IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 12262/07

In the matter between:

FOSCHINI RETAIL GROUP (PTY) LIMITED Plaintiff

and

CELLULAR INSURANCE MANAGERS (PTY) LTD Defendant

JUDGMENT DELIVERED: 11 MAY 2010

FOURIE, J:

INTRODUCTION

[1] Plaintiff is involved in the retail trade by selling diverse brands of merchandise to the general public. This includes the sale of cell phones to customers who visit its Foschini stores.

[2] Defendant is active in the cell phone insurance business, *inter alia*, by marketing cell phone insurance policies to distribution channels, including retail stores.

[3] It is common cause that during November 2001, the parties, through their authorised representatives, concluded an oral contract ("the oral contract") in terms of which plaintiff undertook to market all risks insurance policies to its customers who purchased cell phones at Foschini stores. In terms of the insurance policies, which were to be concluded between the insurance company underwriting the risk and the customer purchasing the cell phone, the customer would be indemnified against the loss or damage of the cell phone. Defendant would act as the administrator (also referred to as the broker) of the insurance scheme.

[4] The written policies of insurance make provision for the payment of a monthly premium by the insured customer, which premium is deducted by defendant from the customer's bank account by monthly debit order. Each policy stipulates the amount of the monthly premium payable, depending on the indemnity limit chosen by the customer. This monthly premium is made up of a "nett premium" and an "admin fee". It appears that the nett premium is utilised for the payment of claims, costs, the fees of defendant, the insurer and re-insurer, as well as the provision

of a statutory reserve. The administration fee, which the customer pays as part of the total monthly premium, is collected by defendant for distribution to plaintiff. The purpose of the payment of the administration fee, is to compensate plaintiff for the marketing of the policies and providing certain services in connection therewith to its customers.

[5] In its particulars of claim, plaintiff alleges that in terms of the oral contract, the following terms were expressly agreed upon. The existence of these terms are either common cause or not seriously disputed by defendant:

(a) In respect of each customer who purchased an insurance policy, plaintiff's staff would:

(i) assist the customer to complete the application form for insurance;

(ii) send the various completed forms to defendant, including insurance schedules, claim forms, replacement forms and cancellation forms;

(iii) assist the customer in relation to any queries or claims which he or she may have in terms of the policy;

(iv) undertake the necessary head office claims verification and reconciliation functions; and

(v) manage the cell phone replacement procedure and collection of the applicable excess at the time of claim.

(b) The insurance policy would remain in force while the insured customer continued paying the premiums.

(c) In respect of each policy purchased by a customer, defendant was obliged to pay to plaintiff an agreed administration fee of R5,00 (which was subsequently increased to R7,00, thereafter to R8, 50 and finally to R10,00) upon receipt of each and every premium paid by the customer to defendant.

(d) Defendant would account to plaintiff monthly in respect of all premiums received by it that month in terms of all policies which had been sold by plaintiff and pay the total amount due as administration fees, to plaintiff.

[6] It is common cause that from approximately November 2001 to April 2007, customers of plaintiff purchased cell phone insurance policies as a result of plaintiff marketing the defendant’s insurance scheme to such customers. It is further common cause that defendant accounted to plaintiff monthly until 25 April 2007 in respect of all premiums received by it under these policies, and paid the administration fees due to plaintiff

in terms of such policies. However, as from May 2007 to December 2009 (the period covered by plaintiff's claim), defendant failed to account to plaintiff or to pay any administration fees to plaintiff. It is common cause that during this period the administration fee amounted to R10,00 per premium paid.

THE CONTRACTUAL CLAIM

[7] Plaintiff's contractual claim for the payment of administration fees for the aforesaid period, together with interest thereon, is based squarely on the express terms of the oral contract. Plaintiff does not rely on any tacit or implied terms. In particular, plaintiff relies on the express term that, in respect of each policy purchased by its customers, defendant is obliged to pay plaintiff the agreed administration fee, upon receipt of each and every premium paid by the customer to defendant.

