IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 19 / 2016

LAC Case No: JA 06 / 2011

In the matter between:

SOUTH AFRICAN REVENUE SERVICES	Applicant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	1st Respondent
NOMSA MBILENI N.O.	2nd Respondent
JJ KRUGER	3rd Respondent

APPLICANT'S HEADS OF ARGUMENT

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What is this application about?

1. To what extent does a collective agreement regulating discipline at SARS limit SARS' common-law right to dismiss its employees?

How the leave to appeal application arose

2. Under a collective agreement, SARS agreed to appoint an 'independent dispute resolver' to chair disciplinary hearings into allegations of misconduct by its employees, to make findings of guilt, and to impose disciplinary sanctions.

3. In this case, a dispute resolver was appointed to decide on the guilt and sanction of Kruger, an employee of SARS. Kruger was accused of using the word 'kaffir' on two separate occasions on 2 August 2007 with reference to Mr Mboweni, his team leader.

4. Kruger admitted the allegations against him. The dispute resolver found him guilty of gross insubordination and of using derogatory and abusive language. He imposed a sanction of a final written warning valid for six months, suspension without pay for ten days and a requirement that Kruger submit himself to counseling.

5. SARS substituted that sanction with dismissal. It did that because Kruger's conduct was destructive of the relationship of trust and confidence between an employee and a public sector employer under a constitutional democracy, and because it found his continued employment at SARS intolerable.

6. A CCMA arbitrator found that Kruger's dismissal was unfair because the collective agreement and the LAC[1] prohibit SARS from overruling the

[1] **County Fair Foods (Pty) Ltd v CCMA** (2003) 24 ILJ 355 (LAC) cited at p21 of the review record

sanction imposed by the dispute resolver.

7. On review, the Labour Court found that, because the collective agreement in question is silent about substitution of sanction,[2] substitution is not permitted.[3]

8. On appeal, the LAC found that it was bound by the LAC decision in *Chatrooghoon*,[4] and that *Chatrooghoon* is not wrong.

9. The LAC in *Chatrooghoon* was faced with the same issue arising from the same collective agreement. The only difference of any substance is that the employee there (Mr Chatrooghoon) was guilty of a breach of confidentiality, not racism. There, the LAC found that silence about the power to substitute in the collective agreement in question, means that SARS does not have the power of substitution.[5]

The issue on appeal

10. SARS has applied for leave to appeal against the LAC judgment. The issue on appeal is the following:

    10.1. Is SARS precluded from substituting the sanction of the dispute resolver with its own sanction, because the collective agreement is silent on substitution?

    10.2. Or, put differently, did SARS abandon or waive its right to dismiss, by concluding a collective agreement that is silent about the substitution of a sanction imposed by the dispute resolver?

    10.3. Even if the collective agreement precludes substitution, should

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2 LC Judgment, Record vol 4: 237 para 23

3 LC Judgment, Record vol 4: 238 para 26

4 **SARS v CCMA** (2014) 35 ILJ 656 (LAC) ("Chatrooghoon")

5 **Chatrooghoon** (above) [28]

Kruger be reinstated where the continuation of his employment at SARS is intolerable?

11. In summary, we submit the following:

11.1. The collective agreement does not contain an abandonment or waiver of SARS' common-law right to dismiss its employees;

11.2. Silence on substitution in the collective agreement does not preclude substitution, because on a proper construction, the agreement permits substitution;

11.3. The racist insubordinate conduct of Kruger is destructive of the relationship of trust and confidence between him and SARS and rendered its continuation intolerable. Consequently, it was unreasonable of the arbitrator to find Kruger's dismissal unfair for the reason that the agreement prohibits substitution.

The facts

Kruger's employment

12. Kruger was employed by SARS as an anti-smuggling officer at OR Tambo international airport.[6] He was charged with two counts of gross insubordination and the use of derogatory and abusive language.

13. It was alleged that on 2 August 2007 with reference to Mr Abel Mboweni, his team leader,[7] he said the following, each on a separate occasion:
"Ek kan nie verstaan hoe kaffirs dink nie".
"A kaffir must not tell me what to do".

