IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.2188/96

In the matter between:

SVMS (PTY) LTD	PLAINTIFF
VS	
SWD ROYAL INSURANCE CORPORATION	DEFENDANT
CORAM	: MATSEBULA J
FOR THE PLAINTIFF	: MR. CADES
FOR THE DEFENDANT	: MR CURRIE

JUDGMENT

By summons issued on the 4th December 1996, Plaintiff sued Defendant for the following relief:

(a) Payment of the sum of El 11,129.00;
(b) Interest on the aforesaid sum tempore morae at the rate of 24% per annum;
(c) Cost of suit.

The Plaintiff's cause of action is based on the contents of a written agreement entered into by and between the parties on the 23rd November 1995 in terms of which the Defendant through its agent BBS Insurance Brokers (Pty) Ltd insured the Plaintiff's motor vehicle a Toyota Hi-ace Super 16 registration number SD343CG. A copy of the certificate of insurance was annexed to the summons as annexure "A."

On the 30th March 1996 the insured motor vehicle was stolen. Plaintiff reported this incident to the agents, After a considerable delay of plus minus seven weeks, the Plaintiff went to enquire at the offices of the Defendant and spoke to the Claims

Manager, one Mr. Nhlabatsi who informed Plaintiff that the motor vehicle did not appear in their files. Plaintiff had seen an entry in the books of the Defendant with an entry no. 211 on the occasion that he visited Mr. Nhlabatsi in his office. Plaintiff then wrote a letter, exhibit "1" to the General Manager and drew his attention to what transpired when he met Mr, Nhlabatsi. The letter is exhibit "1". It is self-explanatory.

According to some endorsement on exhibit "1" it was referred to Mr. Nhlabatsi and subsequently responded to on the 12th June 1996 by the Assistant General Manager, Mr. Magagula per exhibit "2". On 17th July 1996, Plaintiff's attorneys sent a letter of demand to Defendant. The Defendant responded to the letter of demand on the 13th August 1996 per exhibit "4". The contents of some of these letters will be dealt with later when dealing with the pleadings and the evidence given at the hearing; so too other documents handed in.

On the 10th October 1996, Defendant's attorneys entered a notice of intention to oppose an application for summary judgement which had been filed by the Plaintiff but the parties ultimately consented that the matter follow a normal course. I will refer to the affidavit of Mr. Magagula deposed to in opposition to the summary judgement application later.

On the 4th August 1998, there was in my file the book of pleadings prepared by the Plaintiff's attorney. There were so many documents not filed in the book of pleadings e. g. request of further particulars by the Defendant, furnishing of further particulars by the Plaintiff, notice to make discovery by the Plaintiff and Defendant respectively filing of discovery affidavits by the Plaintiff and Defendant respectively and Plaintiff's replication, notice of taxation and taxation.

The file was in such disarray that Mr. Cades at the end of the day on the 4th August 1998 had to move an application for leave to file replication. Mr. Currie viciously opposed the application for the defendant. Mr, Currie submitted that Plaintiff had been ipso facto barred in terms of Rule 25 to file any replication. Both counsel agreed however, that the court should as far as possible not be bound by the rules where justice dictates that it should grant the application in the interest of equity.

1 applied my mind on the application and decided that it was in the interest of justice to grant leave to Plaintiff to file the replication. It is clear from the attitude of both counsel that neither of them were aware that infact a replication dealing with the doctrine of estoppel had infact been filed bearing the date stamp of the Registrar of the 4th August 1998.

Turning to the evidence led at the trial. It is common cause that BBS were the insurance brokers for the Defendant and the Manager of BBS, Mr. Kunene had issued a certificate of insurance annexure "A." The same Mr. Kunene had insured another motor vehicle belonging to the Plaintiff on some previous occasion in a similar manner and had insured a certificate similar to annexure "A." It is also common cause that Plaintiff had proceeded to his financiers armed with annexure "A" and the financiers were satisfied with the contents of annexure "A" and the motor vehicle had infact been insured.

Plaintiff went and claimed delivery for the motor vehicle from Leites Motors. Arrangement was made with the insurance brokers for the payment of part of the premium that was E4, 500.00 and the balance payable over a period of four months. It is also common cause that the value of the motor vehicle was El 11 129.00, an amount that is being claimed by the Plaintiff.