[8] In response thereto defendant pleaded as follows:

"The defendant alleges that it was a material, express, alternatively implied, further alternatively tacit, term of the oral agreement concluded between the defendant and the plaintiff, that the defendant was obliged to pay the plaintiff an amount upon receipt of each and every premium paid by the customer to the defendant, only for so long as the oral agreement between the parties remained in force". (my emphasis)

[9] It is common cause that on 20 December 2006, plaintiff advised defendant in writing that in March or April 2007, it would discontinue marketing and promoting defendant's insurance scheme. It is further common cause that, with effect from 2 April 2007, plaintiff no longer invited its customers to purchase the insurance policies promoted by defendant. In view thereof, defendant has pleaded that the oral contract terminated with effect from April 2007. Its formulation is that the oral contract was cancelled by plaintiff, alternatively that it was repudiated by plaintiff, which repudiation was accepted by defendant. Defendant therefore pleads that, in view of the termination of the oral contract, it is not obliged to pay any administration fees to plaintiff for the period May 2007 to December 2009, or thereafter.

[10] Defendant's counsel, relying on the principles enunciated in **Kriegler v Minitzer and Another** 1949 (4) SA 821 (A) at 828, submitted, correctly in my view, that plaintiff bears the onus of proving that the oral contract did not contain the term contended for by defendant, i.e. that defendant was obliged to pay plaintiff the administration fee upon receipt of each and every premium paid by the Foschini customers to defendant, only for so long as the oral contract remained in force. As indicated in paragraph 7 above, plaintiff contends that it was an express term of the oral contract that defendant is obliged to pay the

administration fee to plaintiff for the duration of each respective policy which had been sold to a Foschini customer. This obligation, plaintiff maintains, is not extinguished by the termination of the oral contract.

[11] At this stage I should mention that in cross-examination, defendant's witness, Mr. De Klerk, conceded that, notwithstanding what has been pleaded, plaintiff did lawfully terminate the oral contract on reasonable notice as it was entitled to do. It follows that, in terms of the evidence of De Klerk, there was no cancellation or repudiation of the oral contract by plaintiff. However, this does not, in my opinion, preclude defendant from relying on its defence as pleaded, namely that defendant's obligation to pay administration fees to plaintiff would endure only for so long as the oral contract remained in force. On defendant's version, as appears from the evidence of De Klerk, the oral contract was terminated, albeit on reasonable notice by plaintiff and not by virtue of a cancellation or repudiation by plaintiff.

[12] It is necessary, firstly, to determine what the express terms of the oral contract were. In particular, it is necessary to decide whether it was an express term of the oral contract that defendant was obliged to pay the agreed administration fees to plaintiff in respect of insurance policies

purchased by Foschini customers, only for so long as the oral contract remained in force.

[13] The evidence of all the main role players (Messrs. Fullalove and Lequito on behalf of plaintiff and Mr. De Klerk on behalf of defendant) shows that there was no express discussion or agreement as to what would happen in the event of the termination of the oral contract. In particular, their evidence shows that it was not expressly agreed that defendant was obliged to pay the agreed administration fees to plaintiff in respect of insurance policies purchased by Foschini customers, only for so long as the oral contract remained in force. There is also no other evidence which shows that, at the time of the conclusion of the oral contract, the parties expressly agreed upon a term of this nature.

[14] If one has regard to the pleadings, in particular paragraphs 4.5 and 5 of the particulars of claim, read with paragraphs 9.1 and 11 of the plea, it is common cause that the oral contract contained an express provision that in respect of each policy purchased by a Foschini customer, defendant was obliged to pay to plaintiff an agreed administration fee of R5,00 (which was subsequently increased to R7,00, then to R8,50 and finally to R10,00), upon receipt of each and every premium paid by the customer to defendant.

[15] In view of the aforesaid, I find that the parties had expressly agreed that the administration fees were to be paid to plaintiff upon receipt by defendant of each and every premium collected, i.e. for the duration of each respective policy which had been sold to a Foschini customer. Put differently, it is clear to me that no limitation as to time was agreed upon by the parties and that, in terms of the oral contract, the administration fees remained payable for the duration of each insurance policy sold to a Foschini customer.

