REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2019/02684

In the matter between:

IGLO PORTUGAL, COMERCIALIZACAO E PRODUCAO DE PRODUTOS ALIMENTARES SOCIEDADE UNIPESSOAL LDA **FIRST PLAINTIFF**

ATLAS MARITIME SAM **SECOND PLAINTIFF**

And

HANGANA SEAFOOD (PTY) LTD **DEFENDANT**

Neutral citation: *Iglo Portugal, Comercializacao E Producao De Produtos Alimentares Sociedade Unipessoal LDA* v Hangana Seafood (Pty) Ltd (HC-MD-CIV-ACT-CON 2019/02684) [2022] NAHCMD 599 (2 November 2022)

Coram: PRINSLOO J

Heard: **15 September 2022**

Delivered: **2 November 2022**

Flynote: Civil Practice – Special plea in the form of stated case in terms of rule 63 – Locus Standi – Plaintiffs' insurers acting as *dominis litis* and using name of the plaintiffs on basis that it could do so by reason of right of subrogation – Requirements of subrogation considered – Special plea raised in respect of the first plaintiff is upheld – Special plea raised in respect of the second plaintiff is dismissed.

Summary: In consolidated action the plaintiff's instituted action against the defendant for damages suffered in consequence of a rotten consignment of fish received. The claim arises from a breach of contract by failing to apply the necessary duty of care in packing the fish and maintaining the refrigeration unit to specified standards. Plaintiff were indemnified by their respective insurers in terms of a Marine Cargo Insurance Policy. The action was instituted and pursued by the respective insurers acting as dominis litis and using the name of the plaintiffs, by reason of the right of subrogation.

Special plea of lack of locus standi raised by the defendant in respect of both claims and parties agreed that the court adjudicate the special pleas in the form of a stated case in terms of rule 63.

In terms of an agreement concluded between the plaintiffs and I & J (whether as principal or agent), I & J would supply fish to the plaintiff in terms of Incoterm CIF Lisbon or Genoa. The consignment of fish would be transported from the port of origin, Walvis Bay to the ports of Lisbon and Genoa via sea carriage.

I & J therefore issued a commercial invoices to the plaintiffs incorporating the CIF Incoterm 2010 which implied that the ownership and risk in the fish passed to the plaintiffs upon shipment. Upon discharge of the containers in the ports of final destination it was found that fish was rotten.

The parties agree for purposes of the stated case that the risk in respect of the consignment of fish occurred whilst the refrigeration containers were under care and supervision of the defendant.

I & J had concluded an Insurance Agreement with Zurich Insurance Company South Africa Limited, in terms of which it insured, amongst other things, frozen fish. As a result of the loss of the fish, the insurer indemnified and paid the loss to the plaintiff, Iglo and instituted this action in the name of the Plaintiff. Upon closer inspection of the Marine Cargo Insurance Policy Iglo was not the insured party as its name does not appear in the policy document apart from a Form of Subrogation, which is irrelevant for the proceedings. The defendant pleads that the insurer could not rely on its rights to subrogation as it had no obligation to indemnify Iglo by virtue of the Marine Cargo Insurance Policy as it was not a party thereto and therefor the insurer has no locus standi to proceed with action against the defendant.

I & J also concluded an Insurance Agreement with Mutual and Federal Insurance Company in respect of the plaintiff, Atlas. This agreement does not suffer the same deficiencies as the insurance agreement in respect of Iglo. The defendant pleads that as it is agreed that the peril insured against occurred before shipping whilst the consignment of fish was in the custody of the defendant. In terms of the agreement between the parties, regulated by CIF Incoterms the risk did not yet pass to the plaintiff, Atlas at the time, as the risk would only pass over to the plaintiff upon loading the container of fish on the vessel. The defendant avers that as a result Atlas had no ‘insurable interest’ at the time damages and if Atlas did not have an ‘insurable interest’ it had no locus standi.

Held that: a valid insurance agreement is the foundation of the right of subrogation because it is in terms of the said insurance agreement that the insurer indemnifies the insured. If a valid insurance agreement is not in existence between the parties then the insurer has no right to subrogation. This then further implies that the authority to use the name of the insured that would be available to the insurer by reason of subrogation to advance an action against a third party, does not exist, which further implies that there can be no *locus standi* to advance the claim of the insurer.

Held that: a party instituting proceedings has the onus to establish legal standing and that is not only concerning establishing the sufficiency and directness of interest but also that it is the rights-bearing entity or acting on the authority of that entity or has acquired the rights.

