IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JA15/01

In the matter between**:**

VAAL TOYOTA (NIGEL) **Appellant**

and

MOTOR INDUSTRY BARGAINING **First Respondent**

COUNCIL

HEIN GERBER **Second Respondent**

A.J.L. WYNGAARDT **Third Respondent**

MOTOR INDUSTRY STAFF ASS **Fourth Respondent**

JUDGEMENT

ZONDO JP

Introduction

[1] This is an appeal from a judgement of the Labour Court in a review application brought by the present appellant to review and set aside an arbitration award issued by the second respondent, an arbitrator, under the auspices of the first respondent. The terms of that judgement will appear later in this judgement. Before dealing with the appeal, it is necessary to set out the facts of this matter.

The facts

[2] The third respondent was employed by the appellant in

1997 as a car salesman. His immediate superior was one Mr Venter. Mr Venter's position was described as that of a dealer principal. Prior to the two men working together in the appellant's business, they had had occasion to work together elsewhere some years before within the motor industry in connection with the selling of cars. Then the third respondent had been employed as a principal dealer and was Mr Venter's immediate superior. The third respondent had worked in that company as a principal dealer for at least ten years. Mr Venter was the first of the two to join the appellant's employment. Within a few days after Mr Venter had joined the appellant, he recruited the third respondent to work for the appellant as a car salesman.

[3] Clause 10 of the third respondent's letter of appointment provided that the rates and frequency of salary increments were entirely at the discretion of the board of directors of the appellant. The procedure to obtain a salary increase was for the supervisor of an employee to request the appellant's managing director to approve a salary increase for the employee. The managing director would take a decision on the request but his decision would be subject to ratification by the board of directors.

[4] In about May 1998 the third respondent approached Mr Venter and requested a salary increase. Mr Venter agreed to give him an extra R 500,00 per month. Mr Venter told the third respondent that the increase was going to be in the form of an **"over allowance"**. In terms of the appellant's policy, an **"over allowance"** was a special discount which the appellant granted to a customer in order to facilitate the purchase of a vehicle. It was payable only to the customer.

[5] The third respondent described how the special over-allowance granted to him by Mr Venter worked as follows:

> "... [Mnr Venter] het vir my gese AJL ek gaan vir jou die verhoging gee in die vorm van 'n OA, 'n over allowance eenmaal per maand wanneer die geld betaalbaar was, partykeer was dit eers 'n week of wat in die volgende maand na gelang my transaksies geloop het, het ek op die OA op die ODP was daar in gevalle meer as een over allowance want as daar 'n voertuig ingerull is en die voertuig se netto waarde is R30 000,00 en die voertuig wat aangekoop word, kom ons se ons het in meer verstaanbare taal nie dat ek se jy verstaan dit nie, 'n kortig van byvoorbeeld R10 000,00 dan het ons die klient R40 000,00 aangebied en dan OA teruggeskryf van R10 000,00 en dit is dan op die ODP aangetoon sodat hierdie **voertuig in sy korrekte netto waarde in voorraad gebring word en in gevalle waar daar dan nou 'n voertuig betrokke was wat ons ingeruil het en dit was nou tyd vir my R500,00 het ek gowoonlik geskryf OA R500,00 sodat mnr. Venter dit kon van die voertuig afhaal. "**

[6] The third respondent began receiving the special over-allowance in May 1998. For convenience I shall refer to the over-allowance of R500,00 per month paid to the third respondent as a "**special over allowance**". This is necessary to distinguish it from the normal over allowance that the appellant used to pay to its customers to facilitate the purchase of a motor vehicle. The payment of the special over-allowance entailed in some cases that a crossed cheque--- usually in the amount of R 500,00 --- would be made out in the name of a

customer who was purchasing a vehicle. This was done without the customer's knowledge. The cheque would not be given to the customer nor would the money ever find its way to the customer. The third respondent would cash such a cheque with the appellant's cashier. This was possible because Mr Venter and one Mrs Barnard, both of whom were required to co - sign cheques in the appellant, approved the third respondent's cashing of such cheques with the appellant's cashier. This would be done without the cheque having been endorsed by the customer in whose name it had been made out. The third respondent would then pocket the cash. Some cheques were made out in the third respondent's name. The initials used in those cheques which bore the third respondent's surname had the initials **"A.J"**, sometimes **"AJP"** and sometimes **"JP"**. The third respondent's names and surname as they appear in the answering affidavit in this matter are Andries Johannes Lombard Van Wyngaardt.

