IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 12/18

In the matter between:

KERRY EDWARD ARCHER **Appellant**

and

THE PUBLIC SCHOOL – PINELANDS HIGH SCHOOL **First Respondent**

THE SCHOOL GOVERNING BODY

OF PINELAND HIGH SCHOOL **Second Respondent**

WESTERN CAPE EDUCATION DEPARTMENT **Third Respondent**

Heard: **27 August 2019**

Delivered: **25 November 2019**

Summary: Whether employee entitled to refer a breach of contract dispute after unsuccessfully challenging his unfair dismissal claim – employer raising *res judicata* - court holding that employee having both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract. This entitled him to pursue an unfair dismissal claim in the CCMA and an independent contractual claim in either the High Court or the Labour Court which have concurrent jurisdiction to determine a contractual claim - appeal upheld and

judgment of the Labour Court set aside-matter remitted to the Labour Court to determine the merits.

Coram: Davis JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment of the Labour Court (Rabkin-Naicker J) holding that the Labour Court lacked jurisdiction to adjudicate the appellants' claim.

In the CCMA

[2] The appellant, Mr Kerry Archer ("the appellant") referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in which he claimed that he was dismissed by Pinelands High School ("first respondent"), that his dismissal was procedurally and substantively unfair and that he should be reinstated alternatively compensated.

[3] At the arbitration hearing, the first respondent contended *in limine* that the appellant had failed to join the second respondent, the School Governing Body of Pinelands High School ("the second respondent"), in the arbitration proceedings. Having heard argument, the arbitrator directed the second respondent to be joined as a respondent in the arbitration proceedings.

[4] At the conclusion of the hearing the arbitrator found that the appellant had been dismissed and that his dismissal was both procedurally and substantively fair.

In the Labour Court

[5] The appellant did not institute review proceedings against the arbitrator's award. Instead, on 17 July 2017, he instituted civil proceedings in the Labour Court

against the first and second respondents. In these proceedings, he claimed that the first respondent was his employer and he was unlawfully removed from his place of employment by the second respondent. He alleged in his statement of claim that:

(a) his removal from his place of employment by the second respondent was unlawful because it was not authorised by the first respondent;

(b) although his dismissal came to the attention of his employer (the first respondent) some-time after his removal from his place of employment, his employer took no action and implemented no steps whatsoever to mitigate the damage suffered by him as a result of the unlawful conduct of the second respondent.

[6] He claimed that:

(a) his removal by the second respondent from his place of employment was unlawful as the second respondent was not his employer, and

(b) the first respondent's failure to reinstate him and/or to remedy the unlawful actions of the second respondent constitutes an unlawful breach of the contract of employment.

[7] The appellant, accordingly, claimed the following relief against the first and second respondents:

(a) Rectification of the actions of the first and second respondents by reinstatement of the contract of employment.

(b) Alternatively, payment of damages by the first and second respondents in the maximum amount allowed under the jurisdiction of the Labour Court, the one paying the other to be absolved.

[8] The Labour Court dismissed the appellant's claim for "want of jurisdiction". It sought support for this conclusion in the decision of *James and Another v Eskom Holdings SOC Ltd and Others ("James").*[1] In doing so, it reasoned as follows:

> "In *James…,* the LAC dealt with a matter in which the two appellants, employees of Eskom, referred an unfair dismissal dispute to the CCMA, where the commissioner found that their dismissal was substantively fair. On review, the employees relied solely on breach of the applicable collective agreement. They argued that, in terms of the collective agreement, the decision of the appeal tribunal was final and binding and that the general manager's decision to overturn the appeal tribunal's decision was invalid and unlawful. They therefore contended that there had been no valid dismissal and that the commissioner consequently lacked jurisdiction to arbitrate the dispute. The Labour Court rejected this argument and upheld the arbitration award. The employees appealed to this Court. It stated as follows:
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> > '[20] Section 186 of the LRA defines dismissal to mean, inter alia, that an employer has terminated a contract of employment with or without notice. The ordinary meaning of 'termination' is to bring to an end. In this case, the respondent has through the action of the general manager brought the contracts of employment of the appellants to an end. It does not matter that the general manager did so contrary to the collective agreement. The appellants were in the circumstances entitled to approach the CCMA to challenge the fairness of the conduct of the respondent as they did. Having done so, it is not open to them to abandon their arbitrated referred dispute, and claim that they had not been dismissed. Nothing barred the appellants from approaching the CCMA for relief. It all depended on how they pleaded their case to the CCMA. Termination of the contracts of employment of the appellants was a factual phenomenon which they themselves found to constitute a dismissal that was unfair. In *Gcaba* the Constitutional Court warned that: 'Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered.'
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> The [appellant] in this case cannot, after successfully pursuing a case in the CCMA based on the existence of an alleged unfair dismissal, now approach this court on

