IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No : CCT 19 / 16
LAC Case No : JA06/11

In the matter between:

SARS	Applicant
and	
CCMA	1st Respondent
NOMSA MBILENI N.O.	2nd Respondent
JJ KRUGER	3rd Respondent

THIRD RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JACOBUS JOHANNES KRUGER

do hereby declare under oath and state that :

1. I am an adult male of full legal capacity and the Third Respondent in this application for leave to appeal against the judgment and order of the Labour Appeal Court (LAC), delivered on 8 December 2015.

2. The facts herein contained are, unless otherwise stated or indicated by the context, within my own personal knowledge and are to the best of my belief both true and correct.

3. Legal submissions are made on the basis of advice received from my legal representatives, which advice I accept and concur with.

4. I have read the affidavit supporting the application for leave to appeal deposed to by Mr. Luther Lebelo (*"Mr. Lebelo"*), the Executive Employment Relations of the Applicant (*"SARS"*), and wish to respond to the allegations therein contained.

5. The application for leave to appeal is opposed on the following basis :

   5.1 SARS has perempted any right to a further appeal;

   5.2 the application for leave to does not raise any constitutional matter or an issue connected with a constitutional matter and the matter

can be disposed with effectively on the basis of established legal principles on a non - constitutional basis;

5.3 it would not be in the interest of justice to grant leave to appeal as there are no reasonable prospects of success on appeal.

PEREMPTION OF APPEAL BY SARS:

6. In a letter dated 18 December 2015 SARS' attorneys expressly and unequivocally informed my attorney that their client, SARS, would not pursue any further appeal in this matter pursuant to its consideration of the LAC judgment.[1] A copy of the letter is annexed hereto as annexure **"JJK1"**.

7. SARS' intention not to further appeal was accordingly communicated to me *via* my attorney.

8. The instruction not to further appeal was apparently given by Mr. Million Mbatha (*"Mr. Mbatha"*), the Regional Employee Relations Manager of SARS. Mr. Mbatha was the deponent to the supplementary and replying affidavits in the review application before the Labour Court (LC). He is accordingly familiar with the matter and represented SARS herein before.

[1] Annexure "LN1" to the affidavit supporting application for leave to appeal.

9. It is not SARS' case that Mr. Mbatha lacked authority to give such an instruction to its attorneys, for communication to my attorney. Mr. Mbatha's instruction is also not repudiated on such basis. It is unconscionable to believe that Mr. Mbatha would have given such an instruction before consulting his superiors at SARS.

10. SARS' decision to pursue a further appeal is nothing but a change of mind, which should not be allowed.

11. A party who acquiesces in a judgment is at common law deprived of the right to appeal (or further appeal).[2]

12. SARS clearly acquiesced in the judgment of the LAC by not only expressly informing me that it would not pursue any further appeal in this matter, but also by requesting me to contact Mr. Mbatha to arrange for my return to the workplace.

13. A party who has abided the decision of the lower Court (the LAC in this instance) will not ordinarily be granted leave to appeal to the Constitutional Court (CC).[3]

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[2] ***Hlatshwayo v Mare and Deas 1912 AD 242; Dabner v SAR & H 1920 AD 583 at 594***

[3] ***Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC) at para [9]***

14. SARS' conduct does have material consequences and I will suffer prejudice as a result of such conduct as I will have to defend myself against a further appeal by SARS, especially under circumstances where I was not awarded costs by the LAC. I simply do not have the financial resources to oppose a further appeal before the CC.

15. Leave to appeal should accordingly be refused with costs on the basis that SARS has acquiesced in the judgment of the LAC and has thereby perempted any right of further appeal.

DISCIPLINARY PROCEEDINGS:

16. I commenced my employment with SARS on 25 November 1991 and held the position of anti - smuggling officer at the time of my dismissal. I had a clean disciplinary record with SARS.

17. At a disciplinary hearing in August 2007 I pleaded guilty to a charge of twice using the "k" word when referring to my team leader, Mr. Abel Mboweni.

