IN THE HIGH COURT OF ESWATINI

CASE NO. 798/13

In the matter between:

PLAINTIFF

LEWIS G THOBELA

And

HENRY B DLAMINI **DEFENDANT**

NEUTRAL CITATION: **Lewis v Henry B. Dlamini (798/13) (2021] SZHC (100) September 2021 - 25 May 2022**

CORUM **BW MAGAGULA J**

HEARD **15/01/21; 01/02/22; 03/02/22. &17/02/22**

DELIVERED **25/05/22**

Summary: *Civil Law - claim for damages arising out of a motor vehicle collision accident- legal principle of subrogation under insurance law revisited - The defence by the defendant is clearly misconceived, if the claim has been instituted by the Plaint/ff on behalf of the insurance company the oral agreement that is relied upon by the*

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Defendant is not binding on the insurance company. The insurer has the legal right to recover the costs it expended for the repairs of the insured 's motor vehicles- no evidence adduced before, Court indicating that the Insurer had waived its claim- Plaintiff proved its case on a preponderance of possibilities -Plaintiff's claim succeeds. Costs -with regard to the issue of costs, the role played by the insured in misleading the Defendant to the effect that he must make the payment to him, makes the Defendant to be partially successful in this action. He is correct to say he has paid some of the money that is being claimed to the insured. The latter gave evidence that this was disclosed to the insurance company. As to why did they pursue the Defendant for the full amount, has not been explained. Despite that the Defendant is found to be liable for the balance of the claim, the costs will be borne by the Plaintiff

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Judgment

Introduction

[1] The Plaintiff and the Defendant met by accident, literally, on the 23,d June 2023. Mr. Henry Bhekisisa Dlamini was driving down on Dutoit Street, at the intersection with Nkoseluhlaza Street, exactly where he collided with the Plaintiff's vehicle, a white

Isuzu double cab. As a result of the collision, the Plaintiffs motor vehicle was damaged on its right side. Both the right hand doors and the side step of the Plaintiffs motor vehicle were also damaged. The collision did not only result in the damage of the Plaintiffs motor vehicle, but the Defendant's motor vehicle was also badly damaged. This is reflected in the police rep01i compiled after the accident.

[2] The unfortunate meeting of the paiiies before Court, is what would subsequently escalate into the litigation resulting in this judgment.

Background facts

[3] The Plaintiff is the owner of a motor vehicle described as an Isuzu LDV double cab, with registration numbers HSD 256 AH. In his evidence in chief, he told the Court that he was driving fr9m his work place at Eswatini Royal Sugar Company in Mhlume into Manzini town. The collision happened at the intersession of Nkoseluhlaza Street and Mentjies street. It is common cause that Plaintiff filed a claim with his insurer, Eswatini Royal Insurance Corporation which honored his claim. It is also common cause that after the accident, the Plaintiff and the Defendant engaged each other and certain agreements were made, which culminated to the payment of E6, 500.00 by the Defendant to the Plaintiff.

[4] In as much as the Plaintiff before Court is Lewis Goodman Thobela, it transpired through evidence that in fact, the party that seeks to recover the pecuniary loss is Eswatini Royal Insurance Corporation. The legal action is a subrogation claim.

[5] The claim before Court is therefore for the payment of the total sum of E60, 875.05 being costs incurred for repairing the Plaintiff's motor vehicle to its original condition together with interest and costs.

[6] The Defendant has filed a plea denying the liability for the claimed amount. He only acknowledges liability in the sum of EIS, 000.00 which he alleges was the amount that was agreed upon between him and the insured, Mr. Lewis G. Thobela. This amount is allegedly to be for the cost of "excess" that Mr. Thobela was required to pay to his insurance company to enable the latter to honor his claim.

Plaintiff's case

[7] The Plaintiff's case on the pleadings, which he confirmed during his oral evidence, is as follows, in a nutshell;

7.1 On the 23,d June 2012 he was driving in his motor vehicle which he described as an Isuzu double cab registered HSD 256 AH. He was coming from his work place in Mhlume.

After he had passed the traffic circle, as you enter Manzini

Nkoseluhalaza Street, his vehicle was smashed by the Defendant's motor vehicle on the right hand side. He continued to tell the Court that the damage was on both doors on his right hand side which means the front and the back door were damaged. There was also a big dent in the rear. The side steps were also damaged.