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6 Award, Record vol 4: 252 para 4.1

7 Award, Record vol 4: 251 para 2.1
Collective Agreement, Record vol 4: 260
Outcome of disciplinary hearing, Record vol 4: 251 para 2.1

What the dispute resolver found

14. At a disciplinary hearing convened during September 2007 the dispute resolver –

14.1. found that Kruger had pleaded guilty to both counts of gross insubordination;[8]

14.2. found Kruger guilty of both counts of gross insubordination and of using derogatory and abusive language;

14.3. imposed a sanction of a final written warning valid for six months, suspension without pay for ten days, and a requirement that Kruger submit himself to counselling.[9]

Substitution of sanction by SARS

15. On 3 October 2007 the Commissioner of SARS dismissed Kruger.[10] That meant that the sanction imposed by the dispute resolver was substituted with the sanction of dismissal determined by the Commissioner. Substitution occurred because Kruger's conduct was considered to be racist, and so insubordinate as to be destructive of the relationship of trust and confidence required by the employment contract, and because it was intolerable to continue to employ an employee guilty of such conduct.[11]

What the CCMA arbitrator found

16. The dispute was referred to arbitration. The arbitrator made the following findings:

16.1. At the discplinary hearing, Kruger had admitted the allegation of

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8 Outcome of disciplinary hearing, Record vol 4: 252 para 3.1

9 Outcome of disciplinary hearing, Record vol 4: 259 para 9.5

10 SARS letter of dismissal, Record vol 3: 147

11 LC judgment, Record vol 4: 236 para 17

racists insults of his team leader. At the arbitration, Kruger denied that allegation;

16.2. Kruger's denial was not believed for the following reasons:

16.2.1. It was unlikely that he would have admitted to the allegation if it were not true;

16.2.2. His reason for pleading guilty was stress, yet no evidence of stress or how it resulted in the admission of guilt was adduced (relying on the LAC case of *Mgobhozi*);

16.2.3. Witnesses called by Kruger at the arbitration were not believed because their evidence contradicted his own. Witnesses called by SARS were believed because it was unlikely that they would have fabricated the allegation;

16.3. The collective agreement prohibits SARS from overruling the sanction by the chair of the disciplinary hearing;

16.4. The LAC[12] prohibits an employer from overruling the sanction imposed by a disciplinary hearing chair;

16.5. She was bound by the LAC decision of *Mgobhozi*[13] and consequently found that the dismissal was unfair, even though that was setting a bad precedent at SARS.

<u>What the Labour Court found on review</u>

17. SARS reviewed the decision in the Labour Court.[14] The review application

12 **County Fair Foods (Pty) Ltd v CCMA** (above)

13 **Mgobhozi v Naidoo NO** (2006) ILJ 786 (LAC)

14 Award, Record vol 4: 246

was dismissed with costs on 23 October 2009.[15] The following are the salient findings in the judgment:

17.1. The collective agreement in question is silent about whether SARS can subsitute the decision of the chair of the disciplinary inquiry with its own.[16]

17.2. The most reasonable inference to be drawn from that silence is that the parties never intended to grant SARS the power of substitution.[17]

17.3. Consequently, the collective agreement does not permit SARS to substitute a sanction short of dismissal imposed by the disciplinary chair, with the sanction of dismissal.[18]

17.4. The imposition of a sanction short of dismissal by the Chair is subject to review and SARS should have reviewed his sanction under the common law.[19]

<u>What the LAC found on appeal</u>

18. SARS appealed the decision to the Labour Appeal Court and on 8 December 2015 the LAC dismissed the appeal without costs.[20]

19. The LAC held as follows:

19.1. It would be unfair to permit arbitrary interference by an employer[21]

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15 LC judgment, Record vol 4: 233

16 LC judgment, Record vol 4: 237 para 23

17 LC judgment, Record vol 4: 238 para 26

18 LC judgment, Record vol 4: 243 para 52

19 LC judgment, Record vol 4: 241 paras 42-46

20 LAC judgment, Record vol 4: 207

21 LAC judgment, Record vol 4: 231 para 48

in a fair system of employee discipline.[22]

19.2. It was bound by its earlier judgment (in *Chatrooghoon*)[23] and that judgment is correct.

19.3. In *Chatrooghoon* the LAC found that where a collective agreement is silent on the power of an employer to substitute its decision for that of an independent disciplinary chairperson, the employer has no such power.[24]

19.4. Any attempt by an employer to exercise such a power is *ultra vires* and invalid.[25]

19.5. Whether the issue of substitution is about substantive and/or procedural fairness is not decisive of the enquiry.[26] *Chatrooghoon* is not authority for the proposition that an invalid substitution of sanction constitutes merely procedural unfairness.[27]

19.6. The appropriate relief for an organ of state, as employer, who is dissatisfied with the outcome of internal disciplinary proceedings is to institute review proceedings against the decision taken. In accordance with the judgment in *Oudekraal*, an organ of state cannot unilaterally repudiate its own decision.[28]

20. The effect of the LAC judgment is that Kruger is reinstated with effect from 3 October 2007 on the terms and conditions of the sanction imposed by the dispute resolver.

