Journal of African Law (2024), **68**, 109–123
doi:10.1017/S0021855323000359

RESEARCH ARTICLE

Revisiting the Right in Zimbabwe of a Subrogated Insurer to Proceed against a Third Party in the Name of the Insured: Lessons from South Africa

Noah Maringe*

Department of Law and Legal Services, Zimbabwe Ezekiel Guti University, Bindura, Zimbabwe
Email: noah.maringe@gmail.com

(Accepted 28 April 2023; first published online 31 January 2024)

Abstract

The doctrine of subrogation, like many other legal principles in Zimbabwean insurance law, has evolved with changing times. The position in Zimbabwe (which was adopted from English law) is that a subrogated insurer who intends to enforce the insured's right to recover compensation for the insured loss from a third party can only do so in the name of the insured. The reason is that the insured is the custodian of legal rights against the third party; the insurer's rights only relate to the insured and not the third party. This research discusses legal developments in South African law and how they may be adopted in Zimbabwe in order to advance the rights of the parties in subrogation proceedings.

Keywords: Indemnity; insurer; insured; subrogation; third party; Zimbabwe

Introduction

The development of the doctrine of subrogation in Zimbabwe has largely been influenced by South African law.[1] Although the indemnity insurance contract is between the insurer and the insured, in practice, the involvement of third parties is more likely. In the event that the third party is liable, the position of the law in Zimbabwe is that the insurer can only proceed against the third party in the name of the insured.[2] In sharp contrast, in the South African case *Rand Mutual Assurance Co Ltd v Road Accident Fund*, it was decided that a subrogated insurer may conduct proceedings in its own name in enforcing the insured's right to recover compensation for their loss from the third party, provided that it does not prejudice the third party procedurally.[3] However, the case did not define the ambit of situations which may justify the enforcement of subrogation rights by the insurer in its own name; it was therefore suggested that the decision may provoke a lot of debate.[4] This research explores whether this is the best course of action for Zimbabwe. In addition, it discusses the various

* LLB (Zimbabwe), LLM, LLD (South Africa). Lecturer in law and chairperson, Department of Law and Legal Services, Zimbabwe Ezekiel Guti University.

1 See, for example, *Tsodzai v Mageza* [2011] HH-193-11, wherein the Zimbabwean court quoted with approval DM Davis *Gordon and Getz: The South African Law of Insurance* (4th ed, 1993, Juta & Company) at 267 on the meaning of subrogation in South African law. Furthermore, in *Muguti v Sunduza* [2011] HH-45-11, a Zimbabwean court quoted with approval the principles enshrined in the South African *Ackerman v Loubser* [1918] OPD 31, which brought the doctrine of subrogation into South African law.

2 *Muguti*, above at note 1; *Tsodzai*, above at note 1; *Credit Insurance of Zimbabwe v Textbook Sales* [2014] HH-52-14.

3 *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] (6) SA 511 (SCA) (*Rand Mutual*), para 24.

4 *Rand Mutual*, above at note 3, para 22. See also JP Van Niekerk "Insurance subrogation: Not always in the name of the insured? *Rand Mutual Assurance Co Ltd v Road Accident Fund*" (2009) 21 *SA Mercantile Law Journal* 555.

© The Author(s), 2024. Published by Cambridge University Press on behalf of SOAS University of London. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

situations that may or may not justify a subrogated insurer proceeding in its own name in enforcing the insured's rights against third parties in order to clarify the effect of the decision on the insurer, the insured and third parties.

Theoretical background

It is instructive to begin the discussion by giving a theoretical background to the doctrine of subrogation in order to understand its nature, import and extent. Such an approach assists in understanding the issues at hand and the respective rights of the parties.

The nature of subrogation

The doctrine of subrogation was devised in order to uphold the indemnity principle, which holds that the insured cannot recover more than his / her loss.[5] The insurer's right of subrogation is the right it has against the insured, not against the third party.[6] In Zimbabwean law, subrogation is an implied term of the indemnity insurance contract; the insurer has a right of subrogation against its insured (provided that the common law requirements of subrogation or the express provisions of the insurance contract have been met).[7] The insured's right to compensation by the third party can be found in contract, delict or any legally recognized claim.[8] *Rand Mutual* identified two aspects of the right of subrogation.[9] The first is the subrogated insurer's right to enforce the insured's claims against the third party.[10] In this case, there is no transfer of rights from the insured to the insurer; as a matter of fact, the insurer merely takes control of proceedings against the third party as the *dominus litis* and enforces the insured's rights in the latter's name.[11] The existence of the subrogated insurer does not need to be disclosed when it is enforcing the insured's rights against the third party.[12] After the insurer takes control of the proceedings, it can issue summons against the third party or give notice to them of its intention to take action against them in the insured's name.[13] The court in *Rand Mutual* noted that the requirement that the insurer should proceed against the third party in the insured's name originated from English law. This position was different from American or civil law which allows the insurer to proceed in its own name in order to protect litigants against harassment and to avoid confusion over the real plaintiff.[14] It was an acknowledgement by the court that the English law position, which had been adopted in South Africa and later in Zimbabwe, was not cast in stone and could be changed in accordance with the ever-changing commercial world.

Before proceeding against the third party, the insurer should first seek the consent of the insured to use his / her name. However, a subrogation clause in the insurance contract can confirm the insurer's right to act as *dominus litis* in litigation against the third party and to do so in the name of the insured. In that instance, there is no need to seek the consent of the insured to the

5 *Castellain v Loubser* [1883] 11 QBD at 380; MFB Reinecke, JP Van Niekerk and PM Nienaber *South African Insurance Law* (2013, Lexis Nexis) at 385.

6 J Birds *Birds' Modern Insurance Law* (9th ed, 2013, Sweet & Maxwell) at 333.

7 The common law requirements of subrogation are discussed below.

8 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 391.

9 *Rand Mutual*, above at note 3, para 12. See also Van Niekerk "Insurance subrogation", above at note 4 at 567.

10 Birds *Birds' Modern Insurance Law*, above at note 6 at 333.

11 The right of the subrogated insurer to enforce the insured's rights in the latter's name forms the focus of this research. The right is analysed in the light of the decision in *Rand Mutual*, where it was decided that the insurer may proceed against the third party in its own name in enforcing the insured's rights against the third party, as long as the third party is not procedurally prejudiced. See *Rand Mutual*, above at note 3, para 24.

