Sneller Verbatim/MM CASE NO. J3877/99

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

2000-10-27

In the matter between:

VAAL TOYOTA (NIGEL) Applicant

and

MOTOR INDUSTRY BARGAINING COUNCIL Respondent

J U D G M E N T

Delivered on 30 October 2000

REVELAS J:

1. This is an application to review an award made in favour of the third respondent, a former employee of the applicant. The award was made by the second respondent, ("the arbitrator"), who conducted an arbitration hearing after the third respondent referred an alleged unfair dismissal dispute to the first respondent ("the Council").

2. The facts which gave rise to the dismissal dispute and this review application, are briefly:

The third respondent was employed by the applicant as a motor vehicle salesman at a salary of approximately R3 000 per month. He was also paid a petrol and cell phone allowance. At some stage the third respondent approached his direct supervisor, Mr Venter, to discuss the possibility of an increase in salary with him. Mr Venter was not

authorised to grant salary increases as he would

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have had to apply, on behalf of the third respondent, to the managing director of the applicant. The increase would then need to be confirmed by the Board of Directors of the Hallmark Motor Group which consisted of inter alia, the applicant. The relevance of this aspect will become apparent below.

3. The applicant has a business practice in the form of, a special discount to customers. After a customer has paid the full purchase price for a vehicle bought from the applicant, that customer would receive a cheque for an amount (usually R500,00) from the applicant. The purpose of this discount method is to facilitate sales. The practice is called "over-allowance" and is payable to customers only.

4. The applicant conducted certain investigations and it was established that over a period of time subsequent to his request for an increase, the third respondent was paid R500 per month which was reflected as an "over allowance".

5. The arbitrator was provided with exhibits of which "over- allowances" on certain transactions were identified. The amounts were R500 per transaction. Some cheques were made out to the customers involved, and others were made out to the third respondent personally.

6. It is also common cause that all the cheques, (also those made out to the customers) were exchanged for cash by the third respondent at the driveway cashier of the applicant's garage where the third respondent worked. This was done openly, for all to see.

7. The customers involved in the transactions giving rise to the "over-allowances" in question, never received these allowances. The were also unaware that they were

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instrumental in allocating an "over-allowance" to the third respondent.

8. The third respondent's explanation to the applicant was that the payments of R500,00 he received every month was his salary increase which was arranged by Mr Venter. At the arbitration hearing Mr Venter testified on the third respondent's behalf and corroborated this version. In addition he stated that Mr Strydom, (the Managing Director of the Hallmark Group) had in fact given him verbal authorisation to arrange this increase for the third respondent.

10. Mr Venter resigned from the applicant's employ after the payments to the third respondent were discovered.

11. It is common cause that no tax was paid on these amounts cashed by the third respondent and it was never recorded anywhere as a salary in the applicant's records. The applicant held the view that it was fraud and a charge was laid with the South African Police Services.

12. At a disciplinary enquiry the applicant was found guilty of two charges and on appeal only on one charge. He was dismissed by the applicant.

13. There was evidence before the arbitrator that the third respondent also claimed money for a petrol allowance which exceeded that which he was entitled to. It was also common cause that the third respondent had claimed certain cell phone monies to which he was not entitled. However, the third respondent was not charged with these offences.

14. Mr Venter testified that he never told the third respondent of his discussions with Mr Strydom. According to the third respondent, he assumed that the manner of

management and there was no need for him to investigate whether Mr

Venter indeed had spoken to Mr Strydom or any other person of authority.

15. Mr Strydom was not called by the applicant to corroborate this testimony. It was also not disputed that during a short tea adjournment in the arbitration proceedings Mr Brits of the applicant's human resources department established that Mr Strydom was at home and willing to testify. It is also indicated that Mr Strydom would refute what Mr Venter had said.

16. An application was brought on behalf of the applicant to reopen its case in order to call Mr Strydom as a witness to the arbitration hearing. This application was declined by the arbitrator on the basis that he was not persuaded what Mr Strydom would testify about and that his testimony would not make any difference. His reasoning was that the applicant would have had to prove collusion between Mr Venter and the third respondent in order to succeed and furthermore, that Mr Strydom would not be able to shed any light on this aspect.

17. An application, at the onset of the arbitration hearing by the applicant, to be legally represented was also turned down by the arbitrator. The arbitrator did not reject the evidence of the applicant's witnesses but found that on the probabilities, the third respondent did not have the necessary mens rea to act dishonestly and to defraud his employer because he acted with Mr Venter's approval.