[8] The cause of the accident, the date on which it happened and the extent of the damages caused on the respective motor vehicles are not in dispute. I will therefore not belabor this judgment by capturing in detail those facts. The costs of repairs of the Plaintiff's motor vehicle, and who paid for the repair costs are also facts that are common cause.

[9] The Plaintiff is not the only witness that gave evidence. Mr. Bongani Simelane, the motor vehicle assessor, also gave testimony before Court. In summary, his evidence is that, he is a motor vehicle assessor who is employed by Range Assessors. He has 27 years' experience in this field. He confirmed that he is the one that assessed the damaged motor vehicle on behalf of Eswatini Royal Insurance Corporation. He also confirmed that the motor vehicle was damaged on its right hand side and the quotation was submitted to him. Initially, it was for the amount of E64, 407. 59. As an assessor he made an adjustments to this quotation and reduced it to the amount of E60, 865.05. He submitted to Court that the aforesaid quotation was from

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Mbabane panel beaters. It was admitted by the Court as an exhibit and it was marked "Pl".

[1OJ Mr. Simelane after assessing the motor vehicle in question, he thereafter prepared an assessment rep01i which was also tendered as part of his evidence and it was admitted by the Court as an exhibit marked "P2". There was no objection from the Defendant's Attorney to the admission of the assessment report. He also produced pictures reflecting the damaged vehicle and he confirmed that he took the pictures himself. He handed over the pictures to Court and they were admitted as an exhibit marked "P3". Mr. Simelane was subjected to cross examination by the Defendant's counsel, Ms. Ndlangamandla. He was questioned on whether he was the one that prepared exhibit "P 1", to which he conceded to and confirmed that he was given this document by the claims clerk of ERIC, Mr. B. Dlamini. He was also interrogated regarding why he had to adjust the quotation. He explained that it was pati of his job to adjust up or down any quotation. In the matter at hand, he was of the view that the quotation was high, hence he felt the garage should reduce the costs on the labor and on the paiis.

[11] In his patiiculars of claim, the Plaintiff's case is largely based on patrimonial damages incurred as a result of the Defendant's negligence. During his oral evidence, he said a lot about exhibit "P4". He told the Court that it was acknowledgment of debt that was signed by the Defendant, after both parties had

recorded their

respective statements at the police station in Manzini, after the occurrence of the accident.

[12] The contents of exhibit "P4" are reproduced hereunder;

"P. O. box 148

Kwaluseni

Dear sir I Madam

To whom it may concern

1 Henry Bhekisisa Dlamini acknowledge that on the 23,·d June 2012, I was involved with Mr. Lewis Thobela 's car, in an accident. I did not stop and hit it on both doors on the right, both doors were damaged and the side steps, I do agree I will pay the costs of the car.

I allow Mr. Lewis Thobela to recover the money of the damages of his car.

Regards

Signed

[13] In his Mr. evidence in Chief Thobela produced this document and asked that it be admitted as evidence, it was accordingly admitted and marked "P4" there was no objection from the defense Mr. Thobela also confinned that the signature appearing from exhibit "P4" was the

Defendant's signature. This issue of the acknowledgment of debt was not challenged by Ms. Ndlangamandla during h r cross examination of the Plaintiff.

The Defendant's case

[14] As it has already been alluded to in this judgment, the Defendant does not deny the occurrence of the accident. He also does not deny that he was the driver of the motor vehicle that caused the accident. He has also not disputed that it is his negligent driving that caused the accident.

[15] The premise of his defence is that, subsequent to the accident, and subsequent to the signing of the aclmowledgment of debt, there was an oral agreement that was entered into by him and the Plaintiff, wherein the Plaintiff furnished the Defendant with a quotation from Mbabane panel beaters. At the bottom of it, it had a hand written inscription to effect that the excess will be El8,

000.00. The Defendant avers that it was the Plaintiff that advised him that he only needs to pay thatE18, 000.00. This represented what would be the excess amount that would have been paid by the Plaintiff to his Insurance Company Eswatini Royal Insurance Company. The net effect of the oral agreement would be that the Defendant would make good what the Plaintiff would be required to pay to the insurance company, to enable the latter to cover the remainder of the costs of repairs.

[16] The Defendant further submits that, subsequent to the alleged Oral agreement, he proceeded to make a total payment of E6, 500.00. to the Plaintiff. The payments which were in different trenches, were made to the

Plaintiffs bank

account held with the First National Bank and the details of the Plaintiffs bank account were provided by the Plaintiff himself to the Defendant.

