Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 10570/2003

In the matter between:

BMW FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LTD **Plaintiff**

and

1. SYGNA ROMAY MYRTHLE HARDING **First Defendant**
2. HENDRIK PETRUS HOUGH **Second Defendant**

JUDGMENT DELIVERED : 15 JUNE 2007

MOOSA, J:

INTRODUCTION

1. Plaintiff instituted action against first defendant for the delivery of the motor cycle, payment of damages and other ancillary relief, arising from an alleged breach of the Instalment Sales Agreement ("Agreement"). First defendant opposed the action and raised two special pleas and a general plea. In the first special plea she alleged that an oral agreement of compromise was concluded between plaintiff and herself, in terms of which she was relieved from liability to make any further payments arising from the Agreement. In the second special plea, first defendant alleges that the Agreement was void *ab initio*, by virtue of

the fact that plaintiff traded as an insurer, either on its own or in partnership with Guardrisk Insurance Company Limited ("Guardrisk"), in violation of the Short-Term Insurance Act, 53 of 1998. The main plea reiterated the defences raised in the special pleas, but in addition raised the failure of plaintiff to comply with certain provisions of the Credit Agreement Act, No 75 of 1980. First defendant also counterclaimed and raised essentially the same issues she raised in her special and general pleas and sought certain relief arising therefrom.

JOINDER

2. At the commencement of the hearing, the court, by agreement between the parties, ordered that Hendrik Petrus Hough ("Hough") be joined as a second defendant in the claim in convention and as second plaintiff in the claim in reconvention. After the joinder of Hough, first defendant, through her legal counsel, indicated that she abides by the decision of the court and applied for her to be excused from any further attendance at the hearing of this matter. As there was no objection from either plaintiff or second defendant, the court granted her application. She was accordingly excused from further attendance.

AMENDMENT OF PLEADINGS

3. After evidence was led by both plaintiff and defendants, they brought an application to amend their respective pleadings. Plaintiff sought to amend its particulars of claim by deleting its claim for the delivery of the motor cycle and certain ancillary relief flowing therefrom and claiming instead, payment of the balance of the purchase price amounting to R59 092, 25 together with interest thereon at the rate of 15,5% per annum from 5 December 2003 to date of

payment and costs. Second defendant had no principle objection to plaintiff's proposed amendment, but pointed out that it introduced a new cause of action. However, in his heads of argument, he submitted that the amended claim had become prescribed by effluction of time and accordingly there were no further justiciable issues for the court to adjudicate upon. Because of the belated objection raised by second defendant to the proposed amendment, plaintiff was prepared to drop the application for amendment.

4. Second defendant brought an application, on his and first defendant's behalf, to amend the first and second special pleas and the general plea. Second defendant claimed that he was acting on behalf of first defendant by authority of a power of attorney. There was no application to amend the counterclaim. Other than certain formal amendments, the application essentially sought to introduce a new defence of estoppel. Mr **Stockwell**SC, who with Mr **Bresler**, appeared for plaintiff, objected to certain proposed amendments on the ground that it was excipiable.

5. It is a trite principle of our law that the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, not be bogged down by technicalities and formalities and to determine the real issues between the parties so that justice may be done. **Innes, CJ**in **Robinson v Randfontein Estate G.M. Co Ltd**1925 AD 173 at 198 said the following:

> "*The object of pleading is to define the issues; and the parties will be kept to their pleas where any departure would cause prejudice or would prevent full enquiry. But within these limits the*

Court has a wide discretion. For pleadings are made for the Court and not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been."

(See also: **Shill v Milner**1937 AD 101 at 105; **Cross v Ferreira**1950 (3) SA 443 (C) at 447B-H; **Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another**1990 (3) SA 547 (A) 565E-J.)

6. In my view, the evidence led at the trial sufficiently covers the issues raised in the amendments proffered by both parties and the parties will not suffer any prejudice or an injustice if such amendments are allowed. In the case of prescription, there are sufficient evidence and facts placed before the court to determine whether plaintiff's amended claim is prescribed or not. In the case of estoppel, it is inextricably wound up with the main thrust of first defendant's defence namely, that the Agreement is invalid by virtue of the fact that plaintiff illegally traded and held itself out as "BMW Insurance" jointly with Guardrisk. In order to adjudicate on the real issues between the parties so that justice can be done, I am of the opinion that the amendments of both parties should be allowed and it is so ordered.

