IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: DA 11/2007

SONWABISO MAXWELL NDIMENI **Appellant**

and

MEEG BANK LIMITED (BANK OF TRANSKEI) **Respondent**

JUDGMENT:

DAVIS JA:

Introduction

[1] The appellant was employed by respondent as a branch manager at its Lusikisiki branch. After a number of delays, he was finally subjected to a disciplinary hearing on 21 July 1998. He was charged with the following counts of misconduct.

1. He acted irregularly and contrary to the standing bank procedures/practice in the execution of his duties as a branch manager at Lusikisiki as reflected by transactions in the account of YI Dockrat;
2. He made an unauthorised payment from the housing loan of B Lwana;

3. He failed to control staff according to correct procedures for he threatened some staff members of the Flagstaff agency of respondent.

He was found guilty on all counts by the chairperson of an enquiry which was held to deal with the charges. In respect of charges 1.3 and 4 he was summarily dismissed, while in regard to the respective charge 2 he was give a final written warning.

[2] On 4 November 1998, the Commission for Conciliation Mediation and Arbitration ('CCMA') determined that the dispute regarding appellant's unfair dismissal should be referred to the Labour Court for adjudication in terms of section 191 (6) of the Labour Relations Act 66 of 1995 ('LRA').

[3] The Labour Court heard evidence from 14 to 18 August 2000 and again from 28 to 30 August 2000, during which trial respondent called three witnesses and appellant called four witnesses. On 9 March 2001, Zilwa AJ determined, with regard to charges 2 and 3, that the appropriate sanction was a final written warning. However, with regard to charge 1, he found appellant guilty and ordered that he confirmed that appellant be summarily dismissed.

[4] It is against this order that appellant has now proceeded to this court, leave to appeal having been granted by way of petition on 6 December 2007.

The nature of the appeal

[5] Subsequent to his successful petition on 6 December 2007, appellant filled a notice of appeal on 5 March 2008. The notice of appeal is hopelessly unsatisfactory in that it sets out no grounds for appeal and merely records that the appeal is against the whole of the judgment and order of Zilwa AJ. There is in addition the further question as to whether the delay of more than two months in filing the appeal notice should be condoned. Respondent persisted with its objection that no condonation should be granted in respect of this delay, but it was agreed during the hearing that this court should determine condonation in the light of an evaluation of the merits of the case. It is thus to the merits that I now turn.

Merits

[6] From appellant's heads of argument it appears that there are two separate grounds of appeal:

6.1 The court *a quo* erred in finding the dismissal of appellant to be substantively fair. In this regard, the argument is that, on the probabilities, appellant was not guilty on the first charge

of misconduct; that is that he did not breach certain instructions, rules and practices of respondent in relation to the account of Dockrat.

6.2 In the event that the appellant is unsuccessful with regard to its first ground of appeal, he contends that Zilwa AJ lacked impartiality. In support of this submission, appellant contends that the presiding judge, who was an acting judge, had practiced as an attorney, in which capacity he enjoyed a commercial relationship with respondent. His wife and wife's brother had a similar relationship with respondent, prior to 9 March 2001, when judgment was delivered. Thus, it was contended by appellant that the commercial link between the presiding judge and his family with respondent and with senior management of the bank, precluded ZIlwa AJ from hearing the dispute, particularly in circumstances where the dispute as to the justification for the dismissal turned on the credibility of two witnesses, one of whom was a senior manager of respondent. Accordingly, there was a reasonable prospect that, in such a case, the presiding judge could not bring an impartial mind to the proceedings. For this reason, appellant adopted the position that the matter be referred back for a fresh hearing before a different judge.

[7] Mr Pillemer, who appeared on behalf of appellant, accepted that, were this court to find, on the substance of the dispute, that the probabilities were clearly in favour of respondent after an analysis of the record, credibility questions would have no bearing on the decision, no purpose would be served by referring the case back to another judge. For this reason therefore, the critical issue turns on the evidence relating to the charge.