[16] This conclusion is underscored by the contents of the following contemporaneous documents:

(a) In defendant's written presentation of the terms of the intended cell phone insurance scheme, it was stated that the administration fee is *"an amount per month per policy payable in respect of policy documentation costs, premium collection costs, marketing costs, claim administration costs and incentives"*. No time limitation was placed upon the payment of administration fees, nor was it suggested that payment thereof would cease upon the termination of the contractual arrangement between the parties.

(b) In an e-mail sent by De Klerk to Fullalove on 4 July 2001, De Klerk recorded that the administration fee which plaintiff required *"will be R5,00 per subscriber per month."* Once again, no limitation as to time was imposed for the payment of administration fees, nor was it suggested that defendant's obligation to pay the administration fees would cease upon termination of the contractual arrangement between plaintiff and defendant.

(c) The relevant insurance policies which were to be marketed to Foschini customers, also require the monthly premium (which includes the administration fee) to be paid over the life of the policy, i.e. until the policy is cancelled by either the insurer or the customer upon 30 days notice in writing.

[17] I now turn to the question whether the proviso pleaded by defendant, namely that it was obliged to pay the agreed administration fees to plaintiff, only for so long as the oral contract remained in force, ought to be implied in the oral contract.

[18] An implied term is described in **Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974 (3) SA 506 (A) at 531E-F as:

"…an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties…it does not originate in the contractual consensus: it is imposed by the law from without."

At 532G of the same case the following is said:

"The implied term…is essentially a standardised one, amounting to a rule of law which the court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation."

[19] Counsel for defendant submitted that the proviso is a term incorporated by law in the oral contract, namely that the termination of a contract allows a party to consider its obligations to perform thereunder as at an end. Although the termination of a contract puts an end to the obligations of the parties to perform thereunder, this usually only applies to the executory portion of the contract. Where a right has accrued to a party before the termination of the contract, such right is not affected after termination, save where the parties agree to the contrary.

See **Walker's Fruit Farms Limited v Sumner** 1930 TPD 394 and **Crest Enterprises Ltd v Rycklof Beleggings (Bpk)** 1972 (2) SA 863 (A) at 869H-870H.

[20] The oral contract was, on the evidence of the witnesses for both parties, to endure for an indefinite period. Such a contract is normally referred to as an executory contract. The nature of an executory contract was explained as follows by Van Zijl J (as he then was) in **Maw v Grant** 1966 (4) SA 83 (C) at 87B-D:

"I have often wondered whether it would not have been better to have referred to such contracts as running contracts because during the period they run they generally create a succession of rights and obligations that are – if the contracts are carried out normally – successively extinguished by fulfilment and generally before the next set of rights and obligations arise. In a contract of this nature there are, therefore, executed portions and executory portions of the contract. When a contract of this nature is terminated by agreement (other than a termination ab initio) either party can recover from the other the contra prestation for those portions of the contract he has performed. If the contract has been terminated by mutual agreement this legal provision operates unless the parties have agreed otherwise."

[21] In the instant case it is common cause that prior to 2 April 2007, plaintiff performed its obligations by marketing the insurance policies to its Foschini customers and providing the necessary infrastructure for such customers to purchase policies and derive benefits in terms of the said policies. The performance of these obligations created rights for plaintiff in terms of the oral contract, namely the entitlement to payment by

defendant of the administration fees upon receipt of each and every premium paid by the customer to defendant.

[22] To imply a term in the nature of the proviso in the oral contract, would mean that all rights which may have accrued to plaintiff prior to 2 April 2007, to payment of administration fees, would be disregarded. This would, particularly in the absence of evidence of an agreement to the contrary upon termination of the oral contract, be in conflict with the legal principles enunciated in the cases referred to above.

[23] There is, of course, a much shorter answer to this submission of defendant. That is to be found in the trite principle that a term that would normally be implied by law, is excluded where it would conflict with the express terms of the contract. As I have already indicated, it was an express term of the oral contract that, in respect of each policy purchased by a Foschini customer, defendant is obliged to pay to plaintiff the agreed administration fee upon receipt of each and every premium paid by the customer to defendant. If a term is implied that this obligation of defendant would endure only for so long as the oral contract remained in force, it would be in direct conflict with the express term that defendant is obliged to pay the administration fee upon receipt of each and every premium paid to it by the customer.