The Defendant's defence can be gleaned from a reply to a letter of demand sent by the Plaintiff's attorneys on the 17th July 1996 and the reply by Defendant's Assistant General Manager by letters dated the 12th June 1996. In the reply, Mr. Magagula states that the Defendant had not received the premiums for Plaintiff's insurance and that consequently Plaintiff had no insurance cover. Mr. Magagula also gave evidence in Court. He admitted, however having written a letter dated 12th June 1996. In that letter, Mr. Magagula says nothing about termination or withdrawal of BBS agency and the authority by Defendant. In fact, Mr. Magagula admitted that because of the insurance certificate by BBS, Defendant was bound (See page 80 of the transcribed record) and I read the question that was put to Mr. Magagula;

"QUESTION: So you did not tell anybody about this withdrawal of the authority apart from BBS? Did you tell the world that BBS no longer had the authority? That BBS has now limited authority, that you (Defendant) has now limited its authority? Did you tell anybody? Did you print it on the forms?"

And the answer by Mr. Magagula was:

"MAGAGULA: As much as we didn't tell the world when we gave them the authority, we wrote to BBS to informing them that the authority had been withdrawn.

QUESTION: You told the world because when BBS issued a certificate of insurance, it bound you and the world knew you were bound.

MAGAGULA: Yes we were bound." End of quote.

Mr. Greeney who also testified that he was General Manager as way back as 1995/96. It was his evidence that the very first week he took over as Manager, the first matter he dealt with was BBS Insurance Brokers. According to him they would collect premiums and not pass them over to them, (See page 23 of the transcribed record).

It would be recalled that the Manager or Managing Director of the Plaintiff, Mr. Baartjies had in the course of 1995 when Mr. Greeney was the General Manager for the Defendant insured two motor vehicles simultaneously. The one which was the subject of this present claim and another which is not subject to the present claim. The other motor vehicle's entry was no.322 and the one that is subject matter of this claim; its entry was 211. These entry numbers were seen by Mr. Baartjies on the occasion that he visited Mr. Nhlabatsi at the offices of the Defendant. (See page 14 of the typed record)

Internally, between the Defendant and BBS, some correspondence exchanged. One dated the 17th March 1995 and the other dated the 23rd May 1995 respectively. That would be exhibits "6" and "8" as handed in at the hearing. The one dealt with termination of the agency and the other dealt with the provisional reinstatement of the agency. The one dealing with the termination of the agency, exhibit "6", I read paragraph 2 thereof:

"Section 8 of the Control of Insurance Brokers and Agency Regulation regulates the receipts and remission of payments. On numerous occasions you have been in breach of this Section, in particular sub-Section 4 and 5 notwithstanding several warnings." End of paragraph 2.
As I have indicated, exhibit "6" does not in any way refer to the withdrawal of the authority by the Defendant.

The letter dated 23rd May 1995 deals with the provisional re-instatement of agency. It reads as follows and I quote:

"Following the termination of your agency on the 7th March 1995, we indicated that we would have to reconsider rescinding the termination of your agency subject to your complying with the following conditions:

(a) you remit to the Corporation all prevalence in respect of business in which the Corporation was on risk as of the 7th March 1995;
(b) you furnish the Corporation with your audited accounts for the eleven months ending on 28th February 1995; you furnish the Corporation with your cash-flow projections for the period commencing 1st April 1995 (The letter continues) - you have now complied with these three conditions.
(c) We further indicated that should the Corporation rescind the termination of your agency further conditions would be imposed as follows:-

1. All premiums you collect must be paid in full into the trust account;
2. The only withdrawals that could be made in this trust account would be premium remittances to the Corporation;
3. That you submit to the Corporation every Friday afternoon proposals together with the full premiums you had collected during the week;
4. On clearance of the cheque by your bankers, the Corporation will then pay your brokerage;
5. The above conditions will be reviewed in December 1995." End of quote.

Of interest to note here is that Mr. Greeney did not give any evidence on what the position was in regard to this but it could seem that the agency of BBS was being reinstated.

