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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J898/00

2001-08-06

In the matter between

OBAKENG ANDREW MOLOKO

Applicant

and

ABSA BANK LIMITED

Respondent

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J U D G M E N T

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LANDMAN J: Absa Bank Limited dismissed Mr O Moloko after finding him guilty on four charges. These charges are:

1. On 14 October 1998 you purchased 21 000 US Dollars on behalf of Absa Bank. This transaction is however not reflected in the bank's records and the transaction was subsequently found to be concluded on behalf of a client K C V Abrahams.
2. On or about 12 October 1998 you exceeded your mandate by granting a credit facility to K C V Abrahams for R91 000 and subsequently on 14 October approved an excess of R32 000 on this particular facility.
3. You admitted receiving R20 000 in cash from a client K C V Abrahams to be

deposited on such client's account which deposit was not effected immediately or within a reasonable time. You in fact admitted to having taken such amount home and only having made the deposit on 31 October 1998 at Absa Bank, Maud Street, Sandton.

4. You allocated a discretionary bonus to the amount of R10 000 to the credit manager N S Cantaloupo of Absa Rissik Street Branch without following prescribed procedures.

Mr Moloko was unhappy about his dismissal and referred the dispute to the CCMA. The dispute was arbitrated before commissioner Matlape, the second respondent. He found in favour of Mr Moloko and ordered his retrospective reinstatement. Absa is distressed by the finding and seeks to review and set the award aside. Mr Moloko on the other hand seeks to have the award made an order of court.

Absa contends that the reward is reviewable on three grounds, these grounds are set out in the heads of argument which were filed on behalf of Absa. They are:

1. Second respondent committed misconduct in relation to his duties and alternatively a gross irregularity in the conduct of the proceedings by failing to allow applicant to reopen its case in order to call the evidence of Ms Canada and Ms Abrahams.
2. Second respondent committed misconduct in relation to his duties alternatively a gross irregularity in the conduct of the proceedings by failing to assist the parties in securing the evidence of Ms Abrahams as a witness.
3. There is no rational objective basis justifying the connection made by the second respondent between the material properly available to him and the conclusion he arrived at in respect of his finding that first respondent did not exceed his

mandate.

In its founding affidavit Absa made an allegation that the commissioner was biased against it. Absa however did not persist with the allegation of bias. I may interpose to state here that allegations that commissioners and judges are biased are made all too often and too loosely. Should civil litigation follow where these allegations are abandoned or made without merit the applicants will only have themselves to blame for their predicament.

The first ground concerns the commissioner's failure to allow Absa to reopen its case to call Ms Canada and Ms Abrahams. It appears to be common cause that this was the case, although that portion of the record dealing with the application to reopen the case, is missing.

It is of course quite clear that the commissioner is enjoined to dispose of a matter as expeditiously as possible. Ms Canada and Ms Abrahams were competent and compellable witnesses who were available from the start of Absa's evidence which was spread over several months. Absa chose not to call Ms Abrahams until she had testified in a criminal case which they had preferred against her. Indeed the arbitration proceedings were postponed from time to time for the purpose of obtaining her evidence. At the close of the arbitration proceedings the criminal proceedings against Ms Abrahams were still not completed. It appears that there was an application to postpone the case until the following year. This was refused. The refusal is not challenged in this review, and it must be accepted that this refusal was justified. Indeed the commissioner was justified in saying that the matter should be brought to an end, particularly as Miss Abrahams could have been called at an earlier stage.

Ms Canada was also available to Absa. She appeared on a list of witnesses which had been compiled by Mr Moloko. In the event he did not call her. Absa

then wanted to call her. The commissioner refused to allow Absa to open its case for this purpose. His decision is not recorded in any substantial manner, but it appears to be justified and there is no room to interfere on this ground. It must have been apparent to Absa that Mr Moloko was entitled to call all the witnesses on his list or none of them. If Ms Canada's evidence was relevant to their case they should have called her. The submission that Absa was represented by lay persons and that therefore the commissioner should have assisted them, is quite clearly baseless. Absa is a large institution which has many resources at its disposal and to say that its representatives were mere lay persons is simply without foundation.

The second ground on which Absa relied may be disposed of shortly. The commissioner advised the parties to secure the attendance of their witnesses. He did this on more than one occasion. It is again unthinkable that Absa did not know that it was entitled to issue a subpoena and summons Ms Abrahams to attend the hearing. Clearly it was not the commissioner's responsibility to issue the summons and to ensure that Ms Abrahams was in attendance. He allowed the parties ample time and opportunity to secure her presence.

