



IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

HELD AT MBABANE

CASE NO. 2/2017

In the matter between:

GLORIA MKHWANAZI

Appellant

And

NEDBANK SWAZILAND LIMITED

Respondent

Neutral citation:

*Gloria Mkhwanazi v NedBank Swaziland Limited
(02/2017) [2018] SZICA 04 (03 May 2018)*

CORAM:

C. MAPHANGA AJA

D. TSHABALALA AJA

N. MASEKO AJA

FOR THE APPELLANT:

**ADV L. MAZIYA (Instructed by Mabuza
Johnson Attorneys)**

FOR THE RESPONDENT:

MR. Z.D. JELE (ROBINSON BERTRAM)

HEARD: 04 APRIL 2018

DELIVERED: 03 MAY 2018

Preamble: *Dismissal from employment – Whether Appellant fairly dismissed from employment after facilitating money lending activities amongst staff members.*

Held: That the Appellant was fairly dismissed from employment after she engaged in misconduct which was in conflict with the Nedbank’s Code of Ethics, Conflict of Interest Policy and Staff Gift’s Policy.

Held further: Appeal dismissed.

[1] This is an appeal against judgment of the Industrial Court per T. A. Dlamini J. sitting with members D. Nhlengethwa and P. Mamba, delivered on the 21st November 2016, wherein the Court *a quo* dismissed an application brought by the Appellant against the Respondent for unfair dismissal and related claims thereto.

HISTORY OF THE MATTER

[2] The Appellant was employed by the Respondent in March 1985, as a Reconciliation Clerk and she rose through the ranks until she held the position of Operations Managers when she was dismissed on the 10th February 2010.

[3] Evidence led before the Court *a quo* indicated that on the 1st June 2009 the Appellant was confirmed to the position of Operations Manager for the Respondent’s Matsapha Branch. On the 6th October 2009 the Respondent communicated staff changes to its employees.

- [4] The Appellant was affected by the staff changes because the Respondent appointed a certain Ms Makhubu to the position of Operations Manager, Matsapha Branch without consulting the Appellant. This did not go down well with the Appellant and naturally any person would be affected by such conduct and situation which the Appellant found herself faced with in.
- [5] It was only on the 7th October 2009 that correspondence was addressed to her advising her that she was to be attached within the Operations Manager Manzini Branch for training purposes for a period of three (3) months, effective 1st October 2009 ending 31st December 2009.
- [6] For ease of reference I will quote the correspondence addressed to Appellant dated the 7th October 2009.

'7th October 2009

Mrs Glory Mkhwanazi

Nedbank Swaziland Limited

Matsapha Branch

Dear Glory

Attachment at Manzini Branch

After discussion with your Supervisors, a decision has been taken to attach you with the Operations Manager at Manzini Branch for

Training purposes for a period of three (3) months, effective 1st October 2009, ending on 31st December 2009.

The purpose of the attachment is to specify the arrears where we feel you need to improve and assist you in the process. Should there be problems in reaching the required competency standards, then we will further assess the suitability of your current role.

On receipt of this letter you are requested to acknowledge that you had discussions with your Supervisors with regards the Training.

We trust that at the conclusion of the period there will have been a successful outcome.

Yours Sincerely

“Signed”

EDWARD SITHOLE

Head of Human Resources

“Signed”

P J BOUWER

Head of Sales

Acknowledgment

I acknowledge that I had discussions with my Supervisors with regards my attachment at Manzini Branch and hereby accept.

**Signed.....at.....on
.....”**

(signature)

(Day/Month/Year)

I will revert to this letter as Counsel for Appellant attacked the conduct of the Respondent owing to the contents of this letter.

[7] Upon receipt of the 7th October 2009 correspondence, the Appellant did not endorse her signature to acknowledge the discussions between herself and Respondent as portrayed in the correspondence. This letter was marked exhibit “GM2”.

[8] On the 19th October 2009, the Appellant responded to the letter of the 7th October 2009 (“GM2”) in the following manner;

“19th October 2009

Edward Sithole

Head of Human Resources

Nedbank Swaziland Limited

P. O. Box 68

Mbabane

Dear Sir

RE: ATTACHMENT AT MANZINI BRANCH

- 1. The above matter kindly refers and in particular your letter dated 7th October 2009.***
- 2. Be informed that I am pleased to be afforded an opportunity for further training which in my humble view stands to be a benefit to all parties here concerned.***
- 3. Be informed further that I am however disturbed by the nature of the said letter. I wish to indicate the following;***
 - 3.1 my performance and / or competency are being put to question which is a first instance since my appointment and subsequent confirmation to the position that I believe I currently and lawfully hold Operations Manager in the Matsapha Branch.***

