

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG.

Not reportable

Case no: JA32/2021

In the matter between:

SASBO – THE FINANCE UNION

First Appellant

CHARLINE FRAZENBURG

Second Appellant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER M.A. HAWYES N.O.

Third Respondent

Heard: 10 March 2022

Delivered: May 2022

Neutral Citation: *South African Society of Bank Officials (SASBO) and Other v The Standard Bank Of South Africa Limited and Others JA32/2021*

Coram: Phatshoane ADJP, Savage and Phatudi AJJA

JUDGMENT

PHATSHOANE ADJP

Introduction

[1] In *National Union of Metalworkers of South Africa obo Nganezi & others v Dunlop Mixing and Technical Services (Pty) Limited & others*¹ the Constitutional Court held that: ‘In our law, fiduciary duties are not implied by law into all employment relationships. They may be inferred as a matter of fact from employment contracts and moral notions of trust, confidence, loyalty and good faith.’ This appeal concerns primarily the question whether the conduct of Ms Charline Frazenburg (the second

¹ (2019) 40 ILJ 1957 (CC) para 62.

appellant), insofar as it is alleged by Standard Bank of South Africa Limited (the bank / the first respondent) that she falsified its records, amounted to dishonesty and thus breached the duty of trust and fidelity she owed to the bank.

[2] The appeal is with leave of the Labour Court (*per* Rheeder AJ) against the whole of its Judgment and order upholding the review application filed by the bank; setting aside the arbitration award issued by Commissioner Hawyes (the third respondent), under the auspices of the Commission for Conciliation Mediation and Arbitration (the CCMA/ the second respondent), in terms of which the CCMA had concluded that Ms Frazenburg had been negligent as opposed to being dishonest and, consequently, that her dismissal was substantively unfair.

The factual background

[3] Ms Frazenburg commenced employment with the bank in January 2005. Prior to her dismissal, she was a foreign exchange consultant based at the bank's Cradlestone Service Centre. Her responsibilities included buying and selling foreign notes, electronic transfers, balancing travelers' cheques, foreign notes and Rands. Ms Fawzia Cassim, a branch manager where Ms Frazenburg was stationed, conducted an investigation into the allegations of misconduct against Ms Frazenburg and was the initiator of her disciplinary enquiry. She explained that Ms Frazenburg, as a forex consultant, was required to operate an automatic teller machine (ATM) safe which contained her cash for the day. She would use the cash in her safe to load various ATMs. Once she had done so, she was required to adjust the amounts that had been loaded into the ATMs. The system would then reflect that the money is no longer in the safe but in the ATMs. At the close of business, Ms Frazenburg had to ensure that all her transactions were adjusted. Thereafter, she would balance her safe by physically counting the money in the safe and recording the balance in the system. The money in the safe had to be reflected in the bank's records or system as her balance for the day. Ms Frazenburg was fully trained as an ATM branch custodian during October 2016 and had last worked on the ATMs in December 2016.

[4] On 17 February 2017, Ms Frazenburg took over a safe which reflected a balance of R1 442 000. The next day, on 18 February 2017, she loaded two different ATMs with R248 000 and R148 000, respectively. She later balanced her safe with the correct figure of R1 046 000. On 20 February 2017, she opened her safe with this closing balance. She loaded two ATMs with R108 000 and R24 000, respectively. At the close of business on 20 February 2017, her physical cash in the safe was supposed to reflect a balance of R914 000. She made three attempts to balance her safe and had sought assistance from Mr Donovan² and Ms Ayanda Masola, her team leaders. At 13h35 she recorded a balance of R1 442 000 which was her takeover amount of 17 February 2017, before loading the ATMs on 18 and 20 February, when she did not have that amount in her safe. She did not physically count the cash in her safe. Ms Masola certified that the R1 442 000 balance was checked and found to be correct in respect of the monies that were in the safe. A surprise cash count was conducted on 21 February 2017 because of the deficiencies and surpluses that occurred over that period of 17 to 20 February 2017. This was to ensure that the balance reflected by Ms Frazenburg was accurate. A difference or a shortage of R528 000 was found. The bank did not suffer any loss because the money was traced to a “house” account.

