

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

CASE NO: JA 45/03

In the matter between:

ABSA BROKERS (PTY) LIMITED

Appellant

and

**G N MOSHOANA N.O.
THE COMMISSION FOR CONCILATION,
MEDIATION AND ARBITRATION
J P VAN STADEN**

First Respondent

Second Respondent

Third Respondent

Before: ZONDO JP, PILLAY AJA, NKABINDE AJA

JUDGMENT

Nkabinde AJA

Introduction

[1] This is an appeal against a judgment of Jammy AJ sitting in the Labour Court in which he dismissed with costs a review application brought by the appellant in terms of s 145 of the Labour Relations Act No. 66 of 1995 (“the Act”), for the review and setting aside of an arbitration award issued by the first respondent under the auspices of

the second respondent. The first respondent is a commissioner of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”). The third respondent (“the employee”) is a former employee of the appellant. The arbitration proceedings related to a dispute between the appellant and the employee about the fairness of the employee’s dismissal from the appellant’s employ. Before I deal with the merits of the appeal, it is necessary to set out the facts relating to this matter.

Background and common cause facts

- [2] The appellant is a registered insurance brokerage company and a member of the Life Officers Association (“the LOA”). The first respondent is a commissioner of the CCMA who conducted the arbitration proceedings. The LOA rules (embodied in the Code of conduct of association) seek to safeguard the interests of insurance policy holders and to protect the good name of the life insurance industry.
- [3] The employee commenced employment with the appellant on 1 April 1993 as an insurance broker. His duties included the selling of life insurance policies to, and advising, the appellant’s clients with regard to their financial matters.
- [4] On 21 May 1999 the employee was consulted by one Mr John Isaac

Khoza (“the client”). No one else except the two attended the consultation. The client’s financial situation was, at the time, desperate. The consultation was mainly about the client’s interest in applying for a life assurance policy. As at that time, the client had an endowment policy with Sage Life which had commenced on 16 February 1995 (“the old policy”). The client had registered a bond with ABSA to the value of R63 073.00. He was in arrears with the payment of installments on the bond. The employee assessed the client’s financial situation and gave him advice. Different options were explained to the client with a view to addressing his desperate financial situation. One such option was to replace the Sage Life policy with one ordinary endowment policy which had a life cover benefit.

- [5] During the consultation the employee sold to the client an insurance policy which was registered under policy number 64215262 (“the new policy”). He completed the application forms for life assurance (“the proposal form”) on behalf of the client.

- [6] Clause 14 of the proposal form reads as follows:

“14 PROTECTION OF EXISTING ASSURANCES

Important note: Replacement of any insurances is generally to the disadvantage of the owner because it involves duplication of initial costs charged to the policy.

Is this proposal to replace the whole or any of your existing insurance with any insurer (whether replacement is to occur immediately or to replace an insurance discontinued within the past six months or within the next six months)? **YES / NO**

If ‘yes’ the introducer must discuss and complete the Replacement Policy Advice Record and attach it to this proposal form.” (underlining supplied)

In this case the reference to “the introducer” in the last sentence of clause 14 would have been a reference to the employee.

[7] It will be noted from the contents of clause 14 that there is a question that must be answered with “yes” or “no”. The question is whether the proposal form being completed is for the replacement of any of the client’s existing insurance policies with the insurer. It will also be seen that, if the answer is “yes”, which will be the case if the proposal is for the replacement of an existing policy, the “introducer” is required to ‘discuss and complete the Replacement Policy Advice Record and attach it to the proposal form.’. If the answer to the question in clause 14 were in the negative, it would not be necessary to discuss and complete the Replacement Policy Advice Record (“the RPAR”) nor was it necessary to attach it to the proposal form.

[8] For reasons that will appear later in this judgment, it is necessary to also quote clause 16 of the proposal form. Clause 16 was required to be signed by the “introducer” who made the declaration at the end of the process of the completion of the proposal form. It reads thus:

“I certify that I have explained the meaning of question 14 to the owner. I am aware of the possible detrimental consequences of replacing a life policy. I have informed the owner of the declaration I am signing and am fully conversant with the ‘S’-referencing system embodied in the LOA Code on the S Refence System and I accept the consequences thereof.

Signature of Introducer -----
 Special remarks-----”

The employee signed the above declaration and put the date of 21 May 1999. The effect of the employee signing the declaration in clause 16 was that by his signature thereto he was certifying that, among other things, he had explained the meaning of clause 14 to the client. It would seem that the policy proposal was then processed in the normal way. However, on 24 May 1999, which was only three days from the 21st when the proposal form was completed, the client surrendered the old policy.

[9] On 20 September 1999 the client addressed a letter of complaint to the appellant. The letter read as follows:

“REF POLICY NO 64215262 J.I KHOSA
 In 1995 [I] took out a policy to cover my bond of R63 000.00 with Allied Bank. The payment was on my bond.

