

SOUTH AFRICA / JUDGMENT

Primier Milling Company (Pty) Ltd v Van Der Merwe and Others (126/1988) [1988] ZASCA 154; [1989] 4 All SA 396 (AD) (29 November 1988) [1988] ZASCA 154

COURT

Supreme Court of Appeal

BEFORE

Botha, Hefer, Grosskopf, Kumleben, Eksteen

CASE / FILE NUMBER

126/1988

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LL Case No 126/1988

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

PREMIER MILLING COMPANY

(PROPRIETARY) LIMITED Appellant

and

SCHALK WILLEM VAN DER MERWE JAMES MICHAEL CONNOLLY

TREVOR RICHARD FRANKLIN

ADAM HENDRY GUNN

DAVID JOHN RENNIE

(In their capacities as the joint liquidators of the Short Term Insurance Business (in liquidation)
of A A Mutual Insurance Association Limited First Respondent

PRICE FORBES FEDERALE VOLKSKAS

(PROPRIETARY) LIMITED Second Respondent

CORAM: BOTHA, HEFER, GROSSKOPF, KUMLEBEN

et EKSTEEN JJA

HEARD: 10 NOVEMBER 1988

DELIVERED: 29 NOVEMBER 1988

JUDGMENT BOTHA JA:-

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The litigation which is the subject of this appeal arose as a consequence of the winding-up, by order of court, of the short term insurance business of A A Mutual Insurance Association Limited, to which I shall refer as "A A Mutual". It is a registered insurer in terms of the Insurance Act 27 of 1943 ("the Act"). The order for the winding-up of its short term insurance business was made in the Transvaal Provincial Division pursuant to the provisions of sections 30 (3) (d) and 32 of the Act, provisionally on 4 June 1986 and finally on 24 June 1986. In terms of the final order five persons were appointed as liquidators. They are cited in their capacities as such, collectively, as the first respondent in this appeal. I shall refer to them as "the Liquidators".

The appellant is a company carrying on business as a miller. I shall refer to it as "Premier". The second respondent is a company³ carrying on business as an insurance broker. I shall refer to it as "Price Forbes". It was not represented at the hearing of the appeal; the Registrar of this Court was advised by letter that it would not be participating in the proceedings and that it would abide the decision of the Court.

Early in 1986 Premier wished to obtain appropriate insurance cover in connection with a flour milling complex that was being erected for it at Vereeniging. To this end Premier instructed Price Forbes to advise it and to act as its insurance broker in procuring such insurance cover. Price Forbes accepted and carried out these instructions. In the result it brought about the issuing of a contract works and public liability insurance policy in favour of Premier. The policy was issued jointly by two insurance companies on 4 March

¹⁹⁸⁶. The two companies were A A Mutual and Mutual and Federal⁴. Insurance Company Limited. They shared the risk under the policy, in the proportions of 65% and 35% respectively. In the preamble of the policy it is recited that an application had been made to the insurers on behalf of Premier and that Premier had agreed to pay the premium for the insurance specified in the policy. In the schedule of the policy the period of insurance is stated to be from 20 January 1986 to 30 November 1987, and the premium payable is recorded as being R206 000,00 plus stamp duty of R250,00. The policy was delivered by A A Mutual to Price Forbes and the latter in turn delivered it to Premier.

On 8 April 1986 Price Forbes rendered an invoice to Premier in respect of the premium and stamp duty payable in terms of the policy, in the sum of R206 250,00. Premier paid that amount to Price Forbes by means of a cheque drawn in favour of Price

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Forbes. The cheque was sent to Price Forbes undercover of a letter dated 9 May 1986. It was received by Price Forbes on 21 May 1986 and it was honoured on presentation for payment. A A Mutual's share of the premium was R133 900,00 plus the stamp duty of R250,00. Price Forbes had not yet paid over that money to A A Mutual by the time the latter's short term insurance business was placed in Liquidation, nor was the money paid to the Liquidators thereafter. During June 1986 Premier instructed Price Forbes not to pay over to the Liquidators any part of the money it had received from Premier. The Liquidators, on the other hand, demanded payment from Price Forbes of an amount of R107 370,00, being A A Mutual's share of the premium and stamp duty, less the amount of brokerage that had become due by A A Mutual to Price Forbes. Price Forbes notified Premier of the Liquidators' demand, whereupon Premier again instructed Price Forbes not to pay over any part of the money it had received from

6. Premier to the Liquidators. The Liquidators informed Price Forbes that they would claim interest on the amount of R107 370,00 if their demand for payment of that amount was not met by 31 October 1986. Price Forbes did not comply with the Liquidators' demand.