- 3.2** *I am not clearly advised as to what exactly and / or which arrears will the training focus on and further as to what informed such decision.*
- 3.3** *mention is made to discussions, supposedly between myself and my Supervisors which are unknown to me. I am further directed and compelled to acknowledge such discussions.*
- 4.** *I am further disturbed by the fact that the said letter comes after general communication to general staff which contains staff changes dated 6th October 2009, contained in the communication are personal issues which were publicised prior to consultation with myself in particular.*
- 5.** *I am encouraged by the fact that on the 8th October 2009 I was eventually called into a meeting at my request where I hoped that my concerns would be addressed.*
- 5.1** *I was however, surprised to learn that my Superiors in attendance therein were of the view that the 7th October 2009 letter did not in any way raise concern about my competence or that I am incompetent;*
- 5.2** *my Superiors did raise two (2) issues with regards to my work on the day being my tendency to sympathize with staff and escalating issues from the Branch. In this regard, the first issue, I believe was addressed before. I was however, surprised to see that the minutes of that meeting reflected other issues which we did not discuss because they were not raised.*
- 6.** *I therefore kindly request further and better information on the above concerns and further if I am being trained to return to my current work station at Matsapha. This*

arises because it seems to me that my Supervisor, who was supposed to train me, has already been appointed to occupy my present position without any form of consultations.

7. Your assistance in this regard will be highly appreciated.

Yours faithfully

Mkhwanazi Glory – (Signed)

[9] This letter of the 19th October 2009 written by Appellant to Respondent is Exhibit **“GM3”**.

[10] It appears that this letter Exhibit **“GM3”** touched a raw nerve on the Respondent because on the 21st October 2009 correspondence was addressed to her wherein she was suspended pending internal investigation / disciplinary hearing. This correspondence is Exhibit **“GM4”** and is signed by P J Bower – Head of Sales.

[11] The Appellant through her attorneys argued that the suspension was unjust, unfair and unlawful and demanded that it be withdrawn within twenty four (24) hours. However, the Respondent responded that the suspension of Appellant was pending investigations into allegations off money lending activities by Appellant and in

contravention of bank policy which resulted in conflict of interest with her employer's business.

[12] The Respondent further stated that the suspension and ongoing investigation are under no circumstances informed by ulterior motives and that the outcome of the investigation would determine whether or not the Respondent shall proceed with disciplinary action against the Appellant.

[13] The Respondent conducted its investigations and eventually charged the Appellant for facilitating money lending activities between Nedbank staff in contravention of Nedbank's laid down policies which resulted in conflict of interest with Nedbank's businesses. The disciplinary hearing was conducted and, on the 4th February 2010, she was found guilty as charged and on the 5th February 2010 the sentence was pronounced as one of dismissal.

[14] The Appellant appealed to the Managing Director as per Respondent's disciplinary policy and on the 9th March 2010 the appeal was dismissed, which meant that the dismissal of Appellant by Respondent remained in force.

- [15] The Appellant therefore reported a labour dispute to the Conciliation Mediation and Arbitration Commission (CMAC) on the 15th April 2010 for unfair dismissal and other related claims.
- [16] On the 20th May 2010 the Commission issued a Certificate of Unresolved Dispute which was duly signed by the Commissioner on the 25th May 2010.
- [17] In August 2010, the Appellant launched proceedings before the Court *a quo* against the Respondent for unfair dismissal and related claims. Owing to the congested roll and back log of cases before the Court *a quo* the matter was eventually finalized on the 21st November 2016 when the Court *a quo* delivered its judgment dismissing all the Appellant's claims against the Respondent.

THE APPEAL

- [18] The Appellant then lodged an appeal before this Court on the following grounds of;
- a) That the Industrial Court had erred in not finding that the punishment meted out to the Appellant was harsh, and unreasonable in that, although the Bank's policy was allegedly breached by Masilela, Bertha, Nonhlanhla Mkhonta and the Appellant; only the Appellant and

Bertha were subjected to the disciplinary hearing and subsequently dismissed.

- b) That the inconsistent manner in which the Appellant was treated vis-à-vis the other employees who also breached the Bank's policy vitiates the disciplinary hearing and that it was incumbent on the Industrial Court to find that the Appellant's disciplinary hearing and subsequent dismissal was in the circumstances unfair, unreasonable and vitiated by bias.

- c) That the Industrial Court erred in not dismissing the disciplinary hearing on the basis that the hearing was not procedurally fair in that it was not applied, executed and finalised within forty (40) days of the misconduct having been brought to the attention of Management, as stipulated in 1.11 of the Nedbank (Swaziland) Limited and Swaziland Union of Financial Institutions and Allied Workers Disciplinary Code and Procedures (i.e. it will be argued that the breach or misconduct was brought to the attention of Management on 21st October 2009, and that the hearing took place on the 9th December 2009, and that as such the disciplinary action was applied, executed and finalized after forty (40) days had already expired.

- d) That the Industrial Court failed to take into account relevant considerations in deciding that the dismissal was reasonable.
- e) That the Industrial Court took into account irrelevant considerations in reaching its decision.
- f) That the decision of the Industrial Court was unreasonable in the light of all the evidence that was led before it.

In terms of Rule 12 of the Industrial Court of Appeals Rules, on the 27th March 2018, further grounds of appeal were added and these were that;

- g) The Court *a quo* erred in not finding reasons for dismissing the Appellant's claim for overtime, leave due, recognition and wardrobe allowance, thus rendering its decision arbitrary and unfair.
- h) The Court *a quo* erred in not holding that the dismissal was invalid in as much as the disciplinary process was

unfair as it never observed the principles of natural justice notwithstanding the Chairperson's assertion to that effect,

- i) The Court a quo erred in not holding that the dismissal was not reasonable and fair in that the alleged misconduct was not proved on a balance of probabilities.