See **Alfred McAlpine & Son (Pty) Limited v Transvaal Provincial Administration** supra at 531E and **Group Five Building Limited v Minister of Community Development** 1993 (3) SA 629 (A) at 653F-G.

[24] I accordingly find that there is no room for the importation of an implied term of this nature in the oral contract.

[25] This brings me to the question whether the oral contract contained a tacit term to the effect that defendant would be obliged to pay the administration fees only for so long as the oral contract remained in force. In my view there is also no room for the importation of this proviso as a tacit term of the oral contract.

[26] Firstly, as in the case of an implied term, a tacit term cannot be incorporated in a contract where it is in conflict with an express term of the contract. On this basis alone, for the reasons already furnished in paragraph 23 above, defendant's reliance upon the existence of the tacit term, has to fail.

[27] Secondly, I am of the opinion that, having regard to the principles applicable to a determination of a tacit term in a contract, it cannot be found that the oral contract was subject to the tacit term contended for by

defendant. These principles have recently been restated in **City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO** 2006 (3) SA 488 (SCA) at 494G-495C, as follows:

"(A) tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so…it follows that a term cannot be inferred because it would, on the application of the well-known 'officious bystander' test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time. If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.

In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. It has also *been recognised in some cases, however, that the subsequent conduct of the parties can be indicative of the presence or absence of the proposed tacit term."*

[28] I have hereinbefore dealt extensively with the express terms of the oral contract. For present purposes I reiterate that it was agreed that defendant would pay the agreed administration fees to plaintiff upon receipt of each and every premium paid by the customer to defendant. It should also be stressed that no limitation as to time was imposed and, as such, in terms of the oral contract, the administration fees remained payable for the duration of each policy sold up until 2 April 2007. In addition to the express terms of the oral contract, reference should, in the present context, also be made to the contemporaneous documents referred to above, which confirm that no limitation as to time was imposed upon defendant's obligation to pay the administration fee to plaintiff upon receipt of each and every premium paid by the customer to defendant. This confirms that the administration fee was payable over the life of each policy.

[29] If one has regard to the surrounding circumstances under which the oral contract was entered into, the following appear to be relevant:

(a) Plaintiff incurred costs and rendered services up front to market the insurance policies. Plaintiff was not remunerated for any unsuccessful marketing, nor was it paid a lump sum for its marketing of the policies. Instead, plaintiff was to be remunerated for all of its marketing and other services by means of an administration fee payable per month upon receipt of each and every premium paid by the customer to defendant. The plaintiff's reward was the income stream constituted by the administration fees into the future, paid by the policy holder who had taken out the insurance.

(b) Defendant's obligation to pay the administration fees to plaintiff, was, in terms of the oral contract, reciprocal to the successful marketing of that policy, not the continued marketing of other insurance policies in the future. The oral contract expressly tied the payment of the administration fee to the payments to be made in terms of the specific policy successfully marketed by plaintiff.

(c) The administration fee is paid by the customer to defendant who has no entitlement thereto. Defendant is merely the conduit for the distribution of the administration fee to plaintiff. There is accordingly no basis upon which defendant can lay claim to the administration fee, nor does the insurer have any claim thereto.

There is accordingly no basis in contract or in law for defendant to lay claim to the administration fees payable in respect of insurance policies marketed and sold by plaintiff to its customers prior to 2 April 2007.

[30] When one considers the conduct of the parties subsequent to the conclusion of the oral contract, the following appears to be noteworthy:

(a) In August 2006, when a new scheme was mooted whereby the insurance policies would be sold to plaintiff's customers on credit, certain proposals were made by defendant to plaintiff in a letter dated 7 August 2006. It is significant that, in explaining the different options to plaintiff, defendant at no stage informed plaintiff that, in the event of plaintiff terminating the existing scheme and replacing defendant with another administrator, plaintiff would forfeit its right to payment of the administration fees in respect of the policies which had already been sold to Foschini customers. I should add that in his evidence De Klerk said that he did not inform plaintiff as it may have created the impression that he was threatening plaintiff. This explanation is rather unconvincing and there is merit in the submission of plaintiff's counsel that this failure of De Klerk rather indicates that he himself was not of the view that in such circumstances plaintiff would forfeit its right to the payment of the administration fees. In fact, the evidence shows that at no stage at all during these negotiations did De Klerk advise Fullalove of this view of his. In his evidence De Klerk said that he had thought of telling plaintiff that, upon termination of the oral contract, plaintiff would not continue to receive the administration fees, but that he did not do so as it was self-evident to him.