The Liquidators brought an application on notice of motion in the Witwatersrand Local Division against Price Forbes as first respondent and Premier as second respondent. The relief claimed was an order against Price Forbes for the payment by it to the Liquidators of the sum of R107 370,00 with interest thereon at the rate of 15% per annum from 1 November 1986 to date of payment. In a founding affidavit deposed to by one of the Liquidators the grounds upon which the Liquidators alleged that they were entitled to the relief claimed were set out, and it was stated that the application was in the nature of a test case and that the parties had agreed that none of them would seek an order for costs against any other party. Price Forbes did not oppose the application and abided the judgment of the Court. However, in view of the nature of the case and its importance affidavits were filed on behalf of Price Forbes in which the information at its disposal was set out regarding its business relationship and course of dealings with A A Mutual and Premier respectively. Premier opposed the application. Affidavits were filed on its behalf in which various grounds were put forward for its contention that Price Forbes was not entitled to make the payment claimed by the Liquidators, but was obliged to repay to Premier the amount that Premier had paid to it.

The application was heard by GOLDSTONE J.

He found in favour of the Liquidators and accordingly granted the order sought by them against Price Forbes. Premier applied for leave to appeal against the order⁸. granted. In his judgment granting leave to Premier to appeal to this Court, the learned Judge remarked that he had been informed by counsel that there were "some millions of rands" involved in other similar cases, some of which were pending in provinces other than the Transvaal. The costs of the application for leave to appeal were ordered to be costs in the appeal.

I shall deal first with the contents of the affidavits. Some of the undisputed facts emerging from them have already been mentioned above. In the view I take of the matter, the appeal can be decided on grounds that fall within a narrow compass and for a consideration of which a great

deal of the material appearing in the affidavits need not be canvassed. However, my approach to the case differs substantially from that adopted in the judgment of the Court a quo. It is convenient to say at once that I agree, with respect, with the order made by the Court a quo; but I have reached that conclusion along a route differing from that followed by the Court a quo. Ordinarily it would have sufficed for me to state my reasons for dismissing the appeal, but this appears to be a special case in view of the circumstances already mentioned, viz that it is regarded as a test case and that there are a number of other similar cases pending. That being so, I consider that I ought to deal with the reasoning of the learned Judge in the Court a quo and to explain why I prefer to adopt a different line of reasoning. To that end I am constrained to survey such allegations contained in the affidavits as are necessary for an understanding of the basis on which the case was decided in the Court a quo and of my own approach to the resolution of the dispute between the Liquidators and Premier.

In the Liquidators' founding affidavit it was alleged, inter alia:

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- (a) that A A Mutual had authorised Price Forbes to receive on behalf of A A Mutual premiums paid by insureds in respect of policies issued to them by A A Mutual;
- (b) that the practice which obtained between A A Mutual and Price Forbes in respect of short term insurance business was that Price Forbes paid to A A Mutual premiums received on behalf of A A Mutual in accordance with section 20 bis (2)
- (a) (iii) of the Act; Price Forbes had duly elected to remit payments to A A Mutual in terms of the said subparagraph (a) (iii) and had furnished security in favour of the Registrar of Insurance in terms of section 20 bis
- (3) (b) and (c) of the Act (the relevant provisions of section 20 bis will be quoted later in this judgment);
- (c) that the usual practice was for Price Forbes

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to make payment to A A Mutual of premiums relating to short term insurance business received on A A Mutual's behalf on the last day of the expiration of 60 days of the end of the month during which such premiums were received;

- (d) that on a proper construction of section 20 bis of the Act, Price Forbes having received the premium from Premier on behalf of the short term insurance business of A A Mutual, it was obliged to pay over to the Liquidators the amount of R107 370,00.

