THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 484/07

RAND MUTUAL ASSURANCE COMPANY LIMITED Appellant

and

ROAD ACCIDENT FUND Respondent

Neutral citation: *Rand Mutual Assurance Company Ltd v Road Accident Fund* (484/2007) [2008] ZASCA 114 (25 SEPTEMBER 2008)

Coram: HARMS ADP, SCOTT, JAFTA JJA, LEACH AND KGOMO AJJA

Heard: 12 SEPTEMBER 2008

Delivered: 25 SEPTEMBER 2008

Corrected:

Summary: Insurance – subrogation – right of insurer to sue wrongdoer in own name – Compensation for Occupational Injuries and Diseases Act 130 of 1993 s 36(1).

ORDER

On appeal from: High Court, Pretoria (R D Claassen J sitting as court of first instance).

1. The appeal is upheld with costs.

2. The order of the court below is substituted with the following:

(a) Judgment for the plaintiff in the sum of R 191 078,85 with 15,5% interest a tempore morae.

(b) The defendant is to pay the costs including the preparation fee of Dr du Plessis and Ms Vos.

JUDGMENT

HARMS ADP (SCOTT, JAFTA JJA, LEACH AND KGOMO AJJA concurring)

[1] The appellant, Rand Mutual Assurance Company Ltd, is an insurer. It is, for purposes of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), a mutual association, which means that it is licensed to carry on the business of insuring employers against their liabilities under COIDA to employees (s 30(1)).[1] In that capacity it insured a company (presumably Harmony Gold Mining Co Ltd). An employee of the insured, one

[1] Section 30(1): 'The Minister may, for such period and subject to such conditions as he may determine, issue a licence to carry on the business of insurance of employers against their liabilities to employees in terms of this Act to a mutual association which was licensed on the date of commencement of this Act in terms of section 95 (1) of the Workmen's Compensation Act: Provided that the Minister may, from time to time, order that, in addition to any securities deposited in terms of the Insurance Act, 1943 (Act No. 27 of 1943), and the Workmen's Compensation Act, securities considered by the Director-General to be sufficient to cover the liabilities of the mutual association in terms of this Act be deposited with the Director-General or his or her nominee.'

Young, was injured in a motor vehicle accident, which was caused by the negligence of the driver of another vehicle, one Maziya. The accident arose out of and in the course of Young's employment. Young was consequently entitled to the benefits provided for in COIDA (s 22(1)). Because of the insurance policy the appellant, and not the Director-General, was obliged to compensate Young in the sum of R191 078,85 as determined in accordance with COIDA by the Director-General.[2]

[2] The respondent, the Road Accident Fund, is liable for the damages caused by Maziya's negligent driving. The appellant sought to recover the compensation paid to Young from the respondent, relying on the provisions of s 36(1)(b) of COIDA,[3] which provides in essence that if an occupational injury was caused in circumstances resulting in a third party (in this case the respondent) being liable for them,

'the Director-General *or the employer by whom compensation is payable* may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.'

[3] The appellant is not an 'employer'. Accordingly, it was not covered by the wording of the provision although it was a party by whom, in terms of COIDA, compensation was payable. This, said its counsel, was more than unfair because the appellant is entitled to be in the same position against third parties as are the Director-General or the employer 'by whom compensation is payable'. He accordingly submitted that we should by some or other process of interpretation hold that the phrase '*employer by whom compensation is payable*' includes a mutual association by whom

[2] Section 29: 'If an employee is entitled to compensation in terms of this Act, the Director-General or the employer individually liable or the mutual association concerned, as the case may be, shall be liable for the payment of such compensation.'

[3] Section 36: '(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the "third party") being liable for damages in respect of such injury or disease—

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) the Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.'

compensation is payable. The argument was premised on the proposition that a mutual association would otherwise be without a right of recourse against a wrongdoer. In support of this, counsel argued that the employer *in casu* was not one by whom compensation was payable. Accordingly, he said, the employer had nothing which it could cede to the plaintiff and that subrogation does not apply. As I shall seek to show, since the premise is false, the conclusion is also false.

