REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA; JOHANNESBURG

Reportable

Case no: CA 3/2012

In the matter between:

MARK SOLARI **Applicant**

and

NEDBANK LTD **First Respondent**

COMMISSION FOR CONCILIATION, **Second respondent**

MEDIATION & ARBITRATION

COMMISSIONER VAN ROOYEN **Third Respondent**

Heard: **5 November 2013**

Delivered: **27 March 2014**

Summary: review of arbitration award- employee approving home loans facility without following bank procedure- employee dismissed for dishonesty- commissioner reinstating employee- commissioner failing to apply his mind to relevant facts- award failing to meet the reasonableness test- Labour Court setting aside arbitration award – Labour Court judgment upheld- Appeal dismissed with costs.

CORAM: WAGLAY JP, C.J. MUSI *et* DLODLO AJJA

JUDGMENT

C.J. MUSI AJA

[1] This appeal, which is brought with the leave of the court *a quo* (Lagrange J), in essence concerns the meteoric rise and shameful fall from grace of the appellant.

[2] The appellant was, at the time of his dismissal, the area manager of the first respondent (Nedbank Ltd). He was charged and convicted at a properly held disciplinary hearing of dishonesty in that, he collaborated with junior staff to approve and release unsecured loans from Nedbank without the necessary signed documents, thereby causing potential financial and reputational risk to the bank. He was also convicted of e-mail abuse in that he received, returned and forwarded pornographic material using Nedbank resources in contravention of the bank's e-mail and internet policy. He was consequently dismissed. He referred the matter to the second respondent (Commission for Conciliation Mediation and Arbitration (CCMA)). After unsuccessful conciliation proceedings, he referred the matter for arbitration. The arbitrator (third respondent) found that the appellant's dismissal was substantially unfair and ordered his reinstatement. Nedbank launched review proceedings in the court *a quo* against the arbitrator's award. The court *a quo* reviewed and set aside the arbitrator's award. The appellant appeals against the court *a quo*'s judgment.

[3] Before dealing with the merits, I pause to deal briefly with a preliminary issue. The appellant applied for condonation for his failure to comply with Rule 5 of this Court's rules. Although it is not contained in his notice of motion, he also, in his founding affidavit, applied for condonation for the late filing of the appeal.

[4] Leave to appeal was granted on 21 February 2012. The record was due to be delivered by no later than 22 May 2012, being 60 days after the order granting leave to appeal. It was, however, only delivered on 25 June 2012. It was therefore 34 days late.

[5] The record was also incomplete in that the affidavit filed in the review application, the judgment of the Labour Court, the order granting leave to appeal and the notice of appeal were omitted from the record. The record was not properly paginated and divided into conveniently sized volumes of approximately 100 pages each. The record did not contain a consolidated index. It contained irrelevant documents and heads of arguments. The record did not reflect any cross-reference or marginal notes where reference was made to pages in the appeal record.

[6] Nedbank opposed the application and pointed out that the deficiencies have not all been cured and that it would be prejudiced.

[7] The appellant cured the defects and filed a replying affidavit wherein he stated that he complied with the rules at considerable cost to himself.

[8] His explanation for not complying with the rules, in the first place, is that he was impecunious because he used his pension money to pay the home loans which form the subject matter of this case (R800 000) and other creditors (R150 000). He did not have money to put his attorney in funds and therefore had to attend to the copying, binding, paginating and filing of the record himself, due to his financial position. He was unaware of the rules because he is not a legal practitioner. He at all times thought that he is going about it the right way.

[9] Although Mr Myburgh, on behalf of Nedbank, indicated that Nedbank was still opposing the application, he could not indicate how Nedbank would be prejudiced in the conduct of its case if the deficiencies were not corrected. In fact, Nedbank filed comprehensive heads and Mr Myburgh addressed us fully on the merits.

[10] The appellant's explanation was not disputed by Nedbank. It is an acceptable explanation. The delay was long but not inordinately so, in view of the explanation

given therefor. The prospects of success are also not hopeless. In my view, the application for condonation ought to be granted and the appeal reinstated.

[11] The facts of this matter are mostly common cause or not seriously disputed. The difficulty lies in determining what inferences, if any, should be drawn from the facts.