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22 LAC judgment, Record vol 4: 209 para 2

23 (above)

24 LAC judgment, Record vol 4: 216 paras 22-23

25 LAC judgment, Record vol 4: 228 para 42

26 LAC judgment, Record vol 4: 223 para 33

27 LAC judgment, Record vol 4: 227 para 40

28 LAC judgment, Record vol 4: 228 para 41, citing **Oudekraal Estates v City of Cape Town** 2004 (6) SA 222 (SCA) at [35]-[37]

Leave to appeal application

21. SARS applied for leave to appeal to the Constitutional Court (CC) on 14 January 2016. According to a CC directive issued on 1 March 2016, the leave to appeal application is set down for hearing on 11 August 2016.

22. The application for leave to appeal is brought under ss167(3)(*b*)(i) and (ii) of the Constitution.[29]

Leave to appeal - the test

23. The test for leave to appeal to the CC is –

23.1. Does the appeal raise a constitutional matter or an issue connected with a constitutional matter?

23.2. Is it in the interest of justice that leave to appeal should be granted.[30]

24. A constitutional matter is raised if the grounds of appeal 'raise a constitutional issue of importance on which a decision by the [Constitutional Court] is desirable'.[31]

25. Whether it is in the interest of justice to grant leave to appeal to the Constitutional Court depends on the relevant facts and circumstances of each case.

26. The following considerations are relevant:

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29 Constitution of the Republic of South Africa, 1996

30 **Minister of Safety and Security v Luiters** 2007(2) SA 106 (CC) at [31]
De Reuck v Director Public Prosecutions, Witwatersrand Local Division 2004 (1) SA 406 (CC) at [3]

31 **Islamic Unity Convention v Independent Broadcasting Authority** 2002 (4) SA 294 (CC) at [16]-[17]

26.1. the importance of the constitutional issue raised;

26.2. the nature of the rights and interests of the applicant and respondent;

26.3. the public interest in a determination of the constitutional issues raised, and

26.4. the prospects of success.[32]

Constitutional matter

27. We submit that the appeal issue raises a constitutional matter of public importance and on which it is desirable to obtain a decision from the Constitutional Court for the following reasons:

27.1. It touches upon the constitutionally guaranteed rights of fair labour practices and collective bargaining.[33] Both promoted by the Labour Relations Act 66 of 1995 (LRA). They are foundational to employment justice.

27.2. The LRA provides for the primacy of collective agreements in a voluntarist collective bargaining system.

27.3. Collective agreements are recognised as the foundation of collective bargaining. They are enforced (in accordance with s 24 of the LRA) because that gives effect to the primary objects or social policy purposes of the LRA, including constitutional labour rights, fair labour practices, orderly collective bargaining and industrial peace.[34]

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32 **S v Basson** 2005 (1) SA 171 (CC) at [39]

33 s 23 of the Constitution

34 See **North East Cape Forests v SAAPAWU** (1997) 18 ILJ 971 (LAC) at 980
FAWU v Ceres Fruit Juices (Pty) Ltd (1996) 17 ILJ 1063 (C) at 1074C-1075F

27.4. Collective agreements are not merely regarded as another variety of contract. For that reason, deviation from collective agreements is not encouraged or countenanced.[35]

27.5. It raises the issue of the fairness that is foundational to employment justice and to discipline for misconduct in an employment relationship.[36]

27.6. Under the common law –

- Employers have a right to dismiss for misconduct such as gross insubordination;[37]
- They may limit that right by abandonment or waiver;[38]
- The LRA recognizes employers' common law right to dismiss for misconduct;[39]
- They may dismiss, subject to a fair procedure and subject to a fair reason to dismiss;[40]
- Gross insubordination is a fair reason to dismiss.[41]

27.7. This application requires an examination of the extent to which the constitutionally and statutorily protected collective agreement in question, limits the common-law and statutorily recognised right to dismiss for gross insubordination.

