

SOUTH AFRICA / JUDGMENT

Le Bonheur Wine Estate (Pty) Ltd v Stellenbosch Vineyards (Pty) Ltd (17111/2021) [2025] ZAWCHC 260 (20 June 2025)

[2025] ZAWCHC 260

COURT

Western Cape High Court, Cape Town

BEFORE

Moosa

CASE / FILE NUMBER

17111/2021

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FLYNOTES:

INSURANCE

– Fire loss – Subrogation –

Substitution

notice – Subrogation does not transfer substantive or procedural rights from insured to insurer –

Grants insurer a

right of reimbursement – Formal plaintiff retained

procedural rights – Included authority to

appoint and

dismiss attorneys – Retained right to terminate mandate and

appoint new legal representation – Rendered

substitution

notice valid – Insurer's financial interest warranted

joinder to protect subrogation claim –

Application

dismissed.

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Reportable

CASE

NO: 17111/2021

In

the matter between:-

LE
BONHEUR WINE ESTATE (PTY) LTD
PLAINTIFF
and
STELLENBOSCH
VINEYARDS (PTY) LTD
DEFENDANT
STEPHANUS
JACOBUS NEETHLING
FIRST THIRD PARTY
FANIE
NEETHLING BEDRYSINGINEUR
SECOND THIRD PARTY

Coram: MOOSA AJ

Heard: 2, 4 JUNE 2025

Delivered: 20 JUNE 2025 (delivered electronically
to the parties)

Summary: Insurance law – disclosure
of subrogated claims –
subrogation as a separate cause of action – meaning and effect
of insurer stepping into the
shoes of an indemnified insured –
nature and extent of the transfer of rights from an indemnified
insured to an insurer –
effect of insurer electing to litigate
in an insured's name – indemnified insured terminating
the mandate of attorneys
acting for the subrogated insurer's
benefit – insurer disputing the validity of the termination –
rule 16 interpreted
and rule 30 discussed
ORDER

1.

The application by Hollard Insurance Company Ltd (Hollard) is
dismissed with costs, such costs for Plaintiff's counsel shall
be on tariff Scale C.

2.

Hollard is, with immediate effect, joined as a co-Plaintiff
to the
main action. Hollard will be the 'Second Plaintiff' and
Le Bonheur Wine Estate the 'First Plaintiff'.

3.

Hollard is granted 30 court days from date of this order to
file a
notice to amend the Combined Summons and Particulars of Claim in all
necessary respects.

4.

Before the lapse of the period referred to in (3) above and
pending

the effecting of the amendments envisaged in (3) if notice thereof is given, the main action may not be withdrawn by La Bonheur or anyone acting on its behalf, nor may the defendant's dismissal application and the trial in the main action be enrolled for hearing.

JUDGMENT

Introduction

- [1] This judgment relates to an application by Hollard Insurance Co Ltd, registration no. 1952/003004/06, t/a Hollar Insure (Hollard) represented by Clyde & Co Inc (Clyde & Co). The application is against Le Bonheur Wine Estate (Pty) Ltd (Le Bonheur). The application raises significant legal questions regarding the inner workings of the doctrine of subrogation in indemnity insurance litigation.
- [2] The trial in the action (the main action) was scheduled to commence on 2 June 2025. On the eve of the trial, the defendant served a substantial urgent application. It comprised 129 pages. Within 24 hours, after opposing and replying papers were filed, the pleadings in the urgent application ballooned to more than 200 pages. The defendant, in its notice of motion, sought, inter alia, an order to dismiss the main action (the dismissal application). The petition indicated that the defendant intended to enrol the application for hearing immediately before the trial was scheduled to start on 2 June. Within half an hour of the court's scheduled commencement time, a last-minute development occurred. Werksmans Attorneys (Werksmans) delivered a notice indicating that it was the plaintiff's new attorneys of record (the substitution notice). Hollard and its attorneys, Clyde & Co, objected to this substitution of attorneys.
- [3] Attached to the substitution notice was a resolution signed by Le Bonheur's directors (the directors' resolution). Owing to its importance for what happened next in this matter, I quote its contents in full:

'RESOLUTION OF THE BOARD OF DIRECTORS OF LE BONHEUR (PTY) LTD

Adopted on 30 May 2025.

WHEREAS Le Bonheur (Pty) Ltd ("the Company") is a subsidiary of Advini South Africa (Pty) Ltd ("Advini SA") and is currently cited as the plaintiff in High Court case number 17111/2021 against Stellenbosch Vineyards (Pty) Ltd, the defendant,

("Stellenbosch Vineyards") also a subsidiary of Advini SA;

AND WHEREAS the Board of Directors of the Company is unanimously of the view that the claim against Stellenbosch Vineyards has no foundation in law, and that it should not have been instituted, and that it is contrary to the interests of the Company, Stellenbosch Vineyards, and the group and of the companies involved, and in conflict with the agreements concluded between the parties prior to the fire and currently applicable, and inconsistent with the governance and operational principles of Advini SA;

NOW THEREFORE IT IS RESOLVED THAT:

1. The legal proceedings instituted under case number 17111/2021 are not authorised or supported by the Company, and shall be immediately withdrawn.
2. Any power of attorney, mandate and/or instruction given to Clyde & Co Attorney y Hollard Insurance Company Limited (“Hollard”), purportedly on behalf of the Company, or any other legal representatives involved in such litigation as instructed by Hollard, is hereby revoked and terminated with immediate effect.
3. Ms Naretha Smit, in her capacity as a director of the Company, is hereby authorised and mandated to:

3.1 notify Clyde & Co of the Company’s decision recorded in paragraph 2 above;

3.2 appoint Werksmans Attorneys to represent the Company in the action going forward, and to instruct them to withdraw the action on the basis that each party shall bear its own costs;

3.3 do all things necessary to give effect to this resolution.