[17] The Court was taken through the proofs of payments, which also forms part of the pleadings. They are marked annexures "HDB4", "HBD3" & "HBD4". It is the Defendant's case that, the reason why he could not pay the balance of El 1, 500.00 as per the alleged oral agreement, was because he subsequently received a telephone call from someone who said he was an assessor from the Eswatini Royal Insurance Corporation. This unnamed person made a demand that he must pay the sum ofE60, 875.05 to the Insurance Company (ERIC). According to the Defendant, his response to the said assessor was that he already has an agreement with the Plaintiff and he has already paid some of the money. He was apparently advised to stop making fmiher payments to Mr Thobela as it was unlawful to do so.

[18] When narrating the circumstances under which the oral agreement was concluded, the Defendant said the following;

"Q- After the accident did you communicate with Mr. Lewis Thobela? A - Yes my Lord

Q- What did you talk about?

A- He said something I did not understand. He said I am lucky because his motor vehicle was insured, he also mentioned something about excess. I

was not familiar about it. He gave me his banking details where I should pay the money.

Q- Did he tell you how much was the excess?

A- No he said I must pay urgently because there are people that may call and disturb. We then went to Mbabane Motors where the motor vehicle was being repaired. I met Lewis there, together with the guy who was working there. I was told that the excess was around E18, 000.00".

[19] The Defendant was cross examined at length by the Plaintiffs counsel Mr. Tengbeh. It was put to him that being a Bsc Animal Production degree holder, he was fairly a literate person who was above average. It was also put to him that in respect of Exhibit P4, which is the quotation that had a handwritten inscription reflecting the amount of excess, he was there when it was produced and he could have seen the Plaintiff making any annotations on the document. The Defendant said he did not see the Plaintiff making annotations.

Mr. Tengbeh further put the following question to the witness;

Q- The Plaintiff has testified that you generated this job quote

A 1 did not ei,en know the garage, it is the Plaintiff who gave me the details of the garage.

[20] The Court notes that this exhibit is actually addressed to Mr Lewis Thobela, the Plaintiff.

[21] The Defendant was also asked by the Plaintiff's attorney, a question as to why after having confirmed that he acknowledged to be the one that caused the accident, should the Court not order that he pays the damages.

[22] In response, the Defendant explained that the Plaintiff had told him that he was only liable for the excess, which was handwritten on the quotation. It was for the sum of El 8, 000.00. He complied and paid E6, 500.00, leaving the balance of El I, 500.00.

[23] The Defendant further testified that, when the acknowledgement of debt was signed, he was stressed. His mind was not stable. He told the Court that he did not even read it. The Court notes that this aspect of the Defendant's evidence, was not set out in his 'plea during the pleading stage. It is also reckless to append one's signature on a document that has not been read.

[24] The other relevant aspect of cross examination was with regard to the letter of demand that the Defendant had received from Eswatini Royal Insurance Corporation. It was put to the Defendant by the Plaintiff's counsel that, ifit is his case that the reason why he stopped making the payments directly to the Defendant, was because of the alleged telephone call that he had received from SRIC. Why then did he not continue to make the payment directly to SRIC? He responded by saying that he was confused and he did not know SRIC.

[25] Even under cross examination, the Defendant maintained that he thought the El 8, 000.00 that was agreed to with the Plaintiff, was the only payment that he was expected to pay. He had been assured by the Plaintiff, that the balance would be catered for by the Eswatini Royal Insurance.

The Law

[26] In the ordinary run of the mill, the current suit before Court would be a delictual claim arising out of damages incurred by the Plaintiff in repairing his motor vehicle to the condition it was in, before the accident. The Plaintiff would ordinarily be suing the Defendant on the basis that it was the Defendant's conduct that caused the accident. As a consequence thereof, the Plaintiff had in turn suffered patrimonial loss. However, this case has inherent in it, dimension that the Plaintiff is the insured. Subsequent to the accident, he lodged a claim which was successfully honored by Eswatini Royal Insurance Company. As such, it would then be a case of double compensation if the Plaintiff would sue the Defendant for the same pecuniary loss he was compensated for, by his insurer. It is on that basis that Plaintiff submits that this suit has been instituted under the legal principle of subrogation. I will now discern to consider this legal principle.

