IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 06/11

Reportable

SOUTH AFRICAN REVENUE SERVICE **Appellant**

and

CCMA **First Respondent**

NOMSA MBILENI *NO* **Second Respondent**

JJ KRUGER **Third Respondent**

Heard: **26 February 2015**

Delivered: **08 December 2015**

Summary: The question posed on appeal was whether an employer who has delegated final disciplinary discretion to a person *qua* chair of a disciplinary enquiry can substitute the chair's decision with a different or harsher sanction

***Held* - Absent a power to regard the decision of a chair as a mere recommendation an employer cannot do so and any purported decision to substitute a sanction is invalid**

***Held* - An employer's invalid substitution of a sanction is not merely a procedural irregularity – because of the invalidity of such a decision the decision is also a substantively unfair act – the distinction between substantive fairness and procedural unfairness is a forensic tool of analysis rather than two discrete concepts**

***Held* - The fundamental premise of our labour relations jurisprudence is that fairness shall prevail – a general rule that employers are not at large to interfere with the outcomes of disciplinary hearing outcomes with which they disagree is an appropriate and necessary safeguard for workers subjected to discipline – the rule is worthy of preservation**

The LAC decision in *SARS v CCMA (Chatrooghoon)* explained and applied
The LC decision in *SARS v CCMA (Botha)* explained and criticised

***Held* - Racist abuse – seriousness - despite the gravity thereof, a fair enquiry including an enquiry into whether any mitigating circumstances might exist is necessary – the imposition of a sanction of dismissal for racist conduct cannot as a matter of course follow – despite the likelihood that cogent mitigation could exist being rare, without such an enquiry, the disciplinary enquiry would be a sham –**
The LAC decision in *Crown Chickens v Kapp* at [39] explained

On appeal, the decision by the commissioner of SARS to substitute a sanction of dismissal for the sanction of a suspension imposed by the disciplinary enquiry chair found to be invalid – the decision of labour court dismissing a review application against an arbitrators award on the grounds that the award satisfied the test in *Sidumo v Rustenurg Platinum Mines* upheld - Appeal dismissed

Coram: Davis JA, Sutherland JA and Mngqibisa-Thusi AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] In the lexicon of the South African people, there is a word, which more than any other word, has the capacity to utterly denigrate the person to whom it is

addressed and to mark the speaker as utterly contemptible. That word is "kaffir". In 2015, 21 years since the Apartheid mind-set was supposedly defeated, this Court is called upon to adjudicate upon a matter triggered by a white man who saw it fit to refer to his black boss as a "Kaffir".

[2] However, the chief controversy before the Labour Appeal Court is not whether that abuse was uttered, nor indeed the seriousness of such utterance, which is undisputed, but rather, an issue that goes to the heart of a fair system of employee discipline in our Labour Law jurisprudence: may an employer unilaterally substitute a decision of a chair of a disciplinary enquiry, to whom final decision making authority had been assigned, and impose a different, harsher, sanction?

[3] The controversy, as articulated before the Labour Appeal, is the most recent chapter of a long evolution. That evolution is addressed chronologically, at the disciplinary enquiry, at the arbitration, at the review of the arbitration award Pillay J in the Labour Court, and lastly on appeal against the order of Pillay J.

The Disciplinary Enquiry Stage

[4] Mr Jacobus Johannes Kruger (Mr Kruger) is an employee of the South African Revenue Service (SARS). He was accused of uttering the above-mentioned racial abuse on 27 July 2007 and was suspended on 8 August 2007, and appeared before a disciplinary enquiry on 31 August 2007.

[5] Regrettably, the record prepared for the appeal does not include the minutes of that hearing, nor the bundle of documents used, including apparently, affidavits from his accusers, handed in during the hearing. What is revealed to the Labour Appeal Court about that episode is derived from the evidence elicited in the cross-examination of Mr Kruger in subsequent arbitration proceedings, from the arbitration award, and from some unchallenged references thereto in the affidavits deposed to for the review application.

[6] The exact allegations in the charges and the evidence adduced (as inferred from the sources mentioned) do not tie up exactly as to what was uttered and on what occasion it was uttered. These differences are not significant for the

purposes of this judgment. Rather than needlessly traverse the differences, I privilege the account given in the award. According to that account, on 27 July 2007, Mr Kruger, at the end of a heated telephone conversation with Mr Amos Mboweni, his immediate supervisor, said to fellow employees, present in his company at the time: "Ek kan nie verstaan hoe 'n kaffer dink nie". Mr Kruger may have used the term on another occasion too.

[7] At the disciplinary hearing, Mr Kruger pleaded guilty. He submitted a case in mitigation based on stress from which he said he was suffering at that time. A plea bargain was apparently struck in terms of which the chair of the disciplinary enquiry, an independent person drawn from a dispute resolution organisation, found him guilty as charged, imposed a final written warning, suspended him without pay for 10 days, and directed him to receive counselling.

[8] However, when the result of the disciplinary enquiry was subsequently reported, presumably routinely, to senior management, it resulted in a notification from the Commissioner of SARS, its chief executive officer, to Mr Kruger, dated 3 October 2007, stating that the disciplinary enquiry chair's "recommendation" about the sanction had been "declined" and that his services were "terminated with immediate effect". It may be mentioned, at this juncture, that SARS, at that time, had a firm and fixed view that it was lawfully able to treat all disciplinary enquiry outcomes as mere recommendations. By the time of the appeal, it had abandoned that view because of the judgment of Ndlovu JA in *SARS v CCMA (The Chatrooghoon Case).*[1]

[9] Mr Kruger was invited to appeal. Mr Kruger's Shop Steward, Anton Van Heerden, did so on his behalf on 10 October. The notice of appeal challenged, first, the power of the employer to substitute the sanction, and secondly, extrapolated on mitigating circumstances. The appeal was dismissed on 22 October 2007.

