

**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**

1<sup>st</sup> Respondent

**NOMSA MBILENI N.O.**

2<sup>nd</sup> Respondent

**JJ KRUGER**

3<sup>rd</sup> Respondent

---

**THIRD RESPONDENT'S PRACTICE NOTE**

---

**NATURE OF APPLICATION :**

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 LAC dismissed an appeal against a judgment of the Labour Court (LC) dismissing an application to review and set aside an arbitration award issued by the first respondent (CCMA).
3. The second respondent (CCMA arbitrator) found that the dismissal of the third respondent (Kruger) by SARS was unfair and reinstated him into the employ of SARS.

**ESSENTIAL FACTS :**

4. 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.
5. SARS did not lead the evidence of any witness, either on the merits of the charges or in aggravation.

6. The disciplinary chairperson found Kruger guilty on all the charges.
7. The disciplinary chairperson asked SARS' representative whether he had a problem with the proposed sanction (final written warning coupled with suspension and counseling) and whether he accepted the sanction.
8. SARS' representative did not object thereto
9. The disciplinary chairperson recorded that there was no evidence that the employment relationship had been irreparably damaged.
10. The proposed sanction was imposed.
11. Dissatisfied with the outcome of the disciplinary hearing, SARS dismissed Kruger on 3 October 2007 without any further hearing.

12. 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.
13. 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.
14. On review the LC was 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.
15. 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
16. The LC concluded that Kruger's dismissal was substantively and procedurally unfair and dismissed the review application with costs.

17. On appeal 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. The LAC held that it was bound by its decision in ***Chatrooghoon***.
19. 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.
20. 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. 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.

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

**BASIS OF OPPOSITION :**

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

23.1 SARS has perempted any right to a further appeal;

23.2 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;

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

**THIRD RESPONDENT'S MAIN SUBMISSIONS :**

24. Leave to appeal should 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
25. The present matter requires the straight application of law and a constitutional issue does arise.
26. On a proper construction and interpretation of the provisions of the collective agreement it cannot be said that there is any room for substitution of sanction by SARS.
27. Even if it is accepted that substitution by SARS is allowed, such substitution was not warranted under the circumstances as

there was no evidence of the irretrievable breakdown of the employment relationship.

28. SARS was provided a remedy by section 158(1)(h) of the LRA.
29. SARS elected not to make use of the remedy provided by section 158(1)(h) of the LRA.
30. The decisions of the LAC are correct and should not be upset.
31. Kruger's reinstatement was reasonable, either by virtue of the fact that his dismissal was invalid or by virtue of the fact that there was no evidence of the irreparable breakdown of the employment relationship.
32. SARS has no prospects of success on appeal and it would not be in the interest of justice to grant leave to appeal.
33. The application for leave to appeal should be dismissed with costs.

**WHAT TO READ :**

34. The complete core bundle consisting of 5 volumes must be read.

**ARGUMENT :**

35. One day.

**COUNSEL :**

R Grundlingh

(012) 424 4219 / 082 923 1233

riaan@grundlingh.com