The merits relating to appellant's dismissal

[8] It appears that, as at February 1998, appellant had been employed by respondent for over fifteen years. At that stage he had an impeccable work record and was manager of the Lusikisiki branch of respondent bank. One of the accounts at the branch was operated by Mr Dockrat who ran a supermarket. It appears that Mr Dockrat had a most unfortunate history with the bank in that he owed the bank many millions of rands following a kite flying operation. Such an operation entails depositing cheques and drawing against uncleared affects in different accounts and accordingly borrowing by using funds that were actually not in the account. Thus, when the kite falls, the bank invariably has to bear the loss. In Mr Dockrat's case, a deficit of some R14 million, according to appellant, or R9 million, according to respondent, had been generated as a result of this scheme.

[9] On 3 February 1998, appellant received a written instruction permitting him to pay certain cheques drawn on the Dockrat account but to dishonor one cheque for R 625 612. 69. This instruction was given to appellant by Mr Marais, the collections manager based at the head office of the respondent bank in Umtata. The exact instruction read thus:

> "*You may pay the cheques except R 625 672.69 which has been dishonored. You must pay careful attention to uncleared defects according to your manual."*

[10] It is common cause that a telephone conversation took place between appellant and Mr Marais at the latter's instance. Mr Marais informed the appellant that a cheque in the sum of approximately R 700 000 would be deposited by Dockrat. It is agreed that on 4 February 1998, a cheque of R727 190.16 was deposited at a time when the Dockrat account had been overdrawn to the extent of R 201 631 .66. As a result of the deposit the account now reflected a positive balance of R 525 558 . 50.

[11] It also appears to be common cause, from the pre-trial minute, that almost seventy cheques were paid on the Dockrat account during the period 4 February 1998 to 20 February 1998. This included, crucially, a cheque in the amount of R 625 672 . 69. In terms of the instruction given to appellant as set out in the relevant documentation of 3 February 1998, this cheque was not paid.

[12] On 20 February 1998, the cheque for R 727 190.16, was returned, 'payment stopped'. The Dockrat account was now overdrawn in the amount of R 462 654. 12. On the same day the cheque was redeposited, resulting in a positive balance in the Dockrat account. On 5 March 1998, the same cheque was returned and was reflected as having been 'mutilated'. The account was now overdrawn to the extent of R 829 442.82. When the cheque was returned mutilated, appellant again communicated with Marais and was instructed to return the cheque and to raise a query with Standard Bank. A manager of Standard Bank informed appellant that the cheque had initially been met but then had been dishonored on 16 February, pursuant to which a notification had been sent by Standard Bank to respondent bank. According to appellant, all of this was communicated to Mr Marais over the telephone and later a letter was generated by appellant in which the series of events leading up to the dishonouring of this cheque was set out in full. Appellant contends that respondent has suppressed the discovery of this letter and thus it was not made available at the trial.

[13] By contrast, Mr Marais denied the content of the telephone conversations to which the appellant testified. He denied that he gave any instructions to pay as alleged by the appellant, even though he had access to the account electronically and could have seen the nature of the uncleared

effects. He relied upon the appellant who was the manager on the ground' who, he claimed, had never clarified that the R 727 000 cheque was an uncleared effect until it was returned on 20 February 2008.

The key issue

[14] When the matter was argued on appeal, much turned on the allegation that appellant was instructed by Mr Marais to pay the cheque of R625 612.89 and that accordingly he could not be blamed for any loss suffered by respondent as a result of an instruction given by Mr Marais. In short, he had simply implemented an instruction from his superior. Mr Pillemer suggested further that the reason for the denial by Mr Marais of this conversation was that the latter had shifted the blame for his own incompetence in handling the Dockrat account to appellant who had become 'the fall guy'.

[15] In support of this contention, Mr Pillemer referred to the evidence of Dockrat who testified that his account had been supervised by Mr Marais. In Mr Pillemer's view, this gave credence to appellant's version that Marias had performed more than a 'watching brief' over the Dockrat account but, in effect, had managed the account directly so that the payment of R625 000 could not be blamed upon appellant. However, the evidence of Mr Dockrat in this connection justifies a somewhat different

interpretation of the events than that placed by Mr Pillemer on Mr Dockrat's testimony.