Subrogation

[27] The doctrine of subrogation has been defined in Joubert(ed) **The law of South Africa** volume 12 (first re- issue) paragraph 373 as follows;

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"Subrogation is a doctrine of insurance law, it embraces a set of rules providing for the reimbursement of an insurer who has indemnified it's 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 law".

[28] The above definition clearly signifies that the insurer effectively steps onto the shoes of the insured.

[29] The citation of the insurer in a law suit is in-elevant and therefore it is not necessary to plead such involvement'. It has already been stated above that, in subrogation claims, the insured takes the place of the insurer. The practice at least in the neighboring jurisdiction in South Africa, is to allow the insurer to institute the action in the name of the insured'. Logically the parties to a suite have the same rights and duties as they would have had, had the matter not been a subrogated claim.

[30] It therefore follows that in a subrogation claim, the Plaintiffs cause of action is one of subs titution[3]. 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. These sentiments were shared by the Court in the matter of **Ntlhlabanye v Black Panther trucking Pty ltd & another**

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[1] See Smith v Banjo (AR 290/10 [2010] ZAKZPHC73; 2011 (2) SA 518 (KZP);[20112] All SA 577(KZP) (12 November 2010) at paragraph 12

[2] See the rent mutual assurance case supra

' See Bankorp ltd v Anderson - Moshead 1997 (l) SA 25 l (w) 256 1-J

A3 08/308 (209) ZAGPJHC 461 (1 September 2009), the Plaintiff was the owner of the motor 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 he had failed to produce a copy of the insurance policy. On appeal, the Court confirmed that subrogation did not affect the Plaintiffs locus *standi* to institute an action. The Court held that there was neither a duty on the Plaintiff to prove subrogation, nor to produce the policy of insurance.

[31] I concur with the sentiments expressed by the Court, in the above stated decision.

[32] The Plaintiffs ownership of the vehicle is sufficient to establish the right to sue. There are previous decided cases where the Courts recognized that ownership gives rise to a legal standing to sue for compensation'. In the Ntlhlabanye decision, a collision occun-ed in the evening, between the car owned and driven by the Plaintiff and the car driven by the Defendant. The facts are that in 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 on to the purchaser, The Plaintiffs loss was caused by his decision to release the purchaser from the latter's obligation to accept the damaged vehicle. The Court also 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 a

• See Vanwyk v Herbst 1954 (2)SA 571 (T)

purchaser's *locus standi* to sue the wrong doer for compensation. The Comi 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 the owner or by the purchaser, after taking cession of the right action as a cessionary' .

[33] Against this backdrop, I make a finding that the Eswatini Royal Insurance Corporation has a right to recover against the Defendant, the patrimonial loss incurred when it compensated the Plaintiff for the costs of repairs. It is now proper that I proceed to traverse the law, relating to the defence advanced by the Defendant. The gist of the Defendant's defence is that, he should be absolved from liability on the basis that subsequent to the accident, he entered into an oral agreement with the Plaintiff. He thought Mr. Thobela had all the rights and capacity to contract with him as the owner of the vehicle. He allegedly agreed that the compensation must be limited to the sum of E18, 000.00 being the amount of his exposure to the insurer, in the form of excess.

[34] I have no doubt in my mind that in ordinary circumstances, an oral agreement is a binding contract between the patiies. As long as terms thereof can be proved. It is also logical to conclude that such an oral agreement, must concern the rights and obligations of the parties to that oral agreement. In the matter at hand, unfo1iunately, as it has already been established, the suit is under the doctrine of subrogation. It therefore means, the real party that seeks to recover the damages from the Defendant is the insurer, through the Plaintiff. The

'This judgment was also considered and applied in Rondalia Finansieringk Ngskorporasie Van SA bk Vs

Hanekom 1972 (2) (SA 114) at 1188 (c)

power of attorney fu1iher proves that the paiiy that seeks to recover what it expended on the Plaintiff, for the costs of repairs, incmTed as a result of the negligence of the Defendant. The question that begs interrogation is whether in such circumstances, the defence as advanced by the Defendant is sustainable to insulate it from liability against the insured.

[35) It is also common cause that the cause of action by the insurers not limited to excess, that the Plaintiff paid. The claim before Court, is for the entire patrimonial loss, that the insured had to pay to restore the Plaintiffs motor vehicle to the condition it was in, before it was damaged as a result of the negligent of the Defendant.

