



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA107/2022

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

Appellant

and

**SOUTH AFRICAN SOCIETY OF BARGAINING
OFFICIALS**

First Respondent

NONTOKOZO NGCOBO

Second Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Third Respondent

COMMISSIONER TSIETSI CHAKAKANE N.O.

Fourth Respondent

Heard: 28 November 2023

Delivered: 27 February 2025

Coram: Molahlehi DJP, Savage and Malindi AJJA

JUDGMENT

MALINDI, AJAIntroduction

[1] The employee, Ms Nontokozo Ngcobo, the second respondent herein, was charged by the Appellant (the Bank) as follows:

“1. It is alleged that you acted in breach of the Standard Bank Housing Policy (processes) and acted outside your mandate / authority as a Human Capital Business Partner, in that:

(a) On 21 May 2018, you captured and/or authorized a lease agreement and the PRU between the bank and Mr. Johannes Taljaard (“Taljaard”).

2. It is alleged that you acted in a manner that is Grossly Negligent, in that:

(a) when you received a copy of the lease agreement on 28th February 2018, you failed to check if the agreement was properly signed by Taljaard.

(b) When you captured the agreement and completed and authorized the PRU,¹ you failed to enquire from the Provincial Head Anton Nicoliasen and/or Brendon Jacobs (“Jacobs”) as well as Khetsiwe Mabuza (“Mabuza”) whether they were aware that Taljaard had signed a lease agreement with the bank.

(c) You failed to obtain authorization from Provincial Head, Jacobs and/or Mabuza prior to capturing the agreement and authorizing PRU.

(d) On 25 June 2028, you sent an email to Human Capital to cancel the lease agreement without notifying Jacobs and Mabuza.

[2] The matter was referred to arbitration under the auspices of the third respondent, the Commission for Conciliation Mediation and Arbitration (the CCMA), and the Commissioner held that the Bank’s Housing Policy was silent on Ms Ngcobo’s responsibility in the circumstances that she was charged for gross

¹ Personal Record Update.

negligence under and that Ms Ngcobo be reinstated because she was remorseful and she never acted in a dishonest manner.²

[3] The Commissioner held further that the form of misconduct complained of is one that *“can be managed to coaching and training taking into account that the applicant was only one year in service”*.³

[4] The Bank took the matter on review to the Labour Court and Tulk AJ agreed with the Commissioner that the dismissal was substantively unfair and ordered the reinstatement of Ms Ngcobo. In addition, the Labour Court reviewed the Commissioner’s order of three months’ back pay and ordered back pay of five months.

Background

[5] Ms Ngcobo was employed as the Bank’s Human Capital Consultant (HCC) on 1 July 2017. Her role included providing Human Resources-related services to business clients in the Free State. The Bank contends that she was the custodian of all the policies and procedures of the Bank.⁴

[6] In terms of the Bank’s Housing Policy (the Housing Policy), Ms Ngcobo was expected to receive the Personal Record Update (the PRU) from Taljaard’s Line Manager, and as HCC capture it on the Team Track/SAP and the file. This was the last step to authorising a lease agreement which falls within the province of the lessee’s Line Manager.

[7] Ms Ngcobo was issued with a notice to appear before a disciplinary inquiry to answer to allegations of misconduct related to a contravention of the appellant’s Housing Policy and gross negligence.⁵ She was found guilty of the allegations of

² Award: 076-30, para 40.

³ Award: *Ibid*.

⁴ FA, para 9, 076-12.

⁵ The allegations of misconduct read as follows:

misconduct and on 27 August 2018, she was dismissed from the employ of the appellant.

[8] Aggrieved by her dismissal, Ms Ngcobo, with the assistance of the first respondent, referred an unfair dismissal dispute to the CCMA. On 2 October 2018, the dispute was declared as unresolved, and the matter was referred to arbitration. The dispute came before the Commissioner, who in turn issued the impugned arbitration award.

The arbitration award

[9] The Commissioner noted that even on Ms Ngcobo's version, she had accepted a lease agreement that was irregular; signed the PRU of an employee; that Ms Ngcobo had acted negligently when she signed for the authorisation of the PRU without verifying the supporting documents. Furthermore, that Ms Ngcobo had only realised that she had failed to inform the line manager when the employee had complained about the status of the lease agreement on or about May/June 2018. Moreover, that Ms Ngcobo had apologised and proffered motivation on why she should not be suspended.

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(c) You failed to obtain authorization from Provincial Head, Jacobs and/or Mabuza prior to capturing the agreement and authorizing PRU.

(d) On 25 June 2018, you sent an email to Human Capital to cancel the lease agreement without notifying Jacobs and Mabuza.

[10] The Commissioner further noted that the allegations against Ms Ngcobo related to gross negligence. He found that it was clear that the Housing Policy was ambiguous on the roles and responsibilities of a Human Capital Consultant. Thus, it was probable that Ms Ngcobo could have not foreseen the harm as she was under the impression that the employee being a senior official was aware of the contents of the Housing Policy and it was for that reason that Ms Ngcobo thought that she was allowed to authorise the PRU.

[11] The Commissioner noted that negligence entails failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person, and that it was probable that Ms Ngcobo could not have foreseen the potential harm. This was since she was under the impression that the employee, being a senior employee, was familiar with the Housing Policy and thus, would have complied with the Policy. Moreover, the Housing Policy being unclear on her role and responsibilities, Ms Ngcobo probably assumed that she would have been authorised to sign the PRU as the functionary which is the support to the business department.