12 JP Van Niekerk "Subrogation, express or implied: In the name of the insured always" (2007) 19 *SA Mercantile Law Journal* 502 at 505.

13 *Avex Air (Pty) Ltd v Borough of Vryheid* [1973] (1) SA at 620 (A).

14 *Rand Mutual*, above at note 3, para 19.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

use of his / her name by the insurer after the insured's loss in proceedings against the third party.[15] The insured is bound by the insurance contract to consent to the use of his / her name provided that the insurer undertakes to indemnify him / her against any resultant costs.[16] If the insured refuses to consent to the use of his / her name in proceedings against the third party, it is a breach of the insurance contract; the insurer can sue the insured for damages or specific performance when the insured refuses to consent to the use of his / her name.[17]

Related to the right to use the insured's name against the third party is the insurer's right to the preservation of its subrogation rights by the insured. The insured has a general duty not to prejudice the insurer's subrogation rights.[18] In the event that the insured decides to institute proceedings against the third party on his / her own, s/he should claim both the uninsured and the insured loss, to protect both his / her interests and those of the insurer.[19] If the insured splits the claim, it is a sign of failure to preserve the insurer's claim, because the insurer exercising its right of subrogation against the insured will be barred from pursuing a separate claim by law.[20] Even before the insured has been indemnified by the insurer, s/he should not release the third party from liability, as this would also amount to a breach of the insurance contract.[21] Moreover, the insured cannot settle with the third party for the purpose of defeating the rights of the insurer after the latter has already become *dominus litis*; the settlement or compromise with the third party is only acceptable if it takes into account the insurer's interests.[22] In this regard, the insurer's interests would be to exercise its subrogation rights against the insured. The insurer has a right to recover every benefit which may be due to it in terms of the insurance contract; these may be recovered through the insurer's right of recourse. They may also be recovered from the third party by the subrogated insurer which will be enforcing the insured's rights against the third party as the *dominus litis*.

There is a difference between an instance where the insurer (in the exercise of its right of subrogation) institutes the insured's claim against the third party and one where the insured has ceded his / her right against the third party to the insurer. In the case of cession, the insured's right against the third party is transferred to the insurer, and the insurer, as the cessionary, exercises its own right against the third party.[23] Subrogation, by contrast, does not involve any transfer of the insured's right against the third party to the insurer; the right remains that of the insured.[24]

15 Davis *Gordon and Getz*, above at note 1 at 261.

16 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 404.

17 Davis *Gordon and Getz*, above at note 1 at 260. See also *Ackerman*, above at note 1 at 34, wherein it was ruled that if the insured refuses to consent to the use of his name by the *dominus litis* insurer then the insurer should only claim damages in such a case. Furthermore, Reinecke, Van Niekerk and Nienaber argue that the refusal by the insured to consent to the use of his / her name justifies rescission of contract by the insurer, with the result that the insurer may not be liable for the particular claim involved; *Insurance Law*, above at note 5 at 404 (footnote 155).

18 Birds *Birds' Modern Insurance Law*, above at note 6 at 343.

19 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 407. When the insured is still *dominus litis*, s/he has no obligation to take positive steps to initiate proceedings for the sole reason of protecting the insurer's interest. This can explain why insurers prefer to insert subrogation clauses in insurance contracts, so that they can also create positive duties on the part of the insured to preserve the claim against the third party.

20 Ibid. An example is where the insurance contract has an excess clause and the insured does not get full indemnity from the insurer. The insured then issues summons against the third party, claiming the value of the excess only. The insurer will not be allowed to issue summons again to claim the balance from the third party based on the same cause of action, as it amounts to impermissible splitting of claims.

21 Id at 408.

22 *Visser v Incorporated General Insurance Ltd* [1994] (1) SA at 478 (T). In this case the insured was still the *dominus litis*. He concluded a settlement with the third party where the insured was compensated to the extent of the loss which had not been insured. The insured did not take away the insurer's right to recover what it had paid to him from the third party. Hence the court held that the insured had acted properly and not in breach of the contract.

23 *Muguti*, above at note 1.

24 JP Van Niekerk "Subrogation and cession in insurance law: A basic distinction confounded" (1998) 10 *SA Mercantile Law Journal* 58 at 59.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

The second aspect of subrogation is the insurer's personal right of recourse against the insured. As the insurer's right is against the insured, it is exercised (and can only be exercised) in the insurer's name. The insurer is entitled to this right if the insured has been indemnified by the insurer and compensated by the third party, and the proceeds exceed the insured's full indemnity.[25] This means that the insurer can recover what it had paid to the insured in excess of the insured's full indemnity.[26] The insurer's liability to indemnify its insured is reduced or extinguished if the third party compensates the insured before the insurer has indemnified them. This principle is referred to as indemnification *aliunde*.[27] The insurer may, in appropriate circumstances, recover its payment in full or in part from its insured if the insured receives payment from the insurer after s/he had already been compensated by the third party and such compensation had not been taken into account by the insurer.[28]

The common law requirements of subrogation

There are certain requirements which should be met before an insurer can exercise its subrogation rights at common law.[29] The first requirement is that there must be a valid contract of insurance;[30] the second is that the insurer should have performed its obligations fully in terms of the insurance contract before it acquires subrogation rights.[31] Payment to the insured must not be conditional. Unless the insurer has an option to reinstate or repair the object of risk, it should perform by making a payment to the insured for his / her loss.[32] The third requirement of subrogation at common law is that the insured's loss must have been indemnified in full by the insurer before the latter can proceed against the third party in enforcing the insured's rights.[33] The requirement at common law that the insured must be fully indemnified means any recoveries from the third party should first go towards compensating the insured in full, before the subrogated insurer can enforce the insured's rights to compensation against the third party.[34] The fourth requirement is that the insured's rights against the third party must be susceptible to subrogation; the insured must have a right to be compensated by the third party. This means that if the insured is to proceed against the third party, the proceeds from that party will have the effect of reducing his / her loss.[35] Finally, it is a requirement

25 *Rand Mutual*, above at note 3, para 12; Van Niekerk "Insurance subrogation", above at note 4 at 562.

26 Ibid. The second aspect of subrogation involves the insured and the insurer only; the third party would have already compensated the insured, and the insurer can no longer enforce the insured's rights against the third party. However, this right is merely discussed as background to this research.