[12] Mr Jonathan Mitchell, a friend and colleague of the appellant, was the team leader in the home loans department of Nedbank. They used to work together at the SA Perm bank before they were employed by Nedbank. Mitchell had super user rights which allowed him to make indicative changes on Nedbank's computer system in order to change bond registration amounts and property values on the system.

[13] The appellant had three bonds and therefore home loan accounts with Nedbank relating to immovable property. The first bond was registered in June 2002 for R415 000. The second was registered in February 2005 for R110 000 and the third was registered in July 2006 for R200 000.

[14] During 2008, Mitchell was investigated for abusing his super user rights by making unauthorised indicative changes to home loan accounts. It was discovered that Mitchell also made indicative changes to the appellant's home loan accounts.

[15] The appellant, with the assistance of Mitchell, withdrew during the period February 2003 to 25 June 2008, a total of R853 507.00 in excess of the registered bond amounts, from the three accounts.

[16] When the appellant's accounts were investigated, it was found that the outstanding balance on the first bond of R415 000 was R1 132 307. On the second bond of R110 000 it was R193 200 and on the third bond of R200 000 it was R243 000.

[17] Mitchell would make the indicative changes to the bond accounts after receiving an e-mail request from the appellant. I reproduce some of the e-mails, for the sake of context.

[18] On 19 October 2005 at 12:33, the appellant wrote the following e-mail to Mitchell:

"Hi Jono

As discussed please make R15 000.00 available on my bond

Should there be any problems please call me on …...

Thanking you in advance

Regards

Mark Solari

Manager

Nedbank Parow

Tel- (021) 937 7000

Fax- (021) 937 7002" (Cellular phone number not reproduced.)

At 01:12 pm on the same day, Mitchell responded as follows:

"Registered amount increased by R15k, however only R12 761.00 available, because of ….. you know what!"

On 9 December 2005 at 02:10 pm, the appellant sent the following e-mail to Mitchell:

"Hi Jonathan

As discussed can you please make R100 000.00 available on the above bond

Please advise once done.

Thanking you in anticipation.

Regards

Mark."

Mitchell responded, at 03:52 pm on the same day, as follows:

"Sorry, R97 860.00 only

Advise if okay

Jonathan"

On 21.9.2006 at 3:04 pm the appellant sent the following e-mail request:

"Hi Mr Mitchell

As discussed please increase limit on above bond by R50k

Please advise when done

Regards

Mark"

Mitchell responded at 3:15 pm and said

"Check if enough. The credit is E van Heerden, wiettie wie daai issie!"

On 12 October 2007 at 02:30 pm, the appellant sent the following e-mail to Mitchell:

"Hi Jonathan

The 11th hour has arrived, better get my last bit in before the world end

As discussed could you please arrange the following:

(1) Bond account 8867661900101, M Solari, please increase bond to R500 000.00. Instalment on balance of bond.

(2) Bond account unknown. Client is A J & G E Petersen. Mrs A J Petersen Id 7505120123089. Address of property = 2 Frans Hals Street Panorama. Request is to change debit order date to the 25th of each month from the 20th. Will assist as husband get paid on this day.

Hope you can still assist with this as I know I left it late.

Let me know, please sir.

Regards

Mark”

On 12 October 2007 at 02:40 pm, Mitchell replied as follows:

“Done

J”

On 15/01/2008, the appellant sent the following e-mail to Mitchell:

“Hi Jonathan

Compliments of the season to you & your love one’s (sic). Hope that 2008 will be a successful year for you.

As discussed could you please make the funds available on the above bond.

Please give me a call once done.

Your assistance is highly appreciated & I thank you in advance for it.

Regards

Mark”

Mitchell responded as follows, at 12:13 pm

“Mark, hoeveel soek jy!”

[19] On 26 June 2008, Mr Peter Jacques Simon, a forensic investigator at Nedbank, interviewed the appellant. The appellant then wrote the following statement:

‘Although I cannot recall dates (exact dates that is) we were told 5 – 6 years ago that bond admin can increase limits of registration amounts to assist clients provided there is sufficient value in the property. Based on this I asked how and was told all that’s required is an email. I have made use of this to increase the value of the property further by doing renovations and alterations.