Held that: the special plea raised in respect of the first plaintiff (Iglo) must be upheld.

Held that: from the definition of 'insurable interest' as per *Refrigerated Trucking Pty Ltd v Zive NO (Aegis Insurance Co Ltd, Third Party)* the court is satisfied that the second plaintiff (Atlas) had an 'insurable interest' in the consignment of fish which became spoiled whilst in the custody of the defendant.

Held that: as a result of the finding that the second plaintiff (Atlas) had an 'insurable interest' in the consignment of fish, the insurer would be entitled to subrogate its claim. Even if Atlas had no 'insurable interest' but the insurer made payment reasonably and in good faith then the insurer would still be entitled to subrogate that claim.

Held further that: the special plea raised in respect of the second plaintiff, Atlas, stands to be dismissed.

ORDER

---

1. In respect of the first plaintiff, Iglo Portugal, Comercializacao E Producao De Produtos Alimentares Sociedade Unipessoal Lda, the special plea is upheld and the first plaintiff's claim is dismissed with costs. Such costs to include the employment on one instructing and one instructed counsel.

2. In respect of the second plaintiff, Atlas Maritime Sam, the special plea is dismissed with costs. Such costs to include the employment on one instructing and one instructed counsel.

3. The matter is postponed to 24 November 2022 at 15h00 for a Status Hearing (Reason: To determine the further conduct of the matter).

JUDGMENT

PRINSLOO J:

The parties

[1] The first plaintiff is Iglo Portugal, Comercializacao E Producao De Produtos Alimentares Sociedade Unipessoal LDA (Iglo), a company duly incorporated according to the laws of Portugal, carrying on business at Lagos Park Edificio 5C 5 Andar 2740-298 Porto Salvo, Portugal.

[2] The plaintiff is Atlas Maritime Sam (Atlas), a company duly incorporated according to the laws of Monaco, carrying on business at Le Panorama B, 57 Rue Grimaldi, MC98000, Monaco.

[3] The defendant is Hangana Seafood (Pty) Ltd (Hangana), a company duly incorporated and registered according to the laws of Namibia, carrying on business at Ben Amathila Avenue 19, Walvis Bay, Namibia.

Introduction

[4] The matter came before me as a consolidated case. The consolidation came about as a matter of convenience, as many of the facts in the Iglo and Atlas[1] matters are similar.

[5] The claim in respect of both matters arises from two causes of action, advanced in the alternative:

---

[1] Previously under case: *Atlas Maritime Sam vs Hangana Seafood (Pty) Ltd* HC-MD-CIV-ACT-DEL-2018/01880.

1.1 a delictual claim arising from the packing of the fish;
1.2 a contractual claim arising from an agreement in terms of which it is claimed that the defendant had undertaken to supply the fish as an undisclosed principal in the agreement.

[6] It is common cause that the actions were instituted and pursued by the plaintiffs' insurers acting as dominus litis and using the plaintiffs' names on the basis that it could do so by reason of the right of subrogation.

[7] The parties agreed for such locus standi to be determined. Accordingly, the parties approached this court to decide the issue of locus standi raised in Hangana's special pleas in the form of a stated case in terms of rule 63 of the Rules of Court in advance, separate from the merits and quantum.

Special pleas

[8] Without having to replicate the special pleas, it is common cause that the relevant special pleas are that of locus standi, or rather the lack thereof.

[9] In the Iglo matter, Hangana pleaded that the action is instituted by an insurer, i.e. Zurich Insurance Company South Africa Limited (Zurich), in the plaintiff's name, based on subrogation or cession of the plaintiff's rights.

[10] Hangana pleads that insofar as the deterioration of the goods occurred prior to shipping:

a) The insured period had not commenced;

b) The risk of loss or damage did not vest with the plaintiff;

c) The insurer was:

    i. Not obliged to compensate the plaintiff;

ii. Could not acquire any right from the plaintiff by subrogation.

[11] Therefore, the insurer has no locus standi to claim by subrogation. Insofar as it relates to the insurer instituting action based on the rights acquired by session, Hangana pleaded that the cession needed to be specifically pleaded and proven, and as a result, the insurer is without locus standi to make the claim.

