THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 456/2010

In the matter between:

CELLULAR INSURANCE MANAGERS (PTY) LTD **Appellant**

and

FOSCHINI RETAIL GROUP (PTY) LIMITED **Respondent**

Neutral citation:	***CIM v FOSCHINI* (456/2010) [2011] ZASCA 85 (27 May 2011)**
Coram:	Nugent, Malan, Tshiqi and Seriti JJA and Petse AJA
Heard:	**18 May 2011**
Delivered:	**27 May 2011**

Summary: Termination of agreement – accrued rights – term implied by law.

ORDER

On appeal from: Western Cape High Court, (Cape Town) (Fourie J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

MALAN JA (Nugent, Tshiqi and Seriti JJA and Petse AJA concurring)

[1] This is an appeal against the judgment of Fourie J in the Western Cape High Court (Cape Town) who ordered the appellant, Cellular Insurance Managers (Pty) Ltd (CIM), to pay over to the respondent, Foschini Retail Group (Pty) Limited (Foschini), some R6 million with interest, being administration fees collected by CIM in respect of cellular phone insurance policies sold by Foschini; to provide a monthly accounting to Foschini; and to pay the costs. The appeal is with the leave of the court below.

[2] Foschini's claim is based on an oral agreement between the parties concluded in 2001 pursuant to which Foschini would market insurance policies covering cellular phones sold by it to its customers on behalf of CIM. The premiums due under the policies were to be paid by the customer to CIM by way of monthly debit orders. Foschini's staff would assist the customer in completing the application form for the policy and forward it to CIM. It would also assist the customer with any queries and claims, undertake the necessary head office claims verification and reconciliation functions, and manage the cellular phone replacement procedure and collection of any excess at the time of a claim. The policy would remain in force while the customer continued to pay the premiums.

[3] It is not in dispute that it was an express term of the agreement that in respect of each policy sold, CIM was obliged to pay to Foschini an amount of R5,00 (later increased to R R7,00, R8,50 and eventually R10) as an administration fee upon receipt of each and every premium paid by the customer to CIM. However, CIM pleaded as follows to the express term of the oral agreement:

'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.'

[4] It is not in dispute that the oral agreement, which was silent as to its duration, was terminable by either party on reasonable notice.[1] The oral agreement between the parties was terminated by Foschini by notice with effect from 2 April 2007. Foschini's claim is for the total amount of the administration fee due after termination of the oral agreement and a monthly accounting. The only issue is whether it was an implied term of the oral agreement that the administration fee would be payable only for as long as the oral agreement remained in force. CIM has abandoned all reliance on an express or a tacit term. There was no express agreement between the parties supporting the term relied upon by CIM. As CIM's only witness, Mr J de Klerk, testified: 'We certainly didn't discuss any terms and conditions of that nature.' This is supported by Mr A D M Liquito who was called as a witness by Foschini. The appellant argues that the term relied upon by themselves is a term imported by law,[2] and in particular the

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[1] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & other related cases* 1985 (4) SA 809 (A) at 827I-J.
[2] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D-533E.

rule of law that on termination of an agreement 'there is no longer any debt or right of action in existence'.[3]

[5] In a careful and reasoned judgment Fourie J found that the oral agreement contained an express provision that, in respect of each policy sold to a Foschini customer, CIM was obliged to pay to Foschini the agreed administration fee upon receipt by CIM of each and every premium paid by the customer to CIM. Since no limitation of time was agreed upon, the administration fee remained payable for the duration of each policy sold. Fourie J accepted that, although termination of an agreement usually puts an end to the rights and obligations of the parties thereunder, this usually applies only to the executory portion of the contract unless the parties have agreed otherwise. The learned judge further relied on *Maw v Grant*[4] where it was stated that where 'executory' or 'running' contracts are terminated, 'either party can recover from the other the contra prestation for those portions of the contract he has performed'. What the contra prestation in a particular case is depends on the construction of the agreement. Fourie J found, and it was common cause, that the marketing of the policies prior to termination of the oral agreement created rights for Foschini, that is the entitlement to payment of the administrative fee upon receipt by CIM of each and every premium paid by the customer. The learned judge therefore declined to import the term contended for into the oral agreement because it would have deprived Foschini of the benefits of the rights that have accrued to it. Fourie J also had a 'much shorter' answer; stating that a term normally implied by

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[3] *Atteridgeville Town Council & another v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 (A) at 304H-I.