In June 1999 a certain Mr Van Staden made contact with me and said we must stop the old policy of R180.52 and take out a new policy. He said that my installment to (sic) my house will be the same as it was namely R1453.00. He also said that the old policy money will be paid onto my house and that the new policy will pay my house in 8 years. Now to my surprise my house is still R1453 and the new policy is R398 per month, and [I] cannot afford this as my salary is only R3393 per month. I think Mr van Staden did not tell me the truth and [I] want to cancel my policy and get the R398 back.”

The disciplinary inquiry

[10] Pursuant to the client’s complaint, the appellant preferred a disciplinary charge against the employee and notified him to attend a

disciplinary inquiry. The charge, which was in Afrikaans, read thus :

“Daar word beweer dat u wanvoorstelling en/of ‘n valse verklaring afgelê het deurdat u op die aansoekvorm om versekering van Sage Lewens vir die kliënt John Isaac Khoza, die vraag oor vervangende versekering by puntnommer 14 van die aansoekvorm, negatief beantwoord het, terwyl dit positief beantwoord moes word.

Bogemelde optrede het ‘n direkte finansiële voordeel vir u ingehou en bogemelde optrede is strydig met die vervangingskode van die Vereniging van Lewensversekeraars van Suid-Afrika (LOA) en is ‘n verbreking van klousule 20.3.7 van u makelaarsdiensooreenkoms, welke oortreding in ‘n ernstige lig beskou word in terme van ABSA Makelaars se Dissiplinêre Kode met spesifieke verwysing na paragraaf 1.1 en 1.2 van die lys van wangedrag soos vervat in die kode en sou u skuldig bevind word op bogenoemde klagte, kan dit tot u summiere ontslag lei.”

In an affidavit in subsequent court proceedings the appellant provided the following as the English translation of the charge that was put to the employee, namely:

“misconduct relating to the making of a misrepresentation and/or false statement in that the employee completed an application form for life insurance in which he stated that John Isaac Khosa was not applying for replacement life insurance under circumstances in which Khosa was applying for replacement life insurance and thereby obtained a financial benefit in contravention of the LOA rules as read with clause 20.3.7 of the employee’s contract of employment.”

The relevant LOA rule is set out in clause 3.2.1(b) of the Code. It provides thus:

“(b) If the transaction is a replacement, the intermediary must inform and counsel the client appropriately and must complete the RPAR (Annexure 3) in consultation with the client. Member officers may decide whether they wish to have this signed.”

Clause 20.3.7 of the employee’s contract of employment reads as follows:

“20.3.7 Vervanging van bestaande aansoeke of polisse soos in die Vervangingsooreenkoms omskryf, waar die Werknemer bewus dat n vervanging plaasvind, die vervanging ongetwyfeld nie in

belang van die kliënt was nie en nie in die aansoekvorm vermeld nie,”.

[11] The appellant was represented by Mr Johannes Joost van Heerden (“Van Heerden”) in the disciplinary inquiry. Van Heerden was the appellant’s compliance consultant. The employee represented himself. Van Heerden led evidence in the inquiry. The appellant did not call the client to testify. It relied, essentially, on the evidence of Mr. Simon van der Merwe (“Van der Merwe”), the audit manager of Sage Life. Much of his testimony was common cause. In essence, Van der Merwe testified with regard to the contents of the proposal form which Sage Life received after the consultation between the employee and the client.

[12] Van der Merwe testified about the manner in which Sage Life handled matters arising out of clause 14 relating to the replacement of an insurance policy. He testified that the old policy was surrendered on 24 May 1999 and that Sage Life did not receive the RPAR. At first, Van der Merwe testified that he could not say who had initiated the surrender application. After the letter of complaint had been read into the record, he testified that, based on the letter and the date on which the proposal form was signed, the employee was the initiator of the surrender of the old policy.

[13] Van der Merwe explained that the basic rules of LOA were that, when a proposal was sought or received in respect of a new assurance policy, the intermediary and insurer were obliged to establish whether such a policy was a replacement policy or not. If it was, the client had to be properly

counselled on the consequences of a replacement so as to enable him to make a fully informed decision regarding the replacement and the RPAR had to be completed. If it was not, the RPAR would not be required. Van der Merwe testified further that the employee was paid a commission on the new policy in the sum of R4059.60 which amount would have been debited to the account of the client. Van der Merwe explained the advantages and disadvantages of each policy and concluded that the new policy was “commission driven”.

[14] The employee also testified in the disciplinary inquiry. He denied the allegations made against him. When the chairman of the disciplinary inquiry asked him to give his version of what had taken place, the employee refused to do so. He responded thus:

“Ek dink nie ek moet op hierdie stadium dit doen nie. Ek dink ons moet ons bepaal by die klag, met alle respek. Die klag is dat ek ‘n valse verklaring gemaak het. Ek dink nie ek moet van ‘n ander ding aangekla as dat ek ‘n valse verklaring afgelê het nie. Daardie punt betwis ek. Soos ek sê, dit is nie korrek nie. Ek wil nie enige ander kommentaar lewer daaroor nie.”

