IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

2024-08-27

DATE SIGNATURE

Case Number: 84274/2016

Heard on: 5 August 2024

Delivered on: 27 August 2024

In the matter between:

MFANSENI JOSEPH MASEKO Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 27 August 2024.

JUDGMENT

STRIJDOM J

[1] Plaintiff's claim is for past hospital and medical expenses in the sum of R202 747.40 interest and costs.

[2] Plaintiff issued summons against the defendant on or about 27 October 2016, claiming payment of damages for injuries the plaintiff sustained as a result of a collision which occurred on 14 June 2015, on the old Pretoria Road, between a white Toyota Quantum and a BMW motor vehicle. Plaintiff was a passenger in the Toyota Quantum at the time of the collision. Both vehicles were driven by insured drivers and the collision occurred as a result of the negligence of the insured drivers.

[3] All the plaintiff's claims were settled with the defendant, save for the plaintiff's claim for past hospital and medical expenses, which was postponed *sine die* on 1 November 2018.

[4] The defendant has raised two special pleas in relation to the plaintiff's claim for past hospital and medical expenses.

[5] The defendant did not pursue the special plea of prescription.

[6] Defendant raised a special plea stating that past medical expenses in the amount of R202 747.20 was adjudicated and duly settled under statutory CJP Policy/Statutory EMP/COIDA and/or other.

[7] It was further submitted by the defendant that the plaintiff passed away on 2 November 2023 and therefore must be substituted with the executor of the estate as a deceased does not have *locus standi* to litigate. It was also argued that Rand Mutual Assurance does not have *locus standi* as Rand Mutual Assurance is not a party to the Summons.

[8] The following facts are common cause between the parties and are not in dispute:

8.1 The plaintiff received payment of the sum of R202 474.40 from the Rand Mutual Assurance Company Limited ("RMA") under and in terms of a Commuting Journey Policy.

8.2 RMA is an insurer that ensures employers against their liabilities to employees under the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ("COIDA").

8.3 The plaintiff was an employee of an employer insured by RMA. Because of the insurance policy, RMA compensated the plaintiff for the past hospital and medical expenses he had incurred as a result of the motor vehicle collision which occurred on 14 June 2015. As such, RMA is now seeking to recover the compensation it paid to the plaintiff.

8.4 A schedule of the expenses comprising the sum claimed, supported by vouchers, has been uploaded onto Caselines under section 005. This amount accords with the sum paid to the plaintiff in terms of the Commuting Journey Policy of RMA.[1]

8.5 Dr Steven Pretorius deposed to an affidavit to confirm the necessity and justified payment of the past hospital, medical and related expenses ("Past Medical Expenses"), incurred pursuant to injuries sustained by the plaintiff.[2]

---

[1] Caselines: 005-1 to 005-66
[2] Caselines: 007-1 to 007-4

[9] The defendant concluded that any claims under the Commuting Journey Policy are not recoverable from the defendant since the policy is intended to cover the accident which occurs while the employee is journeying to and from work at the beginning or at the end of a work shift and these claims should be repudiated.

[10] It was submitted by defendant that the special plea be upheld and the Court to find the defendant not liable to pay the past medical expenses to the plaintiff in terms of his agreement he concluded with RMA.

[11] The current claim is a subrogated claim. What this entails appears from an extract from Lawsa on insurance:[3]

> "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."

[12] The doctrine as part of insurance law was established during the 18th Century and 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

---

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

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] The Supreme Court of Appeal in ***Commercial Union Insurance Co of SA Ltd v Lotter***[4] with reference to the judgment in ***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 insurer'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."

[15] In ***Somersall v Friedman***[5] it was stated that:

> "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."

[16] In ***Rand Mutual Assurance Co Ltd v Road Accident Fund***[6] the court held that:

---

[4] [1999] 1 All SA 235 (A); 1999 (2) SA 147 (SCA)
[5] [2002] 3 SCR 109 (2002) 215 DLR (4th) 577; 2002 SCC 59 at para 50
[6] 2008 (6) SA 511 (SCA)

> "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 entitled the insurer to claim the loss from the wrongdoer."

[17] The court in ***Rand Mutual Assurance*** remarked that 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. The court decided that although this practice is not desirable that it would be wrong to abolish it by judicial fiat.

[18] In my view RMA is entitled to claim payment of the compensation it paid to the plaintiff in terms of the Community Journey Policy in the plaintiff's name by virtue of the doctrine of subrogation. The amount awarded to the plaintiff for past hospital and medical expenses must be paid to RMA as undertaken by the plaintiff.

[19] In the result, the second point *in limine* is dismissed. The draft order marked "X" is made an order of Court.

[redacted]

J.J. STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 84274/2016

HEARD ON: 5 August 2024

FOR THE PLAINTIFF: ADV. Z. MARX

INSTRUCTED BY: Marais Basson Inc.

FOR THE RESPONDENT: Ms. E. van Zyl

INSTRUCTED BY: State Attorney

DATE OF JUDGMENT: 27 August 2024