[12] In respect of the fairness of the sanction, the Commissioner held that the appellant failed to discharge its onus, particularly since despite the assertion by the appellant that Ms Ngcobo's conduct was negligent, Ms Ngcobo had demonstrated that she and her department had regularly signed PRUs without the supporting documents, and that others have never been disciplined for such conduct.

Judgment of the Labour Court

[13] The Labour Court noted that the appellant had the burden of proving the existence of the rule and this included demonstrating that the Housing Policy was explicit in terms of the obligations which rested on Ms Ngcobo. It then held that based on the uncertainty on whether the authority to sign the PRU could be delegated, together with the different interpretation emanating from the evidence, it was not unreasonable for the Commissioner to conclude that the Housing Policy was not explicit in respect of the role and responsibilities of Ms Ngcobo.

[14] It further held that the evidence was not such as to vitiate the Commissioner's award on the issue of negligence. This was since there was no evidence that demonstrated that Ms Ngcobo had received the lease agreement in February 2018, and moreover, contradicting versions were proffered in respect of the nature of the negligence. The Labour Court stated that initially the contention on behalf of the appellant was that the negligence flowed from Ms Ngcobo's approval of the PRU without verifying that the lease agreement was correctly signed and it then morphed to the allegation that Ms Ngcobo had signed the PRU without being in possession of the lease agreement. As such, the allegations against Ngcobo were mutually destructive since both situations could not have occurred simultaneously.

[15] The Labour Court further held that the contention that the Commissioner misconstrued the charge of breach of the Housing Policy could not be sustained since the Commissioner was aware that he was confronted with the question of Ms Ngcobo's responsibilities under the Policy and canvassed precisely this question in the award. Furthermore, that it was incorrect that Ms Ngcobo had never disputed her awareness of the Housing Policy, since this was even apparent from her email in which she proffered an apology and stated that she was unaware that she could not act as she did.

[16] It further held that the Commissioner was cognisant of the fact that reinstatement was the primary remedy and concluded that the parties could still work together, particularly since Ms Ngcobo did not act in a dishonest manner and showed contrition. Moreover, that since the misconduct was not proved, the continued relationship could be managed through training and coaching, particularly since Ms Ngcobo had been with the appellant for a short period. The Labour Court concluded that the ultimate outcome in the arbitration was reasonable.

The evidence

[17] Ms Khetsiwe Mabuza, Ms Ngcobo's Line Manager, testified on behalf of the Bank. Ms Chauke led her evidence in chief. Regarding the gravity of Ms Ngcobo's conduct and what the appropriate sanction should be she testified as follows:

“MS CHAUKE: Okay and how did this conduct by the applicant authorising Mr Taljaard’s lease agreement affect the relationship with the bank and or with you as well as the Line Manager?

MS MABUZA: So for me my view is you know, if a person makes a mistake just saying no, I actually made a mistake, how can we rectify this, so I think for me what I did not appreciate was the fact that Nontho and Johan were now cancelling leases and there were conversations that were happening between the two of them, where I am sitting it is after they possibly realised that there is a bit of a blunder that has happened here.

So Nontho went ahead again with no authorisation to cancel the lease on Johan’s instruction and you know, so in July when I am now asking to say please explain one, two, three, in June already she has authorised, sent an e-mail to authorise, to cancel a lease and not actually having followed the correct process and more especially not reading and understanding the Company Housing Policy, which is actually the proviso upon which evidence lies.

Had she seen the policy and had she actually looked at the lease agreement itself and realised that Johan had actually signed in the wrong place, that was the first red flag to say Johan, please go to Brandon, you know you have signed where Brandon should have signed, so please take this up with Brandon, or if that did not happen she had every right to escalate that to me to say to me can I please do that, if she did not know how.

MS CHAUKE: So and how did that affect the relationship with the respondent?

MS MABUZA: Look, like as the bank we work on honesty and integrity, it is very key and it is very critical and especially in any role, but for me in the role as a Human Capital Business Partner and someone who is a custodian of company policies, if you yourself do not understand and follow those policies then it really is a problem. And how then does the bank trust you in that role to actually perform the roles that you have to do if you are actually not aware of some of the policies and how you need to apply them?”

[18] Ms Mabuza went on to testify about dismissible forms of misconduct in terms

of the Disciplinary Code⁶ with reference to gross negligence and loss of trust and intolerable employment relationship for the Bank.⁷⁸

[19] Under cross examination Ms Mabuza explains that by the allegation that Ms Ngcobo “captured and/or authorised” the lease agreement is meant that she “captured the information onto the PRU and approved it”. She did not capture the lease agreement.⁹ What Ms Ngcobo did was to enter information on to the PRU and approved it. As will appear under Ms Laveen Oswin’s (her position?) evidence later, Ms Mabuza misused the word “capture” instead of “complete”. Ms Ngcobo completed the PRU and signed it, and someone else, a Ms Jessy C Mabuza (JC Mabuza), captured the PRU by entering the request therein onto Mr Johannes Taljaard’s personnel record or file. Ms Mabuza confirmed that Mr Taljaard completed the lease agreement, not Ms Ngcobo.¹⁰ She also confirmed that Ms Ngcobo did not receive the lease agreement on 28 February 2018.¹¹

[20] Regarding charge 2 which concerns gross negligence, Ms Mabuza testified that:

20.1 There is no evidence that Ms Ngcobo received the signed lease agreement on 28 February 2018.¹²

20.2 The gross negligence arises out of Ms Ngcobo’s failure to “*enquire from the Provincial Head, Anton Nicoliasen and/or Brandon Jacobs or Ms Khetsiwe Mabuza (the witness) whether they were aware that Mr Taljaard had signed a lease agreement with the Bank*”.¹³

20.3 The failure to enquire allegation is not because of a written procedural requirement but Ms Ngcobo should have known to enquire because as a

⁶ Pagination: Vol 2, p 170, part 6.