[19] During arguments Mr. Maziya for the Appellant argued strongly that the disciplinary hearing was a mere formality because the Respondent had already displayed its intention to dismiss the Appellant by transferring her to Manzini without consulting her and also appointing someone in her position of Operations Manager at Matsapha. He argued that these actions of the Respondent were unfair and unjust.

[20] He further argued that during the disciplinary hearing the Chairperson displayed extreme bias against the Appellant to the extent of completely failing to observe the principles of natural justice. He argued that the Court a *quo* ought to have found that the dismissal was unfair in that the alleged misconduct was not proved against the Appellant.

- [21] On the other hand Mr Z D Jele for the Respondent submitted before us that the alleged misconduct and conflict of interest committed by the Appellant was proved before the Court *a quo* on a balance of probabilities and therefore that the said Court *a quo* correctly found in favour of the Respondent.
- [22] He submitted that the Respondent introduced certain policies and code of ethics in an endeavour to prevent the staff from committing misconduct. The Appellant was well aware of these, however, she chose to engage in misconduct which resulted in her disciplinary hearing and subsequent dismissal.
- [23] The gist of Mr Maziya's submission was that the Appellant was charged for misconduct and subjected to disciplinary proceedings and subsequently dismissed unfairly from employment because Respondent had long made up its mind to dismiss her and that the transfer of Appellant to Manzini without her knowledge was part of the unfairness meted out to Appellant by Respondent. Further, that during the disciplinary hearing no evidence linking the Appellant to the charges was established, in fact he submitted that there was no evidence of misconduct on the part of the Appellant during the disciplinary hearing and before the Court *a quo*.

[24] As a result of these submissions by Mr Maziya it then becomes necessary for us to consider whether sufficient and credible evidence was led before the Court *a quo* by Respondent to prove that the Appellant was guilty of the misconduct and subsequently dismissed fairly from the employment of the Respondent.

THE EVIDENCE BEFORE THE COURT A QUO

[25] The Appellant testified in her case and the Respondent led two (2) witnesses in Mr Siphosithole and Mr Robert Masilela respectively. After the testimony of the three (3) witnesses the submissions were made on the 19th September 2016 and judgment subsequently delivered on the 21st November 2016.

Before analysing the evidence it is crucial that we deal with the Respondent's policies and code of ethics which regulate the conduct of the employees.

THE GIFT POLICY OF 2007

[26] According to the introduction part of this policy, its purpose is to promote transparency and to ensure that all Nedbank staff act with integrity and honesty, upholding the highest ethical standards in their dealings with internal and external parties. The policy also gives effect to the Prevention of Corruption Act No. 3 of 2006 relating to bribery

and / or corruption, read in conjunction with the Nedbank Code of Ethics.

- [27] This Policy defines gifts as any donation, loan, fee, rewards, favour, service and benefit and includes without limitation to sport and entertainment, events and similar types of corporate or other hospitality events.
- [28] Staff members means any permanent or temporary staff member of Nedbank Swaziland Limited. Executives are staff who are members of the Management Committee and any staff member that serve on boards of trust of companies in which Nedbank has an equity or debt interest.
- [29] The policy is that, all staff below executive level are required to make declarations in line with the requirements of this Policy. Reporting needs to be directed to the relevant business / divisional unit head.
- [30] According to Clause 3.1 the policy is that, a Staff member may not, directly or indirectly and whether for the benefit of him / herself or the benefit of another person:

3.1.1 gratuitously accepts money, whether in cash or otherwise;

3.1.4 gratuitously accept any payment, release, discharge or liquidations of any personal loan, obligation or other liability whether in whole or in part;

3.1.6 gratuitously accepts any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

[31] Clause 3.2 of the policy provides that, a staff member must make a written declaration within twenty four (24) hours of receipt of or of becoming aware or as soon as practicable after the receipt of any gifts given to him / her where:

3.2.1 the total value of the gift exceed E100.00 (One Hundred Rand).

3.2.2 the total value or number of gifts received from one source within a twelve (12) month period exceeds E500.00 (Five Hundred Rands)

Written declarations should contain the following: executive name, division/ branch, date gift presented, by whom gift presented, business relationship with grantor, brief details of the gift and appropriate value of the gift.

Clause 3.3 provides that “*Gifts in kind*” such as tickets to sporting events, entertainment or other corporate hospitality falls within the ambit of this policy. It continues to state that;

A staff member must obtain the prior written consent of the Managing Director or the Company Secretary to accept a gift which exceeds a total value of E1, 000.00 (One Thousand Emalangeni).

Clause 5 prohibit Gifts to Third Parties.

5.1 Staff members may not give gifts exceeding a total value of E500.00 (Five Hundred Emalangeni) either inadequately or in aggregate to any external third party without the prior written approval from the Managing Director or Head of Function or Company Secretary.