[1] (2014) 35 ILJ 656 (LAC). In order to distinguish the plethora of cases reported as "SARS v CCMA" and the danger of confusion, in this judgment they are called by the name of the employee in question.

The Arbitration Stage

[10] Mr Kruger thereupon referred an unfair dismissal dispute to the CCMA. Again, regrettably, the record prepared for the appeal omits the referral to conciliation document and the referral to arbitration document. This failure obscures what exactly was the issue articulated to be in dispute which had been referred. Again the Labour Appeal Court is driven to glean this important fact from a secondary source. The award states that the "issue to be decided" is:

> '2.1 Whether the dismissal of the applicant was procedurally and substantively unfair.
>
> 2.2 Whether [the Commissioner of SARS] had powers to convert a sanction of final written warning and suspension without pay to dismissal.'

[11] The cited paragraph 2.1 is not helpful in divining the issues which were put in dispute before the arbitrator because these categories of "procedural" and "substantive" fairness are generic issues. Generally, it is only useful to belabour this distinction when one or other category of unfairness is *not* in issue. These two cited paragraphs, read together, cannot, in my view, logically mean that the issue as articulated in paragraph 2.2 meant that the question about the powers of the SARS commissioner to "convert a sanction" was a third issue. Rather, the text of paragraph 2.1 ought to be read as being the proper subject matter of the arbitration, namely, that there is a dispute as to whether the substitution of the sanction constituted both or either substantive or procedural unfairness. Moreover, as the unfair dismissal, alleged to have been committed, was the action of substituting a dismissal for a lesser sanction, initially imposed, logically, that must be the proper scope of the dispute. However, a reading of the award and the outcome reached, show that this is not, apparently, how the arbitrator understood the scope of the enquiry.

[12] What the arbitrator did was to approach the matter as two discrete enquiries. First, the arbitrator enquired into whether the employer could substitute a sanction. The arbitrator held that the employer could not do so. That ought, logically, to have been the end of the matter. However, the arbitrator then also enquired into whether the alleged misconduct had indeed occurred. This

second line of enquiry was inspired by Mr Kruger retracting his admission of guilt, tendered at the disciplinary enquiry, and asserting that he had not uttered the words and had been subjected to undue pressure by Van Heerden to plead guilty, whereas he was innocent. The arbitrator held that the misconduct did occur. Among the questions, which this case gives rise to, is whether the arbitrator needed to, or ought to have conducted that factual enquiry at all. The conclusion to which I have come is that the arbitrator ought not to have done so because that factual enquiry had no effect on the outcome of the arbitration. The outcome of the arbitration turned on the finding that the employer had no power to change the disciplinary enquiry outcome. Accordingly upon that premise this judgment shall not address the factual enquiry, because to do so would be to commit the same error which was committed by the arbitrator.

[13] The first question addressed, ie, whether the employer was vested with power to substitute the disciplinary enquiry sanction, was dealt by the arbitrator by relying on the authority of *County Fair Foods (Pty) Ltd v CCMA (County Fair).*[2] The *ratio* in the judgment in *County Fair* was that the disciplinary code of that employer vested a power of final decision in the person designated to chair the disciplinary enquiry. Accordingly, the employer was prohibited from changing it. As a result, the arbitrator, in applying *County Fair*, found that because the disciplinary code in force to regulate the relationship between SARS and its employees, properly interpreted, also conferred final decision-making power on the chair of the disciplinary enquiry, the arbitrator, similarly, declared the dismissal of Mr Kruger on 3 October 2007 to be unfair.

[14] The arbitrator's award then stated, expressly, that the sanction imposed by the chair of the disciplinary enquiry would prevail.

The Review Stage

[15] The award was published on 15 March 2008. SARS applied to review the award on 19 May 2008.

[2] (2003) 24 ILJ 355 (LAC) at para 19 – 23.

What were the grounds of Review?

[16] Among the arguments advanced in argument at the appeal was that SARS could not, in its grounds of appeal, legitimately include issues not raised at the arbitration or before the Labour Court in the review application. This proposition of law is correct. (See: *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* (2009) 30 ILJ 269 (LAC) at paragraphs 25 – 29; *NUM obo Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC) at paragraph 46) Hence, an identification of the questions the review court was required to answer is necessary.

[17] The case that SARS advanced in the review application is contained in two affidavits. The first affidavit, filed on 19 May 2008, declared that the review is one contemplated by section 145 of the Labour Relations Act 66 of 1995 (LRA).[3] The award is alleged to be vitiated by gross irregularity. The significance of this allegation is that plainly, a ground that fell outside the ambit of section 145 was not available to SARS to rely upon. Two specific grounds were articulated:

17.1. First, that the arbitrator wrongly relied on the decision in *Mgobhozi v Naidoo NO and Others* (2006) 27 ILJ 786 (LAC) as authority to hold that the employer had no power to change a sanction of a disciplinary enquiry chair, whereas that case has nothing to do with that issue.