[7] One of the cheques was made out on the 31st October 1998 --- initially to **"AJ v Wyngaardt" ---** but later the initials **"AJ"** were crossed out and the initials **"JP"** were written above them. The surname remained as v Wyngaardt. The cheque had the words **"NOT TRANSFERABLE"** written across it. Another cheque in the amount of R500,00 was issued on the 4th December 1998 in the name of a customer by the name of E. Matomentheni. In the internal document relating to that cheque the words **"Discount to client"** were written by hand. That

client never got that discount. On the 10th October 1998 a crossed cheque was made out in the name of the Greater Town Council, Nigel, in the amount of R 500,00. The Greater Town Council, Nigel, had purchased a vehicle from the appellant. That cheque was never given to the Greater Town Council, Nigel. It was cashed by the third respondent with the appellant's cashier and the third respondent pocketed the money. The Greater Town Council, Nigel, was never made aware that a cheque would be, or, had been made out in its name but that it would not receive the cash.

The Disciplinary inquiry

[8] In February 1999 Mr Barkett, who had just taken over as managing director of the appellant, became aware of transactions involving the payment of the special over allowance to the third respondent. He then initiated an investigation which led to the third respondent's suspension from work. The third respondent was given a notice to attend a disciplinary inquiry. The charges that the third respondent was called upon to answer in the disciplinary inquiry were formulated thus:-

> **"1. Continuing inadequate performance**
>
> **2. Knowingly submitting incorrect commission sheet with effect of (sic) causing or attempting to cause loss to the company**

3. Falsely stating payments to customers thereby causing loss to the company."

[9] The transactions relating to the payment of the special over-allowance to the third respondent fell under the third charge in the notice. The minutes of the disciplinary inquiry reveal that with regard to the first charge the presiding officer in the disciplinary inquiry commented that the third respondent had **"openly admitted to substandard performance;"** and that he also commented that **"non-performance cannot be tolerated"**, but proceeded to say that **"the benefit of the doubt will be given to [the third respondent]"** and, accordingly, did not find the third respondent guilty of the first charge of misconduct. He found the third respondent guilty of the second and third charges of misconduct. As a result of this the third respondent was summarily dismissed by the chairman of the disciplinary inquiry.

The internal appeal

[10] The third respondent noted an internal appeal against the findings made against him of guilt and the sanction of dismissal. In the internal appeal he did not challenge the fairness of the procedure followed in the disciplinary inquiry but challenged the findings of guilt and the sanction of dismissal. The result of the internal appeal was that the finding of guilt in respect of the second charge was overturned but the finding of guilt in respect of the third charge was upheld. The third respondent's dismissal was confirmed.

The arbitration

[11] A dispute then arose between the appellant and the third respondent about the fairness of the dismissal. The third respondent referred a dispute of an alleged unfair dismissal to the Motor Industry Bargaining Council, the first respondent, for conciliation. Attempts to resolve the dispute through conciliation failed. He then requested that the dispute be arbitrated. The second respondent was appointed to arbitrate it and presided over the arbitration proceedings that followed. The third respondent was represented by a union official, Mrs Keyter, in the arbitration proceedings. An attorney initially appeared for the appellant and moved an application for permission that the appellant be represented by a lawyer. The application was opposed by the third respondent. The second respondent dismissed it. Thereafter a Mr Britz, a human resources manager, represented the appellant in the arbitration proceedings. Messrs Barkett, Chilvers, Azzie, Strattford and Moodley testified on behalf of the appellant. The third respondent testified on his own behalf but also called Mr Venter as well to testify on his behalf.

