

Case Number : 252 / 2001

REPORTABLE

***IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

In the matter between

ASHTON INSURANCE BROKERS CC
t/a WALMER INSURANCE BROKERS
MICHELLE DENISE RIDDLE

First Appellant
Second Appellant

and

INDEPENDENT MUNICIPAL AND
ALLIED TRADE UNION

Respondent

Composition of the Court : Smalberger ADP, Olivier JA and
Lewis AJA

Date of hearing : 13 May 2002

Date of delivery : 23 May 2002

SUMMARY

Trade union insurance scheme - broker - fiduciary relationship.

J U D G M E N T

OLIVIER JA

OLIVIER JA

[1] The central dispute between the parties to this appeal relates to the nature and terms of the contractual relationship between them.

[2] The first appellant ("Walmer") is a firm of insurance brokers. The second appellant ("Riddle") is its sole member and representative. The respondent ("Imatu") is a trade union, which represents the employees of the Nelson Mandela Metropolitan Municipality, previously the Port Elizabeth Municipality.

[3] Imatu has a membership of approximately 1000 municipal employees. Although its prime function is to represent its members in labour relations matters, it also offers them a short term group insurance scheme. The scheme was arranged some

thirty years ago by Imatu. Many of its members, some of them now pensioners, have joined the scheme. At first the insurer was Shield Insurance Company. Later Allianz Insurance Company took its place.

[4] The administration of the scheme posed certain problems.

In 1989 Riddle, who was then employed by Shield as an underwriting and claims clerk, recognised that there was an opportunity to earn an income, by offering a range of administrative services in respect of the scheme both to Imatu, its members and Allianz. She made an offer to Imatu. In February 1989 her firm, Walmer, was appointed in writing " ... as in-house broker for the short term scheme with Allianz with effect from 1 April 1989." She resigned from Shield.

[5] Thereafter, a long and mutually beneficial relationship developed between the parties. Walmer and Riddle moved into a

part of Imatu's offices, for which Walmer paid a monthly rental. It also shared some of the office expenses of Imatu, such as telephone costs.

[6] The working arrangement between Walmer (as represented by Riddle) and Imatu was as follows. Walmer canvassed the members of Imatu (a list being furnished by the latter) to join the scheme. On a monthly basis Walmer sent a list of all the members utilising the scheme to Imatu. Imatu had an arrangement with the City Treasurer's Department to deduct the premiums from the salaries of the insured employees and pay same over to Imatu. Imatu then handed such premiums over to Walmer, after deducting the commission to which it, Imatu, was entitled, viz 8% (plus VAT) on all premiums received, plus R4,00 (plus VAT) per member per month as administration fee. In respect of Sasria insurance, Imatu was further entitled to a fee of

2,5% (plus VAT) on the applicable Sasria premiums. It was further agreed that should the loss ratio of the scheme not exceed 65% in any period of insurance, Imatu would receive 60% of the bonus paid by the insurer. It emerged that for the financial years 1998, 1999 and 2000, the total premium income amounted to R3 525 728, R3 413 598 and R3 606 156 respectively. The income received by Imatu amounted to R299 960, R321 404 and R346 416 for the said years respectively.

[7] Although the papers do not establish the income derived by Walmer from this arrangement, it could not have been negligible, having regard to the premium incomes mentioned above.

[8] Unfortunately, the happy cohabitation was disturbed during February 2001. Walmer blames Imatu for the unhappiness. Riddle stated in an affidavit that at that time, Imatu approached her for a renewal of the contract, and presented a written document for

her signature. She was unhappy with the proposed terms, requiring, for the first time, that upon termination of the contractual relationship, Walmer would have to furnish Imatu with the list of the members belonging to the scheme. The draft agreement also required her to sign a two year restraint from being involved with any of Imatu's members upon termination of such agreement. This was also a new proposed term. Riddle states that she found the proposed two new terms unacceptable. In a letter by its attorney, dated 21 February 2001, Walmer accuses Imatu of acting in "a high-handed and aggressive manner".

[9] Riddle persisted in refusing to agree to the two new proposed terms. On 27 February 2001 the attorneys for Imatu addressed a letter to the attorneys for Walmer and Riddle stating, *inter alia*, that the two new proposed terms were not negotiable, and

"Under the circumstances this letter thus serves as a notice to your client that its appointment as Brokers of the Scheme is not renewed and thus terminates on the 1st April 2001."

