IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JR984/08

HEARD: 1 OCTOBER 2009

DELIVERED: 23 OCTOBER 2009

REPORTABLE

In the matter between

SOUTH AFRICAN REVENUE SERVICES APPLICANT

And

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION FIRST RESPONDENT

COMMISSIONER NOMSA MBILENINO SECOND RESPONDENT

JACOBUS JOHANNES KRUGER THIRD RESPONDENT

JUDGMENT

PILLAY D, J

Introduction

1. In this review, the employee pleaded guilty to the charge of twice referring to his team leader as a "kaffir." He was found guilty of using derogatory and abusive language.
2. The chairperson of the disciplinary inquiry, a panellist from Tokiso, appointed in terms of a collective agreement regulating dispute resolution, sanctioned the employee with a final written warning valid for six months, suspension without pay for 10 days and referred him for counselling.
3. Dissatisfied with the outcome the employer, the South African Revenue Services (SARS) dismissed the employee without a further hearing.
4. The employee submitted his dismissal dispute to the first respondent,

the Commission for Conciliation, Mediation and Arbitration (the CCMA).

5. The second respondent arbitrator found the dismissal of the employee to be unfair and awarded him reinstatement on the same conditions imposed by the disciplinary chairperson.

Submissions for SARS

6. Mr Bruinders, appearing for SARS, acknowledged that the provisions of the collective agreement required SARS to implement the finding and the sanction of a dispute resolver who chairs a disciplinary hearing, and that there is no provision in the collective agreement permitting SARS to interfere with the decision of the dispute resolver.[1]
7. Although he acknowledged the sanctity of collective agreements he nevertheless persisted that the arbitrator failed to ask the fundamental question:Does the implied term of trust and confidence, to which the collective agreement is subject, permit the reinstatement of an employee of an organ of state if he is guilty of insubordinate, racist, derogatory and abusive conduct? If the arbitrator had asked this question, she could not have found that SARS was not permitted to dismiss an employee simply because the collective agreement did not permit interference with the decision of the disciplinary chairperson.[2]
8. A reasonable arbitrator would have found that the collective agreement did not alter the law. SARS could not be expected to retain an employee in whom it had lost trust and confidence because of his insubordinate, racist, derogatory and abusive conduct towards his black supervisor.
9. *Country Fair Foods (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others* (2003) 355 LAC on which the arbitrator relied was different from this case in that SARS did not review the decision of the chairperson of the inquiry. It dismissed the employee

[1] Paragraph 13 of the heads of argument for SARS
[2] Paragraph 15-16 of the heads of argument for SARS

and the arbitration was a fresh hearing. [3]

10. A reasonable arbitrator could not rely on *Country Fair Foods* to award reinstatement when she finds an employee guilty and the employer adduces evidence that the employment relationship has broken down to the extent that the continued employment of the guilty employee is intolerable. [4]

11. *Country Fair Foods* found that it was procedurally unfair to interfere with the decision of a chairperson of a disciplinary inquiry not to dismiss. The LRA does not permit reinstatement when a dismissal is only procedurally unfair. Therefore, the dismissal of the employee was, at worst, only procedurally unfair. [5]

12. Mr Bruinders relied on *Ntshangase v MEC for Finance KwaZulu-Natal, MEC for Education for KwaZulu-Natal*, (SCA) (*per* Bosielo AJA) case number 402/08 unreported, delivered on 28 September 2009, three days before the hearing in this matter, to support his submission that the decision of the chairperson is not final and binding, but reviewable. Although this application is not a review of the chairperson's decision, but a review of the arbitrator's decision, he urged the Court to intervene nevertheless.

Submissions for the Employee

13. Mr Scheepers submitted for the employee that the finding and sanction of the internal disciplinary hearing had to be submitted to the Employee Relation's Department, which was responsible for implementing its outcome. SARS had no discretion to deviate from its collective agreement. The decision of the disciplinary hearing was peremptory and not advisory.

14. The South African Revenue Services Act 34 of 1997 (SARS Act) also

[3] Paragraph 18 of the heads of argument for SARS
[4] Paragraph 20 of the heads of argument for SARS
[5] Paragraph 17 & 21 of the heads of argument for SARS

did not give SARS or its commissioner any discretion or authority to deviate from its disciplinary code and procedure embodied in the collective agreement.