[5] Ms Frazenburg’s evidence was largely not put to Ms Cassim. She testified that she did not set the ATMs for the amounts she had loaded. She made a mistake because she did not adjust the figures correctly. She recorded R500 000 instead of R148 000 and R248 000, the actual amounts loaded into the two ATMs. When she attempted to balance her safe, the system incorrectly reflected R1.5 million as the money she had loaded on the ATMs. She called Donovan who advised her to adjust the figures from the safe. The figures did not adjust properly causing a difference of R1.8 million. She had also called Paul³, a service consultant who was trained to be an ATM custodian and more knowledgeable than she was. On Sunday 19 February 2017, Ms Masola and Donovan received WhatsApp text messages to the effect that the ATMs

² Donovan’s surname was not disclosed on the record.

³ Whose surname is not reflected on the record.

were experiencing a shortage. Ms Frazenburg and Donovan attempted to reset the ATMs figures the same day.

[6] On Monday, 20 February 2017, Ms Frazenburg unsuccessfully attempted to recall all the 'resets' she made. Her efforts at balancing the figure in her safe came to naught. She then called Paul who, together with Ms Masola, put the balance of 17 February 2017. Paul and Ms Masola had checked the balance in the safe on the morning of 20 February 2017 and found it to be correct. Ms Frazenburg intimated that she was inundated with work as an ATM custodian, a foreign exchange consultant, team leader and teller when the bank had been open for business and had to render assistance where she could.

[7] Ms Masola disputed that Ms Frazenburg was dishonest when she balanced her safe because she did this in the presence of her team leaders. She acknowledged that Ms Frazenburg would have entered the figures on the system as she alone would be allowed to work on the computer. Ms Masola was disciplined and dismissed for certifying 'that the teller's cash amount of R1 442 000 had been checked and found to reflect an apparent surplus of R 396 000 as per the teller's cash balance specification.'

[8] On 22 February 2017, Ms Frazenburg was suspended pending an investigation into allegations of misconduct. On 3 April 2017, she attended a disciplinary hearing to answer to the charge of alleged dishonesty in that she falsified the bank's records when she balanced her till with money that she did not have in order to show a balanced position during the period 18 to 20 February 2017. She was subsequently found guilty and dismissed. Aggrieved, she challenged this outcome at the CCMA.

The CCMA proceedings and the arbitration award

[9] Only the substantive fairness of the dismissal was in dispute during the arbitration proceedings. Ms Frazenburg did not dispute that she acted in the manner already described. However, she disputed that her conduct amounted to dishonesty. According to her, she made a mistake with full knowledge of her supervisor, who had

been present when the cash balance was incorrectly entered into the system on 20 February 2017. Moreover, the bank did not suffer any loss because the excess monies were found in the house account where unallocated monies were temporarily stored.

[10] The CCMA commissioner recorded as common cause that the bank did not prove theft or fraud and had suffered no loss pursuant to Ms Frazenburg's actions. He found that Ms Frazenburg had been negligent in that she inputted data into the ATMs which made it impossible to balance the books. The commissioner made an observation that Ms Frazenburg's actions, after entering the data, were desperate attempts to correct her original mistake. Her intention was to rectify and not to falsify the records because falsification implied a devious intent.

[11] In the final analysis, the commissioner held, that Ms Frazenburg was not charged with any other alternative misconduct which bore negligence as an element. In light of this, and further, on the bases that the bank did not prove that Ms Frazenburg was dishonest, he concluded that the dismissal was substantively unfair. Consequently, he ordered that Ms Frazenburg be retrospectively reinstated on the same terms and conditions which governed the employment relationship prior to the date of her dismissal. The bank was further ordered to pay her R52 869, equivalent to her five months' remuneration. Dissatisfied with the results of the arbitration, the bank filed a review application in terms of s 145 of the Labour Relations Act 66 of 1995 (LRA) with the Labour Court.

The judgment of the Labour Court

[12] In its contrasting outcome, the Labour Court reasoned that the commissioner committed an irregularity by failing to separate the conduct of Ms Frazenburg on days preceding her wrongdoing from the offence itself. The court held that Ms Frazenburg admitted to counting the cash. She printed the balance at 13h30 and knowingly recorded a false balance of her takeover amount of 17 February 2017. This, the court reasoned, was an intentional act 'to force balance the system or as she called it "to fix what had gone wrong" as she was scared of being accused of theft.' She intended to

deceive the bank. She may not have intended to steal any money, remarked the court, however, that was not the reason she faced discipline. According to the Labour Court, the fact that the bank suffered no loss did not exonerate Ms Frazenburg from her dishonest conduct which the bank's system was designed to obviate.

