NORTON ROSE FULBRIGHT

The Big Read Book series Volume 13

Review of Botswana insurance judgments: 2003-2023

December 2023

Introduction

Dearest Reader

Welcome to another volume of Norton Rose Fulbright's The Big Read Book Series.

This is Volume 13 of the series – A review of Botswana insurance judgments: 2003 – 2023.

An online version of this publication is available through our Financial Institutions Legal Snapshot blog at https://www.financialinstitutionslegalsnapshot.com/ with links to the judgments. You can also keep up with developments in insurance law including South African judgments and instructive judgments from other countries by subscribing to our blog.

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Norton Rose Fulbright South Africa Inc

December 2023

Absolution from the instance

Nnewes Commercial Farm (Pty) Ltd v General Insurance Botswana (Pty) Ltd

(Civil Case No. F859 of 2002) [2003] BWHC 2 (January 1, 2003)

Keywords: absolution from the instance / legal standing

The plaintiff alleged that it was insured for property, machinery, and stock in trade. The plaintiff claimed for losses relating to a fire on the property.

The plaintiff called only one witness at trial, Mr Nnewe, its managing director. His evidence was that one of the properties belonged to him in his personal capacity, and the other belonged to another company that he ran. This meant that neither of the properties belonged to the plaintiff.

There was no evidence that the plaintiff had suffered patrimonial loss. Mr Nnewe was also not called as an expert with the skills necessary to comment on the extent of the alleged loss and therefore did not attempt to quantify that loss. The plaintiff had no legal standing to sue for the alleged losses.

The court noted that proof of damages is fundamentally important in claims of this nature. The failure to prove such damages can justify a court in ordering absolution from the instance (that the claim was not proved), which the court then did.

Brokers

Ramosi v Botswana Insurance Company Ltd and Another

(CVHLB-0002092-06) [2008] BWHC 79 (June 26, 2008)

Keywords: premium in arrears / broker as agent

The plaintiff sued his insurer and his broker for repairs to his motor vehicle, which had been damaged in an accident, for around 18 000 Pula. The insurer rejected the claim because the plaintiff had not paid the previous two months' premium.

The plaintiff alleged that he had approached his broker after the accident, and his broker confirmed that cover would be provided if he paid the arrear premiums. The plaintiff paid the arrear premiums, but the claim was still rejected.

The evidence showed that the broker did not represent to the plaintiff that paying the arrear premium would result in acceptance of his claim. It would only result in the policy renewing for future claims. The broker was also not the insurer's agent and could not make a representation on behalf of the insurer. In fact, the broker's actions showed him to be acting as the insured's agent.

The court was not impressed with the plaintiff as a witness and instead accepted the defendants' witnesses' evidence as credible.

The plaintiff's claim was dismissed.

Associated Insurance Brokers of Botswana (Pty) Ltd v Lake Dow Motors and Panel Beaters (Pty) Ltd

2007 (3) BLR 481 (HC) (August 27, 2007)

Keywords: broker / broker duties / duty of insured / agency

The plaintiff broker instituted action against the insured for premiums it had paid over to an insurer. The broker had paid the premiums on behalf of the insured, who had failed to pay, on the understanding that the insured would reimburse the broker for these premiums.

The insured filed a counterclaim for a loss that the insured alleged should have been covered, but which the insurer had refused to cover.

During the trial, the insured admitted that it owed the broker the amount the broker paid over to the insurer. It also became clear that the broker's claim was based on the brokerage agreement, and not the insurance contract. Further, the claim was for the amount of the premium and not for the premium itself, because that claim belongs solely to the insurer.

The only issue for determination was therefore whether the broker was liable to the insured for the rejected insurance claim.

The broker argued that it was not liable to the insured for a debt arising out of the contract of indemnity. The insured maintained that it was entitled to judgment because the broker failed to process and pay the claim it had lodged.

The court noted that the decisive issue was the relationship between the parties. There were several relationships involved: a contract of mandate between broker and insured, a contract of commission between broker and insurer, and a contract of insurance between insured and insurer that was facilitated by the broker. The broker acted as the insured's agent in concluding the insurance contract but was not a party to that contract.

The court noted that a broker usually acts primarily for an insured. It is only in rare circumstances that a court should assume a dual capacity of a broker, acting both for the insurer and the insured.

The court stated that the insured had confused the role of broker for insurer. The broker is not the insurer. The broker was obliged to forward the claim to the insurer for processing, and it then fell on the insurer to determine whether to cover the loss.

The insured did not show a basis for the broker being held liable for the loss by advancing a claim against the broker in terms of the law of agency or delict, or in relation to the contract between it and the broker.

The insured's claim failed.