5.2 The Head of Function must keep a written registrar of all such approvals.

[32] **CLAUSE 6** deals with the criteria aspect and provides that, before providing consent referred to in Clause 3.3 above, the Managing Director, Head of Function or Company Secretary, as the case may be, must ensure that the acceptance of presentation of the gift:

- 6.1 does not conflict with the Nedbank Code of Ethics.
- 6.2 does not contravene the Prevention of Corruption Act 3 of 2006.
- 6.3 does not negatively impact on the reputation of the Bank.
- 6.4 does not compromise this Bank or relevant staff members in the course of his / her employment with the Bank.

Clause 7 deals with the Declaration Procedure as follows:

- 7.1 Declaration in terms of the Gift Staff Policy must be made as follows:
 - 7.1.1 by executive staff members (MANCO) to the Company Secretary:
 - 7.1.2 by all other staff members to their divisional gift representatives / Compliance Chairpersons and copied to the Head of Function.
- 7.2 Declarations must be made in the prescribed format.

[33] I must mention that having perused the Staff Gift Policy, there is no doubt that the Respondent's Management is prohibiting its staff members at all levels of seniority from receiving and / or giving out

gifts. This is indeed a zero tolerance attitude to this issue and the stringent conditions imposed can only be ignored by someone who has complete disrespect to comply with this strict policy.

THE NEDBANK CODE OF ETHICS

[34] The Code of Ethics were introduced to the staff during the tenure of the Managing Director Ambrose Dlamini who stated as follows in the preamble of the Code of Ethics:

'Nedbank (Swaziland) Limited is committed to the highest ethical standards in conducting its business. These ethical standards reflect our belief that business should be conducted honestly, fairly and legally.

The Nedbank Code of Ethics is our solemn promise that these ethical standards will underpin every feature of our endeavours in securing all our clients, both corporate and retail.

This code, together with any business – specific policies in your location, provides a guide to help you understand and live the Nedbank values in order to make decisions that are good, right and fair. It also obligates any Executive Manager or employee who witnesses any conduct that compromises or will compromise the Nedbank Values, to speak out.

All employees, suppliers and agents are expected and required to comply with the provisions detailed in this Nedbank Code of Ethics and to maintain the highest ethical standards, to ensure that the Banks business practices are conducted in a manner that, in all circumstances, is beyond reproach.

The Nedbank Code of Ethics is defined as a document in which the Bank publicly declares what it regards as morally or ethically acceptable behaviour for every employee in the Bank.

The Code of Ethics sets out the ethical values, standards, principles or guidelines that members of the organisation should respect in their declarations with internal and external stakeholders’.

[35] According to Clause 2.2 of the Code of Ethics it is documented because;

- an organization’s code of ethics is a key element of good governance
- the development of the Code of Ethics is intended to raise the ethical consciousness amongst all Nedbank employees as internal stakeholders.
- it defines accepted / acceptable behaviours.
- it promotes high standards of ethical business practices.
- it provides a benchmark for employees to use for self-evaluation of professional behaviour and responsibilities.

[36] The Code of Ethics emphasises on accountability which requires staff members to be prepared to make commitments and be judged against their commitments and deliver on these commitments and also to be responsible for their actions.

[37] It also introduces the concept of integrity which requires staff members to be honest, trustworthy, truthful, consistent and transparent in all their conduct and decisions.

[38] Clause 2.3.2.1 of the Code provides that employees must avoid Conflict of Interest. This occurs when an employee has a personal interest that could be seen as having the potential to interfere with the objectivity required to perform official duties or exercise judgment on behalf of Nedbank. Nedbank employees may not operate under the influence of such conflicts themselves or create them for others. In order to avoid conflict of interest all employees must;

- not offer any staff members of Nedbank any item of value, including money in return for certain action or inaction by the staff member; or any such item that could reasonably be perceived to create such an obligation.
- Refuse and report any offers of bribes or other potential corruption emanating from any service: and
- Refrain from engaging in other income-producing activities, outside business interests or additional employment without the prior written approval of the relevant line manager.

CLAUSE 2.3.2.2 DEALS WITH HONESTY/TRUTHFULNESS

[39] The commitment to honesty/trustfulness requires each Nedbank employee to avoid any action that could be reasonably viewed as dishonest, deceptive, or misleading as well as any action that could reasonably be perceived as cheating or stealing.

[40] In order to meet the standards of honesty and trustfulness all employees must:

- Avoid any false or misleading statements to colleagues, customers, suppliers, shareholders, competitors, or any other who may rely on the accuracy and trustfulness of the information being provided.
- Avoid untruths, concealment and overstatement in their communications:
- Avoid any form of intentional misrepresentation, fraud, dishonesty or illegal practices or actions,
- Ensure the accuracy of all record, reports, invoices, and other documents submitted to or on behalf of the Bank.

[41] The code of ethics also requires the staff members to commit to fairness and refrain from engaging in restrictive trade practices and respect the human rights, dignity and interests of colleagues.

[42] Clause 2.7 of the code provides that all Nedbank employees are required to know, understand and comply with the standards outlined in this code of ethics.

