# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER 481/96

In the matter between: ABSA INSURANCE BROKERS (PTY)

LIMITED Appellant

and

JACOBUS LUTTIG NO. First Respondent

CORNELIUS JACOBUS OOSTHUIZEN NO.

Second Respondent

CORAM: MAHOMED CJ, SMALBERGER, VIVIER,
ZULMAN JJA et STREICHER AJA

Date of Hearing: 23 May 1997

Date of Judgment: 30-5-97

J U D G M E N T

The respondents are the duly appointed curators of IGI Insurance Co Ltd ("IGI"). In terms of relevant court orders they are authorised to control and manage the short term insurance business of IGI in terms of a management scheme.

IGI had at all relevant times carried on business as a registered insurer pursuant to the provisions of the Insurance Act 27 of 1943 ("the Act") until the end of September 1993. On that date it was placed under curatorship in terms of s 6 of the Financial Institutions (Investment of Funds) Act 39 of 1984.

The appellant, which at all relevant times carried on business as a broker of short term insurance, was sued by the respondents in the court a quo for payment of Rl 041 707,57. The sum represents short term insurance premiums that the

appellant had received on behalf of IGI prior to 30 September 1993, but which it had failed to pay over to the respondents in terms of s 20bis of the Act.

In its plea the appellant raised various defences to this claim. An exception to the plea was however upheld by Melamet AJ in the court a quo . Leave to appeal was granted to this Court.

The respondents' cause of action for the payment of Rl 041 707,57 is pleaded as follows in its particulars of claim:

1. In terms of an agreement concluded in 1985 IGI appointed the appellant as its agent to receive, on its behalf, premiums paid by insured persons in respect of policies issued by IGI.
2. The appellant agreed to pay the aforesaid premiums to IGI in accordance with s 20bis of the Act.
3. In accordance with the agreement and the appellant's obligation in terms of s 20bis (3) the appellant was obliged to pay to the respondents premiums received on IGI's behalf prior to September 1993 by no later than 10 November 1993, accompanied by a payment statement.
4. In breach of its obligation in terms of the agreement and s 20bis, the appellant failed to pay to the respondents, by 10 November 1993, premiums of Rl 041 707,57 received by it on behalf of IGI prior to 30 September 1993.

The defence of the appellant to this claim is pleaded as

follows:

5. The appellant acquired the business of a broker of short term insurance from a third party on 1 August 1992.

6. The third party concluded an agreement with IGI during 1985/1986. In terms of this agreement:

7. the appellant would, as agent for IGI, receive payment from Bankfin (an abbreviation used by the appellant in its plea to include Santam Bank Ltd, the Bankfin division of Bankcorp Ltd or the Bankfin division of ABSA Bank Ltd, as the case may be);

8. the appellant would be entitled to set off any commission due to it by IGI before remitting the premiums to IGI.

9. the appellant would regularly pay the balance of the premiums received, after deduction of commission, to IGI;

10. the appellant would regularly furnish IGI with detailed payment bordereaux in respect of the payment of insurance premiums;

11. the appellant would, on behalf of IGI, repay premiums, or a portion thereof, to Bankfin which became refundable as a consequence of the fact that the insurance had been cancelled;

12. the repayment would be made out of the total amount of premiums received by the appellant during a month.

13. All the rights and obligations of the third party, in terms of the agreement with IGI, were transferred to the appellant on the 1 August 1992.

14. During September 1993 the appellant received the sum of R3 049 974,15 in terms of the agreement from Bankfin in respect of premiums as contemplated by s 20bis of the Act; during the course of the same month certain insured individuals cancelled their insurance with IGI with the latter's knowledge and consent and in

each instance IGI determined an amount representing a portion of the insurance premium (which had previously and before 1 September 1993 been paid) to be refunded to each individual in respect of the cancelled insurance; a total amount of Rl 012 831,00 became due to be refunded by IGI to the various individuals during September 1993 as a result of the cancellation of insurance; the relevant amounts, totalling Rl 012 831,00 were credited to the accounts of the persons in question; the appellant, on behalf of IGI and as its agent, paid this amount of Rl 012 831,00 to the party who had credited the accounts of the various individuals; in the result IGI became indebted to the appellant in the amount of Rl 012 831,00.

15. The appellant made payment of the amount of Rl 012 831,00 out of the premiums of R3 049 974,15 received during September 1993.