Omega Insurance Brokers v Maphanyane

(Civil Case No. 2605 of 2003) [2005] BWHC 122 (December 12, 2005)

Keywords: broker / premiums in arrears / ignoring a summons

The insured sued his broker for damages suffered due to the broker's failure to transfer his insurance premiums to the insurer timeously. The insurer had rejected a motor vehicle accident claim because the insured's premium payments were in arrears.

The broker did not enter an appearance to defend the claim and the insured was awarded default judgment in his favour.

The broker's attorneys then wrote to the insured, saying that they expected the judgment to be abandoned because the broker had innocently assumed that the insured would not obtain judgment against the broker because, in his view, negotiations were in progress. The insured refused and the broker applied to court to rescind the judgment.

The court held that it was unreasonable for the broker's managing director to claim ignorance of the law to the extent that he simply ignored a summons. In the court's view, even if he did not know how to deal with a summons, he should have immediately consulted with a lawyer. He should have known that despite how beneficial negotiations can be to resolve a dispute, this cannot undermine court procedures.

The rescission application was therefore refused.

Employment issues: Competition, theft, disability benefits

LSC Botswana (Pty) Ltd v Bolux Group (Pty) Ltd

(CVHLB-001519-09) [2010] BWHC 22 (August 6, 2010)

Keywords: employee theft / rejected insurance claim

The plaintiff, a labour broker, supplied workers to the defendant. The defendant, before terminating the contract, deducted around 244 000 Pula from the amount payable to the plaintiff, due to alleged theft of stock by the workers.

The plaintiff had written a letter, at the defendant's request, to the defendant's auditors, confirming that a claim had been lodged with the plaintiff's insurers to recover the sum lost due to the theft. The plaintiff admitted that if the insurance claim had been accepted, they would not have claimed against the defendant as the deduction would have been accepted.

The plaintiff only threatened legal action against the defendant once its insurance claim had been rejected. This indicated that the plaintiff had agreed to the deduction and then hoped to recover from its insurers. The court noted that the plaintiff's acceptance that its staff were responsible for the stock losses was confirmed by its claim for recovery of that sum from its insurers under its staff fidelity policy.

The plaintiff's claim failed.

First Sun Alliance Insurance Brokers (Pty) Ltd v Jangano

(CVHLB-001021-08) [2010] BWHC 7 (February 19, 2010)

Keywords: restraint of trade / competition with former broker / employer / defamation

The plaintiff sued the defendant, a former employee and Principal Officer, for setting up a brokerage firm in competition with the plaintiff, and for allegedly fraudulently diverting business to his firm. The defendant counterclaimed for defamation, alleging that the plaintiff wrote to many important entities within the insurance industry, detailing what the plaintiff described as the defendant's dishonest and fraudulent conduct.

The court noted that there is no general restriction on an ex-employee canvassing or doing business with customers of a former employer. This principle applied as there was no restraint of trade clause in the defendant's employment contract. The defendant had offered to serve out his notice period, which was all that was required in terms of the contract, but the plaintiff had refused the offer.

The court found that the defendant had underhandedly but not unlawfully registered the new brokerage while still employed by the plaintiff. In the absence of a restraint of trade agreement, the defendant was entitled to compete with his former employer as soon as he was no longer employed by them.

The defendant was under a duty to protect confidential information regarding the plaintiff's customers and suppliers while he remained employed with the plaintiff. Failure to protect that information could result in dismissal, but a former employee was entitled to use that information. The information the defendant had used did not fall into the category of trade secrets so exclusive to the plaintiff that it would be protected from disclosure even after the employment contract ended.

The plaintiff also did not tender any evidence of an actual loss, and had no evidence to prove that the defendant used any of its information while still employed with the plaintiff.

The plaintiff's claim therefore failed.

The plaintiff had also tried to lobby the brokers' association to impose a six-month restraint period on brokers leaving employment – this was not successful and is not part of Botswanan law.

The defendant's counterclaim for defamation succeeded for limited damages. He claimed 450 000 Pula but could only evidence a minor adverse effect on his reputation and business, and so only 5 000 Pula was awarded for this claim.

Central Bank Union v Bank of Botswana

(MAHLB 000496-06) [2008] BWHC 7 (January 16, 2008)

Keywords: disability indemnity

This was an employment dispute regarding whether an employee who suffers temporary, not permanent, disability should receive compensation from the company's insurers.

Staff members were erroneously compensated for temporary disability. When the company stopped this practice, an employee sued it for unilaterally varying the employment contract.

The company argued that when an employee suffers permanent disability, they lose their job and the insurer pays the employee who is unable to earn a salary due to the permanent disability. But in the case of temporary disability, the employee does not lose their employment. They continue to receive a salary and the company must hire a temporary replacement, or other employees must take on additional work, to compensate for the temporarily disabled employee. This creates a loss for the company and not for the disabled employee, and so the employee is not entitled to an extra benefit from the insurer, which would serve only to unjustly enrich the employee. The previous practice of providing an insurance benefit to employees with temporary disabilities was not a contractual term and did not create an expectation of the practice continuing in future. The company also did not claim any benefits back from those previously and erroneously compensated.

