



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 601/2006

In the matter between:-

CYPRIAN THWALA

APPLICANT

AND

STANDARD BANK SWAZILAND

RESPONDENT

Neutral citation : *Cyprian Thwala v Standard bank Swaziland*
(601/2006) [2019] SZIC 39 (23 April 2019)

CORAM : **DLAMINI J,**
(Sitting with *A.S. Ntiwane & S.P. Mamba*
Nominated Members of the Court)

Heads submitted : **11 April 2019**

Judgement Delivered : **23 April 2019**

Summary: *Labour law – Unfair Dismissal: Applicant motivating for the approval of a loan facility that had previously been declined by a senior manager. He thereafter went ahead and approved the loan without reference to and concurrence from the senior Manager who had initially declined the loan application. Held: Conduct of the Applicant of concealing to the senior Manager that he had approved the loan was dishonest. Held: Dismissal of the Applicant in casu was procedurally and substantively fair – Applicant's application accordingly dismissed.*

1. Cyprian Thwala is the Applicant in this matter. He has approached this Court for relief, claiming unfair dismissal against his former employer – Standard Bank Swaziland, the Respondent in these proceedings. Thwala was initially employed by the Respondent in October of 1989 and was dismissed in July 2006, following a disciplinary hearing. He complains that his dismissal was both procedurally and substantively unfair, hence now his claim for compensation before this Court.
2. When the Applicant was dismissed in July 2006, he had risen through the ranks and was occupying the position of Manager – Retail Credit Evaluation. His evidence was that in his capacity as Manager Retail Credit Evaluation, he could approve loans for clients and staff up to the limit of E120,000. He further informed the Court that he was dismissed for approving a loan application of a client without referring same to his Manager. The loan in question was for a client by the name of Nelisiwe Thwala – trading as Eternity Hair and Beauty Clinic.

3. Evidence of the Applicant further indicated that he received the loan application from the Business Banker (Themba Mahlindza) who was based at the Manzini branch. Since he (Applicant) was going on leave, he handed the loan application to his Supervisor at the time, Veli Dlamini, to consider and process the application. He proceeded on leave and when he came back from his official leave he got a call from the client enquiring about the progress of the loan application.
4. Thwala further testified that he then retrieved the file and noted that his Supervisor had raised some concerns to the Business Banker about the application. He says he advised the client to go back to the Business Banker and submit the outstanding information. According to the testimony of the Applicant the outstanding information was submitted and was forwarded to him by the Business Banker. On receiving the outstanding information he says he then advised his Supervisor and further recommended that the client be granted the loan facility subject to the conditions that; a) the application be forwarded to the Central bank for a guarantee, b) that the client provides a life policy and c) that the client provides a deed of hypothecation for furniture and fittings.

5. Thereafter he says he submitted his recommendation to his Supervisor, who was surprised that the Business Banker had taken so long in re-submitting a straightforward application. After submitting to his Supervisor he advised the Business Banker of this development and also issued an in-principle approval – which he described as an approval pending finalization of the terms and conditions he had set for the client. Thwala further informed the Court that the Business Banker advised him that the terms and conditions had been met by the client and the Bank also received notification from the Central Bank that the loan facility had been guaranteed. The Applicant then issued a formal sanction to the Business Banker approving the loan and he (Business Banker) then processed it. He conceded though that he went ahead and approved the loan without reverting to his Supervisor, stating instead that he had the requisite authority to approve loans since his limit was loans under E120,000.
6. On the issue of the limit, Thwala testified that loan applications could either be evaluated by himself or his Supervisor Veli Dlamini. He says he dealt with the loan applications that were within his limit of E120,000 and the Senior Manager dealt with those that were above

the E120,000 limit. It was the Applicant's further evidence that when he dealt with Nelisiwe Thwala's loan application he had not been aware that Veli Dlamini had declined the application twice. According to him, the only information in the file was that the Senior Manager needed more information on the client, i.e. her skills and if there were any succession plans in place for the business. After getting the information needed he says he then communicated with both the Business Banker and the Senior Manager.