15. The employee had pleaded guilty at the disciplinary inquiry on advice from his representative. He had also clarified that although he could not recall using the offensive word because he was stressed and anxious, he did not deny using it because he did not think that his team leader, Mr Mboweni, would have lied under oath.[6]

16. The chairperson of the disciplinary hearing, Advocate Z Mdladla, had applied SARS' disciplinary code and procedure, which endorses the concept of progressive or corrective discipline rather than punitive discipline.[7]

17. SARS had submitted at the arbitration, but not at the disciplinary hearing, that the employee's conduct struck at the heart of the employment relationship and resulted in a complete breakdown of trust, thus rendering the employment intolerable.[8] SARS tendered no evidence that the trust between the parties had deteriorated to the extent that continued employment was intolerable.[9] On the contrary, Mr Moodley, who had initiated discipline on behalf of SARS accepted the sanction imposed by the disciplinary chairperson.[10]

18. The chairperson of the disciplinary inquiry had found that SARS adduced no evidence that the employment relationship between the parties was irreparably damaged.[11]

19. By altering the sanction to summary dismissal SARS acted irregularly and *ultra vires* since so justification existed for such a serious deviation from SARS' policies and procedures.

20. Although the arbitrator had to determine the substantive and procedural fairness of the dismissal, only the procedural fairness was in

[6] Paragraph 4 of the heads of argument for the employee
[7] Paragraph 6 of the heads of argument for the employee
[8] Paragraph 27 of heads of argument for the employee
[9] paragraph 30 and 34 of the heads of argument for the employee
[10] paragraph 31 and 32 of the heads of argument for the employee
[11] Paragraph 7 of the heads of argument for the employee

issue to the extent that SARS had to justify overturning the sanction of the chairperson. The guilt of the employee was not in issue. He did not ask to be cleared of any wrongdoing.

21. *Country Fair Foods* confirmed that an employer cannot overturn a sanction imposed by a chairperson of a disciplinary inquiry unless the Disciplinary Code and Procedure permits it.[12]

The Issues

22. The questions for the Court are the following:

a. Does the collective agreement regulating dispute resolution permit SARS to substitute the decision of the independent panellist who chaired the disciplinary inquiry with its decision to dismiss?

b. Is SARS allowed to dismiss the employee if it failed to present full evidence and argument for dismissal at the disciplinary hearing?

c. If the collective agreement permits SARS to dismiss the employee, must SARS afford the employee a hearing before dismissing him?

d. If the answer to the preceding questions is yes, is the award nevertheless reviewable?

The Collective Agreement

23. The collective agreement is silent about whether the decision of the chairperson of the disciplinary inquiry is final. It has no express provision that permits SARS to substitute the chairperson's decision with its own. Instead, the collective agreement obliges SARS to implement

[12] Paragraph 6 of the heads of argument for the employee

the decision of the disciplinary chairperson. [13]

24. When SARS concluded the collective agreement it must have been mindful that the SARS Act lists the maintenance of discipline as one of the responsibilities of its Commissioner.[14] It retained that responsibility by recording in the collective agreement the principle that discipline is a management function.[15] Although its Commissioner could assign or delegate his powers he could do so only to an employee of SARS; and even when he does so, he is not divested of his responsibility.[16]

25. These considerations would have influenced the balance of forces at play when the parties negotiated and concluded the collective agreement. SARS elected to execute its responsibility for discipline by conducting a disciplinary enquiry, chaired by one of its own managers or an independent panellist. SARS did not reserve for itself the right to substitute the decision of the chairperson of the inquiry with its own.

26. As the collective agreement is silent about whether SARS can substitute the decision of the chairperson of the enquiry with its own decision, the most reasonable inference is that the parties did not intend to grant to SARS the power of substitution. 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. Such interference would be the antithesis of the freedom to contract and bargain collectively.

27. This case is similar to *Country Fair Foods*. In that case the Labour Appeal Court (LAC) confirmed that without a provision in the employer's code permitting the managing director to interfere with the decision of the chairperson, such interference was unjustified.[17]

28. *Country Fair Foods* (distinguishable from *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC)) applies to this case. As SARS did not

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[13] paragraph 10.6.6 of the collective agreement
[14] section 9 of the SARS Act
[15] Paragraph 4.3 of the collective agreement
[16] Section 10 of the SARS Act
[17] paragraph.23 of Country Fair Foods

reserve for itself the right to substitute the decision of the chairperson of the inquiry with its own, it was bound to implement the decision of the chairperson. However, if it disagreed with the chairperson's decision, it had another remedy.

The Remedy

29. Although SARS could not substitute the decision of the chairperson of disciplinary enquiry, it could also not be saddled with an egregious decision. This much became common cause during the hearing, especially in the light of the facts in *Ntshangase*. If, therefore, in principle or as a matter of fairness and justice, it should be possible to reject the decision of the chairperson of disciplinary enquiry, does the law permit it?

