IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C362/17

In the matter between

KERRY EDWARD ARCHER **Applicant**

and

THE PUBLIC SCHOOL - PINELANDS **First Respondent**

THE SCHOOL GOVERNING BODY OF PINELANDS HIGH SCHOOL **Second Respondent**

THE WESTERN CAPE EDUCATION DEPARTMENT **Third Respondent**

Heard: 15 March 2018
Delivered: 20 April 2018
Summary: Whether the Applicant having been unsuccessful at the CCMA can approach the Labour Court on the basis of the unlawful breach of his employment contract.

JUDGMENT

RABKIN-NAICKER J

[1] Applicant and the first and second respondents agreed in a pre-trial conference that certain points in limine should be heard by way of a separate hearing, supported to the extent necessary by oral evidence.

[2] It was agreed during the proceedings before me that the first point in limine relating to whether due notice was given of the institution of proceedings to the third respondent, be dealt with at a later stage of the litigation.

[3] The further points in limine in effect challenge this court's jurisdiction to hear the applicant's claim. It is common cause that an arbitration award exists finding that the applicant's dismissal from his position of Business Manager at Pinelands High School was procedurally and substantively fair. The parties before the CCMA were the applicant, and as respondents the Pinelands High School and secondly, the Governing Body of Pinelands High School. In line with an in *limine* ruling by the CCMA, the Pinelands High School was regarded as the employer party. Neither the ruling, nor the Award were taken on review and are thus binding on the parties.

[4] In this Court the legal issues are framed by the applicant as follows:

"The removal of the Applicant by the Second Respondent from the Applicant's place of employment was unlawful in that the Second Respondent was not the Employer of the Applicant.

The failure on the part of the First Respondent to re-instate the Applicant and/or to remedy the unlawful actions of the Second Respondent constitutes an unlawful breach of contract of employment."

[5] The applicant seeks reinstatement of the contract of employment, alternatively damages, to be paid by the first and second respondent jointly and severely.

[6] Simply put, the applicant approached the CCMA on the basis that he had been unfairly and unlawfully dismissed from his employment. The CCMA had jurisdiction to hear his dispute only in as far as unfairness of the dismissal was concerned[1]. Applicant was unsuccessful in that forum. In this Court, the applicant pleads that his contract of employment was terminated unlawfully as set out in his claim above.

[7] In **James & another v Eskom Holdings SOC Ltd & others**[2] 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 the Labour Appeal Court. The LAC stated as follows:

"[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

[1] Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening) (2016) 37 ILJ 564 (CC) paras 106,107,108

[2] (2017) 38 ILJ 2269 (LAC)

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.'

[7] The applicant in this case cannot, after unsuccessfully pursuing a case in the CCMA based on the existence of an alleged unfair dismissal, now approach this court on 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 this matter on the authority above. If an employee were to be able to pursue a new cause of action as the applicant 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.

In the result, I make the following order:

Order

1. Applicant's claim is dismissed for want of jurisdiction.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances

For the Applicant: Applicant in person

For Respondents: S. Kirk-Cohen SC; P. Kantor instructed by Dorrington Jessop Attorneys