[1] (2017) 38 ILJ 2269 (LAC).

> the basis that the termination of his employment contract did not constitute a dismissal in law. Counsel for the respondents sought to argue the jurisdictional point as a species of *res judicata*. The Court *mero moto* finds that it does not have jurisdiction to hear the matter on the authority above. If an employee were able to pursue a new cause of action as the [appellant] has sought to do, the architecture of our employment law would be breached. In addition our guiding principle of speedy resolution of disputes would be undermined. I make no order as to costs against the individual applicant."

[9] The appeal lies against the decision of the Labour Court with the leave of this Court.

The Appeal

[10] The question for determination on appeal is whether the Labour Court was correct in finding that it lacked jurisdiction to determine the contractual dispute before it.

[11] The appellant contends that the Labour Court erred in concluding that it lacked jurisdiction to determine his contractual claim as jurisdiction is to be determined from the pleadings, and his pleaded case was clearly based on breach of his contract of employment which, in terms of section 77 of the Basic Conditions of Employment Act,[2] ("BCEA") the Labour Court has jurisdiction over.

[12] To the contrary, the first and second respondents submit that the Labour Court was correct in dismissing the appellant's claim for want of jurisdiction as it constituted forum shopping which must be prevented. They argue that the true nature of the appellant's claim is one of unfair dismissal which he pursued against the first respondent in the CCMA claiming reinstatement, alternatively maximum compensation. And since his claim in the CCMA is essentially the same as that in the Labour Court, the latter is precluded by the principle of *res judicata*. In addition, they contend that having made an election to pursue his unfair dismissal claim in the CCMA, the appellant is bound by that election and

[2] 75 of 1997.

cannot approach a civil court or the Labour Court based on an allegation that his purported termination was unlawful. Lastly, they argue that the Labour Court was correct on the principle established in *Gcaba*[3] that once a litigant has chosen a particular cause of action and system of remedies provided for by the LRA, it is impermissible to abandon that cause when a negative decision or event is encountered. They accordingly ask that the appeal be upheld.

[13] The question for determination is not a novel one. In 2009, the Supreme Court of Appeal ("SCA") dealt with a similar question in *Makhanya v University of Zululand.*[4] There, Professor Makhanya instituted an action against the University of Zululand in the KwaZulu-Natal Local Division of the High Court (Durban). He claimed that his dismissal amounted to a breach of contract and that he was entitled to remuneration because he had continued to tender his services. However, prior to this, Professor Makhanya instituted an unfair dismissal claim against the University in the CCMA, which was dismissed.

[14] In a special plea, the University challenged the jurisdiction of the High Court to determine the contractual dispute on the basis that because Professor Makhanya pursued a claim in the CCMA for enforcement of his rights under the Labour Relations Act[5] ("LRA"), the High Court had no power to consider his claim for enforcement of his contractual right.[6]

[15] The SCA held in *Makhanya* that a dismissed employee has various alternative remedies. An employee may lodge a claim to enforce or claim a breach of an employment contract and, in addition, lodge a claim under the LRA for unfair dismissal. In other words, an employee has both a common law contractual right to challenge a dismissal in the Labour Court as well as an independent right under the LRA.[7] In relation to the question of the jurisdiction of the Labour Court

[3] 2010 (1) SA 238 (CC).
[4] *Makhanya v University of Zululand* (2009) 30 ILJ 1539.
[5] No. 66 of 1995.
[6] *Makhanya* at para 19.
[7] *Makhanya* at paras 11-13 and 18.

and the High Court to determine matters concerning a contract of employment, the SCA observed that:

> 'The first case that came before this court that purported to raise a jurisdictional challenge of this nature was *Fedlife.* Other cases followed that also purported to raise such jurisdictional challenges, which include *United National Public Servants Association of SA v Digomo NO*, *Boxer Superstores, Mthatha v Mbenya, Fredericks v MEC for Education and Training, Eastern Cape,* and they continue with a regularity that is becoming alarming. Upon proper analysis none of those cases was about jurisdiction at all. They were about whether the claimant had a good claim in law.
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> All those cases, as well as this case and *Chirwa*, have three features in common. The first is that the claimant was an employee. From that arises the second common feature, which is that the claimant had an LRA right. The third is that the claimant asserted that he or she also had a right that arose outside the terms of the LRA. (I do not say that the claimant necessarily had the right that was asserted. I say only that he or she asserted that right.) That right in each case was either the right at common law to exact performance of a contract, or it was the constitutional right to just administrative action.
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> The claim in each case arose from the termination of the contract of employment. That fact had the potential to found a claim for relief for infringement of the LRA right. But it also had the potential to found, in addition, a claim for relief for infringement of the other right that was asserted. Thus in every case the claimant had a potential claim for enforcement of an LRA right (which was enforceable only in a Labour Forum). In every case the claimant also had a potential claim for enforcement of a right that fell outside the LRA (enforceable either in the high court or in the Labour Court).
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> It follows from this that the claimant in each case was capable of pursuing both claims in the Labour Court, either simultaneously or in succession (because they were different claims). In one claim the Labour Court (as one of the Labour Forums) would be asked to enforce an LRA right (falling within the exclusive power of the Labour Forums). And in the other claim it would be asked to enforce

> a right falling outside the LRA (but within the concurrent jurisdiction of the Labour Court). Similarly, the claimant would have been capable of bringing one claim (the claim to enforce an LRA right) in a Labour Forum and to bring the other claim (for enforcement of the right arising outside the LRA) simultaneously, or sequentially, in the high court.
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> None of that should evoke surprise. It is the natural consequence of a claimant asserting two claims, each of which is capable of being brought in a different forum. That two claims arising from common facts might be asserted, whether separately or in the alternative, is not unusual. Whether the assertion will succeed is another matter, but that is irrelevant to the jurisdictional question.'[8][9]

[16] On application of these principles to the decision on appeal, the appellant has both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract. This entitled him to pursue a claim in the CCMA and an independent contractual claim in either the High Court or the Labour Court which have concurrent jurisdiction to determine a contractual claim in terms of section 77 of the BCEA which provides that the "Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract." The appellant elected to pursue his contractual claim in the Labour Court. In relation to this election, the SCA in *Makhanya* observed as follows:

> '….[I]t is true that a litigant who has a single claim that is enforceable in two courts that have concurrent jurisdiction must necessarily make an election as to which court to use. In that respect the law specifically allows for 'forum shopping' by allowing the litigant that choice. But it is altogether different when a litigant has two distinct claims, one of which may only be enforced in one court, and the other of which may be enforced in another court, which is how the court below applied it in this case.'[10]

[8] *Makhanya* paras 35-39.
[9] Footnotes omitted.
[10] *Makhanya* para 61.

[17] Despite the adverse finding in the CCMA, the appellant was entitled to pursue his contractual claim in the Labour Court as it has a different cause of action from his unfair dismissal claim under the LRA. By virtue of this, it is immaterial that the CCMA dismissed the appellant's unfair dismissal claim, and that that decision was not taken on review to the Labour Court. Even if it was, the appellant would have still been entitled to pursue his contractual claim in the Labour Court, because it was a completely different claim from the one that was dismissed in the CCMA.

[18] The upshot of this is that the appellant was not precluded by the principle of *res judicata* from pursuing his two claims in different fora. This is because the claim that was before the Labour Court, and the one that was pursued in the CCMA were not the same claims. The one is for payment of damages arising from a purported breach of contract by the first and second respondents, and the other is for compensation arising from an unfair dismissal as envisaged under the LRA. The two claims do not have the same cause of action. The pleadings bear this out.

