IN THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Reportable

Case no: JR 1281/19

In the matter between:

MMATLOU MARIA MOLOANTOA **Applicant**

and

CCMA **First Respondent**

COMMISSIONER THEMBA MANGANYI N. O **Second Respondent**

ESKOM SOC LIMITED **Third Respondent**

Heard: **19 May 2021**

Delivered: **31 May 2021**

Summary: Opposed Review – Eskom reviewed the sanction of suspension as imposed by its internal chairperson. The principle developed in *BMW v Van Der Walt* considered. The view held by the LAC in *SARS v CCMA-Kruger* applied – the dismissal invalid and substantively unfair. It is doubted that the view in *SARS v CCMA-Kruger* is consistent with the view in *Steenkamp v Edcon*. The Labour Court bound by the latest LAC decision on the matter.

The Labour Court takes a view that any dismissal challenged in terms of the LRA is challenged on the basis of fairness alone. Where an employer dismisses an employee for reasons of misconduct, such a dismissal is for a

fair reason in terms of section 188 of the LRA. In *casu*, Eskom dismissed the applicant for reasons related to conduct. That makes the dismissal to be for a fair reason. Where the misconduct involves an element of dishonesty the continuation of employer and employee relationship is rendered intolerable and a commissioner is not at large to interfere with the sanction of the employer. Where a misconduct is involved and such misconduct involves the element of dishonesty, the dismissal is substantively fair. A finding by a commissioner that a dismissal is fair in such circumstances is one that a reasonable decision maker may reach.

However in following the binding decision of *SARS v CCMA-Kruger*, the conclusion to reach is that the dismissal of the applicant was substantively unfair and the decision to the contrary is one that a reasonable decision maker may not reach. In light of the fact that the issue of fairness of the dismissal does not arise in instances where the dismissal is *ultra vires*, this Court must find on that basis alone that the dismissal of the applicant is substantively unfair.

With regard to the remedy, this Court is reluctant to order reinstatement taking into account the circumstances surrounding the misconduct of the applicant. In my view compensation is the appropriate remedy. Held: (1) The award is reviewed and set aside and replaced with an order of Court. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] An invalid dismissal, is it also an unfair dismissal? Where an employer reviews the sanction of the internal chairperson in instances where the

disciplinary code does not specifically sanction that review, is there room for the application of the *ultra vires* principle to a point that the dismissal is substantively unfair? The concept of invalid and/or unlawful dismissal has been rejected by the majority in *Steenkamp and Others v Edcon Ltd*[1], when the Constitutional Court rejected the findings reached in *De Beers Group Services (Pty) Ltd v NUM*[2] and *Revan Civil Engineering Contractors and Others v NUM and others*[3]*.* The majority in *South African Revenue Services v CCMA and Others-Kruger*[4] concluded that a dismissal similar to the one involved in this matter is invalid. *Steenkamp* judgment was handed down in January of 2016. Unfortunately on appeal the Constitutional Court did not find it opportune to overturn, as it did in *Steenkamp,* the finding that the dismissal is invalid and substantively unfair.[5] This was prompted by the fact that SARS limited its case to the issue of the remedy of reinstatement as opposed to the finding that the dismissal was substantively unfair.

[2] The application before me somewhat reopens the issues outlined above. It is an opposed application seeking to review and set aside an arbitration award issued by Commissioner Manganyi (Manganyi). He concluded that the dismissal of Mmatlou Maria Moloantoa (Moloantoa) is both substantively and procedurally fair. Moloantoa was aggrieved by that finding and launched the present application. The application is opposed. However, Eskom Holdings SOC Ltd (Eskom) filed an answering affidavit out of the time prescribed by the rules of this Court. Condonation was sought. Since there was no objection on the late delivery from Moloantoa, a condonation application was not necessary. For that reason, this matter was treated as opposed without the need to condone the late filing of the answering affidavit.

Background facts

[1] [2016] 4 BLLR 335 (CC).
[2] [2011] 4 BLLR 319 (LAC).
[3] (2012) 33 ILJ 1846 (LAC).
[4] [2016] 3 BLLR 297 (LAC).
[5] See: *SARS v CCMA and Others* [2017] 1 BLLR 8 (CC).