[12] In respect of the Atlas matter, Hangana pleads that the plaintiff does not have locus standi due to the fact that the plaintiff concluded an international contract of sale with a third party, I&J, on 10 April 2015 for the sale of frozen fish, to which the defendant was not a party and the risk of the goods vested in the third party, namely I&J, and not the Hangana. Therefore, in that premise, the plaintiff does not have the necessary locus standi to institute the claim against the defendant.

The facts agreed on by the parties in terms of rule 63(2)

[13] I will replicate portions of the agreed facts between the parties where so required but will attempt not to overburden the record by replicating it in full. Many of the agreed facts in the Iglo and the Atlas matters are similar.

[14] On 10 April 2015 (Atlas matter) and 26 April 2016 (Iglo matter), the plaintiffs and Irving and Johnson (I&J) concluded an International Contract of Sale in terms of which I&J sold a consignment of frozen fish to the plaintiffs.

[15] In terms of the contract of sale, I&J was obliged to deliver fish to the respective plaintiffs in a fresh and fit for human consumption condition.

[16] The terms of the individual agreements appear in I&J's commercial invoices. It was regulated by the terms of the Incoterm CIF (Cost, Insurance and Freight) Genoa

and Lisbon, respectively. The agreements were regulated by the CIF of Incoterms 2010®[2], which controlled and described the international trade terms at the time.

[17] The consignment of frozen fish in the case of Iglo would be carried from the port of Walvis Bay to the port of Lisbon on vessel mv JANDAVID S under bill of lading MAEU569386661. In the case of Atlas, the fish would be carried from the port of Walvis Bay to the port of Genoa on vessel mv JPO GEMINI under bill of lading MAEU566258703.

[18] In the alternative in the Atlas matter, the parties agreed that the plaintiff and the defendant, being I&J's undisclosed principal, concluded an agreement of sale, in terms of which the defendant sold the consignment of frozen fish to the Atlas (undisclosed international contract of sale). In terms of the undisclosed international agreement of sale, Hangana was obliged to deliver fish to the plaintiff which were fresh and fit for human consumption. Further to that:

a) The material terms of the undisclosed international contract of sale were similar to those in para 15 above in that Incoterm CIF Genoa regulated the commercial agreement and the I&J commercial invoice incorporated the terms of CIF Incoterm 2010®.

b) In addition, Hangana, either directly or through its agent, would procure the usual marine insurance cover over the goods and further procure the issue of a marine insurance certificate from a marine insurer.

c) In this regard, Hangana, either directly or through its agent I&J, would conclude a contract of carriage with a shipping line in respect of the carriage by sea of the consignment from the port of loading to the port of discharge and would pay the freight to the relevant shipping line and procure the issue of an original bill of landing.

[2] Incoterms® by the International Chamber of Commerce: The ICC rules for the use of domestic and international trade terms

d) As part of its delivery obligations Hangana, either directly or through its agent, I&J, would deliver the original invoice, the original marine insurance certificate and the original bill of lading to the plaintiff.

e) Hangana would load and ship the goods in a refrigerated container. The container had to comply with prescribed operational specifications.

[19] In both cases, the fish were to be carried in a refrigerated container, and for those purposes, the container was supplied to Hangana in working condition to be packed with fish.

[20] The parties are in agreement that in packing the container, Hangana owed the plaintiffs a legal duty, alternatively a contractual duty to exercise reasonable care in doing so and that Hangana had to ensure that it took all the reasonable steps to maintain a specified temperature whilst the container was in its possession and to ensure that the container continued to function properly.

[21] The containers were loaded onto the respective vessels in the port of Walvis Bay. Upon shipment of the containers, I&J tendered to the plaintiff the original commercial invoice, the bill of lading and the Marine Insurance Certificate, which, together, constituted the shipping documents.

[22] The parties agree that pursuant to and in terms of the shipping documents, the ownership and risk passed to the plaintiffs upon shipment.

[23] In this regard, the parties agree as follows:

a) In terms of the obligations according to the International Contract of Sale concluded with I&J, alternatively the defendant, the plaintiffs were obliged to pay the purchase price to I&J, which received the payment as principal alternatively as the agent of the defendant.

b) The plaintiffs both duly paid the purchase price.

c) At the time of delivery of the container and the packing of the fish in the container by Hangana:

   i. A contractual relationship existed between Hangana and I&J in terms of sales and distribution agreements.

   ii. Hangana was aware that the fish supplied to I&J was destined for sale in Europe and that the goods were destined for delivery to the plaintiffs as I&J's purchasers.

   iii. There was no contractual relationship between the plaintiffs and Hangana.