The court accepted the employer's arguments and allowed the change in practice. The court confirmed that it was a contractual matter and not an administrative law issue, which the employer had dealt with correctly.

Motor vehicle accidents

Kamanga v Hollard Insurance Botswana (Pty) Ltd

High Court, Lobatse [2017] 1 BLR 359 (HC)
(March 22, 2017)

Keywords: motor vehicle accident / insured amount / reasonable market value

The insured's motor vehicle was damaged beyond repair in an accident, and he claimed for the insured amount of around 62 000 Pula. The insurer offered roughly 42 000 Pula as the reasonable market value of the vehicle at the time of the accident.

The insured had been part of an employee insurance scheme put in place through a brokerage. He paid premiums of 396 Pula per month based on the value of the vehicle, assessed at inception of the policy, at 62 000 Pula. At the time of the accident, the vehicle's value was assessed at 42 000 Pula.

The insured argued that he was entitled to the value of the vehicle as stated on the policy because he had paid premiums based on that value and because he had not been given a copy of the policy, which stated that the insurer would indemnify the insured for the value of the vehicle at the time of the loss, until after he lodged the claim.

He alleged that the broker, as the insured's agent, had a duty to provide a copy of the policy to the insured. The insured had duty to provide an accurate value of the insured vehicle.

The court said that the insurer's liability to indemnify loss of property was limited to the real and actual value of the loss, which cannot exceed the value or amount of the insurable interest. If it does, then the loss stands to be adjusted to the lower amount. The insured cannot make a profit out of an indemnity policy.

The insured bore the onus of proving the loss and the real value of the loss. He also had a duty to review the value of his vehicle periodically and update the insurer accordingly to ensure that the premiums corresponded with that value. The court noted that an insured who pays premiums for an asset above its market value does so at their own peril and cannot ground a claim for loss based on payment of premiums.

The insured's claim failed.

Malikongwa v Guaranteed Loans Insurance Fund and others

High Court, Francistown CVHFT-000018-12 (April 18, 2013)

Keywords: motor vehicle accident / driving under the influence of alcohol / exclusion / evidentiary burden

The plaintiff sued a statutory insurer for losses sustained due to a motor vehicle accident. The insurer attempted to avoid the claim on the basis of an exclusion as the insured was driving under the influence of alcohol at the time of the accident.

The evidence of the insured's intoxication was based on a breathalyser test and the officer on duty's testimony that the insured's breath smelled of alcohol. However, the court found that the evidence relating to the calibration of the breathalyser device was insufficient, and the mere fact that the officer alleged that he smelled alcohol on the insured's breath was not enough to prove that the insured's driving was impaired as a result of consuming alcohol.

The court noted that in cases of ambiguity, exclusion clauses must be construed against the insurer. In this case, the insurer had to lead sufficient evidence to prove that the insured's driving was impaired as a result of consuming alcohol, which it did not do.

The claim was therefore not excluded, and the court ordered the insurer to pay the insured's damages as proved or agreed.

Palmer & Sons Transport (Pty) Ltd and Another v Tiphe Transport Holdings (Pty) Ltd and Others

(CACGB-026-12) [2013] BWCA 33 (February 1, 2013)

Keywords: motor vehicle accident / salvage

This case involved a transport permit attached to a vehicle that was involved in an accident. The vehicle had been damaged beyond economical repair and a dispute arose regarding transfer of the permit to another vehicle.

The court considered whether the insurer had a right to the remains of the vehicle.

The court noted that it is a well-recognised principle of insurance law that if an insurer has paid for a total loss, it is entitled to whatever is recovered of the object – this is referred to as an insurer's right to salvage. This right to salvage is a natural consequence of an indemnity policy and will apply if there are no provisions to the contrary in the policy. It will also be an implied term if it is not expressly included in the contract.

Lekhori v Botswana Motor Vehicle Accident Fund

(CC No. 2896/2004) [2008] BWHC 8 (January 16, 2008)

Keywords: motor vehicle accident / negligence / reasonable driver / reasonable pedestrian

The pedestrian plaintiff was bumped by a vehicle while he was crossing a road. He claimed against the vehicle's insurer, alleging that the driver had been driving negligently at the time of the accident.

The plaintiff called three witnesses (including himself) and alleged that he had checked the road before crossing, and that the vehicle was driving at around 200km per hour.

