IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No : 19/16

LAC Case No : JA06/11

In the matter between :

SOUTH AFRICAN REVENUE SERVICES Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION 1st Respondent

NOMSA MBILENI N.O. 2nd Respondent

JJ KRUGER 3rd Respondent

THIRD RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION :

1. The applicant (SARS) applies for leave to appeal to the Constitutional Court (CC) against the judgment and order of the Labour Appeal Court (LAC) dated 8 December 2015.

2. The application for leave to appeal is opposed by the third respondent (Kruger) on the following basis :

   2.1 SARS has perempted any right to a further appeal;

   2.2 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;

   2.3 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 :

3. A party who acquiesces in a judgment is at common law deprived of the right to appeal (or further appeal).[1]

4. A party who has abided the decision of the lower Court (the LAC *in casu*) will not ordinarily be granted leave to appeal to the CC.[2]

5. The general rule that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it is part of a broader policy that there must at some time be finality in litigation in the interests both of the parties and of the proper administration of justice.

6. It is however open to a Court to overlook the acquiescence where the broader interests of justice would otherwise not be served.[3]

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

[2] ***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***

7. In a letter dated 18 December 2015 SARS' attorneys informed Kruger's attorney that SARS would not pursue any further appeal in this matter pursuant to its consideration of the LAC judgment.

8. Kruger was requested to make contact with Mr. Million Mbatha (Mbatha) to enable SARS to directly arrange with Kruger the details of his return to the workplace.[4]

9. The instruction not to further appeal was apparently given by Mbatha, the Regional Employee Relations Manager of SARS.[5]

10. 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.

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[3] ***Minister of Defence v SANDU [2012] ZASCA 110 (unreported judgment, case no 161/11, 30 August 2012) at para 23***

[4] Annexure **"JJK1"**, Record vol 5 : 313 para 2

[5] Affidavit supporting application for leave to appeal, Record vol 4 : 198 para 32

11. It is not SARS' case that Mr. Mbatha lacked authority to give such an instruction to SARS' attorneys, for communication to Kruger's attorney.

12. Kruger's attorneys was on 21 December 2015 informed that SARS would be seeking leaving to appeal to the CC.

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

14. SARS clearly acquiesced in the judgment of the LAC by not only expressly informing Kruger's attorneys that it would not pursue any further appeal in this matter, but also by requesting Kruger to contact Mbatha to arrange for his return to the workplace.

15. Kruger was dismissed almost 9 years ago on 3 October 2007.

16. It cannot be disputed that finality should be reached in the protracted litigation.

17. The broader interest of justice would not be served by allowing SARS to pursue any further appeal in this matter.

18. The issues raised by SARS may be ventilated in other proceedings in future and SARS will not be barred from raising them again.

19. 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.

MATERIAL FACTS :

Kruger's employment and disciplinary record

20. Kruger commenced his employment with SARS on 25 November 1991 and held the position of anti - smuggling officer at the time of his dismissal.

21. He had a clean disciplinary record with SARS for almost 16 years.

Disciplinary proceedings

22. Kruger was during August 2007 charged with two counts of gross insubordination and one count of the use of derogatory and abusive language.

23. At a disciplinary hearing convened on 31 August 2007 Kruger pleaded guilty to charges of twice using the “k” word when referring to his team leader, Mr. Abel Mboweni (Mboweni).

24. SARS, who was duly represented by Mr. Kumaren Moodley (Moodley) as employer representative at the disciplinary hearing, did not lead the evidence of any witness, either on the merits of the charges or in aggravation.[6]

[6] Outcome, Record vol 4 : 254 para 5.1.

25. Moodley was the group manager anti - smuggling team. He managed the activities of 6 anti - smuggling teams as well as HR activities. Kruger fell within one of those teams.[7]

26. Moodley was thus in Kruger's line of report. He could have presented evidence on the trust relationship between the parties.