[24] The containers were carried to their destinations, i.e. Genoa and Lisbon, where they were finally discharged into the plaintiffs' care. When inspected, it was found that the fish had deteriorated to the point that it was not fit for human consumption and had to be destroyed.

[25] In both sets of particulars of claim, the plaintiffs allege that deterioration and ultimate destruction of the consignments of fish happened because, during the period that the containers were in possession of Hangana, it negligently failed:

a) to exercise reasonable care in the packing of the containers;

b) to ensure that the temperature within the containers were maintained at the required temperature to prevent te fish from deteriorating; and

c) to ensure that the containers continued to function properly.

[26] The plaintiffs claim that due to Hangana’s alleged failure, the fish deteriorated whilst under its control, and the deterioration continued during the ocean carriage. Further, as a result, the plaintiffs suffered the following damages: a) Iglo suffered damages in the sums of €112 154.33 (Euros) and £1 658.71 (British Pound). b) Atlas suffered damages in the sums of €113 040.00 (Euros), €6837.50 (Euros) and R85 875.00 (South African Rand).

[27] In terms of its obligation, I&J concluded a Marine Cargo Insurance Agreement with duly registered insurers, in terms of which the consignments of fish were insured. In the case of Iglo, I&J concluded the Marine Cargo Agreement with Zurich Insurance Company South Africa Limited (Zurich). In the case of Atlas, it concluded a Marine Cargo Insurance Agreement with Mutual & Federal Insurance Company.

[28] Pursuant to the indemnification of the plaintiffs, the respective insurers claiming to be acting under its rights of subrogation instituted the current action in the names of the plaintiffs. Neither Iglo nor Atlas relies on a specific cession, nor do the plaintiffs rely on or refer to the insurers' rights in law or the Form of Subrogation in their particulars of claim.

[29] It should be noted that neither of the insurers is a party to the current proceedings.

[30] Hangana claims that the plaintiffs are without locus standi. In contrast, Iglo and Atlas contend that the insurers' right to subrogation are irrelevant to the proceedings.

General principles of subrogation

[31] It is common cause that the actions were instituted and pursued by the plaintiffs' insurers acting as dominus litis and using the plaintiffs' name on the basis that it could do so by reason of the right of subrogation.

[32] The author MFB Reinecke *et al*[3] describes subrogation as the right to recourse not affecting any transfer of rights. In its literal sense, the word 'subrogation' means the substitution of one party for another as creditor.

[33] Reinecke proceeds to state the following in respect of subrogation as a doctrine of insurance law:

'Subrogation as a doctrine in insurance law embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance. The gist of the doctrine is the insurer's personal right of recourse against its insured, in terms of which it is entitled to reimburse itself out of the proceeds of any claims that the insured may have against third parties in respect of the loss. Complementary to the insurer's right of recourse, is the insurer's rights to take charge of the proceedings against third parties who are liable for the loss to the insured. The proceedings are conducted in the name of the insured and the insurer merely acts as dominus litis. These rights of subrogation is subject to certain requirements.

It is firmly established that subrogation does not affect a transfer of the insured's rights of recourse against third parties in favour of the insurer, by operation of law or otherwise. Unless cession occurs, the insured therefore remains the holder of his rights against the third party. This implies that, if for example, the insured should release the third party from liability (whether before or after indemnification), the third party's debt will be discharged. Subrogation is simply a process of settling-up between the insurer and the insured after the insured's claim against third parties has turned out to be successful. It is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance and confers no rights and imposes no liabilities on third parties.'[4]

[34] Subrogation is confined to indemnity insurance and has specific requirements[5], i.e.:

a) A valid insurance contract;

---

[3] MFB Reinecke et al, *General Principles of Insurance Law 2005 Lexis Nexis Butterwo*rths at para 373.
[4] MFB Reinecke et al, *General Principles of Insurance Law 2005 Lexis Nexis Butterworths* at para 373.
[5] Ibid at paras 385 to 388.

b) The insurer must have indemnified the insured;
c) The insured's loss must have been fully compensated; and
d) The right must be susceptible to subrogation.

[35] The rights of the insurer under subrogation, provided the requirements for subrogation have been met, are the following[6]:

a) The right to recourse;
b) The right to conduct proceedings against a third party;
c) Negative right to preservation of claim by the insured;
d) Positive right to preservation of claim; and
e) Right to information and assistance from the insured.