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[3] The relevant portion Section 145 provides:
(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
(a) ….
(b) ….
(2) A defect referred to in subsection (1), means-
(a) that the commissioner-
(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers; or
(b) that an award has been improperly obtained.
(3) ….
(4) If the award is set aside, the Labour Court may-
(a) determine the dispute in the manner it considers appropriate; or
(b) make any order it considers appropriate about the procedures to be followed to determine the dispute.

(This is technically an accurate description of paragraph 5.8.2 of the award, but as it was later conceded, the reference to that case by the arbitrator was a clerical misnomer and reference to *County Fair* was what was intended, which would have been an appropriate reference for that proposition). This ground was rightly abandoned.

17.2. The second ground was premised on an argument about the interpretation of the SARS disciplinary code. SARS contended it could treat disciplinary enquiry outcomes as recommendations. The arbitrator held that the disciplinary code meant that the employer had no powers conferred on it to change a sanction imposed by a disciplinary chair. The arbitrator had relied on *County Fair*. The ground of appeal was that this finding was wrong. However, in the alternative, it was advanced as a ground that if the authority of *County Fair* was accepted as generally correct, then, at least, in regard to a statutory body like SARS, unlike a private employer as in *County Fair*, the decision could have no application. (The interpretation ground)

[18] On 21 January 2009, a supplementary affidavit was filed by SARS. The supplementary affidavit, although disavowing a desire to add to the scope of the case as set out in the founding affidavit, did precisely that in paragraphs [8] – [10]. The gravamen of these paragraphs is to allege that there is a duty of trust and confidence implied by law into the terms of employment contracts, and also into the collective agreement which governs the employer/employee relationship, wherein resided the SARS disciplinary code. Upon the basis of such an implied term, the contention was advanced that racist abuse is a material breach of such implied term. Accordingly, the contention, such abuse "warrants" dismissal. The argument further runs on to assert that not only the employees and the employer, but also, dispute resolvers (ie chairs of internal enquiries and external arbitrators) are bound to uphold that implied term. Accordingly, a decision not to dismiss, by the chair of the disciplinary enquiry, and a similar decision by the arbitrator "breached" that implied term. Ergo, it was contended that the decisions taken must be overturned on review. Self-evidently, if this contention were to be read literally, it would be a nonsense to say that the chair of an enquiry and the arbitrator could be bound by contracts

to which they were not parties. However, I understand the proposition to be that they were obliged to take decisions about the employment relationship within the paradigm of the reciprocal obligations of the employer and its employees, as captured in the individual contract of employment and collective agreements which bound the disputants. Thus, on such grounds, it is alleged, the award was unreasonable. (The Trust and Confidence Ground)

[19] SARS Supplementary affidavit also addressed the prospects that the substitution of a sanction might be held to be invalid, anticipating the *Chatrooghoon* Case. At paragraph 7, this is stated:

> 'In the founding affidavit the meaning and application of clause 10.2.6 [of the disciplinary code] is dealt with at some length. The essence of the applicant's case is that it is open to it as employer not to implement the sanction imposed by a dispute resolver and to impose a sanction that it deems appropriate. …The case made out in the supplementary affidavit is that even if the arbitrator were correct – ie that clause 10.2.6 means that the applicant is bound to implement the sanction imposed by the dispute resolver – *the setting aside of the dismissal and restitution of the sanction imposed by the chair of the disciplinary hearing is none the less reviewable.*' (Emphasis supplied)

[20] Plainly, the decision of the arbitrator is indeed reviewable, a trite proposition. The very question posed to the arbitrator was whether the dismissal was unfair. If the dismissal was unfair, it stood to be overturned. That would leave the status *quo ante*; ie, a *de facto* restoration of Mr Kruger to the condition in which he was when the disciplinary enquiry chair sanctioned him. This outcome was criticised by SARS. However, the logical consequence of a finding that the dismissal was *invalid* would be that the *status quo ante* 3 October 2007 regarding the employment relationship was restored. In effect, Mr Kruger's dismissal was set aside and his status*, qua* employee, would thereupon have been that of an employee who had already been sanctioned in the manner decided by the chair of the disciplinary enquiry. The award expressly states that consequence, but the fact that it was reiterated adds nothing to the legal position that prevailed upon the dismissal being declared unfair, and accordingly, that part of the award supposedly confirming the

chair's sanction, is superfluous. As such, it cannot therefore trigger any legal consequence. Indeed, the appropriate way to read that part of the award is that it is no more than a prudent clarification of the consequences of the award, the arbitrator having found that the employer had no power to change the outcome of the disciplinary enquiry and thereupon to dismiss Mr Kruger.

The outcome of the review application

[21] The review application was ultimately heard by Pillay J on 1 October 2009 and judgment dismissing the application was handed down on 23 October 2009. The Judgment is reported as SA *Revenue Service v CCMA (*2010) 32 ILJ 1238 (LC) (*The Kruger Review*)

[22] The critical question to be answered in every review application against an arbitrator's award is whether the arbitrator has rendered a reasonable award within the meaning of the test in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[4] Applying that test, Pillay J held that the finding by the arbitrator that the employer had no power to change the sanction was a reasonable decision. On appeal, that specific finding by Pillay J is no longer challenged. The reason for that subtraction from the grounds of appeal is the decision by Ndlovu JA in the Labour appeal Court in the *Chatrooghoon Case* which held that SARS had no power to change a sanction in circumstances indistinguishable from the present case of Mr Kruger, save for a different act of misconduct committed by Chatrooghoon; ie, in that case, the abuse of confidential staff information.