[3] Moloantoa was employed by Eskom effective 1 November 2013. She held a position of Assistant Officer Documentation as at the time of her dismissal. Moloantoa was approved by Eskom to attend a training course in Midrand. On 15 February 2016, she travelled from Medupi Power Plant located at Lephalale to Midrand. She travelled as a passenger in a co-worker's private vehicle. The co-worker charged her an amount of R400.00 for the travel.

[4] On her return she lodged a claim for reimbursement of the travel costs. The electronic system in place allowed her to input a claim of an amount of R2 584.80. Apparently 713 kilometers were inputted on the electronic system and the system automatically calculated the amount to be R2 584.80. The claim was approved by her manager and was paid to her.

[5] Around September 2017, Eskom received an anonymous tip alerting it of fraudulent travel claims made by several employees in Eskom. A forensic investigator was appointed to investigate the tip off. The investigations revealed that Moloantoa was also one of the employees who lodged fraudulent travel claims. Eskom introduced some form of amnesty for employees who come clean on their wrongdoing. Moloantoa did not come clean.

[6] On 22 February 2018, Moloantoa was charged with the following charge:

> "Misconduct 2.30 makes any false statement or representation to, or ensues from his/her duties in that-
> It is alleged that you conducted yourself in a grossly and fraudulent manner in that on 15th and 18th February 2016 you travelled from Lephalale to Midrand and back as a passenger with a colleague…but upon your return you submitted a travelling claim…whereas you have not operated any vehicle and your conduct resulted in you receiving R2 584.80) from Eskom."

[7] At that time, Eskom had in place an approved Disciplinary Procedure (the Procedure)[6]. The Procedure contemplated a disciplinary enquiry for less

[6] Signed and dated 02 March 2011 and reviewable on November 2013.

severe offences and a disciplinary hearing, which takes a shape of an adversarial process, in instances where dismissal as a sanction is possible. Usage of disciplinary hearing did not automatically imply that dismissal will be the only suitable sanction. Other sanctions provided for in the Procedure were possible. The Procedure was negotiated with NUMSA, NUM and Solidarity.

[8] One Mr TD Zulu (Zulu), a Project Manager: (Kriel) was appointed to be the chairperson of the disciplinary hearing of Moloantoa. Zulu found Moloantoa guilty as charged and after considering mitigating and aggravating circumstances, he imposed one of the sanctions provided for in the Procedure – suspension without pay for seven working days. Moloantoa served her sanction. Two weeks or so after her return to work, on 09 May 2018, one Mr Rudi Van Der Wal (Wal), the General Manager: Medupi Power Station, addressed correspondence to Moloantoa calling upon her to make representations as to why she should not be dismissed for the misconduct she was found guilty of by Zulu.

[9] Moloantoa was a member of NUMSA at that time and NUMSA objected to the process citing some cases against such process undertaken by Wal. On 17 May 2018 Wal disagreed with the objection by NUMSA and concluded that Moloantoa was grossly dishonest and the gravity of this offence is that it is a serious fraud. He then imposed a sanction of summary dismissal. NUMSA and Moloantoa were displeased thereby and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging an unfair dismissal. Conciliation failed to resolve the dispute.

[10] On 5 December 2018, Manganyi issued the impugned award. The application seeking to impugn the award was launched outside the prescribed six week period. Condonation was sought by Moloantoa. The application was argued before me on 19 May 2021 and judgment was reserved.

Grounds of review

[11] As an opening gambit, Moloantoa alleges that the award is unreasonably. She alleged that Manganyi committed a misconduct when he ruled that Eskom was empowered to revoke the sanction imposed and already served. She contended that Manganyi erred in his application of the principle condoning the double jeopardy rule. She contended that Eskom as an organ of State should have availed itself to the own decision review in terms of section 158 of the Labour Relations Act[7] (LRA). She further contended that Manganyi erred in applying the inconsistency rule.

Evaluation

Condonation issue

[12] Eskom vigorously opposed the granting of condonation in this matter. The issue whether condonation must be granted or refused fall within the discretion of the judge hearing it. A slew of authorities accepted the factors set out in *Melane v Santam Insurance Co. Ltd*[8]. One of the factors is providing of an acceptable and adequate explanation. In brief the explanation of Moloantoa is one that seeks to blame her trade union NUMSA. According to her explanation, NUMSA did not launch the review application as promised. She made follow ups for a period of five months to no avail. Having failed she approached her attorneys of record, who there and then advised her that she is six weeks late. I tend to agree with Ms Barnes SC, appearing for Eskom that the explanation is not adequate and as held in previous judgments there is a limit beyond which litigants can put a blame on representatives. As held in *Melane*, this factor is not decisive. It must be weighed with other factors. In certain instances, a weak explanation is compensated by strong prospects of success.

