

REPUBLIC OF SOUTH AFRICA



Not Reportable
Of interest to other judges

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPE TOWN**

Case No: C 408/2009

In the matter between:

NEDBANK LIMITED

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER M VAN ROOYEN (N.O.)

Second Respondent

MARK SOLARI

Third Respondent

JUDGMENT

HEAD NOTES: (review-failure to consider relevant evidence-process and substantive review-dishonesty)

LAGRANGE, J

Introduction

[1] I handed down judgment in this matter on 8 November 2011. The full reasons for the judgment appear below.

[2] This is an application to view and set aside an arbitration award issued by the second respondent, a CCMA commissioner, on 15 April 2009. The third respondent, an area manager of Nedbank at the time of his dismissal on 21 August 2008, was dismissed by the bank after being found guilty of two charges of misconduct. The charges read:

"1. Dishonesty in that during the period 3 September 2004 until 10 March 2008, you have abused your position in a dishonest manner by collaborating with junior staff to approve and release unsecured loans from the bank without the necessary signed documents. Your above conduct has resulted in potential financial risk and reputation risk to the bank.

2. E-mail abuse in that you received, retained and forwarded pornographic material using Nedbank resources (E. G. Laptop and Internet access) in contravention of the Bank's E-mail and Internet policy."

[3] The only issue between the parties at the arbitration was whether the third respondent's dismissal was substantively fair.

The arbitrator's award

- [4] The arbitrator correctly observed that most of the facts in the matter were common cause. In early 2008 there was a general investigation of irregular loan authorisations made by a certain Mr Mitchell, a team leader in Nedbank's home loans department. Mitchell had made unauthorised alterations to mortgage details of bank clients, thereby allowing the clients to borrow funds in excess of the registered bond value. The third respondent had obtained three mortgage loans from the bank in respect of three separate properties. The registered value of the bonds were R 415,000, R 200,000 and R 110,000 respectively, amounting to a total of R 735,000. Over a period of few years the third respondent drew down a further amount of R 853, 507 from these bond accounts without the values of the existing registered bonds being increased correspondingly. In the case of each of the three properties it was common cause that the value of the property exceeded the combined value of the bond value and the additional amounts advanced to the third respondent in respect of that property. Accordingly, the bank conceded that if the third respondent had applied for an extension of the registered bonds to cover the additional amounts advanced he would have qualified for the additional loans.
- [5] However, the third respondent never registered additional bonds on any of the properties. He simply obtained the additional loans by communicating with Mitchell by email. Mitchell then made the necessary changes on the existing bond account details to permit him to advance the extra amounts. Because the values of the registered bonds were never increased, the bank believed it was potentially exposed to greater risk in respect of these additional amounts.

[6] The arbitrator identified two issues in dispute between the parties regarding the first charge. Firstly, the central question was whether the third respondent knew, or ought to have known, that Mitchell had conducted unauthorised transactions to advance the additional loans to him. Secondly, it was a matter of dispute whether the bank held any security for the additional amount loaned to the applicant.

[7] The third respondent was interviewed by an investigator of the unauthorised loan scheme, Mr Simon. He told Simon that he had saved paying attorneys' fees by using Mitchell's e-mail procedure. The investigator concluded that this statement indicated that the third respondent knew that he would have incurred legal costs for registering an additional bond if the normal procedure for obtaining a further advance on an existing bond was followed. Because the correct procedure was not followed, no credit checks were done and no documents such as the loan agreement were completed as required by bank procedures.

[8] Even though the value of the properties covered the amount of the extended loans, the investigator believed that the bank would not be able to recover the unauthorised loans because the additional loans were not secured by a corresponding increase in the registered bond or by a new bond. Moreover, in terms of the provisions of the National Credit Act 34 of 2005 ('the NCA'), Mitchell's loan authorisations might well have constituted reckless lending in the absence of a proper credit assessment being done before granting the loans.¹ It was common cause that eighteen loan advances were made to the third respondent before the NCA was promulgated, and another

¹ Chapter IV, Part D of the NCA, amongst other things, prohibits reckless lending and makes provision for the suspension of credit agreements which are considered reckless.

seven thereafter. There was also evidence that the third respondent had signed off on debt restructuring agreements for clients in which money was drawn from the bonds to consolidate their debt, yet the procedure he followed with Mitchell in respect of his own debt restructuring was not the same.