Arguments advanced on behalf of the parties

[36] The parties agree that the issues that the court needs to consider in respect of the Iglo and Atlas matters are almost identical. The parties are also ad idem regarding the principles that apply to the doctrine of subrogation as enunciated by Frank AJA in *Sheehama v Nehunga*[7], specifically regarding the fact that subrogation need not be pleaded and that there is no duty on an insurer, where it sues in the name of the insured by virtue of the doctrine of subrogation, to allege or prove the subrogation.

On behalf of the plaintiffs

[37] Ms De Vos is of the view that this court's findings in respect of the special plea should be that subrogation is irrelevant to the proceedings between the insurer and third parties and that the only party that can claim that the requirements of subrogation have not been met is the insured and not the third party. Ms De Vos further submitted that this is firstly because subrogation is a contractual engagement between the insurer and

[6] Ibid at paras 389 to 393.
[7] *Sheehama v Nehunga* 2021 (2) NR 349 (SC) at p 356.

the insured. Secondly, it does not transfer any rights or obligations from the insurer to the insured.

[38] Ms De Vos further argues that the plaintiffs are and remain Iglo and Atlas, who have locus standi to institute the action against Hangana and remain vested with the action. As a result, the court is not required to consider if the insurers have sufficient interest, nor is it necessary for this court to consider if the conditions of subrogation have been complied with. Ms De Vos reiterates that the only party entitled to say that the requirements to subrogation were not met would be the insured, i.e. Iglo and Atlas.

[39] Ms De Vos contends that the marine insurance certificates are critical to the matter. Counsel referred the court to the certificates mentioned earlier and contended that I&J obtained insurance as it was required to do and then provided the certificates of insurance in terms of which the insurers became obliged to indemnify the respective purchasers, Iglo and Atlas. When Iglo and Atlas became aware that the fish were destroyed, they were already the owners thereof and suffered damages due to the loss of the shipment of fish. Counsel contends that the insurers correctly indemnified the plaintiffs. In addition, in each of the matters, the plaintiffs and the insurers entered into an agreement, and a certificate of subrogation was issued, giving the insurers the authority to institute action against Hangana. The plaintiffs are however not relying on the subrogation forms attached to the stated case(s).

[40] Ms De Vos submits that for purposes of the stated case, Hangana owed the plaintiffs a duty of care to ensure the proper handling of the consignment of fish, according to a specific set standard, whilst the container was in its possession. However, because Hangana breached its duty of care, the plaintiffs suffered damages. Ms De Vos contends that the deterioration continued after the containers were loaded on board and the damage manifested upon opening the containers at the port of destination.

[41] Ms De Vos takes a firm view that the insurers need not show their locus standi as they are not parties to the current proceedings.

On behalf of the defendant

[42] Mr Marais on the contrary, submits the matter is more complex than the plaintiff would like the court to believe.

[43] Mr Marais argues that the current matter is distinguishable from the *Sheehama*[8] and *Marco Fishing*[9] matters because those cases dealt with the assumption of insurance. This, according to Mr Marais, is, however, not the end of the matter, and he invited the court to consider the facts agreed upon for purposes of the stated case wherein the parties agreed on the following issues:

a) The agreement between I&J and the plaintiffs;

b) The terms of the agreement would be regulated by CIF Incoterms (para 6.4);

c) Ownership would pass pursuant and in terms of the shipping documents and risk passed to the plaintiff upon shipment (para 6.12);

d) The defendant negligently failed to exercise reasonable care in packing the container (para 6.19);

e) Destruction of the fish occurred whilst the container was in the possession and under control of the defendant, i.e. before it was loaded onto the vessel (para 6.20).

[44] In addition to that, Mr Marais points out that in respect of the Iglo matter, a marine insurance agreement was entered into between I&J and Zurich Insurance Company South Africa, and Zurich indemnified and paid out the plaintiff. Yet, the name of Iglo does not appear anywhere in the insurance documents as being the insured. The

[8] *Sheehama v Nehunga* 2021 (2) NR 349 (SC) at 356.
[9] *Marco Fishing (Pty) Ltd v Government of the Republic of Namibia & others* at 750D-E.

parties to the marine insurance agreement were limited to I&J, its subsidiaries, and the insurer. Mr Marais argues that Iglo is an independent purchaser and not a subsidiary of I&J. There is only a form of subrogation signed on behalf of Iglo, which the plaintiff does not rely on.