7. In support of his case, the Applicant referred the Court to documentary evidence which consisted mainly of the email communication between him, his senior Manager and the Business Banker – Themba Mahlindza. The first email at page 1 of exhibit document A3 was the initial communication from the Business Banker to the Applicant dated 03 January 2005, in which the Business Banker was submitting the loan application. The Applicant responded to that email by informing the Business Banker to forward the supporting documents to his senior Manager, Veli Dlamini, since he (Applicant) was proceeding on leave on that very day.

8. At page 2 of exhibit document A3 is an email from senior Manager Veli Dlamini directed to the Business Banker in which he (senior Manager) raised a number of concerns about the loan application and dated 04 January 2005. Amongst these concerns raised were the following; a) that the client, Nelisiwe Thwala operates an overdrawn savings account, b) that she was unable to clear her ITC record, c) that her stake was very insignificant, which was a recipe for default, d) that the business was said to be run as a company yet it was introduced as a sole proprietorship and e) that there was no information on how the business would move forward if the client were to be incapacitated because it relied on her skills and contacts. On the basis of the above concerns, the senior Manager requested the Business Banker to mitigate further in relation to the loan application.
9. At page 3 of exhibit document A3 is further email communication exchanged between Veli Dlamini and the Business Banker. The first email, sent a week after the email of 04 January 2005, on Tuesday 11 January 2005, was from Veli Dlamini addressed to the Business Banker. In it Veli Dlamini informed the Business Banker that in the absence of further correspondence from his (Business Banker's) side,

the application was treated as a decline. This 'further correspondence' Veli Dlamini was talking about was the mitigation he had talked about in the email of 04 January 2005. The Business Banker responded on the same day to say he had only met the client, Nelisiwe Thwala, on the same morning of 11 January 2005, and that she was arranging to furnish the Bank with the mitigation information and that a report would follow by the end of that week.

10. It would seem nothing was forthcoming from Nelisiwe Thwala because exactly a week again after the last email communication between Veli Dlamini and the Business banker, on 18 January 2005, the Business Banker wrote to Veli Dlamini to advise that he was still awaiting feedback from Nelisiwe Thwala. He further stated that if he did not hear from her in another week he shall close the file. There after there was no further communication on this loan application between the Business Banker and Veli Dlamini, and the week grace period which she was to have mitigated further lapsed without any communication from her as regards her loan application.

11. Then at page 4 of A3 is a document titled '*Nelsiwe C Thwala t/a Eternity Hair & Beauty Clinic*'. The Applicant informed the Court that this was the mitigation information submitted to him by the Business Banker. He further informed the Court that after going through the write up he forwarded it to Veli Dlamini, the Senior Manager. The mitigation correspondence was signed by the Applicant at the bottom and was dated 04 February 2005.
12. On 07 February 2005, Veli Dlamini responded to the mitigation write up by email addressed to the Applicant. He informed the Applicant that he would have preferred that the client, Nelisiwe Thwala, does mitigation submissions through the Business Banker since he was handling the application and also because he would be running with the exposure and should take ownership in the event of a default. The Applicant testified that he did not send the file back to the Business Banker, he says he felt there was no need to since the application was now over a month old. Exactly two days after this email of 07 February 2005, the Applicant penned an email addressed to the Business Banker advising him that 'they' had revisited the application and approved it, for that purpose he attached what was called an 'in

principle' approval. The loan application was finally approved and payment made to the client Nelisiwe Thwala.