27. The disciplinary chairperson found Kruger guilty on all the charges.[8]

28. Kruger submitted mitigating circumstances, which were clearly recorded by the disciplinary chairperson.[9]

29. Moodley did not object against the statement handed in by Kruger and the mitigating factors presented by him.[10]

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[7] Extract from review record, Record vol 5 : 314 lines 7 - 11.
[8] Outcome, Record vol 4 : 255 para 6.2.
[9] Outcome, Record vol 4 : 256 - 257 para 7.
[10] Extract from review record, Record vol 5 : 315 lines 3 - 5.

30. The disciplinary chairperson asked Moodley whether he had a problem with the sanction and whether he (obviously in his capacity as representative of SARS) accepted the sanction (final written warning coupled with suspension and counseling).

31. Moodley did not object thereto.[11]

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

33. The disciplinary chairperson recorded that Kruger was very remorseful and that he had apologized for his behavior.[12]

34. Importantly, the disciplinary chairperson also recorded that there was no evidence that the employment relationship had been irreparably damaged.[13]

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[11] Extract of review record, Record vol 5 : 314 lines 8 - 11.
[12] Outcome, Record vol 4 : 259 para 9.3.
[13] Outcome, Record vol 4 : 259 para 9.4.

35. The disciplinary chairperson adhered to the principle that, when determining an appropriate sanction for the use of unacceptable language, the circumstances of the incident must always be considered.[14]

36. 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

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

38. SARS contended that Kruger was dismissed because his use of the “k” word on two occasions resulted in the breakdown of the employment relationship, making his continued employment by SARS intolerable.

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

39. It is emphasized that SARS led no evidence during the disciplinary hearing to the effect that the employment relationship had been irreparably damaged and that a continued employment relationship would be intolerable

40. It is accordingly not open to SARS to contend that the misconduct perpetrated by Kruger resulted in the irretrievable breakdown of the employment relationship under circumstances where Moodley, who at all material times acted as its elected representative, never conveyed such sentiment to the disciplinary chairperson. This aspect will be returned to later in these heads of argument.

CCMA arbitration

41. Mr. Luther Lebelo (Lebelo), who was the Industrial Relations Manager of SARS at the time, testified at the arbitration.

42. According to his evidence was that he was not present at the disciplinary hearing and had no knowledge of Kruger's

personal circumstances and the evidence presented at the disciplinary hearing.[15]

43. Lebelo in fact never met Kruger prior to the arbitration hearing.[16]

44. Lebelo did not know whether the Employee Relations Manager who made the recommendation of dismissal to the SARS Commissioner was involved in the disciplinary hearing, and as far he as he knew the SARS Commissioner was also not involved in the disciplinary hearing.[17]

45. The managers to whom Kruger reported should have testified about the destruction of the trust relationship.[18]

46. The SARS Commissioner and Moodley did not testify at the arbitration hearing.

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[15] CCMA arbitration record, Record vol 2 : 60 line 8.
[16] CCMA arbitration record, Record vol 2 : 74 lines 9 - 14.
[17] CCMA arbitration record, Record vol 2 : 72 lines 9 - 23.
[18] ***Edcon Ltd v Pillemer NO and Others (2009) 30 ILJ 2642 (SCA) at para 19***

47. They were the persons who could have testified about the alleged irretrievable breakdown of the trust relationship.

48. The evidence presented by Lebelo at the arbitration hearing about the alleged breakdown of the trust relationship is speculative and generalized and did not meet the threshold set by ***Edcon Ltd***.

49. Moodley also during the arbitration hearing testified that he did not object against Kruger's statement at the disciplinary hearing and the mitigating evidence presented him.

50. The CCMA arbitrator during the arbitration proceedings correctly remarked that a plea bargain of some kind was struck at the disciplinary hearing.[19]

51. There was thus no direct evidence of the breakdown of the trust relationship before the CCMA arbitrator. In the absence of such evidence the decision to dismiss would be unfair.[20]

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[19] CCMA arbitration record, Record vol 2 : 186 lines 8 - 10.

