IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NUMBER: D 600/05

IN THE MATTER BETWEEN:

ZEENAT ABDOOL KALIK — **APPLICANT**

AND

TRUWORTHS (GATEWAY) — **FIRST RESPONDENT**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION — **SECOND RESPONDENT**

COMMISSIONER HILDA GROBLER — **THIRD RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicant sought to review and set aside the arbitration award issued by the second respondent under case number KNDB 7835-05 dated 8 July 2005. The applicant also sought an order reinstating her retrospectively into the position

she held prior to her dismissal or alternatively an order referring the matter back to the second respondent for arbitration.

Background facts

[2] The applicant was, prior to her dismissal by the first respondent on the 9 June 2005, employed as a cosmetic consultant. The applicant was disciplined and dismissed for dishonesty relating to the accusation that she had, on the 11 May 2005, removed a "clinique tester" from the store without permission.

[3] Following her dismissal the applicant referred an unfair dismissal dispute to the second respondent (the CCMA). The mater was then set down for a con/arb by the CCMA. The conciliations part of the process having failed to resolve the dispute the matter was then arbitrated upon by the third respondent (the commissioner). Thereafter the commissioner issued an award in terms of which she found the dismissal to be fair and accordingly confirmed the dismissal of the applicant.

The grounds for review

[4] The applicant contended that the commissioner failed to advise her of her rights to a fair arbitration process and procedure in circumstances where it was evidently incumbent on her to do so. This according to her amounted to an irregularity so gross that it rendered the arbitration proceedings defective.

[5] The finding of the commissioner is also challenged on the basis that she misconstrued the evidence which was before her by concluding that the allegation of dishonesty was the only rational conclusion to be drawn from the evidence.

[6] It was further contended that the commissioner committed an irregularity by failing to hear, assess and examine mitigating factors which were in favor of the applicant.

[7] The other ground upon which the applicant relied on in challenging the decision of the commissioner is that she denied her right to submit closing arguments at the end of the hearing.

[8] The arbitration award was also challenged on the basis that the commissioner failed to apply her mind on the important facts of the conditions of a fair dismissal.

[9] The third respondent called three witnesses to testify on its behalf at the arbitration hearing. The first witness was the chairperson of the disciplinary hearing who testified mainly on how she arrived at the decision that the applicant should be dismissed.

[10] The second witness, Ms Doyanard, testified that she searched for more than a day for an item known as the "concealer," which she wanted to use on one of the customers. During the course of the search, on the second day, she was apparently advised by Ms Chantelle Anthony, the third witness, that the item was taken by the applicant.

[11] Ms Anthony testified that she saw the concealer in the applicant's pencil case. At that stage she was not aware that the second witness, Ms Doyanard was looking for it.

The arbitration award

[12] The commissioner in her analysis of the evidence found that the applicant did not deny that she had removed the item in question and that it was indeed in her pencil case at the time Ms Anthony opened it. The commissioner also found that the applicant's understanding of the law was poor in that she argued that she could not be disciplined because no one had searched her or found the goods in her possession.

[13] In addition to finding that the probabilities favored the version of the third respondent, the commissioner found that the chairperson of the disciplinary hearing not to have been biased in finding the applicant guilty as charged. In this regard she found that the finding of guilty by the chairperson was made separate to the hearing of mitigating circumstances.

Grounds for review

[14] During argument, counsel for the applicant argued that the commissioner was aware that the applicant was totally at loss with regard to cross-examination. This analysis projects the applicant as

someone who was so uninformed that she would hardly ask a question to challenge the veracity of the version of the third respondent's witnesses.

[15] I do not agree with this analysis. The record reveals that after explaining the process and what the arbitrator expected of the parties, she thought that the applicant was the representative or the second respondent. As a result of this mistake it seems the commissioner called upon the applicant to make the opening statement. The applicant responded by informing the commissioner that she was the employee and that it is for the third respondent being the employer to begin.