[13] I need to point out that trade unions are not necessarily representatives in the normative sense. In terms of section 200 (1) of the LRA, a registered trade may act in the following capacities in a dispute which any of its members is a

[7] No. 66 of 1995, as amended.
[8] 1962 (4) SA 531 (A).

party, namely (a) own interest; (b) on behalf of member; and (c) in the interest of member. At the arbitration proceedings NUMSA was a party, as it is entitled to be by virtue of section 200 (2) of the LRA. Legal representatives do not have the same luxury as trade unions. To my mind the authority of *Saloojee and another NNP v Minister of Community Development*[9] did not have trade unions in mind when it stated the limit beyond which a litigant can escape the consequences of an attorney's lack of diligence.

[14] Therefore, I take a view that NUMSA as a party to the dispute involving Moloantoa and Eskom cannot be treated the same way as a legal representative in this instance. NUMSA was obliged by its constitutional arrangements to assist Moloantoa. That being the case, there was no obligation on the part of Moloantoa to have made follow ups like in a situation of an attorney and client. Therefore an explanation by trade union members that they looked upon their trade union to assist them should not be rejected lightly on the simple basis of lack of follow up as it is the case in an attorney and client situation.

[15] Nevertheless, in this matter, I am satisfied that Moloantoa possesses strong prospects of success and the interests of justice drove me to a conclusion that condonation must be granted.

Merits

[16] In the main, the central legal issue pertinent in this matter is the question whether an employer can legally revoke its earlier decision to impose a lesser sanction. In *casu*, there is no dispute that Eskom had issued a sanction of suspension and later revoked it to a harsher sanction of dismissal. The commissioner and all the parties involved approached the issue as one of holding a second hearing hence reliance on the *BMW (SA) Pty Ltd v L Van*

[9] 1965 (2) SA 135 (A).

Der Walt[10] decision. In my view the true question is that of powers to revoke a sanction imposed earlier.

The principle in Van Der Walt and developments thereafter

[17] One distinguishing factor between *Van Der Walt* and this matter is that Moloantoa did not face a new and different charge brought about by newly discovered facts. In *casu*, Wal took a view that the sanction as imposed by Zulu was not adequate. In other words, the punishment meted out did not fit the offence. The import of *Van Der Walt* is to be found in the following *dictum* by Conradie JA:

> "[12] Whether or not a second disciplinary hearing may be opened against an employee would, I consider, depend upon whether it is in all the circumstances fair to do so...I should make two cautionary remarks. It may be that the second disciplinary enquiry is *ultra vires* the employer's disciplinary code…That might be a stumbling block. Secondly, it would probably not be considered fair to hold more than one disciplinary enquiry save rather in exceptional circumstances."
>
> (Own emphasis)

[18] I take a view that the cautionary remarks do not constitute the *ratio decidendi* of the judgment and were made *obiter dictum*. The *ratio decidendi* is constituted by the underlined opening parts of paragraph 12. This view is fortified by the following:

> "[11] The new and different charge of misconduct is the one cited at the beginning of this judgment on which the second respondent was found guilty…"

[19] Therefore, when Conradie JA referred to a second disciplinary hearing he must have related it to the new and different charge. It seems logical in my view to refer to a new and different charge as a second hearing as opposed to

[10] (2000) 21 ILJ 113 (LAC).

the changing or revocation of the sanction. The changing of a sanction often happens without presenting a new and different charge. If the view is correct, then the *ratio decidendi* does not apply to the issue of change of a sanction. I thus consider the issue of fairness to be relevant to the holding of the second hearing and not the revocation of the sanction. The *obiter dictum* relating to *ultra vires* refers yet again to the holding of a second hearing as opposed to the revocation of a sanction. Similarly the exceptional circumstances relates to the holding of the second or even the third hearing.