[10] Shortly after the writing of the said letter, a further conflict erupted between the parties. Imatu came into possession of evidence which, it alleges, proved that Walmer, represented by Riddle, was canvassing the members of the Imatu scheme to cancel their membership of that scheme and to join another scheme, and also to terminate the arrangement whereby Imatu collected the premiums and paid them over to Walmer. Imatu also alleged that Riddle had secured the co-operation of a number of its members, particularly employees within the Treasury Department of the Municipality, to assist her to implement the new scheme. Imatu was unable to ascertain exactly how many members had joined the new scheme nor was it able to ascertain the extent of the unlawful activities of Walmer and Riddle.

[11] The events alluded to above gave rise to two applications in the South Eastern Cape Local Division of the High Court. The first application numbered 487/01 was launched on 1 March 2001. The applicant was Walmer and the respondent Imatu. In its prayers, Walmer requested :

- "2 That a declarator be issued that the Respondent is bound by the agreement it concluded with the Applicant for the appointment of the Applicant as preferred broker for members of the Respondent until 31 October 2001 and that thereafter the agreement is subject to six months notice by either party;
- 3 That the Respondent be interdicted and prohibited from appointing any other broker performing any of the functions currently performed by the Applicant in respect of the Respondent's members until the expiry of the agreement referred to in 2 above;"

[12] In the second application, numbered 489/01, launched in the same court also on 1 March 2001, the applicant was Imatu, the first respondent was Walmer and the second respondent Riddle.

In its prayers Imatu sought a temporary interdict against both respondents to show cause why they should not be

- "1 Inderdicted and restrained from approaching any members of the Applicant's group short term insurance scheme ("the scheme") to terminate their membership of the scheme or switch to another insurance scheme and from utilising any information relating to the scheme for the purpose of promoting any other insurance scheme.
- 2 Directed to deliver up to the Applicant all insurance policies, schedules to insurance policies and claims histories in respect of the scheme and participants therein, as well as all copies of such information, in whatever form, in the possession of the Respondents.
- 3 Directed:
 - 3.1 to render to the Applicant within 30 days a full account, supported by vouchers, all premiums received, all claims made and all claims paid under the scheme for the years ended 31st March 1999, 31st March 2000 and 31st March 2001; and
 - 3.2 to debate the said account; and
 - 3.3 to pay to the Applicant any amounts found to be due to the Applicant."

[13] Both applications were opposed and voluminous affidavits and annexures were filed. The applications were argued together.

Jones J, within a commendably short time, on 13 March 2001,

delivered judgment in both cases. The learned judge granted a final interdict in case no 489/01, *ie*, the application by Imatu. He interdicted Walmer and Riddle from approaching any members of the Imatu group short term insurance scheme to terminate their membership of the scheme or to use any information relating to the scheme for the purpose of promoting any other insurance scheme. He also ordered them to deliver to Imatu all documents in their possession relating to the scheme, to render a full account to Imatu, to attend a debate of the said account, to pay over any amounts found to be due to Imatu, and to pay the costs of the application.

[14] The application by Walmer in case no 487/01 was dismissed with costs.

[15] On 20 March 2001 the learned judge refused leave to appeal in respect of both applications. This Court, however, granted

leave to Walmer and Riddle to appeal against the orders made in case no 489/01, *ie* the application brought by Imatu for an interdict against Walmer and Riddle.

[16] In case no 487/01 *ie* the application launched by Walmer, a further dispute developed in respect of the date on which the agreement between itself and Imatu would come to an end. Walmer's case was that the agreement would last at least until 31 October 2001, and that thereafter it would be subject to six months notice by either party. Imatu's case was that the agreement came to an end on 1 April 2001. Walmer's application was refused, and no leave to appeal against such refusal was granted. It follows that the present appeal must proceed on the basis that the agreement between Walmer as represented by Riddle on the one hand and Imatu on the other came to an end on 1 April 2001.

[17] What remains to be decided is whether the learned judge *a quo* was correct in granting Imatu a permanent interdict operative against Walmer and Riddle

" ... from approaching any members of the Applicant's group short term insurance scheme to terminate their membership of the scheme or switch to another insurance scheme and from utilising any information relating to the scheme for the purpose of promoting any other insurance scheme"

after the termination of the contract between them.