16. On the basis of the above facts the appellant denies any liability to the respondents; in the alternative, and in the event of it being found that the amount of Rl 012 831,00 was paid contrary to the provisions of s 20bis of the Act, the appellant relies upon the fact that IGI was party to the agreement in terms whereof the payment was made and that the practice regarding repayment of premiums was followed at IGl's instance and with its full knowledge and that consequently the respondents are not in law entitled to claim the amount from the appellant; in the further alternative the appellant relies upon the defence of set off.

The respondents excepted to this plea on the following grounds:

1. The appellant relies upon an agreement entitling it to deal with insurance premiums received by it on behalf of IGI and further upon set-off and unjust enrichment in consequence of the implementation of the agreement.

2. Section 20bis of the Act prohibits such an agreement and obliges the appellant to pay the premiums in question to the respondents.

Six issues arise for consideration in this appeal. The issues are:-

17. whether the agreement relied upon by the appellant is prohibited by s 20bis of the Act;

18. if the agreement is indeed so prohibited whether it is nevertheless enforceable;

19. whether it is permissible in law for IGl to waive the benefits of s 20bis

20. whether the appellant is lawfully entitled to set off amounts allegedly owing to it by the respondents in terms of the agreement upon which it relies;

21. whether the appellant has a claim based on unjust enrichment if the agreement is indeed prohibited by the Act;

22. whether the appellant can rely on the maxim in pari (delicto potior est conditio defentis in the circumstances.

THE REVELANT PROVISIONS

The relevant portions of s 20bis provide as follows.

"(1) Subject to the provisions of subsections (2), (3) and (4), no registered insurer shall authorize or permit an agent, broker or other person, not being a registered insurer, to retain or deal with any moneys in respect of premiums received other than in terms of subsection (3) on behalf of such insurer and relating to short term insurance business carried on by such insurer in the Republic: ...

(2) (a) Every such agent, broker or person shall before becoming indebted to any insurer furnish security, within the period prescribed by regulation, for any amount which may become payable by him to insurers in terms of subsection (3),

(3) Every such agent, broker or person who receives such premiums on behalf of an insurer shall -

(a) close off his records of premium receipts not later than the last day of the month during which such premiums were received;

(b) pay the amount of such premiums to the insurer within 15 days after closing the records referred to in paragraph (a); and

(c) simultaneously furnish such insurer with a statement containing such particulars as the insurer may require in respect of a payment in terms of paragraph (b).

(4) Any such agent, broker or person may before remitting any premiums in respect of subsection (3) set off any commission due to him by such insurer in respect of such premiums.

(5) Payment of a premium by a policyholder in terms of his insurance policy to an agent, broker or other person referred to in subsection (1) shall be deemed to be payment in terms of such policy."

Sections 73 and 73bis of the Act are also of relevance.

Section 73 provides general penalties for contraventions of any of the provisions of the Act or any regulation made thereunder. Where no penalty is specifically prescribed in the Act for a contravention, a fine not exceeding R20 000, or imprisonment not exceeding 1 year, or both, is provided for.

Section 73bis provides that a financial penalty in the discretion of the Registrar of Insurance may be imposed upon a person who fails to comply with any provisions of s 20bis, irrespective of any criminal action which may have been taken or may be taken against such person under the Act.

THE ENFORCEABILITY OF THE AGREEMENT PLEADED BY THE APPELLANT

The language used in s 20BIS is unambiguous. The section sets out in clear and unequivocal terms the manner in which a broker or agent, such as the appellant, is to "deal with any moneys in respect of premiums received". Furthermore in

terms of s 20bis (1) no "registered insurer shall authorize or permit" a. broker or agent to "deal with any moneys in respect of premiums received other than in terms of subsection (3)". Subsection (3) and more particularly ss (3)(b) expressly obliges ("shall") the broker or agent to "pay the amount of such premiums to the insurer within 15 days after closing the records" referred to in ss (3). In terms of ss (4) it is only commission due to the broker by the insurer in respect of such premiums that the broker is entitled to set off before remitting premiums in terms of ss (3). The agreement relied upon by the appellant, in my view, constituted an "authorisation" to the appellant to "deal" in premiums in a manner other than that authorized in terms of ss (3).

The appellant paid the amount in question to the erstwhile insured persons out of premiums that were received, instead of paying such money to the insurer as is required by this section. This claim was not one for commission and, therefore, in terms of the Act, it could not be set off against the premiums that were due to the respondents.