13. Further evidence by the Applicant was that he was then charged in relation to this loan in June 2006. He says he was charged after 17 months of him approving the loan in question, when the disciplinary code stipulates that he ought to have been charged within 3 months. He also complains that the Bank's Legal Advisor at the time, Nozizwe Mulela, chaired his hearing when she was the one who advised the Bank on what charges to prefer against him. He now claims against the Respondent bank his terminal benefits and compensation for the unfair dismissal.
14. Under cross examination by the Respondent's Counsel, Attorney Sibandze, the Applicant conceded that his exact position was Manager Retail Credit Evaluation, which means he was responsible for evaluating credit applications. It emerged under cross examination as well that he was based at the head office in Mbabane whilst the Business Banker was based at the Manzini branch of the bank. The Applicant conceded as well that the Business Banker, who is

sometimes also referred to as the Relationship Manager, is the one who received the loan application from the client and transmitted it to the head office. In essence, the Business Banker is the one who liaises with the client directly on the loan application and whatever concerns that are raised. Another concession by the Applicant was that Nelisiwe Thwala, the loan Applicant, had an ITC record report. An ITC record report is for clients who have been blacklisted. In this case Nelisiwe Thwala was said to be unable to service an outstanding debt of E800.

15. Attorney Sibandze also questioned the Applicant at length about the email by Senior Manager Veli Dlamini addressed to the Business Banker dated 04 January 2005 (exhibit A3 page 2) in which he raised a number of concerns about Nelisiwe Thwala's loan application. He questioned the Applicant about the fact that Nelisiwe's savings account was overdrawn and her ITC record report – especially the fact that there was no firm commitment from Nelisiwe on when she would pay off the meagre E800 debt (for which she had only paid only E300). The Applicant though was very evasive in his responses. He was not giving clear answers. For instance, he first disputed Nelsiwe

had been blacklisted and that she had made no firm commitment on how she would liquidate the ITC debt. But after some considerable back and forth by Attorney Sibandze, he finally conceded that Nelisiwe had not made any commitment on the liquidation of the E800 debt and that she was in fact a bad payer.

16. The Respondent's Attorney also questioned the Applicant on the instruction by Senior Manager Veli Dlamini that there was need for further mitigation on Nelisiwe Thwala's loan application. He conceded that the '*mitigate further*' instruction was specifically directed at Business Banker Themba Mahlindza. He (the Business Banker) was supposed to be the one mitigating further. He conceded as well that it was the Business Banker who was supposed to go back to Nelisiwe Thwala to bring to her attention the concerns of the Bank to her loan application.
17. Then in terms of the 11 January 2005 (A3 page 3) email, the Applicant conceded that according the Veli Dlamini, in the absence of further correspondence from the Business Banker, Nelisiwe Thwala's loan application was treated as a decline. Another admission by the

Applicant under cross examination was that the Business Banker informed Veli Dlamini in the 18 January email (A3 page 3) that he (Business Banker) was still awaiting feedback from Nelisiwe Thwala and that if he did not hear from her in another week, the Bank would close the loan application file.

18. The Applicant admitted as well that by the time he came back from leave, the week grace period the Business Banker had extended to Nelisiwe had lapsed. He admitted as well that the correspondence he wrote on 04 February 2005 (A3 page 4), mitigating for the loan to be granted to Nelisiwe was procedurally supposed to be written by the Business Banker and not him. This anomaly was even raised by Veli Dlamini in his email to the Applicant on 07 February (A3 page 5). Further to this, the Applicant conceded that after this email 07 February from Senior Manager Veli Dlamini, he did not have any further discussion on the loan with the Business Banker, contrary to his evidence in-chief where he said he did. Instead, under cross questioning he informed the Court that he saw no need of referring the file back to the Business Bank, whereas at his hearing he informed the Chairperson that it was an oversight on his part not to refer the

application back to the Business banker. Before Court, the Applicant conceded that he went ahead and approved the loan regardless of the concerns of the Senior Manager, in other words he consciously ignored his advice that the Business Banker should continue and handle the matter.

19. The Applicant was also cross questioned at length about the separation of powers or duties in the different portfolios in the credit department. In this regard Attorney Sibandze questioned him on whether he understood that it was procedurally improper that he would motivate for the approval and grant of the loan on the one hand and also be the one to finally approve the loan. The Applicant confirmed his understanding of this principle of separation of duties. He confirmed as well that the responsibility to motivate was not part of his duties but fell under the Business Banker's portfolio. He conceded that his duties were to assess and sanction loans and not motivate for their approval. The Applicant also conceded under cross examination that the decision of the Senior Manager, Veli Dlamini, not to approve the loan was binding on him and that, as his subordinate, he could not overrule him.