However, the defendant's version was that the plaintiff slowed and then stood in the middle of the road when he noticed the driver approaching, and that the driver slowed as well. The driver assumed the plaintiff would remain in the centre line until she drove past, but as she was about to pass, the plaintiff rushed into her path, attempting to cross ahead of her. The driver's version was confirmed by a police officer at the scene. The police officer's sketch drawn at the scene showed that the vehicle had stopped around four metres from the point of impact, indicating that the vehicle must have been going slowly at the time of impact.

The driver's testimony and the police officer's version were forthright and corroborated each other, whereas the plaintiff and his witnesses provided inconsistent testimony. The court inferred that the plaintiff had not kept a proper lookout and that the driver had not acted negligently. The plaintiff, by stopping in the road, specifically gave the impression that he was waiting for the vehicle to pass.

The court noted that while drivers are expected to act reasonably cautiously when seeing a pedestrian, the pedestrian is also expected to act with reasonable caution.

Negligence was not proved, and the claim was dismissed.

JNG Express (Pty) Ltd v Botswana Insurance Company Ltd

Civil Appeal 017-06 (Court of Appeal of Botswana, Lobatse) (July 26, 2007)

Keywords: motor vehicle accident / fraud

The insured claimed 145 000 Pula under a motor vehicle policy for loss of his vehicle destroyed through fire. The insurer rejected the claim on the grounds that it was fraudulent, alleging that the vehicle was deliberately set on fire to obtain the insurance benefit. The insurer also alleged that the insured failed to take reasonable precautions to prevent the loss.

The plaintiff, a public transport company, gave evidence that the vehicle had a long-standing problem of overheating, and invoices were produced as evidence of the plaintiff attempting to fix this problem. After one such repair, the plaintiff's managing director felt confident in taking the vehicle on a long journey of over 500km and reached his destination without incident. On his return journey, the vehicle began to overheat. He continually added water to the vehicle's radiator, which he noticed was leaking, but this did not stop the vehicle from overheating. He eventually parked the vehicle and returned home by bus.

He returned to fetch the vehicle the next day and the engine seemed to be running normally. He then heard an explosion beneath the vehicle and opened the bonnet to see flames emanating from the engine. As there was no sand or other people nearby to assist him in putting out the fire, the vehicle burnt to ashes. The driver reported the incident to the police and remained steadfast in his version of events throughout cross-examination.

The insurer called an expert witness who testified that he did not find any evidence of the fire coming from the radiator and that there was no sign of engine seizure. He found damage to the underside of the vehicle and was of the view that this was caused by something burning underneath the vehicle at high heat, and concluded that the fire was deliberately set. In the court's words, this evidence was "torn to shreds" in cross-examination.

The court held that the onus was on the insurer to prove the fraud that it alleged. The insurer failed to prove the alleged fraud, and the insured's claim succeeded.

Policy interpretation

Sinohydro Botswana (Pty) Ltd v Botswana Insurance Co Ltd

2012 (1) BLR 527 (HC) (March 9, 2012)

Keywords: policy interpretation / flood endorsement

The insured was engaged by the Government of Botswana to construct a dam. The insured was required to design and construct water diversion works to divert any flows of water in the river away from the works taking place below or on the level of the riverbed.

The works were insured with the following conditions of cover: "All diversion works must be designed to withstand 1 in 100 year flood water", and the Munich Re Endorsement "110 safety measures" was to apply.

The Munich Re Endorsement 110 (which until that time had never been judicially considered anywhere in the world) read:

> "It is agreed and understood that otherwise subject to the terms, exclusions, provisions and conditions contained in the Policy or endorsed thereon, the insurers shall only indemnify the insured for loss, damage or liability caused directly or indirectly by precipitation, flood or inundation if adequate safety measures have been taken in designing and executing the project involved.
>
> For purposes of this Endorsement adequate safety measures shall mean that, at all times throughout the policy period, allowance is made for precipitation, flood and inundation up to a return period of 100 years for the location insured on the basis of the statistics prepared by the meteorological agencies."

There were unusually heavy rains in the area several months into the project and flooding exceeded the diversionary safety measures in place. This resulted in damage to the works and loss of materials.

The insured's claim was rejected on the basis that the diversionary works had not been designed to meet the 1 in 100-year flood that followed. The insured argued that it had complied with the obligation as the design strength was measured on a seasonal, and not a yearly, approach.

The parties led competing factual and expert evidence regarding the design of the diversionary works and the understanding of the flood return periods. In interpreting the policy, the court said that it was not for it to make contracts for the parties. Nor was its function to depart from clear policy language on equitable grounds. Where terms used in a document have a specialised or technical origin or use, their meaning must be found in such specialised or technical concepts, and not from a different concept or a layperson's understanding.