[12] The third respondent's evidence was to the effect that he had approached Mr Venter for a salary increase in May 1998 which was about a year after he had commenced employment with the appellant. He testified that Mr Venter had agreed to give him a R 500,00 per month increase which he said would take the form of an over-allowance that would be paid once every month.

[13] He also testified that Mr Venter and Mrs Barnard approved of the manner in which these payments were made to him as well as the procedure that was followed in connection with such

payments. In his evidence-in-chief the third respondent was asked whether the other sales people also got this special over-allowance and he answered that he did not know that they got it. When he was asked whether the issue of the other sales people receiving the special over-allowance like himself was ever discussed with Mr Venter, he replied: **“Ek kan nie spesifiek, ek meen elke man moet maar seker sy eie saak hanteer maar ek wil my heriner dat hy wel genoem het dat hy nie ‘n algehele verhoging kan...”** Asked if he knew whether Mr Venter had cleared this special over-allowance arrangement with any of his seniors, the third respondent said that the did not know.

[14] In his evidence in chief the third respondent admitted that, although some of the cheques meant for him as special over- allowance were issued in his name, there were others that were also meant for him as special over-allowance which were not issued in his name but were issued in the name of customers. He admitted that in neither case were the customers made aware of the transactions nor did they receive the money. He admitted, too, that the cheques were not endorsed by the customers in whose name they had been made out before he cashed them with the appellant’s cashier. The third respondent stated that Mr Venter gave instructions that some of the cheques that had been made out in the third respondent’s name be changed and be made out in the names of customers. The third respondent was asked whether Mr Venter had given any reason for this and he replied that, as far as he knew, no reason had been given by Mr Venter for this instruction.

[15] Under cross examination the third respondent testified that he saw nothing wrong with cashing cheques made out in customers’ names and in cashing them with the appellant’s

cashier when such cheques were marked **“NOT TRANSFERABLE”**. He said that, if he had had a problem with that, he would not have cashed the cheques. At some stage during cross-examination about how he came not to see anything wrong with this special over-allowance that he got, the third respondent said that he had asked for an increase and he had got an increase and that was that.

[16] Under cross-examination the third respondent was further asked what his explanation would have been, if after he had cashed a crossed cheque that had been made out in a customer’s name, the customer returned and told him that he had become aware that a cheque had been made out in his name and asked him where his (i.e. the customer’s) money was. The third respondent’s answer to this question was that he did not know whether to call that speculation and said that it had never happened. He was then asked how he would have answered the customer if it had happened. He replied that he would have explained that that was an internal matter that had to be debited against an account.[In Afrikaans he said: **“Dan sou ek glo ek aan hom kon verduidelik dat hierdie is jou interne aangeleentheid wat ons teen ‘n rekening moet debiteer.”]** He was then asked why the cheque had to be made in the customer’s name and not in his name. He answered that there were cheques that were made in his name and there were cheques that were made in the names of customers. At this stage he was asked why the cheques were not consistently made in his name. To this he answered that

that was done in the administration office and that he could not take responsibility for this as he was not the one who wrote out the cheques nor was he the one who did the requisitions. The third respondent admitted under cross-examination that in principle a crossed cheque is supposed to be deposited into an account and not cashed.

[17] Mr Venter, who was called by the third respondent to testify on his behalf, corroborated the third respondent's evidence in regard to his approval of the payment of the special over - allowance to the third respondent. However, Mr Venter added that he had secured the approval of Mr Strydom, the then managing director of the appellant, for the special over allowance.

