IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/425/19**

In the matter between

BOITHATELO RATSOANE **PLAINTIFF**

AND

BAPHUTHI MATONA **DEFENDANT**

Neutral Citation: Boithatelo Ratsoane v Baphuthi Matona (CIV)/T/425/2019 [2021] LSHC 11

JUDGEMENT

CORAM: BANYANE J

HEARD: 25/09/2020

DELIVERED: 19/03/2021

Summary

Insurance - subrogation-indemnification - whether it absolves the defendant (wrongdoer) from liability for the damages suffered and whether it disqualifies the plaintiff from instituting the claim against the

defendant (wrongdoer) - the insurer has a right to sue in the name of the insured and plaintiff is accountable to the insurance company for the fruits of the action.

ANNOTATIONS

Cited cases

1. Ramakoro v Peete LAC (1980-84) 94
2. Rand Mutual Assurance Company Ltd v Road Accident Fund ZASCA 114; 2008(6) SA 511 SCA
3. Ackerman v Loubser R 1918 OPD 31
4. Chi & Another v Lodi 1949 (2) 507
5. Avex Air Pty Ltd v Borough of Vryheid 1973 (1) SA 617
6. Lesotho Red Cross Society v Thabang Mafojane and another CIV/T/438/2008
7. Teper v Mcgee Motors (Pty) Ltd 1956 (1) SA 738 (C)

Books

1. Cooper: Delictual Liability in Motor Law, (1996) Juta & Co.
2. Gordons & Getz: The South African Law of Insurance, (1993) 4th ed, (Juta & Co).
3. Fouche M: The Legal Principles of Contracts and Negotiable Instruments (5th edition) 2002 LexisNexis

BANYANE J

Introduction

[1] The plaintiff has instituted an action against the defendant for payment of an amount of M 34 981.57 as costs of repairs necessitated by a collision which occurred on the 23rd August 2018. In her summons and particulars of claim, she alleges that the accident was caused by the defendant's negligence; that as a result of the collision her vehicle was damaged and she suffered damages in the said amount being the reasonable, fair and necessary repairs to the damaged vehicle.

The facts

[2] It is common cause that the plaintiff's vehicle was involved in a collision with the defendant's vehicle. The plaintiff's vehicle was insured by an insurance company. The latter has paid the sum of M 34 981.57 in respect of the said repairs.

The exception and special plea

[3] The action is opposed by the defendant. He excepts to the plaintiff's summons and declaration on the ground that they do not disclose a cause of action. In this regard, he contends that the claim does not arise against him but must be directed at the covering insurance, alternatively that; even if the plaintiff is claiming on the basis of subrogation, the claim should be dismissed because the plaintiff failed to plead that he has been fully indemnified; that for this reason he lacks capacity to sue.

[4] He also filed his plea on the same date as the exception. He raised a special plea of *locus standi* on the same ground that the plaintiff possesses no legal capacity to sue but the insurance company.

Submissions

[5] The defendant's counsel, Mr. Phakoana raised a two-pronged argument in support of the exception. He contends firstly that the plaintiff must show that he has been indemnified and suing on

behalf of the insurer, failing which he has no *locus standi* to institute these proceedings but the insurance company.

[6] He argues secondly that should the claim succeed; the plaintiff will benefit twice by virtue of the reimbursement by the insurer, and this is not permissible in Law.

6.1 He referred the Court to **Fouche: The Legal Principles of Contracts and negotiable instruments 5th ed p260,** to submit that once the insurer has paid the insured the full extent allowed by the policy, it may sue the wrongdoer to recover the money it has paid to the insured and that subrogation prevents the insured from receiving compensation from both the insurer and the wrongdoer.

6.2 For the proposition that the insurer should sue in its own name, he cited the case of **Rand Mutual Assurance Company Ltd v Road Accident Fund ZASCA 114;2008(6) SA 511 (SCA)**.

[7] The plaintiff's Counsel Ms taka counter argues that the exception is baseless because the plaintiff has fully set out averments necessary to sustain a cause of action.

[8] On principle she agrees that the doctrine of subrogation arises where the insured plaintiff has been indemnified by his insurance company. She relied on the following extract from Joubert The Law of South Africa (Lawsa) on insurance (para 373);

> In its literal sense the word subrogation means the substitution of one party for another as creditor. In the context of insurance, however, the word is used in a metaphorical sense. Subrogation as a doctrine of insurance of 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.