[4] To understand the argument and my conclusion it is necessary to turn to the repealed Workmen's Compensation Act 30 of 1941, the precursor of COIDA. Under that Act, compensation had to be paid to any workman entitled thereto either (a) by the employer individually liable, or (b) by the commissioner (s 37). The term 'employer individually liable' was defined to mean an employer who was exempt from paying contributions to the accident fund (s 2). There were two types of employers individually liable, namely the state and certain other authorities and, secondly, employers who had, with the approval of the commissioner, obtained from a mutual association a policy of insurance for the full extent of their potential liability under the Act (s 70). Compensation was payable irrespective of the common-law liability of the employer (i e, irrespective of negligence) and the Act thereby increased the rights of the employee but, on the other hand, the right to compensation substituted all other remedies the workman may have had (s 7).[4] The commissioner or 'the employer by whom compensation [was] payable' had a right of action against the third party for the recovery of the compensation they were obliged to pay (s 8(1)(b)). The Act was ambivalent about who had to pay

[4] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1, 1999 (2) BCLR 139 (CC) discussed the constitutionality and ratio of the legislation is detail. It said (at para 14): 'By way of contrast [to the common-law position] the effect of the Compensation Act may be summarised as follows. An employee who is disabled in the course of employment has the right to claim pecuniary loss only through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled. The procedure provides for speedy adjudication and for payment of the amount due out of a fund established by the Compensation Act to which the employer is obliged to contribute on pain of criminal sanction. Payment of compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee's contributory negligence. The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant's actual pecuniary loss. An employee who is dissatisfied with an award of the Commissioner has recourse to a court of law which is, however, bound by the provisions of the Compensation Act. That then is the context in which section 35(1) deprives the employee of the right to a common-law claim for damages.'

compensation. In some instances it had to be either the commissioner or 'the employer individually liable' (e.g. s 40(2), s 46(2), s 48, s 90) while in other circumstances it was either the employer individually liable or the mutual association (s 63). However, the Act also said that the association, that had to insure employers, had 'liabilities under this Act' (s 95(5)).

[5] It is difficult to conceptualise the liability of the employer towards the employee which could be insured against. This is because even an uninsured employer or one who had failed to pay contributions to the commissioner had no potential liability towards the employee under the Act. An employer who had failed to pay the required contributions may have had to pay a penalty but even then no common-law or statutory liability towards the employee arose (s 72).

[6] These inconsistencies were not only carried over to COIDA but were in a sense exacerbated. This is because COIDA distinguishes between employers individually liable (consisting of government organs) on the one hand and, on the other, employers who have obtained from a mutual association a policy of insurance for 'the full extent of their potential liability' (s 84(1)). Liability is no longer attached to an employer as in the 1941 Act; instead it is attached to either the Director General (who replaced the Commissioner), the employer individually liable or the mutual association (s 29, 61, 62). The employer is also not liable to the employee unless the liability arises under COIDA (s 35).

[7] However, COIDA provides (as mentioned) for 'insurance of employers *against their liabilities to employees in terms of this Act*' by a mutual association (s 30(1) and (2)).[5] This implies that employers do have a liability under COIDA although the nature and extent of their liability is not spelled out. The implication is that the liability is borne by either the Director-General or the mutual association. (The position of the employer individually liable as currently defined does not require consideration.) Although the employee is the only person entitled to benefit under the insurance policy (he, and only he,

[5] See footnote 1 above.

receives compensation) the legal effect of all this is that the employer is insured against this transient claim of the employee.

[8] Reverting to s 36(1)(b):[6] it provides, as mentioned, that either the Director-General *or the employer by whom compensation is payable* may institute action against a third party for the recovery of compensation. The emphasised words would obviously include an employer individually liable but they go wider. They also include an insured employer. But they do not include a mutual association. This means that although the insured employer does not pay, he is entitled to recover, obviously on behalf of the insurer.