[9] Other evidence which the arbitrator expressly considered was the fact that the third respondent had previously worked in the home loans department of the bank some 10 or 15 years before. The arbitrator also took account of the third respondent's claim that he assumed that Mitchell was following proper procedures. This assumption was apparently also accepted by other staff members who were disciplined, but not dismissed, for obtaining unauthorised loans through Mitchell.

[10] The third respondent claimed that he had first contacted Mitchell, with whom he had previously worked in the home loan department, at a time when he was experiencing frustrations in processing clients' home loan applications timeously. Mitchell had advised him that he had the authority to do certain transactions to facilitate the process. The third respondent then called on Mitchell regularly for assistance. Mitchell also advised him that if he needed additional funds himself he could apply merely by sending him an e-mail. The third respondent then took Mitchell up on his advice and on several occasions obtained extensions on his own mortgage loans by sending Mitchell an e-mail request. Occasionally he asked Mitchell to come back to him if there were any problems but Mitchell never did. In the circumstances, he said he did not have any reason not to trust Mitchell.

[11] The third respondent also mentioned that a procedure for obtaining loans *without* further bond registration was described on the bank's intranet facility

and speculated that may have been the procedure which Mitchell followed. However, he subsequently conceded that this procedure referred to re-advances on an existing mortgage facility, which did not apply in his case, because the loan facility was extended beyond the value of the registered mortgage bond. In so far as there were formalities to be completed in order to advance the loans, the third respondent was under the impression that Mitchell took care of these formalities.

[12] In respect of the first charge, the arbitrator concluded that it was clear that the third respondent was not guilty of dishonesty on the basis of the common cause facts. The arbitrator was satisfied that the employer had not proven that the third respondent had an intention to deceive, defraud or steal and it could not be said that conduct which was reckless, disobedient or foolish fell within the ambit of dishonest conduct.

[13] In reaching this conclusion, the arbitrator relied mainly on the following evidence advanced by the third respondent in support of his claim that he was ignorant of the procedures adopted by Mitchell, namely that:

- a) dual control systems were in place which made it impossible for someone like that Mitchell to grant loans unless he had the authority to do so;
- b) the loans granted were reflected on his monthly bond statements;
- c) other staff members were also being assisted by Mitchell;
- d) the process was not done in secret;

e) the loan was secured because the bond agreement was a continuing covering security for all present and future indebtedness of the third respondent to the bank;

f) the total value of the loans never exceeded the value of the respective properties;

g) merely because his requests for a loan were often met quickly, this could not have alerted him to the fact that formalities were not followed as he would not have known if Mitchell had involved the credit assessment department or not, and evaluation was not always required to make additional funds available, and

h) the bank's intranet (K-net) did provide for advancing loans without registration and there had been talk for some time of improving the system of loans to overcome client frustrations.

[14] The employer submitted, in the alternative to a charge of dishonesty, that the third respondent could be found guilty of serious misconduct in the form of intentionally obtaining unsecured loans without the bank's knowledge by not committing a gross violation of loan procedures, but the arbitrator found that such a charge has never been put to the third respondent during the hearing and could not be entertained.

Analysis

[15] What was the third respondent's understanding of whether the loans were unauthorised or not? This question was critical to the arbitrator's deliberations. Clearly, if the third respondent knew or ought to have known that the procedure of obtaining extended loans from Mitchell was not authorised, then he was a party to such an improper transaction. The reasoning of the arbitrator on the question of the third respondent's knowledge of the unauthorised nature of the loan advances is set out in paragraphs 44 and 45 of the award:

"[44] After his first interview with the investigators the Applicant made a written statement [...]. Therein the applicant states the procedure employed by Mitchell is strange in hindsight and he should have investigated. He also states he saved attorneys fees by following Mitchell's procedure. These two aspects were highlighted by the respondent and used in support of its argument that the applicant knew the correct procedures were not being followed. If the statement is read and evaluated as a whole however it becomes clear that the applicant's version remained the same throughout. He states he experienced frustrations at branch level and Mitchell advised him that home loans department was able to increase the limited registration amounts provided there was sufficient value in the property. All that was required was an e-mail. He was under the impression that the e-mail served as a written application and constituted his electronic signature. He benefited from this procedure as he saved attorneys fees. Because he was never told the system does not allow the transactions he never thought it was not authorised.

[45] In his e-mail to Mitchell, the applicant asked for increases to the limit of his bonds. Six of these e-mails were included in respondent's bundle [...].