[13] The Labour Court held that, in finding differently, the commissioner narrowly interpreted the charge to have required that theft, fraud or loss to the bank be established and thus misconstrued the nature of the enquiry before him. The court was of the view that the misconduct complained of was of a serious nature to warrant a dismissal which it found to have been for a fair reason. It concluded that the commissioner came to an unreasonable decision in characterising Ms Frazenburg's conduct as a mere desperate attempt to correct her mistake and failing to comprehend the dishonest and misleading nature of her conduct. Therefore, the court reviewed and set aside the award and substituted it with an order that the dismissal of Ms Frazenburg was substantively and procedurally fair.

The summary of the argument on appeal

[14] Before us, it was contended for Ms Frazenburg that this is not a case where the Labour Court ought to have disturbed the outcome of the arbitration proceedings. It was argued that the bank did not prove dishonesty. At best, Ms Frazenburg's conduct amounted to some form of negligence or 'foolishness' in balancing the safe while knowing that the balance captured was incorrect. She did not attempt to hide that she could not balance her ATM. Even if it were to be remotely found, it was argued, that there was an element of dishonesty it would be of such a nature that equates to imprudence. Thus, the sanction of a dismissal would be unfair.

[15] Counsel for the bank submitted that the bank's complaint against Ms Frazenburg was that she recorded information on the teller's cash balance specification which she knew was false. By recording the takeover figures of 17 February 2017, it was argued,

she misrepresented the true nature of the position regarding the cash in her safe and falsified the bank's records in breach of the disciplinary code. Her actions were deliberate and calculated to mislead the bank. Whether she reported the matter to her team leaders, it was argued, was immaterial to the question whether the bank records were falsified.

The issues arising for consideration

[16] The issue central to the appeal is whether the Labour Court correctly reviewed and set aside the commissioner's award. Allied to this enquiry is the question whether Ms Frazenburg's conduct amounted to dishonesty which merited her dismissal or negligence of a trivial nature which would not justify her discharge.

The discussion

[17] Dishonesty as an aspect of misconduct is a generic term embracing all forms of conduct involving deception.⁴ This Court in *Nedcor Bank Ltd v Frank & others*⁵ defined dishonesty as a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently.⁶ Deceitfulness can manifest itself in various forms, which includes providing false information, non-disclosure of information, pilfering, theft and fraud. The fiduciary duty owed by an employee to the employer generally renders any dishonest conduct a material breach of the employment relationship, thereby justifying summary dismissal.⁷ In terms of the bank's disciplinary code, dishonesty would include, amongst others, deliberately giving untrue, misleading or wrong information or instructing a subordinate to do so; falsification of the bank records; theft, misappropriation or unauthorized possession of property or funds belonging to another employee or a customer; fraud or forgery. These offences are regarded as 'dismissible actions without previous warnings' in the bank's disciplinary code.

⁴ CI Tshoose & R Letseku: 'The breakdown of the trust relationship between employer and employee as a ground of dismissal: Interpreting the Labour Appeal Court's decision in *Autozone*' 2020 SA Merc LJ 162.

⁵ (2002) 23 ILJ 1243 (LAC).

⁶ *Nedcor Bank Ltd v Frank & others* (2002) 23 ILJ 1243 (LAC) para 15.

⁷ Van Niekerk A et al, *Law@work* 4th ed (LexisNexis 2017) 299.

[18] The courts have frequently upheld dismissal for dishonesty. However, it is not an invariable rule that offences involving dishonesty necessarily incur the supreme penalty of dismissal. The facts of every case must be assessed and the mitigating features taken into account.⁸

[19] In issue, as said, is whether the employee's actions were intrinsically dishonest. The South African Society of Bank Officials (SASBO), the first appellant, and Ms Frazenburg placed much reliance on the decision of this Court in *Nedcor Bank* (supra) and that of the Labour Court in *Arcelormittal South Africa Limited v Pretorius and Others*⁹ in their argument that the Labour Court ought to have found that dishonest intention or intention to deceive was central to the finding that Ms Frazenburg acted dishonestly by falsifying the bank's records. In amplification, it was argued that the Labour Court's approach was directly opposite to that adopted in the two decisions.