⁷ Pagination: Vol 2, p 171.

⁸ 076-263, line 7.

⁹ 076-268, lines 8 – 20.

¹⁰ 076-268, line 18 to 076-269, line 3.

¹¹ 076-272 line 20 to 076-273 line 5

¹² 076-272, line 20 to 076-273, line 5.

¹³ Charge sheet: para 2.2

senior staff member she should have known to do so before authorising the lease agreement.¹⁴

20.4 The gist of the allegation is that Ms Ngcobo performed Mr Taljaard's Line Manager's functions or duties when the policy does not give her such duties and had no delegation to do so.¹⁵

[21] It was submitted on behalf of the Bank that by signing the PRU, Ms Ngcobo was authorising the lease agreement. She did so despite an improperly signed lease agreement in that Mr Taljaard had signed it as lessor instead of as lessee.¹⁶

[22] In short, it was submitted, the lease agreement should have been signed for lessor by the Line Manager, Mr Brandon Jacobs. After Mr Jacobs had finalised the process in terms of clause 2 of the Housing Policy, he is required to submit the PRU to the Human Capital Consultant, Ms Ngcobo in this instance, who would process the information contained in the PRU. This last step performed by Ms Ngcobo would constitute the authorisation of the lease agreement. However, she did not merely process the PRU but signed it herself, usurping the function of Mr Jacobs. Further, she failed to enquire from Ms Mabuza about the propriety of the defective lease agreement.¹⁷

[23] The essence of the charge is that Ngcobo failed to enquire from the Provincial Head, Mr Anton Nicoliasen, and/or Mr Brandon Jacobs, as well as Ms Khetsiwe Mabuza (Ms Ngcobo's Line Manager) "*whether they were aware that Mr Taljaard had signed a lease agreement with the Bank*". Meaning that Mr Taljaard had signed as "*lessor*" instead of "*lessee*". Mr Brandon Jacobs should have signed on behalf of the Bank as "*lessor*" because he was Mr Taljaard's Line Manager.

[24] As will appear from the unchallenged evidence of Ms Ngcobo, Ms Oswin and Ms Mabuza's own evidence, the step of capturing or entering the request in the PRU

¹⁴ 076-275, line 18 to 076-275, line 22.

¹⁵ 076-280, line 1 to 076-281, line 13.

¹⁶ Bank's HOA, para 10, 11; FA, para 14, 076-13.

¹⁷ Bank's HOA, para 9, read with para 7; 078-22/24.

was done by Ms JC Mabuza. She is the one who was to enquire whether the lease agreement was valid in view of its defective signing (signed by Mr Taljaard instead of Mr Jacobs and unsigned on behalf of the lessee). Ms JC Mabuza was the capturer, not Ms Ngcobo. Paragraphs 2.2 and 2.3 of the Charge Sheet assign conduct to Ms Ngcobo which was Ms JC Mabuza's. Ms Ngcobo admits that she signed the PRU which should have been signed by Mr Jacobs. Her conduct was to authorise the deduction of low cost housing rental as required by the Housing Policy read with the lease agreement. Her evidence that she had not seen the lease agreement as Mr Taljaard had not returned it to her when he presented her with the PRU is uncontradicted. She was therefore unable to make the enquiries that the charge sheet characterises as constituting gross negligence. Furthermore, it is not the Human Capital Consultant or Human Capital Shared Services that authorises the lease. It is the line manager of the prospective lessee by signing on behalf of the bank as lessor. She therefore is incapable of being charged for "*failure to enquire*" when she had had no sight of the defective lease agreement.

[25] Even if Ms Ngcobo was the one to make the enquiries as to the validity of the lease agreement the question is whether this was an omission that could lead to a breakdown of trust between the employer and the employee. Was Ms Ngcobo dishonest in any of her responses when this failure to enquire was discovered by Ms Mabuza and she requested a response from Ngcobo?

[26] Whether Ms Ngcobo's conduct was grossly negligent and whether the relationship of trust had been broken is a factual enquiry. Ms Mabuza testified to this as a principle that Ms Ngcobo's failures under paragraphs 2.2 and 2.3 of the charge sheet constituted gross negligence and therefore was intolerable because of the Bank's rigorous adherence to procedure

[27] The question is whether Ms Ngcobo failed to exercise the standard of care that can reasonably be expected of her through conduct that caused loss or potential loss to the employer.¹⁸

¹⁸ *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2477 (LAC) at 19, hereinafter referred to by the employee's name, *Brett Danney*.

