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CASE LAW UPDATE
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SUBROGATION: CAN INSURER SUE IN ITS OWN NAME WITHOUT CESSION?

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1. *Rand Mutual Assurance Co Ltd v Road Accident Fund*, a Supreme Court of Appeal judgment delivered on 25 September 2008 considers the Compensation for Occupational Injuries and Diseases Act 1993 (COIDA) and the rights of insurance companies to sue wrongdoers in their own names.

2. COIDA provides compulsory insurance cover for employers should any of their employees die, sustain an injury or contract an occupational disease during the course of their employment.

3. In terms of Section 29 of COIDA *if an employee is entitled to compensation in terms of the 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.* A mutual association is an insurance company which is licensed to carry on the business of insuring employers against their liabilities under COIDA to employees in terms of Section 30(1) of the Act. It was in this capacity that the appellant, Rand Mutual Assurance Co Ltd insured the employer, Harmony Gold Mining Co Ltd in this matter.

4. An employee of the insured, Young, was injured in a motor vehicle accident, which was caused by the negligence of the driver of another vehicle. The accident arose out of and in the course of Young's employment. Young was consequently entitled to the benefits provided for in COIDA. Because of the insurance policy, the appellant, and not the Director-General, was obliged to compensate Young in the sum of R191 078,85 determined in accordance with COIDA by the Director-General.

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

6. Rand Mutual was not the employer and accordingly, it was not covered by the wording of the provision although it was a party by whom compensation was payable.

7. In reaching its decision, the Court considered the repealed Workmens' Compensation Act 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. The term employer "*individually liable*" was defined to mean an employer who was exempt from paying contributions to the Accident Fund. There were two types of employers individually liable, namely the State (and certain other organs of State) and, secondly, employers who had, with approval of the Commissioner, obtained from a mutual association a policy of insurance for the full extent of their potential liability under the Act.

8. 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. 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. The Act was ambivalent about who had to pay compensation. In some instances, it had to be either the Commissioner or the employer individually liable while in other circumstances, it was either the employer individually liable or the mutual association. However, the Act also said that the mutual association had the right to insure employers' liabilities under that Act.

9. In terms of COIDA, liability is no longer attached to an employer as in the 1941 Act. COIDA provides for "*insurance of employers against their liabilities to employees in terms of this Act*" by a mutual association. This implies that employers do have a liability under COIDA although the nature and extent of their liability is not spelt out. The implication is that the liability is borne by either the Director-General or the mutual association.

10. In the case at hand, the insured's indemnity claim had been paid in full. The insured employer was accordingly entitled to recover from the respondent. However, the employer did not seek to recover, Rand Mutual did not obtain a cession and sued, not in the name of the insured, but in its own name. This non-compliance with the subrogation doctrine was, according to Road Accident Fund, fatal to the appellant's claim.

11. The appeal court then turned to the question whether the rule that an insurer must sue in the name of its insured forms part of our law and, if so, whether it can be justified. The answer required consideration of the history of the reception into South Africa of the English law of subrogation, the nature of the 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. In its literal sense, the word "subrogation" means the substitution of one party for another as creditor. 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 proceedings of any claims the insured may have against third parties in respect of the loss. (*Law of South Africa, Volume 12 pg 373*)

13. The doctrine was imported into South African law through *Ackerman v Loubster* in 1918 in the Orange Free State High Court (1918 OPD 31). In this case, the plaintiff was an insured who had been fully paid by the insurer 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 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*".

14. It was noted that 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. In our law, it would be a case of an implied essential term of the contract as opposed to a tacit term.

15. In formulating the doctrine of subrogation, the Supreme Court of Appeal has never held that the insurer is not entitled to sue in its own name. Different laws deal with this aspect differently. For example, the English common law requires the insurer to sue in the name of the insured. American law on the other hand, adopts a different approach, whereby the insurer institutes litigation in its own name to protect litigants from harassment and avoid confusion over the identity of the real plaintiff. This appears to be similar to the position in Continental law.

Locally, academics contend that subrogation is for a large part nothing more than a procedural device in the service of the indemnity principle.

16. The court was duty bound to consider whether the procedural requirement is consonant with our Constitutional values and our law of procedure. The Court concluded that requiring the insurer to sue in the name of the insured is formalistic, creates anomalies in that it enables the insurer to litigate without taking any risk as far as litigation costs are concerned.

17. The Court turned to the prevailing practice within South Africa and found that insurance companies have been acting for many years on the basis that they have to litigate in the name of the insured. The Court was reluctant to interfere with settled legal principles and clarified that the judgment did not aim to provide that the insurer must litigate in its own name and not in the name of the insured. What it did provide was that "*unless the wrongdoer is prejudiced in a procedural sense, the Courts may permit the insurer to proceed in its own name*". The Court recognised that certain procedural law changes will be required, for instance the discovery of documents.

18. On this basis, the Court concluded that "*the plaintiff was not non-suited by litigating in its own name, particularly since there was no discernable prejudice to the respondent*". Consequently, the appeal succeeded and Rand Mutual was entitled to judgment.

19. In my opinion, the judgment of the Court is in line with the underlying constitutional principles in South African law. I agree with the Court that to require a party to litigate in the name of another flies in the face of the requirement of transparency, which underlies all litigation. As appears from the position in the United States, the Court revealed that the rule shows no public interest in modern times and is merely a corollary of the indemnity principle. However, since it

forms part of common practice in our law, the Court was correct to "*not to abolish the practice by judicial fiat*".

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