18. SARS, who was duly represented by Mr. Kumaren Moodley (*'Mr. Moodley'*) at the disciplinary hearing, did not lead the evidence of any witness in support of its case.[4]

19. The disciplinary chairperson found me guilty of derogatory and abusive language.

20. When determining an appropriate sanction for the use of unacceptable language, the circumstances of the incident must always be considered.[5]

21. I submitted mitigating circumstances, which were clearly recorded by the disciplinary chairperson.[6]

22. The disciplinary chairperson mentioned to Mr. Moodley that she intended to issue a final written warning coupled with suspension and counseling, whereupon Mr. Moodley indicated that SARS would be comfortable with such sanction.

23. At no stage did Mr. Moodley indicate to the disciplinary chairperson that SARS desired dismissal as a sanction.

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[4] Disciplinary outcome, p 4, para [5.1].

[5] ***Gouws v Chairperson, Public Service Commission & Others (2001) 22 ILJ 174 (LC) at para [57]***

[6] Disciplinary outcome, pp 5 - 7, para [7].

24. The disciplinary chairperson recorded that I was very remorseful and that I apologized for my behavior.[7]

25. Importantly, the disciplinary chairperson also recorded that there was no evidence that the employment relationship was irreparably damaged.[8]

26. The disciplinary chairperson accordingly imposed a final written warning valid for six months coupled with suspension without pay for ten days and counseling.

DISMISSAL BY SARS:

27. Dissatisfied with the outcome of the disciplinary hearing, SARS dismissed me on 3 October 2007 without any further hearing.

28. SARS contends that I was dismissed because my use of the "k" word on two occasions resulted in the break - down of the employment relationship, making my continued employment SARS intolerable.

29. I reiterate that SARS led no evidence during the disciplinary hearing to the effect that the employment relationship was irreparably damaged and that a continued employment relationship would be intolerable. SARS in fact,

[7] Disciplinary outcome, p 9, para [9.3].
[8] Disciplinary outcome, p 9, para [9.4].

qua Mr. Moodley, indicated that it was comfortable with a final written warning coupled with suspension and counseling.

30. It is not open to SARS to contend that the misconduct perpetrated by me resulted in the irretrievable break - down of the employment relationship under circumstances where Mr. Moodley, who at all material times acted as its representative, never conveyed such sentiment to the disciplinary chairperson.

31. It is not SARS' case that Mr. Moodley was "on a frolic of his own" when conveying to the disciplinary chairperson that SARS would be comfortable with a sanction of final written warning coupled with suspension and counseling.

CCMA ARBITRATION:

32. Mr. Lebelo, who was the Industrial Relations Manager of SARS at the time and who testified at the arbitration, was not present at the disciplinary hearing and had no knowledge of my personal circumstances and the evidence presented at the disciplinary hearing.[9] He did not know whether the Employee Relations Manager who made the recommendation of dismissal to the Commissioner of SARS was involved in the disciplinary

[9] Appeal record volume I, p 99, line 8, p 111, lines 14 - 15.

hearing, and as far he as he knew the Commissioner of SARS was also not involved in the disciplinary hearing.[10]

33. The Commissioner of SARS did not testify at the arbitration hearing. He was the person who could have testified about the alleged irretrievable breakdown of the trust relationship. SARS is a countrywide organisation and I may be deployed to any branch or division if need be.

34. The evidence presented by Mr. Lebelo at the arbitration hearing about the alleged breakdown of the trust relationship is speculative and hearsay at best.

35. Mr. Moodley also testified during the arbitration hearing that he did not object against my statement at the disciplinary hearing and the mitigating evidence presented by me. Mr. Moodley furthermore confirmed during the arbitration proceedings that he indicated to the disciplinary chairperson that her proposed recommended sanction of a final written warning coupled with suspension and counseling as an appropriate sanction was acceptable.[11] The CCMA arbitrator during the arbitration proceedings correctly remarked that a plea bargain of some kind was struck.[12]

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[10] Appeal record volume I, p 99, lines 9 - 23.
[11] Review record, p 247. SARS omitted to include this part of the transcribed arbitration record in the appeal record.
[12] Appeal record volume 2, p 125, lines 8 - 9.