[4] *Maw v* Grant 1966 (4) SA 83 (C) at 87A-C. See further *Walker Fruit Farms Ltd v Sumner* 1930 TPD 394 at 401; *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 at 870G-H; *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd; Shelfaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd* 1995 (3) SA 187 (A) at 193H-I .

law is excluded where it would be in conflict with the express terms of the agreement.[5]

[6] Foschini's particulars of claim contain no reference to the termination of the oral agreement. In its particulars of claim it alleged the facts set out above and continued that it sold insurance policies on behalf of CIM, completed the various forms on their behalf 'and complied with all of its obligations in terms of the agreement in respect of each policy sold by it'. Termination of the oral agreement thus forms no part of its cause of action; nor was there any need to allege that the agreement was terminated. CIM admitted that Foschini sold the insurances but pleaded that Foschini by giving notice of termination repudiated the oral agreement which repudiation was accepted by CIM. Because the agreement had been terminated, CIM was no longer obliged to perform in terms of it. CIM, however, does not rely on the repudiation or breach of the agreement any more but only on its termination with the consequences implied by law referred to above. The principles are the same, whatever way the agreement is terminated.[6]

[7] The entitlement to the administration fees payable after termination had accrued to Foschini prior to termination of the oral agreement. Foschini established an 'accrued right', that is a 'right which is accrued, due, and enforceable as a cause of action independent of any executory part of the contract.'[7] I have not been persuaded that anything 'executory' remained on which payment of the administration fee depended. The case of CIM was that payment of the administration fee depended on continued marketing of the policies. But the term entitling Foschini to payment is not expressed as being reciprocal to its continued marketing of the policies. Continued marketing is not

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[5] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531E-F; *Group Five Building Ltd v Minister of Community Development* 1993 (3) SA 629 (A) at 653F-G.

[6] *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 564B-C.

[7] *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A) at 870G-H; *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA (A) at 561A-B.

the contra prestation to Foschini's entitlement to the administration fee. Moreover, there is nothing in the reference to *Maw v Grant*[8] to 'running contracts' that detract from this conclusion. Indeed, that decision supports the conclusion of the court below. In *Maw's* case the appellant's right to payment was not dependent upon his undertaking further work. However, his right to 'payment', that is his right to have his name coupled with that of his contracting party as architects on a builders' signboard, had accrued but was postponed until a time after the consensual termination of the agreement, if and when the building was constructed.

[8] After argument was heard in this matter the appellant directed a letter to the Registrar with the request that a further written submission be considered by this court. The submission arises from a question put to counsel for CIM by the court during argument. It is not only improper to place further submissions to the court after argument but particularly so where the other side has refused, as it did here, to consent to it. I have nevertheless considered the argument put forward on behalf of CIM in this submission. As I have said earlier, what the contra prestation for Foschini's right to the administration fees is depends on the construction of the agreement. To my mind, the submission does not add to the contentions already advanced on behalf of CIM. I am in agreement with the judgment of the court below and the reasons advanced for its decision. It follows that the appeal should be dismissed.

[9] The appeal is dismissed with costs including the costs of two counsel.

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F R MALAN
JUDGE OF APPEAL

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[8] *Maw v* Grant 1966 (4) SA 83 (C) at 87B-D.

APPEARANCES:

For Appellant:	L J Morison SC P R V Strathern Instructed by: Brian Kahn Inc Johannesburg Claude Reid Inc Bloemfontein
For Respondent:	R W F MacWilliam SC, and L B urger SC Instructed by: C K Friedlander Shandling Volks Inc Cape Town Webbers Bloemfontein