Adjudication

[36) As it has already been stated, the Defendant does not dispute liability for the accident•. Even when one considers the Defendant's plea, he does not seem to have controverted the Plaintiffs averments in his plea. He does not deny that the accident was as a direct result of his negligent driving'. In his plea, he avers that such averments are noted. This attracts a conclusion that, if the Defendant was denying that he was the sole cause of the accident due to his negligent conduct, this availed an opportune time and platform, for him to dispute it. He did not. Every allegation of fact not specifically denied in a plea, shall be taken to be admitted'. It is on that basis that I will proceed with the determination of

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' See paragraph 2 of the Defendant's heads of arguments
[7] See paragraph 5 of the Plaintiff's particulars of claim
' Reference in this regard to Rule 22 (3) of the Rules of Court

this matter, on the basis that liability for the cause of the accident is not being denied by the Defendant.

[37] The thrust of the Defendant's defence, appears to be the oral agreement which was alleged entered into with the Plaintiff. On the reading of the pleadings and hearing of the evidence and subsequently the legal arguments advanced by Respective counsel, I deduce that the Defendant's defence is the oral agreement entered into with the insured. He avers that he must be absolved of liability for the entire costs of repairs, save for the excess that the Plaintiff was obligated to pay to the insurer in terms of the insurance policy.

[38] The Defendant argues that he was advised by Mr Thobela that the excess was in the amount of E18, 780.00. He subsequently paid E6, 500.00 of that amount. I hasten to note that, in as much as this comes out from the documentary evidence produced before Court. His own version when he gave oral evidence was that the oral agreement was for the sum of El 8, 000.00. Unless he was rounding off the amount, it is not the amount appearing on the quotation. The hand written inscription reflects the sum ofE18, 780.00. The other interesting dimension with regard to the amount of excess came through the cross examination of Mr. Thobela. He was asked how much was the excess amount that he was required to pay by the insurer. He said it is the amount of E6, 087.00. When he was further asked by Ms Ndlangamadla, how much did he tell the Defendant the excess was. His answer was the same, that it is the amount E6, 087.00.

[39) I am not persuaded that the Defendant was told by the Plaintiff that the amount of excess is E6, 087.00. Why would then the Defendant elect to overcharge himself and tell the Comi he was advised to pay El 8,000.00, when in fact he was told a lesser amount. Again, if this is the amount that was communicated to the Defendant, why did the Plaintiff accept the amount of E6, 500.00 that was paid into his account? This figure was definitely more by E413.00 than the amount that he says was communicated to the Defendant.

[40) Be that as it may, irrespective of the amount of excess the parties orally agree to, the essence of the matter is that the Plaintiff and the Defendant did enter into some soti of an oral agreement. In all fairness to the Defendant, in light of the evidence adduced during the hearing, the pmiies did engage each other to settle the consequences of the accident. As to the extent and legality thereof, it may be blurry. The evidence as adduced, demonstrates that for instance, the Plaintiff did furnish his bank account details to the Defendant. That aspect was not disputed. In fact, the Insured (Plaintiff) through cross examination, admitted that he did receive the payment of E6, 500.00 from the Defendant. This is telling that the parties were communicating and at least to a certain extent complying with what they were engaging each other on.

Legality of the oral agreement

[41] Having established that the Plaintiff did engage the Defendant and the Comi is persuaded that this was for the settlement of the excess amount. Although

the evidence is contradictory to what amount. It is proper that an interrogation

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be made on the import of such an oral agreement on the claim before Court. This is more so because it is part of the Defendant's defence that since he discharged *albeit* partly. His obligation in terms of the oral agreement, according to his own version, was to pay the El 8, 000.00, which had been agreed. He only paid E6, 500.00 of this amount. This then begs the question that, even if I would entertain the argument that his liability must only be confined to the terms of the oral agreement, which is the payment of the amount of excess charged by the insurer. Would the Defendant's defence still be sustainable in light of the fact that he only paid a po1iion of what was agreed to? Further, the crncial and more intriguing question is whether the oral agreement binding on the insurance company, in light of the cause of action being based on subrogation. The Plaintiff currently stands in the shoes of the insurer in instituting the cun-ent action. A fmiher legal question is that, should the Defendant be absolved from paying the entire claim on the basis that he entered into an oral agreement to pay the excess only? What should happen to the balance of the costs of repairs, because Defendant does not deny that he was the sole cause of the accident.

