



**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NUMBER A 3083/08

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between

VC NTLHABYANE

APPELLANT

and

BLACK PANTHER TRUCKING (PTY) LTD

FIRST RESPONDENT

NEW LEAF CARRIERS (PTY) LTD

SECOND RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] This is an appeal against an order of absolution from the instance with costs granted by the court *a quo* at the end of the appellant's case in the trial of an action instituted by the appellant against the respondents for damages caused to her motor vehicle in a collision. At the commencement of the trial the appellant's *locus standi*, the issue of negligence and the *quantum* of the

appellant's damages were in dispute. The appellant testified and called two witnesses to testify on her behalf. It is only necessary to refer to that part of the appellant's evidence which is relevant to deciding this appeal.

[2] The appellant testified that she was the registered owner of the motor vehicle which she had purchased in terms of a written instalment sale agreement. Insurance of the motor vehicle was provided for in the agreement and was duly effected by the appellant with Thebe Hoskins. She further testified that her claim for indemnity in the sum of R90 000 was fully paid by the insurer after the collision. Her claim for damages in the action was for R70 000. At the close of the appellant's case the defendants' attorney applied for absolution from the instance on the grounds firstly, that the appellant was not 'out of pocket' concerning damages as she had been indemnified by the insurer in an amount in excess of the amount claimed in the action and secondly, that she had failed to 'prove subrogation' in failing to produce in her evidence the original or a copy of the insurance policy in respect of which the motor vehicle was insured. These arguments found favour with the Magistrate who based thereon, granted absolution from the instance with costs.

[3] The application for absolution from the instance was based on a clear misunderstanding of the principles of the doctrine of subrogation and therefore was ill-conceived. The same misconceptions advanced to the court in argument on the doctrine of subrogation in the law of insurance regrettably perpetuated themselves in the judgment and reasons of the magistrate. In his reasons the magistrate held against the appellant that she had failed to present evidence 'that excludes cession'. Cession of the appellant's claim to the insurer was neither mentioned by the appellant in her evidence nor put to her at any stage. It simply never arose. On her evidence the insurer clearly acted under subrogation in instituting the action in her name. The legal principles on the doctrine of subrogation are well-settled and hardly need clarification. The basic rules thereof are dealt with in LAWSA Joubert (Ed) Vol 12 (first re-issue para 373) as follows:

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 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.

The doctrine as part of insurance law was imported into South African law through *Ackerman v Loubser* 1918 OPD 31 (see also D M Davis *Gordon & Getz on The South African Law of Insurance* 4 ed (1993)). A useful summary of the history and principles of subrogation is given by Harms ADP in the recent judgment of the Supreme Court of Appeal in *Rand Mutual Assurance Co Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA). The judgment in essence dealt with the right of the insurer to sue in its own name under the doctrine of subrogation, in respect of which the learned judge concluded (para [24])

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.³¹ *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.

The insurer on the facts of this matter was clearly entitled by subrogation to institute action against the alleged wrongdoers in the name of the insured (see *Rand Mutual Assurance* para [24]; *Schoonwinkel v Galatides* 1974 (4) SA 388 (T)).

[4] Subrogation did not in any way affect the *locus standi* of the appellant to institute action: it merely provides the insurer with a personal right of recourse against its insured, *in casu* the appellant, to be reimbursed out of the proceeds of her claim, if successful. There can be no question of the appellant not being 'out of pocket': a similar argument was rejected as long ago as in 1918 in *Ackerman v Loubser* *supra*, and the doctrine of subrogation has ever since formed part of our law of insurance. There was neither a duty on the

appellant to prove subrogation, nor to produce the policy of insurance. That being so the appeal must be upheld.

[5] In the result the following order is made:

1. The appeal is upheld with costs, such costs to include the costs reserved by this court on 4 March 2009.
2. The order of the court *a quo* granting absolution from the instance with costs, is set aside and substituted with the following:
The application for absolution from the instance is dismissed with costs such costs to include counsel's fees for one day.
3. The matter is referred back to the court *a quo* for the continuation of the trial.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

MP TSOKA
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT
APPELLANT'S ATTORNEYS

ADV AC VAN DER NEST
BOTHA & SUTHERLAND

COUNSEL FOR FIRST RESPONDENT
FIRST RESPONDENT'S ATTORNEYS

ADV G LAZARUS
HAUPT & EARLE

DATE OF HEARING
DATE OF JUDGMENT

1 SEPTEMBER 2009
1 SEPTEMBER 2009