- Executive and management are responsible for management and staff members' observance of the code in day-to-day business routines and procedures.
- Executive and Management are also responsible for the implementation of appropriate disciplinary actions when recommended or indicated.
- The Governance and Compliance Division is responsible for initiating and supervising the investigation of all reports of breaches of this code and recommending appropriate disciplinary action when required. Nedbank's disciplinary procedures will be applicable.
- The Bank's auditors may be asked to report any practice uncovered, in the course of their work, which appears to be a breach of this code.

[43] Clause 2.8 provides that every Nedbank employee is required to know, understand and comply with the standards outlined in this code of ethics, the organisation, in turn, is obliged to communicate these standards and to educate and train employees on ethical expectations.

- [44] Once implemented, employees, including executive and management, have a responsibility to acquire a working knowledge of the code (together with all other policies) consistent with the conditions of employment as contained in the Human Resource Manual. The code was made available to all employees through the appropriate intranet, and employees were encouraged to implement it and read it in conjunction with their terms and conditions of the employment.
- [45] The code defines ethics as the principles of moral conduct that should guide behaviour or human conduct regarding whether an action is right or wrong, a motive good or bad, and the outcome desirable. Ethics is the practice of aligning human life, individually or collectively, or institutional structures and practices, according to basic standards of conduct.
- [46] The code provides that conflict of interests exists when an employee has a personal interest that could be seen as having the potential to interfere with his/her objectivity in performing his/her Nedbank duties or exercising his/her judgement on behalf of the Bank.
- [47] The code directs that all employees should refrain from engaging in other income generating activities outside business interest or additional employment without the prior written approval of the

relevant line manager. The consent may be withheld if in the opinion of management, such activities and/ or services may in any way whatsoever, adversely affect the services which the employee is expected to perform for the Bank.

[48] The code further prohibit the use of Nedbank property, assets or equipment in an improper manner by the employees.

[49] It is common cause that the Appellant utilised the Respondent's banking electronic system whilst engaged in the money lending and or facilitating such prohibited activities between herself, Bertha and Masilela and Nonhlanhla. She was the centre piece to these activities.

EMPLOYMENT AGREEMENT BETWEEN NEDBANK AND APPLICANT

[50] On the 5th of June 2008 the Appellant and Respondent entered into an agreement wherein the Appellant was appointed to the position of Operations Manager, and reporting to the Branch Manager.

[51] Clause 8 of the agreement refers to the code of ethics and provides as follows:

'You shall at all times comply in all respects to the Bank's code of ethics, as published on the Bank's intranet, and conduct yourself in a manner so as to ensure that the good name and reputation of the Bank is not adversely affected'.

[52] Clause 9 provides that the Appellant shall execute her duties in a proper and diligent manner and in utmost good faith. Further to perform these duties to the best of her ability with integrity, due skill, care and diligence and to promote and protect the interest of the Bank and shall not do anything harmful to those interests.

[53] Clause 33 of the agreement provides that breach of any of the conditions of employment may render Appellant subject to disciplinary action in terms of the Bank's disciplinary code and procedure.

[54] I must mention that the Respondent made a huge policy investment in the Staff Gifts Policy and the Code of ethics. It demonstrates the seriousness and the vigilance of the Respondent to guide their staff members as regards acceptable and unacceptable conduct. It is crystal clear from these policies that the Respondent expected the utmost standards of behaviour and job performance from their employees. It defeats logic why the Appellant who was well aware of all these basic but stringent policies decided to conduct herself in the manner in which she did and which resulted in her dismissal.

- [55] The Disciplinary Code and Procedure is made available to all employees on engagement free of charge. This code provides that any serious misconduct may result in the termination of the employee's employment if found guilty in a disciplinary hearing.
- [56] On the 23rd November 2007 the Respondent approved the CONFLICT OF INTEREST POLICY. This policy provides that all Nedbank directors and employees have a responsibility to manage, reduce or eliminate any actual or possible conflicts of interest that may adversely affect the image, credibility and reputation of the bank in such a way that stakeholders' trust and confidence are compromised.
- [57] The policy continues to provide that a fiduciary relationship comes into existence from the moment that an employee or a director commences to work with Nedbank. That means an employee must ensure that his services are rendered in good faith and must in no way detract from the relationship of trust. Nedbank expects all staff to uphold ethical standards, which includes an obligation not to work against Nedbank's interests (my emphasis).
- [58] I must state that facilitation of the money lending activities amongst the Nedbank staff members by the Appellant was a breach of the

fiduciary duty and was a deliberate conflict of interest with the Respondent's interest.

[59] The main purpose of the Conflict of Interest Policy is to advise employees and directors about conflict of interests and raise awareness and promote disclosure of conflicts to ensure that conflicts can be properly dealt with and hence do not materialize.

[60] The Policy further provides that a conflict of interests may arise when an employee enters into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict with the interests of the bank and / or appear to perform his / her duties impartially.