[42] It is trite that the wronged party is entitled to be compensated for the consequences of the unlawful conduct. The wronged paiiy is to be placed in the position that he or she would have been, had the wrongful and negligent conduct not occurred. See ***First National Bank of South Africa ltd v Duvenhage 2006 (5) SA 319 (SCA) 324 H - I (paragraph 17 & Trotman*** & ***another 11 Edwick 1951 (1) SA 443 (A) at 449 B-C.*** The litigant who institutes an action based on delict, sues to recoup the loss which he or she has sustained because of the wrongful conduct of another. In other words, he seeks to sue for the amount by which his or her patrimony has been diminished by

such

conduct. The Plaintiffs damages must be assessed at the time the injury was done to him or her. See **GNM builders' suppliers (Pty) ltd v SARNH 1942 tbd 120 at page 121** In as much as this is not the central question for the determination of this matter, but for clarity in the reasoning of the judgment, it is important that I must traverse on the general principle in cases of this nature. 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 limited vs British Telecommunication PLE (Scotland) & others (2002) ALLER (COMM.) 321 (HL) paragraph 92**

[43] There are various ways of giving effect to this principle. One is to say, the person who has paid is entitled to be subrogated against the other person liable. The other is to say, one payment discharges the liability. The authorities show that the law ordinarily adopts the first solution, when the liability of a 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, may be in a position to reclaim what it has paid, where it can exercise a right of subrogation. Insurance law demands that it does so in the name of the insured. A right of subrogation can be excised against a primary debtor whether the latter is a delictual wrong doer or a contractual defaulter[9].

'Nkosi v Mbathatha (AR20/10) (2010] ZAKZPHC 38 (6 July 2010) Also see Caledonia North see ltd V bridge engineering core & other (2000) lyoid rep 1R249 at 261

[44] 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, ifhe is fully compensated by the insurer, becomes a trustee for any compensation paid to him or her by the wrong doer. He is bound to hand over to the insurer whatever money he or she receives from the wrong doer, over and above the actual loss he or she had sustained after taking into account the amount he or she has received under the contact of insurance. The insurer may then sue in the name of the insured. See **Ackerman vs Ioubser 1918 NPD 31.** Also **see Mandelsohn vs estate Morom 1912 CBD 690 at 693.** In light of the above authorities, it is my considered view that, there is nothing amiss with the citation of the Plaintiff representing the insurer. I also find that an oral agreement between the Plaintiff and Defendant was entered into. The Plaintiff does not deny that he received the E6, 500.00. On what basis was that payment made, if the parties had not agreed. Having said so, the Defendant cannot be absolved from liability of the amount that was incurred by the insurer in repairing the Plaintifrs motor vehicle. From this amount, the sum ofE6, 500.00, which the Defendant has already paid, must be deducted. I will return back to this issue, when I deal with the issue of costs.

[45) It is my finding that, the insurer having fully compensated the Plaintiff, has a clear subrogated claim against the Defendant, whose negligence caused the loss, in respect of which compensation was paid.

Waiver

[46] The Defendant in his heads of argument, argues that the Plaintiff waived his ·right to claim the full amount for damages on the mot.or vehicle when he made an agreement with the Defendant to pay his excess in the sum ofElS.102.05. In as much as this line of defence was not raised in the plea, but for completeness of the judgment, I will consider it. Two issues arises out of this argument. First, the argument assumes that the Plaintiff is claiming the damages for himself. This cannot be true, in light of the principle of subrogation. The power of attorney clearly states that the Plaintiff stands in the insurer's shoes. Second, the argument brings a slightly different amount ofE18, 102.05. Yet the Defendant himself, in his oral evidence had said the amount is El8, 000.00. To whatever extent the different amounts may be relevant, the main issue is that the Plaintiff could not have waived a right that he does not have. He is not entitled to the money claimed from the Defendant, as he has already been compensated for the repairs by his insurer. He could not then, have had the right to waive the insurer's claim. Therefore, this argument of waiver has no merit.