[9] I accordingly agree with the respondent's counsel who argued that an employer who obtains a policy of insurance for the full extent of its liability under COIDA is exempted from paying assessments to the Director-General; that a mutual association is nothing other than an insurer; and that once the mutual association has indemnified the employer by paying compensation in full to the employee, the association may exercise the right of recourse against a third party by either obtaining a cession from the employer or by bringing a subrogated claim for recovery under s 36(1)(b).

[10] The insured's indemnity claim has been paid in full. The insured employer was accordingly entitled to recover from the respondent, not only by virtue of s 36(1)(b), but also under ordinary legal principles. However, the employer did not seek to recover; the appellant did not obtain a cession; and the appellant did not sue in the name of the insured but in its own name. This, and only this, non-compliance with the subrogation doctrine was, according to the respondent, fatal to the appellant's claim, and the court below agreed.

[11] During argument the question was raised whether the rule that the insurer must sue in the name of the insured forms part of our law and, if so, whether it could be justified. The answer requires a consideration of the history of the reception of the English law of subrogation, the nature of the

[6] See footnote 3 above.

rule that a subrogated claim must be brought in the name of the insured, and a reflection of whether the rule requires adaptation or amendment.

[12] Lord Hoffman once said that 'the subject of subrogation is bedevilled by problems of terminology and classification which are calculated to cause confusion.'[7] Bearing that in mind, it is useful to commence the discussion with the following extract from the chapter in *Lawsa*[8] on insurance:

'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 authors also mention (at para 374) that the doctrine as part of insurance law was established only during the 18th Century and that it was imported into South African law through *Ackerman v Loubser* 1918 OPD 31.

[13] The plaintiff in *Ackerman v Loubser* was an insured who had been fully paid by the insurer and who sought to recover the loss from the defendant on behalf of the insurer. The defence was that since the plaintiff's loss had been made good by the insurer the plaintiff had no further claim against the defendant. In rejecting the argument the court referred to the English law of subrogation (as set out in the preceding paragraph) and applied it to the case before it. The court also mentioned that in English law, should the insured refuse to litigate, the court would allow the insurer to do so 'in the name of the insured whether the latter likes it or not' (at 34).

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[7] *Banque Financière De La Cité v Parc (Battersea) Ltd* [1998] UKHL 7, [1999] AC 221, [1998] 1 All ER 737, [1998] 2 WLR 475.

[8] MFB Reinecke, SWJ van der Merwe, JP van Niekerk, PH Havenga and J Church *Lawsa* (reissue) vol 12 para 373. See also D M Davis *Gordon & Getz on The South African Law of Insurance* 4 ed (1993) 257.

[14] What is easily overlooked is that when *Ackerman v Loubser* was decided the law of insurance applicable in the Orange Free State was English law. The General Law Amendment Ordinance 5 of 1902 (ORC) had introduced the law applicable in the Cape Colony. The General Law Amendment Act 8 of 1879 (Cape), in turn, had introduced the English law of insurance and replaced the Roman Dutch law in the Cape Colony. In other words, the court in *Ackerman v Loubser* was bound to apply the English law of insurance and it did not purport to infuse our law with English law principles.

[15] The next case that dealt with the issue was *Teper v McGees Motors (Pty) Ltd* 1956 (1) SA 738 (C). It, too, was bound to apply English law being a Cape case. However, the law in Transvaal and Natal remained Roman Dutch, something not considered in *Schoonwinkel v Galatides* 1974 (4) SA 388 (T) when it adopted the principle of subrogation as set out in *Ackerman v Loubser.* Importantly, neither case held that the insurer may not sue in his own name.[9]

[16] The Cape and Orange Free State laws were repealed by s 1 of the Pre-Union Statute Revision Act 43 of 1977 –

'with the result that the English law (as it existed in 1879) concerning fire, life and marine insurance is no longer binding authority in the Cape Province or in the Orange Free State Province. . . . Hence, the South African law of insurance is governed mainly by Roman-Dutch law as our common law.'[10]

The effect of this repeal is that, subject to statutory law, our courts are entitled to look at other legal systems in developing our law of insurance and that we are not bound to follow English law and precedent.[11]

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[9] Also *Chi v Lodi* 1949 (2) SA 507 (T).
[10] *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) at 430F-G.
[11] J P van Niekerk *Subrogasie in die versekeringsreg* (unpublished LLM thesis UNISA 1979) ch 1.