On August 8th, 1996 the Defendant wrote to BBS and informed it that the binding authority was withdrawn with immediate effect. This withdrawal of binding authority was conditional. (See exhibit "9" paragraphs 1 & 2 of that letter). Exhibit "9" is handed in by authority and I quote:

"You are hereby notified that your binding authority has been withdrawn with immediate effect. You are further notified that no liability will be undertaken in respect of new business until the proposal has been accepted by the Corporation. The acceptance of a proposal will be based on the following conditions:

1) As regards property insurance, the property is to be inspected by the Corporation's own personnel, this will apply to the following class of business: all risks, burglary, commercial all risks, glass, householders, houseowners, office premises, goods in transit, combined fire.

2) All motor vehicles proposed for insurance are to be inspected by the Corporation's own personnel. Such vehicles are to be brought to the Corporation's premises for inspection.

Exhibit "9(2)" falls short of indicating whether or not BBS Insurance Brokers complied with this,

because exhibit "9" seems to me to be conditional.

Considering that the Plaintiff had insured two motor vehicles almost simultaneously and according to Plaintiff's Managing Director both these motor vehicles were given entry numbers by Defendant. One being 211 and the other being 322. Defendant, in my view, should be stopped from denying that BBS Insurance Brokers be estopped advancing the defence that BBS Insurance Brokers had the authority withdrawn by the Defendant. Having dealt with exhibit "6, 8, 9" whose contents are so ambiguous that even BBS Insurance Brokers can argue convincingly that their binding authority was never withdrawn.

I now turn to deal with Section 8 (3) of the COMMERCE AND TRADE that is the Kings - Order - in - Council No.33/1973 and I will refer to sub-section 3 that provides as follows:

"Any insurance agent or insurance broker accepting premiums for any type of insurance, business shall remain responsible for the security of such premiums whilst they are in his possession, and in the event of a failure by him to pay such premiums to his principal on due date, he shall be liable to the person who has paid the premium to him for any damages whatsoever suffered by such person as a result of such failure." End of subsection 3.

In my judgement, this sub-Section is directed to the insurance agent or insurance broker and not the third parties. This is only logical, third parties cannot know if the insurance agent or broker does not pay the premiums or has paid the premiums to its principal. It is only the insurance broker and the principal who will be privy to know whether payment or not were made.

I have been referred to MANN VS SIDNEY HUNT MOTORS (PTY) LTD 1958(2) SA103 GW which sets out the functions of estoppel (See also ARIES ENTERPRISES FINANCE (PTY) LTD VS PROTEA ASSURANCE COMPANY LIMITED 1981(3) SA274A @291).

The position is as follows dealing with estoppel for representation. The operation of estoppel operates as follows:

"Its sole office is either to place an obstacle in the way of a case which might otherwise succeed, or to remove an impediment out of the way of a case which might otherwise fail. It has no other function. Emphatically, it is not a cause of action itself, nor does it create one, though the application of this, as of any other rule of evidence in the course of litigation, may result in a total or partial establishment, or disestablishment, of the case made by one or other of the parties. To use the language of naval warfare, estoppel must always be either a minelayer or a minesweeper: it can never be a capital unit." End of quote.

One would wish to add here that in respect to Plaintiff estoppel is not a cause of action.

The Plaintiff can therefore not rely on it in his claim nor can a Defendant rely thereon in his counter claim. (See in this respect ROSEN VS BARCLAYS NATIONAL BANK LTD 1984(3) SA974W @953.)

"If Plaintiff wishes to rely on the estoppel it must be pleaded in the replication in reply for the Defendant's plea where reliance is placed upon the true facts." End of quote.

I have referred to, earlier on in my judgment that I allowed the Plaintiff to file the replication and that is in that replication that the estoppel is pleaded. This is ratio decidendi in the case of MANN VS SIDNEY HUNT MOTOR VEHICLE (PTY) LTD 1958(2) SA102G.

In the result, I am of the view and this is my considered view that in the circumstances, judgment should be granted in Plaintiff's favour in terms of prayer (a) payment for the sum of E111 129 00, (b) interest on the foresaid sum a tempore morae not at the rate of 24% but at 9% which is the amount that is allowable and then cost of suit.

J. M. MATSEBULA

JUDGE