20. When questioned why he did not inform the Senior Manager of his decision to approve the loan, the Applicant informed the Court that it was an oversight on his part not to. However, at the same time he also stated that he saw no reason of informing him because the loan sought fell within his limit. It also emerged under the intense cross questioning of the Applicant that Nelisiwe Thwala in fact never came back to the Bank with the information required for the approval of her loan, instead the motivation was penned by the Applicant himself and that procedurally he was not supposed have to motivated on behalf of the client. He confirmed as well that the Bank's policy was that employees in the credit department were not supposed to have contact with the loan application clients and that he breached this policy. That, in essence was the Applicant's case.
21. In support of the Respondent's case, the Respondent's Attorney started off by calling witness Veli Dlamini. He was previously employed by the Respondent as Head of Retail Credit, a position he held until May 2005 when he resigned to pursue other interests. As head of the Retail Credit department, the Applicant was his subordinate and reported to him. According to Dlamini, the Applicant

was responsible for vetting loan applications. The vetting process involved the Applicant preparing statements for this witness to make informed decisions in respect of the loan applications. This witness also revealed that the Applicant had a discretion in respect of approval of staff loans but did not have any discretion at all in respect of employed individuals and small businesses.

22. Veli Dlamini also testified on how small business loan applications were processed. He explained that the loan applications were initially received by the Business Banker at the branch. The applications had to be accompanied by the client's bank statement, a business plan and a statement of affairs of assets and liabilities of that small business. All the above had to be sent up to Mbabane by the Business Banker. Before it could be captured in the Bank's system, the Bank would apply for a Credit Bureau clearance to check whether or not the loan Applicant was blacklisted. Thereafter the application would be narrowed down to the specifics of the viability of the business, irrespective of whether or not the Applicant was blacklisted. Once that had been done the application would then be sent to this witness for a

final decision on whether or not to finance that small business. The narrowing down was done by the Applicant and Sibusiso Gama.

23. After making a decision on whether or not a particular small business could be financed, he would then communicate that decision straight to the Business Banker or any other officer responsible for collateral at the branch. If the loan was approved, he would also copy the email confirming such approval to the Applicant since he was responsible for releasing the funds once all the requirements had been met.
24. In the present case, Veli Dlamini confirmed having received Nelisiwe Thwala's loan application from Themba Mahlindza, the Business Banker from the Manzini branch. After going through the application he says he declined it with reasons. He referred the Court to exhibit document R1 at page 29, which is the email he addressed to the Business Banker, and copied to the Business Banker's Supervisor Enock Kunene, raising a number of concerns. Amongst the concerns he raised are that her savings account was overdrawn and that her ITC record reflected that she was blacklisted. In total he raised 8 concerns in his email addressed to the Business Banker. In conclusion he

directed the Business Banker to mitigate further, meaning that he (Business Banker) should invite the client, Nelisiwe Thwala, so that the concerns could be addressed. When asked if he had made the Applicant aware that the loan had been declined, Dlamini informed the Court that he did not because the loan had not been approved.

25. This witness was then referred to mitigation document prepared by the Applicant, found at page 27 of R1. He informed the Court that upon receiving this mitigation document from the Applicant he was surprised that it was coming from the Applicant and decided to ignore it. He says he was surprised because firstly, his response per the email of 04 January 2005 (R1 page 29) was directed to the Business Banker and he had invited him (Business Banker) to mitigate further, not the Applicant. Secondly, the role of the loans approval department did not permit that they deal directly with the loan applicants, instead they dealt with the Business Bankers in the branches.
26. Witness Veli Dlamini also testified on the document at page 25 of exhibit R1, which is a letter he wrote to Elizabeth Arden about the same loan of Nelisiwe Thwala explaining how everything unfolded. In

this letter he states that he declined the loan application through email correspondence to Mahlindza the Business Banker. He goes on to state that the Applicant then approached him a day after to suggest that Nelisiwe Thwala had the ability to service it. He further says he informed the Applicant that Nelisiwe should convince the Business Banker (Relationship Manager) who in turn was to motivate to him (Veli) for the approval of the loan.