30. Section 195 of the Constitution of the Republic of South Africa Act 108 of 1996 articulates the basic values and principles governing public administration. *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) confirmed that although section 195 provides valuable interpretive assistance, it does not found a right to bring an action.[18] The CC redirected Chirwa to look to the LRA for a remedy.[19]

31. In *Ntshangase,* the chairperson of the disciplinary enquiry had issued a final written for gross misconduct involving unauthorised expenditure in excess of R1,5m. The Supreme Court of Appeal (SCA) found a process in section 158(1)(h) of the Labour Relations Act 66 of 1995 for remedying an egregious decision of a chairperson of a disciplinary enquiry. The section conferred on the Labour Court the power to "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

32. The SCA came to this finding after enquiring whether the decision of the chairperson was administrative action and, if it was, whether it was

[18] *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) para 76 and 195
[19] *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) para 77

reviewable. It answered both questions affirmatively. The employer, it found, was an organ of state. It exercised public power in its capacity as the State when it appointed the chairperson of the inquiry. Therefore, the chairperson acted *qua* the State as employer.

33. Although the relevant provision in *Ntshangase*, namely Resolution 2 of 1999 of the Public Service Co-ordinating Bargaining Council, which regulated the disciplinary procedure, had been negotiated and agreed with the trade unions, the employer retained the power to appoint the chairperson of the inquiry.

34. A similar situation prevails in this case in which the collective agreement provides as follows:

> "10.4.1 The disciplinary hearing will be chaired by a delegated and an authorised management representative, or alternatively one of the SARS dispute resolvers at the employer's cost." [20]

35. Irrespective of whether the chairperson of the enquiry was an independent panellist or one of SARS managers, she executed SARS' responsibility for discipline. As such, the chairperson of the disciplinary enquiry, acted *qua* SARS as the employer. In so assigning his responsibility to the chairperson, the Commissioner could not divest himself of his responsibility.[21]

36. SARS is an organ of state exercising public power and performing public functions. As the chairperson of the disciplinary enquiry acts in place of SARS, her decision is reviewable as a decision of SARS as employer under section 158(1)(h).

37. When the LAC heard Ntshangase's case,[22] it could not decide whether the chairperson of the enquiry "perform(ed) a function on behalf of the employer or whether he was performing such function as an

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[20] Page 72 of the record

[21] Section 10 of the SARS Act

[22] The Member of the Executive Council for Finance, KwaZulu Natal and other v Dorkin and Ntshangase Case no: DA16/05

independent tribunal"; it preferred instead to determine whether the decision of the disciplinary chairperson was administrative action.[23] The LAC was not referred to *Chirwa,* which had been issued barely a month earlier on November 28, 2007.

38. At the SCA, however, the appellant in *Ntshangase* referred to *Chirwa.* In *Chirwa* the minority opinion of Ngcobo J, endorsed *orbiter* by the majority, was that dismissal was not administrative action. Nor was it justiciable under PAJA.[24] At the very least *Chirwa* was persuasive; but the SCA did not apply it.

39. In concluding that a disciplinary enquiry is administrative action both the SCA and the LAC relied on *Sidumo v Rustenberg Platinum Mines (Pty) Ltd*. (2007) 28 (IOJ) 2405 CC, in which the majority held that arbitration under the auspices of the CCMA is administrative action.

40. Section 158(1)(h) does not prescribe as a prerequisite for review that the decision or act of the employer must amount to administrative action. Correctly therefore, this court, unlike the SCA, and probably the LAC before it, is not invited to determine whether the decision of the disciplinary chairperson or SARS' decision to dismiss amounted to administrative action.

41. Subsequently, the controversy about what constitutes administrative action in employment has been put to rest. In a judgment issued after this matter was heard, the CC settled the controversy on 7 October 2009 by declaring that "(g)enerally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA".[25] In *Gcaba v Minister of Safety and Security and Others* Case CCT64/08 (2009) ZACC 26 para the CC confirmed the *obiter* and

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[23]The Member of the Executive Council for Finance, KwaZulu Natal and other v Dorkin and Ntshangase Case no: DA16/05 para 10

[24] *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) para 73 and 142

[25] *Gcaba v Minister of Safety and Security and Others* Case CCT64/08 (2009) ZACC 26 para 64

minority opinions in *Chirwa*[26] that dismissal is not administrative action. Nor are dismissal and other employment and labour relationship issues justiciable under PAJA.[27] Dismissal, like the failure to promote and appoint an employee, is therefore not administrative action.[28]

Grounds and Standard of Review

42. If decisions and acts of the State as employer are reviewable, what then are the grounds of review?

43. Section 158(1)(h) does not prescribe the grounds of review. Although in *Ntshangase*[29] the SCA acknowledged that the grounds of review are those "permissible in law", it did not identify the applicable law. Having found that the disciplinary hearing was administrative action, the SCA probably had in mind grounds of review applicable to administrative acts. However, such grounds could not have been sourced from the Promotion of Administrative Justice Act 3 of 2000 (PAJA) because the SCA decided that the review was not in terms of PAJA but section 158(1)(h). Also, now that it is resoundingly established that employment decisions are not administrative acts, the grounds of review do not have to be sourced from administrative law.