[18] The third respondent's representative had intended to call Mr Strydom as a witness but closed the third respondent's case without calling him. She indicated that Mr Strydom was no longer available and that was why she was not calling him. The appellant's representative then made an application to the second respondent for the re-opening of the appellant's case so that he could call Mr Strydom to give evidence. The second respondent dismissed the appellant's application. The reasons that the second respondent gave for this decision were that:

(a) it was not clear what Mr Strydom's evidence was going to be as none of the parties had consulted with him and,

(b) it was uncertain what difference Mr Strydom's evidence would make.

The Finding in the Arbitration Proceedings

[19] The second respondent found that the dismissal was procedurally fair but substantively unfair. As the third respondent did not seek reinstatement, the second respondent ordered that he be paid compensation equal to 12 months'

remuneration. This appears to have totalled R 82 802, 28. No order as to costs was made. Aggrieved by this decision, the appellant brought an application in the Labour Court to have the award reviewed and set aside. That application came before Revelas J who dismissed the application with costs. With the leave of the Labour Court, the appellant now appeals to this Court .

The Appeal

[20] The first decision of the second respondent that the appellant sought to have reviewed and set aside was the decision denying the appellant legal representation. The appellant's application for permission to be represented by a lawyer had been made in terms of s 140(1)(b) of the Labour Relations Act, 1995 (Act No 66 of 1995)(**"the Act"**). Sec 140(1) of the Act provides thus:-

> **"140. Special Provision about dismissals for reasons related to conduct or capacity.**
>
> **(1) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless -**
>
> **(a) the commissioner and all the other parties consent;**
>
> **(b) the commissioner concludes that it is unreasonable**

to expect a party to deal with the dispute without legal representation, after considering-

(i) the nature of the questions of law raised by the dispute

(ii) the complexity of dispute
(iii) the public interest and
(iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute."

[21] Sec 140(1)(a) did not apply in this matter. Sec 140(1)(b) did. In dealing with the appellant's application for permission to be represented by a lawyer, the second respondent took the view that it would not be unreasonable to expect the appellant to deal with the dispute in the arbitration without legal representation. In coming to this conclusion, he indicated that he had considered the factors set out in sec 140(1)(b)(i) to (iv) of the Act. He held that there were no complex legal issues in the matter and the matter was not one that was in the public interest.

[22] In the review application the appellant attacked the second respondent's decision not to permit it legal representation on the basis that the second respondent had acted unreasonably in making that decision. That attack is wholly without merit. This dispute is certainly not complex. No difficult question of law arises in this matter nor is there any public interest involved. The comparative abilities of the parties were also not such that the appellant should have been allowed legal representation. The second respondent's approach that

the test was whether or not it would be unreasonable to expect the appellant to conduct the arbitration without legal representation was the correct approach. (see **Afrox Ltd v Laka & others (1999)20 ILJ 1732 (LC) at 1737 par 13.).** The second respondent was perfectly correct in dismissing the appellant's application for permission to be legally represented.

[23] The second decision of the second respondent that the appellant attacked both in the Court a quo and before us was the second respondent's decision refusing the appellant's application to re-open its case so that it could call Mr Strydom. I have already stated above the reasons that the second respondent gave for refusing the appellant's application. Because of the view I take of the merits of the appeal, I do not consider it necessary to deal with the appellant's challenge of the second respondent's decision to refuse its application to re-open its case and call Mr Strydom.

[24] The appellant attacked the second respondent's award on its merits on the basis that it was unjustifiable. In this regard the appellant contended that the second respondent had failed to consider or to properly consider the probabilities of the parties' versions. Reduced to its essence, the issue before the second respondent was whether or not the third respondent had acted dishonestly in playing the role that he played in relation to the special over - allowance scheme. All parties approached the matter on this basis both in the arbitration proceedings before the second respondent, in the Court a quo as well as in this Court. Indeed, that had been the understanding of the main issue in the internal appeal hearing as well.