[23] The *Chatrooghoon* decision is binding on this Court unless we were to be persuaded that it was clearly wrong. We were not invited to do so. Ndlovu JA at paragraphs 23 – 30 in *Chatrooghoon* addressed, first, the theme of the invalidity of a substituted sanction and, secondly, the theme premised on the alleged implications of an implied term of trust and confidence in the disciplinary code and employment contracts. Because of the importance of that judgment on the various arguments advanced before us, and a contested

[4] 2008 (2) SA 24 (CC).

interpretation of the effect of the judgment of Ndlovu JA, it is appropriate to cite the relevant passages at length:

> '[23] It is common cause that after 1 January 2004, the incidence of discipline in SARS workplace was governed by the disciplinary code or the collective agreement which, at the time material to this dispute, was binding on all the parties to it, namely SARS and the two unions concerned.
>
> [24] To my mind, the wording of the collective agreement is clear and unambiguous on the point that the decision of the chairperson on penalty becomes the final sanction, not a mere recommendation. Therefore, Mr Bruinders correctly conceded this point.
>
> [25] Indeed, the duty of trust and confidence is an implied term in every employment contract. The breach of that duty by an employee may result in the dismissal of the employee concerned on the ground that, in the absence of trust and confidence in the employment relationship, the employer can no longer tolerate the continued employment of that employee. However, the issue here is about whether SARS was, in terms of the collective agreement, entitled to substitute a sanction of dismissal (of Chatrooghoon) for a sanction short of dismissal imposed by the chairperson, given the fact that the collective agreement was silent on the issue of substitution. Indeed, as a matter of principle, it is in my view regardless whether the substituted sanction was higher or lesser than the one imposed by the chairperson. *In other words, the issue is essentially about whether the element of implied term of trust and confidence in the collective agreement extended to include a right in favour of SARS, as the employer, to substitute any sanction imposed by the chairperson appointed in terms of the collective agreement, where SARS is of the view that the misconduct the employee was found guilty of has affected the trust relationship between the parties.*
>
> [26] As indicated, it is trite that the rules of contractual interpretation do allow for reading into a contract a term which is implied by law for that type of contract. However, as was stated in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*, the intention of the parties should not be totally ignored, to the extent that if the term in question is in conflict with the express provisions of the contract, the term cannot normally be implied.

[27] It is apposite to refer to the relevant parts of clauses 10.3 and 10.4 of the disciplinary code, in relation to the issue of sanction:

'10.3 Finding …

10.3.3 Before deciding on a sanction, the chair must give the employer and employee parties an opportunity to present relevant circumstances in aggravation and mitigation.

10.4 Sanctions …

10.4.2 The chairperson with due consideration to the Code of Good Practice in the Labour Relations Act, the nature of the case, the seriousness of the misconduct, the employee's previous record, any relevant mitigating or aggravating circumstances and sanctions imposed in similar or comparable cases in the past *may impose any of the following sanctions*:

10.4.2.1 counselling;

10.4.2.2 a written warning;

10.4.2.3 a final written warning;

10.4.2.4 suspension without pay, for no longer than 15 working days;

10.4.2.5 demotion of one grade;

10.4.2.6 a combination of the above; or

10.4.2.7 dismissal.

10.4.3 With the agreement of the employee, the chairperson may only impose the sanction of suspension without pay or demotion as an alternative to dismissal. …

10.4.6 Employee relations will be responsible for implementing the hearing outcome, and informing the employee. 10.4.7 The employee has the right to appeal the outcome of the disciplinary proceedings using the proceedings outlined in section 11 below.

10.4.8 The employer shall not implement the sanction during an appeal by the employee.' (Emphasis added.)

[28] The wording of the collective agreement does not only make it abundantly clear that the chairperson's pronouncement on penalty is a final sanction, but, in my view, it also leaves no room for interpretation in favour of the parties having intended to provide in the collective agreement a term granting a right to SARS to substitute its own sanction for a sanction imposed by its chairperson. *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 include 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.*

[29] Significantly, the fact that in terms of the old disciplinary code the wording was clear that a disciplinary chairperson (a magistrate) was only entitled to issue a recommendation which SARS was empowered either to endorse or reject should, in my view, serve as sufficient demonstration that in terms of the (new) disciplinary code, SARS no longer has such power. It seems to me that the disciplinary code, to the extent that it conflicts with the old one on this particular aspect, ought to be treated on the same basis as in statutory interpretation involving amending statutes. In this regard, the learned author Kellaway makes the following submission, with which I respectfully agree:

“Although the omission of certain words in a provision in an amending statute, which were there before, may well appear to be an oversight, a court should not, it is submitted, construe the provision as if the words were still there, particularly if the inclusion would clearly conflict with the intention or purpose of the amending Act.”

[30] On the basis of this historical background, it seems to me reasonable to conclude, as a further ground, that when the parties signed the collective agreement providing for the (new) disciplinary code they also intended to move away from the previous practice where SARS had the final say on the question of sanction. That being the case, I am inclined to find that the collective agreement prohibited SARS from substituting its own sanction for

> the one imposed by the chairperson of the disciplinary enquiry appointed by SARS in terms of the collective agreement. Instead, SARS was obliged in terms of the collective agreement to implement and execute the sanction imposed by the chairperson, unless there was an appeal by the employee concerned. Therefore, for SARS to have substituted its own sanction it acted ultra vires the disciplinary code and the collective agreement, which had statutory authority in terms of the LRA. Indeed, it was up to SARS at the time of conclusion of the collective agreement to have negotiated a clause that would include its right to substitute the disciplinary sanction in certain circumstances. This, unfortunately, SARS did not do.' (Emphasis supplied and footnotes omitted)

[24] This judgment of Ndlovu JA plainly puts paid to the "Interpretation ground."