[18] In argument before the court *a quo* and also in this Court some time was spent on debating whether Walmer could be described as an agent or a broker. In the context of this case, that debate is futile. The labels as such do not provide an answer to the question to be answered. That answer can be found only by interpreting the contract between the parties in its contextual setting, having regard to its genesis and purpose. The fundamental question is whether the contract, thus interpreted,

gave rise to the creation of a protectable interest, such as claimed by Imatu, which would endure beyond the date of termination of the contract.

[19] In the court *a quo* the learned judge held that the contract created a fiduciary relationship between the parties giving rise to the rights as claimed by Imatu. He formulated his judgment on this point as follows

"In short, the union appointed and employed the broker to do all things normally done by an insurance broker in the management and administration of a group insurance scheme. The scheme was the union's scheme, specially arranged for it and offered by it to its members for their benefit. The broker is subject to dismissal by the union. The result is that the broker acts on behalf of the union in arranging insurance contracts with an approved insurer on behalf of the union's members. The union could itself have done all things done on its behalf by the broker. Although the union is not an insured under the scheme, the union has direct input into each individual contract between the insurer and union members. The union appoints the insurer each year. It agrees on the premiums to be paid on behalf of members. It agrees to any changes to the terms and benefits of the group policy on behalf of members. I have no doubt that when it appointed the broker, it appointed it as its agent to do these things on its behalf.

It follows from the above that certain fiduciary duties flow from the contract between the union and the broker. The broker is to an extent given exclusivity. The union cannot oblige its members to join the scheme through the agency of the broker, but in my view it is obliged not to appoint another broker as a competitor and it is not at liberty to influence its members to channel their short term insurance business of the kind covered by the scheme to another broker. In my view, this involves reciprocal duties by the broker. The broker cannot bring outsiders who are not members of the union into the group scheme. It cannot abuse its brokerage by giving other persons the privileges and benefits of a scheme specially arranged for the benefit of union members and made possible by the union's collective bargaining power, without first obtaining the union's consent. Similarly, it cannot persuade union members to join some other group insurance scheme, thereby undermining the scheme which it has been appointed to administer and promote. This is especially so because it and the union are locked into a mutually beneficial financial arrangement arising out of the administration of the scheme. The amount of the shared income derived from the monthly commission paid by the insurer on the monthly premiums is dependent on the numbers of members who join the scheme. Even more importantly, the amount of income derived from the profit sharing arrangement is directly related to the number of insured persons who join the scheme. Indeed, the members of the scheme would not be available to the broker were it not appointed by the union to act as broker. In these circumstances I fail to see how I can come to any conclusion other than that the broker is bound by the ordinary rules of agency not to allow its interests to conflict with or take precedence over the interests of the union."

[20] It seems to me that the conclusion reached by the learned judge *a quo* is solidly based on general legal principles, logic and equity. The position is simply that Walmer and Riddle were appointed as the exclusive broker to Imatu's existing group short term insurance scheme in 1989. Long before that date, Imatu had created the scheme for the benefit of its members. It offered the scheme to its members as one of the benefits of membership, and it undertook the responsibility of administering the scheme. Walmer was given entry to a lucrative, captive audience of participants, and it obtained its information relating to the union members exclusively from Imatu. For practical purposes it was Walmer's only business. In return, it had to share the revenue and profits generated by the scheme with Imatu. It is inconceivable that Walmer would be at liberty to make off with the scheme by taking the individual participants out of it or taking the

information about the identities and insurance needs of the participants away from Imatu, which had furnished both the opportunity and the information, and utilise it for its sole benefit to the detriment of Imatu.

[21] In my view, a fiduciary relationship came into being between Walmer and Riddle on the one hand and Imatu on the other. This gave rise, as a matter of law, to an obligation to respect the confidentiality of the information given to them by Imatu, and not to use it to the detriment of Imatu, nor to attempt to entice its members to join an insurance scheme not approved by Imatu.

(See *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) at 426 E - 430 H.)

[22] It follows logically that the duty, described above, endures past the termination of the contract itself.

[23] In the result, Jones J rightly granted Imatu's application.

The appeal is dismissed with costs.

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P J J OLIVIER

CONCURRING :

Smalberger ADP

Lewis AJA