IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 3766/2010
Date Heard: 27/11/2012
Date Delivered: 28/11/2012

In the matter between:

MOMENTUM GROUP LIMITED Plaintiff

and

RIAAN WOLMARANS Defendant

JUDGMENT

REVELAS J

[1] The plaintiff, an insurance company, instituted action against the defendant for payment of the amount of R650 000.00, plus interest and its costs of suit. It was common cause that 25 December 2007, the plaintiff paid the amount of R650 000.00 into the bank account of the defendant. The plaintiff's case is that the payment was made in error and that the defendant had no legal entitlement thereto. The plaintiff relies on the *condictio indebiti,* alleging that the defendant was enriched in the amount claimed, at the expense of plaintiff.

[2] The defendant disputes that the enrichment was unjustified and *sine causa*. He maintains that the amount paid to him by the plaintiff was

owing to him as a disability benefit payable in terms of a policy of insurance underwritten by the plaintiff.

[3] The insurance agreement came about in the following circumstances: During February 2007, the defendant was approached by someone from a division of First National Bank, (FNB) called 'Bancassurance', with a view to sell a new product in terms whereof all debts of a client are consolidated into one account. Salaries would be paid into this account from which the bank's clients would manage and repay all debts at a more beneficial interest rate. The defendant and his wife met with a Ms Geldenhuys who was with Bancassurance at the time on two occasions to discuss purchasing this product. It was called "One Account", and was provided for under a "Living Series Facility". Insurance cover for this consolidated debt was also provided, and in particular, the defendant wanted cover for the outstanding amount on his mortgage bond. The cover under discussion was underwritten by Momentum Aspire, a division of the plaintiff.

[4] When the defendant met with Ms Geldenhuys, he was already insured in terms of a policy (SL 025854338) underwritten by the plaintiff. The commencement date of this policy was 1 March 1991, and its maturity date was in 2010. Under this policy the defendant had basic (life) cover, as well as inability and disability cover ("basiese dekking, "ongeskiktheidsvoordele" and what was termed as a "hersteller").

[5] It was common cause that the defendant accepted FNB Bancassurance's offer, for the Living Series Facility and life cover in the amount of R650 000.00 (the amount eventually paid to him on Christmas day, 2007). The monthly premium for the life cover was R557.73. No disability or inability cover was ever included in this policy.

[6] The defendants' case was that Ms Geldenhuys had assured him that he would have the same benefits under this later policy with the plaintiff, as he had under the previous 1991 policy. He testified that he was under the impression that he was purchasing a policy with the same benefits as his previous policy, and therefore that he was also covered for disability and inability. Because he could not afford both policies, he said he surrendered the earlier policy. He was paid out a sum of about R56 000.00 in two instalments in respect thereof.

[7] On 24 August 2007 the defendant underwent an emergency coronary bypass operation and submitted a claim for "Inability Benefits" on 26 October 2007 with the plaintiff. During December 2007, Ms Nannie Lombard, a senior assessor with Momentum Aspire, who dealt with the claim in question, approved the defendant's claim for inability benefits and authorized payment of the amount R650 000.00 to the defendant. It was paid in two instalments. Ms Lombard soon thereafter discovered that the defendant had no inability cover, but only life cover. Accordingly, the

defendant was not entitled to the benefit paid out to him. The defendant was telephonically advised that the amount was paid to him in error, and also in subsequent correspondence. He was also advised not to dispose the money paid to him in error.

[8] Ms Lombard's mistake, she explained, was due to a new claims processing system which was recently introduced into the workplace by the plaintiff. This new system reduced paper work, by doing away with the practice of keeping all files in storage. In terms of the new system, documents could be scanned and their information stored on computer (after a certain period) thereby obviating the need for storage space and the considerable storage costs. According to her, she did not receive a message on her computer screen to alert her that the defendant was not covered for inability benefits, when she processed the claim. Much evidence was led on precisely how the mistake occurred and it is not necessary to repeat it herein. It was properly established on the evidence, that the defendant was never covered for inability by the plaintiff, that Ms Lombard made a human error in authorizing the payment, and that the relevant records were not tampered with.