27. Veli Dlamini further informed the Court that it was wrong for the Applicant to approve the loan because one; he (Veli) had the sole discretion to approve the loan and two; in terms of business ethics it was wrong for the Applicant to mitigate for the grant of the loan and also be the one to approve that it be granted. He says this was a conflict of interest which the Applicant should have known better to avoid. He also testified that the last he heard of this loan application was when he informed the Applicant that the motivation aspect was the Business Banker's prerogative and was surprised that the Applicant had gone ahead and approved it without his knowledge. He concluded by stating that the Applicant, as his subordinate, could not overrule him.

28. Nothing much came out of the cross examination of this witness, except that he maintained and was steadfast in his evidence. He was a credible witness. He denied that the Applicant had a discretion at all in the approval of small and medium enterprises loan applications (SMEs), maintaining instead that his discretion only extended to staff loans only. He maintained as well that at the head office, where the loan applications were considered, they never dealt with the external clients, instead it was the Business Bankers who dealt directly with them, and that they at head office in turn were dealing with the Business Banker. And the Applicant, according to him, was well aware of this rule against them dealing directly with the clients (see R1 page 19 3rd paragraph). That, according to this witness, is why in his email of 07 January he advised the Applicant that *'...I would prefer that she does the submission through the BB [Business Banker] in view of the fact that it is a pending issue on his side. He will be running with the exposure and should be able to take ownership in the event of default...'*
29. Witness Veli Dlamini also maintained that his initial assessment of the loan application by Nelisiwe Thwala was that she would not be able to

service it properly, hence he declined to approve it. He clarified that there had to be an exercise of extreme prudence in the approval and granting of loans, which was not the case in the present matter, as a result of which there was default by the client in servicing the loan after only a year of its approval.

30. Under re-examination by the Respondent's Counsel, this witness informed the Court that even if, for the sake of argument, it could be said that the Applicant had a limit of approving loans for SMEs, he still could not override him as senior manager because he had declined it.
31. The second and last witness to testify in support of the Respondent's case was Elizabeth Arden. She was previously employed by the Respondent as Head of Finance before she eventually became Head of Credit. Her evidence under oath by and large corroborated that of Veli Dlamini. She testified that a loan application by Nelisiwe Thwala t/a Eternity Hair and Beauty Clinic was received by the Business Banker (Mahlindza), who transmitted it to the Senior Manager (Veli Dlamini) for consideration and who in turn declined it because he thought it

was not viable. However subsequent to that the application was approved by a junior Manager (Cyprian Thwala - the Applicant) without reference to the Senior Manager who had declined it, which was wrong.

32. Thereafter, after an audit this anomaly was discovered and a full blown investigation was launched, especially after Nelisiwe Thwala started defaulting in repaying the loan. It was then that it was discovered that senior manager Veli Dlamini had initially declined the loan because he was of the opinion that the application was not viable. When referred to R1 page 27 she informed the Court that this was the mitigation document prepared by the Applicant, which he submitted to the senior Manager motivating for the approval of the loan. She said it was wrong for the Applicant to mitigate for the loan Applicant and then also be the one approving for the grant of the loan facility. What compounded this issue was that the Applicant mitigated and then also turned around to approve the loan based on his own mitigation. She also testified that Veli Dlamini was correct in saying he expected that the motivation should have come from the Business

Banker especially because the Applicant was not allowed to deal or communicate directly with clients.