27 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 386.

28 Ibid.

29 Id at 415, wherein the authors note that a contract of indemnity insurance in most cases contains express provisions relating to subrogation in a subrogation clause. The clause has the effect of altering the common law position: it entitles the insurer to exercise the right of subrogation before any payment to the insured under the contract; it entitles the insurer to exercise the right of subrogation before payment of a full indemnity to the insured under the insurance contract; it confirms the insurer's right to act as *dominus litis* in litigation against the third party and to do so in the name of the insured; it enables the insurer to receive payment directly from the third party, obviating the need to exercise the right of recourse; it may entitle the insurer, and not the insured, to any surplus recovered from the third party; it entitles the insurer to exercise the right of subrogation where otherwise there is not such right, for example in non-indemnity insurance; and it confirms the insurer's right to defend action against the insured in the latter's name in liability insurances.

30 Id at 397.

31 Birds *Birds' Modern Insurance Law*, above at note 6 at 341.

32 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 398.

33 Van Niekerk "Subrogation, express or implied", above at note 12 at 510. See Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 415, where it is noted that a subrogation clause can do away with the requirement that the insured should have been indemnified in full before the insurer assumes control of the action against the third party. Hence the insurer takes control of the action against the third party at an earlier stage than what is allowed at common law.

34 Van Niekerk "Insurance subrogation", above at note 4 at 572.

35 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 401.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

that the insurer's right against its insured to proceed against the third party in the name of the insured should not have been excluded by agreement between the insurer and the insured.[36]

The position of the third party

Defences not available to the third party

If the insurer makes an insurance payment to the insured, that payment is not considered in assessing the compensation which must be paid by the third party. The payment by the insurer to the insured is a matter which is *res inter alios acta* as far as the third party is concerned.[37] The principle of *res inter alios acta* is explained by the fact that subrogation involves no transfer of rights from the insured to the insurer; the insurer merely enforces the insured's rights against the third party.[38] The reason for not taking the insurance payment into account when establishing the liability of the third party seems to be that it would defeat the notion that the wrongdoer must pay for his / her wrongful conduct. The result would be that the third party, who is primarily responsible to compensate the insured, would be exonerated from liability.[39] There is no obligation on the part of the insured to disclose to the third party that the insured is covered by insurance.[40] The third party remains indebted to the insured and must pay the insured in order to discharge his / her obligations.[41]

There are other issues which do not provide the third party with a defence: the insured (plaintiff) is insured; a payment may be made to the insured by its insurer; after the insurer has paid its insured, it may or may not decide to exercise its right of subrogation; the insurer may not have the right of subrogation; the insured's claim is for the benefit of the insurer; proceedings are being controlled by the insurer; the insurer may or may not exercise its right of recourse against the insured; and the insured may be over-compensated.[42]

Defences available to the third party

The third party can raise all the defences s/he has against the insured despite the presence of the *dominus litis* insurer. This is because subrogation does not concern the third party; it is a matter between the insurer and the insured. The fact that the insured's claim against the third party is

36 Ibid.

37 Id at 410. In *Raji NO v Road Accident Fund* [2010] ZAWCHC 30 at 38, the insured claimed damages from the third party for medical expenses resulting from a motor vehicle accident. By the time summons were issued against the third party, the insurer had already indemnified the insured for his medical expenses. The third party then argued that the insured's rights against it ceased soon after payment by the insurer. It was decided that payment to the insured by the insurer did not discharge the third party from its liability to pay the insured.

38 Van Niekerk "Subrogation, express or implied", above at note 12 at 517.

39 MFB Reinecke "Waiver by an insurer of its rights to subrogation" (1990) *Tydskrif vir die Suid-Afrikaanse Reg* 541 at 543.

40 Van Niekerk "*Airlink Cargo International (Pty) Ltd v Africa (Pty) Ltd* (unreported WLD)" (2003) 6 *Juta's Insurance Law Bulletin* 61 at 62. See also *Smith v Banjo* [2011] (2) SA 518 (KZP) at 520, in which it was decided that the fact of subrogation or involvement of the subrogated insurer need not be disclosed, alleged, pleaded or proved in an action by the insured against the third-party defendant.

41 However, by express provisions between the insurer and the insured, the parties can agree that payment by the third party should be made directly to the insurer. The third party will discharge its obligations towards the insured by paying the insurer; Van Niekerk "*Airlink Cargo International*", id at 63.

42 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 411. Van Niekerk also states that these issues do not play any role in determining whether the insured has locus standi and an enforceable claim against the third party; "Subrogation, express or implied", above at note 12 at 516. See also Reinecke "Waiver by an insurer", above at note 39 at 543, wherein the author notes that when the third party is sued by the insured, s/he cannot maintain that the loss was made good by insurance. Subrogation is a matter which is between the insurer and the insured only as an implied term of their contract of insurance, unless there are express provisions which cover the third party. See further Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 410, who note that proceedings by the insurer against the third party are wrongly referred to as a "subrogation claim" or "subrogation proceedings". They further state that these two terms strictly refer to a subrogation-related claim or proceedings between the insurer and its insured. An example would be a claim by the insurer against the insured for breach of contract by the insured.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

being enforced by the insured or his / her *dominus litis* insurer does not affect the defences the third party has against the insured, which are against the insured and not the insurer. The insurer's right of subrogation is a right which it has against its insured, not the third party.

To begin with, the third party can raise as a defence that there is an arrangement between the insured and the third party which excludes the third party from liability.[43] This is a direct defence which can be raised by the third party against the subrogated insurer when it enforces the insured's rights against the third party. If the third party was excluded from liability by the insured, then the existence of insurance by the insured should be taken into account in determining whether the third party is liable towards the insured.[44] However, the existence of the insured's insurance is not used to determine how much the third party is liable to compensate the insured.

The existence of insurance can play a role in the imposition of civil liability, and can be relevant in determining policy-related issues, an example being whether the third party's conduct was unlawful so as to render him / her delictually liable.[45] The conduct of the third party must be unlawful as an essential element in a delictual claim. The existence of insurance can also be used to interpret an exemption clause in a contract between the insured and the third party in order to determine whether they both intended the insured's insurance to cover the third party, thus excluding the third party from liability.[46] If the third party was excluded from liability in the contract of insurance, it means they can raise that exclusion as a defence against the insured. As a matter of fact, the insured and the third party's arrangement as to which of them should insure a particular object of risk is a factor which should be taken into account in determining the parties' respective liabilities under that contract in the event of loss of or damage to that object.[47]

Secondly, the third party can also raise a defence that s/he is a co-insured in the insurance contract between the insurer and the insured. This defence is based on a contract between the insurer and the third party as the co-insured.[48] It is an indirect defence in that it cannot be raised against a claim by the *dominus litis* insurer but takes the form of a counterclaim, which neutralizes the insurer's claim against the third party.

