IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No:

LAC Case No: JA 06/11

In the matter between:

S A R S	Applicant
and	
CCMA	1st Respondent
NOMSA MBILENI *NO*	2nd Respondent
JJ KRUGER	3rd Respondent

AFFIDAVIT SUPPORTING APPLICATION FOR LEAVE TO APPEAL

I, the undersigned

LUTHER LEBELO

do swear and say that:

1. I am an adult male employed by the applicant as its Executive Employment Relations.

2. I am duly authorised to bring this application and to depose to this affidavit. The facts deposed to, except as otherwise stated, are within my personal knowledge and belief and they are true and correct.

A brief history

3. **Disciplinary sanction short of dismissal by a disciplinary chair**

3.1 At a disciplinary hearing in September 2007, the Chair (an independent third party appointed in terms of a collective agreement governing discpline at SARS) [1] -

(a) Found that third respondent (Kruger) employed by SARS as an anti-smuggling officer had pleaded guilty to a charge of twice using the 'k' word when referring to Mboweni, his supervisor;

3.2 **Imposed a sanction of –**

(a) a final written warning valid for six months;

(b) suspension without pay for ten days; and

(c) requiring to Kruger submit himself to counseling.

3.3 **Dismissal by SARS**

(a) On 3 October 2007 SARS dismissed Kruger[2] because –

(i) SARS is an organ of State subject to the Constitution and legislation that outlaws racism and is bound to eradicate racism at the work place;

[1] Her finding is at 274-282 of the review record
[2] The notice of dismissal is at p283 of the review record

(ii) Racist, derogatory and abusive conduct by a subordinate such as Kruger towards his black supervisor is insulting and insubordinate and is destructive of the employment relationship between SARS and Kruger;

4. Kruger's use of the 'k' word on two occasions resulted in the break-down of the employment relationship relationship, making the continuation of Kruger's employment at SARS intolerable.[3]

4.1 CCMA arbitration award – dismissal unfair

(a) A CCMA arbitrator found -

(i) The collective agreement prohibits SARS from overruling the sanction by the chair of the disciplinary hearing;

(ii) The LAC[4] prohibits an employer from overruling the sanction imposed by a disciplinary hearing chair.

4.2 LC review – arbitration award reasonable

(a) On review the LC found –

(i) The collective agreement in question is silent about whether SARS can subsitute the decision of the chair of the disciplinary inquiry with its own.[5]

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[3] Transcript p 120-121; p 146-140

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

[5] Judgment at Record V 1/92/23

(ii) The most reasonable inference to be drawn from that silence is that the parties never intended to grant SARS the power of substitution.[6]

(iii) Consequently, the collective agreement does not permit SARS to substitute the sanction short of dismissal - a final written warning valid for six months, suspension without pay for ten days and Kruger was required to undergo counselling - imposed by the disciplinary chair, with the sanction of dismissal.[7]

(iv) 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.[8]

4.3 LAC – dismissal of appeal against LC judgment

(a) The LAC found that the award by second respondent (the arbitrator) was not unreasonable and dismissed the appeal without a costs order.

5. The effect of the order by the LAC is this –

5.1 The award by the arbitrator stands;

5.2 Under that award the arbitrator found that the dismissal of third respondent (Kruger) by his employer who is the applicant (SARS) was unfair and she reinstated Kruger on the terms imposed by the Chair of the disciplinary hearing;

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6 Judgment at Record V 1/93/[26]
7 Judgment at Record V1/98/[52]
8 Judgment at Record V1/96-7/[42]-[46]

5.3 Kruger remains in the employ of SARS from 3 October 2007.

Leave to appeal against the LAC decision to the CC

6. SARS applies to the Constitutional Court (CC) for leave to appeal against the judgment of the LAC.

Leave to appeal – the test

7. The test for leave to appeal from the CC is -

7.1 Does the appeal raise a constitutional matter or an issue connected with a constitutional matter;

(a) Is in the interest of justice that leave to appeal should be granted.[9]

7.2 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'.[10]

7.3 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.