33. Arden also informed the Court that the Applicant, in his position as Manager Retail Credit Evaluation, was aware of his limits of authority and the procedures in the approval and grant of loans. She says the correct procedure was for the Applicant to go back to the Senior Manager for his concurrence and approval and not go against his decision to decline the facility especially because a decline is treated as a serious matter in the banking sector. The conduct of the Applicant, according to Arden, exposed the Bank to risk because the loan facility in question not only failed to perform but it was subsequently classified as a bad debt.
34. This brought the name of the Bank into disrepute because the one senior Manager declined the application and then the junior Manager turned around and approved it without reference to the senior Manager who initially declined it. Further to this, the question of whether or not the Applicant had a limit in the approval of loans is not relevant in this matter because a senior Manager had declined the

facility, therefore a junior Manager could not then turn around and approve it without his (senior Manager's) concurrence and reference to him. This matter was serious because the Applicant was dishonest in concealing and withholding the information of his approval of the facility to the senior Manager.

35. Then on the question of the guarantee by the Central Bank, this witness clarified that even though the facility was eligible for guarantee by the Central Bank scheme, there were still requirements that had to be met for the Central Bank to honour the guarantee. In this regard, the obligation is on the Respondent Bank to ensure prudence and due care in the approval and grant of the loan, which brings into play such issues as the viability of the business and the credit worthiness of the client in question.
36. In terms of the charges and discipline of the Applicant, witness Arden explained that as Manager, the Applicant fell within the Stanbic Disciplinary code which had been adopted by the Respondent. She denied that the Chairperson was impartial, disputing that she (Chairperson) participated in the investigation of this matter.

37. Under cross examination this witness, to a large extent, reiterated her evidence in chief, emphasizing that the Applicant failed to take heed of his immediate Supervisor's instruction to take the Nelisiwe's Thwala's loan application back to the Business Banker to be dealt with by him. She emphasized as well that in the banking sector the segregation of duties was of paramount importance and that in this matter it was procedurally wrong that the Applicant approved a loan based on a motivation he had prepared himself. This, according to her, was a clear case of conflict of interests. Over and above this, Arden reiterated her earlier assertion that a junior Manager could not override a senior Manager.
38. Explaining the charge which eventually led to the dismissal of the Applicant, Arden testified under cross examination that the charge was based on an act of dishonesty in that there was a decision by the senior Manager to the effect that the loan application was a decline since it did not meet the requirements, the Applicant however not only motivated for the approval of the loan but went behind the senior Manager's back and approved it without reference to him. She clarified that the Applicant withheld and concealed his approval from

the senior Manager, thus exposing the Bank to risk, which conduct the Respondent viewed as dishonest and therefore serious enough to warrant dismissal.

39. Arden then referred the Court to exhibit document R1 at page 18 from the second paragraph. These are the minutes of the disciplinary hearing which indicate that the Business Banker discussed the insight from the senior Manager after the decline of the loan application with Nelisiwe Thwala. She undertook to return when she had secured enough 'ammunition' to support her loan application. She was advised of the time frame within which to do this but failed to come back with the required information within the agreed time frame. Instead the Business Banker then received email communication from the Applicant advising him that the loan had been approved after reconsideration. She explain that the seriousness of the Applicant's misconduct was because of the fact that he concealed his subsequent approval to the senior Manager, after the file had been closed due to the lapse of the allowed time frame given to the client Nelisiwe Thwala.

40. Then on the issue of the guarantee with the Central Bank, Arden under cross questioning by the Applicant's Counsel, Attorney Mr. Simelane, explained that even though there was this guarantee with the Central Bank, for it to hold there are certain requirements that must have been met which was not the case in this loan facility of Nelisiwe Thwala. She further informed the Court that the Central Bank did not honour this guarantee because some conditions were not met when the loan was approved by the Applicant. That is to say, because there was no prudence and due care in the approval of this facility, the Central Bank declined to honour the guarantee. She again reiterated her earlier evidence that in the banking sector there are procedures, policies, segregation and levels of authority, all of which are meant to minimize the risk of default. Motivation is the prerogative of the Business Banker and approval is by the senior Manager. And because these were not adhered to by the Applicant in the approval of this loan facility, the client ended up defaulting and the loan was eventually classified as a bad debt. That was the Respondent's case.