52. The CCMA arbitrator found that there was no provision in the collective agreement allowing the SARS Commissioner to overturn the sanction imposed by the disciplinary chairperson and found that she was bound by the decision of the LAC in ***Mgobhozi***.[21]

53. The CCMA arbitrator accordingly determined that Kruger's dismissal was unfair and SARS was ordered to reinstate him on the conditions stated by the disciplinary chairperson.

LC review

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

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[20] ***Edcon supra at para 22***

[21] CCMA arbitration award, Record vol 4 : 249 paras 5.7 and 5.10. It is submitted that the CCMA arbitrator in fact intended to refer to the decision of the LAC in ***County Fair Foods (Pty) Ltd v CCMA (2003) 24 ILJ 355 (LAC)***.

55. The LC noted that the collective agreement was silent about whether the decision of the disciplinary chairperson was final.[22]

56. There was no express provision that permitted SARS to substitute the disciplinary chairperson's decision with its own.[23]

57. 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 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.[24]

58. 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.[25]

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[22] LC judgment, Record vol 4 : 237 para 23.
[23] LC judgment, Record vol 4 : 237 para 23.
[24] LC judgment, Record vol 4 : 238 para 26.
[25] LC judgment, Record vol 4 : 238 para 28.

59. 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.[26]

60. The LC accordingly concluded that Kruger's dismissal was substantively unfair because the decision to dismiss was not one that SARS could validly make. The collective agreement barred SARS from substituting the decision of the disciplinary chairperson.

61. Kruger's dismissal was also held to be procedurally unfair because, even if the process of dismissing him had been available to SARS, it should have afforded him a pre - dismissal hearing, which it had failed to do.[27]

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

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[26] LC judgment, Record vol 4 : 238 - 243.
[27] LC judgment, Record vol 4 : 244 para 52.

63. The LC further held that, even if it had to put substance above form and treat 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).[28]

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

LAC appeal

65. 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.[29]

[28] LC judgment, Record vol 4 : 244 paras 54 - 56.
[29] LAC judgment, Record vol 4 : 212 para 12.

66. The LAC held that it was bound by its decision in ***Chatrooghoon***[30] unless persuaded that it was wrongly decided.[31]

67. SARS at no stage prior to this application for leave to appeal contended that ***Chatrooghoon*** was wrongly decided.

68. SARS only took issue with the interpretation and effect of the ***Chatrooghoon*** judgment on appeal before the LAC.

69. 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.

70. 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

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[30] ***SARS v CCMA & others (2014) 35 ILJ 656 (LAC)***

[31] LAC judgment, Record vol 4 : 216 para 23.

is not merely unfair for want of procedural authorization, but is invalid.[32]

71. 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.[33]

72. The appeal to the LAC was consequently dismissed with no order as to costs.

CONSTITUTIONAL MATTER :

73. It is well established that matters involving the straight application of law that do not raise a constitutional question about the validity or the proper interpretation of that law are not constitutional issues.[34]

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[32] LAC judgment, Record vol 4 : 228 para 42.
[33] LAC judgment, Record vol 4 : 231 para 50.
[34] ***Horn and Others v LA Health Medical Scheme and Another [2015] 7 BCLR 780 (CC) at para 32; S v Boesak 2000 (1) SA 912 (CC) at para 15***

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

75. One of the main objectives of the LRA is to promote and facilitate collective bargaining at the workplace.

76. The Constitution contemplates that collective bargaining between employers and employees is key to a fair industrial relations environment.[35]

77. That much is clear from the insertion of a constitutional right to engage in collective bargaining in section 23(5) of the Constitution.

78. Deviation from collective agreements is not encouraged or countenanced.[36]

[35] ***NUMSA v Bader Bop (Pty) Ltd [2003] 2 BLLR 103 (CC) at 111***
[36] ***CUSA v Tao Ying Metal Industries 2009 (1) BCLR 1 (CC) at para 56***

79. It is generally accepted that employers have the right to dismiss employees for misconduct such as gross insubordination. The CC need not say anything further.

80. Legislation such as the LRA may impose limitations to the common law right of dismissal. The LRA requires a fair reason and fair process for dismissal for misconduct to be labeled as fair. This is established law and requires the straight application thereof .