[15] Under cross-examination by Van Heerden, the employee admitted having assisted the client by completing the proposal form. He testified that he answered the question in clause 14 in the negative on instructions of the client. He testified further that he discussed replacement with the client. When asked whether he had been aware that replacement was going to take place, the employee testified that ‘daar was ‘n vervanging ter sprake gewees. Ek kan nie sê date ek op daardie oomblik bewus was van ‘n vervanging wat sou plaasvind nie, maar daar was ‘n vervanging ter sprake gewees’. Van Heerden put to him that ‘... U tree op as ‘n agent van ‘n lewensversekeraar. So alhoewel u voorsien het dat hierdie ‘n moontlike valse verklaring is,

het u nog steeds op instruksie van die kliënt ‘n wanvoorstelling aan die versekeraar gemaak deur dit nie te openbaar nie.’ The employee responded thus :

“Dit is korrek. Ek gaan nie toelaat dat u my in ‘n hoek druk om te sê ek was bewus of nie bewus daarvan nie. Hier is ‘n aantyging teen my gemaak dat ek ‘n valse verklaring afgelê het en ek wil net herhaal vir u was ek non-nou gesê het. Ek het ‘n vorm voltooi-dit is dee van my werk, die kliënt het die verklaring afgelê en geteken.”

[16] The employee further admitted having signed the declaration in clause 16. However he testified that the declaration in clause 16 ‘sê nie dat ek ‘n valse verklaring geteken het nie. Dit sê dat ek met die kliënt bespreek het en ek is bewus van ‘n S-verwysing. Dit beteken nog nie ek het ‘n valse verklaring afgelê nie.’ At that stage of the inquiry the Chairman inquired from Van Heerden ‘of daar enige ander soortgelyk sake is wat teen mnr van Staden ondersoek word waarop hy bevestiging kry dat daar so ‘n ondersoek is wat nog nie afgehandel is nie.’ Van Heerden indicated that the charge would not be amended. No further witnesses were called.

[17] The chairman of the disciplinary inquiry found the employee not guilty in respect of the allegation of making a false statement. However, he did find him guilty of the allegation of misrepresentation. He gave the following purported reasons for this latter finding, that:

- “a) Dat u u posisie misbruik het deur ‘n nuwe polis vir die kliënt J I Khosa as vervanging van ‘n bestaande polis, vir eie finansiële gewin. Die stap hou geen voordeel vir die kliënt in nie, wat ook aanleiding to sy skriftelike klagte van 20 September 1999 gegee het;
- b) Dat u die riglyne soos vervat in die vervangingskode van die Vereniging van Lewensversekeraars van Suid-Afrika opsetlik verbreek het deur nee te antwoord op die vraag of dit ‘n vervangende polis is trewyl uself erken het dat u bewus was dat dit wel ‘n vervangende polis was.”.

According to the parties' legal representatives before us the English translation of the above is -

- “a) That you abused your position by a new policy for the client JI Khoza as a replacement for an existing policy, for own financial gain. The step is not to the benefit of the client, which gave rise to his written complaint of 20 September 1999.
- b) That you intentionally transgressed the guidelines contained in the replacement code of the Life Officers Association of South Africa by answering no to the question whether it is a replacement policy whereas you have admitted that you were aware that it was a replacement policy.”

Regarding the sanction the chairperson decided that the employee be dismissed. The employee noted an internal appeal against the decision of the chairman of the disciplinary inquiry. The chairman of the appeal hearing dismissed the appeal and confirmed the decision to dismiss the employee.

Arbitration proceedings

[18] A dispute then arose between the employee and the appellant about the fairness or otherwise of the dismissal. The employee referred the dispute to the CCMA for, initially, conciliation and, eventually, arbitration. The issue for determination in the arbitration was whether the dismissal was substantively fair or not. The procedural fairness of the dismissal was not in dispute. During the arbitration the appellant was represented by an attorney, a Mr Ferreira. The employee appeared in person. The employee presented certain documentation which included the minutes of the disciplinary enquiry, the minutes of the

appeal hearing and the LOA rules. By agreement between the parties the minutes were admitted as evidence. The other documents, including the LOA rules, were admitted as what they purported to be. The commissioner spelled out the nature of the arbitration proceedings. He remarked that the arbitration was a hearing *de novo* and that, if the dismissal was not in dispute, the appellant bore the onus to prove the fairness of the dismissal. This statement was based on s 188(1) of the Act.

[19] In the arbitration Mr Ferreira did not call the client to testify. Van Heerden testified on behalf of the appellant. He testified mainly with reference to the transcript of the disciplinary inquiry against the employee so as ‘to give a general overview of the proceedings...’ He testified further that, as a compliance consultant, he had to ensure that the appellant adhered to new legislation and dealt with the appellant’s disciplinary matters. He further testified that, in terms of clause 20.3.7 of his contract of employment with the appellant, the employee was bound by the LOA rules.

[20] Van Heerden testified that the employee had contravened the LOA rules because he had misrepresented or given false information to the client in that, whilst he knew that there existed an old policy, he failed–

- (a) to indicate on the proposal form to Sage Life that the new policy was replacing the old policy; and

(b) to explain the consequences of such replacement to the client.

