

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT- DEL- -2019/02849

In the matter between:

WESTERN NATIONAL INSURANCE COMPANY LIMITED	1st PLAINTIFF
DETLIEF ALBAT	2nd PLAINTIFF

And

ASSER MWEULINALE	1st DEFENDANT
NAMPOWER	2nd DEFENDANT
BARTOLOMEUS ISHITILE	3rd DEFENDANT

Neutral citation: *Western National Insurance Company Ltd & Another v Mweulinale & Others.* (HC-MD-CIV-ACT-DEL-2019/02849) [2021] NAHCMD 82 (11 February 2021)

Coram:	TOMMASI J
Heard:	29 October 2020.
Delivered:	11 February 2021
Reasons released:	25 February 2021

Flynote: Exception – claim bad in law – does not disclose cause of action – Insurance company sued in own name – exception upheld.

Insurance Law – Principle of Subrogation – English Law – applied as such in Namibia. *Rand Mutual Assurance Co Ltd v Road Accident Fund 2008 (6) SA 511 (SCA)* distinguished.

Summary: The defendants excepted to the plaintiff's particulars of claim on the ground that the 1st plaintiff does not have *locus standi* to claim the amount by which it allegedly indemnified the 2nd plaintiff from the defendants in its own name. The plaintiffs opposed the exception. According to the plaintiff, the procedural requirement of the doctrine of subrogation which requires that an insurer litigate in the name of the insured flies in the face of the requirement of transparency that underlies all litigation, serves no public interest in modern times, is formalistic and creates anomalies and it is preferable and this court should permit the insurer to proceed in its own name.

Held: court reluctant to, as of right, permit insurer to sue in own name and, that, the current position that insurer may in terms of the principle of subrogation institute in name of the insured or act and sue in own name in terms of cession is maintained.

Held that: The facts in *Rand Mutual Assurance Co Ltd v Road Accident Fund 2008 (6) SA 511 (SCA)* differs from the facts of this case.

ORDER

1. The exception is upheld with costs, such costs to include the costs of one instructing and two instructed counsel (not limited in terms of Rule 32 (11)).
 2. The parties are to file a Case Plan on or before 19 March 2021.
 3. The matter is postponed to 24 March 2021 for a Case Planning Conference at 14:15.
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RULING

TOMMASI J,

[1] The defendants excepted to the plaintiff's particulars of claim and the plaintiffs opposed the exception.

[2] The 1st plaintiff, an insurance company, entered into an agreement with 2nd plaintiff in terms whereof 1st plaintiff insured 2nd plaintiff's motor vehicle. The said vehicle was involved in a collision. The 1st plaintiff (the insurer) alleges that it suffered damages in the sum of N\$74 659.41 being the repair and tow-in costs. The second plaintiff (the insured) also claims damages. The exception only applies to the claim of 1st defendant.

[3] The defendants' exception to the particulars of claim is as follows:

'The 1st plaintiff does not have *locus standi* to claim the amount by which it indemnified

the 2nd plaintiff from the defendants in its own name. As the insurer of the vehicle and not the owner of the vehicle the 1st plaintiff has no interest in the diminution of the patrimonial value of the vehicle and therefor has no *locus standi*

In terms of the principle of subrogation, on which principle the 1st plaintiff claim against the defendants is premised, the insured party, in this instance 2nd plaintiff remains *dominus litis*.

The principle of subrogation, provided the requirements of subrogation have been met, creates a personal right for the insurer (i.e. 1st plaintiff) against its insured in terms of which it is entitled to recoup itself out of the proceeds of any rights the insured may have against a 3rd party in respect of the loss which the insurer indemnified the insured. Subrogation in effect requires a settling-up between the insurer and the insured if the insured's claim against a third party in respect of a loss as result of an insured event is successful.

Once the insured indemnifies the insured the claim is subrogated to the insured who can institute action against the negligent third party in the name of the insured. It is trite law that the arrangement between the insurer and the insured is irrelevant to the opposing party. It confers no rights and imposes no obligation on third parties.

The only manner in which the first plaintiff can institute action in its own name is if it has taken cession of the 2nd plaintiff's claim against the defendants. This has not been pleaded.

The 1st plaintiff's claim therefore lacks the averments which are necessary to sustain a cause of action, alternatively the 1st plaintiff's claim lacks averments to sustain an action, is incapable of being supplemented to sustain a cause of action and is consequently bad in law.'

[4] The plaintiffs' position in response hereto is as follows:

'The procedural requirement of the doctrine of subrogation which requires that an insurer litigate in the name of the insured flies in the face of the requirement of transparency that underlies all litigation, serves no public interest in modern times, is formalistic and creates anomalies.

For all the above reasons the (English) rule, in its stark form (i.e. requiring that an insurer sue in the name of the insured), cannot be justified and unless the defendants will be prejudiced in a procedural sense, it is preferable and this court should permit the insurer to proceed in its own name.'