81. It is also accepted that gross insubordination may be a fair reason to dismiss.

82. The dismissal of an employee for misconduct such as gross insubordination may however be unlawful and invalid.

83. A dismissal in breach of the requirements of a collective agreement is a nullity.[37]

[37] ***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

84. 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.

85. An enquiry into the extent to which a collective agreement limits the common law and statutorily recognized right to dismiss for gross insubordination is a factual enquiry and not a constitutional issue.

86. The terms of a collective agreement may in one instance impose such a limitation and in another one not.

87. Once it is found that there is such a limitation, the employer is bound because it agreed to such limitation as a product of collective bargaining

88. SARS voluntarily entered into the collective agreement and should abide by it. *Pacta sunt servanda*.

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breach of a collective agreement may warrant an order of specific performance (which resulted in the reinstatement of the employee).

89. If the employer is dissatisfied with the end result, it may negotiate an amendment to the collective agreement or terminate the collective agreement in accordance with the terms thereof. SARS at all material times had the option to do so.[38]

90. In the event the employer is burdened with an intolerable position as a result of the operation of the collective agreement, it must pursue the remedies legally available to it.

91. Disregard for the purpose and provisions of the collective agreement, or a convenient interpretation thereof, is not an alternative thereto.

92. The fact that SARS is a public sector employer and organ of State cannot distract from the general principles applicable to dismissal for misconduct. On the contrary, SARS is expected to abide by the law.

[38] Collective agreement, Record vol 4 : 280 para 12

93. The present matter requires the straight application of law and a constitutional issue does arise.

94. Leave to appeal should accordingly be refused with costs on the basis that the appeal does not raise a constitutional matter.

INTERESTS OF JUSTICE :

Right to dismiss

95. It must be accepted that a collective agreement may limit the common law right of an employer to dismiss.

96 Any such limitation is self - imposed.

97. Collective agreements are the products of collective bargaining and it would create immense uncertainty in the workplace if the employer is permitted to deviate or act in contravention thereof as and when it suits him.

98. The decisions in ***County Fair Foods***, ***Chatrooghoon*** and the present matter created legal certainty over a period of time and should not be upset merely because SARS did not make out a case for dismissal at the disciplinary proceedings.

99. SARS elected to ignore the clear warnings sounded to employers in ***Edcon Ltd*** at its own peril and should not expect sympathy from the CC at this late stage.

100. SARS also elected not to make use of the remedy provided by section 158(1)(h) of the LRA, probably because it realized that it was doomed for failure.

Contractual interpretation of collective agreements

101. The process of contractual interpretation is well established.[39]

102. The process must start with the plain wording of the relevant provisions.

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

103. Two trade unions are parties to the collective agreement with SARS.

104. It is to be expected that they required legal certainty about disciplinary procedures employees could be subjected to by SARS and that they never intended the collective agreement to be a mere guideline.

The relevant provisions of the collective agreement

105. Clause 1.2 of the collective agreement makes it clear that the Disciplinary Code and Procedure is intended to ensure that all employees understand the procedure to be followed to address misconduct in SARS.[40]

106. This object will be frustrated should substitution by SARS be allowed.

[40] Collective agreement, Record vol 4 : 261 para 1.2.

107. Clause 10.6.1 of the collective agreement provides that the chairperson shall, after consideration of all factors, notify the employee and the employer in writing within 14 working days after mitigation and aggravating factors have been lead, of the sanction and the reasons for it.[41]

108. This provision makes it clear that the chairperson has the final say in the sanction to be imposed. If he or she could merely make a recommendation, it would have been communicated to the employer alone and not also to the employee.

109. In this regard it is submitted that the LC erred when it noted that the collective agreement was silent about whether the decision of the disciplinary chairperson was final. The collective agreement makes it sufficiently clear that the decision is final.