[61] Clause 4.1 of the Conflict of Interest Policy provides that the bank endorses the principle that an employee should serve his / her employer honestly and faithfully in that an employee:

4.1.1 has the duty when rendering his / her services, always to act exclusively in the interests of his / her employer, therefore his / her conduct, when rendering such services should never result in his / her private interests being in

conflict with the execution of his / her duties or the interests of his / her employer;

4.1.2 has a duty / obligation not to create a conflict of interest situation, during the existence of a contract of employment. Employees owe a fiduciary duty (stands in a special relationship of trust, confidence and responsibility in obligations to the bank) to an employer and the rule against no conflict arises from this fiduciary relationship;

4.1.3 is not entitled to use his / her employment relationship with his / her employer's permission to make a profit or earn a commission for his / her own account.

4.1.4 may not use the property of his / her employer for his / her own purposes.

4.1.7 must devote his / her working hours to his / her employers business and not conduct unauthorised business during working hours.

4.1.8 may not commence, another business in competition with his / her employer or even attempt to make arrangements in this regard, and

4.1.9 may not solicit the employees to build up his / her own business.

4.1.11 may not engage in work associated with the conduct of any enterprise or entity that may be in

conflict with and / or disruptive to the employee's duties with the bank.

[62] Clause 7 of the Conflict of interest Policy provides that the policy must be read in conjunction with the Code of Ethics, Gifts Policy, Insider Trading Policy and Procurements Policy.

[63] On the 18th March 2009 the Appellant signed the Nedbank Declaration of Outside Interests / Conflict of Interests Policy Appendix A Form where she declared that she had no conflict of interests whatsoever.

[64] On the 14th August 2009 she signed the Declaration of Conflicts of Interests = Nil return whereby she stated that and I quote -

'I hereby certify that I have read the Bank's Conflict of Interests Policy and I shall abide by the said policy in accordance with the terms and conditions of employment ...'

[65] It is worth noting that during the period when Appellant signed these Declarations of Conflict of Interests, the transactions in respect of Robert Masilela and Bertha Vilakati were still being conducted by her through her bank account. Appellant was using the Respondent's property and equipment in an improper manner very well knowing that the Respondent has vigorously prohibited that through the

introduction of these policies and most importantly she was aware that the consequences of this misconduct were dismissal from employment.

[66] During her evidence in chief before the Court a quo the Appellant testified that the Respondent dismissed her as a result of two (2) transactions discovered in her account and these related to her colleagues who were also her friends. These were Robert Masilela and Nonhlanhla Mkhonta.

[67] Appellant testified that the Respondent traced these transactions in her bank account. She stated that the money would be deposited by Bertha Vilakati into her account and she would then transfer the money to her colleagues Robert Masilela and Nonhlanhla Mkhonta, using the Respondent's internet facilities.

[68] Appellant testified that she assisted her colleagues because they were desperate. For instance Nonhlanhla's electricity has been disconnected and she was in desperate need of E1, 500.00 (One Thousand Five Hundred Emalangen).

[69] The evidence reveals that Bertha Vilakati transferred E1, 500.00 (One Thousand Five Hundred Emalangen) into the account of Appellant, who in turn transferred the money into Nonhlanhla's account.

Nonhlanhla later repaid the loan to Bertha through Appellant's account. In fact according to annexure "**GM3**", Nonhlanhla repaid a total amount of E1, 800.00 (One Thousand Eight Hundred Emalangi to Appellant through Appellant's bank account. However, it is crucial to mention that only E1, 300.00 (One Thousand Three Hundred Emalangi) was paid to Bertha by Appellant. The sum of E500.00 (Five Hundred Emalangi) transferred by Nonhlanhla on the 23rd October 2008 into Appellant's account was never transferred to Bertha. In essence only E1, 300.00 (One Thousand Three Hundred Emalangi) was transferred to Bertha by Appellant during the period August 2008 to December 2008.

[70] Under cross-examination the Appellant conceded that by virtue of her position she was expected to know the Staff Gift Policy, Conflict of Interest Policy and Code of Ethics and also ensure that those under her supervision know these policies and in fact practice what was contained therein these policies and procedures.

[71] The Appellant also conceded that she was aware of the road shows conducted by the Nedbank Managing Director where bank employees were being discouraged from borrowing money from savings clubs and Shylocks. Instead employees were encouraged to use financial institutions only. Employees were further discouraged to be over

committed and not to exceed the 35% mark on their salary expenditure.

[72] The Appellant further conceded under cross-examination that she facilitated money lending transactions between Nonhlanhla Mkhonta, Robert Masilela and Bertha Vilakati.

[73] At some point in time the cross – examination proceeded in this manner;

RC: it has been suggested that, what was painful was that your business did not make a sizeable profit on these transactions and on top of that you lost your job.

AW1: I was only helping the people that borrowed money as a result of which Bertha lost her job

RC: You pleaded with her to commit offences knowing it was wrong.

AW1: At the time it did not occur to me that I would go through such when I gained nothing.

RC: When you pleaded with Bertha you were aware that lending money was in violation of the Bank's policy and was unlawful at the Bank, yet now you pleaded with Bertha to assist.

AW1: It was because of desperation, I felt touched and overlooked that I could be in trouble.

RC: You gave Mr Masilela E4, 000.00 (Four Thousand Emalangeni) in 2007, you had over twenty (20) years' service; you knew that the primary business of the Bank is to receive deposits and lend out money.

AW1: Yes.