[5] The parties are *ad idem* regarding the principles applicable to exceptions as set out in *Van Straten N.O and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC) and for the sake of brevity I shall not restate same herein. The court is called upon to determine whether the particulars of claim is bad in law in that it does not disclose a cause of action in respect of the 1st plaintiff's claim.

[6] The dispute centres on the doctrine of subrogation in insurance law and the question for determination is whether the 1st plaintiff is entitled to claim damages for the repair of the motor vehicle and tow-in services in its own name or whether it may do so only in the name of the insured.

[7] Mr Corbett, counsel for 1st plaintiff, held the view that this court has a duty to develop the common law whether or not it is the English or the Roman Dutch law by

conclusively deciding that the insurer may sue in its own name as was done in *Rand Mutual Assurance Co Ltd v Road Accident Fund 2008 (6) SA 511 (SCA)*.

[8] Mr Heathcote, counsel for the excipient, submits that the principle was adopted from English Law and that it arrived at Namibian shores by way of the Administration of Justice Proclamation 21 of 1919 (SWA) section 1 which has, to date, not been repealed. Counsel for the defendants submitted that the position that currently exists in South Africa differs materially from the Namibian position and that the court must be slow to adopt the approach by the South African Supreme Court in the *Rand Mutual* case, *supra*. He submits that one of the characteristic features of the doctrine of subrogation is that, in the exercise of its right of subrogation, the insurer cannot act in its own name against the liable third party but has to enforce the insured's right against that party in the insured's name only.

The *Rand Mutual Assurance Co Ltd v Road Accident Fund* case

[9] In the *Rand Mutual Assurance* matter, a mutual association, paid compensation to an insured's employee for injuries he sustained in a work-related motor-vehicle accident. *Rand Mutual* instituted action against the RAF in the High Court under s 36(1)(b) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) for recovery of the compensation it paid to the insured's employee. The RAF at the trial raised a similar objection i.e that *Rand Mutual* had no right to sue because according to the doctrine of subrogation the insurer was not entitled to sue in its own name and *Rand Mutual* did not obtain cession of the action from the insured. The High Court upheld the RAF's objection and dismissed *Rand Mutual's* claim. *Rand Mutual* appealed against that decision to the Supreme Court of Appeal. The Supreme Court held that the doctrine of subrogation did not accord either with South African constitutional values or the Roman-Dutch law of procedure, that settled legal principles should not lightly be interfered with, that it was thus possible to hold that the insurer was bound to litigate in its own name and barred from litigating in the name of the insured. The English rule in its stark form was not, however, justified, and unless the wrongdoer would be prejudiced in a procedural sense, the insurer was entitled to proceed in its own name.

[10] Harmse ADP considered the history of the reception of the English law of subrogation, the nature of the rule that a subrogated claim must be brought in the name of the insured, and reflected on whether the rule requires adaptation or amendment. He states the following:

‘Significantly, in formulating the doctrine of subrogation, this court has not as that the insurer is not entitled to sue in its own name. Different laws deal with this aspect differently. The English common law, as has been said, requires the insurer to sue in the name of the insured. This requirement gives rise to a number of procedural anomalies. American law apparently adopts a different approach: although it is accepted that in strict law the action ought to be brought in the name of the insured, the insurer institutes the litigation in its own name to protect litigants from harassment and to avoid confusion over the identity of the real plaintiff. (para 19)

‘That does not, however, mean that the procedural rule that the insurer has to sue in the name of the insured is in accordance with the general principles of our law;(paragraph 20)

Courts are entitled to regulate their own procedure. It is therefore not surprising that common-law courts outside Britain, on occasion, have permitted the insurer to litigate in its own name.(paragraph 21)

This court is duty-bound to consider whether the procedural requirement is consonant with our constitutional values and our law of procedure. I believe that it is not. To require a party to litigate in the name of another appears to me to fly in the face of the requirement of transparency that underlies all litigation. The rule serves no public interest in modern times, as appears from the position in the USA. It is formalistic and creates anomalies. It enables the insurer to litigate in the name of the insured without taking any risks as far as litigation costs are concerned. The supposed advantage, namely that the insurance company may be able to retain its anonymity, is clearly not to the advantage of the wrongdoer and also probably not to that of the insured. (paragraph 23)

It is safe to assume if regard is had to the prevailing practice that insurance companies have been acting on the basis that they have to litigate in the name of the insured. Although this is in my view a less than desirable practice it would be wrong to abolish it by judicial fiat. This court is reluctant to interfere with settled legal principles, even when they have their origin in an incorrect interpretation of the law because members of the public may have arranged

their affairs on the assumption that they were settled. *Communis error facit ius*. Consequently, this judgment does not hold that the insurer must litigate in its own name and may not litigate in the name of the insured. What it does hold is that the English rule in its stark form cannot be justified and that, unless the wrongdoer will be prejudiced in a procedural sense, courts may permit the insurer to proceed in its own name. It might be necessary to adapt other procedural rules in such an event as requiring, by analogy with Uniform Rule 35(5)(b), discovery by the insured (paragraph 24)

[11] The English Law has in unequivocal terms stated that an insurer cannot institute action in its own name. See also Case Comments – JP Van Niekerk, (2009) 21 SA Merc LJ 568 where the author states as follow:

'The insurer's right of subrogation being a right against the insured is exercised by the insurer in its own name. The insured's right against the third party, which is the object of one aspect of the insurer's right of subrogation, being and remaining the insured's right against the third party, is, at least as a general rule in English law, exercised by the insurer in the name of the insured.'