[25] The second respondent found that the third respondent had not been shown to have acted dishonestly or to have intended to mislead the appellant. Accordingly he found that the dismissal was substantively unfair. The second respondent stated in his award that it was common cause that the third

respondent had cashed crossed cheques in the appellant's drive way some of which were made in the names of customers and that Mr Venter had approved this. He stated that the third respondent's defence was that he did what he did with the full authority and permission of Mr Venter and that on that basis he could, therefore, not be said to have been guilty of fraud or to have falsely stated payments to customers. I think the charge of falsely stating "**payments to customers thereby causing loss to the company"** was inelegantly framed. However, as I have already said, everybody understood that its essence was that the third respondent's role in the scheme involved dishonesty and the matter has, throughout, been dealt with by all parties on this basis.

[26] The second respondent said that the third respondent did not have a dishonest state of mind because, as far as he knew, the scheme had been approved by Mr Venter. It is true that Mr Venter had approved the scheme. The appellant conceded this much throughout. However, the appellant's case is that the scheme was illegal, involved dishonesty and, having regard to all of the circumstances that were known to the third respondent, the third respondent participated in the scheme with full knowledge that it was illegal and involved dishonesty. The appellant's case has throughout been that the fact that Mr Venter had approved the scheme did not exonerate the third respondent. This line of argument was pursued by the appellant's representative even during his cross - examination of the third respondent in the arbitration proceedings. In this regard it is necessary to refer to certain extracts of the evidence that was led before the second respondent about both what the appellant's case was against the third respondent and about the latter's defence that there was nothing wrong with his role in the scheme.

[27] One of the transactions from which the third respondent

pocketed a special over - allowance related to a vehicle that was purchased by a Mrs Pillay. In giving evidence about this transaction, Mr Barkett had this to say in part:-

> **“ A vehicle is sold for R37 000,00, the details of the vehicle sold is on the top right - hand corner of the Honda Lux line automatic and effectively the customer pays R37 000,00 for the vehicle. It is a cash deal and there is no trade - in on this vehicle. Just below the part that is crossed out, the trade in vehicle part where there is a line through it, you will see writing there that reflects OA, which stands for over - allowance, R500,00 bonus and R500,00 to customer is written next to it , totalling R1 000,00.**
>
> **You will also notice that the offer to purchase is, salesman’s name is [the third respondent] and its Mr van Wyngaardt’s, I assume Mr Wyngaardt’s signature there and Mr Venter’s signature under general/administration manager. The customer did not see that R1 000,00 over allowance. This document is the legal document of the contract of purchasing a vehicle between the company and the customer, in this case Mrs Pillay.**
>
> **If Mrs Pillay came back to the company and requested a record this was the document we will show her. Unfortunately she did not**

receive the R1 000,00. That came out at the disciplinary inquiry and Mr Wyngaardt himself said that he received the cash.

MR BARKETT: The R1 000,00 is described, the first page is a cheque requisition that it made out that reflects the allocation of R1 000,00. As you can see the allocation is described as discount to client, R1 000,00, which is obviously not correct. The cheque is actually, in this instance, made out directly to Mr van Wyngaardt for R1 000,00, which corresponds to the R1 000,00 that is in the bottom right - hand corner of the offer to purchase.

Despite the cheque being not transferable this cheque was cashed on our own driveway, the R1 000,00 was paid across to Mr van Wyngaardt and he kept it for his own gain, so the record in the company's books was incorrect, it was fraudulent. It was not a discount to the client, Mrs Pillay did not receive this cash. The offer to purchase was fraudulent because, as I said, Mrs Pillay did not receive cash.

The company suffered loss because the profit that it made on this vehicle, whatever it was,

was reduced by R1 000,00 because R1 000,00 was charged against the deal. The bank paid out R1 000,00, sorry not the bank, the company paid out R1 000,00 against a non - transferable cheque and on page 18 you will see how the whole scheme was completed by the cheque being re - banked back into the company's own bank account. It is a Hallmark Motor Group cheque. Sorry, the photostat obviously did not come through very clearly, of R1 000,00 that goes back into the company's bank account obviously balancing the receipts on the driveway for petrol sales but effectively showing R1 000,00 less profit on the vehicle, which was kept by Mr van Wyngaardt.