[20] *Brandford v Metrorail Services and others*[11] is a case that sought to explain the principle in *Van Der Walt*. Of importance, the facts in *Brandford* were not similar to those in *Van Der Walt*. In *Brandford*, the employee was issued with an oral warning by his line manager. Later he was formally charged. The employee protested that he is being disciplined twice. The chairperson of the disciplinary hearing rebuffed the protest and concluded that the employee was not disciplined twice, as the first process with the line manager was more of discussions. Wallis JA in a minority judgment concluded as follows:

> "[7] …Where there has been compliance with the company's disciplinary code and the first enquiry has adequately canvassed the facts involved, it will be unfair to hold a second hearing."

[21] In the majority judgment penned by Jafta AJA he rejected the contention that the holding of the second hearing is permissible only in exceptional circumstances and concluded that fairness alone is to be the decisive factor in determining whether or not the second enquiry is justified. As indicated above, I plentifully agree. He stated that the true legal position pronounced in *Van Der Walt* is that a second enquiry would be justified if it would be fair to institute it.

[22] It is key to note that according to Jafta AJA in *Brandford* there was only one enquiry as opposed to two. He was prepared to assume that because two successive punishments were imposed, there were two enquiries. Further, he

[11] [2004] 3 BLLR 199 (LAC).

assumed that because of the assumption he made that two successive punishment equates two enquiries, *Van Der Walt* shall be applied. To my mind, *Brandford* is not authority for the proposition that when a sanction is reviewed that equates a holding of a second enquiry, which prompts application of the *Van Der Walt* principle. Jafta AJA took a view that the holding of the second enquiry – referring to the imposition of the subsequent sanction – is not *per se* rendering the dismissal unfair.

[23] The learned Jafta AJA found as misconception of the law that the issuing of a warning by the line manager was binding on the employer to a point that it was not permissible to later charge in respect of the same misconduct. Of cardinal importance, he reached the following key conclusion:

> "[21] As a result of the arbitrator's misconception of the law relating to the propriety of holding second disciplinary enquiry, the employer in the present matter was denied the opportunity of having the issue of fairness of the dismissal considered in a fair public hearing and by means of applying the relevant law. The arbitrator failed to consider whether or not in the circumstances of the present matter the employer was entitled to hold the enquiry that led to the appellant's dismissal and if so whether the sanction of a dismissal was fair."

[24] I understand the learned judge to be saying that even in an instance of a reviewed sanction, an employer once challenged must be afforded an opportunity to show that the dismissal was for a fair reason – misconduct – and that the sanction of dismissal was fair. This in my view accords with clear legal position that arbitrations are hearings *de novo*[12]. The above is also consistent with section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

[25] Ultimately, the import of *Brandford* is that the holding of a second hearing is guided by fairness and nothing else. To the extent that it could be argued that

[12] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

imposing a different sanction is tantamount to a second hearing what will guide such imposition is fairness and nothing else.

[26] The next important case in line is that of *County Fair Foods (Pty) Ltd v CCMA and others*.[13] This case came to the Labour Court and the LAC as a review. The arbitrator had found that the dismissal was procedurally unfair for reasons that an employer had altered the sanction imposed earlier to one of dismissal. The LAC observed that the dispute concerned the unfairness of interfering with the decision of the disciplinary tribunal which had properly been appointed by the company to which interference no express provision was contained in the disciplinary code which could justify the actions of the interference. Although *Van Der Walt* was referenced, it does not appear to have been relevant to the case. In the main, the LAC was concerned with acting without recourse to express provision of the disciplinary code. On the strength of this judgment, it seem to be procedurally unfair for an employer to interfere with an imposed sanction in the absence of express provisions in the disciplinary code to do so.

[27] If this Court were to apply the *dictum* of this case without more, since there is no express provisions in the negotiated Procedure that allows Eskom to interfere with the sanction as imposed by Zulu, the dismissal of Moloantoa is procedurally unfair. Clause 6.8 of the Procedure, provides that the chairperson, in this instance Zulu, is obligated to issue a sanction and no other person.

[28] The LAC followed its decision in *County Fair* in a subsequent judgment of *SARS v CCMA and others (Chatrooghoon).*[14] The facts of this case are strikingly similar to the facts of the one before me. Mr Chartrooghoon pleaded guilty and after hearing mitigating and aggravating factors the chairperson imposed a sanction of suspension without pay and a final written warning. The business area manager recommended that the sanction be altered to one of

[13] (CA12/1/2001) [2002] ZALAC 31 (11 December 2002).
[14] [2014] 1 BLLR 44 (LAC).

dismissal. The general manager endorsed the recommendation. The LAC reached the following conclusion:

> "[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."

