

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD at JOHANNESBURG)

REPORTABLE

CASE NO: DA4/01

In the matter between:

NEDCOR BANK LTD

Appellant

and

CYRIL FRANK

First Respondent

KOVILAN SARUGASER

Second Respondent

SASBO

Third Respondent

COMMISSIONER S.M. GOVENDER

Fourth Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION (“CCMA”)**

Fifth Respondent

JUDGMENT

WILLIS JA:

[1] This is an appeal against a judgment of the Labour Court (*per* Pillay J.) dismissing an application to review an arbitration award. The Court *a quo* granted leave to appeal to this Court.

[2] The first respondent had been employed by the appellant as an “ATM

(Automatic Teller Machine) Custodian". Among his responsibilities was to ensure that the ATM at the Durban Airport remained operational, was available to the appellant's customers at all times and that all problems connected therewith be "escalated" (i.e. reported and followed up) with his immediate superior, the second respondent.

[3] The second respondent had been employed as an "ATM Controller." Among his responsibilities was supervision and control of the first respondent and all other ATM custodians in the Durban area. He was obliged to "escalate" all problems which had been "escalated" to him and which he was unable to solve to Mr John Waters, the appellant's National Manager, Operations: Electronic Banking Retail Operation. In order to avoid the use of esoteric jargon, I shall use the words "report" and "reported" for "escalate" and "escalated" respectively.

[4] Two of the appellant's general managers attempted to draw cash from the appellant's ATM at the Durban Airport during the evening of Sunday, 5th July, 1998. This was the Sunday after the "Durban July Handicap " and the airport had been particularly busy over that week-end. Although the ATM appeared operational, it did not dispense any cash. The general managers reported the matter, which led to an investigation. It transpired that the first respondent had disengaged the card-reader ("the card") of the ATM as a result of the ATM having run out of cash earlier that evening. The effect of this was that the ATM would have appeared to have been operational but would not have been able to process any transactions, including the dispensing of any cash. By reason of the disengagement of the card, the appellant's monitoring system was unable to detect that the ATM was not, in fact, operating. The first respondent re-engaged the card on the morning of Monday, 6th July 1998 at the time when the ATM was reloaded with cash.

[5] A disciplinary enquiry was held at which the first respondent was charged as follows: "Dishonesty- On 5th July 1998 you deliberately and knowingly disengaged the card reader denying access to our clients in the knowledge that monitoring would not discover an escalated fact that the ATM would not have sufficient cash." He was found guilty and dismissed.

[6] Similarly, a disciplinary enquiry was held at which the second respondent was charged as follows: "Dishonesty- On 5th July 1998 you deliberately and knowingly allowed your custodian C Frank (*i.e. the first respondent*) to disengage the card reader denying access to our clients in the knowledge that monitoring would not discover an escalated fact that the ATM would not have sufficient cash." He, too, was found guilty. The second respondent was also charged with "not adhering to laid down policy and procedures." He was also found guilty on this charge. Consequent upon these findings of guilt, he was dismissed, no separate sanction having been imposed in respect of the different charges.

[7] The respondents referred their dispute of an alleged unfair dismissal to the fifth respondent, the CCMA. At the request of the parties, the matters of the alleged unfair dismissals of the first and second respondent were consolidated. After an unsuccessful conciliation, the first and second respondents requested that the dispute be resolved through arbitration under the auspices of the CCMA. The arbitrator found that the appellant had failed

to prove dishonesty on the part of either the first or second respondent and ordered the appellant to reinstate the respondents.

[8] The appellant then brought an application to review the award of the arbitrator in terms of section 145 of the Labour Relations Act, No.66 of 1995, as amended. The Court *a quo* found the award justifiable and dismissed the application. Indeed, the Court *a quo* seemed to endorse the finding that dishonesty on the part of either the first or second respondent was unproven.

[9] During the course of Sunday, 5th July 1998 the appellant's monitoring systems section alerted the first respondent that there was a problem with the ATM in question and he ascertained that the machine had run out of cash. It is common cause that it would not have been possible to load the machine with cash on that day, it being a Sunday. Those who actually did the loading did not work on Sundays. It was also the appellant's policy that cash should not be transferred between ATMs. The first respondent reported the problem to the second respondent. The first respondent together with the second respondent decided not to leave the ATM in the condition it was because this would have alerted the airport's management that the ATM was inoperative. There had been ongoing problems with the ATM being inoperative and signalling that it was out of order. This led to complaints by the management of the airport. By this is meant those responsible for the operation of the airport itself and not the management of the appellant.