The court had to consider whether the expression "up to a return period of 100 years" meant a 1 in 100-year flood based on an annual peak flood as contended for by the insurer or a 1 in 100-year dry season or monthly peak season as argued by the insured. The question was whether the literal meaning of the technical term was the one to be adopted or whether the court, in interpreting the clause, had to account for the international practice of strategies adopted in large dam construction and designing of diversion works for dams.

The court said that an approach that seeks to read into the relevant phrase the words "seasonal flood" was fraught with difficulties. There was no consensus as to what months constituted that period and even the recognised methods of analysing and computing the data gave very different yields. In any event, even if the insured was only required to comply with dry season requirements, the insured would still have failed to meet the relevant safety measures.

The court found that if the parties had intended the return period to account for the dry and wet seasons, the language of the policy would have been specific in that regard. The court said that the construction of the clause had to be interpreted having regard to the language of other documents constituting parts of the policy and proposals. The Munich Re Endorsement wording was relevant where the 1 in 100-year flood was unqualified and the court held that this technical term meant what it said. It referred to a 1 in 100-year return flood based on an annual peak flood regardless of the time of the year.

While all experts agreed that it would have been more expensive for the insured to comply with the requirement, it was for the insured to negotiate terms that it could meet without undue financial hardship.

This decision was based on South African authorities and a similar decision would be reached in South Africa, especially having regard to current concepts of policy interpretation.

Norton Rose Fulbright successfully acted for the insurer in this case.

Subrogation

Phoenix of Botswana Assurance Co (Pty) Ltd v Old Mutual Insurance Co Ltd and Others

[2020] 1 BLR 443 (Court of Appeal) (February 7, 2020)

Keywords: subrogation

Old Mutual's insured was involved in a motor vehicle collision with Phoenix of Botswana Assurance Company's insured. Old Mutual indemnified its insured, and then claimed against the driver of the other vehicle, alleging negligence, and against Phoenix as the insurer. The claim against Phoenix was supposedly based on the doctrine of subrogation.

Phoenix raised an exception, claiming that Old Mutual had not established any link between it and Old Mutual, and that there was no legal obligation alleged that made Phoenix indebted to Old Mutual.

The court emphasised that subrogation does not create substantive rights against third parties who were not parties to the insurance contract. What it did, in this case, was permit Old Mutual to step into the shoes of its insured once she was indemnified and claim from those parties against whom she had a cause of action. Old Mutual's insured had no claim against the insurer of the other vehicle's driver because the insurance contract between an insurer and insured did not create rights for third parties. She had a claim in delict against that driver but not against Phoenix.

The appropriate step would have been to sue Phoenix's insured, and for that insured defendant to issue a third-party notice against Phoenix, claiming an indemnification under its policy with Phoenix.

Old Mutual could only step into its insured's shoes in her cause of action against the driver.

The court held that the doctrine of subrogation could not give Old Mutual a cause of action against the driver's insurer and Old Mutual's claim against Phoenix was therefore dismissed.

Baleseng v Mosele and Security Systems (Pty) Ltd

Heard simultaneously with: *Masunga v Seele*

Court of Appeal: CACGB-198-18 (2019) (February 8, 2019)

Keywords: subrogation / legal standing to recover despite indemnity

Two cases were heard simultaneously because they raised the same issue of subrogation in insurance law.

In *Baleseng v Mosele*, the plaintiff sued the defendant for negligent driving causing a motor vehicle accident. She claimed the costs of repairing her vehicle, engaging an assessor to determine the scope of her loss, as well as excess costs. The defendant alleged that the plaintiff did not have legal standing to sue for the costs of the assessor and the costs of repair as this was covered by the insurer and merely alleging that she was the vehicle's owner was insufficient to ground her legal standing.

In Masunga v Seele, the claim was similar but the defendant pleaded that the plaintiff had already been paid for her loss and was not entitled to the amounts claimed. The defendant did not specifically raise a defence relating to legal standing.

The court had to determine whether an insured, who has been fully compensated by the insurer for their loss, can proceed with a claim in their own name.

The court defined subrogation as:

> "A procedural device in service of the indemnity principle which is available to an insurer to recover in the name of the insured whatever is due by the wrongdoer to the insured. It has no effect on the substantive rights and obligations of the parties because it is solely concerned with the rights and duties of the parties to the contract of insurance and confers no rights and imposes no liabilities on third parties."

The insurer has a personal right against its insured, to reimburse itself out of the proceeds of any claims that the insured has against third parties for the loss. Complementary to this right is the right to take charge of proceedings against the third party, which may be conducted in the name of the insured but with the insurer acting as dominus litis.

Subrogation does not affect a transfer of the insured's rights against the third party to the insurer. The insured remains the holder of those rights unless they are ceded to the insurer. Subrogation allows the insurer and insured to settle their affairs and does not impose liabilities on third parties.

Because subrogation applies between the insurer and the insured, it cannot create a defence or a right for the third party.