36. There was thus no direct evidence of the break - down of the trust relationship before the CCMA arbitrator.[13]

37. The CCMA arbitrator accordingly determined that my dismissal was unfair and SARS was ordered to reinstate me on the conditions stated by the disciplinary chairperson.

LC REVIEW:

38. SARS applied for the review of the arbitration award in terms of section 145 of the LRA.

39. On review to the LC, it appeared that the collective agreement required SARS to implement the finding and sanction of the disciplinary chairperson and there was no provision permitting SARS to substitute the disciplinary chairperson's decision with its own.

40. The LC noted that the collective agreement was silent about whether the decision of the disciplinary chairperson was final. There was no express provision that permitted SARS to substitute the disciplinary chairperson's decision with its own. The LC held that the most reasonable inference to be drawn was that the parties, when they negotiated and concluded the collective agreement, did not intend to grant SARS the power of

[13] ***Edcon Ltd v Pillemer NO & Others (2009) 30 ILJ 2642 (SCA) at paras [19] to [22]***

substitution. The LC further held that, to infer otherwise would be to interfere with the bargain and to make an agreement which the parties either never intended or could not make for themselves.

41. The LC was accordingly satisfied that, as SARS had not reserved for itself the right to substitute its decision for the decision of the disciplinary chairperson, it had been bound to implement the disciplinary chairperson's decision.

42. The LC was of the view that, if SARS disagreed with the disciplinary chairperson's decision, it had another remedy, being a review in terms of section 158(1)(h) of the LRA.

43. The LC accordingly concluded that my dismissal was substantively unfair because the decision to dismiss was not one that SARS could validly make. The collective agreement barred it from substituting the decision of the disciplinary chairperson. My dismissal was also procedurally unfair because the process of dismissing me had not been available to SARS, if it had been available then SARS should have afforded me a pre - dismissal hearing, which it had failed to do.

44. The LC held that the arbitration award was reasonable and not reviewable.

45. The LC further held that, even if it had to put substance above form and treated the application as a review of the disciplinary chairperson's finding as well as the arbitration award, SARS had to fail as it had not made out a case for irretrievable breakdown in the trust relationship at the disciplinary hearing. As it had not made out a case for irretrievable breakdown at the disciplinary hearing, there was nothing for the LC to review in terms of section 158(1)(h).

46. The LC accordingly dismissed the review application with costs.

REVIEW IN TERMS OF SECTION 158(1)(h) OF THE LRA:

47. This remedy has been confirmed in a number of judgments, in which the courts have held that the LC has the power to review the decisions of internal disciplinary proceedings - at least in the public sector - under section 158(1)(h) of the LRA.[14]

[14] See ***Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin NO & others (2008) 29 ILJI 1707 (LAC)***; ***Ntshangase v MEC: Finance, KwaZulu-Natal (2009) 30 ILJ 2653 (SCA)***; ***Hendricks v Overstrand Municipality and others [2014] 12 BLLR 1170 (LAC)***; ***Overstrand Municipality v Magerman NO & others [2014] 2 BLLR 195 (LC)***. ***Ntshangase*** was applied in ***Khumalo and Another v MEC for Education, Kwazulu - Natal 2014 (5) SA 579 (CC)***.

48. The effect of these judgments is to confirm that unless and until this is done, the rulings of disciplinary tribunals remain binding until set aside by a competent Court. [15]

49. SARS as an organ of State and employer in the public sector thus has a remedy in the form of a review in terms of section 158(1)(h) of the LRA for remedying an egregious decision of a disciplinary chairperson. But, like any other employer, it will have to present evidence of an irretrievable break - down in the employment relationship during the disciplinary hearing before such a review will be likely to succeed.

50. The outcome of a disciplinary process cannot be determined with reference to the nature of the misconduct *per se.*

51. The record of the disciplinary hearing did not form part of the review record before the LC or the appeal record before the LAC.