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35 See, **CUSA v Tao Ying Metal Industries** 2009 (1) BCLR 1 (CC) at [56]
Minister of Safety & Security v Safety & Security Sectoral Bargaining Council (2001) 22 ILJ 2684 (LC) at [13]
SACCAWU v Shakoane (2000) 21 ILJ 1963 (LAC) at [15]-[16]
SACCAWU v Speciality Stores Ltd (1998) 19 ILJ 557 (LAC) at [32]

36 s 23(1) of the Constitution

37 **CUSA v Tao Ying Metal Industries** 2009 (1) BCLR 1 (CC) para 56
CCAWUSA v Wooltru t/a Woolworths (Randburg) (1989) 10 ILJ 311 (IC)

38 **Van Eyk v Minister of Correctional Service** (2005) 26 ILJ 1039
Administrator, OFS v Mokopanele (1920) 11 ILJ 963 AD at 968
Van der Grijp v City of Johannesburg [2007] ZALC 28 (unreported, case no JS878/05) 18 April 2007

39 **Atlantis Diesel Engines (Pty) Ltd v Roux NO** (1998) 9 ILJ 45 (C)

40 **Avril Elizabeth Home for the Mentally Handicapped v CCMA** [2006] 9 BLLR 833 (LC) at 841A

41 **CCAWUSA v Wooltru t/a Woolworths (Randburg)** (above)

27.8. There is an added dimension to this application. SARS is a public sector employer and an organ of state. The Constitution requires that public administration maintains a high standard of professional ethics,[42] is accountable[43] and that it cultivates good human resource management.[44] SARS substituted its sanction for that of the dispute resolver in pursuit of good public administration that should not countenance racism at the workplace. Whether it may do so is a constitutional matter that warrants scrutiny by the CC.

Interests of justice

28. We submit that it is in the interests of justice to grant leave for the reasons set out below.

<u>The right to dismiss</u>

29. At common-law, employers have a right to dismiss.[45] They have a right to maintain discipline and to prescribe standards of acceptable conduct in the workplace.[46] They have a right to dismiss for gross insubordination.[47]

30. That right is recognised by the LRA[48] subject to a fair reason and a fair procedure. Gross insubordination is a fair reason for dismissal.[49] But this application is not concerned with statutory limitations on the right to dismiss. Consequently, we do not address that question. This application

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42 Section 195(1)(*a*) of the Constitution

43 Section 195(1)(*f*) of the Constitution

44 Section 195(1)(*h*) of the Constitution

45 **Country Fair Foods (Pty) Ltd v CCMA** [1999] 11 BLLR 1117 (LAC) para 11

46 Grogan *Workplace Law* 11th Ed (2015) Juta at 149-150. See also **Dyasi v Onderstepoort Biological Products Ltd** (2011) 32 ILJ 1085 (LC)

47 **CCAWUSA v Wooltru t/a Woolworths (Randburg)** (above)

48 **Country Fair Foods (Pty) Ltd v CCMA** [1999] 11 BLLR 1117 (LAC) at [11]

National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd 2005 (5) SA 433 (SCA) at [51]-[52]

49 **Theewaterskloof Municipality v SALGBC (Western Cape division)** (2010) 31 ILJ 2475 (LC)

is concerned with whether a collective agreement limits that right. And it is to that question that we turn.

31. Whether the collective agreement limits SARS' right to dismiss, as found in *Chatrooghoon* and by the LAC in this case, depends upon an interpretation of its relevant provisions. Here, the collective agreement is silent on substitution of sanction. Silence does not mean that substitution is precluded. Whether substitution is precluded requires the interpretation and construction of the collective agreement.