[9] She contends further that the indemnification by the insurance company does not destroy the plaintiff's right to recover damages for his loss and for this reason the defendant cannot resist liability on the ground that the plaintiff has been indemnified. She relies on **Gordon & Getz: The South African Law of Insurance; p262** in this regard.

[10] She also cited the case of **Ackerman v Loubser 1918 OPD 31** to contend that the compensation between the insured and the insured is *res alios acta* as far as the defendant is concerned. And further that on the strength of **Chi & Another v Lodi 1949(2) SA 507 and Avex Air Pty, Ltd v Borough of Vryheid 1973(1) SA 617,** if the plaintiff's claim were to succeed, this would not amount to double compensation because the plaintiff has to account to the insurer for any money received in excess of his actual loss.

[11] In our Jurisdiction, she cited the case of **Lesotho Red Cross Society v Thabang Mafojane and another CIV/APN/438/08** to submit further that the insurer is entitled to enforce its right of subrogation in the name of the insured, and that the insured is regarded as the real plaintiff while the insurer is merely *dominus litis* and that when judgement is given in favour of plaintiff, the insurer must pay the money to the insurer.

Analysis

[12] Exceptions are governed by Rule 29 of the High Court Rules of 1980. It reads as follows;

> "Rule 29(1) (a) where any pleading lacks averments which are necessary to sustain an action or defence, as the case may be, the

opposing party, within the period allowed for the delivery of any subsequent pleading, may deliver an exception thereto"

Rule 29(6) whenever an exception is taken to a pleading or whenever an application to strike out is made, no plea, replication or other pleading will be compulsory but may be delivered.

[13] An exception of no cause of action is justifiably raised when the excipient admits all his opponent's facts but he successfully challenges the conclusion based on those facts. **Ramakoro v Peete LAC (1980-84) 94**.

[14] The gist of the defendant's objection, both under the exception and special plea is that the indemnification disqualifies the plaintiff from bringing this action, consequently, the action ought to have been instituted by the insurance company**.**

[15] The main issues that arise from the parties' arguments are; a) whether the plaintiff lacks capacity to sue the defendant for damages by reason of the indemnity or whether the indemnification absolves the defendant from liability; b) whether he stands to benefit twice in the event of the claim succeeding?

[16] To determine these, the principle of subrogation, which is pivotal to both the exception and special plea will be discussed in detail.

The doctrine of Subrogation

[17] As correctly submitted by the plaintiff's counsel, subrogation means the substitution of one person for another so that the person subrogated succeeds to the rights of the person whose place it takes. It expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of all the latter's rights and remedies against the 3rd parties. In order for the insurer to recoup the money paid to the insured, it can use subrogation using the insured's name. Alternatively, the insurer,

may through cession of the insured's right against the third party sue in its own name. **Gordon; General Principles of Insurance Law p 260**.

I proceed now to deal with the questions raised by the parties' submissions.

Does the indemnification absolve the defendant from liability?

[18] The wrongdoer does not derive any benefit from the fact that the plaintiff has been indemnified by his insurer in terms of a policy of insurance for the damage caused to his vehicle. When an insurance pays for the damages to the Plaintiff's vehicle, it does so to discharge its own liability under the contract of insurance with the plaintiff, and not with the intention of releasing the defendant. Payment of the plaintiff's damage is therefore *res inter alios acta* and does not in any way affect the question of the defendant's liability for the wrong done. **E. Cooper: Delictual Liability in Motor Law pp 265-266.**

[19] In **Teper v Mcgee Motors (Pty) Ltd 1956(1) SA738© at 743-744**, the insurance company had paid for repairs to the assured motor vehicle in full. The Court stated the position as follows;

> "the defendant was paid by the insurer in pursuance of contractual arrangement between the insurer and the defendant, and not-so prima facie would appear to me-by way of releasing defendant from obligation. On the authorities, it seems to me clear that the events that have happened do not bar the plaintiff from his right to pursue the present action against the defendant.
>
> Defendant's liability, if any, to plaintiff stems from an entirely different cause of action from that which existed between the defendant and the insurance company in relation to repairs. In my judgement, the fact that plaintiff will, or may, have to pay over to his insurer the amount of 97 dollars, should that be awarded to

plaintiff, is irrelevant to the present inquiry and does not enure to the benefit of the defendant as a defence in this case.