52. SARS elected not to take the decision of the disciplinary chairperson on review and had no intention of doing so. This was made abundantly clear by SARS in its replying affidavit in the review application, where the following was stated by Mr. Mbatha :

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[15] ***MEC for Health, Eastern Cape & another v Kirland Investment (Pty) Ltd t/a Eye and Lazer Institute 2014 (3) SA 481 (CC)***

"The review is of the arbitration award, not the finding by the chairperson of the disciplinary hearing."[16]

and

"Kruger's approach in his answering affidavit is fundamentally flawed in that he required that in the absence of a review of the finding by the chairperson of the disciplinary hearing, applicant is bound by the chairperson's finding. I am advised that is wrong. In addition the review before this Honourable Court concerns the arbitration award. Whether that award is reviewable, is not dependent upon a review of the finding by the chairperson of the disciplinary hearing."[17]

53. The difference between a review in terms of section 145 and a review in terms of section 158(1)(h) of the LRA is one of substance. In a review in terms of section 158(1)(h), the focus is on the rationality of the decision of the disciplinary tribunal. In a review under section 145, the focus is on the reasonableness of the decision of the arbitrating commissioner.

54. By foregoing the option of taking the decision of the disciplinary chairperson on review in terms of section 158(1)(h) of the LRA, SARS must be presumed to have accepted that the decision was unassailable to any rationality review. A rationality review would have been bound to fail *in casu* in the absence of evidence pointing to the irretrievable break - down

[16] Appeal record volume I, p 81, para 4, lines 12 - 13.
[17] Appeal record volume I, p 81, para 5, lines 23 - 28.

of the trust relationship. This must be why SARS sought to have the matter heard *de novo* by a CCMA commissioner in an attempt to obtain the proverbial second bite at the cherry.

55. This was improper because the decision of the Commissioner of SARS to revisit the sanction imposed by the disciplinary chairperson could only be defensible if the decision was irrational. By referring the matter for arbitration, SARS avoided that issue at first instance as well as on review in terms of section 145 of the LRA.

56. SARS should not be heard to complain about the sanction imposed by the disciplinary chairperson under the circumstances.

LAC APPEAL:

57. The LAC held that the outcome of the arbitration turned on the finding that SARS as employer had no power to change the outcome of the disciplinary enquiry.[18]

58. The LAC held that it was bound by its decision in ***Chatrooghoon***[19] unless persuaded that it was wrongly decided.[20]

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[18] At para [12].
[19] ***SARS v CCMA & others (2014) 35 ILJ 656 (LAC)***
[20] At para [23].

59. SARS at no stage prior to this application for leave to appeal contended that ***Chatrooghoon*** was wrongly decided. SARS only took issue with the interpretation and effect of the judgment on appeal before the LAC.

60. The LAC held that the LC was correct to hold that an invalid substitution of a sanction was not merely an instance of procedural unfairness. The LAC also held that the judgment in ***Chatrooghoon*** does not have application only to procedural unfairness and made it clear that a substitution of a sanction without a lawful foundation is not merely unfair for want of procedural authorization, but is invalid.[21]

61. The LAC accordingly held that it had not been shown that the arbitration award was one to which a reasonable arbitrator could not have come and concluded that the LC correctly dismissed the review application.

CORRECTNESS OF THE DECISIONS OF THE LAC[22]:

62. Whilst it is correct that an employer like SARS in general has a contractual right to terminate an employment contract for misconduct that is destructive of the employment relationship, such contractual right has to be exercised within the confines of the law.

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[21] At para [42].

[22] ***Chatrooghoon*** and the judgment of the LAC in the present matter.

63. The following was stated by the LAC in ***Chatrooghoon***:

"Whilst it is trite that the duty of trust and confidence on the part of an employee is a term implied by law in an employment contract, I do not think that such implied term extends to included the right of an employer to substitute its own sanction for that of the chairperson, particularly in a situation such as the present where the parties in a collective agreement elected expressly to confer on the disciplinary chairperson the sole power to impose the final sanction."[23]

64. SARS, in terms of the collective agreement, conferred its right to discipline on the disciplinary chairperson, who was given the final say on the issue of sanction. This was the result of a negotiated and agreed process and SARS is at liberty to renegotiate the collective agreement in future.