41. Through his new Counsel, Attorney Mr. Rodrigues, in his submissions in closing, the Applicant insists that his dismissal was procedurally and substantively unfair. He complains that he was charged 15 months after he committed the alleged misconduct. In this regard however, the Court points out that the Applicant seems to conveniently ignore that the uncontroverted evidence led in trial indicates that the misconduct of the Applicant only came to the attention of the Respondent after an audit and when it was noted that the loan account of Nelisiwe Thwala t/a Eternity Hair & Beauty Clinic had defaulted in repayments. It was only then that a thorough investigation was undertaken which revealed that there were anomalies in how it was approved in the first place.
42. On the substantive aspect of Cyprian Thwala's dismissal the Court points out that under cross questioning by the Respondent's Counsel, the Applicant made a number of concessions which the one cannot realistically ignore. Amongst the critical concessions he made were the following;
- a. He conceded that senior Manager Veli Dlamini had declined the loan application of Nelisiwe Thwala.*

- b. *He conceded that the email declining the loan application was not copied to him but had been directed specifically to the Business Banker to motivate further should the Client bring forth new information.*
- c. *He conceded as well that employees at the Credit department in the head office were not supposed to have any contact whatsoever with the Bank's clients, instead they were supposed to deal with the Business Banker.*
- d. *The Applicant also conceded that procedurally, the motivation for the client was supposed to come from the Business Banker and not him. He also confirmed that it was procedurally wrong for him to motivate on behalf of the client because motivation on behalf of clients was not part of his duties.*
- e. *Another concession by the Applicant was that when he came back from his leave, the time frame the Business Banker had given to the Client to come up with new information which could be used to motivate for the grant of the loan had lapsed, as such her file had been treated as closed.*
- f. *The Applicant conceded as well that the senior Manager, Veli Dlamini, in the email of 07 February 2005, specifically*

informed him that the motivation by the client had to be done to the Business Banker, who would in turn then refer the loan application to him (senior manager).

g. Mr. Thwala conceded as well that he consciously decided to ignore the instruction of the senior Manager that the motivation be done by the client through the Business Banker, informing the Court instead that he saw no need to.

h. Thwala also conceded that when he decided to approve the loan he did so without informing the senior Manager or at the very least copy the email approving the loan to him. He claims it was an oversight on his part not to.

43. What is clear from the foregoing is this; the loan application of Nelisiwe Thwala t/a Eternity Hair & Beauty Clinic was declined by the Bank but she was given an opportunity to provide further information before it could be revisited and reconsidered. She was given a time frame within which to have come back to the Business Banker with this further information failing which the file would be closed. After the lapse of the time frame given to her and with no further information forthcoming from Nelisiwe Thwala, the Business

Banker then closed the file. All this time the Applicant was on leave. Immediately when he came back from his leave, and much against the policies of the Bank, the Applicant communicated with Nelisiwe Thwala (whom she informed the Court was known to her) and thereafter prepared the motivation for the approval of the loan. When he presented this to the senior Manager, he (senior Manager) advised him that it was not his job to motivate on behalf of the client and informed him that this was the Business Banker's prerogative. Despite this advice from the senior Manager, the Applicant did not revert back to the Business Banker but decided to approve the loan without further reference to and concurrence from the senior Manager.