ISSUES

7. The case really turns on the defences raised and the claim in re-convention

instituted by first defendant. As the substantive issues overlap between the pleas and the counterclaim, the court will deal with the substantive issues *in seriatim*as follows: (i) Prescription; (ii) Non-compliance with the provisions of the Credit Agreement Act; (iii) The oral agreement of compromise; and (iv) Whether plaintiff traded as an insurer, either on its own or in partnership with Gaurdrisk under the name and style of "BMW Insurance".

PRESCRIPTION

8. The first substantive issue is the question of prescription. Second defendant argued that should the court grant the particular amendment of plaintiff, plaintiff's claim would effectively be prescribed. The amended claim of plaintiff against first defendant was for payment of the sum of R59 092,25 together with interest thereon from 5 December 2003 to date of payment. The parties agreed that the balance owing by first defendant, in terms of the Agreement, as at 5 December 2003 was R59 092,25. Second defendant argued that the amount had become prescribed by effluction of time and that effectively puts an end to plaintiff's claim. I agree with second defendant that should first defendant succeed with her plea of prescription, it would put paid to these proceedings and it would not be necessary to consider all the other defences raised by first defendant. Although this matter was not specifically pleaded, it arose as result of the amendment granted by the court. In my view there are sufficient facts before the court to determine the issue. I would therefore consider the defence as if it had been pleaded by first defendant.

9. Section 11 of the Prescription Act, 68 of 1968, provides that a debt, like that of

first defendant, becomes prescribed after a period of three years from the date on which the debt becomes due and payable or becomes claimable by plaintiff. (**Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd**1991 (1) SA 525 (A) at 532H.) From a procedural point of view, an amendment usually operates from the time a pleading has been filed. However, from the perspective of substantive law, it only operates from the time the amendment has been granted. Prescription is accordingly interrupted in respect of a new cause of action introduced by such amendment from the date such amendment is granted. (See **LAWSA**, Volume 21, First Re-issue, para 147 at page 67 and the authorities quoted there under.) It is common cause that more than three years have elapsed from the date on which the full balance became due and payable, ie 5 December 2003 and when the amendment was granted. The crucial question which arises is: Did the issue of summons interrupt prescription?

10. Second defendant submitted that the amendment introduced a new cause of action, which has become prescribed. I will examine that contention. Plaintiff's cause of action is based on the breach of the Agreement. In pursuance to clause 12.2 of the Agreement, plaintiff's attorneys addressed a letter, dated 5 December 2003, to second defendant in terms of which plaintiff elected to cancel the Agreement with first defendant and claim the return of the motor cycle and damages. Clause 2.2.2 provides: *"as pre-estimated liquidation (sic) damages, the total amount of payables not yet paid, whether same are due for payment or not, less the value of the goods as at date on which the Seller obtains possession of same…"* Clause 12.3 provides that: *"If the goods are*

not recovered by the Seller for any reason whatsoever, the value shall be deemed to be nil." the application for amendment which was granted, plaintiff abandoned claims 1, 2, and 3 and sought to amend the remaining claims. It effectively claimed payment of the agreed amount of R59 092,25 owing as at 5 December 2003 as pre-estimated liquidated damages, together with interest thereon at the rate of 15,5% per annum calculated from 5 December 2003.