Contractual interpretation of collective agreements

32. In determining whether the collective agreement does limit SARS' right to dismiss by precluding it from substituting its sanction for that of the dispute resolver, a court should start with the plain wording of the relevant provisions, remain loyal to the text of those provisions, have regard to the purpose of those provisions and of the agreement as a whole, maintain consistency between the relevant provisions and other material provisions of the agreement, have regard to the context in which they were concluded and the way in which they have been implemented, and give effect to the provisions of the LRA that promote collective bargaining.[50]

The relevant provisions of the collective agreement

33. The collective agreement concluded between SARS and the PSA sets out the disciplinary code and procedures applicable in the organisation.[51] The agreement is aimed at corrective discipline, and is intended to ensure that employees are aware of the type of conduct viewed by SARS as

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50 **KPMG Chartered Accountants (SA) v Securefin Ltd** 2009 (4) SA 399 (SCA) at [39]

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]

Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) at [10]-[12]

Novartis SA (Pty) Ltd v Maphill Trading (Pty) Ltd 2016 (1) SA 518 (SCA) at [24]-[31]

North East Cape Forests v SAAPU (1997) 18 ILJ 971 (LAC) at 980 B-I

51 Collective Agreement, Record vol 4: 260

misconduct and the consequences of misconduct.[52] The purpose of the collective agreement includes promoting constructive labour relations in SARS and enhancing mutual respect and trust between employer and the employees.[53]

34. The relevant clauses are the following:

34.1. Clause 3.4 provides that one of the objectives of the agreement is to 'enable management to manage in a way commensurate with their responsibilities and with fairness and integrity'.[54]

34.2. Clause 4.4 provides that 'discipline is a management function and responsibility'.[55]

34.3. Clause 10.4.1 provides that a disciplinary hearing 'will be chaired by a delegated and authorised management representative or alternatively one of the SARS Dispute Resolvers at the employer's cost'.[56]

34.4. Clauses 10.6.1 and 10.6.2 empower the chairperson to impose any of eight sanctions.

34.5. Clause 10.6.5 provides that the finding and sanction report, where applicable, and record of the disciplinary proceedings must be submitted to SARS' Employee Relations Department and recorded on an employee's personal file.[57]

34.6. Clause 10.6.6 states that "Employee Relations will be responsible

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52 Collective Agreement, Record vol 4: 261 clauses 1.1 and 1.2

53 Collective Agreement, Record vol 4: 261 clauses 1.3

54 Collective Agreement, Record vol 4: 263

55 Collective Agreement, Record vol 4: 264

56 Collective Agreement, Record vol 4: 274

57 Collective Agreement, Record vol 4: 276

for implementing the outcome of the disciplinary hearing".[58]

Applying the rules to the collective agreement on discipline

35. In the LAC Sutherland JA relied on the finding in *Chatrooghoon.*[59] There, the LAC accepted that the rules of contractual interpretation including reading in of implied terms, is applicable to the interpretation of collective agreements.[60]

36. *Chatrooghoon* held that "*the wording of the collective agreement is clear and unambiguous whether the sanction imposed by the dispute resolver is final, rather than a mere recommendation*".[61]

37. It made that finding relying on clauses 10.3.3 and 10.4.2,[62] and without submitting the collective agreement to analysis under the rules of intepretation. That approach, we submit, is too simplistic. It does not meet the interpretive analysis required by our law.

38. Had the LAC applied the rules of interpretation applicable, it should have done the following:

    38.1. Start with the common law rule confirmed by the LRA that SARS has a right to dismiss for gross insubordination consisting of racist slurs.

    38.2. Ask whether a collective agreement, in which it is agreed to appoint an independent dispute resolver to make a finding of guilt and impose a disciplinary sanction, amounts to a limitation of the

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58 Collective Agreement, Record vol 4: 277

59 LAC judgment, Record vol 4: 216 at [23]-[25]

60 **Chatrooghoon** (above) at [26]

61 **Chatrooghoon** (above) at [24] and [28]

62 **Chatrooghoon** (above) at [27] – note that the clauses referred to in the judgment were amended in June 2007 and the provisions dealing with the issue of sanction are now contained in clauses 10.5.3 and 10.6.2 of the Collective Agreement (Record vol 4: 275-276)

right to dismiss.

38.3. Find that it would amount to limitation if the collective agreement incorporates an abandonment or waiver of the right to dismiss.

38.4. Find that there are no words expressly and unambiguously embodying abandonment or waiver,[63] and that neither is consistent with any of the other relevant terms of the agreement.

38.5. Find that under the collective agreement, the employer agreed that a third party (independent dispute resolver) may adjudicate disciplinary hearings and it conferred on that disciplinary chair a discretion to impose a sanction for misconduct.