[21] During Van Heerden's cross examination by the employee the latter put it to Van Heerden that he (i.e. the employee) had answered the question in clause 14 in the negative 'under the instruction of [the client]' and that the client was 'unsure about the situation...' Van Heerden's response was –

“In general there are no indications of any of these discussions with the client and Mr Van Staden did not use the opportunity in the disciplinary matter to put forward his argument that he has now chose (sic)...

...

... Well, my comment is it is very improbable...”

Of course, Van Heerden's answer to such question was irrelevant because he had no personal knowledge of the discussion that had taken place between the employee and the client.

[22] In the arbitration the employee repeated the defence he had raised in the disciplinary inquiry that he had not made any misrepresentation or false statement. According to him the arrears on the payment of the installments on the client's bond were occasioned by, among other things, by the fact that the client had been furnished with inaccurate information by ABSA concerning the repayment of the bond and that there had been a duplication of insurance on his bond. He testified that no decision to replace the existing policies had been taken during the consultation between himself and the client or soon thereafter. He also testified that he had been unaware of the cancellation of the old policy until this fact was brought to his attention in the inquiry. He testified

further that, had the client heeded his advice, the arrears in his bond would have been reduced, the duplication on his bond insurance would have been rectified and the monthly insurance costs on the bond could have remained the same.

- [23] The employee testified further that he had given the client the best advice that he could. According to him, the fairness of the dismissal turned on the answer to the question in clause 14. He testified further that, if the client had decided to cancel the old policy, the answer to the question in clause 14 would have been in the affirmative and the RPAR would have been completed. He further testified that, although the various options had been discussed, the client had not been sure whether he should continue with the existing policies or not. He testified that the client had been surprised that his bond was in arrears because he had been paying for four years. The employee testified that the client could also not understand how two insurance policies had been debited to his bond. The employee further testified that, after he had discussed the various options with the client, he advised the client that the question in clause 14 had to be answered. He testified that the client was not sure at that stage whether or not to go ahead with the suggestion of canceling the existing policies and replacing them with a new one. The employee informed the commissioner that he told the client that the decision was his (i.e. the client's) and that the question in clause 14 had to be answered with either, 'yes' or 'no' but the client was not sure. The employee testified that finally the client had told

him to answer the question in the negative and had then said: ‘... because I do not know what I want to do’ and that ‘[a]lthough we can apply for the cover I do not know whether I am going to cancel those policies’. He testified that the client, after the completion of the proposal form, had signed a declaration to the effect that the answers given in the proposal form were true and correct. The employee testified that he had signed the declaration under clause 16 ‘as an introducer’ to confirm that he had explained the questions in the proposal form to the client’. As to the relief, the employee sought compensation equivalent to 12 months’ remuneration. He testified that his remuneration had been R45 000.00 per month.

- [24] At the commencement of the cross-examination of the employee Mr. Ferreira asked the employee whether he intended calling the client as his witness. When the employee answered in the negative, Mr. Ferreira put it to him that his ‘credibility on the evidence he tendered is very important.’ The following discussion ensued when Mr. Ferreira suggested to the employee that the new policy was intended to replace the old policy:

“Not hundred percent correct, Mr. Ferreira. Our discussion went along the way in that direction. When coming to question 14, I have testified that the client was not sure, so at that stage we could not make a decision. He could not make a decision and I could not make it for him. That is what I have said.

.....

But the whole discussion concerning this, the replacement was involved. So, there has not, replacement has not happened at that stage.’

...

MR FERREIRA: Jy sê jy het punt 14 met die kliënt bespreek. ---Yes, I have said it.

‘Hoekom het jy dit met die kliënt bespreek? Was jy bewus dat daar ‘n vervanging gaan plaasvind.’? ... ---Exactly. It is exactly, I do not have to rephrase that . . . I stated in Afrikaans daar was ‘n vervanging tersprake. Ek kan nie sê dat ek op die oomblik bewus was van ‘n vervanging wat sou plaasvind nie maar daar was ‘n vervanging ter sprake ...

Yes, but you have testified there was a great possibility in that this policy must be replaced... --- But that is, exactly, Mr. Ferreira. We are talking about possibilities now. We are not talking about facts (?)”

The employee testified further, under cross examination, that he was entitled to earn a commission regardless of the answer to the question in clause 14. No further witnesses were thereafter called.

[25] The commissioner found the dismissal substantively unfair. He ordered the appellant to compensate the employee in an amount of R540 000.00 being an equivalent of twelve months’ remuneration at the rate of R45 000.00 per month. The commissioner articulated his reasons for his finding thus:

“The issue in this case is centered on question 14... According to the [appellant], the [employee] was not supposed to answer question 14 in the negative but was supposed to answer it in the positive. That being the view held by the [appellant] the facts before me is that the question itself has been answered in any event in the negative. There is no dispute about that.

...