[12] In *Marco Fishing (Pty) Ltd v Government of The Republic of Namibia and Others 2008 (2) NR 742 (HC)* the court had occasion to consider the principle of subrogation. In this matter the third defendant applied to compel discovery of, inter alia, the agreement of insurance between the plaintiff and its insurer, relying on the doctrine of subrogation but the court held that such discovery is not relevant for the conduct of the litigation. The court in this matter referred to *Commercial Union Insurance Co of SA Ltd v Lotter 1999 (2) SA 147 (SCA) ([1999] 1 All SA 235)*, where that court stated the following at page 154D (All SA at 240E):

'It is trite law that an insurer under a contract of indemnity insurance who has satisfied the claim of the insured is entitled to be placed in the insured's position in respect of all rights and remedies against other parties which are vested in the insured in relation to the subject-matter of the insurance. This is by virtue of the doctrine of subrogation, which is part of our common-law.'

[13] Our Supreme Court in the case of *Dresselhaus Transport CC v The Government of the Republic of Namibia 2005 NR 214 (SC)* had this to say about subrogation:

'The latter insurance company in actual fact paid plaintiff for the loss in accordance with an agreement between insurer and insured pertaining thereto. The said insurer was thus entitled on the principle of subrogation to sue the third party, in this case the government, in the name of the insured' [my underlining]

[14] It can therefore be accepted that the doctrine of subrogation finds application in this jurisdiction. I must hasten to add that this court, like the South African courts prior to the *Rand Mutual* case, has not as yet held that the insurer is not entitled to sue in its own name.

[15] The Supreme Court in South Africa in the *Rand Mutual* matter concluded that the courts may permit the insurer to proceed in its own name but stopped short at banishing the common law approach that an insurer may also litigate in the name of the insurer altogether. This decision empowers the courts with the discretion to permit the insurer to proceed in its own name.

[16] The question which remains is whether there is a need to develop the doctrine of subrogation to also permit an insurer to claim in its own name. Mr Corbett submits that the English procedural rule that an insurer has to sue in the name of the insured for a subrogated claim, has lost its basis and should be developed by this court to permit an insurer to sue in its own name as was done by the Supreme Court of Appeal in the *Rand Mutual* case. It must be borne in mind that the *Rand Mutual* case involved a policy of insurance for the full extent of their potential liability under a statute. This is not the case herein as the insured remains liable for the excess and other damages as is evident from the claim of the 2nd plaintiff.

[17] This court would be reluctant to open the door to a flood of cases in which Insurance companies would be permitted, as of right, to sue in their own name. It would have to remain an issue which warrants judicial oversight. It does not mean that the courts would not, in suitable circumstances, permit an insurer to institute action in its own name. The court is mindful of the anomalies in the application of the doctrine but is concerned that generally, the insured not the third party, may be prejudiced if the insurer is allowed to act in its own name. The rights of the insured might be impacted in that he/she may not have a right of recourse to claim any

excess unlike the claim in the *Rand Mutual* case where the plaintiff provided the employer with full indemnity.

[18] In this matter the insured is before this court and is capable of pursuing his claim for the total damages as a result of the collision. The 2nd plaintiff in this matter is best suited to pursue his delictual claim for damages caused by the negligence of the defendants and the insurer, in terms of the doctrine of subrogation, is entitled to litigate in the name of the insured having paid the insured his claim in terms of the insurance contract between the parties. The common law as it stands and applied in our courts, grants the insurer the right to sue in the name of the insured but does not extend an entitlement to sue in its own name. The exception consequently must be upheld.

[19] The general rule is that costs follow the event. Both parties employed the services of one instructing and two instructed counsel. Given the complexity of the matter the court finds that the defendants would be entitled to the cost of one instructing and two instructed counsel. The court for the same reason would not limit the costs in terms of Rule 32(11).

[20] In the premises the following order is made:

1. The exception is upheld with costs, such costs to include the costs of one instructing and two instructed counsel (not limited in terms of Rule 32 (11)).
2. The parties are to file a Case Plan before or on 19 March 2021.
3. The matter is postponed to 24 March 2021 for Case Planning Conference.

M.A TOMMASI,
Judge

APPEARANCES:

PLAINTIFF:

Marguerite Rix
of Delport Legal Practitioners

DEFENDANT:

Francois Erasmus
Of Francois Erasmus & Partners