The first affidavit filed on behalf of Price Forbes was deposed to by Mr G J L Taylor, the administrative manager of Price Forbes. In it, he stated that Price Forbes was not a broker appointed by A A Mutual, but that it carried on business as an independent intermediary and that it held a formal

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appointment from Premier to act as Premier's insurance broker. With reference to the Liquidators' allegations mentioned in paragraphs

(a) to (d) above, the following appears from Taylor's first affidavit:

Ad (a) : Price Forbes, in Taylor's words,

"has, to the best of the knowledge and recollection of its existing management, never received any communication or instruction from the Insurer [A A Mutual] amounting to an authorisation in regard to the receipt of premiums on the latter's behalf."

Ad (b): This was admitted, coupled with a statement that Price Forbes believed that it had advised A A Mutual of the election made by it in terms of section 20 bis (3) (a) of the Act.

Ad (c): This was admitted (subject to a

13. minor qualification as to the manner of calculation of the 60 days period, which is of no moment in the context of the present case). Ad (d) : Price Forbes had received legal advice that, on a proper construction of section 20 bis , the premiums received and held by it in terms of that section were so received and held on behalf of A A Mutual and that Price Forbes was accordingly obliged to pay such moneys over to the Liquidators, but that, in relation to those cases (of which the present is one) in which it received direct instructions from clients not to effect
14. payment of such premiums to the Liquidators, it was possible that a court might hold a different view as to the interpretation of section 20 bis and would conclude that Price Forbes was obliged, in terms of its general mandate as agent for its clients, to abide by the instruction of such clients and not to pay moneys so held to the Liquidators.

Two supplementary affidavits were filed on behalf of Price Forbes. One was a second affidavit by Taylor and the other an affidavit made by Mr R S Wildman. The main object of these affidavits was to qualify Taylor's statement in his first affidavit which is mentioned in the paragraph marked "Ad (a)" above. Wildman was, until 1975, the financial director and secretary of a company which is referred to in the affidavits as "the predecessor company" of Price Forbes. No explanation is offered, however, as to the meaning of this expression or the legal relationship, if any, between the predecessor company and Price Forbes. Wildman says in his affidavit, with reference to certain correspondence between the predecessor company and A A Mutual, that there was an informal agreement between the predecessor company and A A Mutual that the former would remit premiums to the latter in terms of section 20 bis (2)

- (a) (iii) in accordance with the election made by the former under the section. Wildman expresses the view that "the effect of the agreement" as alleged was that the broking company (i.e. Price Forbes's predecessor company) and A A Mutual "regarded" the premiums, once received by the broker, as being held on behalf of A A Mutual and payable by the broker to A A Mutual in accordance with the time periods stipulated in the section

as amended from time to time. Relying on these statements Taylor, while reaffirming his own statement in his first affidavit, as mentioned under Ad (a) above, says in his second affidavit that Price Forbes

"did generally regard premiums received by it in response to invoices which it issued in regard to business placed with the Insurer [A A Mutual], as having been received and held on behalf of the Insurer."

The answering affidavit of Premier was deposed to by Mr C Wootton, its divisional technical director. The factual allegations made by him include the following: there was at no stage any direct communication or contact between Premier and A A Mutual or its co-insurer in regard to the placing or acceptance of the insurance; nothing was said (as between Premier and Price Forbes) of Price Forbes acting in a representative capacity on behalf of A A Mutual or its co-insurer, either in regard to the conclusion of the insurance contract or in regard to receipt by or payment to Price Forbes or the holding by Price Forbes of a premium under such contract, nor was anything said in regard to any authority of Price Forbes to act in any of these respects; nothing was said in regard to the basis on which Premier would pay the premium; when Premier received the invoice from Price Forbes relating to the premium payable in terms of the policy, Premier simply paid the amount reflected therein to Price Forbes, and such payment was not accompanied by or made on the basis of any communication between Premier and Price Forbes or A A Mutual or its co-insurer, other than Premier's letter under cover of which its cheque was sent to Price Forbes (the latter contains nothing of any relevance). These facts were not disputed. Wootton submitted in his affidavit that they justified the following inferences: Price Forbes was in fact not authorised to receive or hold any of the moneys paid to it by