Page 19, 20 and 21, sorry, page 19 and 20 is a similar modus operandi. In this case the cheque is actually made out to Mr Malan, who is the customer. Mr Malan did never receive this money, this R500,00. By Mr van Wyngaardt's own admission at the disciplinary inquiry he cashed the money and kept the R500,00, once again described falsely as an over - allowance of R500,00. Once again no trade - in so there wold be no purpose for an over - allowance on a cash deal. Effectively why not just give the customer R500,00 off the

purchase price.

MR BRITS: **Okay, continue.**

MR BARKETT: **So on, page 21, page 22, same story. A vehicle sold, whether it is coincidence or a family member I am not sure, to a Mr JP van Wyngaardt. This time there is s trade in and there is two amounts. There is an over - allowance of R25 500,00 and there is another over - allowance where it has actually got Mr van Wyngaardt's initials next to it, D D W, of R500,00. Once again the customer never saw the R500,00 despite the cheque being not transferrable.**

Page 23, a vehicle sold to Mr Dirks. Here the modus operandi changed to the one of the first one again where the cheque was actually made out to Mr van Wyngaardt himself, cashed on the driveway again. If the original cheques are looked at in some instances, well in all instances where they are made out to customers there is no endorsement by the customer, obviously reflecting the fact that the customer was never in receipt of the cheque, but there is no endorsement in any event which (inaudible) negotiable instruments I am told is illegal, the cheques should never have

been cashed.

And Mr Dirks, same story, R500,00 reflected incorrectly in the company's books as a discount of the vehicle and quite clearly received from Mr van Wyngaardt.

On page 25,26, a Mr Matomenteni, Elvis Matomenteni, this time the amount involved was R2 000,00. It was actually started at R2 000,00 and then was changed to R2 500,00. Once again the correct way to describe this, if it never went to Elvis it would have been to just deduct it off the purchase price. The R2 500 was cashed on the driveway. A R500,00 cheque, in addition to the R2 000,00 cheque is on page 27. So obviously the first amount was R2 000,00. There may have been enough profit in this deal for them to believe that the company could afford to lose another R500,00 and so it was adjusted to R2 500,00.

COMMISSIONER: **But document 26 and 28 is a similar document.**

MR BARKETT: **The same document.**

COMMISSIONER: **The same one.**

MR BARKETT: **Just to, 28 accompanies 27.**

COMMISSIONER: **I understand what you are saying.**

MR BARKETT: **And the procedure continued.**

The Greater Town Council Nigel was really the one that, one of the first to come to our attention and there has frightening consequences for the company.

There was a tender document that accompanied the purchase of this vehicle. We, like other companies, tender for the business of the Town Council Nigel. You will see on page 31 there is a town council order in the exact amount, R78 620,69 on page 30, which is the offer to purchase, yet we describe ,although it is a cash deal, a R500,00 over - allowance on it. If the town council of Nigel ever get hold of this I would imagine, being a government department, that the natural conclusion that they could have come to was that somebody was getting a backhander for awarding the tender to Vaal Toyota of R500,00.

The cheque is made out to the Greater Town Council Nigel but cashed by Mr van Wyngaardt and the money put in his pocket. Also no dispute on Mr van Wyngaardt's part on that either the disciplinary inquiry or the appeal hearing".

[28] Mr Barkett made the point in his evidence for the

appellant that the third respondent should have known that what he was involved in was illegal. He put it in these terms under cross - examination. **“I am not disputing that [the third respondent] probably did it with Mr Venter’s authority, but that it must have been known to [the third respondent] that it was not legal to be done. That is what I am saying**”.