The Act is explicit concerning the obligations of the agent or broker of the insurer in respect of premiums. There is no suggestion that it is open to the agent or broker to deal with money in respect of premiums in any way other than that enumerated in the Act. In this respect the learned judge in the court a quo was correct in his finding that the terms of the Act and the language used in this regard are peremptory. What s 20bis clearly states is that an agent or broker is only allowed to deal with or retain moneys received from premiums in accordance with subsection (3). No other exception is authorized. The argument of the appellant is that "there is nothing in subsection 20bis (1) and (3) which precludes the broker from entering into an agreement in terms of which the broker would, strictly as the insurer's agent, repay amounts which became payable by the insurer to erstwhile policy holders". This argument is unacceptable. Premiums paid to the appellant as a broker cannot be "dealt" with in this manner. Such a course is prohibited by s 20bis . Section 20bis (1) provides that the activities set out in ss (3) are the only permissible forms of retention and dealing by the broker on behalf of the insurer. As pointed out by learned

judge in the court a quo:-

"It is clear from the provisions of this section that any activities by the broker in relation to premiums received by him on behalf of the insurer beyond the limit set by [subsection] section 1 would be contrary to the provisions of s 20 bis, and that such actions would be void and able to be nullified. The intention of the legislature is clearly stated and is unambiguous. The fact that in certain circumstances it might create difficulty is in my view not material. Venter v Rex 1907 TS 910 at 913; Schenker v The Master and Another 1936 AD 136 at 142".

The premiums received by the appellant in the present case

were in respect of new business and renewals. The premiums

which the cancellations relate to were received prior to 1

September 1993 and before the amount of R3 049 974,15 was

received during September 1993 in respect of new business

and renewals. The insurer was therefore entitled the full

amount of the premiums. As pointed out by Botha JA in

Premier Milling Co (Pty) Ltd v Van der Merwe and others

NNO and Another 1989 (2) SA 1 (A) at 12 E- H:-

> "On these facts alone, the provisions of s 20bis became operative in respect of the money received and held by Price Forbes. It is immaterial whether or not the parties considered that to be the position. It is immaterial whether or not Price Forbes acted as an agent representing AA Mutual when it received the premium from Premier. If it did, it is immaterial whether or not Premier was aware of the fact. On becoming operative, the provisions of s 20bis placed a statutory obligation on Price Forbes to pay to AA Mutual its share of the premium, and conferred a

> corresponding right on AA Mutual to claim such payment. That right passed to the liquidators. Its enforcement cannot be affected by any contractual relationship between Price Forbes and Premier. Premier's instructions to Price Forbes not to pay the liquidators were ineffectual to render the provisions of s 20bis inoperative. To hold otherwise would necessitate the reading of qualifying words into the section which are not there, and for doing that I can find no warrant."

Whilst it is correct that the Premier case was decided before the amendment to the Act in 1989 which dealt with the question of the registered insurer's right to the premium as a whole and without reference to its entitlement to a portion of the premium which was due to the insured as a result of the cancellation of insurance policies and that the judgment does not refer to s 20bis (2) (b), I do not believe that this renders the principle enunciated in the aforementioned dicta inapplicable to the situation in casu. The submission made on behalf of the appellant to the effect that the respondent was not entitled to the receive the premiums in question and that the Premier case is therefore distinguishable, is, in my view without substance.

The court a quo accordingly correctly held that the agreement pleaded by the appellant is one prohibited by s 20bis.

13

## IS THE AGREEMENT PLEADED BY THE RESPONDENT A NULLITY?

Having come to the conclusion that the agreement contravened s 20bis of the Act does it necessarily follow that

the agreement is a nullity?

If, as in the present case, the Act states nothing expressly concerning the validity of a contract entered into in contravention of s 20bis, then the question of validity falls to be determined by a proper interpretation of the legislation in question.

In Standard Bank v Estate Van Rhyn 1925 AD 266 at 274 it was accepted as a general proposition that "when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law". This principle is not, however, "inflexible or inexorable". (Metro Western Cape (Pty)Ltd v Ross 1986 (3) SA 181 (A) at 188

F-I). It cannot therefore be asserted that because of the penalty provisions contained in sections 73 and 736bis of the Act that it automatically follows that an act in contravention of s 20bis is a nullity. What is decisive of the matter, as pointed out by Solomon JA in Estate Van Rhyn, supra at 274 is the intention of the legislature.

In Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) 872 (A) Miller JA at 885 E-G pointed out that

> "...the subject matter of the prohibition, its purpose in the context of the legislation……, the remedies provided in the event of any breach of the prohibition, the nature of the mischief which it was designed to remedy or avoid and any cognizable impropriety or inconvenience which may flow from invalidity, are all factors which must be considered when the question is whether it was truly intended that anything done contrary to the provision in question was necessarily to be visited with nullity...."

In answering the question as to whether a contract entered into in contravention of the provisions of s 20bis is a nullity, the purpose of the section is crucial. What is clear is that the Act as a whole is designed to regulate the insurance industry. It is an Act which "has set up elaborate machinery to regulate, mainly for the protection of the public, the management and function of insurers and the conduct of their

business." (D M Davis, The South African Law of Insurance, 4th ed at 13 - 14). The provisions of s 20bis are clearly there to regulate the dealing with and retention of premiums by any agent or broker. The section cannot be said to have been enacted only for the benefit of the insurer. It is plainly there to protect the interests of the public at large and to ensure that premiums paid by policy holders are not dealt with in an ad hoc manner depending on a particular agreement between an insurer and a broker.

As pointed out in the judgment of the court a quo the legislature intended in s 20bis to make statutory inroads into the contractual relationship between the registered insurer and its agent in order to protect the interests of the registered insurer, the broker and the policy-holders (cf S v Schrader 1995 (1) SA 194 (N) at 197I-198C). The prohibition in s 20bis (b) is peremptory. The object of the provision is to ensure that the assets of a registered insurance company are kept safe and intact, (cf the remarks of Theron AJ in Trans-Africa Credit and Savings and Bank Ltd v Union Guarantee and Insurance Co Ltd 1963 (2) SA 92 (C) at 103 B - F). The

section requires the premiums to be put directly into the

hands of and into the patrimony of the insurer so that it may direct and determine how such premiums are to be dealt with. In the light of this it seems clear that the legislature would not be content with the mere imposition of a penalty for the violation of the provisions of s 206is; even though such penalty might include a fine or imprisonment or both in terms of s 73 as well as any penalty which the Registrar of Insurance Companies may deem fit, but not exceeding R50 for every day after the expiration of such period for which he or she continues to fail to comply with the provisions of s 20bis, in terms of s 73bis. If one allowed the illegal contract to be enforceable the effect of this would be to undermine the very purpose of the Act which, as previously stated, is inter alia to regulate the operation of the insurance industry. As pointed out by Fagan JA in Pottie v Kotze 1954 (3) SA 719 (A) at 726H - 727A:-

> "The usual reason for holding a prohibited act to be invalid is...the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."

(See also Swart v Smuts 1971 (1) SA 819 (A) at 829E -

830C)

Some support for my view is also to be found in the provisions of s 68 of the Act which expressly provides that a policy issued by any person, whether before or after the commencement of the Act, "shall not be invalid merely because that person contravened or failed to comply with any law in connection with that policy". This indicates that where the legislature does not intend a contravention of a particular provision of the Act to be visited with nullity it expressly states this to be so. The fact that there is no similar statement in regard to a contravention of s 20bis is further support for the proposition that the legislature did not intend a contract in contravention of the section to have effect.

The submission in the appellant's heads of argument that:-

> "...it could not have been the intention of the legislature, that in circumstances such as those pertaining in this matter, the registered insurer be debarred from refunding a premium in respect of a cancelled policy, or instructing his agent to refund the premium on its behalf, upon cancellation, without the parties having to go through the absurdity of having the broker furnish the insurer, more than six weeks

*

i

> after cancellation of the policy, moneys to which the insurer is not entitled, and which it in turn is obliged to refund to the formerly insureds (who would then have been out of pocket for no apparently valid reason for more than six weeks)",

is unsound. What s 20bis unambiguously requires is that premiums received by an agent of the insurer must be dealt with in terms of the section by reducing such premiums (minus commission) to the control of the insurer. It is then for the insurer to decide whether it wishes to repay any moneys due to the erstwhile holders of cancelled policies directly through its bank or through one or other broker. What is crucial is that the control of the premiums is first passed to the insurer.

It is further submitted by the appellant that the interpretation upheld by the court a quo leads to:

> "absurdity so glaring that it could never have been contemplated by the legislature, or...to a result contrary to the intention of parliament as shown by the context or by such other considerations as the court is justified in taking into account." (Venter v Rex 1907 TS 910 at 913; Shenker v The Master and Another 1936 AD 136 at 142).