18. Premier, on behalf of A A Mutual or its short term insurance business; Price Forbes never indicated or suggested that, in receiving or holding the moneys, it was acting on behalf of A A Mutual; there was no agreement nor intention on the part of Premier that Price Forbes would receive or hold the moneys paid to it, on behalf of A A Mutual, nor was the payment of the moneys made by Premier on such basis; Price Forbes received and held such moneys on behalf of Premier; and the premium paid by Premier was neither paid to nor received by Price Forbes on behalf of A A Mutual. Wootton contended further that, because of the liquidation of the short term insurance business of A A Mutual, it became unable to perform its obligations under the insurance contract, Premier was entitled to regard the contract as at an end, and the Liquidators were not entitled to payment of the premium; that (although it was common cause that the policy in

question constituted short term insurance in terms of

19. the Act) neither the provisions of section 20 bis of the Act, nor Price Forbes's election in general terms under the section, nor any alleged practice relating to the receipt by it of premiums on behalf of A A Mutual was of any relevance to the particular facts of this case; and that, in the final result, Price Forbes was not obliged nor entitled to make payment to the Liquidators of the amount claimed by them, but was in fact obliged to repay to Premier the amount received from it.

I turn now to the judgment of GOLDSTONE J. For ease of reference I summarize the salient parts of his judgment in numbered paragraphs, and to avoid confusion I substitute, in the quotations from his judgment below, the method of reference to the parties used in the present judgment, placed in square brackets, for the mode of reference used in the judgment a quo:

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- (1) In the opening part of his judgment the learned Judge said:

"The issue which has to be determined is whether [Price Forbes] was holding the money for [A A Mutual] or for [Premier]. The [Liquidators] and [Premier] both claim payment thereof."

- (2) The learned Judge tabulated the undisputed facts emerging from the affidavits, being the founding affidavit, Taylor's first affidavit and Wootton's affidavit, and thereafter, in some detail, he referred to, and quoted from, the supplementary affidavits filed on behalf of Price Forbes (i e Taylor's second affidavit and Wildman's affidavit).
- (3) In referring to the arguments of counsel, the learned Judge mentioned that it had been submitted on behalf of Premier that the money in question was not being held by Price

21 . Forbes "on behalf of" A A Mutual. The

learned Judge then said that it was clear law that in respect of the placing of insurance the insurance broker is the agent of the insured only, but that it was equally clear that in collecting the premium, the broker may be the agent of the insurer.

- (4) The judgment proceeds as follows:

"The question in the present case really comes down to whether [Price Forbes] was authorised to receive and hold the premium on behalf of [A A Mutual]. It appears from the affidavits filed on behalf of [Price Forbes] that there was no express authorisation by [A A Mutual] to [Price Forbes] in relation to the collection of the premium. Was there an implied authorisation? In my judgment that question must be answered in the affirmative."

- (5) The reasoning of the learned Judge, given in support of the last-mentioned finding, rested

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mainly on the contents of the supplementary affidavits filed on behalf of Price Forbes. In brief, it was held that both Price Forbes and A A Mutual had made a common assumption that the premiums received by Price Forbes were held by it on behalf of A A Mutual, and that there was an implied authorisation of Price Forbes by A A Mutual to collect premiums due to A A Mutual from clients of Price Forbes and to hold those premiums in accordance with, and subject to, the provisions of section 20 bis of the Act.

(6) The learned Judge said further:

"There was nothing inconsistent with [Price Forbes] having been appointed as its broker by [Premier] for the purpose of placing the insurance and its appointment by [A A Mutual] to receive the premium and hold it on its behalf as aforesaid. On the facts which emerge from the

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affidavits that is what occurred in the present case."

(7) The learned Judge concluded his judgment as

follows:

"I would emphasise that all the parties accept the correctness of the facts contained in the affidavits and there was no question of the application being referred to evidence."

To appreciate the effect of the judgment of the Court a quo, it is necessary to examine two aspects of it: first, the meaning of the expression "on behalf of" as used by the learned Judge, particularly in the passages quoted in paragraphs (4) and (6) above; secondly, the learned Judge's formulation of the issue to be determined, as quoted in paragraph (1) above.