[29] Having had regard to the wording of the collective agreement the LAC concluded that SARS was prohibited by the collective agreement to substitute the sanction imposed by the chairperson. Importantly the following conclusion was reached:

> "[30] …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."

[30] The LAC concluded that the fact that in *County Fair* the disciplinary code was not incorporated in a collective agreement makes no material difference. In *casu*, an attempt was made to give Moloantoa an *audi alteram partem*. Based on the interference with the sanction of the chairperson, the commissioner found the dismissal to be unfair and reinstated Chatrooghoon. The LAC confirmed the decision of the Labour Court that the award of the commissioner was one that is reasonable.

[31] Following *County Fair* and *SARS-Chatrooghoon,* it became an accepted principle that an employer who substitutes a sanction without being authorised by the disciplinary code acts *ultra vires* and on that basis alone the dismissal becomes unfair. I must remark that this position seem to be at odds with *Brandford*.

[32] The LAC in *MEC for Finance Kwazulu-Natal and Another v Dorkin N O and Another*[15] when dealing with a review of the decision of an internal chairperson who imposed a sanction less than dismissal the LAC deemed it

[15] [2008] 6 BLLR 540 (LAC)

necessary to endorse the *Van Der Walt* decision. Interestingly, the LAC concluded thus.

> "[14] …In light of that decision (*Van Der Walt*) it would be consistent with that decision to hold in this case that this case presented exceptional circumstances and the second respondent had a right to approach the Labour Court to seek to alter the decision on sanction made by the first respondent."

[33] This is rather surprising regard being had to *Brandford* that what would allow an alteration of a sanction is fairness alone and not some exceptional circumstances. Unless one must understand this *dictum* to mean that in order to approach the Labour Court to use its review powers and alter an inappropriate sanction, a party must show exceptional circumstances.

[34] Nonetheless, that which was introduced by *Van Der Walt* culminated in what appears to be the current legal position as set out in the case of *SARS v CCMA and others*[16] *(Kruger case)*. This case accepted the principle in *County Fair* and *SARS (Chatrooghoon*). An interesting finding was reached by Sutherland JA and he said:

> "[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; i.e. it cannot be made. Invalidity is more than procedural unfairness, it denotes an unlawful act; i.e. 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 space for a parallel enquiry into the appropriateness of a remedy for such "procedural" mishap and, in turn, allow space to address the gravamen of the misconduct *per se*…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 authorization, but is invalid."

[16] Ibid at para 4.

[35] I respectfully find this conclusion to be at odds with *Brandford*. In *Brandford*, Jafta AJA concluded that depriving an employer an opportunity to prove the fairness of the dismissal and its appropriateness is at odds with section 34 of the Constitution. In my view, this is correct. Secondly, I find this *dicta* to be at odds with the *Steenkamp* decision. The LRA does not know an invalid dismissal but knows an unfair and automatically unfair dismissal. This *dicta*, problematic as it may seem, met the eyes of the Constitutional Court justices in *SARS v CCMA and others*[17]*.* However, in my view, it cannot be said that the *dicta* met with the approval or disapproval of the justices. This is because of the following findings:

> "[34] Initially, SARS challenged the Arbitrator's decision on the basis that her construction of the collective agreement as not allowing its Commissioner to substitute the Chairperson's sanction was flawed. Also that the dismissal was substantively and procedurally fair because its Commissioner was, in terms of SARS' disciplinary code, well within his rights to increase the sanction. That ground was abandoned the day before the matter was heard by this Court. In considering the merits, it is thus necessary to bear in mind that, to the extent that the Arbitrator may have impliedly concluded that Mr Kruger's dismissal was substantively unfair, SARS does not attack that finding. It attacks only the reinstatement part of the award. We are therefore only asked to consider the appropriateness or reasonableness of the reinstatement. And the question is whether the reinstatement is reviewable and, if so, on what basis.