As mentioned above and due to pressures at branch level, Parow branch to be exact, we had, in order to assist clients, maintained good relationships with the

> H/L teams. Clients became increasingly frustrated with H/L. Jonathan Mitchell who I worked with and socialised with on the odd occasion advised me that it was possible to increase limits and registered amounts on H/Loans. I admit that I should have investigated how this is possible but took it on (sic) his word. I know for a fact that we assisted at least one or two clients on this basis. I had at that stage registered a bond of R415 000-00 on my property and had just completed doing some renovations. The valuator told me the value went up with the addition of the double garage and other work done. As I required more money and based on what Jonathan had told me about the system change, I approached him for assistance. All that was required was an email stipulating the amount. I thought nothing of it and did not find it strange, although in hindsight it is. However all the funds were not used for personal gain but to do improvements, whether superficial or structural. The only important thing for me was the saving on registration fees that the attorneys intend to charge. I have not once defaulted on a payment and ensured that I could afford the payments including all other accounts. At one stage the funds were drawn to consolidate debt. Due to the fact that I was never told that the system is not allowing the transaction, I never thought that it was not authorised. This belief was further confirmed as I emailed and this would serve as my signature, albeit electronic.'

[20] On 11 July 2008, the appellant wrote a letter to his superiors, Brian Duguid and Anthony Costa, wherein he repeated his assertion that he was told by Mitchell that the home loans department has a mandate to increase bond limits provided there is sufficient value and affordability. He also stated that there were dual control systems in place, in that whatever indicative changes are made, they are checked by someone else. He further stated that

> 'the only people who lost anything are the attorneys as they did not register a bond. The risk to the bank is no different whether a bond was registered or not.'

[21] On 14 August 2008, the appellant tendered his resignation, in writing, with immediate effect. Due to the fact that he had to give a month's notice, it was not accepted and the disciplinary proceedings, which were scheduled for 21 August 2008, continued. He was found guilty and dismissed.

[22] At the arbitration, the procedural fairness of the dismissal was not in dispute. The commissioner only had to decide whether the dismissal was substantially fair.

[23] The arbitrator set out the facts and respective arguments and correctly stated that to prove dishonesty Nedbank had to prove that the appellant had the intention to deceive, defraud or steal. The arbitrator also correctly stated that the appellant cannot be found guilty of the first count unless Nedbank proved on a balance of probabilities that he had known Mitchell was not authorised to process his requests or that he should reasonably have known this.

[24] The arbitrator then proceeded to repeat the evidence and arguments of the parties without any analysis, let alone a critical analysis, of the evidence. The arbitrator then, strangely, concluded that

> 'after a careful analysis of the evidence presented, I find the respondent did not discharge the onus to prove the applicant knew what Mitchell was doing was unauthorised or that he should reasonably have known this.'

With regard to the second count, the arbitrator found that Nedbank did not prove that the applicant was guilty of transgressing the internet and e-mail policy to the extent that could justify his dismissal.

[25] The Labour Court examined the award of the arbitrator and came to the conclusion that the arbitrator did not conduct a balanced assessment of all the significant evidence that was material to deciding if the appellant knew, or probably knew, that he was making use of an unauthorised loan facility. The court a *quo* stated that in ignoring important evidence and failing to evaluate the evidence pointing to the appellant's probable knowledge of the illegitimate nature of the loan transactions, the arbitrator denied Nedbank a fair hearing and thereby committed a reviewable irregularity rendering the award unreasonable. In respect of the second count, the court *a quo* found that although the arbitrator's reasoning is susceptible to criticism, its finding that the sanction of dismissal would be inconsistent given the evidence that was before it, is not unreasonable. Nedbank did not appeal against the court a *quo's* finding with regard to the second count.

[26] Mr Myburgh, on behalf of Nedbank, argued that the arbitrator committed a latent gross irregularity by not applying her mind to materially relevant facts and circumstances. Although Mr Myburgh initially argued that the arbitrator's award should have been set aside on this ground alone, irrespective of the result, he

however conceded that the facts of this matter are of such a nature that it is clear that the failure to consider relevant facts led to an unreasonable result. It is therefore not necessary to revisit the issue whether an award falls to be set aside only because the result is one which a reasonable decision-maker could not reach (result based) or whether it could be set aside solely on the basis that the commissioner committed an irregularity in the conduct of the proceedings.[1]

[27] Mr Fischer, on behalf of the appellant, argued that the arbitrator considered all the relevant evidence and reached a finding that was consistent therewith. He submitted that there was no basis for the court *a quo* to interfere with the evidence of the arbitrator, because it cannot be said that the latter's findings are those which a reasonable decision-maker could not reach.