It is well known that the expression "on behalf of" can bear different meanings: see *De Visser v Fitzpatrick* 1907 TS 355 at 363; *Lind v Spicer Bros* 24 (Afrlca) Ltd 1917 AD 147 at 151; *S A Warehousing Services (Pty) Ltd and Others v South British Insurance Co Ltd* 1971 (3) S A 10 (A) at 20 A-G; *S v Moloi and Another* 1987 (1) S A 196 (A) at 214J-215D; and *S v Melk* 1988 (4) S A 561 (A) at 574 B-D. It can mean

"as agent of", in the sense of representation in the legal connotation (the narrow meaning); or it can mean "for the benefit of", "to the advantage of", or "in the interest of" (the wide meaning). It is clear, in my opinion, that GOLDSTONE J in his judgment used the expression in its narrow meaning. There are several indications pointing to that conclusion. In the passage referred to in paragraph

(3) above the learned Judge adverted to the position of an insurance broker, in respect of the placing of insurance, as "the agent" of the insured. The word "agent" need not necessarily mean "representative" in the legal sense, of course (it may designate a mere mandatary without the capacity of representation), but in the context of

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the learned Judge's discussion there can be no doubt that he did use it in that sense. When he next referred to the possibility of the broker, in respect of the collection of the premium, being "the agent" of the insurer, he was obviously using the word in the same sense. Having made these observations, it follows that when the learned Judge thereafter used the expression "on behalf of", he did so in a corresponding sense. This is borne out by the learned Judge's treatment of the question of authorisation in the passage quoted in paragraph (4) above: that question is a familiar one in relation to the concept of the capacity of one person to represent another as the latter's agent, but it would be unusual to pose it with reference to one person merely acting for the benefit or to the advantage of another, without being clothed with the capacity of representation. Similar considerations apply to the learned Judge's reference, quoted in paragraph (6) above, to "the appointment" of

26. Price Forbes by A A Mutual to receive and hold the premium on the latter's behalf, particularly in view of the juxtaposition of that reference and the immediately preceding reference to the appointment by Premier of Price Forbes as its broker for the purpose of placing the insurance.

In the formulation of the issue to be determined, as quoted in paragraph (1) above, it seems to me to be implicit that GOLDSTONE J approached the matter on the footing that the Liquidators and Premier had competing claims, which were mutually exclusive, for payment by Price Forbes of the amount in question, on the supposition that if the Liquidators' claim were upheld, Premier would have no right of action of any kind against Price Forbes in respect of that money. This approach is in conformity with the learned Judge's

subsequent finding that Price Forbes had received the money on behalf of A A Mutual, in the narrow sense (i.e. as agent *stricto sensu*), for on that basis Premier's payment to Price Forbes was in law equivalent to payment to A A Mutual, operating as a discharge of Premier's obligation to A A Mutual; and presumably the learned Judge had in mind, as further consequences implicit in that finding, that Premier's instructions to Price Forbes not to pay over any of the money to the Liquidators were ineffective, and that, if Premier had any remedy following upon the liquidation of A A Mutual's short term insurance business, it would be compelled to enforce it against the Liquidators.

The effect of the judgment of the Court *a quo* was, therefore, to pronounce not only on the rights and obligations as between the Liquidators and Price Forbes, but also on the rights and obligations as between Premier and Price Forbes.

In my view it is not necessary to express any opinion on the Court *a quo*'s finding that Price Forbes

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had been authorised by A A Mutual to receive and to hold the premium as the agent, *stricto sensu*, of A A Mutual, or on its further finding, implicit in the first, that Premier had no right of action against Price Forbes following upon the former's instructions to the latter not to pay over any of the money to A A Mutual. I prefer not to express any opinion on these matters, for the reasons following.

In the view I take of the case, a decision on the Liquidators' claim against Price Forbes can be based simply on the determination of the meaning and effect of section 20 bis of the Act and its application to certain facts emerging from the affidavits, which are clear and indisputable. By contrast, it seems to me that the findings of the Court *quo rest* on a basis involving some areas of uncertainty. The finding that Price

29. Forbes was acting as the authorised agent of A A Mutual was based, as I have indicated, mainly on the contents of the second affidavit of Taylor and the affidavit of Wildman. The source of the allegations made by them is an alleged agreement between A A Mutual and a predecessor company of Price Forbes. As I have mentioned, the relationship between the predecessor company and Price Forbes is not explained, and it is accordingly not clear how the alleged agreement is relevant to an assessment of the legal relationship between A A Mutual and Price Forbes. Moreover, the pertinent allegations in these affidavits appear to be no more than the deponents' own subjective views of the effect of the agreement, on the one hand, and, on the other hand, of the practice followed between A A Mutual and Price Forbes regarding the receipt and payment of premiums. Nor do the deponents explain what they mean by their statements that the premiums received by the predecessor company and by Price Forbes were regarded as being received and held "on behalf of" A A Mutual. When a witness uses that expression it seems to me to be unsafe to assume, without further enquiry, that he has in mind the concept of agency in the legal sense. Yet these statements form the foundation of the Court's finding of agency. With respect, I consider the grounds for the finding to be somewhat tenuous. In so far as the position of A A Mutual is concerned, the existence of a true agency relationship between itself and Price Forbes regarding the receipt of premiums would have entailed that if Price Forbes went insolvent and the amount of premiums received by it was lost, despite the protective measures of section 20 bis, A A Mutual would suffer the loss, since it would have had no recourse against the insured who had paid Price Forbes. I am not confident that that was indeed the way in which A A Mutual "regarded" the relationship between itself and Price Forbes.