When an insured has been paid by the insurer, the insurer can step into the shoes of the insured in relation to claims against third parties. The argument relating to unjustifiable enrichment should not arise because the insured would need to account to the insurer for any awards received in relation to the indemnities paid by the insurer. The court noted that "at worst, the insured might be enriched at the expense of the insurer should the insurer fail to avail itself of its procedural rights but that is of no concern to the wrongdoer".

The court stated that the insurer is only entitled to subrogation once it has paid the insured for its full loss, and not only in terms of the policy. This is because the claim against the wrongdoer is indivisible. If the insured paid an excess, for example, then the insurer did not pay for the full loss. The insured who has been compensated by the insurer is entitled to claim their full loss from the wrongdoer because payment by the insurer does not affect their legal standing to pursue the claim.

Regent Insurance Botswana (Pty) Ltd v Mutami

2011 (2) BLR 649 (HC) (August 5, 2011)

Keywords: subrogation / insurer suing in own name / cession

The plaintiff insurer claimed the cost of repairs to the insured's vehicle from the driver of the vehicle with which the insured's vehicle collided.

The defendant's negligent driving was proved but the defendant objected to the claim on the basis that the plaintiff had no legal standing to bring the action in its own name. The insurance contract included a subrogation clause that ceded the insured's rights against third parties in relation to their claims to the insurer.

The court held that the doctrine of subrogation permitted an insurer to sue third parties in its own name. The plaintiff insurer's claim succeeded.

Regent Insurance Botswana (Pty) Ltd v Bome

2011 (1) BLR 262 (HC) (May 19, 2011)

Keywords: subrogation

The insured's husband wilfully and maliciously damaged her motor vehicle. The insurer paid for the repairs but sought to sue the insured's husband for repayment under the doctrine of subrogation.

The insurance policy did not permit any claim where loss or damage to the insured vehicle was deliberately caused by the insured or any member of the insured's household or family. It was common cause that at the time of the damaging of the vehicle, the defendant was lawfully married to the insured.

The insurer argued that the defendant could not raise a clause of the insurance policy, to which he was not a party, as a defence.

The court however stated that an insurer can claim subrogation rights only if the insured has a right against a third party that is capable of being subrogated. As the action against a third party is used to enforce the insured's rights against that third party, a third party may raise any defence that the third party is entitled to raise against the insured or insurer, irrespective of who brings the action.

The court accordingly allowed the defendant to raise a defence contained in the insurance contract even though he was not a party to that contract. The insurer took the risk in paying a claim despite its undertaking in the policy not to pay that type of claim.

The court held that the insurer could not sue the insured's husband and found it unnecessary to then consider whether the right of subrogation applies to claims between spouses.

Mokomane v Matlhare and Another

(CAHLB-000007-06) [2007] BWHC 408
(September 25, 2007)

Keywords: subrogation / motor vehicle accident / insured right to sue despite indemnity.

The plaintiff sued for compensation relating to a motor vehicle accident caused by the defendant. The insurer paid for the repairs and the plaintiff paid an excess of 1 000 Pula. The trial court dismissed the claim as it had an incorrect understanding of the principle of subrogation.

The appeal court confirmed that the insured could bring the action for the insurer's ultimate benefit. If successful, judgment is given in favour of the insured and it is then for the insurer to ensure that the insured accounts to the insurer for the proceeds recovered. That is not the third-party defendant's concern, as their liability is not affected by arrangements between insurer and insured.

Alternatively, the insured may cede its right to recover against the third party to the insurer, and in that case the insurer will bring the proceedings in its own name.

The court does not allow splitting claims arising from one cause of action, as a single cause of action cannot support a plurality of claims. The fact that the insured had to pay an excess adds weight to the argument that subrogated claims must be brought in the manner set out above, as the insured has the right to recover the excess paid and the insurer has a right to claim the remainder of the loss from its insured.

Botswana Insurance Company Limited v Mazwi

(Civil Case No. F739 of 2004) [2006] BWHC 20 (March 17, 2006)

Keywords: subrogation / cession / legal standing / motor vehicle accident

The insurer sued the defendant for damages arising out of a motor vehicle accident allegedly caused by the defendant.

The insurer sued for cost of repairs, the assessor's fees, and the excess, alleging that the total claim (including the excess) had been subrogated to it by virtue of its insurance contract with the insured.

The court considered whether an insurer, suing in its own name, could recover the excess.

The court asked why the insured had not sought to claim the excess and noted that even if it had been sought by the insured, the claim for the excess would only be allowed if a formal cession by the insured, or a specific clause of the insurance contract allowing it, was pleaded.