11. In my view the cause of action has remained unchanged. What the amendment has effectively brought about, is a change in the quantification of the damages and not a new cause of action. Initially, in such quantification, plaintiff sought to bring in the value of the motor cycle. The evidence is that the motor cycle is presently disassembled and probably regarded as a wreck with no or little commercial value. First defendant has failed to deliver the motor cycle to plaintiff. In the circumstances, plaintiff has abandoned its claim for the return of the motor cycle and clause 12.3 accordingly applies in that the value of such vehicle is deemed to be nil. The original relief contained in prayer 4 reads as follows: *"An order directing defendant to pay to plaintiff the difference between R66 964,68 and the market value of the motor cycle at the date of delivery thereof to plaintiff."* The substituted prayer reads as follows: *"The defendant be ordered to make payment to the plaintiff in the amount of R59 092,25."* substituted claim is founded on the same cause of action as the original claim and, in my view, the service of the summons interrupted the running of prescription in terms of Section 15 of the Prescription Act. (See: **LAWSA**, *supra*, para 147 at page 67 and the authorities quoted there under.)

12. I now turn to consider whether the interest as contained in prayer 5 which was amended to prayer 2, has become prescribed or not. The original prayer read: *"Interest at the rate of 17% (AS PER AGREEMENT) as at date of cancellation to date of final payment."* Whereas the amended prayer reads: *"The Defendant be ordered to pay interest to the Plaintiff on the aforesaid amount of R59 092,25 at 15,5% per annum calculated from 5 December 2003 to date of payment."* Such interest is based on *mora*interest *ex lege*and not *mora ex contractu*. The rate of 17% applied *ex contractu*and not *ex lege*. The *mora*interest was determined *ex lege*at 15,5%. The object of the amendment was to bring the rate of the *mora* in line with the rate permissible by law. The *mora*interest was claimed from 5 December 2003. In my view, the prescription in respect of interest was also interrupted by the service of the summons.

13. Without expressing an opinion on the correctness of the principle enunciated in **Sanlam v Rainbow Diamonds (Edms) Bpk**1982 (4) SA 633 (C) 641D-643G, namely, that the claim for *mora*interest had a different cause of action to the claim for the capital, it is clear that the facts of that case are distinguishable from the facts of this case. In this case *mora*interest was claimed in the summons, whereas in the **Sanlam** the claim for *mora*interest was introduced for the first time in the amendment that was granted. **Grosskopf, J**(as he then was) that the judicial interruption of prescription in respect of capital did not *ipso facto*extend to the claim for *mora*interest. In the circumstances I conclude that, on the facts of this case, the defence of prescription is not tenable in respect of both the claim for capital and interest as there has been judicial interruption of prescription.

THE NON-COMPLIANCE WITH THE PROVISIONS OF THE CREDIT AGREEMENT ACT

14. First defendant pleaded that she did not receive the Section 11 notice as required by the Credit Agreement Act. The undisputed evidence is that they were sent by prepaid registered post to the *domicilium citandi et executandi*as reflected in the Agreement. Clause 15.1 of the agreement provides that first defendant chooses as her *domicilium: "the address on the face of this agreement".* Clause 15.2 provides that any notice sent by registered post to the purchaser's *domicilium*shall be deemed to have been received. In the absence of a rebuttal, it is presumed that first defendant received the notice. First defendant failed to rebut the presumption as she elected not to testify.

15. Second defendant alleged that plaintiff did not correctly record the address of first defendant as the words *"Dover 05"*were omitted. First defendant did not pick up the omission as she was not furnished with a copy of the Agreement as required by the Credit Agreement Act. First defendant did not testify and in the circumstances these allegations constitute hearsay. However, during cross examination by second defendant, Mr Berry testified that the application for credit was electronically completed on-line by first defendant. Any error or omission would therefore be solely attributable to first defendant who failed to accurately enter her address when completing the electronic credit application form. During argument second defendant objected to the evidence as being hearsay. This evidence was elicited under cross-examination by him and after the witness was specifically requested by him to inspect the records of the

dealership to ascertain how the application for credit was completed. He can hardly be heard to complain.

16. Even if I am wrong in finding, in the first instance, that first defendant had failed to rebut the presumption that she had received the Section 11 notice and, in the second instance, in admitting hearsay evidence, first defendant is faced with the further problem regarding the provisions of Section 11. Section 11 provides that a court will not order the return of the subject-matter of the sale in the absence of the credit-grantor having given the credit-receiver notice as contemplated in the Section. By reason of the fact that plaintiff, in its amendment to the pleading, abandoned its claim for the return of the motor cycle, the matter has become a non issue. In the circumstances there is no substance in this defence.