[36] On application of the *stare decisis et quid movere* principle, the latest legal position is that, as the Labour Court, I am bound by the LAC's conclusions. Thus, substitution of a sanction of a chairperson is invalid and substantively unfair. That position discounts the justification of the dismissal and its appropriateness. In fact Sutherland JA concluded that once this point is reached – that the substitution is invalid – the enquiry must end. There can be no journey to consider whether the substituted sanction finds support from a fair reason – misconduct- or an appropriate and fair basis.

[17] [2017] 1 BLLR 8 (CC).

Is an employer deprived of justifying the substituted sanction of dismissal?

[37] On the strength of the present *dicta* of *SARS-Kruger*, a substitution is invalid and substantively unfair and there is no room for an employer to justify the fairness of the dismissal and the appropriateness of the sanction. *Brandford* suggested otherwise.

[38] In my respectful view, when regard is had to *Steenkamp*, an employer is entitled to dismiss an employee on account of misconduct. Section 188 of the LRA states that a dismissal that is not automatically unfair is fair if the reason for the dismissal is related to conduct. Without hesitation, it is common cause that Moloantoa was dismissed for misconduct. On application of section 188, such a dismissal was for a fair reason. Schedule 8 of the LRA provides that any person considering the fairness of a dismissal must be satisfied that dismissal as a sanction is appropriate. Section 186 of the LRA defines dismissal to mean termination by the employer with or without notice. Similarly, I have no hesitation in my mind that what occurred to Moloantoa was a dismissal as defined. In terms of the LRA, Moloantoa had a right to challenge the fairness of her dismissal.

[39] Section 192 of the LRA provides that once dismissal is established, the *onus* is on the employer to show that the dismissal is fair. Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. In my view, once an employee disputes the fairness of a dismissal, section 34 requires that that dispute to be resolved by application of the LRA. That being the case, an employer must discharge the *onus* by proving the fairness and the appropriateness of the dismissal. Although I am bound to follow *SARS-Kruger*, in my respectful view, whether the substitution of a sanction by one of dismissal may be invalid due to the substitution of a sanction not being provided for by the disciplinary code, once an employee

challenges an employer about the fairness of that dismissal then section 188 of the LRA must be applied to fairly resolve that dispute. That in my view implies that an employer must still show that the dismissal effected is both substantively and procedurally fair. To deprive an employer to do so is, in my view, at odds with section 34 of the Constitution.

[40] Two of the recent judgments of the Labour Court followed *SARS-Kruger* to the fullest. In *NUM obo Members and others v Arcelormittal SA Ltd and others*[18] my sister Mahosi J reached the following conclusions:

> "[30] In light of the case law, if there is no collective agreement or a disciplinary code in place, an employer may substitute the sanction of a disciplinary chairperson if it is fair to do so and with engaging the employee, either in another disciplinary enquiry or to have the employee make submissions.
>
> [31] However, where there is a collective agreement in place, the parties are bound by such. Therefore, the employer will not be allowed to substitute the findings of the chairperson and if done the decision is unfair…"

[41] The above findings records what Mahosi J understands the case law to posit. I have a nuanced understanding. As I understand it, it is not the presence of a collective agreement or a disciplinary code that matters, but whether those instruments empowers the employer to substitute the sanction. Ultimately, Mahosi J concluded that had the arbitrator considered whether the substitution impacted on the substantive fairness of the dismissal she would have found that the dismissal was substantively unfair. It does seem that Mahosi J in coming to that finding was actuated by her earlier finding that the substitution of the sanction by AMSA was in violation of the Code and therefore invalid.

[42] I have already pointed out above that the LRA does not know an invalid dismissal. In terms of section 188 of the LRA a dismissal is substantively

[18] (JR 802/18) [2020] ZALCJHB 167 (2 September 2020)

unfair if it is not related to misconduct and the sanction of dismissal is not appropriate. As indicated above, in my view, in instances where the substitution is made in contravention of a disciplinary code (even if it is in a collective agreement), an employer is still entitled by proper application of the law to show that the sanction is appropriate before a determination may be made about the substantive fairness of the dismissal. I take a view that where a collective agreement is involved – a change of the sanction - would breed a dispute about the interpretation and application of a collective agreement. In terms of section 24 of the LRA such disputes are to be resolved differently. Given my reservations expressed above, with considerable regret I am not in full agreement with Mahosi J. I do accept that the view expressed by Mahosi J is in consonant with a binding authority of *SARS-Kruger*.

