IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REPORTABLE

CASE NO: AR20/10

In the matter between:

NOMPUMELELO PATRICIA NKOSI **APPELLANT**

Vs

ALBAN MBUSO MBATHA **RESPONDENT**

APPEAL JUDGMENT

MADONDO J

[1] This is an appeal against the Judgment of the Empangeni Magistrate's Court dismissing the appellant's claim against the respondent for the payment of R16407-84 damages. For the sake of convenience I shall refer to the parties as the plaintiff and the defendant respectively. The defendant had filed an opposing affidavit to the plaintiff's application for condonation for her failure to comply with the provisions of Rule 51(3) of the Magistrate's Court, but on 10 June 2010 he withdrew such opposition and elected to abide to this Courts decision.

[2] The plaintiff instituted an action against the defendant for damages arising out of a motor vehicle collision which occurred on 10 May 2001 at the

intersection of R619 and Bullion Boulevard, Richardsbay, between the plaintiff's vehicle and defendant's vehicle. The damages the plaintiff sough related to fair, reasonable and necessary costs to restore her motor vehicle to its pre-collision condition. The defendant also filed a counter claim against the plaintiff for the payment of R12500-00 damages, being the costs of repairs to his vehicle.

[3] It is common cause that the plaintiff's vehicle was involved in a collision which resulted in plaintiff sustaining damages. The plaintiff disclosed for the first time at the hearing that at the time of the collision her motor vehicle was insured by Regent Insurance Co. Ltd and that her insurer had fully indemnified her for the loss she had suffered. In terms of the insurance contract with the insurance company she paid an excess in the amount of R2500-00. Also, that she was proceeding against the defendant on behalf of her insurer for the recovery of the amount her insurer had paid to her as costs of repair to her vehicle. The defendant abandoned his counterclaim against the plaintiff.

[4] At the conclusion of the plaintiffs' case an application was made on behalf of the defendant for the absolution from the instance on the ground that the plaintiff had no *locus standi* to institute proceedings against the defendant for the recovery of the amount of R16407-84 paid to her by her insurer as costs of repairs to her motor vehicle since she had not suffered any loss. Instead, the Learned Magistrate dismissed the plaintiff's claim with costs on the grounds that since the plaintiff had been fully compensated for the costs of repairs to her

vehicle, she had not suffered any loss. It was therefore an insurance company which had *locus standi* to proceed against the defendant for the recovery of the amount it paid to the plaintiff as costs of repairs to her vehicle. Nor had the plaintiff disclosed that her claim was a subrogated one. According to the Learned Magistrate the plaintiff was only entitled to claim R2500-00 she paid to the insurer as excess.

[5] The issues raised by argument in this matter are:

5.1 Whether the plaintiff having been fully indemnified by her insurer for the loss she had suffered, was still entitled to proceed against the defendant for the recovery of the same loss.

5.2 Whether the plaintiff should have specifically pleaded a subrogation claim.

[6] Both in the Heads of Argument and in Court Ms Van Jaarsveld for the plaintiff has strenuously argued that since the plaintiff was insured against the accident she had the right to recover from the defendant for the wrong done to her although she had already been compensated in respect of such wrong by her insurer. At the time the delict was committed, the plaintiff's right to claim damages from the defendant was established as well as the defendant's liability to compensate the plaintiff and this liability was not discharged by a payment from a third party, the insurance company. Secondly, that the fact that the plaintiff's vehicle had been repaired at the expense of the insurer is *res inte alios*

acta between the parties and in support thereof, she referred us to *Millward v Glaser 1949(4) SA 93(A) at 940.*

[7] It is trite that the wronged party is entitled to be compensated for the consequences of the unlawful conduct. The wronged party is to be placed in the position that he or she would have been in had the wrongful and negligent conduct had not occurred. See *First National Bank of South Africa Ltd v Duvenhage 2006(5) SA 319(SCA) 324 H-I (paragraph 17)* and *Trotman and another v Edwick 1951(1) SA 443(A) at 449 B-C.*