ORAL AGREEMENT OF COMPROMISE

17. First defendant alleges in her first special plea that an oral agreement was concluded between plaintiff and herself in terms of which plaintiff acknowledged: (i) that it had dispossessed her of the motor cycle;

(ii) that such conduct amounted to an unlawful repudiation of the instalment sale agreement;

(iii) that it would arrange for payment to her of the sum of R43 278,18 in respect of an insurance claim;
(iv) that she would receive possession of the damaged motor cycle and
ii) that the parties would have no further claims against each other.

In pursuance to such oral agreement, first defendant alleges that plaintiff duly performed and, in the circumstances, first defendant is absolved from the

obligation of making any further payments in terms of the Agreement. It is further alleged by first defendant in her plea that, on 2 February 2006, she sold the damaged motor cycle to second defendant and no longer has any interest therein. Plaintiff denies all these allegations

18. Mr **Stockwell** contended on behalf of plaintiff that the provisions of clause 17.3 effectively put an end to the first special plea. The clause reads as follows: *"This agreement may not be amended, cancelled or novated except and only to the extent that such amendment, cancellation or novation is reduced to writing and signed by both parties…"* Hough contended that as plaintiff allegedly repudiated the Agreement and first defendant accepted such repudiation, no agreement was in place and the provision could, therefore, not apply post *ex facto*. Without going into the merits of those submissions, I will assume in favour of first defendant that any subsequent agreement between the parties is not governed by the terms of the Agreement and therefore the alleged compromised agreement need not be in writing. On such basis I will proceed to consider whether or not an oral agreement of compromise was concluded between plaintiff, represented by Mr Les Welch, and first defendant, represented by second defendant.

19. It is common cause that the cycle was involved in a collision and a claim was submitted by first defendant to Guardrisk. Guardrisk regarded the cycle to be beyond economical repair. It agreed to pay out the insurance proceeds by settling the indebtedness of first defendant to plaintiff, deducting the excess owing by first defendant and paying the balance to her. The salvage would be

sold to Bob's Motor Spares for the credit of Guardrisk. First defendant was not to be found for such an arrangement, but made a counter proposal through second defendant in terms of which the repair costs of the cycle would be paid to first defendant and she would undertake to effect the necessary repairs. This counter proposal is contained in a letter dated 25 September 2003, addressed by second defendant to Glenrand the agents of Guardrisk.

20. However, on 14 October 2003, second defendant addressed a letter to plaintiff in which he informed plaintiff that first defendant regards the disposal of the motor cycle to Bob's Auto Spares as a repudiation of the agreement. She accepts the repudiation and demands refund of all monies paid by her in terms of the contract, *"in addition to the insurance claim of R43 278,18".* the intervention of Mr Welch, Guardrisk revisited the claim and agreed to the proposal of second defendant as set out in his letter to Glenrand. In pursuance thereto the insurer submitted an indemnity form and an agreement of loss form for signature by first defendant. On 16 October 2003, first defendant duly signed these forms and returned them to the insurer. On 22 October 2003 payment of the insurance claim was effected to first defendant. This conduct on the part of first defendant was inconcistent with the conduct of second and/or first defendant in accepting the alleged repudiation of the Agreement.

21. Mr Welch in his testimony denied that such an oral agreement was concluded between him and second defendant. He said he had no authority to conclude such an agreement on behalf of plaintiff. He was an operations manager in charge of insurance matters. Mr Welch made a good impression on the court

as a witness. He was open, honest and reliable. He was readily prepared to make concessions that appeared favourable to first defendant's case. His evidence is furthermore consistent with the objective facts and the inherent probabilities. First defendant did not testify, although second defendant indicated that she will be called to testify. Second defendant testified to the effect that an oral agreement, as alleged by first defendant in her first special plea, was concluded between him, acting on behalf of first defendant and Mr Welch, acting on behalf of plaintiff. Second defendant was a pathetic witness. He was argumentative and evasive. His version not only flies in the face of logic, but also does not make commercial sense. His version is so inherently improbable that I am led to believe that it is not only an afterthought, but a fabrication and a figment of his imagination. It is accordingly rejected.