In two of Mitchell's replies to the applicant he states the amounts available to the applicant were less than what was requested [...]. In the e-mail on page 47 Mitchell replies to the applicant "Check if enough". In the context he seems to say it to the applicant to check whether the funds that were made available are sufficient. From these e-mails it appears that applicant did not have free rein to ask for as much funds as he wanted. There were certain limits to what Mitchell was able to do on the system. I am of the view the respondent was not able to present sufficient explanation for the fact that these limits were applicable given the respondent is evidence that Mitchell merely made indicative changes to the system to accommodate the applicant while the applicant knew full well the transactions were unauthorised. These limits that were applicable supports the applicant's version that he was unaware of the wrongdoing by Mitchell rather than the respondent's version that the applicant knew the transactions were underhanded."

(sic)

(my emphasis)

- [16] The applicant argues that the arbitrator's reasoning above shows that she found that the third respondent was probably unaware that Mitchell's transactions were unauthorised because Mitchell appeared to be subject to certain limits on what he could do. Taking into account the contents of paragraph 44 of the award the arbitrator was also clearly persuaded by the consistency of the third respondent's account of how he came to use Mitchell's procedure. I agree with the applicant that it does not seem to follow

that because the third respondent stuck to his version throughout that this increases the plausibility of his account.

[17] The relevance of the third respondent's access to K-Net is that the facility contained explicit instructions to the effect that "if a client wants to increase the loan amount, a new Agreement of Loan/Re-advance must be completed". The procedures and requirements for different types of loans are set out in structured and detailed way on the system, which contrasts starkly with the procedure followed by Mitchell.

[18] The employer's representative in the arbitration asked the third respondent if he accepted that the practice at the bank had been that a further bond would be registered against the property and he would have been called in by attorneys to sign the documentation for the registration thereof. The third respondent confirmed that this was the practice which applied before he used new procedure facilitated by Mitchell. The third respondent had registered three bonds in his own name using the formal process.

[19] In his first handwritten statement made on 26 June 2008, the third respondent stated:

"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 and was told all that is required is an e-mail. 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 relationship with the H/L teams. Client 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 of registered amounts on H/loans. I admit that I should have investigated how this is possible but took it on his word. I know for a fact that we assisted at least one or two clients on this basis.

...

As I required more money [to fund property improvements] and based on what Jonathan had told me about the system change I approached him for assistance. All that was required was an e-mail 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 the attorneys would charge."

(sic)

[20] During his evidence in chief, the third respondent elaborated on Mitchell's advice to him about the email procedure. He claimed that when Mitchell told him he had a mandate to increase mortgage limits he had asked him "Are you sure? How is it possible?"

[21] Under cross-examination, the third respondent qualified his statement about the fees he saved under the new arrangement. Essentially, his

evidence was that he never paid attorneys for bond registration services in the past because they had done it as a favour for him. All he previously had to pay was the bond registration fee itself. He further testified that Mitchell actually told him that he would do the bond registration. Later, under cross-examination, he qualified this to say that Mitchell told him he would 'do the necessary' which he took to mean he would attend to all the formalities including valuations and bond registration.

[22] In a subsequent letter from the third respondent, dated 11 July 2008, he said the following, amongst other things:

"The reason for my being questioned and subsequently suspended took me by surprise as the reason for my drawing funds from my bonds was never with the intention of placing the bank at risk, being dishonest or abusing any system. I was told by someone in the home loan department who was at that stage team leader, that they had been given a mandate to increase limits on bonds. This providing that they be sufficient value & affordability in place. I had no cause or reason not question this as there were always initiative sought out to improve service to clients. There were continued talks of the bank wanting to do their own registrations at the deeds office. As I was newly appointed as a branch manager Parow this was good news to us. I advised the bankers that if they needed assistance with home loan issues that they should refer to Jonathan as he will assist.

...

Not once was there a thought of defrauding the bank in anyway. The only people who lost anything are the attorneys as they did not register a bond.

The risk of the bank is no different whether a bond was registered or not. Whenever the bond is cancelled either by repaying, or sale and then claim the full amount plus interest as the cancellation amount this is fully covered in the bond deed and loan agreements."

[23] It is evident from the above that the third respondent was acutely aware of the fact that no registration fees would be payable by himself using Mitchell's services, but he also understood that it was the registered amount of the bond that would be increased. He also appears to suggest that he understood that Mitchell's activity was a logical outcome of the previously expressed wish of the bank to do its own deed registrations, and he still believed that formalities would have to be attended to. Thus, the third respondent's version of his understanding was that the application process was now greatly simplified but there were still attendant formalities that would be dealt with by the bank and did not require his personal attention or financial outlay. He expanded on this by testifying that he believed the e-mail request made to Mitchell qualified as his electronic signature signifying his agreement to the new loan facility.