[16] The record further reveals that after the first witness the commissioner enquired from the applicant if she wished to question the witness. The applicant indicated that she did not have any question for the witness and confirmed her stance even after the commissioner enquired from her whether she was sure of her position of not wishing to cross-examine the witness. Thereafter, the applicant cross-examined the two other witnesses. It must also be mentioned that most of the questions

posed by the applicant were pertinent to the charges proffered against her.

[17] In support of this ground the applicant relied on the decision of Soni AJ, in the case of *Dimbaza Foundries v CCMA & others* (1999) 8 BLLR 779 (LC). The facts and circumstances of this case are distinguishable from Dimbanza's case.

[18] In the *Dimbanza's case*, the dismissed the employees challenged the severity of the sanction and not the finding of guilty. However, at the arbitration hearing the representative of the employee, an admitted attorney with vast experience in the labour matters, suddenly raised the issue of substantive fairness, an issue for which the employer's representative, who was inexperience in matters of this nature, was ill-prepared.

[19] The court found that the commissioner was alive to the predicament of the employer's representative to handle the issue that was suddenly raised on the day of the hearing. The court found that the representative lacked knowledge and insight on how to apply for a postponement. In the light of this circumstances the court found that

the arbitrator should have *mero muto* postponed the matter. The ability to cross-examine arose in the context where a lay person was taken by surprise and the case he was confronted with was not the one he anticipated or prepared for.

[20] The applicant also challenged the arbitration award on the ground that the commissioner did not afford her an opportunity to make closing arguments. In this regard reference was made to the case of *Mutual & Federal Insurance Co Ltd v Commission for Conciliation, mediation and Arbitration & others* (1997) 12 BLLR 1810 (LC).

[21] This challenge arises in the context where, at the end of the arbitration hearing the commissioner indicated to both parties that:

> *'I am not going to deal with closing statements, because I believe that the matter has been ventilated to its fullest, ..."*

[22] The facts and the circumstances of this case are again distinguishable from those in *Mutual & Federal case (supra).* In the *Mutual & Federal case*, the commissioner stopped the applicant from asking a question that would have highlighted the contradiction between what the witness was saying and what he had said in the disciplinary

hearing. The commissioner said that the issue raised by the question could be dealt with during the closing argument. In this regard Jali AJ, as he then was, had this to say:

> *"In the circumstances, the commissioner did not give the parties the opportunity to present closing arguments. This is notwithstanding the fact that earlier on when Mr Pieters sought to challenge the evidence of the employee, the commissioner had stated that he will have the opportunity during argument. In the circumstances he did not know that Mr Pieters had a number of issues which he would have liked to raise in his closing argument. He had also indicated to him that he would give him an opportunity to address those issues in the closing argument. In the circumstances, he was more than obliged to give Mr Pieters an opportunity to deliver a closing address. Moreover as he raised an expectation. In my view, the failure by the commissioner to give Mr Pieters the opportunity to present a closing address was a gross irregularity which on its own should lead to the setting aside of the award."*

[23] In *Mutual & Federal case (supra)* not only did the applicant's representative indicate that he wished to address the arbitrator, but the opportunity which was initially offered by the commissioner, was later denied.

[24] In this matter the commissioner's view regarding the approach he was to adopt was made clear to both parties on the last day of the hearing. The commissioner cannot be criticized for the approach she adopted as she was entitled to do so in terms of section 138 of the Labour Relations Act 66 of 1995 (the LRA). Section 138 of the LRA empowers the commissioner to conduct an arbitration hearing in a manner that he or she considers appropriate, in order to determine the dispute fairly and quickly.

[25] Turning to the issue of mitigating circumstance, the applicant contended that the arbitration award was reviewable because the commissioner did not afford her the opportunity to present mitigating circumstance.

[26] In my view, it is not necessary to hear mitigating circumstances where the relationship between the employer and the worker has irretrievably broken down due to misconduct relating to dishonesty. See *Cox v Commission for Conciliation, Mediation and Arbitration* (2001) ILJ 137 (LC) and *Naidoo v Lever Ponds* (1999) 20 ILJ 1610 (CCMA).