31. When the learned Judge said (paragraph (7) above) that all the parties accepted the correctness of the facts in the affidavits, he must have been referring to what may be termed the primary facts. He could not have been referring to allegations of "facts" consisting of the various deponents' conclusions and inferences drawn from the primary facts. It will be remembered that Wootton in his affidavit on behalf of Premier denied that Price Forbes had received and held the premium on behalf of A A Mutual, and contended that it had done so on behalf of Premier. The stance taken by Premier was clearly that Price Forbes was not acting as an agent representing A A Mutual, but merely as the mandatary of Premier for the purpose of effecting payment over of the

premium to A A Mutual. . The effect of the judgment of the Court a quo was to reject Premier's contentions. In my view, however, the Court a quo was not called upon to pronounce on the legal relationship between Premier and

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Price Forbes. It was not necessary to do so in order to decide the validity of the Liquidators' claim against Price Forbes, as will appear presently. The Court a quo was concerned only with the Liquidators' claim against Price Forbes. (It may be noted in passing that the papers are silent about the fate of that part of the premium which was due to A A Mutual's co-insurer.) In this Court counsel for Premier submitted that a decision regarding the legal relationship between Premier and Price Forbes had been contemplated as being part and parcel of the test case. But what the parties expected cannot justify this Court indulging in what would amount to no more than the expression of an opinion which would be an obiter dictum. If the Liquidators' claim against Price Forbes is upheld, it may or may not be that Premier would still be able to enforce some remedy against Price Forbes. I refrain from concerning myself with that question.

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I turn now to the basis upon which I consider the appeal should be decided.

Section 20 bis was introduced into the Act by section 17 of Act 10 of 1965. It was subsequently amended on a number of occasions, the last of which was by section 3 of Act 50 of 1986. It will be convenient to refer to the section in the form in which it was prior to the amendments effected by the last-mentioned Act. I quote only those parts of its provisions which I consider to be relevant for the purposes of this case:

"20 bis. (1) No registered insurer shall, except as provided in subsections (2) and (3), 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 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 who receives such premiums on

34. behalf of such insurer shall -

(i) within fourteen days of receipt thereof, transmit the amount thereof to such insurer; or

(ii) forthwith deposit the amount thereof in a separate trust

account, and within

sixty days, of the end of the month during which such premiums were received by such agent, broker or person, transmit to such insurer all moneys so deposited

(iii) pay the amount thereof to

such insurer within

sixty days, of the end of the month during which such premiums were received by such agent, broker or person

(b)

(3) (a) Every such agent, broker or person shall forthwith upon becoming indebted to any insurer, elect to remit in terms of either subparagraph (i) or subparagraph (ii) or subparagraph (iii) of paragraph

(a) of subsection (2), and in writing advise such insurer of the election made by him

(b) Any such agent, broker or person who intends to remit in terms

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of subparagraph (iii) of subsection (2) (a) shall furnish security for any amount which may become payable by him to insurers in terms of that subparagraph, and such security shall be in the form of a banker's guarantee

(c) Such guarantee shall be in favour of the registrar and in a form prescribed by regulation for the benefit of all such Insurers "

(The amendments brought about by section 3 of Act 50 of

1986 related, inter alia , to the termination of the right to elect to remit in terms of subparagraph (i) of subsection (2) (a) and to the shortening of the period of 60 days mentioned in subparagraphs (ii) and (iii) of subsection (2) (a), but since the amendments were so worded as to become effective only as from 1 January 1987 they can be left out of consideration.)