Analysis

[29] The third respondent conceded under cross - examination that a crossed cheque is required to be deposited in a bank account and, unless the crossing was cancelled, it cannot be cashed. It was common cause that some of the cheques involved in the transactions were made out in the names of customers and were marked **“ NOT TRANSFERABLE”** and yet the third respondent had cashed them with the appellant’s cashier and pocketed the money - all of this without the knowledge of the customers in whose names the cheques had been made out. Anyone in the third respondent’s position who was innocent would have found it queer that cheques intended for him were made out in the names of customers and would have queried this. The third respondent did not query this. He simply cashed the cheques and put the money in his pocket ---- not once ---- but more than once. He testified that at some stage Mr Venter had given instructions that cheques that had already been made out in his name and were intended for him be changed and made out in the names of customers. An innocent person would definitely have taken that opportunity to

ask Mr Venter why he was giving such an instruction. The third respondent did not ask this question. His conduct in this regard is, in my view, wholly irreconcilable with the conduct of a person who was innocent and believed that he was legitimately entitled to the money being paid through the cheques.

[30] The third respondent also could not dispute Mr Barkett's evidence that the appellant's records of the transactions in which the third respondent had cashed crossed cheques made out in customers' names reflected that the appellant had paid the money to customers - not to the third respondent - as an over - allowance or as a discount. It was within this context, therefore, that in the arbitration proceedings, the appellant's representative confronted the third respondent with the obvious but very critical question on the third respondent's evidence that he had seen nothing wrong with his role in the scheme. In this regard the relevant part of the transcript reads thus:-

> " MNR. BRITS: Wat sou gebeur het dan as 'n klient wel die dokument sien en merk hier is 'n over allowance en verder merk dat 'n tjek uitgemaak is in sy naam wat deur u gewissel is, watse aanspraak sou so 'n klient dan op die hele transaksie.
>
> **MNR. VAN WYNGAARDT: Ja wel ek glo nie die klient, ek sou antwoord dat by die, op daardie stadium is hierdie transaksie totaal afgehandel daarom sal u sien op sekere OTP's is daar selfs gevalle waar daar twee Oas aangetoon word Mnr. Die Kommissaris en dit is dit. Hierdie is totaal intern, ek wonder of_dit dalk korrek is om ons uiteindelike korrekte profyt op die bord aan te toon want wat u nou vir my se is daarop,**

ek weet nie hoe werk die ander takke of werk hulle dan glad nie op ‘n OA ek meen kan hulle kliente nie terug gaan en dan die OA’s, ek het mos verduidelik hoe ons OA’ s werk .

MNR. BRITS: Okay. Ek is op die ou einde verstaan ek die beginsel maar die probleem is wat ek vir u se is dat die tjek word aan die klient uitgemaak en u wissel die tjek en hierdie klient kom terug na u toe en se kan ek hierdie dokument sien en hy merk dit op die dokument dat die tjek is uitgemaak aan hom en hy vra waar was geld en dan?

MNR. VAN WYNGAARDT: **Ja Mnr. Die Kommissaris ek weet nie of ek dit spekulasie moet noem nie maar dit het nooit met my gebeur nie.**

KOMMISSARIS: Kom ons se nie …..

MNR. BRITS: As dit sou gebeur het

KOMMISSARIS: Ja

MNR. BRITS: Ekskuus tog, Mnr. Die Kommissaris.

MNR. VAM WYNGAARDT: **Dan sou ek glo ek aan hom kon verduidelike dat hierdie is jou interne aangeleentheid wat ons teen 'n rekening moet debiteer.**

MNR. VAN WYNGAARDT: **Ja**

MNR. BRITS: **Hoekom dan word die klient se naam op die tjek gespesifiseer en nie u s'n nie?**

MNR. VAN WYNGAARDT: En dan verder is na die klient se naam daarvoor kan ek nie verantwoording doen nie, dit is in die administratiewe kantoor, ek maak nie die rekwisisies uit nie, ek maak ook nie die tjeks uit nie en teken dit nie".