[17] Nevertheless, this court,[12] with reference to the *Ackerman v Loubser* and *Teper*, held 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]

What this court had in mind in *Commercial Union* were the three rules of the *lex mercatoria* (and not only of the English law of insurance): that the wrongdoer is not entitled to benefit from the fact that the person wronged was insured; that the insured may not be enriched at the expense of the insurer by receiving both the insurance indemnity and damages from the wrongdoer; and that the insurer replaces the insured, i.e., the insured is subrogated by the insurer, which entitles the insurer to claim the loss from the wrongdoer.[14]

[18] In English law 'the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract.'[15] In our law it would be a case of implied terms (but in the sense of *naturalia* of the contract as opposed to tacit terms)[16] of the contract of insurance.[17]

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[12] *Commercial Union Insurance Co of SA Ltd v Lotter* [1999] 1 All SA 235, 1999 (2) SA 147 (SCA).
[13] See also *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A) at 625H. *Samancor v Mutual and Federal Insurance Company Limited* [2005] 4 All SA 193, 2005 (4) SA 40 (SCA) is not in point.
[14] *Somersall v Friedman* 2002 SCC 59 (CanLII), [2002] 3 SCR 109, (2002) 215 DLR (4th) 577 at para 50: 'First, it is important to keep in mind the underlying objectives of the doctrine of subrogation which are to ensure (i) that the insured receives no more and no less than a full indemnity, and (ii) that the loss falls on the person who is legally responsible for causing it. The doctrine of subrogation operates to ensure that the insured received only a just indemnity and does not profit from the insurance. Consequently, if there is no danger of the insured's being overcompensated and the tortfeasor has exhausted his or her capacity to compensate the insured there is no reason to invoke subrogation. Similarly, if the insured enters into a limits agreement or otherwise abandons his or her claim against an impecunious tortfeasor the insurer has lost nothing by the inability to be subrogated.' (Citations omitted.) *Castellain v Preston* (1883), 11 Q.B. 380 at 386 -387. See Visser & Potgieter *Skadevergoedingsreg/The law of damages* 2 ed (2003) para 10.4.
[15] *Banque Financière De La Cité v Parc (Battersea) Ltd* [1998] UKHL 7, [1999] AC 221, [1998] 1 All ER 737, [1998] 2 WLR 475.
[16] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A); *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A).
[17] *The MT 'Yeros' v Dawson Edwards & Associates* [2007] 4 All SA 922 (C) at 930

[19] 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.[18] 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.[19] 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.[20] This appears to be similar to the position in Continental law.[21]

[20] These differences may be due to legislative activities and, especially as far as Continental law is concerned, to the fact that the effect of subrogation may differ from one legal system to another. It may amount to something akin to cession of the claim against the wrongdoer *ex lege* or it may simply mean that although the claim against the wrongdoer still vests in the insured, the insurer has certain procedural rights against both the insured and the wrongdoer.[22] Locally, there is an academic debate about the correct approach to the substantive aspect but this is not the case to decide the matter.[23] For present purposes I shall assume that a transfer *ex lege* akin to cession does not take place. 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.[24]

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[18] *Goodwin Stable Trust v Duohex (Pty) Ltd* [1996] 3 All SA 119, 1999 (3) SA 353 (C) is not of assistance as it dealt with cession.

[19] *MacGillivray on Insurance Law* 10 ed (2003) para 22-43 to 22-51; E C Schlemmer ‘’n Selfstandige reg van verhaal vir ‘n versekeraar gegrond op ‘n solidêre medeskuldverhouding’ 1996 *TSAR* 68.