[24] When he was taken through the bank's policy on re-advances under cross-examination he conceded that a new loan agreement had to be concluded even when the borrower was seeking to borrow the difference between the original loan and the outstanding balance. He also agreed that there was no document to suggest that this policy had been substituted with a new email application procedure. He admitted he ought to have checked up or questioned the new procedure, but said he had no reason not to trust Mitchell.

[25] The third respondent's trust extended also to assuming that the loans were properly authorised, in circumstances where large advances of up to

R 97, 000-00 were approved within three-quarters of an hour of sending the email request and, in one case, within 10 minutes.

[26] When Simon was cross-examined on the need to conclude a written agreement before money could be advanced, it was suggested to him that this was unnecessary if the existing bond provided for continuing covering security for all amounts owed to the bank. However, it is clear that this was not the reason the third respondent was unconcerned about the apparent lack of formalities required of him. On the contrary, his stated belief at the time was that the bank would attend to these, not that he assumed such formalities were unnecessary based on his interpretation of the terms of the existing bond.

Grounds of review

[27] The applicant's principal attack on the arbitration award is that the arbitrator simply failed to grapple with the evidence and relied solely on the parties' submissions and some limited aspects of the evidence, without attempting to resolve factual disputes and draw conclusions on all the evidence based on a balance of probabilities.

[28] In so doing, the applicant relied principally on a so-called 'process based' review rather than a 'result based' review in the sense in which those two approaches were distinguished by Ngcobo, J in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at 2490-2491, [267 - 268]. Nonetheless, as the applicant recognised, if the irregularity

concerns a Commissioner's failure to have regard to the material facts, of necessity that also raises the question whether the result could have been a reasonable one, as the Constitutional Court pertinently observed in *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) at 470, [511].² Indeed, it is difficult to see how a process based review concerning a failure to have regard to material facts could ever be truly distinguished from an outcome based review based on unreasonableness.

[29] The applicant's chief complaint is that the commissioner failed to deal with the all important issue about whether or not the third respondent knew or ought to have known that the correct procedures were not being followed in regard to deregistration of further mortgage bonds when he required additional funds exceeding the registered amount of his existing bonds. It is not strictly true that the arbitrator failed to deal with the issue. However the narrower focus of the applicant's attack is that the arbitrator failed to consider all the material evidence in determining this issue.

[30] The applicant argues that the arbitrator's conclusion that simply because the third respondent's account was consistent, could not explain why he did not think the procedure was strange at the time or why it was reasonable for him to believe that he suddenly no longer had to pay bond registration fees,

² viz: "[511] There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decisionmaker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decisionmaker."

yet the formalities would still have to be completed by Mitchell. The evidence relating to this question will be considered later.

[31] The applicant contends arbitrator was also swayed in her evaluation by the fact that sometimes Mitchell did not authorise a loan for the full amount requested. She accepted that it was reasonable of the third respondent to have believed that because of this it was reasonable for the third respondent to infer that there was nothing untoward about the transactions because they would not have been subject to such occasional limitations if they were unauthorised.

[32] The applicant identifies the portions of the evidence, which it claims the Commissioner ignored in her evaluation. If the claims are correct and the evidence ignored is relevant to the matters the arbitrator had to decide and if it is of sufficient weight to have materially affected the findings she made, then the reasonableness of her award will be implicated. The evidence referred to is evaluated below:

[33] The applicant contends that in finding that the third respondent was ignorant of any wrongdoing, she failed to give any weight to his 26 years of experience with the bank and his previous knowledge and familiarity with the formalities of the bond registration process. I agree. It seems the arbitrator evaluated the reasonableness of the third respondent's belief not from the perspective of a relatively senior manager of the bank with a quarter-century of experience, but from the perspective of someone who was virtually ignorant of standard banking practices.

[34] It is inconceivable that the third respondent could have believed that the bank would simply pick up the bond registration fee and that a loan agreement could be concluded by an informally worded e-mail request for funds without any reference even to a loan agreement. Moreover, in so far as he claimed to believe that the formalities would still be completed by Mitchell, it is difficult to understand how he could possibly have believed that Mitchell could authorise the loan in under an hour when such formalities could not have been completed in that time. Even on his own version it is not in fact true that he thought nothing of it. A person who assumes everything is above board does not ask: *“Are you sure? How is it possible?”* Interestingly, he never told the arbitrator what Mitchell’s supposed answer to these questions were.