[27] An employment relationship broken down as a result of an act of dishonesty can never be restored by whatever amount of mitigation. The underlying reason for this approach is that an employer cannot be expected to keep dishonest workers in his/her employ. The other reason for this is to send an unequivocal message to other employees that dishonesty will not be tolerated. See *Consani Engineering (PTY) LTD v Commissioner for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC). The rational for this approach are also informed by the consideration that a worker with an unblemished record cannot after an incident relating to an act of dishonesty, continue to be trusted. It is the operational risk to the business of an employer that arises from the dishonest conduct, which cancels off whatever good record the worker may have had before the commission of the offence. In other words there would be no purpose in conducting an inquiry into mitigating circumstances where a worker is guilty of misconduct relating to dishonesty. However, this approach would not apply in cases involving other forms of misconduct.

[28] In the *Toyota SA Motors (Pty) Ltd v Radebe & others* (2001) 21 ILJ 340 (LAC), Zondo AJP as he then was said:

> *"Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which is of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty."*

[29] In this respect, Grogan: *Dismissal* (*Juta & Co: Lansdowne, 2002*) at 99, is quoted with approval by Murphy AJ in *Consani Engineering(supra)* as saying:

> *"An employer has two reasons for wanting to rid itself of a dishonest employee. One is that employee can no longer be trusted. The other, less frequently acknowledged but no less legitimate, is the need to send a signal to other employees that dishonesty will not be tolerated. This consideration relates to the deterrence theory of punishment. The question to be asked is whether a repetition of the misconduct, either by the same employee or by others, will adversely affect the employer's business, the safety of the workforce and/or the employer's trading reputation."*

[30] Murphy AJ went further to quote again with approval the decision in *De Beer Consolidated Mines Ltd v CCMA and others* (2000) 21 ILJ 1051 (LAC) at 1058 para 22, where the court held that:

> *"Dismissal is not an expression of moral outrage: must less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers ho steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with society's moral opprobrium of a minor theft; it has everything to do with operational requirements of the employer's enterprise."*

[31] The other issue which the applicant raised in challenging the arbitration award relates to the finding of the commissioner that the respondent had a "zero tolerance policy" to misconduct relating dishonesty. The applicant argued in this regard that no evidence was led by the respondent about the existence of the policy. This argument can only be sustained if one adopts a superficial analysis of the commissioner's finding. An objective analysis of the commissioner's finding reveals that what the commissioner was referring to is the high

standard that the respondent has put in place in dealing with misconduct concerning dishonesty. This relates to the fact that the second respondent had previously taken action against those involved in dishonest conduct.

[32] Even if it was to be found that the applicant's argument was sustainable as concerning the finding on the "zero tolerance policy," I do not belief that such finding would materially affect the rationality of the arbitration award. The award would still stand if the finding on the "zero tolerance policy" was to be excised from the award.

[33] In conclusion I do not agree with the submission of the applicant that the award of the commissioner was irrational and unjustifiable. I do not agree that the commissioner's award does not satisfy the rationality and justifiability test as set out in the *Carephone (Pty) Ltd v Marcus N.O and Others* (1998) 19 ILJ 1425 (LAC). The commissioner reasoned her award and found that on the applicant's own version an offence was committed. The applicant did not deny that the item was in her pencil case when Ms Anthony opened it and that she removed it without authority.

[34] It may well be that if this matter was considered as on appeal, another commissioner may have found the decision to be incorrect. The test for review as indicated above is whether the decision of the commissioner is rational in that it is objectively connected to the evidence before the commissioner. The commissioner in this case considered and applied her mind to the evidence presented before her both in relation to the substantive and procedural fairness.

[35] Having regard to the circumstances of this case and the nature of the issues raised by the applicant, I do not belief that it would be fair to issue costs as a matter of law.

[36] It was in the light of above reasons that I ordered that:

(a) The application to review and set aside the award issued by the third respondent is dismissed.

(b) There is order as to costs.

MOLAHLEHI J

DATE OF HEARING : 15 JUNE 2007

DATE OF JUDGMENT : 10 AUGUST 2007

<u>APPEARANCES</u>

For the Applicant : Advocate D G Tobias

Instructed by : R Hirallal (Applicant's Attorney)

For the Respondent: D Farrel of Farrel & Associates