The expression "on behalf of" occurs in both subsection (1) and the introductory part of subsection (2) (a). I referred earlier to the cases dealing with the different meanings that expression can bear. The 36. Afrikaans text has, for "on behalf of", the expression "ten behoewe van". Applying the reasoning in *Moloi's case* supra at 215 F and 215J-216A, and in *Melk's case* supra at 574 E-H, "ten behoewe van" is incapable of bearing any meaning other than "for the benefit of", or "to the advantage of", or "in the interest of", which is the wide meaning of "on behalf of"; in order to effect a reconciliation between the English and Afrikaans texts it is consequently necessary to interpret "on behalf of" in the English text as bearing its wide meaning. It follows, then, that in the case of a broker who receives a premium from a client which is due by the latter to an insurer, the provisions of the section can be applicable even though the broker in receiving the premium is not acting as the agent, in the legal sense, of the insurer. Of course, the wide meaning embraces the narrow one, for an agent in the legal sense acting "on behalf of" his principal is of necessity acting "for the benefit", "to the advantage",³⁷ or "in the interest" of his principal (c f *Moloi's case* supra at 215 H).

For the purposes of the present case it is

not necessary to consider precisely how far the widemeaning of "on behalf of" in section 20 bis (1) and

(2) (a) extends. One senses that in certain circumstances some limitation of its ambit will be required, particularly in view of the reference to "an agent, broker or other person". The words emphasized may include an agent of the insured (not the insurer), or a friend or a messenger of the insured, to whom the latter hands over the premium for transmission to the insurer. Although it might perhaps be said that such a person received the premium "for the benefit of" the insurer, in the widest sense, the Legislature could hardly have intended the section to be applicable in such a case. However, it is not necessary to pursue this line of enquiry, for in the present case no

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difficulties can arise on this score.

Here, the decisive facts are the following. Price Forbes had been appointed by Premier to act as its broker in obtaining insurance. Price Forbes had obtained the required insurance from A A Mutual and its co-insurer, and the policy had been delivered to Premier. Premier then paid the amount of the premium to Price Forbes. It was a necessary concomitant of that payment that Price Forbes would effect the payment over to A A Mutual of its share of the premium. Accordingly Premier paid the amount of the premium to Price Forbes with the object of bringing about the discharge of its obligation to A A Mutual. The amount received by Price Forbes from Premier constituted "moneys in respect of premiums received", in terms of subsection (1) of section 20 bis. Price Forbes had, to the knowledge of A A Mutual, elected in terms of subsection (3) (a) to remit such moneys to A A Mutual

39. in accordance with subparagraph (iii) of subsection (2) (a) and had furnished security as required by subsections (3) (b) and (c). In these circumstances there can be no doubt but that, as an objective fact, and irrespective of the parties' subjective state of mind, Price Forbes received the premium for the benefit and to the advantage of A A Mutual, and thus on behalf of A A Mutual, within the meaning of section 20 bis (1) and (2) (a).

On these facts alone, the provisions of section 20 bis 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 A A Mutual when it received the premium from Premier. If it did, it is immaterial whether or not Premier was aware of the fact.⁴⁰ On becoming operative, the provisions of section 20 bis placed a statutory obligation on Price Forbes to pay to A A Mutual its share of the premium, and conferred a corresponding right on A A 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 section 20 bis 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.

For these reasons the order made by the Court a quo was correct and the appeal must fail.

With regard to the costs of the appeal, we were informed by counsel that there was a dispute between Premier and the Liquidators as to whether the⁴¹ agreement that neither party would seek an order for costs against the other, which applied to the proceedings in the Court a quo, applied also to the present proceedings on appeal. Premier contends that it did and the Liquidators maintain that it did not.

Since this Court is unable to resolve the dispute, I consider that it should make the order for costs that it would ordinarily have made on the basis that the costs follow the result. Counsel were agreed that if that course were to be followed, the right should be reserved for Premier to institute such proceedings as it may be advised to, in order to enforce the alleged agreement, by claiming repayment of the costs it will be obliged to pay in terms of the order of this Court.

In the result, the order of the Court is as follows:

- (1) The appeal is dismissed with costs.
- (2) The right is reserved for the appellant

42.

to institute legal proceedings for the repayment of the costs it will be obliged to pay in terms of the order in paragraph (1) above.

A.S. BOTHA JA

HEFER JA

GROSSKOPF JA
CONCUR KUMLEBEN JA

EKSTEEN JA

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZASCA/1988/154.html>

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Prepared on 11 October 2026 · Esheria