As pointed out earlier the evidence presented at the arbitration points out that the question was answered in the negative. That being the answer, the proviso that the introducer must discuss and complete replacement advise record does not apply. At the end of [the proposal form] there was a declaration by [the client] declaring that he has answered all the questions truly and correctly. At the bottom of [the proposal form] the [employee] reported that and certified that he had explained the meaning of question 14 and confirmed that he is aware of the possible detrimental consequences and confirmed that he is fully conversant with the LOA rules and accept the consequences thereof.

... [T]he [appellant’s] basis of the dismissal is that the [employee] at the time of proposing this insurance cover was aware that [the client] was

covered by another policy and accordingly the second policy should be a replacement policy. Unfortunately the only evidence at my disposal to point out what the second policy was is document “K”. According to document “K” the person to be assured declared that the subsequent policy was not a replacement policy. If I am to accept that the only evidence reflecting the intentions of [the client] is document “K”, then it follows that it was not necessary for the applicant to complete the so-called replacement record (i.e. annexure 3 to the LOA rules) or to comply with the LOA rules.”.

Again I cannot ignore the evidence of the [employee] . . . that the policy allegedly to replace was only cancelled on the 24 May 1999.

This support (sic) the [employee’s] version that [the client] as at 21 May 1999 was not sure whether he was going to replace or cancel the existing policy.

...

...In this case there is no dispute that the [employee] was dismissed and accordingly the onus was on the [appellant] to prove that there existed a fair reason for a dismissal.

In my view the [appellant] has failed to discharge its onus that the [employee] had contravened any work rule and or the [employee] misrepresented facts as alleged and therefore contravened the LOA rules together with the contract of employment and the disciplinary code and procedure.”

Review proceedings

[26] Aggrieved by the commissioner’s award, the appellant launched an application in the Labour Court for the review and setting aside of the award essentially on the grounds that the commissioner -

- (a) had failed to appreciate the full extent of the employee’s contravention of the LOA rules, thereby rendering the award unjustifiable as contemplated in s 145 of the Act;
- (b) had misconstrued the evidence placed before him, the contention being that he should have concluded that the employee had deliberately answered the question in clause 14 in the negative so as to obviate the need to explain the consequences of a replacement policy to the client so as to

earn a commission which he would otherwise not have been entitled to; and (c) had failed to exercise his discretion in terms of s 194(2) when deciding on the compensation to be awarded to the employee.

Allegations were made in the review application, *inter alia*, that the complaint by the client was that the employee had sold a replacement life policy to him without explaining the consequences of such a transaction to him as required by clause 3.2.1.(b) of the LOA rules.

[27] The court *a quo* dismissed the application with costs. It concluded, with regard to the grounds in (a) and (b), above, that the appellant had not shown any basis to justify interference with the award. With regard to the third ground it found no sustainable basis for the contention that the award was excessive.

The appeal

[28] On appeal Counsel for the appellant was specifically asked to specify exactly what the employee's conduct was for which he had been dismissed and on which the appellant relied to contend that the employee was fairly dismissed. Counsel pointed out that such conduct was that the employee had made a false declaration in clause 16 of the proposal form in that he certified therein that he had explained the meaning of the question in clause 14 to the client when he, in fact, had not done so. He submitted further that the commissioner had misconstrued the evidence and that this had led to him issuing an award that was unjustifiable and stood to be reviewed and set aside. Counsel for the appellant referred to some evidence presented by the

employee during the arbitration when the latter testified that he had discussed replacement with the client. Counsel submitted that there was no way in which the client would have decided to submit the proposal form that he submitted if replacement had been discussed with him. He pointed out that the taking out of the new policy would not have addressed the client's precarious financial position but would have made it worse. It was on the basis of this logic that counsel submitted that the conclusion must be drawn that the employee's declaration that he had explained clause 14 to the client was probably false.

[29] The attorney who appeared on behalf of the employee submitted that clause 16 in the proposal form never formed part of the charge. He submitted that the case which the employee had to meet in the disciplinary inquiry, the arbitration proceedings and the appellant's case in the court *a quo* was that, by supplying "no" as the answer to the question in clause 14, the employee had made a representation that the proposal was not to replace an existing policy when, in fact, it was. Mr. Kocks submitted that this was, according to the appellant, the misrepresentation. In this regard Mr Kocks pointed to a number of areas in the record in support of this contention.