Thirdly, the third party can also raise a defence of settlement or release by the insured. This can occur before or after the loss, and it does not matter whether the insured's conduct amounts to breach of the contract between the insurer and the insured or not.[49] In fact, the third party can also raise as a defence that there is an agreement between them and the insurer that the insurer will not claim anything from them. There can be a stipulation in favour of a third party in the contract of insurance between the insurer and the insured to the effect that the third party shall not be

43 Ibid. For example, in *Commercial Union Assurance Co of SA Ltd v Golden Era Printers and Stationers (Bophuthatswana) Pty Ltd* [1997] 3 All SA 165 (B) at 179, a fire had destroyed the insured's property. The insurer indemnified the insured. The insurer proceeded to claim compensation from the lessee based on the latter's negligence. The court decided that according to the lease agreement, the insured did not have the right to claim damages from the lessee (the third party), because the lease agreement had excluded the lessee from liability.

44 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 411.

45 Ibid.

46 Ibid.

47 Ibid.

48 Id at 413. For example in *Croce v Croce* [1940] TPD 250 at 255, the insured plaintiff claimed damages from the third party who had negligently caused him loss. The action was brought for the benefit of the insurer. However, there was an extension clause in the insured's policy with the insurer which also covered the third party. The court decided that the third party had a defence and that the insured did not have the right to claim compensation from the third party, because the third party was also a co-insured. The insurer could not exercise subrogation rights against a co-insured.

49 Reinecke, Van Niekerk and Nienaber argue that such settlement or release after the indemnification of the insured is not binding if the third party already had knowledge of the insurer's payment to the insured: the third party would have been aware of the potential subrogation rights which the insurer might exercise against the insured. The insurer is entitled to enforce the insured's rights against the third party after indemnifying the insured; *Insurance Law*, above at note 5 at 413.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

liable.[50] The insurer may have waived its right at the time of entering into such an agreement with the third party to enforce the insured's rights against the third party.

The third party can also successfully contend that the insured cannot validly claim at law because of lack of locus standi, prescription, arbitration, choice of law, jurisdiction, or impermissible splitting of charges.[51] These defences are technical and can be raised as special pleas.[52] Furthermore, the third party can raise as a defence that it cannot be affected by the basis upon which the insurer will indemnify its insured. The method of calculating the insurer's level of liability does not affect the extent of the third party's liability to the insured.[53] For example, the insurer and the insured may agree that the level of indemnity is based on new or replacement value, which may be different from the market value of the object of risk at the time of loss. Therefore, the third party will not be liable to pay the value of the new object according to the insurance contract; in fact, it will be liable to compensate the insured based on the market value of the object of risk at the time of loss.

Lastly, the third party can also raise any counterclaim it might have against the insured in an action by the subrogated insurer.[54] The liability of the third party is to compensate the insured, and the insured's claim can arise in contract, delict or any other legally recognized grounds.[55] It follows that the third party can also have a claim in contract, delict or any legally recognized ground against the insured. If the insurer decides to enforce the insured's rights against the third party, the latter can raise any counterclaim it has against the insured.

Factors which may be considered in deciding whether a subrogated insurer may sue the third party in its own name

In *Rand Mutual*, the South African court held that unless the third party is procedurally prejudiced, the subrogated insurer may proceed in its own name.[56] It reasoned that the requirement to proceed in the name of the insured was a procedural rule inconsistent with South African constitutional principles, which require transparency in litigation.[57] However, the court did not hold that the insurer should litigate in its own name and not in the name of the insured. Rather, it held that the English rule in its strict sense was not justified and that courts may allow the insurer to proceed in its own name where there is no prejudice to the third party in the procedural sense.[58] To that end, this section proposes factors which should be taken into account in determining whether the insurer may be allowed to sue in its own name. It is suggested that these proposed factors should be considered by Zimbabwean courts if they decide to follow the South African route that liberalized locus standi in subrogation cases. Prejudice to the insurer, the insured and the third party should be considered in totality before the insurer is granted the permission to enforce the insured's rights against the third party in its own name. The test of prejudice to the third party in *Rand Mutual* should be expanded to include prejudice to the insurer or the insured in situations where the proposed factors discussed in this section are present. The consideration of prejudice to either the insurer or the insured should be in addition to the consideration of prejudice to the third party.

50 Ibid.

51 Id at 414.

52 For example, the insurance contract can have an arbitration clause which obliges parties to refer any dispute to arbitration before one can approach the court. If the aggrieved party approaches the court without going through arbitration, then the other party can raise the issue by way of a special plea that the matter is wrongly before the court and should be referred to arbitration first.

53 Ibid.

54 Ibid.

55 Id at 391.

56 *Rand Mutual*, above at note 3, para 24.

57 Id, para 23.

58 Id, para 24.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

Potential prejudice to the insurer

The insured's refusal to consent to the use of his / her name

An insurer who intends to institute proceedings against a third party must obtain the consent of the insured.[59] The insured has an obligation to consent to the use of his / her name in terms of the doctrine of subrogation provided that the insurer tenders an indemnity as to costs.[60] The subrogated insurer can proceed against the insured's family, friends and business associates as third parties in enforcing its rights against the insured.[61] It may happen that the insured is unwilling to proceed against the third party or consent to the use of his / her name by the *dominus litis* insurer because the third party has a close relationship with him / her.[62] It can be argued that although the subrogated insurer can sue the insured for breach of contract if s/he refuses to consent to the use of his / her name, the results of the proceedings by the insurer against its insured can be different. The insurer's claim against the insured for breach of contract may be unsuccessful. If the insurer is successful in an action for breach of contract against the insured, the latter may or may not have anything which the insurer can recover from him / her in order to satisfy the judgment of the court. The third party may or may not be in a stronger financial position such that if the insurer had proceeded against him / her, it could have recovered money, instead of proceeding against its insured, who may or may not be facing financial challenges. Furthermore, the third party is not prejudiced by the fact that it is the *dominus litis* insurer which is instituting proceedings against him / her. The third party can raise all the defences s/he has against the insured, despite the presence of the *dominus litis* insurer.[63] It is suggested that if the insured refuses to consent to the use of his / her name by the insurer, the prejudice to the latter should be considered. The test that may be adopted by Zimbabwe should not end with prejudice to the third party only, as proposed in *Rand Mutual*, but should extend to prejudice to the insurer. This is because the third party is not affected by the insured's refusal to consent to the use of his / her name by the subrogated insurer.