[8] The litigant who sues on delict sues to recover the loss which he or she had sustained because of the wrongful conduct of another, in the words that the amount by which his or her patrimony has been diminished by such conduct be restored to him. The plaintiff's damages must be assessed at the time of the injury done to him or her. See *G & M Builder's Supplies (Pty) Ltd v SA R&H 1942 TPD 120 at p121.*

[9] The answer to the question posed in this matter is that the general principle in cases of this nature is that a person who has more than one claim to indemnity is not entitled to be paid more than once for the same loss. See *Caledonia North Sea Limited v British Telecommunications Ple (Scotland) and others (2002) All ER (comm.) 321 (HL) at paragraph 92, as per* ***Lord Hoffman J*** *Samonco 2005 (4) SA 40(SCA) 45E- 46B.*

[10] There are different ways of giving effect to the principle. One is to say that the person who has paid is entitled to be subrogated to the rights against the other person liable. The other is to say that one payment discharges the liability. The authorities show that the law ordinarily adopts the first solution when the liability of the person who paid is secondary to the liability of the other liable. It adopts the second solution when the liability of the party who paid was primary or the liabilities are equal and co-ordinate. A typical secondary debtor, an insurer, may be in a position to reclaim what it has paid. Where it can and exercises a right of subrogation, Insurance Law demands that it does so in the name of the insured. A right of subrogation can be exercised against a primary debtor whether the latter is a delictual wrongdoer or a contractual defaulter. See *Caledonia North Sea Ltd v Bridge Engineering Co. and other (2000) Lloyd Rep 1R 249 at 261.* But it cannot be exercised by one secondary debtor against another because payment by the one discharges the other. The insurer under that policy can recover from other underwriters who have insured the same interests against the same risks a rateable sum by way of contribution. *Boris Construction Limited and Another v Commercial Union Assurance Company plc (2001) 1 Lloyd Rep 416, a decision of the Queen's Bench Council.* See also *Samonco case, supra, at 45E-46B.*

[11] The exceptions to the general principle, that a person who has more than one claim to indemnity is not entitled to be paid more than once, would be a

scenario where the plaintiff were to have repairs to her motor vehicle done gratuitously for her by her friend. Also, where the defendant had a contract with an insurer to repair the motor vehicles that had been involved in collision and as a result of such contract the defendant had repaired the plaintiff's vehicle. In which event, the defendant's liability to the plaintiff would have stemmed from a different cause of action, which had existed between the defendant and the insurance company in relation to repairs. The defendant cannot therefore reap any benefit from the advantage received by the plaintiff from this entirely independent source. See *Du Randt v Erickson Motors (Wilkon)Ltd [1953] 3 SA 567(T) 572.*

[12] While it is true that, *prima facie*, the plaintiff would then have an advantage in that she would get both a repaired car and the cash notionally representing the amount she would have expended in repairing the car. But that advantage would be between the defendant and the plaintiff, a *nova causa* extraneous to the legal obligation of defendant to make good the damage to the plaintiff. In the present case, this is not the case since none of the scenarios referred to above had occurred, but the insurance company had fully indemnified the plaintiff in so far as her costs of repairs were concerned.

[13] While it is true that a person who has suffered damages is entitled to compensation from the person who has caused the damage, in terms of the principle of subrogation the insured, if is fully compensated by the insurer,

becomes a trustee for any compensation paid to him or her by the wrongdoer and is bound to hand over to the insurer whatever money he or she receives from the wrongdoer over and above the actual loss he or she had sustained after taking into account the amount he or she has received under the contract of insurance. The insurer may then sue in the name of the insured. *Ackerman v Loubser 1918 NPD 31; Mandelsohn v Estate Morom 1912 CPD 690 at 693.*

[14] This is done in pursuit to the principle that one cannot under any circumstances obtain for his or her own benefit double compensation. The insurer who has indemnified the insured is entitled upon the principle subrogation to the advantage of every right vested in the latter whether such rights exists in contract fulfilled or unfulfilled or in remedy for tort capable of being insisted upon "or already insisted upon". See *Ackerman v Loubser case, supra, at p34.* The action continues in the name of the insured. The effect of the indemnification is to shift the equitable right to receive payment by the wrongdoer from the ensured to the insurer, without, however, affecting the fact that the action proceeds in the name of the insured. See *Teper v Mcgees Motors (Pty) Ltd 1956(1) SA 738 (C) 744D-E.*