[20] The facts in *Nedcor Bank* and *Arcelormittal* are entirely different from those which apply to this case. In *Nedcor Bank*, one employee was charged with dishonesty in that he deliberately and knowingly disengaged the card-reader denying the clients access in the knowledge that the bank's monitoring system would be unable to detect that the ATM did not have sufficient cash. The other employee was also charged with dishonesty and failure to adhere to the bank's laid down policy and procedure. The two employees had made no attempt to conceal a material fact from the bank. They claimed an altruistic motive of shielding the bank from the wrath of the management of the airport. They denied having known of any policy or practice directive prohibiting their conduct before the formal rule was introduced.

[21] In *Arcelormittal South Africa*, an employee was found guilty and dismissed on three charges of misconduct relating to dishonesty. It was alleged that he submitted inflated travel and subsistence claims. He had tendered an explanation for the kilometres in which he over-claimed and in respect of which the employer had failed to do a simple check on Google maps to verify the routes and the accusation of over-

⁸ *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC) paras 43-44.

⁹ (JR999/2014) [2016] ZALCJHB 351 (14 September 2016).

claiming. The employee had also conceded that the total amount where he over-claimed was approximately R9 000 over a period of 3 to 4 years. There was also some 484 kilometres he claimed in August 2009 which he said was a *bona fide* mistake. The arbitrator had found that the employer had failed to prove that the employee acted with the intention to benefit inappropriately or to deceive and had failed to prove the essential element of intent when disciplining the employee for dishonesty. He awarded the employee the maximum compensation. The Labour Court concluded that the arbitrator's award fell within a range of decisions that a reasonable decision-maker could make.

[22] Ms Frazenburg was not charged with causing some financial loss to the bank or theft or fraud which appears to have been key to the commissioner's finding that she was not guilty of dishonesty. During the cross-examination of Ms Cassim, the commissioner put to her that 'the concept of dishonesty' in this case was being stretched. He made similar remarks during the closing address that Ms Frazenburg was not charged for balancing her safe but for dishonesty. He went on to state: 'I am not seeing much in terms of dishonesty here, she certainly did not benefit from anything, there was no fraud there was no theft'. He carried on questioning the bank's representative and in the end said 'Please just one thing, just do not think that I have already made up my mind here, i[t] may look that way, not at all, I am just a little concerned about things getting classified as dishonesty and falsification when I have a different understanding of these things.'

[23] The Labour Court correctly noted that the commissioner opined, in the course of the hearing, that there had been no dishonesty as no money had been appropriated. By so doing, the court said, the commissioner appeared to have closed his mind to the evidence tendered by the bank and searched for theft or fraud to demonstrate that Ms Frazenburg was not guilty of the offence.

[24] The workplace disciplinary hearings are not criminal proceedings. This Court held in *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*, that:¹⁰

‘...(T)he misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant’s disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained...’

[25] The approach adopted by the commissioner was plainly incorrect. In any event, having determined that Ms Frazenburg was negligent, he ought to have dealt with the charge on that basis. It was not open to him to simply state that because the employee had not been charged, in the alternative, of negligence that was the end of the matter. The trier of fact is expected, in the context of discipline in the workplace, to deal with the wrong committed by an employee even if the charge may have been inelegantly phrased provided that the employee is not significantly prejudiced by the incorrect labeling of the charge. In *Woolworths* (supra) the court agreed with the example cited in the work of Le Roux & Van Niekerk, that:¹¹

‘Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a

¹⁰ (2011) 32 ILJ 2455 (LAC) para 32.

¹¹ P A K le Roux & Andre van Niekerk *The SA Law of Unfair Dismissal* (Juta & Co 1994) at 102.

disciplinary rule has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate to the offence found to have been committed may be imposed.'