[31] Asked how he would have explained where the customer's money was if one of his customers had become aware that a cheque had been made out in his name, the third respondent's answer was in effect that this was an internal matter and that he did not make out cheques nor did he make requisitions. That, of course, is a totally unsatisfactory answer. It, nevertheless, highlights the fact that it is highly improbable that a person in the position of the third respondent would not have known that he was taking part in an irregular and illegal scheme when his role in the scheme entailed that he cash crossed cheques made out in other people's names without their knowledge and pocket the money.

[32] It is not as if the third respondent was, for some reason, unaware that the cheques that he was cashing were made out in other people's names. He was aware. He was unable to advance any convincing reason why in this case he should have thought that he was entitled to cash crossed cheques made out in other people's names. All he said was that, because all of this was approved by Mr Venter, it was acceptable as far as he was concerned. In my view that defence is not acceptable and the third respondent's version that he saw nothing wrong in all of this is not true. He knew that there was something wrong. He was content not to ask any question because he was the beneficiary of this unusual scheme. He thought, if this was discovered, he would escape liability or discipline by hiding behind the fact that his immediate superior had approved the scheme. In my view the appellant's contention that his immediate superior's permission is no defence is correct because in law any one's permission for the commission of a crime is not a defence. I do not have the slightest doubt in my mind that on the evidence that was before the second respondent the role that the third respondent played in these transactions entailed acting dishonestly and being party to false statements about who was paid certain amounts, the reasons for such payments and statements to the effect that certain discounts were made to customers when no such discounts had been made to customers. This scheme resulted in the appellant losing to the third respondent money that it was entitled to as part of its profit. Mr Barkett's evidence was to this effect and must be accepted.

[33] The second respondent did not in his award refer to much of the evidence and aspects of the matter that I have referred to above and yet those aspects and those portions of the evidence were critical for the proper evaluation of the role played by the third respondent in the scheme. The Court a quo also did not refer to this evidence and these aspects. The approach that was taken by the second respondent was simply to focus on the fact that the scheme had been approved by the third respondent's immediate superior, Mr Venter. He then proceeded without much ado to conclude that the third respondent could not have had any intention to mislead or to act dishonestly since he believed that what he was doing was authorised by his superior. In reaching this conclusion the

second respondent omitted to consider, among others, the critical question whether anybody in the third respondent's position could, with his eyes wide open, take a crossed cheque made out in another person's name, cash it without such person's knowledge or endorsement and pocket the money without it occurring to him that this was strange and asking those who issued the cheque why they wrote someone else's name on his cheque and not his and asking them to change it and write his name on the cheque.

[34] Having said this, it is necessary to bear in mind that this is a review matter, and, accordingly, the Court must not take an approach that blurs the distinction between reviews and appeals. That distinction remains important. Both the Labour Court and this Court must constantly remind themselves of it. I, nevertheless, think that the matters I have referred to above are so critical that, once they are taken into account, the third respondent's dishonest role in the scheme becomes so glaring that the finding that the second respondent's award is unjustifiable becomes irresistible. Accordingly, I am of the view that the Court a quo ought to have granted the application. This appeal must, therefore, succeed. In my view it accords with the requirements of law and fairness that the third respondent should bear the costs.

[35] In the result I make the following order:-

1. The appeal is upheld and the third respondent is ordered to pay the appellant's costs of the appeal.
2. The order of the Court a quo is hereby set aside and replaced by the following order:-

"a The arbitration award issued by the second respondent in the dispute between the applicant and the third respondent is hereby reviewed and set aside.

b. The dismissal of the third respondent by the

applicant was for a fair reason.

c. The third respondent is ordered to pay the applicant's costs of the application".

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ZONDO JP

I agree.

_____
WILLIS JA

I agree.

_____
MOGOENG JA

Appearances

For the Applicant	Mr Watt Pringle
Instructed by	Deneys Reitz
For 3rd and 4th respondents	Mr A P du Plessis
Instructed by	Hofmeyr Herbstein & Gihwala Inc.
Date of judgement	8 August 2002