REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO.: AR290/10

In the matter between :

DES O SMITH **APPELLANT**

and

A K BANJO **RESPONDENT**

J U D G M E N T
Delivered on : 12 November 2010

PATEL DJP

Introduction

[1] On the 3rd of December 2005, a collision occurred near the intersection of Abington Road and the R102 between appellant's/plaintiff's vehicle bearing registration numbers and letters NPS 792 and a vehicle driven by the respondent/defendant bearing the registration numbers and letters NPS 61719. The parties will hereinafter be referred to as cited in the court *a* quo.

Plaintiff sued defendant on the basis that he was the owner, alternatively, the bearer of the risk for loss in terms of an instalment sale agreement. Two special pleas were raised *in limine*, namely that the matter had prescribed and, secondly, that the plaintiff lacked the necessary locus standi to institute the action. The court *a quo* dismissed the special plea of prescription but upheld the plea that the plaintiff lacked the locus standi to bring the action.

[2] Thus the present appeal is against the learned magistrate's ruling that the plaintiff lacked locus standi to sue. The ruling resulted in the dismissal of the action. The agreed facts on appeal as they were in the court *a* quo are that the plaintiff was the owner of the motor vehicle bearing registration NPS 792, the vehicle was insured by the Des Smith Family Trust ("the trust"), and that the insurer of the trust was driving the litigation. The only issue for determination is whether the plaintiff has legal standing to institute an action for damages arising from the collision on the grounds that he owns the vehicle and notwithstanding the fact that the insured is the trust.

Magistrate's ruling

[3] The magistrate framed the issue as follows: who is the insured party? The magistrate ruled that the person who bears the risk of loss is the person who has legal standing in an action for damages arising out of a motor vehicle collision. The magistrate concluded that although the plaintiff was the owner of the vehicle, he did not bear the risk of loss and therefore did not have standing to sue. The magistrate dismissed the plaintiff's action with costs.

[4] The magistrate acknowledged the plaintiff's submission that as owner he had suffered patrimonial loss as a result of the collision and was therefore entitled to claim damages. The magistrate also noted the plaintiff's further submission that the trust's claim lay against the insurance company which would reimburse the trust while the defendant would reimburse the owner. Importantly, the magistrate did not properly address these submissions in her ruling. The magistrate merely reiterated her earlier finding that the person who bears the risk of loss must bring the action and that the trust should have been the plaintiff and not the owner.

Plaintiff's submissions on Appeal

[5] The plaintiff submitted that the classic principles of subrogation do not apply to the present matter as the plaintiff is not the insured party. The agreement (if any) between the plaintiff and the insurer is one in which the insurer financed the litigation on behalf of the plaintiff. The defendant cannot base a defence on this agreement. There need not be evidence on the record as to any such contractual relationship between the plaintiff and the insurer.

The plaintiff also argued that the involvement of the insurer in litigation is irrelevant. In a subrogated claim the insurer steps into the shoes of the insured. The parties to the lawsuit have the same rights and defences as they would have had had the claim not been subrogated. In practice, it is irrelevant as to whether the claim has been subrogated.

[6] Counsel for plaintiff also argued that it is not necessary to plead the insurer's involvement in the lawsuit where it pursues a claim under rights of subrogation. It was further submitted that the decision in *Nkosi v Mbatha*, unreported, case no AR 20 / 10, which held that a subrogation claim must be proved and specifically pleaded, is

clearly wrong and not binding on future courts. It was also submitted that because subrogation does not affect the rights or duties of either the plaintiff or defendant in an action it does not need to be pleaded.

In the final analysis it was submitted that ownership is sufficient to establish legal standing and it was requested that the appeal be upheld with costs.

Defendant's submissions on Appeal

[7] The defendant submitted that the only way that a person other than the bearer of the risk of loss could institute action was by way of an agreement of cession or some other innominate agreement. The fact of cession has to be pleaded.

The defendant also argued that the plaintiff's submission that ownership of the vehicle was sufficient to establish legal standing is wrong. The defendant submitted that ownership establishes locus standi in vindicatory actions and not actions for damages. The defendant further submitted that legal standing in damages actions is closely linked to risk and that someone who does not

bear the risk of loss cannot sue for recovery.

[8] The defendant countered the plaintiff's submission that the doctrine of subrogation does not apply to the present matter by arguing that subrogation is material only insofar as it relates to the question of who bore the risk of loss or damage to the vehicle.

Although the defendant referred to the *Nkosi* judgment and stated that it is necessary for the plaintiff to plead the involvement of the insurer in litigation, this was especially disavowed by Counsel for the defendant before us. Counsel for defendant submitted that nothing turns on the *Nkosi* judgment in this matter.

Evaluation

[9] The present appeal raises a novel issue. Usually, the plaintiff is both the owner of the vehicle and the insured party. In the present matter, the plaintiff is the owner of the vehicle but not the insured party but that does not mean that he does not bear the risk of loss or damage in respect of the vehicle. The determination of this appeal turns on (a) the proper requirements for pleading a cause of action and (b) the answer to the question as to whether ownership is

sufficient to establish legal standing in an action for damages.