[10] It was the first respondent who suggested to the second respondent that they should disengage the card so that the ATM would give the impression that the ATM was online and in working order. This would have had the effect that a “red screen”, which had led to so many complaints, would not have shown up. The first and second respondents claimed that the motive behind their having resorted to this device was to protect the appellant from the wrath of the management of the airport. Whether the card was engaged or not, the effect for customers of the appellant would have been exactly the same: the machine would have been inoperative and they would not have been able to withdraw any cash.

[11] It is common cause that a code 997 would have appeared at the monitoring systems section indicating that for a period of sixteen hours no transactions were processed at this particular ATM. It is common cause that no one at the monitoring systems section followed this up. It is common cause that the first respondent was fully aware at the time that the code 997 would have alerted the monitoring systems section that there was something amiss at the ATM at the airport. It was common cause that customers of the appellant could have reported the failure of the ATM to operate. It is thus clear that there was no attempt to conceal a material fact from the appellant or the appellant’s customers. An attempt was made to conceal from the management of the airport that the machine was not operating. As mentioned above, the first and second respondents claim an altruistic motive in this regard: shielding the appellant from the wrath of the management of the airport.

[12] It is common cause that it was only on 6th July, 1998, that the appellant introduced a formal rule prohibiting conduct of the kind resorted to by the first

and second respondent. Each of the first and second respondents denies having known of any policy or practice directive prohibiting their conduct before this formal rule was introduced. The appellant seems to accept that this may be true. There is no justification for coming to a different conclusion. In the light of this, the second respondent was wrongly found guilty on the second charge.

[13] It is clear that when the cat was set among the pigeons on the morning of 6th July, 1998, the second respondent panicked and attempted to distance himself from the conduct of the first respondent. This does not reflect well on his honour. He did not face any disciplinary charges in this regard. When the feathers had settled, he spoke the truth.

[14] When the evidence is viewed in its totality, the explanation of both the first and second respondent for their conduct: that they wished to shield the appellant from the wrath of the management of the airport is entirely plausible. No other reason suggests itself.

[15] Dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. (See, **Toyota SA Motors SA (Pty) Ltd v Radebe & Others** (2000) 21 ILJ 340 (LAC) at 345F-H; **R v Brown** 1908 TS 21; **R v White** 1968 (3) SA 556 (RAD) *Ex parte Bennett* 1978 (2) SA 380 (W) at 383H-384C; **S v Manqina**; **S v Madinda** 1996 (1) SACR 258 (E) at 260e-h and the Oxford Dictionary.) In the Canadian case of **Lynch & Co v United States Fidelity & Fidelity & Guaranty Co**

[1971] 1 OR 28 at 37,38, Ont SC, the following was said: (*per* Fraser J):

‘ “ Dishonest” is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning.’ Certainly, insofar as the appellant or its customers are concerned, no intention to steal, cheat, lie or act fraudulently is manifest. And what of the intention to conceal the true state of affairs from the management of the airport? That is not covered by the charge. In any event it is, to my mind, impossible for the appellant to claim that as a result of the first and second respondents’ conduct, the relationship of trust between them and the appellant has been destroyed. (See, for example, **Council for Scientific & Industrial Research v Fjen** 1996 (2) SA 1 (A) at 9H-J; [1996] 2 All SA 379 (A) at 385j; **Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers & Another** (1991) 12 ILJ 340 (LAC) at 344F-G; **Anglo American Farms t/a Boschendal Restaurant v Komjwayo** (1992) 13 ILJ 573 (LAC) at 589B-590F; **Lahee Park Club v Garratt** [1997] 9 BLLR 1137 (LAC) at 1139l; **Sappi Novoboard (Pty) Ltd v Bolleurs** (1998) 19 ILJ 784 (LAC) at 787E-I; **Leonard Dingler (Pty) Ltd v Ngwenya** (1999) 20 ILJ 1171 (LAC) at 1190 J-1191D; **Toyota SA Motors SA (Pty) Ltd v Radebe & Others** (2000) 21 ILJ 340 (LAC) at 352C-E.)

[16 The decision of the arbitrator and the Court *a quo* cannot be faulted.

[17] The following order is made:

The appeal is dismissed with costs.

DATED AT JOHANNESBURG THIS DAY of MAY 2002.

N.P. WILLIS

JUDGE OF THE LABOUR APPEAL COURT

I agree.

R.M. M. ZONDO

JUDGE-PRESIDENT OF THE LABOUR APPEAL COURT

I agree.

D. VAN REENEN

ACTING JUDGE OF THE LABOUR APPEAL COURT

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Date of hearing: 20th November, 2001

Date of Judgment: 8th May, 2002