As the court correctly pointed out in *Rand Mutual*, the doctrine of subrogation is a *naturalia* of the insurance contract in South African law, meaning it can be modified by express terms.[64] The position of the insurer can be improved by the insertion of a subrogation clause in the contract of insurance which confirms the insurer as the *dominus litis* in litigation against the third party and to do so in the name of the insured. The insertion of such a clause entails that the insured consents to the use of his / her name at the time of entering into the insurance contract. The insured's attitude after the loss becomes irrelevant. The interests of the insurer are secured at the time of entering into the insurance contract, such that there is no prejudice to the insurer if it enforces the insured's rights against the third party in the insured's name.

The insured's death or non-existence at the time of claim

Reinecke, Van Niekerk and Nienaber highlight that the subrogated insurer should seek the consent of the insured before it enforces the latter's rights against the third party.[65] In the event of the death of the insured, or the winding up of a company, before the insurer had been granted consent to sue

59 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 404. See also *MT "Yeros" v Dawson Edwards and Associates* [2007] 4 All SA 922 (C) at 928.

60 Reinecke, Van Niekerk and Nienaber *Insurance Law*, id. The authors also note that if the insured refuses to consent to the use of his / her name, the insurer can claim damages or rescind the insurance contract on this ground. They further argue that repudiation by the insured of his / her obligation to consent to the use of his / her name by the insurer justifies rescission by the insurer, who may avoid liability for that particular claim.

61 Id at 395.

62 Van Niekerk "Subrogation, express or implied", above at note 12 at 516.

63 *Schoonwinkel v Galatides* [1974] (4) SA 388 (T) at 396, which held that the insurer may enforce the insured's rights of recovery against the third party but may not improve upon them. See also *Lean v Van der Mescht* [1972] (2) SA 100 (O) at 108, wherein it was held that the insurer has no independent claim that it can pursue against the third party.

64 *Rand Mutual*, above at note 3, para 18.

65 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 404.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

the third party in the insured's name, the executor of the deceased estate or the liquidator of the company may be in a position to consent to the use of the insured's name. However, management of an estate or liquidation has time frames; the insurer may seek the consent of the insured to the use of his / her name after the executor or liquidator has completed his / her mandate. Hence, that mandate ends with the dissolution of the company. Furthermore, section 52 of the Administration of Estates Act in Zimbabwe obliges the executor of the deceased estate to submit to the Master in the prescribed form of the liquidation and distribution of the estate within six months from the date of his / her appointment or any further time allowed by the Master.[66] If the account is approved by the Master, the estate is liquidated and distributed according to that plan and the executor's mandate ends; it then becomes difficult to apply the normal rules of subrogation. The English case of *MH Smith (Plant Hire) Ltd v DL Main Waring (t/a Inshore)*, in which it was held that the insurer was prevented from bringing proceedings in the name of the insured company which had been wound up or dissolved, is a good example that should be followed in Zimbabwe.[67] The basis of the court's decision was that the insurer did not get the authority to sue in the insured's name before the insured ceased to exist.

If one applies the rule that the insurer should first seek the consent of the insured, the result is that the insurer cannot sue the third party should the insured cease to exist before such consent. The insurer will be prejudiced by the consequences of the requirement of the insured's authority. In criticizing the decision in *Rand Mutual*, Van Niekerk argues that although the court had mentioned cases in common law courts outside England where insurers had occasionally been permitted to proceed against the third party in their own names, such cases were rare.[68] The court in *Rand Mutual* referred to cases outside England since the position in England is that the subrogated insurer can only proceed against the third party in the name of the insured. Therefore it can be argued that, in Zimbabwe, the insurer should be allowed to sue in its own name when the insured dies or ceases to exist. It is now apparent that there can be prejudice to the insurer rather than the third party.

Depending on the circumstances, the third party is likely to benefit from the non-existence of the insured because no action can be taken against them without the consent of the insured. Action against the third party may be taken after the insured has ceased to exist if consent to the use of the insured's name is sought from the executor in the case of a deceased estate or the liquidator in the case of a company. However, the problem may persist when there is no longer an estate or company which an executor or liquidator administers. This scenario can arise after the company has been dissolved by a court after liquidation or when the deceased estate is distributed. In both cases the liquidator or executor would have discharged their mandates and fallen out of the picture.[69] It is suggested that the right of the subrogated insurer to proceed in its own name in enforcing the insured's rights against the third party should not be determined by the narrow test of prejudice to the third party. Prejudice to the third party was held to be the primary consideration in *Rand Mutual*.[70] The insurer should be allowed to proceed in its own name where the insured ceases to exist before s/he has allowed the insurer to use his / her name against the third party.

The insurance contract may contain a subrogation clause in which the insured can consent to the use of his / her name in any future proceedings against third parties, meaning that the insurer can still proceed against the third party in the name of the insured if the insured ceases to exist after being indemnified by the insurer. A subrogation clause can allow the insurer to proceed against the third party before it has fully indemnified the insured or before indemnifying him / her at all. However,

66 Administration of Estates Act, cap 6:01. The Master of the High Court is in charge of the administration of deceased estates in Zimbabwe.

67 *MH Smith (Plant Hire) Ltd v DL Main Waring (t/a Inshore)* [1986] Lloyd's Rep 244 (CA) at 252.

68 Van Niekerk "Insurance subrogation", above at note 4 at 572.

69 See Administration of Estates Act, above at note 66, sec 52.

70 *Rand Mutual*, above at note 3, para 24.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

if the insured had not consented to the use of his / her name in advance, the insurer will be prejudiced if the insured ceases to exist after being indemnified but before consenting to the use of his / her name. After being indemnified under such circumstances, the insurer should be allowed to proceed against the third party in its own name.