[35] A further complaint is that the arbitrator also failed to consider whether it was reasonable for the third respondent to believe that a bond registration could have been effected without him signing any document at all and without any valuation of his property being done.

[36] The applicant contends that the arbitrator failed to consider why the third respondent only thought afterwards that he should have been more circumspect about Mitchell’s system, but did not think so at the time. In any event, his own version on whether he had doubts at the time, is contradictory because on the one hand he claims to have trusted Mitchell but on the other claims he questioned him on how it was possible for him to approve loans on such an informal basis. Those questions demonstrate that he had in fact real concerns that something was not right about the method used by Mitchell, but he simply suppressed these doubts. Likewise, the arbitrator simply ignored this evidence.

[37] Given these doubts and given that the only written policies on loans which existed indicated that a new agreement would have to be completed, it is difficult to understand how the arbitrator could have accepted that the third respondent could not have realised that something was amiss and that Mitchell's method was simply too good to be true. The arbitrator also failed to consider why the third respondent simply accepted such a radical departure from the formal procedure he had been accustomed to, and which was set out in the bank's written policies, was possible without any variation of the express written policies.

[38] It is true that an arbitrator does not have to set out every factor considered in arriving at her findings, but where there is no sign that significant material evidence was considered and no apparent reason why the arbitrator felt that evidence could be discounted, a natural inference arises that arbitrator failed to consider it all³, which constitutes a valid ground of review on basis of a flawed process. There is authority that such flaws cannot be remedied, even if the outcome might still be justified on the basis of the evidence before the arbitrator⁴, but if significant material evidence is ignored, it will seldom be the case that it does not also affect the reasonableness of the award, and Ngcobo J's dictum in *Nu-Clicks* will usually apply.

[39] On the basis of what is set out above, I am satisfied that the arbitrator did not conduct a balanced assessment of all the significant evidence that was material to deciding if the third respondent knew, or probably knew that he was making use of an unauthorised loan facility. In ignoring important

³ See *Corobrik (Pty) Ltd t/a Brick & Tile v CCMA & Others* [2002] 8 BLLR 738 (LC) at 740,[7].

⁴ *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC) at 1134, [17]

evidence and failing to evaluate the evidence pointing to the third respondent's probable knowledge of the illegitimate nature of the loan transactions, the arbitrator denied the applicant a fair hearing and thereby committed a reviewable irregularity. Moreover, her failure to do so meant that her findings on the critical question of the third respondent's knowledge of the improper nature of the transactions were not rational and she reached conclusions no reasonable arbitrator should have reached.

[40] There were significant problems with the third respondent's explanation for his alleged ignorance of the improper nature of Mitchell's method of originating loans. In summary,

- a. The third respondent on the one hand said he had queried how it could be possible that the scheme could work the way it did, but on the other hand simply accepted Mitchell's word. Likewise, he admits that he should have been more circumspect about the scheme and claims he did raise his concerns at the time, but never explains why those concerns were allayed.
- b. The third respondent had worked for years in an environment in which loan applications were regulated by written policies and procedures, yet he blithely assumed that these practices had simply been swept away and replaced by a completely informal one where the only document attesting to his consent to a significant loan supposedly secured by the value of his property was his email request for the loan. Moreover, there was not a single bank document to support such a radical departure from prior practices,

yet he was supposedly reassured about the propriety of the quick and easy procedure simply on the basis of the say-so of Mitchell.

- c. In a similar vein, it stretches the limits of credulity to accept that the third respondent honestly believed that all the costs and effort 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.
 - d. It is also difficult to credit that the third respondent could honestly have thought that all formalities such as a loan agreement, registration of a further bond etc, would take place 'behind the scenes' so to speak, and he would only have an informal email to evidence his application.
- [41] In the circumstances, I am satisfied that the third respondent most probably knew that Mitchell's method was not above board and he took advantage of it knowing that it was not an approved method. By so doing he became complicit in taking advantage of an unauthorised method of obtaining loans. It is so that the amount of the loan appeared against his account and that he did not fail to pay the loan instalments. Therefore it must be accepted that the existence of the loan was not concealed and the third respondent was not attempting to defraud the bank of funds, but the method of obtaining the loan bypassed the procedures which, in part at least, are designed to minimise the risks of lending and Mitchell's procedure clearly bypassed these safety mechanisms.