[28] In terms of section 138(7)(a), the commissioner must within 14 days of the conclusion of the arbitration proceedings, issue an arbitration award with brief reasons. In *Maepe v Commission for Conciliation, Mediation & Arbitration and Another,* it was said:

> 'Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'[2]

[29] Allied to what was said above is the fact that where it is clear on the totality of the evidence before the commissioner, that he did not properly consider all the evidence and therefore arrived at a conclusion that a reasonable decision-maker

---

1 See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 267; *Commercial Workers Union of SA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 76. This court recently revisited this issue and came to the conclusion that even where there is an irregularity, such irregularity must render the result unreasonable. See *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* JA 2/2012 [2013] ZALAC 28 (4 November 2013).

2 (2008) 29 ILJ 2189 (LAC) at para 8.

could not reach then the award ought to be set aside. The same will apply when the commissioner makes certain inferences from the proven facts that are totally out of sync with those facts. The inference reached without a proper consideration of the proven facts would be an unreasonable decision or a decision which a reasonable decision-maker could not reach.

[30] It must also be remembered that where a commissioner fails to take into account all the relevant evidence before him/her and thereby reaching a conclusion which a reasonable decision-maker could not reach, such award falls to be set aside.[3]

[31] The commissioner was bombarded with an avalanche of evidence, documentary and *viva voce*. Most of the evidence was circumstantial and the commissioner was called upon to determine the appellant's state of mind when he sent his e-mail requests to Mitchell. The commissioner did not analyse the evidence before coming to the conclusion that Nedbank had not discharged the *onus* of proving that the appellant knew or ought reasonably to have known that Mitchell was not authorised to do what he did. In my view, having regard to the evidence that was before the commissioner, she failed to apply her mind to materially relevant factors that had a bearing on the appellant's state of mind, before reaching her conclusion. I say this for the following reasons:

31.1 The appellant had 26 years experience in the banking industry. He worked in the home loans department at SA Perm bank before joining Nedbank. He was a bank manager who had three properly registered bonds which were obtained after due processes were followed.

31.2 The appellant knew that an increase in a bond amount can only be obtained after a formal process had been followed. When Mitchell told him that it could be done by simply sending an e-mail, he accepted it without inquiring or investigating further. One has to be naïve in the extreme to accept or believe that a bank would extend a loan of up to R97 000 without a formal application or risk assessment. The appellant is certainly not naïve. His upward mobility at Nedbank is undisputed testimony of that fact.

---

[3] *Afrox Healthcare Ltd v Commissioner for Conciliation Mediation and Arbitration and Others* (2012) 33 ILJ 1381 (LAC) at para 19.

31.3 It is common cause that Mitchell was transferred from the home loan department at the end of October 2007. On 12 October 2007, the appellant wrote to him and stated that the 11th hour has arrived and that he "better get his last bit in before the world end (sic)". Those words were followed by a request that his bond be increased to R500 000. It is in my view clear that the world that would end is obviously the fact that Mitchell would no longer be at the home loans department. The appellant had to have his bond increased by Mitchell for the last time, because thereafter Mitchell would not be able to do so. Much has been made of the fact that on 15 January 2008, Mitchell effected another change on the appellant's bond. In my view, this reinforces the inference of subterfuge. If the home loans department could, as a rule, effect changes to bond limits without following a process other than sending an e-mail, why did the appellant not send his e-mail "application" to home loans? Why did he send it to Mitchell who was no longer working in the home loans department?

31.4 Even the code language employed by Mitchell in his e-mail dated 19 October 2005 that "only R12 761.00 available, because of … you know what!" If everything was above board, one would not expect such a response to a formal and legitimate application for a loan. Such language is mostly, if not only, employed if one wants to hide something in case someone else, other than the intended recipient reads the e-mail.

31.5 The appellant sought to portray himself as being a naïve banker who assumed that Mitchell was doing everything in accordance with banking practices. He could however not explain how loans could be approved within 10 minutes! His evidence that he thought that Mitchell did everything else that was necessary is highly improbable. How could Mitchell do a risk assessment and have the property valued in 10 minutes or even two hours? How could the risk assessment be done without the income, if any, of the appellant's wife? How could it be done without the appellant's expenditure?