[43] In another judgment of *Beyers v Anglo American Platinum Ltd Mogalakwena Section and others*[19] my sister Nkutha-Nkontwana J concluded that it was incumbent on the employer to prove exceptional circumstances that justified its decision to review and change the employee's final written warning. If *Brandford* is followed, the barometer is that of fairness only and not exceptional circumstances. Ultimately she reached this conclusion.

> "[34] In the absence of exceptional circumstances to justify the review enquiry, it is my view that such conduct is impermissible in terms of the *doctrine of the right of election* which is foundational in our law and espoused in labour matters as well."
>
> [35] Anglo American exercised an election to issue Mr Beyers with a final written warning, final disciplinary discretion it had delegated to a person *qua* chair of disciplinary enquiry…Accordingly, having exercised its election, Anglo American was barred from blowing hot and cold.
>
> [37] …As a result, the award on substantive fairness stands to be reviewed and set aside."

[19] [2020] 2 BLLR 173 (LC).

[44] It does seem that the conclusions reached by Nkutha-Nkontwana J were largely predicated on the doctrine of election as opposed to absence of exceptional circumstances. By electing to impose the sanction of final written warning, the employer was bound by that election and a breach of that doctrine leads to substantive unfairness. I am not certain whether this is the correct legal position. *Brandford* mentioned fairness as a barometer and none of the previous judgments mentioned the doctrine of election. One doubts whether a doctrine of election may freely operate in the kingdom of fairness. In *UMSA v Vetsak Co-operative Ltd*[20], Smalberger JA stated the following about fairness:

> "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment…"

[45] In fairness, an employer may not be bound by a decision of its employee who may have chosen to ignore the binding practices and procedures of an employer. For an example if the past practice demonstrates that an employer has consistently applied dismissal for certain types of misconduct, it shall be unfair for the employer to be bound by a different sanction. In *Brandford*, Jafta AJA remarked as follows:

> "[15] …The problem in this matter is that Palmer, it would appear, did not know how to discipline an employee properly…it was still unfair to the company to have it denied the opportunity of having the facts evaluated by its Human Resources Manager who was probably more familiar with its disciplinary code than Palmer who hastily decided to discipline the appellant… In these circumstances it would manifestly be unfair for the company to be saddled with a quick, ill-informed and incorrect decision of its employee who misconceived the seriousness of the matter and hurriedly took an inappropriate decision leading to an equally inappropriate penalty.

[20] 1996 (4) SA 577 (A).

[46] Surely if the doctrine of election found application, these apposite remarks would not have been made. With considerable regret, I part ways with my sister with regard to the application of the doctrine of election.

Is the decision of Manganyi one that a reasonable decision maker may reach?

[47] On reading of the award, Manganyi did not deal with the question whether Eskom was empowered by its negotiated disciplinary code to substitute the sanction imposed by Zulu. On the binding authority of *SARS-Kruger*, he ought to have dealt with that question. Failure to do so amounts to an irregularity. What he dealt with was the question whether Eskom was justified in inviting Moloantoa to make written submissions in order to reconsider the sanction contemplated by Wal. This of course is a different question which addresses the issue of procedure, which was rejected in *SARS-Kruger,* when it rejected the decision of Lagrange J in *SARS v CCMA and others (The Botha Case*).[21]

[48] Had he considered that question, as he was obliged to on the strength of the recent authority, he would have found that Eskom was not authorised by its negotiated disciplinary hearing to substitute the sanction imposed by Zulu. Such a finding would have driven him to a conclusion that the dismissal is invalid and substantively unfair without the need to consider if the dismissal was for a fair reason or was appropriate.

[49] Of course if I was not bound by *SARS-Kruger*, having appropriately dealt with the issue of consistent application of discipline and the appropriateness of the sanction of dismissal, I would have reached a conclusion that the finding that the dismissal was substantively fair was one that a reasonable decision maker may reach. With regard to procedure, Moloantoa was afforded the *audi alteram partem*. Thus a finding that the dismissal was procedurally fair is one that a reasonable decision maker may reach. However, having committed a reviewable irregularity – not considering the question of the powers of Eskom to substitute the sanction – the award of Manganyi is not one that a

[21] [2015] 5 BLLR 531 (LC).

reasonable decision maker may reach and reviewable on the constitutional standard. Having found that the arbitration award is reviewable in law and being bound by SARS-Kruger, the award must be substituted with a finding that the dismissal of Moloantoa is substantively unfair.