The appellant has not, however, successfully demonstrated an absurdity that would result from such an interpretation or how

such an interpretation differs from that which the legislature clearly intended. The appellant's submission is flawed in that it is based on the assumption that the moneys which the respondents claim from the appellant are moneys to which the insurer is not entitled. This assumption is inaccurate as such amount relates to the payment of premiums from other policy holders and as such constitute moneys that the insurer, as a matter of law, is entitled to. There is, therefore, no absurdity or disregarding of the intention of the legislature in granting acknowledgement to the fact that as a matter of law the insurer is entitled to such moneys which were received in respect of insurance premiums and which the broker is required to pay over to such insurer. This, after all, is the very essence of s 20bis. And, as stated above, it follows that there is nothing anomalous in the assertion that a contract in violation of this requirement should be treated as a nullity.

We are not dealing with a situation such as the one that confronted the court in Savage and Lovemore Minning (Pty) Ltd v International Shipping Co (Pty) Ltd 1987 (2) SA 149 (W) in which Stegmann J was dealing with regulations relating to export permits. The violation of s 206bis which the

alleged agreement between the appellant and 1GI perpetrates

does not relate to a procedural aspect of the Act. It attempts

to regulate the insurance industry by clearly defining the manner in which an insurer is permitted to authorize a broker to deal with premiums and attaches to the substance, and not merely the procedure, of such authorization. The contract allegedly entered into between the appellant and IGI, strikes at the very heart of this provision. It effectively purports to allow a broker and an insurer to contractually evade the protections afforded by the Act.

The respondents' submission that the alleged agreement relied upon by the appellant was a nullity must succeed.

It was argued on behalf of the appellant in the court a quo and in its heads of argument that the respondents should be barred from receiving the amount they sued for as IGI waived the right to receive the amount because of the alleged agreement, in terms of which the appellant was granted the

authority to pay such sum to insured persons on IGI's behalf.

The argument was wisely not persisted in by appellant's counsel in oral argument before this Court.

As stated earlier the statutory right conferred by s 20bis is not one that was enacted for the benefit of insurers only, it is also there to protect the rights of the insured and the public at large by regulating and limiting the manner in which a broker or agent may deal with money received in respect of premiums. This being the case it is not open to an insurer to waive such right as such a waiver would be contrary to the public interest. (cf Ritch and Bhyat Government (Minister of Justice) 1912 AD 719 at 734-5, S A Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (A) at 49G-I and Neugarten and Others v standard Bank of South Africa Ltd 1989 (1) SA 797 (A) at 809 B-D)

In terms of s 20bis(3) the appellant was obliged to pay the full amount of the premiums received to the respondents

subject however to the appellant's right in terms of s 20bis(4)

to set off any commission due to it in respect of such premiums. Failure to do so constituted a criminal offence. The appellant is therefore, in terms of the Act prohibited form setting off any debts, other than commission in respect of the premiums received. It follows that it is unnecessary to express any view as to whether the appellant has a claim against IGI for payment of the amount paid to policyholders in respect of cancelled policies.

UNJUST ENRICHMENT

The appellant contended that the respondents were not entitled to payment of the amount claimed in that to allow such claim would result in the unjust enrichment of IGI. Again it is unnecessary to decide whether the payment of the amount claimed by the respondents would result in an unjust enrichment of IGI. As I have already stated the appellant was, subject to the provisions of s 20BIS(4), obliged to pay the full amount of premiums received to the respondents.

IN PARI DELICTO POTIOR EST CONDITIO

DEFENDENTS

There is equally no room for applying the in the present matter. This is so on the simple basis that no facts have been pleaded which would entitle a court to conclude that the parties were indeed in equal guilt, the presence or absence of equal "delicto" being clearly a factual matter and a necessary ingredient for the invocation of the rule. For all the Court knows it may well be that both or even one of the parties to the illegal agreement relied upon by the appellant had no knowledge of the illegality. The Court cannot be expected to speculate. In any event, it would not be in the interests of public policy and simple justice to allow an illegal contract entered into between an insurer and a broker or agent to prejudice the interests of innocent third parties such as those policy-holders who did not receive the refund payments referred to by the appellant in its plea. (cf Jajbhay v Cassim 1939 AD 537 at 544.)

The appeal is dismissed with costs, such costs to include costs attendant upon the employment of two counsel by the respondent.

R.H. ZULMAN JA

MAHOMED CJ }
SMALBERGER JA }
VIVIER JA } CONCUR
ZULMAN JA }
STREICHER AJA }