REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO D26/2001

In the matter between:

COROBRIK (PTY) LTD
t/a BRICK AND TILE — Applicant

and

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION — First Respondent

S R BALTON N.O. — Second Respondent

J N MKHIZE — Third Respondent

JUDGMENT

PILLAY D, J

[1] This is a review of an award of the second respondent Commissioner in terms of section 145(2) of the Labour Relations Act No 66 of 1995 (the LRA). The third respondent was dismissed for refusing to carry out a lawful and reasonable instruction of a superior. The Commissioner found

that:

- the third respondent did not deny that he understood the instruction or that it was not part of his duty;
- the instruction had been given to him by his superior;
- the third respondent's evidence was inconsistent, improbable and that he was lying;
- the third respondent was unable to answer straightforward questions;
- the instruction was reasonable;
- the instruction was repeated on three occasions in the presence of colleagues at various times;
- the third respondent was unable to advance any reason why a colleague would testify against him;
- the third respondent failed to carry out the instruction.

[2] Against these factual conclusions the Commissioner conceived her duty as follows:

"The main issue to be dealt with therefore, is whether the sanction of dismissal is appropriate."

She then concluded as follows:

"Having regards to all the evidence placed before me I am satisfied that the sanction of dismissal was harsh taking into account the length of service of the Applicant. I regard the continued employment of the Applicant from 6 August 2000 to 31 August 2000 as being an important factor in considering whether the employment relationship has broken down. There was no substantial evidence before me to this effect. The witness Pretorius tried to lead evidence that the customer who purchased on that day and requested that his goods be offloaded did not return.

There was no substantial evidence to state that this was a regular customer or that the Applicant's conduct had effected the business in any way. Pretorius's evidence that the customer seemed irritated is also unsubstantiated."

She substituted the dismissal with a final written warning for insubordination.

[3] The Commissioner misconceived the nature of her duties in the circumstances of this case. This is so despite her having been referred to relevant authorities, to some of which I now refer.

[4] The Labour Appeal Court has stated the law as follows with regard to the imposition of sanctions by a Commissioner in *Toyota South Africa Motors (Pty) Ltd v Radebe & Others* [2000] 9 LAC at para.56:

"If there is a yawning chasm between the sanction which the Court would have imposed and that which the Commissioner imposed, then it would seem to me that a gross irregularity has been committed. The use of the word 'gross' indicates that the irregularity has to be so egregious that the Court can conclude that the function of assessing a fair sanction has been misconceived."

Further:

"In criminal law Appeal Courts interfere with the sentence of a lower court where such induces a sense of shock or there is an alarming or disturbing disparity between the sentence imposed by the trial Court and the sentence which the Appeal Court is minded to impose. A Commissioner imposing a sanction in an arbitration in terms of the Act has a similar but not identical role."

[5] In *De Beers Consolidated Mines (Pty) Ltd v CCMA & Others* [2000]9 BLLR 995 LAC at para.22 CONRADIE JA said as follows:

"Dismissal is not an expression of moral outrage, much less is it an act of vengeance. It is, or should be, a sensible operational response to mismanagement in the particular enterprise."

[6] In *County Fair Foods (Pty) Ltd v CCMA & Others* [1999]11 BLLR 1117 A-B LAC, the Court said:

"When it comes to determining the fairness of the sanction imposed by an employer, it must be recognised that the law permits employers to set the standard of conduct required of its employees and to determine the sanction with which non-compliance is visited."

[7] In those circumstances the Commissioner acted *ultra vires* and exceeded the limits of her duties imposed by the LRA. The Commissioner also failed to apply her mind to material properly before her. While an award may not necessarily manifest all the factors taken into account by a Commissioner, some factors may be of such importance that a failure by a Commissioner to take them into account may lead to a reasonable inference that they were not considered at all. In the *County Fair* case at para.40 the Court found that the Commissioner's failure to deal with aggravating features in the conduct of the employee, justified the inference that the Commissioner failed to apply his mind properly to the facts.

[8] In this case the Commissioner failed to take into account the applicant's disciplinary code and procedures. Furthermore, having found that the third

respondent had been lying, she made no inference from that fact in so far as it would impact on the trust relationship between the parties, particularly as she granted reinstatement. She took into account long service where the Labour Appeal Court has said that where there is a clear act of misconduct of such a serious nature no length of service can save an employee (*Toyota Motors* case at para.16). Again at para.22 of the *De Beers Consolidated Mines* case CONRADIE JA states:

"The Commissioner also misunderstood the significance of the employee's long service. Long service is no more than material from which an inference can be drawn regarding the employee's probable, future reliability. Long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it. A senior employee cannot, without fear of dismissal, steal more than a junior employee. The standards for everyone are the same. Long service is not, as such, mitigatory. Mitigation, as the term is understood in the criminal law, has no place in employment law."

[9] A further irregularity which renders the award irrational and unjustifiable on the basis of the material before her, is that the Commissioner drew a distinction between gross insubordination and dishonesty and reasoned that as the *Toyota* and *De Beers* cases related to dishonesty, those cases were distinguishable from this one. She ignored the disciplinary code which drew a distinction between the failure to follow a reasonable instruction and the refusal to carry out a reasonable instruction. The former offence carried a lesser penalty following a three-staged procedure whereas the latter offence attracted summary dismissal. As a result, the Commissioner ignored the seriousness with which the applicant viewed

the misconduct. (*Park Hyatt v CCMA and Others* [1999] 8 LC at para.5)

[10] The Commissioner also misconceived the purpose of the failure to suspend an employee pending a disciplinary inquiry. She inferred from this that the relationship of trust had not broken down. The purpose of a disciplinary inquiry is to test whether the employee is in fact guilty of misconduct. It may well transpire that the employee is not guilty of misconduct, in which case the employee will return to work. The purpose of suspension is to safeguard the enterprise and the pending investigation. However, suspension, as an automatic response to a misconduct could be perceived as pre-empting dismissal. It does not necessarily follow that because the employee was not suspended, therefore the relationship of trust has not broken down.

[11] The test for review is also not only that the Commissioner should apply her mind to the material before her but also that her decision must be rational and justified. *Carephone (Pty) Ltd v Marcus N.O. and Another* 1999(3) SA 304 LAC and *Shoprite Checkers (Pty) Ltd , Ramdau N.O. and Others* [2001] 10 LAC.

[12] In the circumstances the application for review is granted with costs.

PILLAY D, J

DATE OF HEARING 6 MAY 2002

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ON BEHALF OF APPLICANT MR I LAWRENCE

ON BEHALF OF THIRD RESPONDENT ADV P J BLOMKAMP