[25] It is appropriate to observe that the "Trust and Confidence " argument, in the exact terms advanced before Pillay J, in the *Kruger Review Case* does not seem to have been put before the court in *Chatrooghoon,* and lest it may be thought that the judgment of Ndlovu JA does not encompass that line of argument. I deal with that aspect here. The remarks of Ndlovu JA at paragraph 25 of *Chatrooghoon,* can only mean that SARS cannot invoke a breach of trust to justify a change in sanction. If that *dictum* is correct, it must follow that no legitimate complaint can be made, on such a basis, about the way the relevant dispute resolvers exercise their discretion in order to found a justification to interfere with their decisions. Accordingly, in my view, the effect of the judgment of Ndlovu JA in *Chatrooghoon* disposes of the contention that an implied term of trust and confidence can be invoked to found an allegation of material breach on the part of the chair of the disciplinary enquiry or of the arbitrator for not imposing a sanction which they were entitled to impose, but chose not to impose. Whether the "Trust and Confidence" type of argument can be deployed to do battle in a specific review of the Chair's decision (as distinct from the arbitrator's decision) is a distinct and different question.

[26] Pillay J in the *Kruger review Case a quo*, in response to arguments about the susceptibility of the chair's decision to a review, surveyed several aspects of the Labour Courts' review jurisdiction and related legal principles about Administrative Law reviews. The excursus seems, in my view, to have been

an *obiter* exploration of what options might be available to an employer that is an organ of state and is aggrieved by a decision taken by itself (ie by whomsoever had the duly delegated authority to make a final decision) which it deemed "egregious". In particular, reference was made to the notion of an organ of state reviewing itself in an employment discipline case as addressed in *Ntshangase v MEC for Finance Kwazulu-Natal and Another (Ntshangase)*.[5] According to the narrative recorded in the judgment of Pillay J at paragraph 12, the *Ntshangase* case was invoked by counsel, in argument, as authority for a broader idea; ie that not only could an organ of state review itself (ie review the decision of the *chair* of the disciplinary enquiry) on grounds of handing down an egregious sanction, but that an *arbitrator's* decision was somehow also susceptible to this approach. I confess to not grasping the force of the submission. As regards the chair's decision, however, the manifest unhelpfulness of that line of argument is obvious because no review application *against the chair's decision* has ever been brought. Moreover, there is no logical foundation upon which to elide that idea into a similar review of an arbitration award regulated by the LRA. The authority exercised by each dispute resolver has a different source and a different purpose. The chair is an instrument of the employer's prerogative to discipline an employee. The arbitrator performs a function in terms of a power conferred by statute to adjudicate afresh the fairness of the reason relied upon by the employer to dismiss an employee. Whether section 158 of the LRA is the appropriate platform upon which an employer may address a grievance about a chair's "egregious" decision is unnecessary for this Court to decide. For that reason, no further comment is appropriate on the possibilities mentioned in the judgment of Pillay J in this regard, save to record that Pillay J did not contemplate that the speculative options alluded to by her contributed to the review powers capable of being exercised by the Labour Court.

[27] Ultimately, the conclusion to which Pillay J came, in the *Kruger Review* case *a quo*, was that the review application before her court was confined to a case within the ambit of section 145 of the LRA, as the application had expressly stated, and even were one or more of the speculative options mentioned by

[5] [2009] 12 BLLR 1170 (SCA).

the Judge been available to an aggrieved employer, none were justiciable in the application before her court. This conclusion must be correct.

[28] Pillay J thereupon held that the arbitrator's decision that the dismissal of Mr Kruger, by means of a substituted sanction based on a non-existent authority to make such a substitution, was not unreasonable and dismissed the review application. The "merits" of the allegations of misconduct did not affect that decision and Pillay J, correctly, did not deal with the arbitrator's treatment of that topic. In my view, that approach by Pillay J was correct because once the dismissal decision was up-ended on grounds of invalidity, there was no need to enquire further, and indeed no logical room or justification, to entertain an enquiry into that subject matter. The arbitrator, who did so, was misled into undertaking such an enquiry, and ultimately regardless of the factual findings, they could have no impact on the *ratio* in the award; ie the substituted sanction was invalid and for that reason the dismissal was unfair.

The Appeal Stage

[29] The Notice of Appeal by SARS against the decision of Pillay J challenged two findings. The first challenge was about the interpretation finding that the collective agreement disallowed the employer from changing a sanction, a point since abandoned. The second challenge was that Pillay J was wrong to suggest that the employer *could* have reviewed the chair's decision and *should* have done so. This finding by Pillay J, if it was a finding, rather than just a hint on how to repair a debacle, was irrelevant to the decision to hold the dismissal unfair and it could therefore take the SARS' case nowhere.

The "procedural fairness" argument

[30] As I understood, Mr Kennedy's key argument advanced in the appeal hearing (and not really foreshadowed by the grounds in the Notice of appeal) was that, notwithstanding that it was not possible for SARS to substitute a sanction imposed by the chair, it remained possible for the arbitrator to overturn the sanction of the chair. The reason why there was space for this power for the arbitrator to address the merits of the misconduct, so it was contended, was because the substitution decision was an instance of "procedural" unfairness

only. In a case where an employer's decision is unfair only because it is "procedurally unfair", an arbitrator may yet uphold the sanction because it was objectively appropriate.