44. Furthermore, because the power to review in section 158(1)(h) is located within the LRA it also does not follow that the grounds for reviewing arbitration awards under section 154(1) will apply automatically to review under section 158(1)(h).

45. The law determining the grounds of review under section 158(1)(h) must therefore be sourced from the common law. Case by case, the

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[26] *Gcaba v Minister of Safety and Security and Others* Case CCT64/08 (2009) ZACC 26 para 67

[27] *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) para 73 and 142; *Gcaba v Minister of Safety and Security and Others* Case CCT64/08 (2009) ZACC 26 para 64

[28] *Gcaba v Minister of Safety and Security and Others* Case CCT64/08 (2009) ZACC 26 para 66 and 68

[29] *Ntshangase v MEC for Finance KwaZulu-Natal, MEC for Education for KwaZulu-Natal*, case number 402/08 unreported, delivered 28 September 2009 (SCA) para 18.

courts must develop the common law to determine the grounds of review under sub-subsection (h), just as they developed the grounds of review under sub-subsection (g) of section 158(1). Predictably, as with sub-subsection (g), the grounds of review are likely to be similar to sub-subsection (g) and section 154(1).

46. Even though the SCA did not specify either the applicable law or the grounds of review, it did, however, set the test for review to be fairness, rationality and reasonableness.[30]

One Cause, Two Processes?

47. Does section 158(1)(h) duplicate processes for a single cause of action?

48. Textually, section 158(1)(h) invites a broad interpretation of "any" decision or act of the State as employer. Contextually, the section is narrowed by a purposive interpretation. In *Chirwa,* Ngcobo J, supported by the majority, urged that the LRA be interpreted purposively. Applying a purposive interpretation the learned judge (as he then was) opined that the manifest objects of the LRA is to subject all employees, public and private, to its provisions.[31] The CC unanimously endorsed this opinion when it emphasized the following in *Gcaba*:

> "The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system."[32]

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[30] *Ntshangase v MEC for Finance KwaZulu-Natal, MEC for Education for KwaZulu-Natal*, case number 402/08 unreported, delivered 28 September 2009 (SCA) para 20.
[31] *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) para 99-101, at 102
[32] *Gcaba v Minister of Safety and Security and Others* Case CCT64/08 (2009) ZACC 26 para 34 and 56

49. One of the primary purposes of the LRA was to create a predictable dispute resolution system accessible to all. A key feature of the "carefully-crafted" system is the filtering of labour disputes through compulsory conciliation. Another compelling purpose was instilling parity in dispute resolution systems for the private and public sectors. These purposes of the LRA will be thwarted if every decision or action of the State as employer is challengeable on review under section 158(1)(h).

50. Furthermore, section 158(1)(h) does privilege parties in public employment over private employment. Hence to preserve and protect the scheme of the LRA, section 158(1)(h) should be interpreted narrowly and purposively. Therefore, a review under section 158(1)(h) should be available only when the LRA does not prescribe another procedure.

51. Following a narrow approach to section 158(1)(h), the word "review" should also be strictly interpreted to mean "reconsider, re-examine, reassess, re-evaluate". Therefore, a party seeking a review may not raise new matter, that is, matter not produced for consideration to the initial decision-maker.

Findings

52. 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.

53. The award is therefore reasonable and not reviewable.

54. Accepting the invitation from Mr Bruinders to not put form over substance and to treat this application to review the award also as an application to review the decision of the disciplinary chairperson, the

court finds that SARS must fail in this review too. SARS did not make out a case for irretrievable breakdown in the employment relationship at the disciplinary hearing.[33] It attempted to make this case out at arbitration and in this application, emphasising that SARS is an organ of state and as such, should not be seen to be employing persons guilty of such serious misconduct.

55. In *Edcon Ltd v Pillemer NO and Others* (191/08) (2009 ZASCA 135 (5 October 2009) (unreported), yet another the judgment of a superior court issued after the hearing in this case, the SCA held that in the absence of evidence showing damage in the trust relationship, the decision to dismiss was unfair.

56. As SARS did not make out a case for irretrievable breakdown at the disciplinary hearing there is nothing for this court to review in terms of section 158(1)(h). Furthermore, *Edcon Ltd* clarifies that an employer resisting reinstatement must prove the irretrievable breakdown in the relationship.

57. The application is dismissed with costs.

Pillay D, J

APPEARNCES:

For the applicant : Mr Bruinders SC
Instructed by : Routledge Modise

For the third respondent : Mr G Scheepers
Instructed by :Jana Beukes

[33] Para 9.4 of Outcome of disciplinary hearing; Page 282 of record