[30] With regard to what the appellant's case against the employee has been through the various stages, a perusal of the record reveals the following:

- (a) the charge against the employee made no reference to the employee having made a false declaration;
- (b) in finding the employee guilty of the second part of the charge which he regarded as misrepresentation, the chairman of the disciplinary inquiry advanced the reasons referred to in paragraph 17, above, as his reasons. There was, manifestly, no reference at all to the employee having allegedly made a false declaration in clause 16;
- (c) during the arbitration proceedings the commissioner stated the appellant's case, as he understood it, thus: 'Mr Van Staden according to [van Heerden] the case for the [appellant] is not that you have fixed policies... The case of the [appellant]...is that there was a question set out in the questionnaire ... [w]hich question was answered in the negative whereas the truth of the matter is, it is yes... That is the [appellant's] case.'. The appellant's counsel did not say that this did not correctly reflect the appellant's case;
- (d) in his award the commissioner remarked that '[t]he issue in this case is centered around question 14 of [the proposal form]';
- (e) in the arbitration Van Heerden testified that at the disciplinary inquiry, he had questioned Van der Merwe about clause 14;
- (f) during Van Heerden's cross-examination the employee asked Van Heerden whether the cause of the appellant's unhappiness was about the answering of the question in the negative or the replacement of the policy whereupon Van Heerden answered that both were the concerns of the appellant. He did not say that the employee's declaration in clause 16 was the cause for the appellant's concern ; and
- (g) in the review application the deponent to the appellant's founding affidavit stated that 'the employee's decision to answer the question in clause 14 in the negative and more importantly, not to advise [the client] of the financial implications of a replacement policy, constitutes a flagrant breach of the LOA rules and therefore a contravention of the terms and conditions of the terms of conditions of employment.' The deponent did not say that the possible falsity of the employee's declaration in clause 16 was a breach of the LOA rules.

[31] It was never suggested, either in the disciplinary inquiry, the arbitration proceedings or the review proceedings, that the appellant's

case against the employee was that the employee's declaration in clause 16 was false. The only time that clause 16 was mentioned was during the employee's cross-examination in the disciplinary inquiry when Van Heerden merely referred to the declaration in that clause.

- [32] Counsel for the appellant took the above approach with regard to the conduct for which the employee was dismissed when, on the second day of the hearing of argument in this matter, he was asked to clarify what the appellant's case was on this issue. Not only is Counsel's reliance upon the making of an allegedly false declaration by the employee at variance with the appellant's case as revealed in the areas of the record referred to above but also it is at variance with Counsel's argument before us during his main address on the first day of the hearing of this matter. Above all, it is not the case contained in his heads of argument before this Court. The appellant's case, as set out in the appellant's Counsel's heads of argument, is that the conduct on the part of the employee that the appellant complained about and for which he was dismissed is that he failed to explain the consequences of a replacement policy to the client. In dealing with the objectionable conduct on the part of the employee in his heads of argument Counsel for the appellant refers to certain extracts of evidence which the employee gave in the arbitration. In paragraphs 3.6-3.11 of his heads of argument Counsel for the appellant wrote thus:

“3.6 It is apparent from the aforementioned extract (as read with the previous extract) that question 14 of the application form was answered in the negative because [the client] (on the [employee's]

version) had not yet made a decision concerning the cancellation of the first policy.

3.7 Under such circumstances, the status of the [new] policy was unclear since:

3.7.1 the [new] policy would be a replacement policy in the event of [the client] canceling the [old] policy;

3.7.2 the [new] policy would not be a replacement policy in the event of [the client] continuing with the [old] policy.

3.8 The primary purpose of the LOA Rules (and more specifically clause 3.2.1 (b) (sic) is to explain the financial consequences of a replacement policy to members of the general public, including [the client].

3.9 Since it must have been reasonably foreseeable to the [employee] (on his own version) that [the client] could not afford to maintain two policies (i.e. the [new] and [old]), the [employee] should reasonably have construed the [new] policy as a replacement and therefore should have completed the RPAR (annexure 3) in consultation with [the client].

...

3.10 This is especially so since the [employee] (on his own version) was aware of the fact that [the client] had not decided to retain the [old] policy at the time of applying for the [new] policy.

3.11 Accordingly, it is respectfully submitted that the learned Judge (and the [commissioner]) adopted too technical an approach in this matter. The [employee] should have explained the consequences of a replacement policy to [the employee] (who was in financial difficulties) under circumstances in which [the client] was undecided as to the cancellation of the [old] policy.”.

[33] From all of the above there can simply be no doubt that it has never been the appellant’s case that the objectionable conduct on the part of the employee was the allegedly false declaration in clause 16. Indeed, that was not the reason for his dismissal. The reason for his dismissal related to clause 14. It was either that he provided a negative answer to the question in clause 14 or that he failed to give the client the explanation contemplated in clause 14. If the appellant’s Counsel’s heads of argument, as set out earlier, are anything to go by, the reason

for the dismissal was the alleged failure on the employee's part to give the client the aforesaid explanation.

[34] If one has regard to the findings and the purported reasons of the chairman of the disciplinary inquiry for his findings, it will be seen that he specifically found the employee not guilty of making a false statement but found him guilty of misrepresentation. What was the alleged false statement in respect of which the employee was found not guilty? The immediate impression one gets is that the statement was the giving of the negative answer to the question in clause 14. The difficulty with this, however, is that paragraph (b) of the purported reasons of the chairman of the disciplinary inquiry, referred to in paragraphs 17 above, suggests that the giving of a negative answer to the question in clause 14 formed part of the basis for the chairman's finding that the employee was guilty of misrepresentation.