8. The following considerations are relevant:

8.1 the importance of the constitutional issue raised;

8.2 the nature of the rights and interests of the applicant and respondent;

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9 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]

10 Islamic Unity Convention v Independent Broadcasting Authority

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

8.4 the prospects of success.[11]

9. I submit that –

9.1 A consitutional matter is raised because the appeal is about whether a public sector employer may terminate an employment contract for racist conduct where a disciplinary chair does not impose the sanction of dismissal for such conduct;

9.2 It is in the interests of justice to grant leave because termination of an employment contract for racism in the public sector is an important constitutional matter and, as will appear below, there are reasonable prospects of success on appeal.

The question before the LAC

10. It was whether the LC was correct in finding that the collective agreement does not permit SARS to substitute dismissal for a sanction short of dismissal imposed by the Chair of the disciplinary hearing into Kruger's misconduct.

The relevant provisions of the collective agreement

11. The agreement regulates the discipline of employees at SARS. The relevant provisions are the following:

11.1 Clause 3.4 provides that one of the objectives of the agreement is to 'enable management to manage in a way commensurate with their responibilities and with fairness and integrity';

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

11.2 Clause 4.4 provides that 'discipline is a management function and responsibility';

11.3 Clause 10.4.1 provides that a disciplinary hearing 'will be chaired by a delegated and authorized management representative or alternatively one of the SARS Dispute Resolvers at the employer's cost';

11.4 (The chair of the disciplinary hearing in question was a dispute resolver as contemplated in clause 10.4.1);

11.5 Clause 10.6.5 provides that the finding, 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.

11.6 Clause 10.6.6 provides that 'Employee Relations will be responsible for implementing the outcome of the disciplinary hearing'.

The main findings by the LAC

12. The LAC in Kruger found that it was bound by the decision of the LAC in Chatrooghoon and that Chatrooghoon is not wrong.[12]

13. Chatrooghoon was faced with the same issue arising from the same collective agreement. The only difference of any substance is that the employee (Mr Chatrooghoon) was guilty of a breach of confidentiality, not racism.

[12] Kruger judgment at [23]-[25]

14. In Chatrooghoon, 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.

15. The question in this leave to application then is whether that finding and the reasons for that finding by the LAC in Chatrooghoon are wrong.

What Chatrooghoon found

16. The LAC found that the arbitration award (the substitution of the sanction by the disciplinary chair of suspension without pay for 15 days and a final written warning, with dismissal by SARS was unfair) is one that a reasonable decision-maker could reach[13] for the following reasons:

16.1 The sanction by the disciplinary chair is not a recommendation but a final sanction.[14]

16.2 A term cannot be implied where it is in conflict with the express provisions of an agreement.[15]

16.3 The wording of the collective agreement is abundantly clear that the disciplinary chair's penalty is a final sanction.[16]

16.4 Under the old disciplinary code a disciplinary chair (a magistrate) issued a recommendation. The old code should be compared with the new one by subjecting them to statutory interpretation. If that were done then the fact that the collective agreement does not include a provision providing for

13 At [37]
14 At [24]
15 At [26]
16 At [28]

recommendation means that the parties did not intend to provide for it in the collective agreement.[17]

16.5 The historical background suggests that the parties intended to move away from the previous practice where SARS had the final say on sanction.[18]

16.6 It followed that the collective agreement prohibits substitution of sanction and that substitution is not an implied term of the collective agreement. So that when SARS substituted the sanction of the discplinary chair, it acted *ultra vires* the collective agreement that had statutory authority under the LRA.[19]

16.7 There is no difference between the *County Fair*[20] case and this one. Both concern the substitution of sanction of dismissal for one short of dismissal where the discpilnary code makes no provision for substitution. It makes no difference that here the disciplinary code is a collective agreement and in County Fair it was not.[21]

16.8 There seems to be no legal impediment why SARS cannot review the decision of the disciplinary chair.[22]

Why Chatrooghoon is wrong

17. The starting point is that an employer like SARS has a constracutal right to terminate an employment contract for misconduct that is destructive of the employment relationship and it has a contractual right recognized by the Labour Relations Act to discipline employees for such conduct.