38.6. The discretion conferred is a contractual discretion because the discplinary chair is appointed under the collective agreement. Acceptance of his appointment means that he binds himself to the collective agreement and that he is subject to its terms. A contractual discretion must be exercised *boni viri*[64] – i.e. in honestly and in good faith[65] and reasonably.[66]

38.7. Find that by enforcing an employment contract where the employee is guilty of misconduct so gross that it is destructive of the employment relationship of trust and confidence and where the continuation of the contract is intolerable, the disciplinary chair cannot be said to have acted in good faith or reasonably.

38.8. Find that the collective agreement is subject to the term of trust and confidence implied by law into all employment contracts. [67]

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63 **Mohamed v President of the Republic of South Africa** 2001 (3) SA 893 (CC) at [63]

64 **NBS Boland Bank v One Berg River Drive** 1999 (4) SA 928 (SCA) at [24]-[25]

65 **Dharumpal Transport (Pty) Ltd v Dharumpal** 1956 (1) SA 700 (A) at 707A-B

66 **Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division** 2004 (5) SA 248 (SCA) at [26]

67 **CSIR v Fijen** (1996)17 ILJ 18 (A) at 26B-F

Sappi Novoboard (Pty) Ltd v Bolleurs (1996) 19 ILJ 784 (LAC) at [7]

38.9. Find that gross insubordination consisting of racist slurs directed at a supervisor, is destructive of the relationship of trust and confidence between a public sector employer such as SARS, that is responsible for public administration and that should not tolerate racism in the workplace, and its employees who are guilty of such insubordination.

38.10. Find that employers should not be required to continue to employ employees who are guilty of conduct that results in a breakdown in that relationship of trust and confidence such that continued employment is intolerable;

38.11. A dispute resolver should not require SARS to continue to employ employees who are guilty of racist insubordination. When he does, the collective agreement permits SARS to dismiss.

38.12. Find that the parties could not have intended that a dispute resolver is mandated to require SARS to continue to employ an employee guilty of a breakdown in the employment relationship.

38.13. If they did, they would have had to exclude it expressly or impliedly.[68] There are no words expressly excluding the implied term. That is not surprising. Employees and employers, like the law,[69] do not expect a continuation of the employment relationship where it has broken down.

38.14. It would be unfair and would not make business or operational sense to expect employers to retain employees who cause a breakdown in the employment relationship.

38.15. For that reason, words that support an implied exclusion of the

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s 193(2)(*b*) of the LRA

68 **Van der Westhuizen v Arnold** 2002 (6) SA 453 (SCA) at [10]

69 **Ngutshane v Arivaiakom t/a Arivia.Kom** (2009) 30 ILJ 2135 (LC) at [29]

implied term cannot be found in the agreement.

38.16. There is a provision in the agreement providing that SARS retains the responsibility for disciplining its employees.[70] That provision is consistent with the retention by SARS of its residual right to dismiss. If it retained its residual right to dismiss, that is consistent with the right to substitute.

38.17. Clause 10.6.6 of the collective agreement provides that Employee Relations is responsible for implementing the hearing outcome.

38.18. That provision cannot be relied on to bar substitution or interference by SARS (or the Commissioner). It merely provides for who is responsible for implementing the outcome of a hearing.

38.19. Substitution is consistent with the language of clause 10.6.5. It provides that "the finding and sanction must be submitted". Compare that to clause 10.6.6 providing "... implementing the outcome of the disciplinary hearing".

38.20. The agreement distinguishes between the finding and sanction submitted to the Employee Relations Deparment, and the outcome that is communicated to the employee. That distinction suggests that the finding and sanction may be different to the outcome; i.e. substitution is contemplated by the agreement.

38.21. Substitution is not unfair and does not affect orderly collective bargaining.

38.22. Upholding the value of non-racism at the workplace is fair. Unions, employers and employees bargain collectively subject to the law and subject to rational operational and business

[70] Collective Agreement clause 4.4, Record vol 4: 264

objectives. Outlawing racist insubordination at the workplace is consistent with the law[71] and fairness and is a rational operational and business objective. Dismissing employees guilty of such conduct does not limit the right to bargain collectively, nor is it unfair.

No review of a sanction by a dispute resolver

39. The finding that SARS should have taken the finding of the dispute resolver on review is fundamentally flawed for two reasons:

39.1. The dispute resolver and SARS disciplined an employee under the provisions of a collective agreement. Discipline by an employer under a collective agreement is not administrative action;[72]

39.2. Nor is discipline by an employer the same as discipline of a member by a voluntary association. SARS is not a voluntary association. Its employees are not members of SARS.