It is true that prima facie, the plaintiff would then have an advantage in that he would get both a repaired car and the cash notionally representing the amount he would have expended in repairing the car. But that advantage is as between him and the defendant, and over causa extraneous to the legal obligation of the defendant to make good the 97 dollars…to plaintiff. the fact that as between plaintiff and defendant and his insurer, the amount may ultimately go to the insurer is furthermore irrelevant because of the doctrine of subrogation, the action continues in the name of the insured; and as Mcgiilivry on insurance 4th edition 1953 190, puts it,

> 'the effect of indemnification is to shift the equitable right to receive payment by the wrongdoer from the insured to the insurer without, however affecting the fact that the action proceeds in the name of the insured"

Would the plaintiff benefit twice if the claim were to succeed?

[20] The argument that plaintiff would, by reason of indemnification by the insurance company be receiving double compensation if the claim succeeds is also untenable because an accident policy is a contract of indemnity and for that it follows that the insurers, who have indemnified the insured, are entitled upon the principle of subrogation to the advantage of every right vested in the insured to recover compensation for any loss. Consequently, the insured is contractually bound to account to his insurer and hand over the fruits of the action(damages recovered from the defendant) to the insurance company. **Cooper p266, Lesotho Red cross v Mafojane**, **Gordon 264-265**.

[21] In **Ackerman v Loubser R 1918 OPD 31** at 32-35, Ward J stated the position as follows;

> ” Mr Botha’s argument that because the insurance company has already compensated the respondent, the judgement appealed against awarding him damage/s in effect compensated him twice for the same damage, seems to me fallacious. For the payment already made by the insurance company was only made to the respondent (the assured), on the understanding that he would fulfil his obligation … and use his right of action for the benefit of the company”.

In whose name should the action be instituted?

[22] Lastly the defendant argued that the action must proceed in the name of the insurer, and that the plaintiff lacks capacity to sue. He relied on the case of **Rand Assurance** in this regard. More about this case later.

[23] As regards the question whether the plaintiff has a right to sue in his name although he has received compensation from the insurance company, authorities are clear that once the insurer has paid the insured the full extent allowed by the policy, the insurer steps into the shoes of the insured and may sue the actual wrongdoer to recover the money it has paid to the insured. The insurer uses the insured’s name to institute the action. **Fouche: Legal Principles of Contracts and negotiable instruments p 260**.

[24] In English Law, if the insured refused to sue the wrongdoer, the Court allowed the insurer to sue such wrongdoer in the name of the insured whether the latter likes or not.

[25] In **Chi & Another v Lodi 1949(2) SA 507 @ 511,** it was held that the insurance company uses the name of the insured for purposes of claiming damages from the defendant unless the insured had made an out and out cession of his claim against the defendant to the insurance company.

[26] In the case of **Rand Assurance** relied on by the defendant, the Supreme Court of Appeal of South Africa dealt with the question whether an insurance company was non-suited by litigating in its own name. It revisited a number of past decisions that dealt with the principle of subrogation. At paragraph 19, it was stated as follows;

> "Significantly, in formulating the doctrine of subrogation, this court has not as yet held 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 the strict Law the action ought to be brought in the name of the insured, the insurer institutes the action in its own name to protect the litigants from harassment and to avoid confusion over the identity of the real plaintiff This seems to be the position in the continental Law."(footnotes omitted)

[27] Although the Court in this case was of the view that requiring the insurer to sue in the name of the insured is formalistic and creates anomalies, it did not however interfere with the prevailing practice that insurance companies have to litigate in the name of the insured. The Court stated thus at para 24 of the judgement;

> "...consequently, this judgement 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 the procedural sense, Courts may permit the insurer to proceed in its own name"(underlining mine)

[28] It is clear on authority that the insurer itself has no independent claim that it can pursue against the 3rd party. It simply enforces the claim of the insured for its own benefit. The plaintiff is entitled to

sue in his own name unless he has ceded or assigned his cause of action to the insurance company.

Conclusion

[29] In the light of these authorities, and on the facts gleaned from the parties' pleadings, there is no allegation that the plaintiff has ceded his cause of action to the insurance company. It follows that the argument that the plaintiff has no right to sue by reason that he has been indemnified by the insurer, is unsound in Law and is therefore rejected, so is the argument that he will inure double compensation if the claim succeeds.

Order

[30] In the result, the exception is dismissed with costs.

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P. BANYANE
JUDGE

For Plaintiff: Ms. Taka

For Defendant: Advocate Phakoane