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17 At [29]
18 At [30]
19 At [30] & [32]
20 County Fair Foods (Pty) Ltd v CCMA (2003) 24 ILJ 355 (LAC)
21 At [32]
22 At [35]

18. Kruger's racist conduct is destructive of the employment relationship. Ordinarily, SARS would be entitled to terminate Kruger's employment contract for his brand of racism displayed at the workplace.

19. Here, by a collective agreement, SARS conferred its right to discipline on an independent third party disciplinary chair.

20. But that agreement is silent on whether SARS can terminate the employment contract where the disciplinary chair imposes a sanction less than dismissal for misconduct that is destructive of the employment relationship.

21. Where an agreement such as this is silent, the question remains, do the words of the collective agreement read in context and against the objects of the agreement and when giving effect to the objects of the LRA,[23] preclude SARS from dismissing an employee despite a breakdown of trust and confidence in the employment relationship, such that its continuation is intolerable?[24]

22. The LAC in Chatrooghooon and Kruger never applied that test. To say, as the LAC did in Chatrooghoon that the that the words of the collective agreement are abundantly clear glosses over a fundamental problem.

23. There are no words in the collective agreement that say that SARS may not terminate or subsitute dismissal for a sanction short of dismissal where an employee is guilty of misonduct that is destructive of the employment relationship. The agreement is silent about that. The question is whether

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23 North East Cape Forests v SA Agricultural Plantation and Allied Workers Union (1997) 18 ILJ 971 (LAC) at 980 B-I

24 CSIR v Fijen (1996)17 ILJ 18 (A) at 26 B-F; Sappi Novoboard(Pty Ltd v Bolleurs (1996) 19 ILJ 784 (LAC) at [7]; s193(2)(b) of the LRA

silence means that termination or substitution is prohibited. That was the task of the LAC in Chatrooghoon and Kruger. It never carried out that task.

24. Had that question been asked and addressed, the LAC in Chatrooghoon would have subjected the collective agreement to contractual analysis and interpretation.

25. Instead the LAC found that a term cannot be implied where it is in conflict with the express provisions of an agreement.[25] That finding is wrong because SARS did not and does not contend for a tacit term. It relies on the right to terminate for misconduct that is destructive of the employment relationship. And it relies on the term implied by law that all employment contracts (including collective agreements) are subject to the requirements of trust and confidence and that when the conduct of an employee destroys that trust and confidence, it is a repudiation of the contract so fundamental that the employer may terminate it.

26. Does the fact that the disciplinary code applicable before the collective agreement provided for a Magistrate to adjudicate at the disciplinary hearing and then to make a recommendation, make a difference?

27. It is submitted that it does not. The disciplinary code was not a collective agreement. The conclusion of the collective agreement was not an amendment of an existing agreement. 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.

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25 At [26]

28. 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*[26] – i.e. in honestly and in good faith[27] and reasonably.[28]

29. 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.

30. Had the LAC applied that test it should have concluded that the collective agreement does not preclude substitution for the following reasons:

30.1 There are no words in the agreement that expressly preclude substitution.

30.2 The agreement is subject to an implied term of trust and confidence that permits SARS to dismiss an employee where that term has been breached.

30.3 SARS is not in law (or fairness) required to retain an employee where the relationship of trust and confidence has broken down and where SARS finds continued employment intolerable.

30.4 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

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26 NBS Boland Bank v One Berg River Drive 1999 (4) SA 928 (SCA) at [24]-[25]
27 Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 707A-B
28 Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division 2004 (5) SA 248 (SCA) at [26]

employment relationship, are not reinstated because their conduct renders intolerable the continuation of the employment relationship.[29]

30.5 The LRA itself in s193(2) provides as follows:

(a) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless —

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

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

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

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

30.6 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.[30]

30.7 It must have been plain to the arbitrator that Kruger's racist conduct was destructive of the employment relationship.

