

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(ORANGE FREE STATE PROVINCIAL DIVISION)**

Case No. : A1671/08

In the matter between:-

**NEHAWU obo A ADELAJA ADEKOYA**

Applicant

and

**CENTRAL UNIVERSITY OF TECHNOLOGY:** First Respondent  
**FREE STATE**

**THANDWA MTHEMBU** Second Respondent  
**THE VICE-CHANCELLOR:**  
**CENTRAL UNIVERSITY OF**  
**TECHNOLOGY: FREE STATE**

---

**HEARD ON:** 12 JUNE 2008

---

**JUDGMENT BY:** HANCKE, J

---

**DELIVERED ON:** 19 JUNE 2008

---

[1] The applicant, the National Education Health and Allied Workers Union, applies for an order on behalf of Mr. Ayodele Adelaja Adekoya in the following terms:

- “1. That the 1<sup>st</sup> Respondent be ordered to reinstate Ayodele Adelaja Adekoya to his post as a lecturer with immediate

effect and with full benefits.

2. That the 1<sup>st</sup> Respondent be ordered to pay damages including emoluments to Ayodele Adelaja Adekoya.
3. That the 1<sup>st</sup> Respondent pay the costs of the application.”

[2] Respondents resist the application on the following grounds:

2.1. The applicant lacks *locus standi* to act on behalf of Mr. Adekoya in these proceedings.

2.2 The High Court does not have jurisdiction to entertain these proceedings.

2.3 Even if the High Court had the necessary jurisdiction to entertain the proceedings, the cause of action framed by the applicant, is essentially one of an unfair dismissal which would resort under dispute resolution procedures in terms of the Labour Relations Act, 66 of 1995 (as amended).

2.4 A claim for damages by way of motion procedure is not permissible in law.

[3] As far as *locus standi* is concerned, Mr. Motloun, counsel for the applicant, submitted that it has jurisdiction to institute the present proceedings in view of the wording of section

200(1) of the Labour Relations Act, which reads as follows:

**“200 Representation of employees or employers**

(1) A registered trade union or registered employers'

organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party-

- (a) in its own interest;
- (b) on behalf of any of its members;
- (c) in the interest of any of its members.”

[3] The cases on which Mr. Motlounq relied for his submission that the applicant has *locus standi* exclusively deal with dispute resolutions in the Labour Court. **MZEKU & OTHERS v VOLKSWAGEN SA (PTY) LTD & OTHERS** [2001] BLLR 857 (LAC); **NUM v HERNIE EXPLORATION (PTY) LTD** [2003] 4 319 (LAC) at 331H – 332C. As will be seen infra (par. [5] – [7]) different statutory provisions are applicable in the Labour Court.

[4] It is also necessary to have regard to section 161 of the Labour Relations Act which deals with representation before the Labour Court and which reads as follows:

**“161 Representation before Labour Court**

In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by-

- (a) a legal practitioner;
- (b) a director or employee of the party;
- (c) any member, office-bearer or official of that party's registered trade union or registered employers' organisation;
- (d) a designated agent or official of a council; or
- (e) an official of the Department of Labour.”

[5] In view of the wording of section 161 the applicant in the present matter would be entitled to represent Mr. Adekoya in the Labour Court. Section 178 of the Labour Relations Act gives a trade union the right to represent its members in the Labour Appeal Court. However, no such statutory provision exists in respect of this Court. To the contrary, it is necessary to have regard to section 200(2) which reads as follows:

“(2) A registered trade union or a registered employers'

organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.”

- [6] It is therefore clear that a registered trade union or registered employers’ organisation is only entitled to be a party to any Court proceedings if one or more of its members is a party to those proceedings. This section does not purport to vest the registered trade union with the authority to act on behalf of its members in any proceedings in any Court.
- [7] Section 200 clearly distinguishes between *representing* a party during a *dispute* (sub-section (1)) e.g. conducting negotiations on behalf of a party with an employer or employers’ organisation on the one hand, and, on the other hand, being a *party* (sub-section (2)) in Court proceedings. Mr. Adekoya is not a party to the present proceedings, therefore section 200(2) has no application. Section 200(1) does not vest the applicant as a registered trade union with *locus standi* to act on behalf of its members in making the present application in this Court. In view of the applicant’s

lack of *locus standi* the application falls to be dismissed.

- [8] However, the applicant has another stumbling block. In cases where an employee can make out a cause of action under the Labour Relations Act on the basis of unfair dismissal, and under the common law on the basis of contractual unlawfulness, (FEDLIFE ASSURANCE LTD v WOLFAARDT 2002 (1) SA 49 (SCA); BOXER SUPERSTORES MTHATHA AND ANOTHER v MBENYA 2007 (5) SA 450 (SCA)) the courts have in the past allowed the employee to approach the High Court instead of the Labour Court.

- [9] The abovementioned judgments must, however, now be considered in a new light in view of the majority decision of the Constitutional Court in CHIRWA v TRANSNET LIMITED & OTHERS: Case No. CCT 78/06 [2007] ZACC 23 handed down on 28 November 2007, where Skweyiya J stated the following:

“[40] Although one should be loathe depriving a litigant of existing rights where she or he is accorded more than one right by the Constitution or any other enabling legislation, it is unsatisfactory that the High Court should be approached to decide review applications in terms of PAJA where the LRA already regulates the same issue to be reviewed.....

[41] It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.”

(My underlining.)

[10] It appears from the application that the applicant in his letter of demand placed the first respondent on terms and gave notice of his intention to approach the Labour Court on an urgent basis. It is also important to note that apart from the fact that he claims re-instatement he also claims it with full benefits and damages, including emoluments as envisaged in the Labour Relations Act. It is therefore clear that his cause of action as set out is essentially a labour dispute

which resorts under the dispute resolution mechanisms of the Labour Relations Act.

[11] There are also policy considerations why the High Court should not hear matters which are essentially labour disputes.

Although differing from the reasoning of the majority judgment in **CHIRWA**, *supra*, Langa CJ, stated the following under the heading “Policy Concerns”:

“[171] The judgments of Skweyiya and Ngcobo JJ raise a number of important policy considerations that, in their view, point in favour of a finding that the Labour Court must enjoy exclusive jurisdiction. These can briefly be described as follows:

- (i) Specialised tribunals should address specialised issues;
- (ii) There is no reason to afford public employees greater protection than private employees;
- (iii) We should not permit litigants to forum shop; and
- (iv) There is a danger of legal incoherence, uncertainty or possible unfairness to individual litigants flowing from allowing two different sets of courts to decide substantially the same sets of facts on different legal grounds (LRA – unfair dismissal; PAJA –

procedural unfairness).”

[12] From the above citations in the **CHIRWA**-judgment it is clear that Mr. Adekoya’s case belongs in the Labour Court, and should not be dealt with in the High Court. Apart from that, however, it is clear that Mr. Adekoya is not properly before this Court. He is not a party to these proceedings, and the applicant trade union has no power to represent him in this Court. The applicant has chosen the incorrect forum. The application also stands to be dismissed on the basis of lack of jurisdiction.

[13] In the result the application is dismissed with costs.

---

**S.P.B. HANCKE, J**

|                         |   |                                                                                      |
|-------------------------|---|--------------------------------------------------------------------------------------|
| On behalf of applicant  | : | Adv. S.E. Motloung<br>Instructed by:<br>Qwelane Theron & Van Niekerk<br>BLOEMFONTEIN |
| On behalf of respondent | : | Adv. N. Snellenburg<br>Instructed by:<br>Kramer Weihmann & Joubert<br>BLOEMFONTEIN   |

/sp