[15] In the present case the insurer having fully compensated the plaintiff, it had a subrogated claim against the defendant, whose negligence caused the loss in respect of which compensation was paid, for the recovery of the amount of R16407-84 it paid to the plaintiff as the costs of repairs. See *Barkett v SA*

National Trust Assurance Co. Ltd 1951(2) SA 353(AD) at 363H; Avex Air (Pty)Ltd v Borough of Vryheid 1973(1) SA 1617(AD) 626E; Samonco case, Supra, 195 paragraph 14. Since the plaintiff has been fully indemnified for the loss she had suffered, she no longer had a ground to proceed against the defendant for the same loss. To allow her to do so, would, obviously, amount to double compensation. In any event if the plaintiff were to be successful in her claim she would be obliged to hand the recovered amount over to the insurer. However, this is not the case in this case since the plaintiff did not succeed in her claim against the defendant.

[16] The pre-requisites for the doctrine of subrogation are: Firstly, that payment or reinstatement has been made, secondly, a valid and subsisting policy, thirdly, that the assured must have had right to claim compensation from a third party.

[17] In this case the plaintiff's vehicle was at the time of the collision insured and the plaintiff was a policy holder. After the collision the insurance company indemnified the plaintiff for the loss she had suffered. At the *Court a quo* the evidence disclosed, *prima facie,* liability on the defendants' part to the plaintiff. Therefore, I am satisfied that all the pre-requisites for the operation of the doctrine of subrogation have been satisfied.

[18] However, the plaintiff said it for the first time under cross-examination that she was proceeding against the defendant on behalf of the insurer for the

recovery of the costs of repairs the insurer paid to her. It does not appear from the plaintiff's pleadings that she was so suing. I am of the view that a subrogation claim is something which must clearly be proved and specifically pleaded. Nor had any mention been made in the plaintiff's pleadings that her motor vehicle was insured and that after the collision the insurer fully indemnified the plaintiff for the loss she had suffered. Nor did the plaintiff plead that the amount to be recovered from the defendant would be paid over to the insurer. The object of pleading is to define the issues between the parties and the parties must be kept strictly to their pleas where any departure could cause prejudice. See *Robinson v Randfontein Estates GM Co. Ltd 1925 AD 173 at 178 as per* ***Rose-Innes CJ****.* The party is therefore not allowed to direct the attention of the other party to one issue and at the trial attempt to canvas another. *Nyandeni v Natal Motor Industries Ltd 1974(2) SA 274(D).* In the request for further particulars the plaintiff was specifically asked whether her motor vehicle was at the time of the collision insured, and whether she had personally paid for the repairs. The plaintiff refused to answer the questions posed to her on the ground that the information requested was not required for pleading. In, my view, the plaintiff had thereby misled the defendant as to the time and correct state of events and as to the nature of her claim.

In my judgment this, clearly, is not a case where the Court should exercise its powers and amend the pleadings. At this stage to permit subrogation claim

raised and to allow the amendment would be most prejudicial to the defendant. See also *Teper case, supra p743.*

[19] One would have expected the plaintiff to proceed against the defendant for the recovery of R2500-00 as the Learned Magistrate correctly found that the plaintiff was entitled to claim the recovery of the amount of R2500-00 she had paid, as an excess to the insurer. Instead, the plaintiff claimed the payment of the amount of R16407-84 in respect of which she had been fully indemnified.

[20] For the plaintiff to succeed in her claim she must have proved that she suffered damages and that she was therefore entitled to compensation from the defendant. See *Webber and others v Africander. G.M. Co. 1898(5) Off Rep 251 at 256.*

[21] In the result, I propose that the appeal should be dismissed and no order as to costs is made.

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MADONDO J

I agree,

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MNGUNI J

And it is so ordered.

Date reserved on:	11/06/2010
Date delivered:	6 July 2010
Counsel for the appellant:	Adv Van Jaarsveld
Counsel for the defendant:	Mr V.J. Ndlovu