[35] If one has regard to the charge that the employee faced in the disciplinary inquiry, one will realize that the first part thereof is clear. It is to the effect that the charge against the employee was that he had given a negative answer to the question in clause 14. It was alleged that his misconduct was the 'making of a misrepresentation and or false statement in that he (i.e. the employee) stated that [the client] was not applying for replacement life insurance under circumstances in which [the client] was applying for the replacement life insurance ...' . The charge then went on to read: '...and thereby obtained a

financial benefit in contravention of the LOA rules as read with clause 20.3.7 of the employee's contract of employment.'. The matter was dealt with on the basis that the findings of not guilty made by the chairman of the disciplinary inquiry related to the allegations that the employee gave a negative answer to the question in clause 14. If that is not correct and the chairman's finding of not guilty did not relate to this but related to something else and he found him guilty of this, there can be no doubt that it could not have been open to the commissioner to so find. This is because it is common cause that, on the unchallenged evidence of the employee before the commissioner, the employee explained to the client that the question in clause 14 had to be answered in one way or another and that the client said that he was undecided on whether to cancel the old policy but ultimately instructed the employee to answer in the negative. Accordingly, since at the time when the question in clause 14 had to be answered, the client had not taken any decision to cancel the old policy, the answer to the question in clause 14 could not have been given as yes. In part the employee testified in the arbitration on this issue as follows:

"So, then I asked [the client], I said...we have got this question here which says, is this policy to replace any of your policies, yes or no, and the client says, but I cannot answer that. I say to him, but you've got to answer it because it is a questionnaire which says yes or no. if we answer the question yes, you got to complete an additional application or an additional form which gives the information concerning this ... (intervenes)

So [the client] said, no, I do not want to do that. I do not want to answer that question yet because if I answer that question then I have made a decision on this thing. So I, my question to [the client] then is, do we answer question 14 then No, on which he confirmed."

[36] That evidence, which was unchallenged, would preclude any finding that the employee gave the negative answer in clause 14 on his own and without the authority of the employee. It would also preclude any finding that the answer that should have been given to the question in clause 14 is yes. This is because there would have been no basis for a positive answer to have been given to that question when the client had not as yet made the decision that he was going to cancel the old policy.

[37] In so far as the appellant may have dismissed the employee for his alleged failure to give the explanation contemplated in clause 14, the first answer to that is that there was no obligation on the employee to give the client such explanation as the client had not taken the decision to cancel the old policy. If there was no such obligation, there could not have been any basis for a charge of misconduct arising from his failure to provide the explanation contemplated in clause 14. I am aware that in his declaration in clause 16 the employee certified that he had given the client such explanation. That statement may or may not have been false. However, since he was not charged with allegations of making a false declaration in clause 16 and since this was not the reason for his dismissal, the declaration cannot be taken into account for the purpose of the determination of the fairness or otherwise of the dismissal. The substantive fairness or otherwise of the employee's dismissal must be assessed with reference to the reason for which he was dismissed.

[38] In any event it would appear from the record that it was not at any stage during the employee's cross-examination put to him that the declaration that he made in clause 16 was false in that he had not given the client the explanation that he said in the declaration he had given him. Indeed, Counsel for the appellant was asked during the hearing of argument whether he was able to refer to any part of the record that would show that this had been put to the employee. He could not do so.

[39] It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *Van Tonder v Killian NO en Ander* 1992 (1) SA 67 (T) at 72I). He has not only a right to cross-examination but, indeed, also a responsibility to cross-examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19 (A)). A failure to cross-examine may, in general, imply an acceptance of the witness' testimony. In this regard Pretorius has the following to say in '*Cross-examination in South African Law*' Butterworths 1997 p149-150 :

“... it is unjust and unfair not to challenge a witness's account if offered the opportunity, then later argue – when it is no longer possible for the

witness to defend himself or offer an explanation – that his evidence should not be accepted.

...

...It would create an untenable situation if each witness had to be recalled later to respond to claim emerging from the opponent's case which the witness might be able to elucidate. In the interest of finality and convenience of witnesses, it is clear that all matters must, as far as possible, be dealt with at a single opportunity. There can thus be no doubt that there is a clear responsibility on a cross-examiner to cross-examine if a witness's account is rejected.”.

(See also *Small v Smith* 1954 (3) SA 434 (SWA)).

[40] The effect of a failure to cross-examine a witness is instructively dealt with in *R v M* 1946 A.D. 1023 at 1027-1028 where Davis AJA remarked-

“Counsel for the Crown stressed the fact that the defence story was never put to the Crown witnesses, who were hardly cross-examined at all ...In this connection reference may be made to the House of Lords case of *Browne v Dunn*, which is to be found reported in full only in 6 R. 67... but the relevant extracts from the speeches are ... summarized by Phipson, *Evidence* (7th ed., p.460) :-

‘As a rule a party should put to each of his opponent's witness in turn so much of his own case as concerns that particular witness, or in which he had a share. . . . If he asks no questions he will, in England, though not perhaps in Ireland, generally be taken to accept the witness's account. . . . Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation. ... Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character...’