[31] Upon that platform, Mr Kennedy invited the court to reappraise the arbitrator's findings. Accordingly, the critical question upon which that line of argument turns is whether the proposition that an invalid decision to substitute a sanction is a matter of substantive fairness, as held by Pillay J, in the *Kruger Review a quo*, or is, merely, an instance of procedural fairness, which, so it is argued, would allow an arbitrator an opportunity to examine the merits of the misconduct allegations and impose an appropriate sanction.

[32] It had been argued on behalf of Mr Kruger that this line of argument was illegitimate, not having been encompassed by the Notice of appeal or the grounds of review. There is some force to this view, but in my view, the argument, nevertheless, invokes an issue that was at least latent in the case from inception, as an examination of the history of the case demonstrates. *A fresh argument* about an issue already raised, or latent in the dispute, does not transgress the bounds of the review grounds invoked. Therefore, the argument advanced on behalf of Mr Kruger that the SARS' case, in this respect, trespasses beyond its proper scope is probably incorrect. However, even if I am wrong on this point, I deem it prudent to deal with the argument, because it has cropped up elsewhere too, and clarity from this court is required in the public interest.

[33] It bears mention that, often, too much is made of the distinction between substantive and procedural unfairness. The distinction is a useful forensic tool, not a principle of law creating two separate concepts. The distinction ought not to be made to do work which distorts its usefulness. An unlawful act will always be, within the Labour jurisprudence paradigm, both substantively and procedurally unfair. A lawful act *may* be both substantively and procedurally unfair, and sometimes only one or the other. Sometimes a defective and thus unfair procedure may taint an enquiry so as to prevent a fair decision on a substantive issue from being taken. Sometimes, an unfair procedure does not get in the way of discerning a substantively fair dismissal.

[34] One argument advanced on behalf of SARS to try to support the notion that the substitution of the sanction in this case ought to be treated as merely procedural fairness issue, relies on a remark in the judgment of Pillay J at paragraphs 19 and 20 recording that among the submissions made on behalf of Mr Kruger, in the review application before her, the substitution issue was conceded to be merely "procedural". The passage in question reads only that the procedural fairness was in issue to the extent that SARS had to justify overturning the sanction of the chairperson and it was submitted that:

> 'By altering the sanction to summary dismissal, SARS acted irregularly and ultra vires since no justification existed for such a serious deviation from SARS policies and procedures.
>
> *Although the arbitrator had to determine the substantive and procedural fairness of the dismissal. The guilt of the employee was not in issue. He did not ask to be cleared of any wrongdoing*.'(Emphasis supplied)

[35] I am unconvinced that the recorded remark necessarily had an abandonment of a reliance on substantive fairness in mind because the burden of the recorded submission seems to me to be an attempt to distinguish guilt from sanction, and emphasises the invalid and therefore unfair interference with a sanction imposed. It would therefore be unsafe to conclude that there has been an intentional disavowal of the proposition that an invalid decision results in substantive unfairness. However, even if it had been made, a submission of such a nature; about the law, would not bind a court, and as already addressed, Pillay J did not understand that she was confined by such a remark to construe the invalidity of the substitution of sanction as a mere procedural affair, if indeed that is what was meant by the submission.

[36] A further argument advanced in the appeal to try to support the proposition that the substitution decision was merely procedural was to invoke the decision by Lagrange J in *SARS v CCMA and Others (The Botha Case)*[6]. This matter was decided after *Chatrooghoon* had been reported. The facts were that Botha, an employee of SARS had been disciplined for inappropriate use of the unrestricted access he had to the internet. The chair of the disciplinary

[6] [6] C683/2011 (9 February 2015) (unreported) (the *Botha* case).

enquiry convicted him and issued a final written warning. As in the other examples dealt with in this judgment, senior management saw fit to override the Chair and substituted a sanction of dismissal. Botha's response was to refer two separate disputes. Dispute number 1 was about the interpretation of the disciplinary code. Dispute number 2 was an unfair dismissal claim. Why they were not consolidated is not explained. In the consequent arbitration in dispute number 1, the award declared that the power of substitution was absent. No review was brought against that award. Subsequently, dispute no 2, about the unfair dismissal was heard. That arbitrator adopted the view that the invalid substitution of a sanction was a matter of procedural unfairness. He then dealt with the merits and concluded that the dismissal was an instance of inconsistent application of discipline. Moreover, he held that SARS had failed to meet the requirements in *Edcon v Pillemer NO* (2008) 29 ILJ 614 (LAC) to adduce evidence of an irreparable breakdown in the employment relationship to justify a remedy other than reinstatement. Accordingly, Botha was reinstated.

[37] On review, Lagrange J, in *Botha,* addressed three grounds of review relied upon by SARS. The first ground was the implied term based on trust and confidence theme scotched by the *Chatrooghoon* decision. The second ground addressed the factual merits of the case that the employment relationship was destroyed. Lagrange J held that the view adopted by the arbitrator that the relationship was undamaged was unreasonable. The third ground was described a "procedural unfairness". The "procedural" unfairness in issue was the question of whether the offer to Botha of a chance to make representations before a substitution of the sanction was imposed could save the substitution from being procedurally unfair. This is not a question that arises in this case of Mr Kruger. Lagrange J found at paragraph 25 of his judgment that in those particular circumstances, the observance of *audi alterem partem* did not save the decision from procedural unfairness. In finding thus, Lagrange J alluded to a remark by Pillay J at paragraph 52 in her judgment in the *Kruger Review Case*, the very judgment upon which the Labour Appeal now sits on appeal. That passage reads:

> 'The dismissal of the employee 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. *Procedurally,* the dismissal *was also unfair* because the *process of dismissing* the employee *was not available to SARS;* if it was available, then SARS should have afforded the employee a pre-dismissal hearing. That it did not do.' (Emphasis supplied)

[38] It appears to me that it was assumed by *everyone* involved in the *Botha case,* both in the arbitration and on review*,* that the substitution issue was confined to procedural unfairness. That unreasoned assumption triggered the notion that there was space to address, separately, the merits of the alleged misconduct and an appropriate sanction under the rubric of substantive unfairness. A proper reading of the judgment of Pillay J in the *Kruger Review case* does not support that notion. The perspective of Lagrange J that the issue was about procedural fairness only, was further encouraged by the view Lagrange J took of remarks in the judgment of Ndlovu JA in the *Chatrooghoon* case. At paragraph 31 Lagrange J states:

> 'However, in the LAC matter previously referred to [ie,*Chatrooghoon*] even though the LAC held that the decision of SARS to dismiss the employee contrary to the decision of the enquiry chairperson was *ultra vires, it proceeded to separately consider the reasonableness of the arbitrator's finding that the employee should be reinstated,* taking into account the fact that the employee was remorseful and had acted with *bona fide* motives, as well as the fact that he could be accommodated elsewhere in the organisation. After doing so, the LAC concluded that the arbitrator's award met the standard of reasonableness. *Consequently, it appears that the LAC's approach was that the fact that the decision of SARS to override the chairperson"s decision was ultra vires did not dispose of the need to evaluate the reasonableness of arbitrator's findings on the substantive merits of the dismissal.*'[7] (Emphasis supplied) (Footnotes omitted)

[39] First, it is plain that the remarks attributed to Ndlovu JA do not constitute a finding that the substitution of sanction issue is merely a matter of procedural

[7] At para 31.

fairness. Moreover, in my view, Lagrange J was misled by the way the *Botha case* was presented into the interpretation he gave to the judgments of Ndlovu JA and of Pillay J. First, the remark by Pillay J, in the *Kruger Review Case* appears in a passage in which she unequivocally held that the substitution decision was an instance of substantive unfairness. Pillay J did no more than declare that the substitution decision was *also* procedurally unfair for want of an opportunity for *audi alterem partem,* a secondary aspect. Secondly, the judgment of Ndlovu JA in *Chatrooghoon* is not authority for the notion that a finding that a decision to substitute a verdict and dismiss *per se* was invalid, did not "dispose of the need" to make a finding on the merits. The mere fact that in *Chatrooghoon* the court indeed did also address the merits of the dismissal decision is an insufficient basis upon which to understand that Ndlovu JA understood it was *necessary* to do so. Indeed the judgment of Ndlovu JA at paragraphs 37 and 38, dealing with the merits of the sanction of dismissal, does not say so, nor does he say so elsewhere his judgment. Moreover, it is not apparent that the question of the necessity of doing so was ever argued before the Court over which Ndlovu JA presided. Rather, it seems that, because the arbitrator had done so, and the Review Court had also done so, so did the Labour Appeal Court also, deal with that aspect. However, in my view, there is no logical room to have done so once it is properly understood that the substitution decision is substantively unfair. In any event, as is patently clear, the remarks made by Ndlovu JA about the merits of the sanction of dismissal had no effect whatsoever on the result, and had those remarks been omitted, the result of an invalid dismissal could not have be different to that which the court held to be the case.

[40] To sum up on this aspect, the *Chatrooghoon* case is not authority for the proposition that an invalid substitution of sanction is merely procedurally unfair and the judgment of Pillay J, in the *Kruger Review case,* does not hold the substitution decision was merely procedurally unfair, and therefore the premise upon which Lagrange J in the *Botha* case held it was appropriate to visit the merits of the alleged misconduct was incorrect.

The Jurisprudential nature of a disciplinary enquiry chair's power

[41] In my view, the proper starting point for an understanding of the critical controversy is the jurisprudential character of the disciplinary enquiry chair's decision. It is plain that the person appointed to perform that function is clothed with the *persona* of the employer. The chair's decision is that of the employer. Anomalously, an employer that is an organ of state may review itself, an escape mechanism not available to employers in the private sector. But plainly, an employer that is an organ of state cannot unilaterally repudiate its own decision. So much is beyond doubt as a result of the judgments in *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) at paragraphs 35 – 37 *,Benwenyama Minerals (Pty) Ltd Genorah Resources* (Pty) Ltd 2011 (4) SA 113 (CC) at paragraph 85, and *Ntshangase (Supra).*

[42] Thus, in my view, it must follow that if the substitution of a sanction is *invalid*, as found in *Chatrooghoon*, that invalidity vitiates the act completely; ie it *cannot* be made. Invalidity is more than procedural unfairness, it denotes an unlawful act; ie one the law will not acknowledge. Accordingly, in my view Pillay J was correct to hold that an invalid substitution of a sanction was not merely an instance of procedural unfairness that might leave open a space for a parallel enquiry into the appropriateness of a remedy for such a "procedural" mishap and, in turn, allow space to address the gravamen of the misconduct *per se*. Similarly, the contention that the judgment of Ndlovu JA, in *Chatrooghoon,* has application only to procedural unfairness cannot succeed because the force of those *dicta* by Ndlovu JA is that a substitution of a sanction without a lawful foundation, is not merely unfair for want of a procedural authorisation, but is invalid.