[42] Moreover, despite his claims that the original mortgage loan agreement covered all future indebtedness he might have incurred on each bond, that was not true. The document makes it clear that, even though all debt incurred would be secured by the bond, this was only true if the total debt did not exceed the amount of the registered bond. What made the third respondent's conduct dishonest was that he must have known he was not entitled to obtain the loans in the way he did, and that the bank could not have been aware of how the transaction was effected, yet he continued to make use of the procedure to procure the funds, thereby obtaining the money without proper vetting of the transaction by the bank. The arbitrator's characterisation of dishonesty as necessarily involving an intention to steal or defraud overstates the requirement for dishonest conduct. In this instance the third respondent consciously made use of an improper procedure to obtain a benefit he must have known he was not entitled to obtain in that manner. That was dishonest.

[43] I accept that the third respondent had long service, but he also occupied a senior position in which he was expected to behave responsibly, yet he became party to an unauthorised scheme by which significant amounts of money were advanced to him by a procedure which did not have the bank's approval. Such conduct was highly irresponsible on his part and his dismissal was justified on this basis.

[44] On the charge relating to pornography it is not necessary to deal with this in the light of my conclusions on the first charge, though a few comments would be in order as this was a matter still canvassed at the review hearing. The third respondent's computer was found to contain approximately a thousand pornographic images, samples of which were in the bundle

depicting what might be termed celebrity exposures and equine encounters. Despite what might be considered a sizeable volume of sexually explicit imagery, the third respondent displayed indifference towards his collection and would not concede that the number of images stored on his computer was significant.

[45] The arbitrator held that the bank's policy of electronic communications should not be construed too narrowly, but nonetheless emphasised the narrowness of the charge against the third respondent, namely that it concerned the receiving, retaining and forwarding of the salacious material. The third respondent received photo images from another staff member, nicknamed 'Poppekas', depicting one Britney Spears exposing her private parts. The email was sent to Mitchell too. The email subject line was "Get in the groove for sales!!" The third respondent reacted to this by re-sending the same email to Mitchell in which he noted that Mitchell had received the same email from Poppekas. He further exhorted Mitchell in the forwarded message: "You can't let Poppekas beat you, let's see if you can equal or better." The third respondent, defended this statement by saying that he was referring to sales and not to the images.

[46] The arbitrator found that since Mitchell had already received the explicit images and the third respondent knew this when he resent the same e-mail to Mitchell, it could not be said in the true sense that he had 'forwarded' pornographic material to Mitchell because he already had it. She also found the email policy did not prohibit the receipt and retention of pornographic images. In her view, the fact that the bank's IT policy required employees to purge their email inboxes regularly did not prohibit the retention of such

material, and if the bank thought that a failure to clear the images out of his computer was a serious offence, it would have charged him with this.

[47] In any event, the arbitrator found that another individual charged with visiting pornography websites on the internet had only received a final written warning so it was inconsistent to have dismissed the third respondent on this charge, even if he was guilty.

[48] There is reason to consider the arbitrator misconstrued the policy by entertaining the unnecessary philosophical question whether the images of Ms Spears amounted to pornography in circumstances whereas the bank policy did not refer to pornography but prohibited the transmission of 'sexually explicit' images. The arbitrator also took an unreasonably narrow view of what it means to forward such material to another staff member. However, even if her reasoning can be criticised on these grounds, and her finding of not guilty must be set her aside, her finding that it would have been inconsistent to have dismissed the third respondent for this charge is not unreasonable given what was before her and there is no reason to overturn her findings that dismissal would have been too harsh a sanction for that charge in the circumstances.

Conclusion

[49] The arbitrator committed reviewable irregularities in failing to consider relevant and material evidence in arriving at her findings on whether the

third respondent was guilty of the charges for which he was dismissed. The arbitrator's findings were also ones no reasonable arbitrator could have reached.

- [50] The conduct of the third respondent, given his seniority and given the extent of his unauthorised loans was serious enough to warrant his dismissal on the first charge alone.

Order

- [51] The third respondent's late filing of heads of argument is condoned.
- [52] The arbitration award issued by the second respondent on 15 April 2009 under CCMA case number WE 11082-08 is reviewed and set aside.
- [53] The arbitrator's finding on the substantive fairness of the third respondent's dismissal is substituted with a finding that his dismissal was substantively fair.
- [54] No order is made as to costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of judgment: 08 November 2011

Full reasons filed: 25 November 2011

Appearances:

For the Applicant: A T Myburgh, SC instructed by Cliffe Dekker Hofmeyer Inc.

For the Third Respondent: W Fisher instructed by M Abrahams