44. As fate would have it, the client, Nelisiwe Thwala t/a Eternity Hair & Beauty Clinic, soon defaulted in servicing the loan. And this is exactly what the senior Manager Veli Dlamini had raised concerns about. An audit was undertaken and it revealed that there was misconduct in the approval of this loan, hence the Applicant was subsequently charged.
45. The evidence before Court clearly indicates that when the Applicant came back from leave he directly communicated with the client

Nelisiwe Thwala, and revived or reopened what was now considered a closed file, prepared the motivation letter much against the procedures – and was told it was not his job to do so - thereafter he went ahead and approved the loan without reference to and concurrence from the senior Manager. Perhaps if the Applicant had gone back to the Business Banker for the motivation letter to be prepared by him, he would have been made aware that the client's file had been closed in the branch. Clearly there was a conflict of interests here in that; he prepared the motivation and thereafter went on to approve the loan, and in so doing was fully aware that he was acting outside of his mandate. Worth noting is that the Applicant himself conceded before Court that Nelisiwe Thwala was known to him. That on its own was reason enough for him not to handle the application at all so that everything could be above board.

46. In fact, it is a finding of the Court that in approving the loan facility without reference to and concurrence from the senior Manager, the Applicant was concealing this information from the Bank and was therefore being dishonest. In this matter, the dishonesty is manifested in the conduct of the Applicant concealing from the senior Manager

that he had approved the loan, despite him (senior Manager) specifically instructing that the motivation should have come from the Business Banker. The Applicant did not bother to take the matter back to the Business Banker but simply went ahead and approved the loan and concealed this fact to the senior Manager.

47. The fact, as well, that the client – Nelisiwe Thwala – contacted the Applicant directly about her loan application leaves a lot of questions lingering. Why would Nelisiwe Thwala contact the Applicant directly when she knew that the time within which she should have submitted more information to her Relationship Manager, the Business Banker, for her application to be re-evaluated had lapsed? How did Nelisiwe Thwala know that she had to contact the Applicant, at the head office, in relation to her loan application when it was Themba Mahlindza, the Business Banker, at the branch who assisted her with the application? Was it a coincidence that she contacted the Applicant just when he returned from his leave? These are some of the questions which the Applicant failed to effectively answer and are still lingering to the Court.

48. It did not help his case that the Applicant was not a credible witness. He was just not impressive as a witness. He was at times very evasive and not forthright in his responses under cross questioning. At one point when it became obvious that his evidence before Court sharply contradicted and was inconsistent with what he had informed the disciplinary Chairperson of his hearing, he nonchalantly informed the Court to decide which evidence to accept. On the other hand, the witnesses of the Respondent were more credible and forthright in their evidence, both in chief and under cross examination. Their evidence stood firm and was not shaken under cross examination by the Applicant's Counsel.
49. The Applicant in this matter, Cyprian Thwala, occupied a senior position in the bank. He was responsible for vetting loan applications of employed individuals and small and medium enterprises. He was also responsible for approving staff loans. It is obvious therefore that the bank placed a high level of trust and confidence in him. However, his misconduct of concealing information from the Respondent Bank that he had approved the loan facility behind the back of the senior

Manager constituted a breach of his fiduciary duty and a breakdown in his trust relationship with the bank.

50. Author **John Grogan** in *Workplace Law*, 10th edition at page 211 postulates thus; '*Dishonesty in the employment context can take various forms, including theft, fraud and other forms of underhand conduct.*' The Applicant's act of concealing the fact that he approved a loan he was not supposed to was clearly underhand conduct and therefore dishonest. In this matter, the conduct of the Applicant is compounded by the fact that the loan he underhandedly approved went on to default. Considering the nature of the Respondent Bank's business, it is the Court's finding that there is no doubt that the Applicant's dishonesty severely adversely impacted on its business.
51. Authors **Le Roux and Van Niekerk** in their work *The South African Law of Unfair Dismissal*, 1994 edition at page 131 state that; '...any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant dismissal.'

52. In view of the foregoing the Court accordingly makes orders as follows;

- a) **The claims of the Applicant against the Respondent be and are hereby dismissed.**
- b) **The Court makes no order as to costs.**

The members agree.


T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 23RD DAY OF APRIL 2019.

For the Applicant : *Attorney Mr. J. Rodrigues (Rodrigues & Associates)*
For the Respondent : *Attorney Mr. M. Sibandze (Musa M. Sibandze Attorneys)*