

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO: **C638/2005**

In the matter between:

KEITH FRASER

Applicant

and

CITY OF CAPE TOWN

Respondent

JUDGMENT

1. The Applicant was employed by the Respondent till his resignation on 30 January 2004. Thereafter he referred an unfair dismissal dispute to the South African Local Government Bargaining Council, and a certificate that that dispute was not resolved was issued during June 2004. The Applicant did not refer the dispute to the CCMA for arbitration in the required period, and his application for condonation in this regard was refused by the CCMA.
2. The Applicant then proceeded to refer a dispute to this court on 6 October 2005 in terms of Section 77(3) of the Basic Conditions of Employment Act 75 of 1997. In his statement of case he relies on the fact that: *The Respondent wilfully and intentionally breached the terms and conditions of the Employment Agreement and/or permitted its representatives and its employees to conduct themselves in such a manner, that the Applicant was compelled to cancel and terminate the agreement.* He alleges that he has suffered damages and claims such damages. This is a claim in

contract and the Applicant does not rely on the fairness or otherwise of the Respondent's conduct.

3. By agreement between the parties argument was addressed on 6 December 2007 on two issues, namely:

- 3.1 Whether the Applicant's claim was *res judicata*.

- 3.2 Whether the Applicant was entitled to claim damages at all.

Jurisdiction

4. Mr Brown on behalf of the Applicant relied on the judgment of the Constitutional Court in Chirwa v Transnet Limited and Others case number CCT78/06, handed down on 28 November 2007 in contending that this court does not have jurisdiction to entertain the dispute and that the Applicant was confined to the CCMA for his remedy, if any. Mr Marinus relied on the judgment of the Supreme Court of Appeal in Boxer Superstores Mthatha and Another v Mbenya, case number 97/2006 handed down on 31 May 2007. In Boxer the Supreme Court of Appeal confirmed that *An employee may therefore sue in the High Court for a dismissal that constitutes a breach of contract giving rise to a claim for damages* (paragraph 5 iii of the judgment). This is consistent with the judgment of the Supreme Court of Appeal in Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA).
5. The crisp question therefore is whether the Constitutional Court overruled the Supreme Court of Appeal in this regard. I do not think so. Chirwa dealt with whether an employee who was dismissed by the State could

approach the High Court for relief and, if so, whether such dismissal constituted administrative action. The matter did not deal with a claim in contract or with the provisions of S77 (3) of the Basic Conditions of Employment Act. Accordingly the Supreme Court of Appeal decision in Boxer stands and it binds this court. This court would have jurisdiction to entertain the claim of the Applicant unless the defence of *res judicata* prevails and I shall now deal with it.

Res Judicata

6. Mr Brown contended that the fact that the Applicant's dispute to the CCMA has been finally decided, by the refusal to grant him condonation, has the consequence that his claim has been extinguished.
7. However, it is not necessary to decide this point as Mr Brown has in argument referred me to paragraph 85 of the judgment of Ngcobo J, where the learned Judge said the following:

[85] Ordinarily and as a matter of judicial policy, even if the High Court had concurrent jurisdiction with the Labour Court in this matter, it should be impermissible for a party to initiate the process in the CCMA alleging one cause of action, namely, unfair labour practice, and halfway through that process, allege another cause of action and initiate proceedings in the High Court. It seems to me that where two courts have concurrent jurisdiction, and a party initiates proceedings in one system alleging a particular cause of action, the party is bound to complete the process initiated under the system that she or he has elected. Concurrent jurisdiction means that a party must make an

election before initiating proceedings. A party should not be allowed to change his or her cause of action mid-stream and then switch from one court system to another. In effect, the applicant is inviting us to countenance such a practice. It is an invitation which, in my view, should be firmly rejected.

8. Six judges of the Constitutional Court concurred in the judgment of Ngcobo J. Although Ngcobo J refers to a party not being allowed to change his or her cause of action in mid stream and then switch from one court system to another, it is, with respect, clear that this means that, once a party has made an election to institute proceedings in one forum, he or she may not thereafter proceed in another forum, irrespective of whether the proceedings in the first forum have been finalised or not.

Conclusion

9. The Applicant is precluded from continuing with proceedings in this Court as a consequence of the fact that he had initially referred a dispute arising out of the same facts to a Bargaining Council having jurisdiction.
10. Accordingly the court orders that:
 - 10.1 The referral is dismissed.
 - 10.2 Due to the novelty of the issue in question and the fact that these proceedings were instituted long before the decision of the Constitutional Court in Chirwa, no order as to costs is made.

NIEUWOUDT AJ

DATE OF HEARING: 6 December 2007

DATE OF JUDGMENT: 14 December 2007

APPEARANCES:

FOR THE APPLICANT: G Marinus

INSTRUCTED BY: Jan S De Villiers

FOR THE RESPONDENT: R Brown

INSTRUCTED BY: Herold Gie