18. The arbitrator found that the dismissal was procedurally fair but substantively unfair and awarded the third respondent compensation equal to twelve months

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remuneration which amounted to R82 802,28.

ntended that the arbitrator failed to apply his mind to the matter. Broadly speaking that was the main attack on the award. The applicant advanced

three grounds of review: the first being that it was an irregularity committed by the arbitrator to disallow legal representation upon a request to do so. Secondly, the applicant contended that the arbitrator committed a reviewable irregularity in disallowing the applicant to open its case and call Mr Strydom as a witness to testify on its behalf. Thirdly, the third respondent contended that the arbitrator's award is not rationally justifiable having regard to the evidence before him.

(10)

20. I will first deal with the question of legal representation. The matter before the arbitrator was not a complex issue. The onus was on the applicant to show that on a balance of probabilities the third respondent was dishonest in receiving cheques from the customers as remuneration.

21. Mr Brits of the applicant's human resources department who represented the applicant seemed quite capable of representing the applicant and did so admirably, therefore I do not believe that this was a reviewable ground. The Act disallows legal representation at an arbitration hearing and confers upon the arbitrator an onus to when application is made to refuse or grant the request. On the facts that were before the

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arbitrator , my view, he properly exercised his direction in terms of the Act and there is nothing about his reasoning which suggests that I should intervene on this ground.

22. Insofar as the second two grounds are concerned, the

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applicant argued that because legal representation was refused there was a greater duty on the arbitrator to ensure that the applicant was not prejudiced by the

or

failed to do, and this is borne out by his refusal to have the applicant

(30)

reopen its case and the resultant award. The applicant argued that the three grounds were interwoven. With that contention I agree.

23. I will now deal with the submissions of the applicant and the evidence which was before the arbitrator. Mr Venter was the applicant's direct supervisor. He gave evidence at the arbitration hearing to the effect that it was his idea to remunerate or give the third respondent an increase in the manner described, this was also the applicant's version. Mr Venter resigned before he could be disciplined. In all probability he had lied about the fact that Mr Strydom had given him the necessary authority to effect an increase for the third respondent. In order to prove the charge of "**falsely stating payments (my emphasis) to customers thereby causing a loss to the company**". The applicant still had to prove that the third respondent was dishonest in receiving the payments. In order to show dishonesty, the applicant had to prove that there was some form of collusion between the third respondent and Mr Venter. This would be a factual enquiry. Mr Strydom's evidence, in my view, would have been of little assistance in such an enquiry. He would only be able to show that Mr Venter was lying by denying that any increase, but could with certainty prove any collusion between Mr Venter and the third respondent.

22. In the absence of any facts to support the contention that there was collusion, I carefully considered whether I

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could interfere with the arbitrator's findings on the basis that the third respondent should have known that his conduct was dishonest and could lead to his dismissal. I was also mindful not to substitute what the arbitrator found with what I would have found.

could criticise the third respondent's morals, particularly if one had regard to the fact that he claimed in excess in respect of cell phone and

petrol claims, the third respondent nonetheless had the support of his supervisor for receiving the payments. It was his supervisor's idea in the first place to remunerate him in this peculiar way. Furthermore, the third respondent once a month cashed a cheque for the same amount at his employer's

own cashier, for all to see. Everyone knew about it. One could perhaps infer collusion and dishonesty if several cheques for different amounts were cashed at irregular times at a bank or at some other venue. The fact that the third respondent did not second guess Mr Venter and ought to have ascertained whether he was entitled to the increase, does not render the third respondent's receipt of the payments, a dismissable offence.

24. In my view, the refusal to let Mr Strydom testify could only have been irregular if it prevented a fair trial of the issues. (See: Goldfields Investment Ltd & Another v City Council of Johannesburg & Another 1939 TPD 551 at 556, and Eastgate Agricultural Cooperative v Du Plessis & Others (2000) 21 ILJ 1335 (LC) at page 1342 paragraph 33 to 35). I do not believe it did.

25. It would indeed have been very difficult for the arbitrator to find a particular dishonest state of mind on the part of the third respondent on the facts which

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were before him. Mr Venter was to blame for the

situation and I assume that is why he resigned. But on the facts before the arbitrator, the applicant's offence was not dismissable, due to the third respondents ignorance of Mr Venter's authority or due to a lack of mens rea as found by the arbitrator. In the circumstances the application must fail.

26. I therefore make the following order, the application is dismissed with

costs.

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Revelas J

Adv. C.E. Watt-Pringle

by: Deneys Reitz Att.

(Mr D. Hayward)

Adv. A.J.P. du Plessis

by: Hofmeyr Attorneys