[28] Ms Ngcobo's defence is that after having advised Mr Taljaard to consult with his Line Manager regarding the lease agreement in February 2018, he returned in May 2018 and told her that he had a completed and signed lease agreement. He asked her to complete and sign his PRU. She only found out in July 2018 that the lease agreement was not properly authorised when Ms Mabuza made enquiries about its existence. The analysis of the evidence in this regard by the Commissioner and the Labour Court was wrong. Her evidence was found to have been that she did not notice that Mr Taljaard signed at the wrong place when she received the lease agreement. As stated above, she denies that she received the lease agreement back after giving Mr Taljaard a blank copy to take to his line manager for completion and authorisation. Ms Mabuza confirmed that despite the allegation in the charge sheet, there is no evidence that Ms Ngcobo received the lease agreement on 28 February 2018. When signing the PRU she had assumed that all procedures had been complied with between the line manager and Mr Taljaard.

[29] Ms Ngcobo's evidence was that she signed the PRU, thereby authorising the update of his personnel file to reflect that he is moving into low cost housing per the lease agreement. The PRU was then given back to Mr Taljaard for submission to Human Capital Shared Services (HCSS).¹⁹ HCSS then captured the information and updated Mr Taljaard's profile.²⁰ HCSS files the original agreement in the employee's personnel record folder.²¹

[30] Mr Taljaard told Ngcobo that he has a signed lease agreement. What was outstanding was the PRU. She signed the PRU and it was for Mr Taljaard to submit it together with the lease agreement to HCSS.²² She had not seen the lease agreement until enquiries were made about its authorisation. She testified that had

¹⁹ 076-379, lines 4 to 16.

²⁰ Oswin's evidence, at 076-367 to 076-368)

²¹ PRU: Item 5.6 (076-158).

²² 076-395, lines 9 to 16.

she seen it she would not have signed the PRU as she would have noticed that the lease agreement was not properly signed.²³

[31] By signing the PRU Ngcobo was authorising the deduction of rental per month from Taljaard's salary.²⁴

[32] Ms Oswin testified that the lease agreement is not for HCSS to assess as the lessee and Line Manager reach that agreement separately. The PRU is the last step required by the Housing Policy as a recordal of the employee's records. She is a Human Capital Shared Services Consultant.

[33] Ms Oswin testified under cross examination by Mr Mtetwa as follows:

"MR MTETWA: Okay, so the lease agreement, if it is not completed correctly by both parties, am I correct that it was supposed to be rejected?

MS OSWIN: No, because we do not look at the lease agreement. I do not know who is going to sign the lease agreement, where they are supposed to sign, as long as they get the authorised, an authorised signature on this to put that person's details on SAP or to change those details on SAP, then that is where my instruction comes from. The lease has got nothing to do with me as the capturer."

[34] Ms Oswin means that the capturer follows the PRU instruction and does not scrutinise the lease agreement's validity. The function of HCSS Consultants is to process any documents that are necessary to update the personnel/personal record of an employee, for example, change of job grade, promotion, change of address, banking details, salary, low cost accommodation rental etc. A PRU contains the information that requires to be upgraded and recorded in the employee's personnel file.²⁵

²³ 076-396, lines 10 to 23; PRU: 076-152, item 16.

²⁴ 076-388, line 7 to 076-389, line 13.

²⁵ 076-361, lines 1 to 15; 076-362, lines 3 to 13.

[35] Ms Oswin testified that Taljaard's PRU was captured by Ms JC Mabuza²⁶, who was expected to testify but was not called without any explanation by the employer. Ms Oswin testified that she was available and at the office. An adverse inference ought to have been drawn in this regard. It suggests that Ms J C Mabuza was deliberately kept away from testifying. Although the Commissioner refers to Ms JC Mabuza as the capturer of the PRU he does not allude to the discrepancy of this to the Charge Sheet which says Ms Ngcobo was the capturer and thereby authorising the lease agreement.

Evaluation

[36] In reply during oral argument the Bank's legal representative, Mr Cithi, stated that the breakdown of the employer/employee trust relationship lies in the risk posed by Ms Ngcobo's conduct.

[37] It was found in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*²⁷ above that:

"[23] The record in this matter is incomplete and was partially reconstructed. In particular, there is no record of the disciplinary hearing and its decision on sanction. The parties nevertheless agreed to proceed on the evidence before us. Given the nature of the offence, the seniority and role of Danney and his short period of service in the employ of the appellant (less than one year), the appellant justifiably lost trust in the continuation of an employment relationship. Dismissal was an appropriate sanction in the circumstances."

[38] Danney had disappointed his employer very early on as an employee, hence the justification to dismiss him. Herein, Ms Ngcobo has not displayed any gross negligence or dishonesty. She is not a candidate for dismissal. There is no evidence that she would repeat her conduct to usurp the functions of a line manager if the Housing Policy prohibits a consultant or HCSS staff member from signing a PRU.

²⁶ 076-364, line 20 to 076-365, line 9.

²⁷ (2019) 40 ILJ 2477 (LAC) at para 23.