22. There is no basis in law or fact that could justify a conclusion that plaintiff repudiated the Agreement. I am strengthened in such conclusion by the fact, firstly, that despite the acceptance of the alleged repudiation of the Agreement, first defendant accepts the proceeds of the insurance claim that has been settled at the behest of second defendant. Secondly, the removal of the cycle in terms of the salvage agreement emanated from the contract of insurance and not from the Agreement. Thirdly, the objective evidence does not support defendants' version. In my view, no oral Agreement of compromise came into being and the first special plea is accordingly dismissed.

WHETHER PLAINTIFF TRADES AS AN INSURER EITHER ON ITS OWN OR IN PARTNERSHIP WITH GUARDRISK UNDER THE NAME AND STYLE OF "BMW INSURANCE"

23. The main thrust of first defendant's defence is based on the premise that plaintiff traded as an insurer and/or traded in partnership or joint venture with Guardrisk under the name and style of "BMW Insurance" without plaintiff or the said partnership or joint venture being registered as insurer in terms of the Short-term Insurance Act, 53 of 1998. By virtue of such contravention, first defendant contends that both the Agreement and the insurance contract are vitiated and accordingly null and void and against *"public policy"*. In support of that contention, she claims firstly, that the Agreement and the insurance contract are not severable and secondly, that plaintiff is estopped from denying that it trades as "BMW Insurance". In the circumstances she submits that she is entitled to restitution and that the parties be restored to their status *ante quo*. Plaintiff denies first defendant's allegations and submits that *"BMW Insurance"* is an insurance product underwritten by Guardrisk in terms of the Short-term Insurance Act. The product is specifically designed by Guardrisk for the customers of plaintiff. Plaintiff acquired a specific class of shares in Guardrisk, which regulates its financial and administrative interest in the scheme. I will deal with the preliminary issues of severability and estoppel before dealing with the main issue of plaintiff acting as an insurer.

SEVERABILITY

24. In my view there is no merit in the contention that the Agreement and the insurance contract are not severable. The objective evidence is that the Agreement was concluded between plaintiff and first defendant and the insurance contract was concluded between Guardrisk and first defendant. The

evidence of Mr Welch is that the principal business of plaintiff is to provide financial services to the BMW dealership and the procuring of insurance cover for the vehicles in question is but incidental thereto. Although the insurance contract was taken out pursuant to the instalment sale agreement, the two contracts are separate and distinct from each other, affects different parties and have different considerations. The question of severability is misconstrued and, on the facts, does not arise in law.

ESTOPPEL

25. With regard to the second issue of estoppel as pleaded in the amended second special plea, it is common cause that, pursuant to the Agreement, first defendant completed the application for insurance. It was submitted to Glenrand MIB who administered the scheme of insurance on behalf of Guardrisk. Glenrand MIB issued the policy on behalf of Guardrisk. First defendant accepted the terms and conditions of the policy issued by Guardrisk and acknowledged receipt of the statutory notice issued in pursuance to the Short-term Insurance Act. In terms of such notice, she was furnished with information, *inter alia*, concerning Glenrand MIB, Guardrisk and the Short-term Insurance Ombudsman and Registrar. No representation was made to first defendant that plaintiff was trading as "BMW Insurance". First defendant could therefore not have acted to her prejudice. In any case, Guardrisk which issued the insurance contract met its obligations to first defendant in terms thereof and she suffered no financial loss or prejudice. I am of the opinion that defendants have failed to prove the requirements of estoppel. The plea of estoppel is therefore rejected.

WHETHER "BMW INSURANCE" IS A TRADING NAME OR A PRODUCT

26. Before turning to deal with the question of whether plaintiff trades as an insurer, I have to determine whether "BMW Insurance" is a trading name as alleged by defendant or a product as alleged by plaintiff. Mr Welch testified that "BMW Insurance" was an insurance product underwritten by Guardrisk and administered on its behalf by Glenrand MIB. The insurance product is marketed by the BMW dealership. The customer is under no obligation to take the insurance product marketed by the dealership. This was confirmed by Mr Berry who, as a representative of the dealership, had arranged both the finance and insurance on behalf of first defendant. Mr Berry testified that First defendant was at no time coerced or forced to take up insurance with Guardrisk by subscribing to the BMW insurance product. This evidence of Mr Berry was not challenged under cross-examination by second defendant.

