the employer must show that it was fair for a reason permitted by s 188. If the employee alleges that she was dismissed for a prohibited reason, for example pregnancy, then it would seem that the employee must, in addition to making the allegation, at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly based on this condition. Some guidance as to the nature of the evidence required is to be found in Maund v Penwith District Council [1984] ICR 143, where Lord Justice Griffiths of the Court of Appeal held at 149 that:

> *'[I]t is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal.'"*

[22] Does the evidence presented to this Court show that the principle reason for the dismissal of the Applicant was discriminatory? Put differently, does the evidence presented to this Court lead to one justifiable inference namely that the Applicant's dismissal was as a result of his origin (him being a Zimbabwean) or as a result of him being a black manager? I have carefully perused the evidence and the documentation submitted to this Court. I have come to the conclusion that the Applicant has not placed sufficient evidence before this Court, in fact I am of the view that the Applicant has not placed any evidence before this Court, to substantiate a claim that the dismissal of the Applicant was discriminatory or that a discriminatory motive had played a roll in dismissing (and charging) the Applicant. I have, in

coming to this conclusion, considered, *inter* alia, the following facts:

(i) It is common cause that the Applicant was suspended in September 2006 pending the outcome of an investigation and that a disciplinary hearing was held in December. During this time no allegation was made by the Applicant nor was any grievance lodged by him to the effect that he was victimized or harassed.

(ii) I have also perused the transcript of the disciplinary hearing. It is clear from the transcript that the Applicant has never raised the issue of discrimination at his hearing. In fact, there is no suggestion on the record that the chairperson was biased or that the chairperson was merely appointed to dismiss the Applicant for an ulterior (discriminatory) motive such as for example, his nationality. It is common cause that the chairperson of the hearing was an external appointment. The chairperson testified that he was an attorney and that he had

been a commissioner of the CCMA for approximately five years. He testified that he approached the hearing with integrity. More in particular, he testified that he did not know the Applicant and that he had no idea what his nationality was. This evidence was not challenged under cross-examination. What is also important to point out is that it was never put to the chairperson that he was part of a conspiracy or that he was instructed to dismiss the Applicant at all costs or that he was influenced by management to dismiss the Applicant for a discriminatory reason. I have perused the Applicant's findings, the documentary evidence and the transcript of the disciplinary hearing and can find no substantiation for the allegation that the Applicant was discriminated against. The charges of fraud and dishonesty that was brought against the Applicant find a basis in the documentation and the evidence presented to this Court. The external chairperson evaluated these charges and came to a decision without any outside influence. I am therefore of the view that the Applicant was properly charged

with fraud and dishonesty and I can find no basis upon which to find that these charges were motivated by xenophobic motives. Whether the dismissal of the Applicant on the basis of fraud and dishonesty was fair and whether or not the sanction of dismissal was fair, is for the CCMA arbitrator to decide. It should also be pointed out that it was not put to the HR officer (who also gave evidence) that the real reason for the dismissal was a discriminatory reason as contemplated by section 187(1)(f) of the LRA.

(iii) The Applicant also conceded in cross-examination that the Respondent employs individuals from various African countries and more specifically conceded that the Respondent employs Zimbabweans and Nigerians. He also could not answer whether any of the other foreign nationals have ever lodged a complaint that they were being harassed or victimized by the Respondent. The Applicant also did not dispute the fact that the reason why the Respondent employs

foreign nationals is the fact that it focuses its business on Africa.

(iv) It is also common cause that the Applicant has lodged an appeal against the findings of the chairperson. In terms of the initial grounds for appeal no mention is made of any discriminatory conduct on the basis of race or nationality. It is only when the Applicant filed his supplementary grounds for an appeal that it is alleged that the Applicant was victimized as a black manager. I have already pointed out that the evidence does not support this contention.

[23] In the event it is concluded that the Applicant has not placed sufficient evidence before this Court to substantiate the claim that the reason for his dismissal is one that falls within the ambit of section 187(1)(f) of the LRA and section 10 of the EEA. In respect of costs, I can find no reason why costs should not follow the result.

[24] The following order is made:

1. The Labour Court does not have jurisdiction to adjudicate the dispute that was referred to it.
2. The proceedings are hereby stayed in terms of section 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.
3. The Applicant is directed to pay the costs.

……..
AC BASSON, J

Date of the proceedings: 12 June 2008.

Date of the judgment: 13 June 2008

For the Applicant: Mr. Sebola: RAWU

For the Respondent: Mr. W Hutchinsin instructed by Lebea & Associates