Prescription

If the insurer denies liability upon the materialization of risk, the insured may decide to sue the insurer.[71] An action by the insured against the insurer can take time to be concluded. In terms of section 15 of the Prescription Act, the period of prescription of ordinary debts in Zimbabwe shall be three years unless there is a provision to the contrary.[72] It can be argued that the third party's liability towards the insured is an ordinary debt, the period of prescription of which is also three years. The prescription of the third party's indebtedness towards the insured should be viewed against the subrogated insurer's common law right to enforce the insured's rights against the third party after indemnifying the insured in full.[73] Van Niekerk argues that in order to stop the third party's indebtedness towards the insured from becoming prescribed, the insurer may apply to the court in its own name to have the third party joined as a second defendant in an action by the insured against the insurer.[74]

Insurance contracts usually regulate the period within which a claim must be brought through time-bar clauses; this contractual regulation usually shortens the statutory period which is laid down for the prescription of debts.[75] A time-bar clause can stipulate that the insurer is not liable for loss or damage to the insured after the expiration of a certain period from the happening of loss, unless there is pending litigation or arbitration arising from the claim. A defence which is based on a time-bar clause has nothing to do with prescription but is a substantive plea on the merits; it is based on either a resolutive time clause (where the claim lapses after a specific period of time) or a resolutive condition (where the claim lapses after a specific period of time after an uncertain event, such as the denial of liability by the insurer).[76] However, time-bar clauses do not affect the insured's rights against the third party, since they are not the same as prescription; prescription extinguishes the insured's rights against the third party, which also affects the insurer's subrogation rights. The time-bar clause therefore only affects the insured's rights to claim from his / her insurer.

If the insured's claim against the third party is affected by prescription, it means the insurer will not recover anything from the third party by way of subrogation. The insurer may be ordered to indemnify the insured by the court in the insured's action against it. If the subrogated insurer is not allowed to proceed in its own name in an application to join the third party to the proceedings between it and the insured, there will be prejudice to the insurer when the insured's claim against the third party is extinguished by prescription; the insurer will have nothing to claim from the liable third party. The insurer can only proceed in its own name in an application for joinder, because it cannot use the name of the insured plaintiff in the same action.

Therefore, the consideration of prejudice to the third party in *Rand Mutual* should also be extended to insurers in Zimbabwe. The reason is that the insurer can be prejudiced if it is faced

71 For instance, the insurer can deny liability on the basis of a breach of a promissory warranty under circumstances where the insured is denying such a breach. The insured may decide to take the matter to court so that the insurer may be ordered by the court to indemnify them.

72 Prescription Act, cap 8:11.

73 JP Van Niekerk "*Samancor Ltd v Mutual and Federal Insurance Company Ltd and Others* (unreported WLD)" (2003) 6 *Juta's Insurance Law Bulletin* 166 at 170. The common law requirement that the insured should be indemnified by the insurer in full before the latter becomes *dominus litis* can be modified by a subrogation clause which can allow the insurer to become *dominus litis* even before indemnifying the insured at all or in full.

74 Van Niekerk "Insurance subrogation", above at note 4 at 572.

75 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 361.

76 Id at 362.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

with the danger of prescription of the insured's claim against the third party before the institution of the subrogated action. The third party cannot be prejudiced by the effect of prescription, but instead can benefit from prescription because no subrogated claim will be brought against him / her if the debt which s/he owes the insured has become prescribed. Hence, through an application, the insurer should be allowed to sue the third party in its own name to join the third party to the main proceedings, that is, between the insurer and its insured, before the third party's indebtedness towards the insured is extinguished by prescription.

However, the court can decide that the insurer cannot sue the third party in its own name in the application for joinder. It is suggested that if the court dismisses the insurer's application to join the third party in the proceeding between the insurer and the insured, the insurer will not be able to stop the running of prescription of the insured's debt against the third party. The insurer will be prejudiced if its application for joinder is dismissed by the court. Hence the insurer's need to preserve the insured's rights against the third party from being extinguished by prescription depends on whether it has succeeded in its application for joinder.

Prejudice to the insured

The subrogation clause

Indemnity insurance contracts in most cases contain one or more clauses which limit or result in the limitation of the amount of indemnity the insured may claim from the insurer.[77] One of such clauses is the subrogation clause, the main purpose of which is to dispense with the implied terms of the insurance contract that is based on the common law that the insured must first be indemnified in full by the insurer before the insurer is subrogated to the insured's rights against the third party.[78] A subrogation clause can also empower the insurer to settle with the third party without the involvement of the insured. However, the insurer should consider the insured's interests that s/he should also recover from the third party if s/he has not been fully indemnified by the insurer. Hence, any settlement between the insurer and the third party should include any interest the insured may retain in the proceedings of the claim against the third party, because the insured has a right to claim from the third party the difference between his / her actual loss and the indemnity which s/he receives from his / her insurer. It can also authorize the insurer to receive payment directly from the third party or allow the insurer to keep any surplus that may be recovered from the third party.[79]

It is clear that a subrogation clause affects the insured's common law right to be indemnified in full before the insurer becomes *dominus litis*.[80] The insurer can also recover from the third party before making any payment to the insured. If the insurer is allowed to proceed in its own name, the insured is likely to be prejudiced if payment is made directly to the insurer as the plaintiff, because the insurer may fail to account for all the proceeds recovered from the third party. The insured may not be in a strong enough financial position to claim what belongs to him / her from the insurer.

It can be argued that where the third party has paid the insurer as a result of the latter exercising its subrogation rights against its insured, the third party's liability towards the insured is extinguished, because subrogation does not concern the third party.[81] This makes it unnecessary to consider prejudice to the third party, as proposed in *Rand Mutual*. Therefore, there will be prejudice to

77 Id at 324.

78 Id at 415. According to the authors, the effect of the clause is that the insurer can take control of the proceedings at an earlier stage than is possible at common law. The insurer becomes *dominus litis* before it has paid the insured in full or before any payment to the insured is made.

79 Ibid.

80 Birds *Birds' Modern Insurance Law*, above at note 6 at 347.

81 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 410.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

the insured if the insurer fails to account for the proceeds belonging to the insured which it has recovered from the third party. If the insurer is proceeding in the insured's name, payment by the third party will be made to the insured despite the presence of the *dominus litis* insurer. The common law position is that the third party remains indebted to the insured and must pay them in order to discharge its obligations.[82] It follows that, in Zimbabwe, the subrogated insurer should proceed against the third party in the name of the insured if there is a subrogation clause that allows for the takeover of a case by the insurer before full indemnity in order to safeguard the rights of the insured.