27. Mr Schoeman, the managing director of Guardrisk, testified that the customer is at liberty to take out his own insurance with his own broker or his own insurance company and it often happens that the representative of the dealership refers the application for insurance to another insurance company of his choice or that of the customer. He denied that plaintiff trades under the name and style of *"BMW Insurance"*. Despite repeated questioning and badgering by second defendant, Mr Schoeman was consistent in his evidence. When referred to various documents where the wording "BMW Insurance" appeared, he was adamant that it was an insurance product underwritten by Guardrisk and not that plaintiff was trading under the name and style of "BMW Insurance". I have

no reason to doubt his testimony or disbelieve him. The evidence of second defendant to the contrary is without merit and is not consistent with the probabilities. I have earlier made a credibility finding in respect of second defendant. I therefore conclude that *"BMW Insurance"* is a product which is underwritten by Guardrisk and administered by Glenrand MIB and that it is not a trading name.

THE TRUE NATURE OF THE RELATIONSHIP BETWEEN GUARDRISK AND PLAINTIFF

28. I now turn to examine the final issue namely, whether plaintiff trades in partnership or joint venture with Guardrisk. It is common cause that an agreement was concluded between plaintiff and Guardrisk in terms of which plaintiff acquired shares of a particular class known as "cell captive – A23" and which regulated the special relationship between plaintiff and Guardrisk. The Registrar of Short-term Insurance imposed certain conditions, when registering the "cell captive" shareholders of Guardrisk. These conditions are, *inter alia*, that the insured shall be issued with a Guardrisk policy, that the risk shall be carried by Guardrisk and such risk shall not be limited to the funds available in the particular "cell-captive" and benefits shall not be withheld due to the non-performance of the re-insurers or the "cell-captive" shareholders. Guardrisk remains ultimately liable to outside third parties, ie the insured in the event of the cell having insufficient funds to meet its claims. This liability arises from Conditions 3.1 and 3.2 of the Certificate of Registration which was imposed by the Registrar of Short-term Insurance

29. Mr Schoeman who was previously employed by the Financial Services Board as its Head: Short-term Insurance, testified that Guardrisk offers, to corporate clients, a structure that is commonly known as "cell-captive". Such structure comprises a special class of ordinary shares in Guardrisk, designated as "A ordinary shares". Any corporate client wishing to make use of the "cell-captive" structure can then acquire a particular number and class of "A ordinary shares". A distinctive number of the particular class of "A ordinary shares" are issued to each corporate client.

30. Such structure allows Guardrisk to issue insurance policies to customers of larger corporate clients, with a large and secure customer base. Such insurance policies are client specific and carry the name of such companies' better known brand or brands, such as "BMW Insurance" for example. Such structure also permits the larger corporate clients to involve themselves in the field of insurance by entitling them to have a say in the administration of the "cell-captive" and deriving a financial benefit from the "cell-captive" in the form of a dividend.

31. Mr Schoeman testified further that Glenrand MIB was appointed by Guardrisk to administer the BMW cell-captive structure. Glenrand issued "BMW Insurance" policies, collected the premiums, and processed the payment of claims on behalf of Guardrisk. All premiums received were deposited into one central Guardrisk bank account. The premiums would be credited to the respective "cell-captive" from which the income has been generated. All necessary expenses in respect thereof are debited against such account and the balance

would be available to meet the claims in respect of that particular "cell-captive". Any shortfall, whether in the form of solvency ratio stipulated for by the Short-term Insurance Act, or in terms of the claims, must firstly be made good by the corporate client or, failing which, by Guardrisk. Any dividend is declared by Guardrisk and subject to the profitability of the particular cell. Guardrisk does not share in the profits generated by the cell, but derives an income from administering the "cell-captive" and carrying the risk.