[19] It follows from this that the Labour Court erred in concluding that it lacked jurisdiction to determine the appellant's contractual claim because an employee cannot, after unsuccessfully pursuing a case in the CCMA based on the existence of an alleged unfair dismissal, approach the Labour Court on the basis that the termination of his employment contract did not constitute a dismissal in law.

[20] The Labour Court furthermore erred by concluding that its conclusion was supported by the decision of this Court in *James and Another v Eskom Holdings SOC and Others.*[11] The decision in *James* is not authority for the principle that the Labour Court lacks jurisdiction to hear a contractual claim arising from the termination of the employment relationship after receiving an adverse award from the CCMA in his unfair dismissal dispute. In *James*, this Court had two primary

[11] (2017) 38 ILJ 2269 (LAC).

concerns. The first was whether the employees concerned were "dismissed" within the definition of a "dismissal" as provided for in the LRA. It found that the evidence before the arbitrator demonstrated as much and that the CCMA, therefore, had jurisdiction to determine the dispute. The second was that employees should not be permitted to pursue a case on review which is inconsistent with the case that was pursued in the arbitration.

[21] *James* is, therefore, completely unrelated to the current case, where the issue for determination is whether an employee is permitted to pursue a claim in contract arising from the termination of the employment relationship after being unsuccessful in his unfair dismissal claim in the CCMA.

[22] The Labour Court furthermore went astray in concluding that "the architecture of our employment law would be breached if the appellant were allowed to pursue a new cause of action in the Labour Court after his unfair dismissal claim was dismissed by the CCMA". As indicated above, the LRA has not extinguished remedies available to employees from their contracts of employment. This much is clear from section 77(3) of the BCEA, the impact of which is that employees are (in addition to pursuing their rights in terms of the LRA) free to pursue claims in the High Court or Labour Court arising from their contracts of employment.

[23] Equally, section 195 of the LRA provides that an award of compensation made in terms of Chapter VIII of the LRA is in addition to, and not a substitute for, any other amount which the employee is entitled to in terms of any law, collective agreement or contract of employment. An award of compensation made in terms of the LRA is for an unfair dismissal or an unfair labour practice. As this may be less than the amount that the employee can claim for breach of contract, the employee may, in addition to having being awarded compensation under the LRA, claim additional compensation which he or she may be entitled to in terms of any law, collective agreement or contract of employment. Section 195 of the LRA recognises that claims for unfair dismissal and unfair labour practice are distinct from claims for the enforcement of contracts of employment, and that

employees may claim both compensation for unfair conduct and damages for breach of contract, if applicable.[12]

[24] Lastly, the Labour Court's reliance on *Gcaba v Minister of Safety and Security and Others*,[13] is also misplaced. This is because the Constitutional Court acknowledged in *Gcaba* that the LRA has not extinguished common law remedies available to employees arising from their contracts of employment, when it made the following observations:[14]

> 'Furthermore, the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies.'

[25] To sum up, the appellant's pursuit of his unfair dismissal claim in the CCMA did not extinguish his claim for enforcement of his contractual rights in terms of his contract of employment which the Labour Court has the power to enforce. That the appellant had pursued a separate claim in the CCMA to enforce his LRA right not to be unfairly dismissed, and that that claim had been decided against the appellant, is simply irrelevant - *a fortiori* because it is a different claim with a different cause of action from the appellant's contractual claim.

[26] For these reasons, the appeal must succeed.

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[12] John Grogan, Dismissal, 3rd Edition at p. 739.
[13] *Gcaba* at para 73.
[14] See also *Mogothle v Premier of the North West Province and Another* [2009] 4 BLLR 331 (LC).

Costs

[27] I consider it to be fair and just not to order costs against the first and second respondents.

Order

[28] In the result, I make the following order:

1 The appeal is upheld.

2 The order of the Labour Court is set aside.

3 The matter is remitted to the Labour Court for determination of the merits.

4 There is no order as to costs

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F. Kathree-Setiloane AJA

DM Davis JA and J Murphy AJA concur in the judgment of Kathree-Setiloane AJA

APPEARANCES:

FOR THE APPELLANT:	CS Bosch
	Instructed by Bob von Witt Attorney
FOR THE FIRST RESPONDENT:	SC Kirk-Cohen SC
FOR THE SECOND RESPONDENT:	P Kantor
	Instructed by Dorrington Jessop Inc