Power of Attorney

[47] The Defendant has also argued that exhibit "PS" being the power of attorney to act on behalf of the insurer, should not be considered simply because the averment that Plaintiff was acting on behalf of the insurer was not made during the institution of the action. The Defendant argues that the matter of subrogation was only raised by the Plaintiff in his replication; Exhibit PS, is an attempt to justify and/or correct the Plaintiffs failure to clearly state that

he was acting on behalf of the insurer. The problem with this argument, in as much as it has traces of merit, is that it is only being raised in the heads of arguments. The Defendant sat on his laurels when the alleged new issue was made in the replication. He took no steps to strike it out or set it aside. The Plaintiff was then availed an opportunity to state his case in Court and adduce oral evidence as the pleading had closed. The Court is persuaded that exhibit "P5" forms part of the record as it was not expunged or set aside. There is no reason why the Court should not consider it. The Comi cannot overlook the subrogation that is inherent in the matter before it. Especially in the existence of documentary evidence which shows that the insurer compensated the Plaintiff. It is therefore entitled to recover the money that it expended on his motor vehicle repairs. I am therefore not persuaded to ente1iain this argument.

[48] There is a plethora of authorities that support that compensation is paid for the recovery of the amount paid to a Plaintiff as the costs of repairs[10] Where a Plaintiff has been fully indemnified for the loss he had suffered, he no longer has a ground to proceed against a Defendant in his personal capacity for the same loss. The game changer in the case at hand is that there is a power of attorney which clearly states that the insurer gave the Plaintiff the powers to pursue the Defendant for the amount the insurer expended to the Plaintiff. It therefore cannot be argued that the Plaintiff would be double compensated. As I have already demonstrated above, he is actually suing the Defendant as an agent or as a trustee, so there will be no c se of double compensation.

"See barkett v SA National trust Assurance co: ltd 1951(2) SA 353 (AD) at 363 H; Avex air Ply Ltd v

borough vryheid 1973 (1) SA 1617 (AD) 262 (E); Samonco case supra 195 paragraph 14

[49) The prerequisites for the doctrine of subrogation are; firstly, that payment or reinstatement has been made. Secondly, a valid and subsisting policy must exist. Thirdly, that the assured must have had a right to claim compensation from the wrong doer.

[50) In the matter at hand, the Plaintiff's vehicle was at the time of the collision insured by Eswatini Royal Insurance Corporation. At least that fact has not been disputed by the Defendant. The very fact that the insurer compensated the Defendant, signifies that there must have been a policy in place. After the collision, the insurance company indemnified the Plaintiff for the loss he had suffered. Therefore, I am satisfied that all the prerequisites for the operation of the doctrine of subrogation have been satisfied in the matter at hand.

Plaintiff's Claim

[51] The Plaintiff in his particulars of claim sues for the following;

51.1 Payment of the sum ofE60, 875.05 being the damages for repairing the Plaintiff's motor vehicle to its original condition.

51.2 Interest on that amount at 9% per annum tempora morae

51.3 cost of suit

[52] The Defendant filed his plea on the 15[1].[1] September 2016 at least that is the date on which the plea was served on the Plaintiff's attorneys. In that plea, the Defendant has clearly pleaded that he had already paid the sum ofE6, 500.00 to the Plaintiff, towards the "excess" as per the oral agreement. This issue has not been denied by the Defendant. In his oral evidence, the Plaintiff also conceded that indeed the Defendant paid this amount to him. After the filing of the plea, the Court assumes that the Plaintiff's attorneys took the necessary instructions and it is reasonable to conclude that they must have been told that indeed the E6, 500.00 was paid by the Defendant. In fact, in no uncertain terms during cross examination, the Plaintiff confirmed that he advised his insurer that he had directly received from the Defendant the sum of E6, 500.00. Against that backdrop, the Plaintiff proceeded to initiate summary judgment proceedings against the Defendant where it insisted on the same amount of E60, 875.05. Although the summary judgment was not pursued or abandoned. The costs of same was also tendered as well. The fact remains, the Plaintiff persisted on this entire amount, not a reduced amount. Which would have been less the amount that had already been paid by the Defendant.

[53] As if this was not enough, the Plaintiff did not amend its particulars of claim to reflect reduced amount. In the light of this state of affairs, the Defendant entitled to expend time, resources to defend the entire claim. He was compelled to demonstrate through evidence firstly to prove that, there was an oral agreement between him and the Plaintiff. Secondly, that he complied paiiially with the said agreement. The interrogation of this aspect of the claim, is relevant to the accuracy of the quantum that has been claimed by the insurer through the Plaintiff and also on the costs as it will appear hereunder.

