

Once judged, twice... *res judicata*

In a recent judgment, the Labour Court has confirmed that instituting a claim for unlawful termination may follow an unsuccessful claim for unfair dismissal at the CCMA. However, the principle of *res judicata* still applies where litigants formulate such a claim on the grounds of fairness.

By [Mpumelelo Nxumalo and Kalene Watson](#) 27 Jan 2023



Image source: Getty Images

In 2017, Motlaung was dismissed from his position at the Department of Health for misconduct related to offences of dishonesty, which included stealing diesel and unauthorised use of a state vehicle. Following dismissal, Motlaung referred an unfair dismissal dispute to the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) and, after hearing the matter, the arbitrator found that his dismissal was fair.

In 2021, Motlaung became aware of the Labour Appeal Court (LAC) judgment in *Archer v Pinelands High School* (the Archer matter) and decided to pursue an unlawful dismissal dispute (as opposed to an unfair dismissal) in the Labour Court.

Principles from the Archer matter

In summary, after Archer was dismissed from his position as business manager, he referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found that Archer's dismissal was both procedurally and substantively fair.

Instead of instituting review proceedings in the Labour Court against the arbitrator's award, Archer institute civil proceedings in the Labour Court in terms of section 77(3) of the Basic Conditions of Employment Act

(BCEA), claiming specific performance. Archer claimed that his removal by the School Governing Body constituted a breach of contract, as it did not have the authority to do so.



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The Labour Court dismissed the application, and, on appeal, the LAC had to consider whether an employee is entitled to refer a breach of contract dispute to the Labour Court after an applicant is unsuccessful in pursuing a claim for unfair dismissal at the CCMA. The LAC held that despite the adverse finding in the CCMA, Archer 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 Labour Relations Act.

Read our previous article on the [Archer judgment here](#).

Motlaung v Department of Health: Free State

When instituting his claim in the Labour Court, Motlaung set out the facts on which his claim was founded in a manner that was essentially the same as the case he had placed before the arbitrator in his unfair dismissal dispute brought in the PHSDSBC, ie. the misconduct with which he had been charged was not proven. The Labour Court held that it must be clear from the pleaded cause of action that there is a proper separation of claims based on the fairness standards under the Labour Relations Act and claims based purely on contract.

Motlaung firstly did not plead any reliance on section 77(3) of the BCEA; secondly, he did not refer to any provision of his contract of employment and what terms were breached; and thirdly, the factual basis of his pleaded claim did not make out a case for breach of contract. Instead, it was akin to a case based on fair dealing as contemplated by the LRA.

Litigants considering the options available to them when pursuing labour disputes should be mindful that where the essence of the dispute remains the same, the cause is the same, what is ultimately demanded : consequential relief is the same, and the crux of the dispute is based on the same facts, then it is a case squarely impacted by the principle of *res judicata* (a matter already judged cannot be pursued by the same parties).

Labelling a dispute as an unlawful dismissal as opposed to an unfair dismissal, would change nothing and that is not what was envisaged in the Archer matter.

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