32. The question that needs to be answered is, firstly, whether the special relationship between plaintiff and Gruardrisk, in terms of the cell-captive shareholding, constitutes a partnership or a joint venture as alleged by first defendant and secondly, whether it falls foul of the provisions of the Short-term Insurance Act. It is common cause that the vehicle used by the parties to achieve the results is not in the form of a partnership or a joint venture. The structure devised was to create a special class of ordinary shares with special rights and obligations set out in the agreement between plaintiff and Guardrisk and reinforced by conditions of registration imposed by the Registrar of Short-term Insurance. In the work **Commentary On The Companies Act** by Blackman MS *et all*, Juta & Co, Vol 1, *op cit* 5-174, *inter alia*, the following is said about special classes of shares:

> "*A company has almost unlimited freedom to create the capital structure it desires, and in so doing to structure the rights of each of its various classes of shares in an almost infinite possible variety of ways. The nature and extent of class rights is thus primarily a question of the construction of the memorandum or*

articles or the terms of issue, as the case may be."

33. **Smalberger, JA** in **Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd and Others**1995 (4) SA 790 (A) at 803H said that courts should not lightly disregard a company's separate corporate personality, but should try to give effect to it and uphold it:

"*To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal considerations that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil."*

(See also **Shipping Corporation of India Ltd v Evdoman Corporation** 1994 (1) SA 550 (A) at 566.)

34. What constitutes a partnership has been set out authoritatively by **Smalberger, JA** in **Pezzutto v Dreyer and Others** 1992 (3) SA 379 (A) at 389I-390E as follows:

"*For a partnership to come about there must be an agreement to that effect between the contracting parties. In determining whether or not an agreement creates a partnership, a court will have regard, **inter alia**, to the substance of the agreement, the*

circumstances in which it was made and the subsequent conduct of the parties. …

*Where **Pothier**'s four requirements are found to be present the Court will find a partnership established 'unless such a conclusion is negatived by a contrary intention disclosed on a correct construction of the agreement between the parties'…"*

35. It is perfectly legitimate for parties to arrange their affairs in such a way to escape the prohibition imposed by statute provided it is not *infraudem legis.* **Innes, CJ** in **Dadoo Ltd and Others v Krugersdorp Municipal Council** 1920 AD 538 at 548, held:

"*Parties may genuinely arrange their transactions so as to remain outside the prohibition imposed by Statute. Such arrangements in the nature of things are perfectly legitimate."*

36. Guardrisk created a special class of shares known as A23 with special rights and issued such shares exclusively to plaintiff subject to certain terms and conditions. A share certificate in terms of the Companies Act was issued by Guardrisk. The pro-forma cell-captive shareholders' agreement was approved and registered with the Registrar of Short-term Insurance attached to the Financial Services Board. At the instance of second defendant, the Financial Services Board investigated the arrangement between Guardrisk and BMW South Africa (Pty) Ltd, in terms of the shareholders agreement and found it to be acceptable.

37. The defendants challenged the validity of the shareholders agreement. Such challenge must be considered in the light of the principles set out in **Sasfin**

(Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 7I -9G. After examining various authorities, **Smalberger, JA** concluded:

> "*No Court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, less uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."*

The fact that some of the terms of the shareholders agreement may offend the defendants' sense of propriety and fairness, is not sufficient ground to have it declared against public policy and therefore unenforceable. In the absence of proof to the contrary, the court will assume that the shareholders agreement correctly reflects the true intention of the parties. **Solomon, JA** in **Zandberg v Van Zyl** 1910 (AD) 310 at 314 observed as follows:

> …***prima facie****, however, we must assume that the nature of transaction is such as it purports to be and the onus is on him who asserts that it is something different, to prove that fact."*

