

**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

**COMMISSION FOR CONCILIATION, MEDIATION AND  
ARBITRATION**

1<sup>st</sup> Respondent

**NOMSA MBILENI N.O.**

2<sup>nd</sup> Respondent

**JJ KRUGER**

3<sup>rd</sup> Respondent

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**APPLICANT'S PRACTICE NOTE**

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**Nature of the application**

- 1 The applicant applies of leave to appeal to the Constitutional Court against the judgment and order of the Labour Appeal Court dated 8 December 2015.
- 2 The LAC dismissed an appeal against a judgment of the Labour Court dismissing an application to review and set aside a CCMA arbitration award under CCMA case number GAJB36967-07.
- 3 The CCMA arbitrator found that the dismissal by the third respondent by the applicant was unfair and reinstated him into the employ of the applicant.

**The essential facts**

- 4 A dispute resolver appointed under a collective agreement to which the applicant was a party, found that the third respondent was guilty of gross insubordination consisting of racist slurs by third respondent, who was an employee of the applicant, against his supervisor. He imposed a sanction of a final written warning valid for six months, suspension without pay for ten days and a requirement that the employee submit himself to counselling.
- 5 Applicant substituted that sanction with dismissal because third applicant'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 the applicant intolerable.

### **Appeal issues**

- 6 They are:
  - 6.1 Is applicant precluded from substituting the sanction of the dispute resolver with its own sanction, because the collective agreement is silent on substitution?
  - 6.2 Or, put differently, did applicant 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?
  - 6.3 Even if the collective agreement precludes substitution, should third respondent be reinstated where the continuation of his employment at the applicant is intolerable?

### **Applicant's main submissions**

- 7 Applicant's submissions in summary are:

- 7.1 The collective agreement does not contain an abandonment or waiver of applicant's common-law right to dismiss its employees;
- 7.2 Silence on substitution in the collective agreement does not preclude substitution, because on a proper construction, the agreement permits substitution;
- 7.3 The racist insubordinate conduct of third respondent is destructive of the relationship of trust and confidence between him and applicant and rendered its continuation intolerable.
- 7.4 Consequently, the arbitrator should not have found his dismissal to be unfair on the ground that the agreement prohibits substitution.

### **What to read**

- 8 The parties have prepared a core bundle of the matter that should be read. They include volumes 1 – 5 of the record.

### **Argument**

- 9 No more than one day.

### **Counsel**

- 10 Applicants:

- Timothy Bruinders SC, 0825519293, [bruinders@law.co.za](mailto:bruinders@law.co.za)
- Sha'ista Kazee, 076 324 6294, [kazee@law.co.za](mailto:kazee@law.co.za)

- 11 Respondents:

- R Grundlingh, 082 923 1233, [riaan@grundlingh.com](mailto:riaan@grundlingh.com)