[32] The appellant himself, in the 26th of June 2008 statement, stated that he wanted to save on registration fees, which attorneys charged. He, however, testified that

he knew a lot of attorneys who could attend to the registration on his behalf, without charge. This was clearly an attempt to explain away a damning admission. I agree with the court *a quo* that it stretches the limits of credulity to accept that the appellant honestly believed that all the costs and efforts of registering an additional bond had simply been absorbed by the bank, without such a major benefit ever being announced through any of the bank's communication channels.

[33] The appellant endeavoured to justify Mitchell's conduct by pointing out that Nedbank's loan policy provides for "further loans without registration". He was, however, constrained to concede during cross-examination that further loans without registration does not apply to increases in bond amounts, but to re-advance withdrawals.

[34] The appellant personally signed bond restructuring agreements on behalf of Nedbank where clients applied for excess facility on their bonds. Yet he thought that it is not necessary for him to sign such an agreement. Nedbank's policy, as the appellant correctly conceded, is clear, if a client wants to increase the loan amount a new agreement of loan or re-advance form must be completed. The appellant did not enter into any agreement neither did he complete any form.

[35] The appellant's contention that the bank would not have suffered any loss is devoid of all truth. The registration of a bond makes Nedbank a secured creditor; that is a creditor who enjoys a security for his claim. If the debtor should be declared insolvent, the creditor would have a preferent right over the property of the insolvent by virtue of the bond.[4] The security only relates to the bond amount. A preferent creditor has a right to receive payment before other creditors. If a loan is unsecured, the bank becomes part of the concurrent creditors. The bank therefore runs the risk of losing its status as a preferent creditor if it does not register a bond over the property. Unsecured lending exposes it to the risk of being a concurrent creditor. Therein lays the potential risk to the bank.

---

[4] Mars: *The Law of Insolvency in South Africa* **-** Bertelsmann *et al* Juta 9th Ed page 432.

[36] The appellant also testified that in terms of the mortgage loan agreement, all future indebtedness to Nedbank that he might incur is covered by the agreement. According to him, the bank's rights or money was not at risk because the bond covered all monies owed to Nedbank. He relied on the following clause for his assertion:

> '1. **Continuing Covering Security**
>
> This bond is a continuing covering security for all and any sum or sums of money which may now or in the future be owing to or claimable by the Bank from any cause aforementioned and any other cause of whatsoever nature, and remains of full force and effect until cancelled in the deeds registry notwithstanding any fluctuation in, or temporary extinction of, the Mortgagor's indebtedness to the Bank from time to time.'

I agree with the court *a quo* that the mortgage loan agreement makes it clear that all debt incurred would be covered by the bond provided that the debt does not exceed the amount of the registered bond.

[37] The fact that the appellant would have received the loans if he properly applied therefore does not detract from the fact that he used a method which he knew was not in accordance with the bank's policy and practice in order to gain an undue advantage *viz* saving time and money. He saved time in that he did not have to wait for the credit department to do a risk assessment; he did not have to wait for a valuator to evaluate his properties; he did not have to wait for the formal approval of the loan and he did not have to wait for the bond to be registered. He saved money because an additional bond would not have to be registered.

[38] In my view, the appellant must have known that the procedure followed by him and Mitchell circumvented banking procedure to save money and time. This could only have been done if Mitchell presented that proper procedure was followed entitling him to make the indicative changes. The appellant had to know that Mitchell must make certain misrepresentations in order to effect the indicative changes. When you deliberately use an improper procedure to gain an advantage, time and money, in this case you are being dishonest because you deceive in order to get the advantage.

[39] I am of the view that had the commissioner applied her mind to all the material facts, she would not have reached the decision that she did. Her award does not remotely fall within the ranch of reasonable outcomes. It is not a decision which a reasonable decision-maker could reach.

[40] I am of the view that the court *a quo* was correct in setting the award aside. The requirements of equity and the law militate in favour of a costs order in this matter.

[41] I accordingly make the following order:

(a) Condonation for the late filing of the appeal and non- compliance with rule 5 is granted and the appeal is reinstated.

(b) The appeal is dismissed with costs.

_____

C.J. Musi AJA

Waglay JP and Dlodlo AJA concur with Musi AJA.

APPEARANCES:

FOR THE APPELLANT:	Adv Fisher
	Instructed by Marius Abrahams Attorneys
	BELLVILLE
For First respondent:	Adv Myburgh SC
	Instructed by DLA Cliffe Dekker Hofmeyr
	CAPE TOWN