[10] It is in my view unnecessary to consider the question as to whether or not the present matter involves a subrogated claim. Subrogation is at best a collateral fact which is not capable of affording any reasonable presumption or inference as to the principal matter in dispute. The question of subrogation is *res inter alios acta.*

[11] It is necessary to briefly define subrogation on the assumption that this matter involves a subrogated claim. The doctrine of subrogation has been defined in Joubert (ed) *The Law of South Africa* vol 12 (first reissue) para 373 as follows:

> '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.'

[See also *Rand Mutual Assurance Co Ltd v Road Accident Fund*

2008 (6) SA 511 (SCA) para 12]. The above definition clearly states that the insurer effectively steps into the shoes of the insured [see *Commercial Union Insurance Company of South Africa Ltd v Lotter* [1999] 1 ALL SA 235 (A) at 240e – f; *Halsbury's Laws of England* vol 25 (4 ed) 2003 reissue at para 196].

Pleading

[12] The involvement of the insurer in a lawsuit is irrelevant and therefore it is not necessary to plead such involvement. It has already been established that in subrogation claims the insurer takes the place of the insurer. The historical practice in our courts is to allow the insurer to institute action in the name of the insured [*Rand Mutual Assurance* supra]. Logically, the parties to a suit have the same rights and duties as they would have had had the matter not been a subrogated claim. I agree with the plaintiff's submission that from a practical perspective the insurer's involvement in the suit is irrelevant. For this reason it is clearly not necessary for the plaintiff to plead the insurer's involvement in the suit.

[13] The plaintiff is only required to plead those facts which sustain a

cause of action [see *Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) at 256I – J]. In the *Nkosi* case, the plaintiff was both the owner of the vehicle and the insured party. The case is factually distinguishable from the present matter and this may be the reason for the defendant's submission that nothing turns on the *Nkosi* case. However, the rule propounded in that case is that subrogation must be proved and specifically pleaded. Accordingly, the case is relevant and needs to be analysed. The fact that a given matter is a subrogated claim is not a fact that sustains a cause of action. It is merely a collateral fact and it is not necessary to plead and prove such a fact.

[14] There is authority for the proposition that subrogation does not need to be proved. In *Ntlhabyane v Black Panther Trucking (Pty) Ltd and Another* (A3083/08) [2009] ZAGPJHC 46 (1 September 2009), the plaintiff was the owner of the vehicle and also the insured party. The magistrate granted absolution from the instance on the misguided basis that the plaintiff had failed to prove subrogation in that she had failed to produce a copy of the insurance policy. On appeal, the court confirmed that subrogation did not affect the plaintiff's locus standi to institute action. The court held that there 'was neither a duty on the plaintiff to prove

subrogation, nor to produce the policy of insurance.' I agree with that decision and in that respect the *Nkosi* judgment is clearly wrong and is not binding on future courts.

Ownership

[15] The plaintiff's ownership of the vehicle is sufficient to establish locus standi to sue. The defendant's contention that ownership only establishes legal standing in vindicatory matters and not damages claims is incorrect. There are many instances in which the law recognises that ownership gives rise to legal standing to sue for compensation. In *Van Wyk v Herbst* 1954 (2) SA 571 (T), a collision occurred in the evening between the car owned and driven by the plaintiff and the car driven by the defendant. The facts were that on the morning of the same day of the collision the plaintiff had concluded a binding agreement of sale with the purchaser. The basis of the appeal was that as the risk of the vehicle had passed to the purchaser, the plaintiff's loss was caused by his decision to release the purchaser from the latter's obligation to accept the damaged vehicle. The court held that the right to sue under the *Lex Aquilia* was originally enjoyed solely by the owner but that the right was gradually extended to other persons. The court also held

that the mere passing of risk is not sufficient to establish the purchaser's locus standi to sue the wrongdoer for compensation. The court held, after assuming that the risk of loss had passed to the purchaser, the defendant was liable to the owner for the consequences of his actions. The court found that the liability could be enforced either by the plaintiff as owner or by the purchaser, after taking cession of the right of action, as cessionary. This judgment was approved and applied in *Rondalia Finansieringskorporasie van SA Bpk v Hanekom* 1972 (2) SA 114 (T) at 118C.

[16] The *Herbst* judgment was also applied in *Lehmbeckers Transport (Pty) Ltd and Another v Rennies Finance (Pty) Ltd* 1994 (3) SA 727 (C). In this case the plaintiff was the owner of the vehicle but at the time of the collision the vehicle was leased to a company which bore the risk of loss in terms of the lease. The argument was raised that the plaintiff had no standing to sue and that the lessee should have sued as it bore the risk of loss. The court rejected this argument and held that the action was Aquilian in nature and that the loss caused by physical damage to the property prejudices the plaintiff as owner.

[17] The plaintiff's ownership of the motor vehicle establishes a direct

interest in the diminution of the patrimonial value of the vehicle. This being an Aquilian action, ownership is sufficient to establish locus standi. The appeal accordingly succeeds.

[18] I make the following order :

1) The ruling made by the Magistrate is set aside and replaced with the following :

   "The defendant's *in limine* point that the plaintiff lacks locus standi is dismissed with costs."

2) The respondent/defendant is ordered to pay the costs occasioned by the appeal.

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PATEL DJP

I agree

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NKOSI AJ

DATE OF HEARING : MONDAY, 01 NOVEMBER 2010

DATE OF JUDGMENT : **FRIDAY, 12 NOVEMBER 2010**

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