[20] *American Jurisprudence* 2 ed (2001) vol 73 s v Subrogation para 82 (p 610-611).

[21] H J Moll ‘Die subrogasieleerstuk in die versekeringsreg’ 1977 *TSAR* 138.

[22] For the position in the case of cession: *Homes for SA (Pty) Ltd v Rand Building Contractors (Pty) Ltd* 2004 (6) SA 373 (W).

[23] E C Schlemmer ‘’n Selfstandige reg van verhaal vir ‘n versekeraar gegrond op ‘n solidêre medeskuldverhouding’ 1996 *TSAR* 68; J P van Niekerk ‘Subrogation and cession in insurance law: a basic distinction confounded’ (1998) 10 *SA Merc LJ* 58; J P van Niekerk ‘Insurance subrogation, implied or expressed: in the name of the insured, always’ (2007) 19 *SA Merc LJ* 502.

[24] *Locus standi* may either be a purely procedural matter or it may impact on the substance of the case. See the diverging views on the facts in *Pentz v Gross* 1996 (4) SA 617 (SCA) at 630G-H (per Corbett CJ) and 632B-G (my judgment). Also in [1996] 4 All SA 63.

[21] In *Freudmann-Cohen v Long Tran*[25] the Ontario Supreme Court had to consider whether an insurer, who is a defendant in an action by an insured, would be entitled to institute third party proceedings (similar to those contemplated by our Uniform rule 13) against a wrongdoer apparently on the ground that if the insurer were to be held liable, a declaration would follow entitling the insurer to an indemnity from the wrongdoer. The insurer/defendant could hardly have issued the notice in the name of the insured/plaintiff. The court held that it was entitled to proceed in its own name. The reason for the conclusion was that the rule in question was a procedural rule of English origin and not a substantive rule whereas the other subrogation rules were of a substantive nature. 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.[26]

[22] J P van Niekerk points out that the rule 'is hoogstens 'n noodwendige aanhangsel tot die skadeloosstellingsbeginsel en die gevolg van die gelding van daardie beginsel in 'n besondere geval.'[27] He refers to others who had stated that the rule is a 'corollary' or 'consequence' of the indemnity principle and 'not a basic principle in itself'. More recently he said that subrogation is 'for a large part nothing more than a procedural device in the service of the indemnity principle.'[28]

[23] 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.[29] The supposed

[25] 2003 CanLII 35516, (2003) 66 OR (3d) 106.
[26] J P van Niekerk *Subrogasie in die versekeringsreg* 105-110.
[27] *Subrogasie in die versekeringsreg* at 62.
[28] J P van Niekerk 'Subrogation in terms of a marine insurance contract governed by foreign law: the untraceable or no longer existing insured creates a dilemma for insurers' 2008 *TSAR* 575.
[29] *Storegate Africa (Pty) Ltd v Airlink Cargo International (Pty) Ltd* [2005] JOL 14054 (SCA).

advantage, namely that the insurance company may be able to retain its anonymity,[30] is clearly not to the advantage of the wrongdoer and also probably not to that of the insured.

[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.

[25] I therefore hold that the plaintiff was not non-suited by litigating in its own name, particularly where there is no discernible prejudice to the respondent. It may be noted that the respondent did not file an exception to the claim and raised the point only at the trial. Consequently, the appeal has to succeed and the appellant is entitled to judgment.

[26] The following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is substituted with the following:
(a) Judgment for the plaintiff in the sum of R 191 078,85 with 15,5% interest *a tempore morae*.

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[30] J P van Niekerk 'Subrogation and cession in insurance law: a basic distinction confounded' (1998) 10 *SA Merc LJ* 58 at 59.
[31] *Business Aviation Corp (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* [2007] 1 All SA 421, 2006 (6) SA 605 (SCA) at para 38.

(b) The defendant is to pay the costs, including the preparation fee of Dr du Plessis and Ms Vos.

L T C HARMS
ACTING DEPUTY PRESIDENT

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