[9] Ms Geldenhuys also testified. She did not remember much of her meeting with the defendant and his wife, but according to what she did recall, and based on her contemporaneous notes, the defendant only wanted extra cover for the outstanding amount on his mortgage bond.

Inability cover was not an option. She had only ticked off life cover and the monthly premium in respect thereof on the defendants application form. The defendant also placed his signature beneath the appropriate ticks on that document reflecting that he chose only life cover, and also signed on another page of the agreement. The space on the form which provides for "Inability Cover" on the application document is left open. *Ex facie* the document signed by the defendant, he only took out life cover. That also became common cause.

[10] The defendant pleaded that the plaintiff's agent (Ms Geldenhuys) represented to him "through her conduct that he would have the same benefits" as his earlier, then existing policy. The defendant further pleaded that the aforesaid representation induced a reasonable belief on his part, that the policy included a disability benefit. He contended that he would not have signed the contract of insurance, had he been aware of the true facts. Accordingly, the defendant pleaded that the plaintiff was estopped from relying on an error in claiming repayment from him.

[11] Ms Geldenhuys was not aware of the defendant's earlier policy which was still in existence, when the defendant and his wife came to see her, and it was also not placed before her. According to her, the defendant said she only wanted life cover because he had other cover in place. This accords with the defendant's bank records which reflect that he had other long term policies with, *inter alia,* Old Mutual. When the

defendant gave evidence, he accepted that Ms Geldenhuys could only have been made aware of the earlier policy's terms if he had told her about the policy. That puts paid to another question which arose, namely whether Ms Geldenhuys had a duty to alert the defendant to the fact that in terms of the new policy, he did not qualify for disability or inability benefits. In other words, it was the responsibility of the defendant himself to ensure that his new policy provided for those benefits. The defendant's explanation in court was that a misunderstanding between himself and Ms Geldenhuys as to the terms of the policy must have occurred.

[12] In my judgment, the misunderstanding was not attributable to any representations on Ms Geldenhuys' part. The defendant should have ensured that the documents constituting the insurance contract he signed and concluded with the plaintiff, made provision for disability and inability benefits. His signature appears twice on the relevant documents. This was also not the first time that the defendant concluded an insurance contract, if one has regard to his bank statements. On the probabilities, the defendant was either negligent in not ascertaining exactly what insurance product he was buying or there was a misunderstanding between himself and Ms Geldenhuys. In either case, the plaintiff cannot be held responsible for the fact that the defendant was not covered to the extent that he wanted to be.

[13] The facts of this case simply do not support a finding of estoppel. No representations were made to the defendant. Ms Geldenhuys had no interest in selling the defendant only the cheaper (Life Cover) product when he wanted disability cover as well. As a result, the defendant was not entitled to the amount paid to him, however regrettable the misunderstanding was. I am therefore compelled to find for the plaintiff.

[14] The defendant was advised more than once that the amount was paid in error, but persisted that he was entitled thereto. Accordingly, costs must follow the result.

[15] The following order is made:

1. Judgment is granted in favour of the plaintiff. The defendant is to make payment to the plaintiff in the amount of R650 000.00;

2. Interest is payable on the aforesaid amount at the rate of 15.5% per annum from date of demand to date of final payment;

3. The defendant is to pay the plaintiff's cost of suit.

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E REVELAS
Judge of the High Court

Counsel for the Plaintiff: Adv AJ Lampough

Instructed by:	Keith Sutcliffe Associate Inc c/o Rushmere Noach Incorporated
Counsel for the Defendant:	Adv D Niekerk
Instructed by:	D Gouws Incorporated Attorneys
Dates Heard:	26, 27 November 2012
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