Furthermore, it can be argued that the negative effect to the insured which emanates from a subrogation clause, which allows the insurer to receive payment directly from the third party, is limited in a situation where proceedings have been conducted in the name of the insured because the insurer should first seek the consent of the insured to the use of his / her name.[83] The insured therefore becomes aware of the proceedings against the third party and will follow the proceedings and the outcome with interest. This is different from a situation where the subrogated insurer proceeds in its own name against the third party and makes a settlement with them without the knowledge of the insured.

Average and compulsory under-insurance clauses

The application of an average principle can be part of the express provisions of non-marine insurance contracts.[84] An average clause is incorporated in an insurance contract in order to discourage under-insurance; the effect of it is that the insurer's liability is limited to a proportion of the insured's loss.[85] Under-insurance is when the sum insured is less than the total value of the insured's interest in the object of risk at the time of loss or damage.[86] Therefore, in situations where an average clause is applied, the insured does not get a full indemnity from the insurer.

A compulsory under-insurance clause requires the insured to bear a part of the loss.[87] The purpose of such a clause is to ensure that the insured has a real interest in the preservation of the insured object.[88] It is usually termed in such a way that the insured cannot insure the proportion which s/he is supposed to bear with another insurer. Therefore, if the insurance contract contains a compulsory under-insurance clause, the insured does not get a full indemnity from the insurer.

The purpose of subrogation is to prevent the insured from being unjustly enriched at the expense of the insurer. However, the insurer is only entitled to claim such sums as will recoup the amount it has paid out to the insured.[89] Insurers may insert subrogation clauses which entitle them to any surplus that may be recovered from the third party.[90] If the insured is not indemnified in full by

82 Van Niekerk "Insurance subrogation", above at note 4 at 572.

83 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 404.

84 See id at 327, which notes that average clauses apply automatically in marine insurance contracts.

85 Ibid. For example, if the value of the object of risk at the time of loss is ZWD 1,000 but it is insured up to ZWD 500, it means it has been under-insured by half. If the object is damaged and the value of the loss is ZWD 200, the insurer will therefore only pay the insured ZWD 100, half the value of the total loss. However, according to Reinecke, Van Niekerk and Nienaber, an average clause does not apply if the insurer elects to reinstate the object of risk; *Insurance Law*, above at note 5 at 327. The insurer cannot require the insured to pay a proportional share of the cost of reinstatement.

86 See *Minister of Education v Stuttaford and Co (Rhodesia) (Pvt) Ltd* [1980] (4) SA 517 at 523. In *Chemical Specialties Ltd v Hollard Insurance Co Ltd* [2011] ZAKZPHC at 22, a fire occurred at the insured's premises and substantial quantities of stock and materials were destroyed or damaged. The insured made a claim under the terms of the contract, but the insurer refused to pay part of the claim, relying on an average clause in the policy. The insured had a warehouse where the insured goods were being kept which was not mentioned in the policy. If the value of the stock in that warehouse was taken into account, the insured was under-insured and the average clause applied. It was held that the sum insured included the stock which was transferred to that warehouse.

87 The insured may be required to bear 10% of his / her loss. If the total loss is ZWD 1,000, it means the insurer can only pay ZWD 900 to the insured; ZWD100 is borne by the insured.

88 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 327.

89 R Bradgate *Commercial Law* (3rd ed, 2000, Butterworths) at 861.

90 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 415.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

the insurer, s/he has the right to recover the shortfall from the third party.[91] It is suggested that the insured's right to recover the shortfall from the third party exists where an average or compulsory under-insurance clause has been applied. The reason is that in both cases, the insured does not get a full indemnity from the insurer.

It could be argued that if the insurance contract contains an average or compulsory under-insurance clause, the position of the law in Zimbabwe should be that the subrogated insurer should proceed in the name of the insured. If the insured is the plaintiff, it means payment will be made to him / her; the third party remains indebted to the insured and must pay the insured in order to discharge their obligations.[92] It is possible that the same insurance contract which contains an average and a compulsory under-insurance clause can also have a subrogation clause which allows the insurer to receive payment directly from the third party. If the insurer receives any payment from the third party, it must account to the insured for any profit.[93] However, the insurer may fail to account for any profit it has received from the third party, and the insured might be in too weak a financial position to pursue the expensive court process in order to sue the insurer for specific performance emanating from its failure to account for the profit which it has received from the third party.

If the subrogated insurer conducts proceedings against the third party in the name of the insured, the latter becomes aware of such proceedings at the time s/he consents to the use of his / her name. Arrangements will be made between the insurer and the insured on the recovery of the insured's shortfall even before the outcome of the proceedings against the third party. It can be argued that where there is an average or compulsory under-insurance clause, the subrogated insurer should proceed against the third party in the name of the insured in order to avoid potential prejudice to the insured. It has been indicated above that if proceedings against the third party are conducted in the name of the insurer, they may either fail to properly account for the insured's shortfall or the insured him/herself might not be aware of any proceedings or settlement with the third party.

In *Rand Mutual*, the court held that prejudice to the third party should only be considered before a subrogated insurer is allowed to enforce the insured's rights against the third party.[94] It could be argued that the third party is not prejudiced by the fact that it has made a payment to the insurer or the insured. The third party's obligation is discharged if they make a payment as compensation for the loss they have caused to the insured. However, as between the insurer and the insured, there can be prejudice to the insured if the insurer receives a payment and fails to account for it. The insured may fail to recover his / her shortfall from the insurer in a situation where there is an average or compulsory under-insurance clause. It follows that in Zimbabwe, a subrogated insurer should, as a general rule, sue the third party in the name of the insured if the insurance contract contains an average or compulsory under-insurance clause. If the insurer proceeds in its own name, then there must be an agreement between the insurer and the insured that payment should be made to the insured, because the insured will be prejudiced if the insurer fails to account for what belongs to the insured after a successful action against the third party.