[54] In the process of deciding whether the Plaintiff is entitled to the costs as it has claimed, it cannot escape my mind that the Plaintiff persisted with an amount that he should have known that is not accurate. The Plaintiff himself, had received as portion of the payment from the Defendant directly. It is my considered view that the Plaintiff was disingenuous in so doing. The Supreme Court of appeal in South Africa stated as follows in the matter of

Boost Sports Africa (Pty) Ltd v South African breweries (pty) ltd [2015] ZACA 93;2015 (5 SA 38) (SCA at 51);-[17]

"According to Nichouls **J in Fisheries development Corporation of SA limited v Joganson & another, Fisheries development Corporation of SA limited v EWJ investments (pty) ltd & others 1975 3 SA 1331 (W)** at 1339 E- F; in its legal sense "facetious" means " frivolous, improper; instituted without sufficient ground, to serve solely as an annoyance to the Defendant;" (shorter oxford English dictionary) facetious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the Defendant"; abuse connotes a misuse, an improper use, a use malafide, a use for an ulterior motive".

[55] In **African Farms &Townships Limited v Cape Town Municipality 1963 (2 SA) 555 (A) at 565 D-E Holmes** JA observed; "an action is facetious and an abuse of the process of Court if inter alia, it is obviously unsustainable. This must appear as a certainty and not merely on a preponderance of probability[1].

[11] See Raven *v* Beeten 1935 CBD 269 at P 276; Burnham *v* Fakheer

[56] It is trite that the onus is on the party seeking costs, to persuade the Court that the costs should be so ordered. It is also trite that in ordinary circumstances, the costs must follow the event. Although the granting of costs is solely at the discretion of the Court. The question that vexes me at this stage, is whether I should depart from the normal legal principle that costs should follow the event. Unfortunately, the peculiar factual circumstances of this case as outlined above indicate that I must refuse to grant costs in favour of the Plaintiff. Despite that I have found that the Defendant has no defence in the balance of the Plaintiffs claim, less the E6, 500.00 that he has already paid. In light of the facetious conduct of the Plaintiff, in the manner in which the litigation has been conducted, especially the failure to amend the pleadings and to concede and accept that the sum of E6, 500.00 was paid. Further, the conduct of the insured to engage the Defendant and advise him to pay the money directly to him, knowing very well that the insurer has the legal right to pursue the Defendant for the entire damages, was disingenuous. It is on that basis I will order that costs of this action be borne by the Plaintiff to its principal (the insurer). In light of the reasons that I have stated above, it is in dispute that the Plaintiff has been wholely successful in this litigation, to be entitled to the widely acceptable principle that costs must follow the event. This I observe in light of the fact that the Defendant has also been successful in defending, albeit partly, the claimed amount. He has been able to demonstrate that the entire amount as claimed in the Plaintiffs particulars of claim, is not due as he has paid a po1iion of it. There is no hard and fast rnle applicable to the exercise of a discretion by a trial judge to award costs. The fact that a judge follows a particular approach to the award of costs creates no precedent binding on judges called upon to exercise such a discretion, in

exactly the same set of circumstances in the future. It is on that basis that I

decide to depart from the normal principle that the costs should follow the event. I accordingly hold that the Plaintiff must pay the costs of suit.

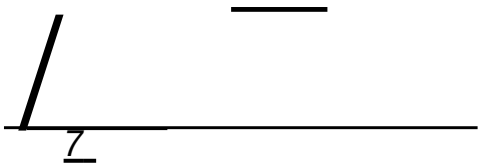
Conclusion

[57) Due to the foregoing reasons, I conclude that on a preponderance of probabilities, the Plaintiff has been able to demonstrate that the insurer is entitled to recoup from the Defendant the balance of the sums expended to the Plaintiff for the repairs to his motor vehicle. This amount should be less what the Defendant has already paid to the insured in the sum ofE6, 500.00. As I have already stated, the costs will not follow the event, but the Plaintiff is ordered to pay the costs of suit.

Order

a) The Defendant is ordered to pay to the Plaintiff the sum ofE54, 375.05.
b) Interest thereon in the sum of 9% tempora morae

c) The Plaintiff is ordered to pay the cost suit including the costs of withdrawing the summary judgment.



B.W. MAGAGULA

JUDGE OF THE HIGH COURT

FOR PLAINTIFF: *Mr. Majaha Tengbheh*

FOR DEFENDANT: *Miss Noncedo Ndlangamandla*