30.8 That meant that it was unreasonable of the arbitrator to reinstate Kruger.

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29 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]

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

30.9 Clause 4.4 provides that SARS retains the responsibility for disciplining its employees. Far from barring substitution or interference, the agreement appears to permit it.

30.10 Clause 10.2.6 of the agreement provides that Employee Relations is responsible for implementing the hearing outcome.

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

30.12 If SARS retains the overall responsibility for discipline, it is entitled in law and fairness to terminate an employment contract where its continuation is intolerable.

30.13 SARS should not and cannot in law be required to continue to employ an employee, who has breached a fundamental term implied by law into the employment contract.

30.14 Silence about substitution in the collective agreement cannot be taken to mean that the parties expressly intended to exclude the operation of an implied term of the employment contract.

30.15 Nor can silence mean that the parties intended to enforce an employment contract against SARS even where an employee is guilty of behaviour that is destructive of the substratum of the employment contract.

30.16 The appointment of an independent dispute resolver is not of itself indicative that the parties intended to prohibit substitution.

30.17 Nor does the mere appointment of the independent dispute resolver mean that he can enforce a contract where the employee is guilty of conduct that is destructive of the substratum of the employment contract.

30.18 His mandate is to discipline, not to enforce a contract where the elements of integrity and trust have been destroyed by the conduct of the employee.

SARS has not abandoned the appeal

31. On 14 December 2015, Ms Jean Ewang ("**Ewang**"), a Senior Associate in the Employment Law Department of Hogan Lovells discussed an appeal with Mr Million Mbatha ("**Mr Mbatha**"), the Regional Employee Relations Manager at SARS.

32. On 18 December 2015, Ewang was telephonically instructed by Mr Mbatha that SARS did not intend to appeal the Judgment. Ewang confirmed the instructions in an email to Mbatha on the same day. A copy of the email is attached hereto as annexure "**LB1**". SARS' instructions not to appeal the Judgment were subsequently communicated to Mr Kruger's attorneys on the same day, 18 December 2015.

33. Late on 18 December 2015, the Chairman of Hogan Lovells, South Africa, and Senior Partner, Mr Lavery Modise, discussed Mr Mbatha's instructions with Mr Ngwako Rapholo, (Senior Employment Relations Manager). Mr Rapholo advised Mr Modise that he would discuss their conversation with me and revert to him (Mr Modise) following such discussion on 21 December 2015.

34. On 21 December 2015, Mr Modise received a telephone call from Mr Rapholo advising him that he (Mr Rapholo) and I had considered Mr Modise's opinion on the prospects of success and accordingly instructed him to address correspondence to Mr Kruger's attorneys advising them of SARS' intention to appeal the Judgment. A copy of such letter dated 21 December 2015 is attached as annexure "**LB2**". I further attach copies of confirmatory affidavits by Mr Modise and Mr Rapholo marked as annexures **"LB3"** and **"LB4"** respectively.

35. Mr Kruger's attorneys insist that SARS has abandoned the appeal and that it cannot continue with it.

36. I submit that in the circumstances SARS - did not abandon the appeal; could not be taken to have abandoned the appeal; that, SARS' conduct does not have material consequences; that Mr Kruger suffers no prejudice as a result of that conduct; and that 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 Constitutional Court, particularly in light of the constitutional question under scrutiny.[31]

Documents

37. The following relevant documents are attached: LAC judgment in Kruger and Chatrooghoon, LC judgment in Kruger, arbitration award, finding by the independent dispute resolver, collective agreement.

[31] See Minister of Defence v SANDU [2012] ZASCA 110 (30-08-2012)

Conclusion

38. The applicant therefore pray that they be granted leave against the judgment of the Labour Appeal Court.

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DEPONENT

I certify that this affidavit was signed and sworn to, before me, at _____ on this the _____ day of _____ 2016, the deponent having acknowledged that he knows and understands the contents of this affidavit, the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, having been complied with.

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COMMISSIONER OF OATHS