[16] Mr Dockrat testified that he issued a cheque of R 625 000 to a supplier by name of Tastic Rice. At that stage his account was overdrawn and he telephoned Mr Marais and informed him that the cheque of R 727 000 'will be deposited to cover up the overdrawn'. Marais, according to Dockrat,

> "*asked me to send that deposit to ….. Lusikisiki on a separate deposit slip and he will speak to Mr Ndimeni at the bank and we see- he didn't give me his assurance that he was going to meet the cheque for R 625 000 but he says that he'll see what he can do.*"

Asked about Mr Marais's approach, Dockrat confirmed that Mr Marais had given him no assurance that this amount of R 625 000 would be so paid.

[17] Appellant's version is essentially the following: notwithstanding any documentation which had been presented to the court *a quo*, a verbal communication took place between Marais and himself in which he was given instructions, which were contrary to those continued in the written documentation, namely for appellant not to pay the R 625 000. By contrast, Marais testified that appellant had disobeyed his direct instruction not to pay the cheque for R 625 000 and that accordingly appellant had proceeded on his own and caused a significant loss to be suffered by the respondent bank.

Evaluation

[18] It is clear from the relevant documentation that Marais had instructed the appellant in writing not to pay a cheque for R 625 000. It was also clear that appellant made a written recordal of the verbal instruction of Marais on 3 February 1998, and that verbal recordal crucially contains the following paragraph:

> "*The client is promising to deposit R 742 000 in the afternoon, can we pay. Cheque no 17234 for R 280 563 – 78 has been deposited today after we asked for code prior deposit which was code C. We recommend."*

Appellant was unable to explain why he had not included in his written recordal of the crucial telephone conversation the key instruction as he alleged, namely that he was entitled to pay the R 625 000 cheque. Mr Pillemer attempted to deal with this problem by suggesting that the language employed in the instruction was of an internal nature and was not intended to be interpreted as ordinary language. With the utmost respect, that explanation is unsatisfactory. It suggests that this court give credence to a version that, notwithstanding a crucial instruction not to pay a cheque by way of express written notification, the counter instruction to pay had been omitted by the appellant from his own written recordal of the verbal conversation.

[19] Significantly, Mr Pillemer was forced to concede that, on the evidence presented to the court *a quo,* both by way of verbal testimony and written documentation, there was a *prima facie* case which had been made out against the appellant. That assessment clearly is congruent with the evidence which was so presented. In the absence of any credible evidence from appellant, the *prima facie* proof must become conclusive proof such that respondent must be held to have discharged the necessary onus. Marine and Trade Insurance Company Limited v Van der Schyff 1972 (1) SA 26 A at 37.

[20] Viewed accordingly, at the very least appellant caused payments to be made against uncleared effects and contrary to express written instructions. Respondent suffered significant loses as a result thereof. Accordingly, it was justified in dismissing the appellant. This conclusion is the only reasonable conclusion to which a court can arrive, after an examination of the competing versions put up by Marias and appellant and viewed within the prism of the available documentary evidence. In short, there is no basis which was provided by appellant, on the available evidence, to indicate that respondent's Umtata head office as opposed to appellant had authorised the relevant payments.

[21] Once this conclusion is reached, Mr Pillemer's concession with regard to the second leg of appeal, namely the impartiality of the judge *a quo*

becomes relevant. Careful examination of the key evidence surrounding the issue in dispute reveals clearly that this is a matter that can be dealt with on appeal, without any prejudice to the appellant. There is simply no justification for referring this matter back for a rehearing before a different judge. The dispute does not turn on the credibility findings of witnesses but on the plausibility of the evidence and an evaluation of the probabilities. The competing versions can be justified or rejected exclusively on the evidence placed before the court *a quo* and which was available to this court. That evidence reveals that the probabilities clearly support the decision of respondent to dismiss appellant and hence the decision of the court *a quo*.

[22] For these reasons, the appeal is dismissed with costs.

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DAVIS JA

I agree

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JAPPIE JA

I agree

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LEEUW JA

APPEARANCES

For the Appellant: Adv M Pillemer SC

Instructed by: Jafta Incorporated

For the Respondent: F.A Boda

Instructed by: Hofmeyr Herbstein & Gihwala Inc

Date of hearing: 8 May 2009

Date of Judgment: 3 September 2009