RC: You know that if a customer wished to borrow money from Nedbank, you did not only have to assist but also to encourage the customer.

AW1: Yes, because that was how the bank made money and paid our salaries.

RC: What does over commitment mean?

AW1: It means the bank cannot give you loans than what you already have. You have reached the ceiling in terms of the loans they can give you.

RC: Why the ceilings?

AW1: Because you must have something to take home monthly.

RC: Fast forward 2008/2009 now you are aware Masilela approaches you again, how much did he borrow?

AW1: He borrowed E4, 000.00 (Four Thousand Emalangeni).

It is common cause that Appellant facilitated a money lending transaction between Robert Masilela and Bertha Vilakati. The

modus operandi was the same whereby Bertha would transfer the money to Appellant who would in turn transfer the money to Masilela. Masilela was during the period in question over committed with his loans in the Bank and desperately needed to pay University tuition for his children. The transaction resulted in Masilela paying an extra E4, 000.00 (Four Thousand Emalangeni) being the 20% interest for the E10, 000.00 (Ten Thousand Emalangeni) loan. As Masilela was struggling to repay the loan to Bertha he had to put up a post-dated cheque of E10, 000.00 (Ten Thousand Emalangeni) with Appellant. Appellant conceded under cross – examination that Masilela did pay E4, 000.00 (Four Thousand Emalangeni) as 20% interest of the E10, 000.00 (Ten Thousand Emalangeni) loan, and that the said E4, 000.00 (Four Thousand Emalangeni) was a gift.

[74] When Robert Masilela testified he also confirmed the transaction of E10, 000.00 (Ten Thousand Emalangeni) with Appellant and further confirmed that the E4, 000.00 (Four Thousand Emalangeni) was deemed to be a gift to Appellant for the assistance. It is common cause that the Appellant never declared this 20% gift i.e. E4000-00 in compliance with the Staff Gift's Policy.

[75] Siphso Sithole who was Head of Human Resources during the period in question, he testified that the Appellant was dismissed from

employment for misconduct in that she breached Nedbank's policy against staff members who engaged in business which was in direct competition with the bank – she facilitated money lending business amongst staff members.

[76] He testified that she was also charged for misconduct in that she had presented misleading information when she was questioned on this conduct and the Bank viewed this as dishonesty for someone holding such a senior position of Operations Manager. He testified that her long service with the Bank worked to her advantage because at the end of year, Bank employees sign the declaration on whether they have any outside business interest, in this way the Bank then determines if these have no conflict with the Bank's business. The Appellant did not declare her money lending business with Bertha Vilakati and the Respondent discovered this chain of money lending activity involving Bertha Vilakati, Nonhlanhla Mkhonta, Robert Masilela and the Appellant being the middle person because all these transactions from Bertha to Nonhlanhla and Masilela went through her account. All these people involved were all employees of the Nedbank at the time.

[77] Sithole emphasised that it was against the Bank's policy for Appellant and other employees to engage in money lending activities because it perpetrated a cycle of indebtedness amongst staff members. Bank

employees were custodians of client's money and as such are not expected to experience financial difficulties hence they get tempted to steal client's moneys.

[78] Sithole further stated that the conduct of Appellant was in direct conflict with the Respondent's Conflict of Interest Policy which provides that an employee must not commence a business that is in competition with the employee's business or even attempt to make any arrangements in that regard.

[79] There is no doubt in my mind that the Appellant did contravene the Respondent's policies, in particular the Staff Gift Policy, the Conflict of Interest Policy and the Code of Ethics. This is demonstrated by the evidence as led before the Court *quo* which I have also analysed and which is also acknowledged by the Appellant.

[80] It therefore became extremely difficult to accept the argument on behalf of Appellant that her dismissal by Respondent was unfair and instead connected to her transfer to the Manzini Branch.

[81] Her conduct in not observing and complying with the Respondent's policies which she was well aware of and combined with her long service is an indictment to her, more particularly because all the

charges that were preferred against her had been committed long before her transfer to Manzini. I am therefore compelled by the evidence and circumstances of this case to hold that the Appellant was not being victimised and that her dismissal was premised on her non observance and disobedience of the Respondent's policies.

[82] Had the Appellant observed the Respondent's policies, as it was her duty to do so, as well as those under her at the time, she would not have experienced the problems that she found herself facing.

[83] The Appellant was in position of authority and owed her fiduciary duty to the Respondent by upholding and making sure that the Respondent's policies put in place by the Respondent were observed and not breached and / or disobeyed in the manner in which she did.

[84] As Operations Manager it was her duty to bring to order Robert Masilela, Bertha Vilakati and Nonhlanhla Mkhonta. She could easily have referred their matters to the Wellness Department as mentioned by Siphosithole. Instead she is the one who encouraged them by engaging Bertha Vilakati and further using the Banks internet banking facilities to facilitate and carry out these transgressions which the Respondent had clearly prohibited through the different policies that had been introduced at great cost to the bank.

[85] I am left with no alternative but to find that on the basis of the evidence led and circumstances of the case, the Appellant was fairly dismissed from employment by the Respondent after a substantively fair and procedurally fair disciplinary proceedings. This was also shown during the proceedings before the Court *a quo*.