The court quoted scenarios presented in *The South African Law of Insurance 2nd edition*:

> "An insurer which has paid the loss can on subrogation sue the third party in the insured's name, not its own name, and if the insured refuses the use of his name, the insurer can obtain a court order compelling him to give the consent. Second, an insurer which has paid the insured the amount of his loss may demand that the insured cede all his rights against the third party and in that event the insurer must sue the third party in its own name. Third, where the insurer has not yet paid the insured the amount of the loss, it is not entitled to be subrogated to the insured's position, but it may demand from the insured cession of the insured's rights of action against the third party otherwise it has no rights against the third party. In this instance the insurer can sue the third party in its own name only after obtaining cession of action. Fourth, the authors deal with the situation of contractual subrogation and states that a policy of insurance may, and often does, contain a clause entitling the insurer 'if he so desires, to take sole charge of and conduct in the name of the insured any action involving the company's interests.' This clause dispenses with the need for a cession of action even before payment is made under the policy."

In the pleadings, the insurer did not state whether it had covered the loss and, if so, to what extent. It also did not allege any cession of rights. The court said that the mere fact that the insurer alleges that there had been subrogation was not in itself sufficient, on the facts of this case, to establish its legal standing to sue the third party in its own name.

The insurer then referred the court to a clause in the policy that allowed it to "take over and conduct the defence or settlement of any claim and have the right to use [the insured's] name for this purpose" but the court found this provision to be unclear. It did not state whether the insurer's right was limited to defence and settlement or whether it extended to prosecuting a claim in insured's place.

The issue relating to claiming the excess made the need for clarity on these issues more important, as this was the portion of the loss that the insured covered. The court said that whether the insurer was going to account to the insured for the excess was not in issue and the failure to specify the basis for suing in its own name disentitled the insurer to the relief sought. The insurer was instructed to amend its claim accordingly.

Drotsky v Kim's Auto Motors (Pty) and Another

2003 (1) BLR 498 (HC) Botswana Law Reports
(May 9, 2003)

Keywords: subrogation / salvage / broker

The applicant appointed Regency Investments (Pty) Ltd, trading as Regency Insurance Brokers, to procure insurance for her assets, which included a vehicle registered in her name. The insurer was Botswana Eagle Insurance Company.

The applicant contacted the broker to lodge a claim when the vehicle was damaged in an accident. The broker sent an assessor to view the vehicle and the assessor asked her to sign a document titled "Agreement of Loss", which she did. The agreement of loss stated that she would be paid 134 000 Pula by "Regent Insurance" and that the salvage would become the property of Regent Insurance.

Payment was not forthcoming and so the applicant followed up with the broker. The broker indicated that the vehicle had been towed by one of the respondents, Kim's Auto Motors, and that the claim would be settled.

Payment remained outstanding and the applicant followed up with the broker in person. She was informed by a director of Regency that he had misappropriated the premium money, and that her assets were not covered at all.

The registrar of insurance intervened, and the insurer agreed to pay the applicant 103 025 Pula as an ex gratia payment. The insurer also agreed to forego any interest in the wreck of the vehicle, subject to certain conditions.

The applicant then traced the vehicle to the respondents' garage in Gaborone. When the applicant demanded the vehicle's return, the respondents refused, alleging that they had purchased the vehicle from Regency and possessed it in good faith. Further, they alleged that the applicant had no rights to the vehicle as she had subrogated these rights to the insurer.

The agreement of loss referred to an unspecified insurance policy and claim, as well as to Regent Insurance as the issuer of the policy. It authorised Regent Insurance to dispose of the salvage, but only in consideration for the payment of the loss. The court found this document to be "wholly ineffective". The broker, Regency Investments (Pty) Ltd, was not an insurer and was not named Regent Insurance. It could not be a beneficiary of subrogation and there was no suggestion that the insurer authorised the broker to acquire the salvage for itself.

The agreement of loss, therefore, did not have the effect of divesting the applicant of her ownership of the vehicle. Regency Investments (Pty) Ltd could also not use it as a basis to pass ownership to the respondents or anybody else, as they enjoyed no rights in the vehicle.

The applicant succeeded in proving her ownership of the vehicle and the respondents' adverse possession of it. The respondents failed to establish any right to retain possession of the vehicle against its owner. The court ordered that the respondent restore possession of the vehicle to the applicant.

Time bar clauses and prescription

Majwe Mining Joint Venture (Pty) Ltd v Old Mutual Short-Term Insurance (Botswana) Limited

Court of Appeal: CACGB-258-20 (November 5, 2021)

Keywords: insurance time bar clauses

The Botswana appeal court considered the date from which a time bar period provided for in the general conditions in an insurance policy started running, following the insurer's disclaiming of liability for an indemnity.

The insurer wrote to the insured and disclaimed liability on 12 November 2018, indicating that: "Our considered view ... is that the claim does not fall within the terms stated in the policy and is therefore repudiated." Action was instituted within the 12-month time bar period following receipt of that letter of rejection.