110. Clause 10.6.5 of the collective agreement provides that the finding and sanction together with a report and the record of the proceedings of the disciplinary hearing must be submitted to

[41] Collective agreement, Record vol 4 : 276 para 10.6.1

the Employee Relations Department and recorded on the employee's personal file.[42]

111. The recordal of the sanction imposed by the chairperson on the employee's personal file is a clear indication that it is intended to be the final sanction.

112. Clause 10.6.6 of the collective agreement provides that Employee Relations will be responsible for implementing the outcome of the disciplinary hearing and inform the employee in writing within 5 days of receipt of the outcome.[43]

113. The outcome is the decision of the chairperson and there is no room left for interference or substitution by SARS.

114. Even on the most liberal interpretation of the provisions of the collective agreement it cannot be said that there is any room for substitution of sanction by SARS.

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[42] Collective agreement, Record vol 4 : 277 para 10.6.5
[43] Collective agreement, Record vol 4 : 277 para 10.6.6.

115. The absence of a denying provision is in any event not the equivalent of the presence of an empowering provision.

116. SARS' interpretation of the relevant provisions of the collective agreement is forced and not in keeping with the accepted process of interpretation. To distinguish between finding and sanction and outcome is mere wordplay under the circumstances.

117. Substitution will not only be unfair, but also unlawful where it is clearly at odds with the provisions of the collective agreement.

118. The decision of the LAC in ***Chatrooghoon*** and the present matter relating to the interpretation of the collective agreement is accordingly correct and should not be upset on appeal.

119. Even if it is accepted that substitution by SARS is allowed, such substitution was not warranted under the circumstances. It is reiterated that there was no evidence of the irretrievable

breakdown of the employment relationship. Not even from Mboweni against whom the misconduct was perpetrated.

Review of the sanction of the disciplinary chairperson

120. The CC has stated repeatedly that it is generally undesirable for it to sit as a court of first and last instance.[44]

121. That the finding of the disciplinary chairperson could not be taken on review in terms of section 158(1)(h) of the LRA was not raised before.

122. There is in any event no merit in such point.

123. The remedy in terms of section 158(1)(h) 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

[44] ***Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd 2008 (4) SA 16 (CC) at para 5; Satchwell v President of the Republic of South Africa and Another 2003 (4) SA 266 (CC) at para 6; Dormehl v Minister of Justice and Others 2000 (2) SA 897 (CC) at para 5; Christian Education South Africa v Minister of Education 1999 (2) SA 83 (CC) at para 12; Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC) at para 8***

disciplinary proceedings - at least in the public sector - under section 158(1)(h) of the LRA.[45]

124. 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. [46]

125. The following was stated by the LAC in ***Overstrand Municipality*** :

"In sum therefore, the Labour Court has the power under section 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on i) the grounds listed in PAJA, provided the decision constitutes administrative action; ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or iii) in accordance with the requirements of the constitutional principle of legality, such

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[45] ***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)***.

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

being grounds "permissible in law". The findings of the LAC and the SCA in that regard in ***Ntshangase*** *are not inconsistent with the findings of the Constitutional Court in* ***Gcaba*** *or* ***Chirwa****, which are restricted to conclusions that unfair dismissals and unfair labour practices will normally not constitute administrative action on account of adequate alternative remedies existing under the LRA. Neither* ***Gcaba*** *nor* ***Chirwa*** *made any reference to* ***Ntshangase****, or, as I have said, section 158(1)(h) of the LRA.* ***Chirwa*** *was decided before* ***Ntshangase****, while* ***Gcaba*** *was handed down shortly after it. More recently, in* ***Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal****, the Constitutional Court cited* ***Ntshangase*** *with approval, indicating implicitly that it saw no inconsistency in the approach followed in that case with its own earlier pronouncements."*[47]

126. 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

[47] At para 29.

disciplinary chairperson. But, like any other employer, it will have to present evidence of an irretrievable breakdown in the employment relationship during the disciplinary hearing before such a review will be likely to succeed.

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

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

129. 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.[48]

130. 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

[48] Replying affidavit, Vol 1 : 42 paras 4 and 5

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.

131. 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 breakdown 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.

132. 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.

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

Correctness of the decisions of the LAC[49]

134. 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.