[45] Mr Marais submitted that, as a result, the insurer paid the incorrect party. If a party had to be indemnified and paid, it should have been I&J, and the insurer should have sued in the name of I&J and not Iglo.

[46] In respect of the Atlas matter, Mr Marais argued that in terms of the agreed facts, the destruction of the consignment of fish took place before the container was delivered on board; thus, neither the ownership nor the risk passed to the plaintiff, Atlas. Mr Marais argued that the date of peril in terms of the insurance agreement was when the container was still in the port of Walvis Bay. The mere fact that the fish deteriorated during that time until it reached its final destination is of no significance as the peril insured against occurred when the risk was vested in I&J. Therefore, Atlas had no insurable interest at the time when the damage occurred, i.e. whilst the container was under the care of Hangana.

[47] Mr Marais directed the court's attention to the following five points to consider in adjudicating the stated cases, i.e.:

a) In the Iglo matter, the plaintiff was not insured in terms of the policy.

b) The event of negligence or damages occurred whilst the containers were in possession of the defendant before the ship was loaded;

c) The plaintiff had no risk at the time of the damages occurring as the risk only passed to the plaintiff upon loading of the container;

d) The Atlas had no insurable interest, and if there was no insurable interest, then the insurer could not institute the action by subrogation;

e) The insurer got a measure of authority implied by law to sue in the plaintiff's name by reason of subrogation, provided that the subrogation requirements are met. Therefore if there is no implied authority, there can be no locus standi.

Issues for determination

[48] The issues that this court must determine are as follows:

a) whether subrogation is relevant to the plaintiffs' claim against Hangana, and
b) whether the plaintiffs have the necessary locus standi.

Discussion

[49] I had the benefit of hearing extremely competent arguments from both counsel. It is clear that they agree on the general principles relating to subrogation and that the idea of the arguments advanced is not to reinvent the wheel.

[50] The plaintiffs take the default position as set out in *Sheema*. I do not quarrel with the principles set out by our Supreme Court, and in the event of a straightforward insurance indemnity claim, these principles apply without question.

[51] The question that begs an answer is whether, given the unique set of facts in the stated case(s), it falls within the principles of subrogation. Mr Marais argues that it does not and that the current facts are distinguishable from the subrogation case law in our jurisdiction.

[52] The plaintiffs' counsel contended that the only party entitled to say that the conditions to subrogation were not met would be the insured. This can however not be a blanket statement applicable to every conceivable set of circumstances.

The Iglo matter

[53] On behalf of the defendant, Mr Marais advanced a strong argument that Iglo was not the insured in terms of the Maritime Cargo Insurance Agreement. It is, therefore, essential to have regard to the said insurance agreement.

[54] Annexure 1 of the agreement reads as follows:

'Attaching to and forming part of MARINE CARGO POLICY NO: **SA MAN 4816808**
In the name of: **Irving and Johnson Holding Company (Pty) Ltd and/or Irving and Johnson Limited and/or Irvin and Johnson International (Pty) Ltd and/or Juno Holdings Limited and/or Juno Management S.A.A. and/or Frozen International Limited**
With Effect from all sailings and/or sending's on and after: **01 July 2015**.'

[55] It is indeed noticeable that there is no reference made to any third parties, nor is there reference to the respective rights and interests of the parties.

[56] Item 1 of the policy further reads as follows:

'**This contract is to insure the subject matter specified for the transit and on the conditions named, shipped by and for the account of the Insured:**
Irving and Johnson Holding Company (Pty) Ltd and/or Irving and Johnson Limited and/or Irvin and Johnson International (Pty) Ltd and/or Juno Holdings Limited and/or Juno Management S.A.A. and/or Frozen International Limited
Including all subsidiary companies as their interest may appear as now existing or hereafter acquired or constituted or the insurance of which is under their control as selling or purchasing agent unless insured elsewhere prior to inception of this contract or to insurable interest being acquired.

2. Period of Insurance
To attach for all sailings and/or sendings for the period commencing on **01 July 2015** and terminating on **30 June 2016** (both days inclusive) and any subsequent period agreed by the Insurer.'

[57] No reference whatsoever is made to Iglo Portugal, Comercializacao E Producao De Produtos Alimentares Sociedade Unipessoal LDA. The only document that refers to Iglo is the Form of Subrogation, which the plaintiff does not rely on for purposes of the current proceedings.

[58] It would be incorrect to contend that Iglo was the insured in terms of the Marine Cargo Insurance Policy. It is, however, common cause that the insurer, Zurich Insurance Company South Africa Limited, compensated Iglo for their purported losses suffered and not I&J.

