CR233

Payment of premiums – debit order on third party's bank account without his authorisation – whether third party has a claim against the insurer for repayment of the premiums wrongfully deducted from his bank account – jurisdiction.

The complainant, Mr C, was for some time in some sort of business relationship with a certain Mr M. What the precise nature of that relationship was appeared to be seriously in dispute.

Section 4 of Mr M's application form which preceded the issue of a policy by Insurer A to Mr M indicated that the premiums were to be paid by debit order from a certain numbered account at Bank B. The account number was that of the complainant, Mr C.

The section concluded: "*I, the undersigned, authorise Insurer A to debit my account with the premiums due for the insurance for which I apply. I undertake to inform Insurer A of any change in my bank details and I authorise Insurer A to verify such bank details with my bank. I accept that Insurer A may debit my account on a date other than specified*."

Two signatures appeared in section 4 against the designation "*Signature of account holder*". The one signature was that of Mr M. The other was reputed to be that of the complainant, Mr C.

During August 2002 Insurer A, acting on the application form completed by Mr M, issued an insurance policy . The policyholder was Mr M and the nominated beneficiary appeared to be his wife.

During the period August 2002 to July 2005 premiums were paid to Insurer A on the strength of a debit order (presumably the one issued pursuant to section 4) for R1000.00 per month (later increased) from the complainant's bank account at Bank B.

During 2005, so the complainant stated, he discovered that an amount (later calculated to be R42643.81) had been deducted from his bank account and paid to Insurer A.

Complainant denied that it was his signature which appeared on section 4 of the application form quoted above. He alleged that it was a forgery.

Complainant, through his attorney, complained to Bank B and to Insurer A and, when he did not receive a satisfactory response, to this office.

The complainant demanded:

(a) the cancellation of the policy; and

(b) a refund of all payments deducted from his bank account as well as bank charges and interest.

Since the complainant was not the policyholder or otherwise a party to the policy, he lacked the status to demand a cancellation of the policy as such. The only relevant issue was thus whether he was entitled to a refund of the payments made.

In one of its letters Insurer A conceded, "*It is our conclusion that Insurer A albeit innocent, made unauthorized withdrawals from Mr C's bank account and we need to refund those payments. Insurer A will still have a claim against the policyholder for damages suffered".*

However, Insurer A subsequently intimated that there may be defences, based on prescription and estoppel, to Mr C's claim for a refund. Moreover, it conducted further investigations. According to Insurer A Mr M visited its offices and confirmed that he and the complainant were business partners; that the complainant's broker, a certain Mr S, wanted to sell Mr M a policy; that he, Mr M, made it clear that he could not afford a policy; that it was Mr S who completed the application form; that he signed section 4 of the application form before it was completed; and that the complainant accompanied him when he went for medical tests.

This statement was largely confirmed by a later affidavit signed by Mr M in which he added that when Insurer A phoned him, "*to ask me if I can service this policy I told them I was not aware that I had a policy they must cancel it*"; and that the signature on the application form is his. He concluded: "*The one for the complainant I did not sign on his behalf*".

Significantly neither in the statement to Insurer A nor in the affidavit was it specifically mentioned that the other signature on section 4 was that of the complainant.

The insurer thereupon raised the factual dispute and stated, "*The facts now clearly suggest that there is a possibility that the complainant authorised the debit order deductions …*".

If the complainant in fact counter-signed section 4 or authorised the deductions from his bank account, as was suggested by Insurer A, that would of course be the end of the matter and he would not have a claim for a refund of the premiums.

If, on the other hand, he had not signed the document and the deductions were unauthorised, the next question would be whether he would have a claim for a refund against the insurer or whether his remedies were limited to claims against the bank and Mr M.

In the statement quoted above Insurer A accepted that if the payments were not authorised by the complainant there would be a claim for a refund against

it. We agreed. Such a claim could either be an enrichment or a delictual claim or one founded on equity.

Dealing first with a potential enrichment claim the position appeared to us to be as follows. Payment is a bilateral act requiring the intention on the part of the payer (whether as debtor or as a third party) to discharge the debt and a corresponding intention on the part of the creditor/payee. Although it is arguable that the payer in the case of a debit order is the bank, the *de facto* payer is clearly the account-holder. This office, clothed as it is with an equity jurisdiction, would be disinclined to close its eyes to the insurer's factual enrichment and the complainant's corresponding factual impoverishment as a result of the unauthorised payments made from his account.

In addition it could be argued that, in the circumstances of this case, there was a duty on the insurer to make appropriate enquiries from the bank as to the authenticity of the account-holder's authorisation of the debiting from his account.

This arose in three respects.

Firstly, there is the wording of section 4, quoted above. Secondly, there is the bank's response to the complainant's attorney's letter of demand to it in which the bank stated, "*The customer instructions was obtained by Insurer A's consultant and handed to his or her head office. They then captured the details on their banking system requesting payment from the bank. Once the bank receives this request this system is programmed to pay the transaction from the accounts. We as bank have an agreement with these companies that they must have proof that the account holder has authorised them to make such deductions"*. And finally, there is the statement in Mr M's affidavit referred to earlier that "*when Insurer A phoned to ask me if I can service the policy I told them that I was not aware that I have a policy they must cancel it*".

A potential claim by the complainant on either an enrichment or a delictual basis would not be compromised by the complainant's potential remedy (depending on the facts) against the bank (paying out without proper authorisation) or against Mr M (forging complainant's signature or designating his account without his authorisation). This office had no jurisdiction over either the bank or Mr M and these issues were accordingly left aside.

As between the complainant and the insurer it all hinged on the factual issue whether the complainant authorised the deductions and signed section 4.

In terms of our Rule 5.1, this office "*shall resolve material disputes of fact on a balance of probabilities and with due regard to the incidence of the onus*". The onus in this instance rested on the complainant to prove his case for a refund. When fraud is alleged this office will always be hesitant to come to a conclusion on the probabilities without further evidence being adduced.

Rule 5.3. provides for the hearing of evidence, "*if the Ombudsman and all the parties concerned are in agreement that a complaint for a material and conclusive dispute of fact can best be determined by the hearing of evidence*".

In our view this was such a case. Our suggestion to both the complainant and the insurer was accordingly that they consent to a hearing in terms of the said Rule so that the critical issue of authorization (and some of the ancillary issues bearing on the probabilities) could be resolved.

Both parties eventually agreed to a hearing to be held in the Pretoria area where the complainant resides and where Insurer A had its offices.

But there was one practical problem. Mr M was not subject to the jurisdiction of this office and Insurer A was afraid that he might not attend the hearing.

Insurer A accordingly contacted Mr M itself. It suggested to him that he should cede the policy to Insurer A who would then pay out the surrender value to the complainant in full and final settlement of the dispute. Both Mr M and the complainant agreed to this solution of the problem and the matter was resolved without a hearing taking place.

PMN
May 2007