38. In the light of the principles set out above and on a proper construction of the cell-captive shareholders agreement between Guardrisk and plaintiff, I am satisfied that the intention was at all times that the special arrangement between them shall be governed in terms of the shareholders agreement as

regulated by the Companies Act and not in terms of a partnership agreement. Even if all the "essentiala" of a partnership are present, the existence of a partnership may be *"negatived by the contrary intention disclosed on the proper construction of the agreement between the parties".* The contrary intention is clearly manifested in the "cell-captive" shareholders agreement. The fact that Guardrisk may have used the terminology of "partnering" in their promotional material is of no consequence to the true relationship between the parties. Guardrisk was entitled, in terms of the Companies Act, to create the capital structure which established the specific class of ordinary shares with special rights and obligations attached thereto. It was further entitled to conclude the Shareholders Agreement with plaintiff. Such Agreement, in my view, is not contrary to public policy as alleged by the defendants. The parties had the contractual freedom to arrange their affairs in such a way that they were not hit by the prohibition of the Short-term Insurance Act. I therefore conclude that the cell-captive shareholders agreement between Guardrisk and plaintiff does not fall foul of the provisions of the Companies Act, or the Short-term Insurance Act. There is accordingly no substance in first defendant's second special plea, main plea and her conditional claim in reconvention that the insurance contract or the instalment sale agreement or the shareholders agreement is unlawful.

COSTS

39. The final issue that falls to be considered is the question of costs. The general rule is that the successful litigant is entitled to its costs. In this matter first defendant, at the commencement of the trial, decided to abide by the decision of the court and was excused from further attendance at the hearing. Despite

the fact that first defendant decided to abide the decision of the court, second defendant persisted unrelentlessly with first defendant's defence. It was clear that his principal objective was to ensure that first defendant avoids payment of the balance owing in terms of the Agreement. Although second defendant indicated that first defendant will testify, it appears that she refused to do so and not to perjure herself. Adv **Stockwell** SC asked the court to award costs on an attorney and own client scale to show the court's disapproval of the manner in which second defendant not only conducted the proceedings, but also launched an unjustified and unwarranted attack on plaintiff and Guardrisk. I am at pains to distinguish between *"attorney and client scale"* and *"attorney and own client scale"*. Be that as it may.

40. **Marais JA** in **Williams v Harris** 1998 (3) SA 970 (SCA) at 973D said:

> "…*[he] who chooses to ride a tiger will find it difficult to dismount unscathed. Much the same can be said of…"*

In my view this applies equally to second defendant who not only of his own volition got engrossed in these proceedings, but also decided to embroider and pursue defences which had very little prospect of success. The first defendant can also not escape the consequences of second defendant's conduct because he was acting in terms of a power of attorney given by her to him.

41. During the course of the trial certain wasted costs were reserved for later determination. It would be fitting to determine such costs also at this stage. An appropriate order, in my view, for such costs would be that they be costs in the cause. As far as the costs, as a whole, are concerned, I think, an appropriate

order would be that first and second defendants be ordered to pay the costs on an attorney and client scale, jointly and severally, the one paying the other to be absolved, subject to the proviso that the assets and/or the estate of second defendant first be excussed before execution is levied against the assets and/or estate of first defendant. The latter course of action is directed to express the court's disapproval of the conduct of second defendant in these proceedings. The matters raised by the defendants were of sufficient importance and complexity to justify the employment of two counsel by plaintiff and I will therefore make allowances for such eventuality.

ORDER

42. In the premises an order is made in the following terms:

(a) First defendant is ordered to make payment to plaintiff in the amount of R59 092,25 (fifty nine thousand and ninety two rand and twenty five cents);

(b) First defendant is ordered to pay interest to plaintiff on the aforesaid amount at the rate of 15,5% (fifteen and a half per cent) per annum calculated from 5 December 2003 to date of payment;

(c) First defendant's claim in reconvention is dismissed;

(d) Wasted costs shall be costs in the cause; and

(e) First and second defendants are ordered to pay plaintiff's costs on an attorney and client scale and such costs to include the costs of the principal action and the claim in reconvention together with the costs consequent upon the employment of two counsel. It is further ordered that first and second defendants shall be jointly and severally liable for

the payment of the costs, the one paying the other to be absolved, subject to the condition that the assets and/or the estate of second defendant first be excussed before execution is levied against the assets and/or estate of first defendant.

…….

E MOOSA