[59] In Colinvaux's Law of Insurance[10], the learned author debates whether an insurer who, while not legally obliged to pay the insured under the insurance policy, but never the less do so would be entitled to exercising subrogation rights. They concluded that if the insurer made a payment for an uninsured peril, it would be difficult to see how it could take advantage of an implied term of subrogation, where its payment is not in accordance with a policy.

[60] Mr Marais referred the court to the Privy Council decision in *King v The Victoria Insurance Company* Limited[11]wherein the court held that there is a right of subrogation as long as the payment was honestly intended to be in satisfaction of a loss under the policy, even if as a matter of law the policy does not cover the loss. It was further held that a third party could not resist liability on the ground that the insurer has made a payment to the insured, which is voluntary, in the sense that, with the benefit of hindsight, the insurer is not liable to indemnify the insured. The right of subrogation remains as long as the insurer acted in good faith and honestly intended payment to satisfy a loss under the policy, believing that it was or might be liable[12].

[61] Mr Marais, however, argued that the *King* judgment is also distinguishable, and I agree. The decision of the court in the *King* matter is firstly based on a court of equity,

[10] R Merkin et al, *Colinvaux's Law of Insurance* 11th Ed, Sweet and Maxwell Ltd 2016 at para 12-031 at 737.
[11] *King v The Victoria Insurance Company Limited* [1896] A.C 250 PC 20 Mar 1896.
[12] R Merkin et al, *Colinvaux's Law of Insurance* 11th Ed, Sweet and Maxwell Ltd 2016 at para 12-031 at 737.

which does not apply to our courts and secondly, the loss was not within the risks covered by the policy. In the Iglo matter, it is not an issue of an uninsured peril for which the plaintiff was compensated. If this were the case, then the subrogation requirements would still be satisfied as there would have been a valid insurance agreement between the parties, but in respect of Iglo, there was not.

[62] I am well aware that courts have previously held that subrogation is, at best, a collateral fact that cannot afford any reasonable presumption or inference as to the principal matter in dispute. The question of subrogation is *res inter alios acta*[13]. However, a valid insurance agreement is the foundation of the right of subrogation because it is in terms of the said insurance agreement that the insurer indemnifies the insured. If a valid insurance agreement is not in existence between the parties, then the insurer has no right to subrogation. This then further implies that the authority to use the insured's name, which would be available to the insurer by reason of subrogation to advance an action against a third party, does not exist, which further implies that there can be no locus standi to advance the claim of the insurer.

[63] In *The Council of the Itireleng Village v Madi* [14] made it clear that the issue of legal standing is procedural but also bears on substance and relates to the sufficiency and directness of interest in the proceedings which warrants a party's title to prosecute a claim. A party instituting proceedings, therefore, has the onus to establish legal standing. That is not only concerning establishing the sufficiency and directness of interest but also that it is the rights-bearing entity or acting on the authority of that entity or has acquired the rights.

[64] Iglo failed to meet that criteria and therefore, in light of the discussion above, the special plea raised in the Iglo matter must be upheld.

The Atlas matter

[13] *Smith v Banjo* [2011] 2 All SA 577 (KZP) para 11
[14] *The Council of the Itireleng Village Community v Madi* 2017 (4) NR 1127 (SC) para 30.

[65] The Marine Insurance Policy in respect of Atlas does not suffer from the same deficiency as that of Iglo as the policy specifically provides for the associated and/or affiliated and/or subsidiary companies or corporations and further specifically provides for their rights and interests. In this specific policy, there is also a provision for a subrogation form signed by Atlas Sam, but as in the Iglo matter, the plaintiff does not rely on the said form.

[66] The argument in respect of the Atlas matter differs from that of the Iglo matter. The plea of lack of locus standi of the insurer, Mutual and Federal, is based on the averment that the damage to the consignment of fish occurred whilst the container was in the possession of Hangana.

[67] Mr Marais contended that the seller bore the risk in terms of the Incoterms items A4 and A5, which reads as follows:

'**A4 Delivery**

The seller must deliver the goods either by placing them on board the vessel or by procuring the goods to delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at port.

A5 Transfer of risks

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage to the circumstance described in B5.'

[68] Mr Marais argues that the plaintiff, Atlas, had no insurable interest whilst the consignment of fish was still in the port of Walvis Bay before it was delivered on board the vessel transporting it to its final destination.