39.3. The reason that common law review has been retained under the Constitution is that members of voluntary associations who are disciplined by tribunals of those organisations, do not have a remedy under law except under the common-law review. Employees who are disciplined under collective agreements have remedies under those agreements and under the LRA.

No reinstatement where a continued relationship intolerable

40. The LRA itself in s 193(2) provides as follows:

"*The Labour Court or the arbitrator must require the employer to*

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71 **Shabalala v Attorney-General, Transvaal** 1996 (1) SA 725 (CC) at [26]
Manong & Associates (Pty) Ltd v City of Cape Town 2011 (2) SA 90 (SCA) at [2]

72 **Overstrand Municipality v Magerman N.O.** (2014) 35 ILJ 1366 (LC) at [18]
Gcaba v Minister of Safety & Security 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC) at [64]

reinstate or re-employ the employee unless —

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure."

41. Section 193(2)(*b*) has been applied to mean that reinstatement should not be granted where the misconduct proved is destructive of the employment relationship such that its continuation is intolerable.[73]

42. Racist, derogatory and abusive conduct by a subordinate such as Kruger towards his black supervisor is insulting and an egregious form of misconduct.[74] It strikes at the heart of the employment relationship, resulting in a break-down of that relationship and rendering the continuation of Kruger's employment contract at SARS intolerable and the only acceptable sanction as one of dismissal.[75]

43. As a rule, dismissed employees who are guilty of misconduct that is destructive of the fundamental elements of integrity and trust that lie at the heart of the employment relationship, are not reinstated because their conduct renders intolerable the continuation of the employment relationship.[76]

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73 **Engen Petroleum Ltd v CCMA** (2007) 28 ILJ 1507 (LAC)

CNA v CCAWUSA (1991) 12 ILJ 340 (LAC) at 344

Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 (LAC)

JD Group Ltd v De Beer (1996) 17 ILJ 1103 (LAC) at 1112-13

Toyota SA Motors (Pty) Ltd v Radebe (2000) 21 ILJ 340 (LAC) at [27]

74 LAC judgment, Record vol 4: 230 para 47, in which the court noted that both "the arbitrator and the judge a quo expressed their disgust at that outcome [of the disciplinary sanction]"

75 **Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp** (2002) 23 ILJ 863 (LAC) at [38]-[39]

76 **CNA v CCAWUSA** (above) at 344

Anglo American Farms t/a Boschendal Restaurant v Komjwayo (above)

JD Group Ltd v De Beer (above) at 1112-13

44. Even if the arbitrator's finding that substitution is not permitted and the dismissal of Kruger is unfair should not be set aside on review, her decision to reinstate Kruger should because it is irrational and unreasonable.

Peremption

45. We submit that SARS has not abandoned its right to appeal, for the following reasons:

45.1. The right to appeal is abandoned or perempted if a litigant by unequivocal conduct inconsistent with an intention to appeal, shows that it acquiesces in the judgment.[77]

45.2. The circumstances between 18 and 21 December 2015 do not show such an intention. SARS' conduct (changing its mind in three days after taking legal advice) does not have material consequences and does not result in prejudice to Mr Kruger.

45.3. It would be intolerable and against the interests of justice if SARS were to be held to a wrong decision and if the LAC decision is not considered by the CC, especially in light of the important constitutional matter raised by the application for leave.[78]

Relief

46. The applicant seeks relief in the form of an order in the following terms:

46.1. Leave to appeal is granted;

46.2. The appeal against the judgment of the Labour Appeal Court under case number JA 06/2011 is upheld;

Toyota SA Motors (Pty) Ltd v Radebe (above) at [27]

77 **Gentiruco AG v Firestone SA (Pty) Ltd** 1972 (1) SA 589 (A) at 600A

Maluti Transport Corporation Ltd v Manufacturing Retail Transport & Allied Workers Union 1999 (20) ILJ 2531 LAC at [35]

78 See **Minister of Defence v SANDU** [2012] ZASCA 110 (unreported judgment, case no 161/11, 30 August 2012)

46.3. The arbitration award by second respondent dated 15 March 2008, CCMA case number GAJB36967-07, is set aside;

46.4. The award is substituted with the following order:
"The dismissal of the third respondent by the applicant on 3 October 2007 is procedurally and substantively fair."