[26] The main thrust of the charge against Ms Frazenburg was that she balanced her till with money that was not in her safe in order to show a balanced position during the period 18 to 20 February 2017. According to the bank, insofar as Ms Frazenburg entered an incorrect figure of her takeover of 17 February 2017, she falsified its records. To consider whether Ms Frazenburg falsified the bank records or that she simply made a mistake requires a careful scrutiny of the evidence presented. Ms Frazenburg sought to portray a picture that, at all relevant times, her team leaders had been around when she attempted to balance her safe. Quite remarkably she said that at around 13h30 she was alone when she printed the balance and used the same figures that had been used in the morning by Paul and Ms Masola during the first reconciliation attempt at about 10h30 because she thought they were correct. A simple exercise that she was required to perform was to count the money in her safe and record the balance on the system. That she did not do.

[27] Ms Frazenburg prevaricated on the question whether she was present when the money was allegedly counted at 10h30 by her colleagues. Her responses were disingenuous. It could not have escaped her mind that the 10h30 balance was incorrect. She did not count the money in the safe at 13h30, which she knew full well that she had to do, but cavalierly set about reflecting the incorrect takeover figure of 17 February 2017 on the bank's record. Failure to count the money could never have been a mistake but a deliberate act. It is also significant that there was no evidence that she informed her team leader that she would use the takeover figure of 17 February 2017 to balance her safe on 20 February 2017 at 13h30. This was entirely her own conscious decision to capture the false balance. She, therefore, misled the bank in respect of the correct balance or the balance of the money in her safe. Ms Frazenburg was also evasive in

her response to the question when she intended to declare to the bank that she had a shortage of R500 000 in her safe. She agreed that she is responsible for anything done on her safe and under her name and that the bank views shortages and surpluses in a serious light. In her own words, employees of the bank had been dismissed for this.

[28] Ms Frazenburg agreed to be honest in her dealings with the bank in her general terms of employment which she concluded with the bank. There was no debate, in this case, that there is a rule in the workplace that prohibits falsification of the bank's record which is legally sound and operationally rational. Ms Frazenburg did not contest that she was aware of the rule. As already said, the bank's disciplinary code lists falsification of the bank's records under examples of dismissible offences without previous warnings. In terms of the bank's balancing rules:

'Any differences found during a surprise check must be referred to the team leader tellers. The team leader tellers must view this in a serious light as the teller had reflected a balanced position the day before and this would be classified as falsification of bank records.'

[29] From the foregoing, the capturing of the false balance on the bank's records points to a dishonest conduct and not foolhardiness as found by the commissioner who clearly paid no attention to the operational needs of the banking industry. Ms Frazenburg's persistent plea of a mistake cannot avail her. The Labour Court correctly reasoned that in the banking environment, as fully set out in the general terms of employment, the employees are expected to be honest and not to circumvent the checks and balances put in place to prevent the misconduct of a kind committed here. The court's assessment of the evidence that Ms Frazenburg altered the bank records to reflect a false picture cannot be faulted.

[30] Ms Cassim testified that Ms Frazenburg's conduct had an impact on the relationship of trust and continued employment relationship because she did not live up to one of the values of the bank which is to act with honesty and integrity. The need for employees to act with honesty and fidelity is so fundamental in the financial services

industry, more so, where the employees deal with large sums of money. A breach of trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it.¹² It can hardly be argued that the dismissal was not justified.

[31] In conclusion: the commissioner's award is characterised by an insufficient and misdirected assessment of the evidence which had a distorting effect on the enquiry he was enjoined to undertake. It is not a decision that a reasonable decision-maker could have reached in light of the material placed before him. It follows that the appeal must, therefore, fail. In accordance with the requirements of law and fairness as set out in s 162 read with s 179 of the LRA, this is not a case where an order of costs should be made. In the result, I make the following order.

Order

1. The appeal is dismissed.

MV Phatshoane
Acting Deputy Judge President - The Labour Appeal Court

Savage and Phatudi AJJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:	Adv J G Rautenbach SC Instructed by BJ Erasmus Pieterse Attorneys
FOR THE FIRST RESPONDENT:	Mr D Cithi Instructed by Mervyn Taback Inc

¹² *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union of SA & another* (1991) 12 ILJ 340 (LAC) at 344; *Standard Bank of SA Ltd v Commission for Conciliation, Mediation & Arbitration & others* (1998) 19 ILJ 903 (LC) para 38.