135. 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

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

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."[50]

136. 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.

137. SARS was prohibited from interfering with the sanction imposed by the disciplinary chairperson and it was legally obliged to accept the sanction.[51]

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[50] At para [28].

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

138. 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.

139. 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.

Reinstatement

140. 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.

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

142. Kruger's long record of unblemished employment and mitigating circumstances advanced before the CCMA arbitrator in the form of his submissions in the internal appeal formed part of the relevant material.

143. The sentiments expressed in ***Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others***[52] with regard to acts of racism in the workplace and the condemnation thereof are wholeheartedly supported. It is also not in issue that the use of the k - word is an offence which will usually attract dismissal. The judgment of the LAC in ***Crown Chickens*** should however not be read to mean that dismissal is the only appropriate

[52] ***(2002) 23 ILJ 863 (LAC)***

sanction for racist conduct in all circumstances. In that case the dismissed employee, a supervisor, had remarked *"los die kaffer - laat vrek"* when informed that a worker had been injured on duty. The offhand word *"vrek"* clearly aggravated the insult. The employee clearly demonstrated an abuse of power, which abuse was aggravated by racial slur. The LAC stated the following :

"Viewed in the light of the history of racism and racial abuse in this country and the constitutional values of human dignity and equality and the repugnancy of the first respondent's conduct, it will be seen that the first respondent's conduct was such that the only appropriate sanction for it was dismissal."[53] (own emphasis)

144. Dismissal is not always appropriate and reinstatement can thus not *per se* be ruled out as an appropriate remedy for such misconduct.

[53] At para 39.

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

RELIEF :

146. In the premises it is submitted that the application for leave to appeal should be dismissed with costs.

147. In the event of the Court interfering with the sanction or remedy, it is submitted that Kruger's dismissal was at least procedurally unfair as he was never afforded the opportunity to address SARS on the substitution of the sanction.

R GRUNDLINGH

COUNSEL FOR THIRD RESPONDENT

23 MAY 2016

THIRD RESPONDENT'S LIST OF AUTHORITIES

1. *Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC)*

2. *Christian Education South Africa v Minister of Education 1999 (2) SA 83 (CC)*

3. *County Fair Foods (Pty) Ltd v CCMA (2003) 24 ILJ 355 (LAC)*

4. *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others(2002) 23 ILJ 863 (LAC)*

5. *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd 2008 (4) SA 16 (CC)*

6. *Dabner v SAR & H 1920 AD 583 at 594*

7. *Dormehl v Minister of Justice and Others 2000 (2) SA 897 (CC)*

8. *Edcon Ltd v Pillemer NO and Others (2009) 30 ILJ 2642 (SCA)*

9. *Gouws v Chairperson, Public Service Commission & Others (2001) 22 ILJ 174 (LC)*

10. *Hendricks v Overstrand Municipality and others [2014] 12 BLLR 1170(LAC)*

11. *Hlatshwayo v Mare and Deas 1912 AD 242*

12. *Horn and Others v LA Health Medical Scheme and Another [2015] 7 BCLR 780 (CC)*

13. *Khumalo and Another v MEC for Education, Kwazulu - Natal 2014 (5) SA 579 (CC)*

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

15. *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin NO & others (2008) 29 ILJI 1707 (LAC)*

16. *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC)*

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

18. *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*

19. *Ngubeni v National Youth Development Agency (2014) 35 ILJ 1356 (LC)*

20. *Ntshangase v MEC: Finance, KwaZulu-Natal (2009) 30 ILJ 2653 (SCA)*

21. *Overstrand Municipality v Magerman NO & others [2014] 2 BLLR 195 (LC)*

22. *SAMWU obo Jacobs v City of Cape Town & others [2014] 10 BLLR 1011 (LC*)

23. *SARS v CCMA & others (2014) 35 ILJ 656 (LAC)*

24. *Satchwell v President of the Republic of South Africa and Another 2003 (4) SA 266 (CC)*

25. *S v Boesak 2000 (1) SA 912 (CC)*