46.5. No costs orders are made.

T J Bruinders SC
S Kazee
17 May 2016

Applicant's list of authorities

1. *Administrator, OFS v Mokopanele & others* (1920) 11 ILJ 963 AD
2. *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC)
3. *Atlantis Diesel Engines (Pty) Ltd v Roux NO & Another* (1998) 9 ILJ 45 (C)
4. *Avril Elizabeth Home for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC)
5. *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA)
6. *CCAWUSA v Wooltru t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC)
7. *CNA v CCAWUSA* (1991) 12 ILJ 340 (LAC)
8. *County Fair Foods (Pty) Ltd v CCMA* [1999] 11 BLLR 1117 (LAC)
9. *County Fair Foods (Pty) Ltd v CCMA* (2003) 24 ILJ 355 (LAC)
10. *Country Fair Foods (Pty) Ltd v CCMA* [1999] 11 BLLR 1117 (LAC)
11. *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* (2002) 23 ILJ 863 (LAC)
12. *CSIR v Fijen* (1996)17 ILJ 18 (A)
13. *CUSA v Tao Ying Metal Industries and others* 2009 (1) BCLR 1 (CC)
14. *De Reuck v Director Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC)
15. *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A)
16. *Dyasi v Onderstepoort Biological Products Ltd & Others* (2011) 32 ILJ 1085 (LC)
17. *Engen Petroleum Ltd v CCMA* (2007) 28 ILJ 1507 (LAC)
18. *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC)
19. *Gcaba v Minister of Safety & Security and Others* (2010) 31 ILJ 296 (CC)
20. *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A)
21. *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC)
22. *JD Group Ltd v De Beer* (1996) 17 ILJ 1103 (LAC)
23. *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA)

24. *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA)
25. *Lufano Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC)
26. *Maluti Transport Corporation Ltd v Manufacturing Retail Transport & Allied Workers Union & others* 1999 (20) ILJ 2531 LAC
27. *Manong & Associates (Pty) Ltd v City of Cape Town* 2011 (2) SA 90 (SCA)
28. *Mgobhozi v Naidoo NO* (2006) ILJ 786 (LAC)
29. *Minister of Defence v SANDU [2012] ZASCA 110* (unreported judgment, case no 161/11. 30 August 2012)
30. *Minister of Safety and Security v Luiters* 2007(2) SA 106 (CC)
31. *Minister of Safety & Security v Safety & Security Sectoral Bargaining Council* (2001) 22 ILJ 2684 (LC)
32. *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC)
33. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)
34. *NBS Boland Bank v One Berg River Drive* 1999 (4) SA 928 (SCA)
35. *NEHAWU v UCT* (2003) 24 ILJ 95 (CC)
36. *Ngutshane v Arivaiakom t/a Arivia.Kom* (2009) 30 ILJ 2135 (LC)
37. *North East Cape Forests v SAAPAWU* (1997) 18 ILJ 971 (LAC)
38. *Novartis SA (Pty) Ltd v Maphill Trading (Pty) Ltd* 2016 (1) SA 518 (SCA)
39. *FAWU v Ceres Fruit Juices (Pty) Ltd* (1996) 17 ILJ 1063 (C)
40. *NUMSA v Bader Bop* (2003) 24 ILJ 305 (CC)
41. *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA)
42. *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA)
43. *Overstrand Municipality v Magerman N.O. and Another* (2014) 35 ILJ 1366 (LC)
44. *S v Basson* 2005 (1) SA 171 (CC)
45. *Sappi Novoboard (Pty) Ltd v Bolleurs* (1996) 19 ILJ 784 (LAC)
46. *SACCAWU v Shakoane* (2000) 21 ILJ 1963 (LAC)
47. *SACCAWU v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC)
48. *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC)

49. *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* 1997 (3) SA 236 (SCA)

50. *South African Revenue Services v Commission for Conciliation Mediation and Arbitration and Others* (2014) 35 ILJ 656 (LAC)

51. *Theewaterskloof Municipality v SALGBC (Western Cape division)* (2010) 31 ILJ 2475 (LC)

52. *Toyota SA Motors (Pty) Ltd v Radebe* (2000) 21 ILJ 340 (LAC)

53. *Van der Grijp v City of Johannesburg* [2007] ZALC 28 (unreported case no JS878/05, 18 April 2007)

54. *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA)

55. *Van Eyk v Minister of Correctional Service and others* (2005) 26 ILJ 1039