[39] In *Grindrod Logistics (Pty) Ltd v SATAWU obo Kgwele and others*²⁸, negligence was found for driving the employer's carrier truck on a gravel road and attempting to cross a tiny bridge where a rivulet was overflowing over the bridge and caused the trailer to be stuck. As a result, five of the eight vehicles on board were damaged by water and had been declared uneconomical to repair. The trailer required extensive repairs thereafter and tow truck fees were incurred, *inter alia*. The finding of negligence arose from the fact that the employer had established the injunction not to drive on gravel roads (unless under authorised supervision).²⁹

[40] Mr *Kgwele* had been working for Grindrod for 6 years before the incident. Although he was found to have been negligent, his dismissal was held to be substantively unfair for the reason that the policy had been applied inconsistently. A number of drivers were found to have committed the same offence with no consequence of dismissal.³⁰

[41] The employee was found to have been negligent for not having raised the alarm the moment the prohibited event happened instead of driving some 157km on the gravel road before pressing the panic button after the truck was stuck. His evidence had also been less than candid. There is no evidence in this case that Ms Ngcobo had disregarded a prohibited conduct. Her evidence was clear and had apologised for having exceeded her powers as she did and had proffered a reason therefore which the Commissioner accepted.

[42] In *DRS Dietrich, Voigt and Mia t/a Pathcare v Bennet N.O. and Others*³¹ the employee, Mr Thulasizwe Thulani Ngcobo, was subjected to disciplinary proceedings wherein the charges were grounded on dishonest conduct. The Court summarised the charges as follows:

"[7] The claim forms were all approved and signed off by the employee's line manager without any queries. On 03 and 08 April 2014 the employee was

²⁸ (2018) 39 ILJ 144 (LAC) (18 October 2017). (hereinafter referred to by the name of the employee, *Kgwele*)

²⁹ *Kgwele Ibid* at 41 and 45.

³⁰ *Kgwele* (Id fn 31) at 55.

³¹ (2019) 40 ILJ 1506 (LAC) at para 7 (*Pathcare*).

subjected to an internal disciplinary hearing on two charges of dishonest conduct and/or falsification of overtime claim forms. In the first charge, it was alleged that during the period October 2013 to January 2014, on 13 occasions, he claimed full overtime hours despite having taken lunch breaks or being off the company premises. As a consequence of this, he received overpayment of R1 376.98. The second charge was that during July, November and December 2013 he claimed overtime at an incorrect hourly rate of 1.5 instead of 1.0 which resulted in an overpayment of R7 270.68. It suffices to mention that, prior to his disciplinary hearing, when the overpayment was discovered, the employee refunded it.”

[43] The Commissioner found the employee’s negligence nothing more than tardiness and altered the disciplinary sanction of dismissal to a written warning to endure for 12 months. He reinstated him with 12 months’ back-pay.

[44] The Labour Court agreed with the Commissioner’s finding that the employee was careless, negligent and had no intention to defraud Pathcare. The Court found that Pathcare did not prove the intention to falsify the overtime claim forms.³²

[45] On appeal the Labour Appeal Court put the issue as “*whether the Commissioner’s conclusion that the employee was guilty of negligence and not dishonesty, was reasonable*”.³³ It agreed with the Commissioner that the established negligence did not warrant a sanction of dismissal as the employee had not acted dishonestly. This negated any plea of a breakdown of the employer/employee relationship.

[46] In *Mkhatswa v Minister of Defence*³⁴, the following is stated:

“[23] However, in the particular circumstances of this case the question of culpability must ultimately be determined not in relation to the foreseeability of the events just described, but with regard to whether those in command at

³² *Pathcare* (Ibid) at 12.

³³ *Pathcare* (Id fn 33) at 15.

³⁴ 2000 (1) SA 1104 (SCA) at 112H, para 23.

Apex base could reasonably have foreseen that some substantial time thereafter one of the soldiers (Lawerlot) would return to the base and wrongfully appropriate the Samil 50 and a number of rifles in order to mount, with the aid of colleagues, what amounted to a revenge attack involving innocent inhabitants of Tamboville rather than those with whom they had previously clashed. The members of D company were disciplined and experienced soldiers - in some respects (according to the evidence) the cream of the infantry - from whom conduct of this kind could not reasonably be expected. There was no evidence of any previous incidents at Apex base involving the misappropriation or misuse of vehicles and particularly rifles which could have served as a warning to those in command. Furthermore, there were structures in place in the form of sentries to try to prevent the unauthorised removal of vehicles and rifles from the base. In my view the reasonable possibility of these events occurring and harm ensuing to the plaintiff would not have been foreseen by a reasonable person in the position of those in command. To have foreseen what happened would have required prophetic foresight, which is not an attribute of the reasonable person. (See *S v Bochriss Investments (Pty) Ltd and Another* 1988 (1) SA 861 (A) at 867 A.) Consequently there can be no fault on their part for not taking steps to prevent what was not reasonably foreseeable."

[47] *Mkhatswa* alerts us that "*foresight of the reasonable possibility of harm*", not "*mere possibility of harm*" is the required test.

Conclusion

[48] Taking into account Ngcobo's evidence as a whole and the circumstances leading to her signing the PRU, together with her honest response to Ms Mabuza, it can hardly be said that she had the foresight of the reasonable possibility of harm befalling the employer. As far as she was concerned Mr Taljaard had complied with the Housing Policy procedures and his Line Manager, Mr Brandon Jacobs had been engaged in the lease authorisation. I agree with the Commissioner.

[49] The Labour Court concluded as follows:

[29] He [the Commissioner] accepted the second respondent's version that the Housing Policy was not clear on her duties, whereas it outlined the responsibilities of the Line Manager. He concluded that the policy was quiet on what she had to do, and that on a balance of probabilities the rule was not clear and created confusion on the different roles played by the relevant officials.