65. SARS was prohibited from interfering with the sanction imposed by the disciplinary chairperson and it was legally obliged to accept the sanction.[24]

66. SARS could have challenged the decision of the disciplinary chairperson on review, which it has elected not to do. There is no need to imply a term of trust and confidence in the collective agreement, or to subject the collective agreement to such term in order to avoid an egregious decision of a disciplinary chairperson. The law already provides a remedy.

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[23] At para [28].

[24] Subject to its right to have taken the decision of the chairperson on review in terms of section 158(1)(h) of the LRA.

67. To allow SARS to substitute the sanction imposed by the disciplinary chairperson would amount to arbitrary interference with discipline in a fair system of labour relations. This will seriously undermine confidence in the system as a whole.

68. A dismissal in breach of the requirements of a collective agreement is a nullity.[25]

69. Once a dismissal is a nullity, the decision to dismiss must be treated as void *ab initio*, and any inquiry into its fairness by a statutory arbitrator or the reviewing Court is thus precluded.

70. The CCMA arbitrator lacked the power to effectively breathe life into an invalid decision by upholding the dismissal. All the CCMA arbitrator could have done in the circumstances was to rule that the decision to dismiss and the dismissal itself were fatally defective as a result of SARS' breach of the collective agreement. The remedy of reinstatement followed automatically.

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[25] ***SAMWU obo Jacobs v City of Cape Town & others [2014] 10 BLLR 1011 (LC)***. The breach in this case was a provision which set a time limit on the commencement of disciplinary action. The Court held that disciplinary proceedings commenced outside that period were a nullity. According to ***Ngubeni v National Youth Development Agency (2014) 35 ILJ 1356 (LC)***, a breach of a collective agreement may warrant an order of specific performance (which resulted in the reinstatement of the employee).

71. The decisions of the LAC are in accordance with established law and serve to promote certainty and confidence in the labour arena. There is no room for interference with these decisions.

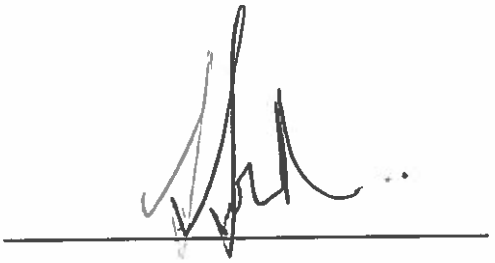
72. SARS in any event has the insurmountable problem that it has not been shown that the misconduct perpetrated by me was destructive of the employment relationship.

73. SARS accordingly has no prospects of success on appeal.

WHEREFORE I humbly pray that the application for leave to appeal be dismissed with costs.

DEPONENT

Signed and sworn before me at PRETORIA on this 28th day of JANUARY 2016 after the Deponent declared that he knows and understands the contents of this statement and regards the prescribed oath as binding on his conscience and has no objection against taking the prescribed oath. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).



COMMISSIONER OF OATHS

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Your ref T. Hitge/K047
Our ref Ms Jean Ewang/4180940
Matter ref L01079

18 December 2015

Dear Ms Hitge

SARS / JJ KRUGER :CASE NO: JA06/11

1. Our letter dated 11 December 2015 has reference.

2. Pursuant to our client's consideration of the Labour Appeal Court judgement our instructions are that our client will not pursue any further appeal in this matter. Accordingly your client is requested to kindly contact Mr Million Mbatha to enable our client to directly arrange with your client the details of his return to the workplace.

3. Million Mbatha's contact details are as follows:

3.1 Cell: 079 891 9227 and landline 012 422 5389.

4. For completeness sake Mr Mbatha's email address is MMBatha2@sars.gov.za.

Yours faithfully

Jean Ewang
Senior Associate
Hogan Lovells (South Africa)