(b) In the letter of 20 December 2006, addressed by Fullalove to De Klerk, advising De Klerk of plaintiff's decision not to continue using the services of defendant as administrator, Fullalove, *inter alia*, said the following:

"(We) will continue to run the existing debit order business via CIM (defendant) *until all policies are cancelled".*

This conveys that Fullalove was of the view that, in these circumstances, plaintiff's right to payment of the administration fees in respect of the policies which had already been purchased by Foschini customers, would not be in jeopardy. In cross-examination De Klerk conceded that, in terms of this letter, the state of mind of plaintiff's representatives *"was that they would be in a position to continue to run the customers."*

(c) From the correspondence subsequent to 20 December 2006, and in particular subsequent to 2 April 2007, it is clear that plaintiff's representatives were of the view that plaintiff was still entitled to payment of administration fees in regard to existing policies, while De Klerk took the view that they were not entitled thereto.

[31] In my view, these facts and circumstances clearly show that the parties would not necessarily have agreed upon a tacit term of this nature, had it been suggested to them at the time of the conclusion of the oral contract. It appears to me that Fullalove would probably have considered such a term to be unbusinesslike, prejudicial to plaintiff's interests and, in any event, incompatible with the express terms of the oral contract. It may be that De Klerk would have responded differently to the enquiry of the officious bystander, but this is not sufficient ground for the importation of a tacit term of this nature in the oral contract.

[32] In the result, I find that plaintiff has discharged the onus of proving, on a preponderance of probabilities, that it was not an express, alternatively implied, further alternatively tacit, term of the oral contract that defendant was obliged to pay the agreed administration fees to plaintiff only for so long as the oral contract remained in force.

THE SECTION 48 DEFENCE

[33] In an alternative defence, defendant relies on section 48 (1) of the Short Term Insurance Act No. 5 of 1998 ("the Act"). It alleges that, by virtue of the parties' failure to comply with the provisions of this section, it is not obliged to account to and/or to pay any amount to plaintiff. Section 48 (1) of the Act reads as follows:

*"**48. Intermediaries: remuneration and binder agreements**. – (1) No consideration shall be offered or provided by a short-term insurer or a Lloyd's broker or a representative of such insurer or broker or any person on behalf of such insurer or broker or accepted by any independent intermediary, other than someone who has entered into an agreement contemplated in subsection (2), for rendering services as intermediary, and otherwise than in accordance with the regulations."*

[34] In relying on section 48 (1) of the Act, defendant pleads that:

(a) At all material times defendant was a short term insurer, alternatively a person acting on behalf of a short term insurer.

(b) In rendering the services to defendant, as set out in paragraph 4 of its particulars of claim (see paragraph 5 above), plaintiff acted as an independent intermediary as defined in section 1 of the Act.

(c) Absent a written agreement between plaintiff and defendant as contemplated in section 48 (2) of the Act, plaintiff is prohibited from accepting any consideration from defendant (as short term insurer or as a person acting on behalf of a short term insurer) for rendering services as an independent intermediary and defendant is prohibited from paying plaintiff such consideration.

(d) Accordingly the oral contract on which plaintiff relies for its claim against defendant, is unenforceable and/or void.

[35] Defendant bears the onus of establishing the facts to support its defence that the payment of the administration fees claimed by plaintiff in this action, is prohibited by virtue of the provisions of section 48 (1) of the Act.

[36] It appears to me that, upon a proper interpretation of section 48 (1) of the Act, defendant has to prove the existence of the following facts to enable it to succeed with this defence:

(a) Defendant agreed to pay, and made payment of, the agreed administration fees to plaintiff, in its capacity as a short-term insurer; or

(b) In agreeing to pay, and making payment of, the agreed administration fees to plaintiff, defendant acted on behalf of a short-term insurer; and

(c) Defendant agreed to accept, and did accept payment of, the agreed administration fees, for rendering services as an independent intermediary.