[30] He went on to reinstate the second respondent with three months' back pay. The reinstatement was premised on the finding that the parties could still work together and that the second respondent was remorseful and did not act dishonestly. This was apparent from her emails where she stated that she was not aware that she was not supposed to sign the PRU. He found that even though the alleged misconduct was not demonstrated, it could be managed through coaching and training taking into account that the second respondent was only in the employ of the bank for one year. He concluded that there was no justifiable reason to dismiss her."

[50] The Labour Court dismissed the review while agreeing with the Commissioner to a large extent and finding that his decision does not fall outside the band of reasonableness as the test for review is whether the decision of the Commissioner is one that a reasonable decision maker would not make.

[51] The employer's case was:

"MS CHAUKE: Yes, I do have further questions. Nontho, this PRU is basically authorising this lease agreement, this PRU says to the bank that I as Nontho I am authorising that Johan Taljaard will therefore go and occupy the bank owned property in terms of the lease agreement, I am putting the version to you that by you signing this PRU you were authorising this lease agreement."

[52] As stated above, the interpretation of the Housing Policy is clear that it is the line manager who authorises that an employee occupy a Bank's property by signing a lease agreement. The PRU is merely an instruction to update an employee's personal record to reflect the low rental house occupation and that appropriate rental be deducted from the employee's salary. The charges against Ms Ngcobo are not

borne out by the evidence. Furthermore, since Ms Ngcobo did not capture the PRU (after signing it), it was the HCSS, in particular, Ms JC Mabuza, that had to ensure that supporting documents are attached to the PRU.

[53] The additional evidence that has been canvassed above merely fortifies the reasonableness of the Commissioner's decision.

[54] Therefore, the following order is made.

Order

1. The appeal is dismissed.
2. There is no order as to costs.

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Malindi AJA

Molahlehi DJP agrees.

SAVAGE, AJA

[55] I have had the benefit of reading my colleague's judgment, with which I am respectfully unable to agree.

[56] This appeal, with the leave of this Court, is against the judgment of the Labour Court which dismissed the application of the Bank to review the arbitration award of the fourth respondent, the commissioner, but varied the back pay awarded to the second respondent, Ms Nontokozo Ngcobo.

[57] At the outset, I would condone the late filing of the appeal record and reinstate the appeal, as well as condone the late delivery of the notice of appeal. The reason for these applications is apparent from the record and no purpose is served setting these out in detail at this juncture, more so since neither application is opposed by the respondents, save insofar as they impact on the issue of costs.

[58] Ms Ngcobo was employed by the Bank as a Human Capital Consultant in 2017. Her role and responsibilities included providing human resources related

services to the Bank in the Free State Province and acting as custodian of all policies and procedures of the Bank. Ms Ngcobo reported to the Head of Human Capital for the Free State and Northern Cape Provinces, Ms Khetsiwe Mabuza.

[59] The Bank's Housing Policy benefits employees who qualify and are transferred into key roles in certain non-metropolitan areas. In terms of the Policy, in order to deploy key skills where needed, the Bank may subsidise an employee's cost of housing to make the move into a non-metropolitan area more acceptable to the employee and aid the provision of adequate housing. The Housing Policy stipulates the procedure to be followed by an employee taking occupation of one of the Bank's subsidised rental housing units. Clause 2 of Annexure A requires that the employee's line manager "must" provide a new or transferred employee with a letter and lease agreement, which stipulates the conditions of the low rental housing benefit; complete a personal record update (PRU) form; complete the low rental housing details on a specified form; retain a copy of the lease agreement in the branch/business unit; and submit the documentation to Human Capital Shared Services department for this to be captured on Team Track/SAP and for the PRU to be filed with the original lease agreement and the letter of appointment/transfer in the employee's personal record folder. The Policy provides that the proposed benefit is to be put first to the Resourcing Allocation Committee for approval. If approved, the line manager provides the employee with a letter and the lease agreement which stipulates the conditions of the housing benefit. Clause 5.3 of the Housing Policy makes it clear that Provincial Human Capital Business Partners have knowledge of the grant of such benefit and requires that such person maintain an updated list of employees occupying Bank-owned houses in the province and ensure that the correct monthly rental is being deducted by payroll in respect of the benefit granted.

[60] On 21 May 2018, the Business Centre Manager for Bethlehem, Mr Johannes Taljaard, who had been in the employ of the Bank for more than 20 years, signed a lease agreement to occupy one of the Bank's housing flats in Winburg, Free State. At the time Mr Taljaard had not been transferred to Winburg but was based 130km away in Bethlehem. He reported to Mr Brendon Jacobs, the Head of Retail and Business Banking for the Central Free State Provinces, who did not authorise the lease. Mr Taljaard signed the lease agreement as the lessor instead of the lessee.

No one signed the agreement as lessee. Without ensuring that the lease had been authorised by Mr Jacobs, Ms Ngcobo signed the PRU which was required in order to process the benefit. By doing so Ms Ngcobo authorised the lease agreement between the Bank and Mr Taljaard, effectively granting the low rental housing benefit to Mr Taljaard in circumstances in which it was clear from the policy she was not entitled to do so.

[61] On 22 June 2018 Ms Mabuza became aware of the existence of the lease when Ms Ngcobo copied her on a response to a query raised by Mr Taljaard regarding the calculations of the fringe benefit tax payable in respect of the benefit and the deductions made from his salary. Ms Ngcobo had not informed Ms Mabuza that he had processed the benefit for Mr Taljaard and when on 25 June 2018 Mr Taljaard indicated that he wished to cancel the lease agreement, Ms Ngcobo sent an email to the Bank's Shared Services department but failed to copy either Ms Mabuza or Mr Jacobs on her email.