These remarks are not intended to lay down any inflexible rules even in civil cases, and in a criminal case still greater latitude should usually be allowed.” .

[41] It is also apposite to refer to what the Constitutional Court had to say

in this regard in *President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1(CC)* at paragraphs 61 and 62. There the Court said :-

“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness and opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character... This rule was enunciated by the House of Lords in *Browne v Dunn [(1893) 6R 67 (HL)]* and had been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but ‘is essential to fair play and fair dealing with witnesses’....

[63] The precise nature of the imputation should be made to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.”

(See also *Sv Boesak 2001 (1) SACR 1 (CC)* para [26])

[42] The only explanation I can think of as to why it was never put to the employee that his declaration in clause 16 was not true or could not possibly be true is that the appellant’s case was never that the declaration he made in clause 16 was false. In all of these circumstances I conclude, therefore, that, in so far as the appellant sought to challenge the court *a quo*’s finding that there was no basis to interfere with the commissioner’s finding that there was no fair reason for the employee’s dismissal, such challenge must fail.

[43] Another ground upon which the appellant based its review application in the court *a quo* relates to the decision of the commissioner to award the employee the amount of compensation that was awarded. In this regard the appellant did not contend that the commissioner should not have awarded the employee any compensation at all but complained that the amount was excessive. The appellant contended that, if regard was had to the conduct of the employee, the prejudice he had caused to the client, the impact of his conduct on the insurance industry as a whole and the financial prejudice he caused to the appellant, the amount of compensation should have been nominal. In the alternative Counsel for the appellant submitted that the matter should be remitted to the CCMA to enable the appellant to call the client to testify. With regard to the latter point there is, in my view, no factual or legal basis for the appellant to be given two bites at the cherry. The appellant elected not to call the client. When it made that election, it made its bed. Now it must lie on it. There is no basis upon which the Court could reverse the process and thus give the appellant a chance to make a different election in this regard.

[44] The court *a quo* found no basis to interfere with the amount of compensation that the commissioner awarded. The commissioner did not give any reasons for the amount that he gave. He should have. However, the fact that he did not give any reasons for deciding on such an amount is itself no reason to conclude that he committed a reviewable irregularity in awarding such amount of compensation.

[45] The award was handed down on 19 October 2001. That was prior to the Labour Relations Amendment Act No. 12 of 2002 (“the Amendment Act”) which came into operation on 1 August 2002. As at the 19th of October 2001, which is when the award was handed down, s 194 of the Act, which deals with the awarding of compensation to unfairly dismissed employee, read thus in ss (1) and (2) :

“(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee’s rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim.

(2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee’s conduct, capacity or based on the employee’s operational requirements, must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal.” (underlining supplied).

[46] In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) this Court held that the Labour Court’s or the arbitrator’s discretion in dealing with an issue of compensation in regard to a dismissal that is unfair only because no fair procedure was followed is limited to the question whether or not compensation should be awarded and

there was no discretion as to how much compensation should be awarded once the court or the arbitrator has decided that compensation should be awarded. That was prior to the Amendment Act. The Court held that once the Labour Court or an arbitrator had decided to exercise its or his discretion in favour of awarding compensation, the amount of compensation was determined by the statutory formula in s 194(1) of the Act. That was that the employee had to be awarded compensation that was equal to the remuneration that the employee would have been paid from the date of dismissal to the last day of the hearing if he had not been dismissed. The part of s 194 (2) which is underlined above stated that the compensation which must be awarded to an employee whose dismissal had been found to lack a fair reason should not be less than the amount contemplated in s 194 (1). This means that it was precluded that an employee whose dismissal fell under s 194 (2) should get lesser compensation than he would have got if his dismissal case fell under s 194 (1). This makes sense because there would be no basis to treat an employee whose dismissal has been found to lack any fair reason less favourably than an employee whose dismissal has been found to have been for a fair reason but was not preceded by a fair procedure. In other words it would be unacceptable that the latter should be awarded a bigger amount of compensation than the former.

[47] In this case, if the employee's dismissal had been for a fair reason but had not been preceded by a fair procedure, the employee would have been awarded 12 months remuneration in compensation because the last day of the hearing of the arbitration proceedings was well beyond 12 months from the date of his dismissal. Accordingly, the commissioner was precluded by s 194 (2) from awarding the employee an amount of compensation that would have been less than 12 months remuneration. Not only would he have acted *ultra vires* if he had awarded the employee less but also he would have acted irrationally. There is no legal or factual basis to interfere with the amount awarded by the commissioner. Therefore, this leg of the appellant's appeal must also fail.

[48] As to costs the matter was dealt with on the basis that costs should follow the result.

[49] In the premises the appeal is dismissed with costs.

NKABINDE AJA

I agree

ZONDO JP

I agree

PILLAY AJA

Date of Hearing: 11 November 2004

Date of judgment: 26 May 2005

Appearances:

For the appellant: Adv J Van As

Instructed by Messrs Erasmus & Ferreira Inc.

For the Third Respondent: Mr. Kocks of Kocks & Dreyer Attorneys