[37] In plaintiff's replication to defendant's plea, read with its further particulars for trial, plaintiff admits that it rendered certain services as an "intermediary", as defined in the Act. The Act defines an "independent intermediary" as a person other than a representative who renders services as an intermediary. Plaintiff does not fall within the definition of a representative, with the result that it rendered these services as an independent intermediary, as defined in the Act.

[38] What has to be decided, is whether defendant agreed to pay, and made payment of, the administration fees in its capacity as a short-term insurer or as a person on behalf of a short-term insurer. A "short-term insurer" is defined in the Act as a person registered or deemed to be registered as a short-term insurer under the Act. It is common cause that at all material times defendant was not, and is presently not, registered as a short-term insurer. However, defendant contends that, in terms of the

provisions of section 7 (3) of the Act, it is deemed to be a short-term insurer, one of the categories of persons from whom plaintiff is prohibited from receiving consideration for services rendered as an independent intermediary.

[39] It appears to me that defendant's reliance on the provisions of section 7 (3) of the Act, is misplaced. Section 7 (1) prohibits persons from carrying on any kind of short-term insurance business unless they have been registered in terms of the Act. Sub-section (3) provides that, *"for the purposes of this section",* a person shall, in the absence of evidence to the contrary, be deemed to be carrying on short-term insurance business if that person performs certain prescribed acts. It follows, in my view, that, in terms of section 7 (3) of the Act, a person may be deemed to be carrying on short-term insurance business only for the purposes of section 7, in which event registration as a short-term insurer in terms of the Act, is required. I should add that a person who carries on short-term insurance business and fails to register in terms of section 7 (1) of the Act, commits a criminal offence.

[40] It follows, in my view, that the deeming provision in section 7 (3) of the Act, has no impact at all upon the provisions of section 48 of the Act. In the result, I find that defendant is not a short-term insurer and has

not, in that capacity, agreed to, or made payment of, the administration fees, as envisaged in section 48 (1) of the Act.

[41] Defendant's counsel further submitted that, even if the court should find that defendant is not a short-term insurer, it is a person who acts on behalf of a short-term insurer, as envisaged in section 48 (1) of the Act. Therefore, it was submitted, defendant falls squarely into a category of persons from which plaintiff is prohibited, by section 48 of the Act, from accepting consideration for rendering services as an intermediary. In the circumstances, defendant contends, that, in order to be legally permitted to accept payment of the administration fee, plaintiff, as independent intermediary having rendered services as such, had to have entered into the agreement contemplated in sub-section 48 (2) of the Act. In this regard, it was contended that the prohibition contained in section 48 (1), is not directed at the origin of the payment made, but prohibits the receipt of payment from any person which falls into the category of persons mentioned in section 48 (1).

[42] In my view, this submission does not take proper account of the wording of section 48 (1). The subsection, in the context of defendant's present submission, provides that no consideration shall be offered or provided by any person, on behalf of a short term insurer, to an

independent intermediary. I am of the view that, upon a proper interpretation of section 48 (1), it is not the mere offering of payment or the making of payment by defendant which is prohibited, but the offering of payment, or the making of payment by defendant, on behalf of a short-term insurer.

[43] Consequently, to succeed in its defence based on section 48 (1) of the Act, defendant must establish that the consideration (the administration fee) was offered or provided by it on behalf of a short term insurer, i.e. the insurer underwriting the risk in terms of the policies purchased by Foschini customers.

[44] It is clear from the evidence and the relevant documentation that defendant, when contracting to pay the administration fees to plaintiff, never acted on behalf of the insurance company underwriting the risk in terms of the insurance policies purchased by Foschini customers. It is furthermore clear from the evidence and documentation that, when payment of the administration fees due in terms of the oral contract were made to plaintiff by defendant, the latter did not act on behalf of the underwriting insurance company or its successors. In fact, Mr. Blain, the Chief Executive of the insurance company presently underwriting the said policies, testified that the underwriter did not have a commercial or

legal interest in the administration fee. According to him it was a fee *"outside the policy"*. In these circumstances the payment of the administration fees by defendant and the acceptance thereof by plaintiff, does not bring the provisions of section 48 (1) into play and no written contract as envisaged in section 48 (2) is required.