The question arose whether an earlier communication from the insurer of 2 February 2017 constituted an unequivocal communication to the insured of rejection of the claim. That letter did not contain any wording like the express rejection contained in the 2018 letter.

While the 2017 letter contained a prima facie conclusion that the insured's loss was, in part or wholly, due to the insured's own employees or sub-contractors' negligence in respect of which cover was excluded, it did not actually reject the claim or unequivocally disclaim liability. An unequivocal disclaimer of liability was required for the rejection (the court used the term "repudiation") to be effective.

The 2017 letter did not use the words "reject", "disclaim liability" or "repudiate". The letter instead offered, without prejudice, to pay half of the assessed claim in full settlement.

The court said that this was not conduct in line with conveying an unequivocal and total rejection of the claim. Further, the insurer's subsequent conduct was not indicative of rejecting the claim outright. Not only did it make a without prejudice offer, but it also collaborated with the insured and paid for a loss adjuster to advise on causation, liability, and quantum after offering to settle the claim.

Twelve months after the 2017 letter, the insurer did not inform the insured that the claim was time barred, nor that it assumed that the claim was abandoned, nor that it was closing its file. Instead, it waited for the loss adjuster's report, which only arrived many months later.

The claim was accordingly not time-barred.

The result would not be any different under South African law. Insurers who wish to decline a claim and reject liability under the policy must communicate the rejection to the insured timeously, clearly, and unambiguously.

Dynasty Ventures (Pty) Ltd t/a A to Z Hardware v Phoenix Botswana Assurance Co. (Pty) Ltd

Court of Appeal: CACGB-032-16 (October 27, 2016)

Keywords: insurance time bar clause

The court dealt with technical arguments around how an insurer could plead a time bar clause as a defence. The court stated that there is nothing in principle or as a matter of good policy that precludes the use of time bar clauses in contracts.

The court held that a party may raise a defence of time bar, arising from the contract of insurance, by way of a special plea. A party does not need to raise a time bar clause on the merits and deal with at trial along with the other defences on the merits.

The court distinguished a time bar clause from prescription, stating that time bar clauses provide "an absolute defence extinguishing the right to claim on a time passage basis" whereas prescription is a statutory defence that can be interrupted or suspended.

The time bar clause was upheld, and the insured's claim was dismissed.

Bricks And Blocks Moulders (Pty) Ltd v Commercial Motors (Pty) Ltd and Another

(CVHLB-001890-09) [2011] BWHC 60 (February 8, 2011)

Keywords: prescription

The plaintiff bought a truck and trailer and insured them with the defendant insurer. A month later, the vehicle was involved in an accident and was damaged. The vehicle was sent to a garage for repairs, but the plaintiff was not satisfied with the repairs. After additional attempts to remedy the damage and further defects being identified, the plaintiff did not collect the vehicle. The vehicle remained at the garage from May 2006 until the launch of proceedings in November 2009.

The plaintiff claimed the cost of repairs, the replacement value of the truck, and loss of business caused by the non-use of the truck, from its insurer.

The court partially upheld the insurer's special plea of prescription. At the latest, the cause of action arose when the plaintiff became aware of the failure to properly repair the truck in May 2006.

The plaintiff sued the insurer for contractual damages, but the policy did not provide for the replacement value of the truck to be claimed if the repair costs had not been paid. There was also no claim that the vehicle had been damaged beyond repair.

The limited portion of the insured's claim that properly related to contractual damages falling within the insurance policy was allowed to proceed, as the period of prescription is six years for contracts in Botswana.

Ketshabile v Botswana Insurance Company Ltd

(CVHLB-002466-06) [2010] BWHC (September 24, 2010)

Keywords: time bar clause

The judgment was limited to a special plea by the insurer that the insured's claim under a motor policy was time-barred by late service of the summons.

The insured had to serve summons within 90 days of repudiation of the claim.

The defendant argued that the time bar clause was unconstitutional, since it stifled the right of access to court, and should therefore be struck out of the policy, leaving the merits to be determined. The plaintiff noted that the right of access to courts is properly limited in Botswana's Prescription Act, which allows six years before actions arising out of contract prescribe.

The court cited the South African Constitutional Court judgment of *Barkhuizen v Napier* (2007), which dealt with a very similar time bar clause. That court held that in the absence of evidence of oppression or other impropriety in the conclusion of the contract, the clause is constitutional and enforceable. The clause did not seek to exclude the court's jurisdiction and it is reasonable for an insurance company to require timeous adjudication of claims made against it.

The plaintiff could not rely on the Prescription Act because the six-year period is given to enforce rights under a contract according to its own terms, including any time bar.

The insurer's defence therefore succeeded, and the time bar clause was enforced.

Donald Dinnie
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