[43] It was upon this premise that Pillay J correctly dismissed the review application.

<u>The persisting curse of racism</u>

[44] Mr Kennedy devoted substantial attention to the anti-social significance in South African society of racist abuse, not least of all within an employment context in an organ of state. There can be no doubt that racial abuse is

serious because over and above the insulting attributes, that behaviour has the capacity to disrupt social order and engender the perpetuation of patterns of subordination and contempt which are anathema to the values upon which our society rests. There is also no doubt that such misconduct would certainly justify a dismissal. However, the mere fact that a species of misconduct, however alarming, would *entitle* an employer to fairly dismiss the perpetrator does not mean that the employer *must* elect do so.

[45] The dictum of Zondo JP *in Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp*[8] was alluded to, in which it was remarked that dismissal was the only appropriate sanction for racial abuse. The miscreant in that case had uttered these following words to his black subordinate who had been injured: "Los die kaffer – laat vrek" and refused to call an ambulance. Zondo JP stated this:

> '[37] The attitude of those who refer to, or call, Africans 'kaffirs' is an attitude that should have no place in any workplace in this country and should be rejected with absolute contempt by all those in our country - black and white - who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard the courts must play their proper role and play it with conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will 'give expression to the legitimate feelings of outrage' and revulsion that reasonable members of our society - black and white - should have when acts of racism are perpetrated.
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> [38] In *Van Wyk's* case Berker CJ said at 172 that the Namibian Supreme Court 'will act in the letter and spirit of the Constitution' and 'in doing so it will deal extremely severely with persons in the country who act contrary to the Constitution and policy'. In *Selzwedel's* case Mohamed CJ, dealing with a similar issue, made it abundantly clear at 79E of the judgment that in such cases the Supreme Court of Appeal would deal severely with criminal offenders guilty of such conduct. He further stated that, as the highest court in such matters, the Supreme Court of Appeal had to project this message clearly and vigorously. As judge president of this court and the Labour Court I

[8] (2002) 23 ILJ 863 (LAC).

> deem it appropriate to echo that message clearly and firmly. Within the context of labour and employment disputes this court and the Labour Court will deal with acts of racism very firmly. This will show not only this court and the Labour Court's absolute rejection of racism but it will also show our revulsion at acts of racism in general and acts of racism in the workplace in particular. This approach will also contribute to the fight for the elimination of racism in general and racism in the workplace in particular and will help to promote the constitutional values which form the foundation of our society.
>
> [39] *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 racist conduct, it will be seen that the first respondent's conduct was such that the only appropriate sanction for it was dismissal*. Maxim had done nothing to invite such conduct but, on the contrary, he was entitled to expect the first respondent to respect his dignity…'[9] (Emphasis supplied)

[46] This Court endorses these sentiments about racist conduct unreservedly. However, the phraseology employed by Zondo JP at paragraph 39 requires careful examination. It is unlikely that Zondo JP meant to say that the outcome of a disciplinary process could be determined simply by the nature of the misconduct *per se*. If that were the law, it would make a mockery of the duty to consider factors in mitigation. The *dictum* cannot therefore be read to mean it is a rule of law that those who utter racial abuse have to be dismissed. The correct position is that it is likely to be rare that a case in mitigation could be sufficiently meritorious to avoid dismissal. But from the point of view of fair process, such an enquiry is necessary, and as a matter of principle, the possibility of such a case in mitigation being successful must mean that there has to be space for it to be ventilated. Were it otherwise, an enquiry would be a sham.

[47] Understandably, the idea that a racist could be given a smack on the hand and told to go back to his desk sticks in one's craw. Both the arbitrator and the judge *a quo* expressed their disgust at that outcome. However, SARS, through its duly authorised decision-maker made a decision to impose a

[9] At paras 37-39.

sanction less than dismissal, exercising a discretion the decision-maker was authorised to make. SARS then purported to substitute that sanction when it had no power to do so. Whether SARS had or has a remedy to address its grievance about its own decision, in some or other form, then, or now, premised on the *dicta* in *Ntshangase* or premised on the provisions of Section 158 of the LRA, or any other basis, or is at large to invoke, independently of its dissatisfaction with the decision of the chair of the disciplinary enquiry, operational reasons to address the propriety of continued employment of Mr Kruger, are not matters about which this Court is required to pronounce a view.

[48] The established law about an employer being disallowed from interfering in the outcome of a disciplinary enquiry where the chair has the power to make a final decision, which is the crucial issue in this appeal, has, as its aim, the protection of workers from arbitrary interference with discipline in a fair system of labour relations. This principle is worthy of preservation.

[49] What seems to me to be of paramount importance is to recognise that racists have done quite enough damage to our country and we should guard against a hard case tempting us to distort established legal principle to ensure that they do not get away with insulting us. If we fell victim to that temptation, it would mean a subtle and exquisite victory for the racists. What the arbitrator did and what the Pillay J did, was not to allow their indignation to undermine their fidelity to the law. People, who, like Mr Kruger, are without honour, are beneficiaries of that system of law no less than the rest of us, an outcome which is our credit, not to theirs.

Conclusion

[50] As a result, in my view, it has not been shown that the award was one to which a reasonable arbitrator could not have come and the judgment of Pillay J on that finding must stand. The appeal must fail.

Costs

[51] As to costs, I take the view that the law and equity requires there to be no order.

The order

[52] The appeal is dismissed.

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Sutherland JA

Davis JA and Mngqibisa-Thusi AJA concur in the judgment of Sutherland JA

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