[45] In fact, a perusal of the requirements of the contract envisaged by section 48 (2), shows that what is envisaged is a contract between a short-term insurer and an insurance broker, and not an agreement of the nature of the oral contract. The contractual terms set out in sub-sections (a), (b), (c) and (d) of section 48 (2), would not normally be found in a contractual relationship of the nature embodied in the oral contract.

[46] I therefore find that the defence based on section 48 of the Act, has to fail, and that the oral contract is valid and enforceable. In view of this finding it is not necessary for me to deal with the various alternatives pleaded by plaintiff in response to the section 48 defence.

CONCLUSION

[47] In view of the aforesaid, I find that plaintiff has proved the existence of the oral contract and, in particular, the express terms thereof, upon which it relies for its contractual claim against defendant. It is not in

dispute that for the period covered by its claim, plaintiff has performed its obligations in terms of the oral contract. In the result, plaintiff's claim for the payment of administration fees for the period May 2007 to December 2009, the quantum of which is admitted by defendant, together with *mora* interest thereon, should succeed. The amount payable as *mora* interest at the rate of 15,5% per annum, on outstanding administration fees for the period May 2007 to 31 January 2010, is R1 529 004,00, calculated and arrived at as per Annexure "A" to plaintiff's particulars of claim. In addition, plaintiff's claim for an accounting and payment in respect of administration fees received by defendant from existing policyholders with effect from January 2010, should similarly succeed.

[48] With regard to costs, plaintiff as the successful party, is entitled to its costs. I am satisfied that this is a matter which justified the employment of two counsel.

[49] What remains, is the issue of the costs of the interlocutory application to set aside a subpoena *duces tecum* issued by defendant against plaintiff's company secretary. The documentation to which the subpoena relates, was subsequently discovered, but plaintiff contends that these documents are irrelevant and that the issuing of the subpoena constitutes an abuse of the process of court. Defendant, on the other hand,

maintains that it was vindicated by the subsequent discovery of these documents by plaintiff. The difficulty that I am faced with, is that the merits of the application were not argued, as the trial proceeded and the necessity for such argument fell away. In the circumstances, I believe that it would be just and equitable if no order as to costs is made in this regard.

[50] In the result the following orders are made:

1. Defendant is ordered to pay plaintiff:

   (a) the amount of R6 093 863,00;

   (b) *mora* interest in the amount of R1 529 004,00 for the period May 2007 to 31 January 2010;

   (c) *mora* interest on the amount of R6 093 863,00 at the rate of 15,5% per annum calculated from 1 February 2010 to date of final payment.

2. Defendant is directed:

   (a) (i) to furnish plaintiff with monthly accounts for the period January 2010 up to and including April 2010, in respect of all administration fees received by defendant from policyholders to whom plaintiff sold policies on behalf of defendant, such accounts to be in the same format as that supplied by defendant to plaintiff up until the end of December 2009; and

(ii) to pay to plaintiff the amount of the administration fees received by it from such policyholders during the period January 2010 to April 2010; and

(iii) to pay *mora* interest at the rate of 15,5% per annum on each such amount due to plaintiff in terms of each such account with effect from the end of the month following the month to which each monthly account relates.

(b) (i) To furnish plaintiff with monthly accounts with effect from May 2010 and every month thereafter, in respect of all administration fees received by defendant from policy holders to whom plaintiff sold policies on behalf of defendant, such accounts to be in the same format as that supplied by defendant to plaintiff up until the end of December 2009; and

(ii) To pay to plaintiff the amount of the administration fees received by it from such policyholders, each month before the end of the month following the month to which each monthly account relates; and

(iii) To pay *mora* interest at the rate of 15,5% per annum on each such amount due to plaintiff in terms of each such account with effect from the end of the month following the month to which each monthly account relates.

3. Defendant is declared liable for payment of plaintiff's costs of suit, including the costs of two counsel.

4. No order is made in regard to plaintiff's application, dated 1 April 2010, to set aside the subpoena *duces tecum* issued by defendant.

P B Fourie, J