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M NO 431/84

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)

WELLINGTON REGISTRY

IN THE MATTER of the Motor Vehicle
Dealers Act 1975

AND

1269

IN THE MATTER of an appeal by JOHN
RICHARD SHAMUS McMILLAN
trading as L.A. Autos
against a refusal of
approval of salesman

BETWEEN

JOHN RICHARD SHAMUS
McMILLAN trading as L.A.
Autos

Appellant

AND

MOTOR VEHICLE DEALERS
INSTITUTE (INC.)

Respondent

Hearing: 27 September 1984

Counsel: G L Turkington for Appellant
W R Flaus for Motor Vehicle Dealers Licensing
Board
M P Reed for Respondent

Judgment: 9 October 1984

JUDGMENT OF JEFFRIES J

This is an appeal by John Richard Shamus McMillan trading as L.A. Autos from a decision by the Motor Vehicle

Dealers Licensing Board declining to approve Marc Laurie Denton as a motor vehicle salesman. In the Notice of Motion of Appeal the Board was named as respondent but by consent that was changed and the Motor Vehicle Dealers Institute (Inc.) was substituted. Mr Flaus appeared for the Board and, as is customary when there is a respondent, he indicated to the court he abided its decision. Mr Reed appeared for the Institute.

The appeal is brought pursuant to s 130(1)(d) of the Act which allows an appeal when there is a refusal under s 84 of the Act to grant an application for a Certificate of Approval. The powers under s 130 of the High Court on hearing an appeal are wide.

The facts are these. The application brought by Mr McMillan before the Board was for the approval of Marc Laurie Denton as a permanent salesman. Mr McMillan had already obtained, pursuant to s 82 of the Act, temporary permission to employ Mr Denton as a salesman. The hearing of the application before the Board took place on 13 June 1984. At that particular hearing the issue before the Board was the fact that in April 1984 Mr Denton had been convicted on charges of forgery and theft. The theft charge arose out of him taking from his place of employment a T.V. set, which was in the possession of his employer on hire. The forgery charge arose out of a false document used by him to obtain a video recorder. To both of those charges Mr Denton pleaded guilty and had imposed upon him a community service order and probation.

The record of the hearing which took place on 13 June, and is before this court, indicates that

Mr McMillan himself had knowledge of these convictions in New Zealand in April 1984 but notwithstanding was prepared to employ Mr Denton as a car salesman. I am satisfied from the record there was genuine altruism in this attitude which might not have been unrelated to his friendship with Mr Denton's father. He indicated he was anxious to give Mr Denton support and an opportunity for rehabilitation. It is appropriate here to mention that at the hearing before the Board no counsel appeared on behalf of the applicant, or Mr Denton. The control of the proceedings was under the direction of the chairman, Mr J.A.L. Gibson, who is a practising barrister. It was he who invited Mr Denton to give evidence under oath, and it was he who largely conducted the questioning. The Institute was represented at that hearing by Mr Russell and it is probably correct to say the Institute's attitude at that stage was at least benign and could even have been supportive of the application towards the end of the hearing.

At the date of hearing Mr Denton was on probation and before the Board was a favourable testimonial from his probation officer. In addition to probation supervision Mr Denton was receiving counselling from Mrs Marie Hopkins, a social worker and court conciliator. Her testimonial was couched in very favourable terms for Mr Denton. Mr McMillan had previously supplied to the Board a testimonial dated 10 April 1984 which contains the following sentence:-

"As the report will show Mark has a recent blemish on his record, one which he is very eager to rectify."

There was also a favourable reference from his former employer from whom he had stolen the T.V. set and the reference, naturally, was given with full knowledge of those convictions.

The questioning of Mr Denton when giving evidence before the Board did not embrace a direct enquiry as to whether or not he had any other previous convictions anywhere recorded against him. However it is also true that the chairman on one occasion asked him whether in effect he wished to add anything to the information that had come about by the questions to that point. The reply of Mr Denton was:-

"Certainly. It is just that I know I have committed an offence."

On the basis of the foregoing evidence the Board reserved its decision for one month and on 13 July 1984 gave its decision declining the applicant approval of Mr Denton as a salesman. The final paragraph of the Board's decision summarises its view and states as follows:-

"Mr Denton's convictions were earlier this year. Only a very short time passed before Mr. McMillan filed the present application on 10 April, 1984. Mr. Denton was born on the 6th of February, 1958. He seems a personable young man. However, he has recently been convicted of two serious offences, both of which involve dishonesty, in relation to his employment with Chateau Regency. We think it is far too soon for Mr. Denton to be approved as a

salesman, if at all. As we see him, at present, we are not satisfied that having regard to the interests of the public he is a proper person to be a motor vehicle salesman and Mr. McMillan's application is therefore refused."

On receipt of that decision the applicant decided to appeal to the High Court. The original papers were filed in the name of Marc Laurie Denton as appellant but counsel at the hearing applied to amend the application to bring the appeal in the name of the only person with standing, namely John Richard Shamus McMillan, trading as L.A. Autos. That amendment was made by consent. As stated earlier in the judgment at the hearing before the Board the Institute's attitude was somewhat benign but because of matters which are now going to be outlined that changed to one of strong opposition on appeal.

At the commencement of the appeal hearing Mr Turkington on behalf of the applicant sought leave to call further evidence from Mr Denton so as to explain two further previous convictions he had against him arising out of the issuing of cheques in Sydney, Australia, in mid 1981. Under examination in chief Mr Denton said at the time he was working as a salesman for a car dealer and he was paid by commission. He issued cheques amounting to \$181 for ski equipment and there were insufficient funds to meet those cheques. He was interviewed by the police and admitted to them the charges. It seemed clear from listening to Mr Denton in examination in chief that he wished to convey to the court there had been some sort of misunderstanding or mistake in regard to his funds at the

bank when he issued the cheques for \$181 but nevertheless he chose, on the advice of the police they were not serious matters, to plead guilty to the two charges of false pretences for which he was fined \$500 and placed on probation for 12 months.

Mr Reed for the Institute challenged this account in cross examination and following some questions by the court the following facts emerged. Mr Denton had been convicted of two charges of false pretences amounting in all to \$900, being \$400 on one charge and \$500 on the other charge. On each of the separate charges he was fined \$500, and on the first charge he was placed on probation for one year and on the second charge he was placed on probation for three years. When the New Zealand offences were committed he was still on voluntary probation for the Australian offences. In fact he returned to New Zealand in 1982 and did so pursuant to a special arrangement with the probation service in Australia. All of the foregoing information about the convictions and their results came from Mr Denton himself and were unsupported by any official documents.

I am afraid the court must state explicitly that even on this appeal Mr Denton was less than candid with the court on his convictions in Australia and left the true facts to be brought out by further questioning of

Mr Reed on behalf of the Institute followed by that from the court itself. Those facts speak for themselves.

The appeal is dismissed.



Solicitor for Appellant:

G L Turkington, Esq.

Solicitors for Motor Vehicle
Dealers Licensing Board

Crown Solicitor, Wellington

Solicitors for Respondent:

Scott Morrison Dunphy & Co.