[62] On 5 July 2018 Ms Ngcobo replied to an enquiry addressed to her by Ms Mabuza regarding the matter and stated that she acted on the instruction of Mr Taljaard as a senior staff member and that he did not indicate that he did not have any authorisation for the lease. She continued that:

‘...Johan spoke to me in February asking for the process and I advised him and then two days after I gave him the lease agreement, and end of April he asked me to sign the lease. I was not aware that Johan had not spoken to Brendan about moving into the house....I apologise for giving Johan the lease agreement and signing it, I did not know that he did not speak to Brendan and moreover Brendan was not aware that he will be moving into the house.’

[63] On 20 July 2018 Ms Ngcobo was given notice to attend a disciplinary enquiry on 27 July 2018. In such notice it was alleged that she had:

‘1. ...acted in breach of the Standard Bank Housing Policy (processes) and outside your mandate/authority as a Human Capital Business Partner in that:

(a) On 21 May 2018, you captured and/or authorised a lease agreement and the PRU between the Bank and Mr Johannes Taljaard (“Taljaard”).

2. It is alleged that you acted in a manner that is Grossly Negligent in that:
- (a) When you received a signed copy of the lease agreement on 28th February 2018, you failed to check if the agreement was properly signed by Taljaard.
 - (b) When you captured the agreement and completed and authorised the PRU, you failed to enquire from the Provincial Head Anton Nicoliasen and/or Brendon Jacobs ("Jacobs") as well as Khetiwe Mabuza ("Mabuza") whether they were aware that Taljaard had signed a lease agreement with the Bank.
 - (c) You failed to obtain authorisation from Provincial Head, Jacobs and/or Mabuza prior to capturing the agreement and authorising PRU.
 - (d) On 25 June 2018, you sent an email to Human Capital to cancel the lease agreement without notifying Jacobs and Mabuza.'

[64] Mr Jacobs testified at the disciplinary hearing that he only became aware of the lease on 3 July 2018 and that he did not delegate his authority to Ms Ngcobo to sign the PRU for Mr Taljaard on his behalf. Ms Ngcobo was found to have committed the misconduct alleged and was dismissed from her employment with the Bank on 27 August 2018.

[65] Dissatisfied with her dismissal, Ms Ngcobo referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). At arbitration the fourth respondent, the commissioner, found that it was common cause that the Housing Policy outlined the responsibilities of the line manager, but that the policy was not specific on the role and responsibilities of the Human Capital Consultant and that it was probable that Ms Ngcobo might have not foreseen the harm as Mr Taljaard as a senior knew the policy and that Ms Ngcobo was allowed to sign the PRU. The commissioner found that the rule was not clear and confusion was created regarding the different roles of employees. The dismissal of Ms Ngcobo was therefore found to be unfair with the Bank having failed to "discharge the onus". Ms Ngcobo was retrospectively reinstated into her employment with the Bank with three months' backpay on the basis that the parties could still work together since Ms Ngcobo had been remorseful, had not acted dishonestly and was not aware that she could not sign the PRU.

[66] Aggrieved with the outcome at arbitration, the Bank sought the review of the arbitration award by the Labour Court. The Court found that the Housing Policy was explicit on the roles of the line manager and the HCSS and noted that Ms Ngcobo had conceded that the Policy did not permit her to sign Mr Taljaard's PRU. This was found to accord with the evidence of Ms Mabuza that a Human Capital Consultant could not sign a PRU unless the delegated authority to do so had been provided. The Court found that based on the uncertainty as to whether the authority to sign the PRU could be delegated, together with different interpretations emanating from the evidence, it was not unreasonable for the Commissioner to conclude that the Housing Policy was not explicit in respect of the role and responsibilities of Ms Ngcobo. The Court dismissed the review application finding that the commissioner had understood the charge faced by Ms Ngcobo. The Court however increased the back pay awarded to Ms Ngcobo from three to five months given a necessary variation application brought by Ms Ngcobo to correct the reference in the arbitration award to the charges she had faced at the disciplinary hearing.

Discussion

[67] The Bank's Housing Policy is express in its requirement that Mr Taljaard's line manager, Mr Jacobs, "must" provide a new or transferred employee with a letter and lease agreement, which stipulates the conditions of the low rental housing benefit. It is the line manager who must complete a PRU form and the low rental housing details. The line manager is required to retain a copy of the lease agreement in the branch/business unit and it is the line manager who must submit the documentation to Human Capital Shared Services department for this to be captured on Team Track/SAP and for the PRU to be filed with the original lease agreement and the letter of appointment/transfer in the employee's personal record folder. This is, in terms of the Policy, after the proposed benefit has been approved by the Resourcing Allocation Committee. In addition, the Policy provides that Provincial Human Capital Business Partners are required to maintain an updated list of employees occupying Bank-owned houses in the province and ensure that the correct monthly rental is being deducted by payroll.