The third ground is that the commissioner's finding was unjustified and irrational. This complaint is restricted to the second charge namely that Mr Moloko exceeded his mandate which was limited to granting loans up to R100 000. The commissioner found that he had either not exceeded his mandate or had exceeded it by an insignificant percentage. Therefore he concluded that the dismissal could not be sustained on these grounds.

The commissioner's finding on the other three grounds is not challenged and therefore this matter turns solely on the charge relating to the mandate. Although Absa basis its complaint against Mr Moloko on the grounds that he exceeded his

mandate in lending money to Ms Abrahams, a former employee of the company, it has been suggested, indeed it was put to him under cross-examination that Absa has a different complaint. The commissioner picked up on this early in the arbitration. There was the possibility that Absa was suggesting that Mr Moloko was guilty of fraudulent or negligent dealing. This was subsequently fortified when it was put to Mr Moloko that Ms Abrahams had said under oath that she had not been in his office and had not borrowed the money, the implication being that Mr Moloko had taken the money for himself. He responded rather angrily and certainly not without justification by saying that in that case Absa should be suing him for the money and not Ms Abrahams.

Against this background Mr Moloko clearly had some difficulty in defending himself against cross-examination designed to prove something else than the formal of charges. The commissioner also experienced difficulty in maintaining focus which he pointed out to the parties. Mr Moloko's mandate to lend money was set at R100 000. He could lend the first R50 000 without requiring the borrower to provide security. He was required to have security for the balance if he approved such a loan.

The question which the commissioner was required to decide, and which he did decide, was whether there was security for the balance, and, if not, did this justify dismissal. It is common cause that there was security in the sum of about R4 000 stemming from a guarantee which had been provided much earlier by Ms Abraham's father. There was also a deposit of R50 000 in an FNB account which was valued by Absa's portfolio manager and credit manager at Mr Moloko's branch, at R40 000. The sufficiency of the security has been challenged by Absa but, in the absence of an allegation finding of fraud or conspiracy, it must be accepted, as the commissioner did, that Mr Moloko was entitled to rely on the

investigations and recommendations of his subordinate that this was proper security.

Ms Abrahams was expecting a pension fund pay out from the Absa pension fund. The payment was dependant on a ruling regarding its taxation. I assume that the pension fund would deduct the tax payable and pay the balance over to Ms Abrahams. Mr Moloko was aware of the situation and established from the receiver of revenue what the maximum tax would be. He took the balance remaining into account in determining whether or not to grant the loan. There was a great deal of discussion during the arbitration about whether unpaid pension proceeds can be regarded as security or merely what the banking officials termed a “comfort”, that is a factor which would tend the manager to believe that the loan would be repaid.

There was evidence on this by different witnesses. Some suggested that the unpaid proceeds were not security. Others, although accepting that it was not security, said that in banking practice it was normally accepted as security. See in particular the testimony of Ms Pillay, Ms Jumpies and Mr Moloko.

The commissioner found that the pension proceeds could be accepted as security. His finding is not unjustifiable. The commissioner also found that as regards the FNB deposit of R50 000 an officer had placed a value of R40 000 on this and that Mr Moloko was entitled to rely on this. I have dealt with this above and the evidence supports this finding. It is not an unreasonable conclusion. Coupled to this is the finding regarding the way in which the account was conducted. This has a bearing on the so-called excess of R32 000 which was granted on this facility.

The commissioner investigated the way in which this account was conducted and came to the conclusion that there was no irregularity and that, if there was an

irregularity, the bank's computer system would have sounded an alarm. Coupled to this is his finding relating to the so-called shadow limit which affects the way in which an account may be conducted. The commissioner's finding on the first charge that it could not be sustained is justifiable on the material which was before him. In any event, if the commissioner was wrong as to whether the mandate was exceeded, there was evidence that it was not uncommon for officials of Absa Bank to exceed their mandates. Absa's principal witness, Mr Moreland pointed out that discipline would not automatically follow if a manager exceeded his mandate. Various circumstances would be taken into account in order to determine whether disciplinary proceedings would be instituted. These circumstances included a degree of recklessness. See also the testimony of Mr Grobler, also a witness for Absa. It must also be remembered that the granting of a loan, although hemmed in by a mandate, amounts to a judgment call and this may prove, after the event, to have been unwise. It was contended that Mr Moloko knew that Ms Abrahams had been dismissed for fraud and that her application should have been handled with more caution. However, Absa did not prove that Mr Moloko was aware of the reason for her dismissal, only that he knew that she had been dismissed.

In the result there is no cause to interfere with the commissioner's award. The application to review the award is dismissed with costs. The award is made an order of court and Absa Bank Limited is ordered to pay the costs attendant on the application to make the award an order of court.

Judge of the Labour Court of South Africa

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