The excess clause

The insured is required to bear a specified first amount or part of a loss him/herself by an excess clause.[95] The insured will not claim anything if the loss is less than or equal to the excess. If the loss exceeds the excess, the insured is entitled to a full indemnity less the amount of excess. An excess clause is common in property and liability insurance contracts; its effect is that the insured will not

91 Van Niekerk "Subrogation, express or implied", above at note 12 at 510.
92 Van Niekerk "*Airlink Cargo International*", above at note 40 at 63.
93 Davis *Gordon and Getz*, above at note 1 at 264.
94 *Rand Mutual*, above at note 3, para 24.
95 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 328.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

recover a full indemnity from the insurer. The excess clause is designed to ensure that the insured avoids losses and / or plunging the insurer into high costs by making small claims.[96] The contract of indemnity only means that the insured must be fully indemnified after his / her loss.[97] Despite the subrogated insurer's right to enforce the insured's rights against the third party, the insured is entitled to recover the amount of excess from the third party in order to be fully indemnified.[98]

It can be argued that in Zimbabwe, where there is an excess clause, the subrogated insurer should proceed against the third party in the insured's name and not in its own name. If the insurer proceeds in its own name, it may fail to account for the excess to the insured, which will result in clear prejudice to the latter. If the insured is the plaintiff in the proceedings, it means the third party will have to make a payment to them in order to discharge its obligations. If, for example, the insured's loss is ZWD 200 and the insurance policy provides for an excess of ZWD 50, the insurer indemnifies the insured by paying ZWD 150. The insurer then recovers ZWD 200 from the third party, and payment is made directly to the insurer because it is using its name. The insurer becomes liable to pay ZWD 50, which is the excess, to the insured; if they fail to do so, then the insured is prejudiced. The insurer has a duty to take into account the interests of the insured as an implied term of the insurance contract; this means it should account to the insured for the ZWD 50 which it recovers from the third party.[99] If the insurer fails to account for it, the insured can be prejudiced as s/he may or may not be in a stronger financial position to proceed against the insurer in order to recover the ZWD 50.

It can be argued that if proceedings are conducted in the insured's name where there is an excess clause, it means the insured is aware of the proceedings against the third party and the outcome. The insured becomes aware of the proceedings at the point where the consent to the use of his / her name by the *dominus litis* insurer is sought. This is different from a situation where the insurer is proceeding in its own name against the third party and the insured is not aware of such proceedings and the resultant outcome. If there is a subrogation clause which allows payment to be made directly to the insurer, prejudice to the insured is minimized by the fact that the insured is already aware of the proceedings and will just demand that the insurer account for what it has received from the third party.

It can also be argued that the third party is not prejudiced by the mere fact that the subrogated insurer is proceeding in its own name (as proposed in *Rand Mutual*) where there is an excess clause, because if the insurer proceeds in its own name against the third party, the third party's obligations towards the insured are not affected. The third party can raise all the defences s/he has against the insured despite the presence of the *dominus litis* insurer.[100] It is the insured who is likely to be prejudiced if the insurer proceeds in its own name and payment is then made by the third party directly to the insurer. The insured may fail to recover the amount of excess or may not be in a better financial position (as compared to the insurer) to institute proceedings against the insurer for breach of contract. Thus, it is proposed that the subrogated insurer should proceed in the name of the insured in enforcing the insured's rights against the third party if the insurance contract contains an excess clause.

Conclusion

This research was motivated by developments in South African law, particularly *Rand Mutual*. It has explored the possibility of adopting the approach that was taken in that case in Zimbabwe. The circumstances which may justify the enforcement of subrogation rights by the insurer in its own name were not elaborated in that judgment. Therefore, this research has sought to explore situations that may

96 Ibid.
97 RW Hodgin "Subrogation in insurance law" (1975) *Journal of Business Law* 114 at 116.
98 Reinecke, Van Niekerk and Nienaber *Insurance Law*, above at note 5 at 328.
99 Id at 409.
100 Id at 411.

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press

justify the subrogated insurer proceeding in its own name in enforcing the insured's rights against third parties.

Therefore, this research has proposed factors which may be considered by a court in deciding whether the subrogated insurer may be allowed to proceed in its own name in enforcing the insured's rights against the third party. Firstly, factors which are prejudicial to the insurer were considered; it was highlighted that the insurer can proceed against the third party in its own name if failure to do so is prejudicial to it. The reason was to prove that the decision in *Rand Mutual* had given a limited test of deciding when an insurer can sue the third party in its own name. Circumstances which are prejudicial to the insured were also considered. Hence, it is proposed that where factors which are prejudicial to the insured are present, the insurer should not proceed against the third party in its own name. This is another test which is different from the test of prejudice to the insurer or the third party. Therefore, it can be argued that the subrogated insurer can proceed against the third party in its own name if it is clear that the interests of the insurer, the insured and the third party have been considered. Should the interests of the parties clash, it is recommended that the subrogated insurer should not be allowed to proceed against the third party in its own name in enforcing the insured's rights against the third party unless the balance of convenience is in its favour. It is proposed that the court should take into account all the relevant factors that have been discussed here in assessing whether the insurer may be allowed to proceed in its own name.

The insurer should proceed in its own name if it is not prejudicial to the insurer, the insured and the third party by doing so. The insurer should also be allowed to proceed in its own name if failure to do so is prejudicial to it. However, the position of the insurer can be improved by the insertion of a subrogation clause in the insurance contract which confirms the insurer as the *dominus litis* in litigation against the third party and to do so in the name of the insured. The subrogation clause solves the problem which may be faced by the insurer in obtaining the consent of the insured in the future. Hence, the insurer can proceed in the name of the insured without any prejudice if its interests have been secured at the time of entering into the insurance contract through inserting a subrogation clause.

Hence, it is recommended that the test of prejudice either to the insurer, the insured or the third party should only be considered in the presence of any one of the proposed factors in this research. The court in *Rand Mutual* had considered procedural prejudice to the third party only, although it did not define the ambit of the situations which may justify the insurer proceeding in its own name in enforcing the insured's rights against the third party. It can be argued that courts should consider the interests of the insurer, the insured and the third party where any of the proposed factors are present. After a consideration of all the factors of a given case by a court, including the interests of all the parties, the end result should be the attainment of justice by the parties.

Competing interests. None

Cite this article: Maringe N (2024). Revisiting the Right in Zimbabwe of a Subrogated Insurer to Proceed against a Third Party in the Name of the Insured: Lessons from South Africa. *Journal of African Law* **68**, 109–123. https://doi.org/10.1017/S0021855323000359

https://doi.org/10.1017/S0021855323000359 Published online by Cambridge University Press