[68] There was no dispute that Mr Taljaard signed an incorrectly completed lease agreement which had not been authorised by the Resourcing Allocation Committee nor his line manager in circumstances in which he was not entitled to lease the property or receive the benefit of a preferential rent on it. The Housing Policy expressly required that Ms Ngcobo receive Mr Taljaard's completed PRU from Mr Jacobs as his line manager before she captured the agreement in Mr Taljaard's personal records on the Bank's human resources system. This in circumstances in which the capture of this information was the last step in the authorisation of the lease agreement and the receipt of the benefit of a reduced rental by Mr Taljaard. In her evidence Ms Ngcobo accepted that she had advised Mr Taljaard on the steps to be taken and conceded that the Policy did not permit her to sign Mr Taljaard's PRU, which she had done *"because I was under the impression that [Mr Taljaard] has done it correctly."*

[69] The Policy was express and in no way ambiguous that Mr Jacobs as the line manager was to authorise the lease and permit the PRU to be updated. Ms Ngcobo on her own version accepted that she was not permitted to authorise the PRU. The finding that the Bank's Housing Policy was ambiguous on her role was therefore not borne out by the evidence. In finding differently, and in concluding that Ms Ngcobo had not acted in breach of the Policy, the commissioner committed a material misdirection and reached a decision which fell outside the ambit of reasonableness required. In supporting the conclusion reached by the commissioner that the Policy was unclear and not explicit in respect of the role and responsibilities of Ms Ngcobo, the Labour Court erred.

[70] My colleague finds, with reference to *Mkhatswa v Minister of Defence*³⁵ that *"it can hardly be said that [the employee] had the foresight of the reasonable possibility of harm befalling the employer"*. I am unable to agree. Ms Ngcobo in her human resources role was required to ensure compliance with all relevant policies and procedures. She had knowledge of the Housing Policy and its terms sufficient to advise Mr Taljaard on the steps he was required to take to enjoy the benefit. A simple reading of the Policy indicated that it was his line manager who was required

³⁵ 2000 (1) SA 1104 (SCA) at 112H at para 23.

to authorise the benefit and provide Ms Ngcobo with the completed PRU before she captured it in Mr Taljaard's personal records on the Bank's human resources system; and on her own version she was not permitted to sign the PRU but nevertheless did so. There can be no doubt that Ms Ngcobo knew that the lease provided a benefit to Mr Taljaard which, if he was not entitled to receive it but did, led to his receipt of a financial benefit in circumstances in which the Bank sustained a financial loss as a result of her conduct.

[71] The misconduct committed by Ms Ngcobo was not insignificant but was of a serious nature given her role and responsibilities and her knowledge of the Policy. The Bank contended that a breakdown in the trust relationship had occurred as a result of Ms Ngcobo's conduct and the risk posed by it. I agree. The majority find that Ms Ngcobo is not a candidate for dismissal given that there exists no evidence that she would repeat her conduct to usurp the functions of a line manager and she had apologised for having exceeded her powers and had advanced a reason for doing so.

[72] With this I cannot agree. Ms Ngcobo acted in breach of a policy with which she was required to ensure compliance. Her conduct led to Bank suffering financial loss. She did not advise her seniors of her conduct and, even after they had questioned her conduct, she proceeded to process the cancellation of the benefit on behalf of Mr Taljaard, without informing them of this and not copying them on her correspondence.

[73] The effect of Ms Ngcobo's conduct was to authorise a benefit to Mr Taljaard in circumstances in which he was not entitled to receive it. This caused clear financial loss to the Bank and amounted to a serious breach of her responsibilities, her duty to ensure adherence to the Bank's policy and safeguard the financial resources of the Bank as her employer. In this regard and in her subsequent attempt to cancel the benefit without informing her seniors of this, Ms Ngcobo failed to act with the honesty, integrity and fidelity required of employees in the financial services industry. This was evident from Ms Ngcobo's admission of her misconduct in evidence, while at the same time seeking to contend that the Policy was not clear and did not specify her responsibilities. The Bank was entitled to rely on Ms Ngcobo's diligent adherence

to the terms of the Policy given her position, more so when a high premium placed in the banking sector on the adherence by employees to rules and procedures to ensure the preservation of the Bank's financial resources. The misconduct committed by Ms Ngcobo was of a serious nature and impacted directly on the trust relationship in causing financial harm to the Bank. In such circumstances, given her relatively limited period of service, dismissal was an appropriate response to the misconduct committed.

[74] In *SA Society of Bank Officials and another v Standard Bank of SA and others*³⁶ an employee was dismissed for altering bank records on the basis that banking employees are expected to be honest and not to circumvent the checks and balances put in place to prevent misconduct. The employee's conduct was found to have 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, with the need for employees to act with honesty and fidelity being fundamental in the financial services industry. The same applies to Ms Ngcobo.

[75] There is no reason, having regard to considerations of law and fairness, why a costs order would be warranted in this matter.

[76] For all of these reasons I am of the view that the dismissal of Ms Ngcobo was substantively fair and I would therefore make the following order:

Order

1. The appeal is reinstated with the late filing of the appeal record and the notice of appeal condoned.
2. The appeal is upheld with no order as to costs.
3. The orders of the Labour Court are set aside and substituted with an order that the review application is upheld with no order of costs and that the award of the commissioner is set aside and substituted as follows:

³⁶ (2022) 43 ILJ 1794 (LAC).

“The dismissal of the employee, Ms Nontokozo Ngcobo, is found to be substantively fair”.

Savage AJA

APPEARANCES

For the Appellant:

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Instructed by Mervyn Taback Inc

For the Respondent:

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Instructed by BJ Erasmus Pieterse Attorneys