[69] According to Reinecke et al[15], in the case of indemnity insurance, it could be said that 'interest' in the broad sense of the word and loss or damage go hand in hand. If the insured has no interest at the time of the occurrence of the event insured against, he

[15] MFB Reinecke et al, *General Principles of Insurance Law* 2005 Lexis Nexis Butterworths at para 53.

cannot suffer any loss or damage. Reinecke[16] clearly distinguishes between the object of insurance and the object of risk. According to the author, the object of insurance is not a physical object but an 'interest' that the insured wants to protect by insurance. In contrast, the object of risk is the physical object exposed to the peril insured against.

[70] In LAWSA[17] the authors attempted to define 'insurable interest' and referred to *Littlejohn v Norwich Union Fire Insurance Society*[18] the court attempted to define 'insurable interest' as follows:

'If the insured can show that he stands to lose something or an appreciable commercial value by the destruction of the thing insure, then even though he has neither *a ius in re* or a *ius ad rem* to the thing insured his interest will be an insurable one.'

[71] In *Refrigerated Trucking Pty Ltd v Zive NO (Aegis Insurance Co Ltd, Third Party)*[19]
Hartzenberg J referred to various cases including *Littlejohn* supra and Phillips and then offered the following definition of 'insurable interest' for purposes of indemnity insurance (372F-H):

'It seems then that in our law of indemnity insurance an insurable interest is an economic interest which relates to the risk which a person runs in respect of a thing which, if damaged or destroyed, will cause him to suffer an economic loss or, in respect of any event, which if it happens will likewise cause him to suffer an economic loss. It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that, despite the fact that he has no personal right in respect of the article, or that the events does not affect him personally, he will nevertheless be worse off if the object is damaged or destroyed, or the event happens.'

---

[16] Ibid at para 54.
[17] *The Law of South Africa* Vol 12(2), 2nd Ed para 31.
[18] *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374 380 to 381.
[19] *Refrigerated Trucking Pty Ltd v Zive NO (Aegis Insurance Co Ltd, Third Party)* 1996 (2) 361 (T).

[72] Ms De Vos argued that ‘insurable interest’ does not apply to the current facts. However, if it does the definition mentioned above relates very well to the facts at hand.

[73] Although Mr Marais argued that the peril insured against occurred before shipping, the deterioration of the fish continued after the container was placed on board the vessel. Atlas became the owner of the consignment of fish when it was delivered on board and had an economic interest in the consignment at all material times, even when it was still in the port of origin. Atlas not only had an in interest in the goods but would have been worse off if the consignment of fish was damaged or destroyed.

[74] Having considered the facts as presented in the stated case in respect of the Atlas matter and having applied the definition by Hartzenberg J above to the current set of facts, I find that Atlas had an ‘insurable interest’.

[75] The insurer mitigated the loss of Atlas even though the agreement between the I&J was that the risk would only transfer to Atlas once the container is placed on board; however, if Atlas has an ‘insurable interest’ the insurer would be entitled to subrogate its claim. Even if Atlas had no ‘insurable interest’ but the insurer made payment reasonably and in good faith, the insurer would still be entitled to subrogate that claim based on the fact that a valid insurance agreement existed between the parties at the time[20].

[76] In respect of the Atlas matter, I agree with Ms De Vos that subrogation is a non-issue and is and remains an issue between the insurer and the insured and the special plea of locus standi cannot stand.

[77] Therefore, the special plea raised in respect of the Atlas matter stands to be dismissed.

[78] My order is as follows:

---

[20] *King v The Victoria Insurance Company Limited* [1896] A.C 250 PC 20 Mar 1896. Also see para 60 above.

1. In respect of the first plaintiff, Iglo Portugal, Comercializacao E Producao De Produtos Alimentares Sociedade Unipessoal Lda, the special plea is upheld and the first plaintiff's claim is dismissed with costs. Such costs to include the employment on one instructing and one instructed counsel.

2. In respect of the second plaintiff, Atlas Maritime Sam, the special plea is dismissed with costs. Such costs to include the employment on one instructing and one instructed counsel.

3. The matter is postponed to 24 November 2022 at 15h00 for Status Hearing (Reason: To determine the further conduct of the matter).

_____

JS Prinsloo

Judge

APPEARRANCES

PLAINTIFF:	C De Vos Instructed by Koep and Partners, Windhoek
DEFENDANT:	J Marais Instructed by Engling, Stritter & Partners, Windhoek