The question of the relief.

[50] Since this Court concludes that a reasonable commissioner should have found that the dismissal of Moloantoa was substantively unfair, the remaining question is whether she is entitled to any relief. Reinstatement is a primary relief. However, if any of the exclusions set out in section 193 (2) of the LRA are present reinstatement or re-employment is inappropriate. Barnes SC argued that the situation contemplated in subsection (2) (b) is present in this matter. The subsection provides that where the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, reinstatement is by law excluded. Barnes SC pointed out portions of the evidence of Moloantoa indicating that she can repeat the offence she was found guilty of. She showed no signs of remorse.

[51] There is a raging debate as to whether an employer is obliged to lead evidence in support of any of the factors set out in section 193 (2). There is authority that supports a view that the circumstances contemplated in subsection (2) (b) must be present at the time of dismissal and not thereafter. However the debate seem to have been settled by the LAC in its recent judgment of *Booysen v Safety and Security Sectoral Bargaining Council and others*[22]. The LAC found that even in the absence of evidence being led, the Labour Court was obliged to take into consideration any of the available factors in determining whether reinstatement was appropriate.

[52] Given the circumstances surrounding the dismissal of Moloantoa, the remedy of reinstatement is inappropriate. This approach was recently endorsed by the

[22] (PA12/18) [2021] ZALAC 7 (30 March 2021).

LAC.[23] Barnes SC further argued that compensation being a discretionary relief must be denied.

[53] Regrettably, I disagree. Where reinstatement is denied, there appears to be no basis in law for the employee to be still denied compensation. In *SARS v Kruger* at the Constitutional Court, Mogoeng CJ acknowledged that the sanction of dismissal is so livelihood-threatening and serious that a breach of the relevant regulatory framework ought generally to be viewed in a serious light. The learned Chief Justice also considered the unilateral reversal of the sanction as a factor strongly pointing to the appropriateness of awarding some compensation to Mr Kruger. Similarly, in this matter Zulu was well entitled to impose the sanction he imposed. The negotiated disciplinary code permitted him. The fact that Wal had a different opinion on the appropriateness of the sanction does not necessarily mean that his opinion is the only available opinion.

[54] It is instructive to note what the LAC said in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[24] :

> '[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.
>
> [23] Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the

[23] See Standard Bank of SA Ltd v Leslie & others [2021] 42 ILJ 1080 (LAC).

[24] (2015) 36 ILJ 2989 (LAC).

employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a *solatium* and it constitutes a solace to provide satisfaction to an employee who's constitutionally protected right to fair labour practice has been violated. The *solatium* must be seen as monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalizing the employer. It is not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

[24] The determination of the quantum of compensation is limited to what is "just and equitable". The determination of what is "just and equitable" compensation in terms of the LRA is a difficult horse to ride…In my view, and as I said earlier, because compensation awarded constitutes *solatium* for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action…for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a *solatium* because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patrimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA. In *Minister of Justice & Constitutional Development v Tshishonga*, this court in an award of *solatium* referred to a delictual claim made under the *actio iniuriarum* for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but not limited to:

"…the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place…"

[25] The above *dictum* should serve as an appropriate guideline in determining what is just and equitable compensation that can be awarded under s 194 (3) of the LRA.'

[55] For all the above reasons, and in the exercise of my judicious discretion, Moloantoa must be awarded compensation that is just and equitable. The appropriate compensation must, in my view, be an equivalent of ten months' salary.

[56] In the results the following order is made:

Order

1 The late filing of the review application is condoned.
2 The award issued by Commissioner Manganyi dated 5 December 2018 under case number LP5082-18 is hereby reviewed and set aside.
3 It is replaced with an order that the dismissal of Maria Mmatlou Moloantoa is substantively unfair.
4 Eskom SOC Ltd is ordered to pay Maria Mmatlou Moloantoa compensation in the amount of **R225 000.00**, being an equivalent of ten months' salary at the rate of **R22 500.00** per month.
5 There is no order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr T Tshabalala
Instructed by:	M K Mabote Inc, Pretoria.
For the Third Respondent:	Ms Barnes SC together with Ms L Buchler
Instructed by:	Maponya Incorporated, Pretoria.