[86] I must point out that the Chairperson during the disciplinary hearing was not an employee of the Bank – the Respondent. The Chairperson had thorough comprehension of the facts and evidence presented before him to prove the case against the Appellant on a balance of probabilities.

[87] Even during the disciplinary hearing, the Appellant confirmed that she was fully aware of the Respondent's policies in respect of Ethics, Gifts and Conflict of Interests as well as the Memorandum from the Managing Director prohibiting Over-commitment by the staff members. Appellant further confirmed that she was the custodian of these policies for her staff.

[88] The evidence led during the disciplinary hearing was basically the same evidence led before the court *a quo*, and at all material times, credible evidence was led which proved the misconduct against the

Appellant on a balance of probabilities resulting in her dismissal. During the disciplinary hearing, it is clear that the Appellant was afforded a fair hearing, she was even allowed to be represented by two (2) attorneys, one of whom was very senior. The rules of natural justice were fully observed and applied – in essence there was procedural fairness and also substantive fairness on account of the credible evidence led before the disciplinary hearing.

[89] This is a classic case wherein the applicability and relevance of Section 36 (b) read together with Section 42 (2) (a) (b) of the Employment Act No. 5 of 1980 as amended which provides as follows:

‘36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons:-

(b) because the employee is guilty of a dishonest act, violence, threats or ill treatment towards his employer, or towards any member of the employer’s family or any other employee of the undertaking in which he is employed;

42. (2) the services of an employee shall not be considered as having been fairly terminated unless the employer proves –

(a) that the reason for the termination was one permitted by Section 36; and

(b) that, taking into account all the circumstances of the case it was reasonable to terminate the services of the employee.’

I have no doubt that the Appellant is guilty of a dishonest act towards her employee in the manner in which she perpetrated the money

lending activities amongst the staff members thereby disobeying the Respondent's established policies and further that taking into account all the circumstances of the case, it was in all probabilities reasonable to terminate the services of the Appellant. The relationship between Appellant and Respondent had irretrievably broken down and the Appellant had breached the fiduciary duty and trust bestowed on her by virtue of being Operations Manager for the Respondent's Matsapha Branch.

[90] At page 171, **John Grogan, Workplace Law, 9th Edition 2007 JUTA**, in dealing with conflict of interest states as follows:

“Employees are required to devote their energies to advancing their employer’s interests. Conduct in which employees intentionally place themselves in situations where their own interests conflict with those of their employer therefore renders the employment relationship intolerable and justifies dismissal. This typically occurs when employees enter into relationships with their employers competitors or engage in business activities which actually or potentially conflict with their employer’s business interests”.

[91] In the case of **OLKERS V MONVISO KNITWEAR (PTY) LTD (1989) 9 ILJ 875 (IC)** the court held that;

“As in all cases of misconduct the employer must prove on a balance of probabilities that the employee committed the offence or was an accomplice to it”.

[92] See also the cases of the **CHEMICAL WORKERS INDUSTRIAL VISION & ANOTHER VS ALGORAX (PTY) LTD (1995) 4 ILJ 933 (IC)**, **SACCAWU & ANOTHER V CHECKERS SHOPRITE (PTY) LTD (1996) 5 BLR 678 (IC)**.

[93] The Appellant breached the Staff Gifts Policy because she did not declare the interests from the loans which she regarded as gifts from her colleagues when she was well aware that the bank prohibited its employees from engaging in such misconduct and which misconduct conflicted with the Bank's interest and amounted to gross insubordination which justifies dismissal.

[94] The Appellant also breached the Managing Director's instruction prohibiting employees from being overcommitted in their salaries. In all these Appellant's actions referred to above, the Respondent proved misconduct against the Appellant on a balance of probabilities.

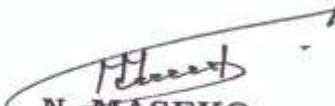
[95] The Appellant engaged in misconduct which in fact is insubordination. This type of misconduct presupposes a calculated breach by the employee of the duty to obey the employer's instructions. The misconduct or insubordination by the Appellant *in casu* was serious, persistent and deliberate. The Respondent led credible evidence to prove the case against Appellant on a balance of

probabilities. In the facilitation of the money lending activities amongst the other staff members, the Appellant breached the Staff's Gifts Policy, Conflict of Interest Policy and the Code of Ethics simultaneously. In the process she also undermined the Managing Director's instruction against salary over commitment by staff members. This was gross insubordination by the Appellant and the Respondent was justified to dismiss her from employment.

[96] See: **CHEMICAL WORKERS INDUSTRIAL VISION & ANOTHER V AECI PAINTS NATAL (PTY) LTD (1988) 9 ILJ 1046 (IC)**

[97] All the evidence that was led in these proceedings never revealed any fabrication of misconduct against the Appellant. The Appellant faced charges of misconduct which were very well known to her, and which she was unable to dispute. I therefore enter the following orders:

1. The appeal is dismissed.
2. No order as to costs



N. MASEKO

AJA

I agree



C. MAPHANGA

AJA

I also agree



D. TSHABALALA

AJA