4. The Board of Directors further resolves that no future intra-group litigation shall be instituted without the prior written approval of the Board.’

[4] The directors’ resolution and the substitution notice set the proverbial ‘cat among the pigeons’. Needless to say, my court’s start time on 2 June was delayed as Le Bonheur’s legal team, Hollard’s legal team, the defendant’s legal team, and the third parties’ legal team assessed the situation and attempted to reach consensus on the way forward.

Unsurprisingly, that was a bridge too far for them. And so, amidst all this,

the case was finally called in open court.

- [5] At the start of proceedings, Mr Lamplough SC informed me that he appears for Hollard, acting on instructions from Clyde & Co. He informed me that Hollard’s position is that it is the ‘true plaintiff’ in the main action by virtue of subrogation, having fully indemnified Le Bonheur for its damages arising from an insurable event pursuant to the terms of an insurance contract. Mr Lamplough further informed me that Hollard challenges the validity of the termination of Clyde & Co’s mandate and the appointment of Werksmans by way of the substitution notice. A notice challenging the latter had, by then, been served on Werksmans in terms of rule

30. Mr Lamplough also informed me that Hollard opposes the dismissal

application. Thus, it sought the trial's postponement and a hearing of the dismissal application on the semi-urgent roll of this Division.

- [6] Mr de Beer then addressed me. He informed me that he acts for the plaintiff cited in the pleadings to the main action, namely, Le Bonheur, and that he is acting on the instructions of Werksmans. He further informed me that Le Bonheur terminated Clyde & Co's mandate to act in the main action in accordance with its rights in law, and that Werksmans was appointed in its stead. As a result of this, so he proceeded to say, neither Clyde & Co nor its appointed counsel, namely, Mr Lamplough, have any authority to appear in the main action any longer. Mr de Beer stated that Le Bonheur opposes the trial's postponement but does not oppose the dismissal application.
- [7] Mr Seale SC, (with A Walters) then addressed me. He confirmed that he acts for Stellenbosch Vineyards (Pty) Ltd (Stellenbosch Vineyards) who wishes to proceed with the dismissal application forthwith. He submitted that the postponement sought by Mr Lamplough would be costly for all parties and ought to be refused. Mr Tyler then placed himself on record and informed me that he had no further comments to make.
- [8] I expressed my concern to the above cast of advocates that a postponement of everything, as sought by Hollard, would not only be costly for all parties concerned but also uneconomical use of scarce judicial resources allocated to a trial scheduled to proceed over five days. I ruled that the dismissal application would proceed. I also encouraged Mr Lamplough and Mr de Beer to work together with a view to possibly enrolling the rule 30 application for hearing on any of the scheduled trial days.
- [9] The Court extends its gratitude to all the legal practitioners involved. By agreement, the hearing of the dismissal application and the rule 30 application were scheduled for 4 June. Court papers, including heads of argument, were filed by 3 June.
- [10] I express my thanks to all counsel for their detailed heads. Their submissions were helpful in its traversing of key questions arising from the doctrine of subrogation.
- [11] On 4 June, and by further agreement between the protagonists, the dismissal application and the trial were postponed sine die with all cost issues being reserved for later determination. Hence, this judgment only relates to Hollard's application.

Hollard's challenge to the substitution notice

- [12] Hollard is not cited as a litigant in the pleadings to the main action. Despite Mr de Beer's submission that Hollard lacks standing, I directed that its counsel is entitled to present Hollard's application for relief based on Hollard's contention that, as a matter of fact and law, it is the 'true plaintiff' in the main action (not Le Bonheur). As support for my position regarding the procedure and the relaxation of any relevant court rules in the interests of justice, I rely on the following instructive dicta from *Eke v Parsons* 2016 (3) SA 37 (CC):

[39] ... Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said “[i]t is trite that the rules exist for the courts, and not the courts for the rules”.

[40] Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to “secure the inexpensive and expeditious completion of litigation and ... to further the administration of justice”. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts’ judicial functions.’ (Footnotes omitted)

[13] In relevant part, Hollard’s notice of motion reads:

‘KINDLY TAKE NOTICE THAT the plaintiff intends to apply on Wednesday 4 June 2025 at 11h00, for the following order:

1 The notice of substitution as attorney of record filed by Werksmans Attorneys

on 2 June 2025, by means of which Werksmans Attorneys purport to substitute themselves for Clyde & Co as attorneys of record for the plaintiff, is set aside as irregular.

2 Additionally or alternatively to the order in 1 above, the notice of

substitution as attorney of record filed by Werksmans Attorneys on 2 June 2025, by means of which Werksmans Attorneys purport to

substitute themselves for Clyde & Co as attorney for the plaintiff, is declared to be legally ineffective and to have no juristic force or consequence.

3 It is declared that Clyde & Co is the appointed attorney of record for the plaintiff, and is entitled to prosecute the action under this case number on the instructions of and for the benefit of Hollard Insurance Company Limited in the name of the plaintiff.’

[14] Hollard seeks relief under rule 30, alternatively it seeks declaratory relief in its alleged capacity qua plaintiff suing in Le Bonheur’s name. In support of its application, Hollard relies, inter alia, on the facts pleaded in its answering affidavit in the dismissal application. Since Hollard’s petition was opposed by Le Bonheur on points of law only, no answering papers were filed. Therefore, the facts averred in Hollard’s affidavit used in support of its application are common cause as between it and Le Bonheur.

[15] Although Stellenbosch Vineyards had no direct interest in Hollard's application, Mr Seale sought my indulgence. He requested an opportunity to make submissions which he believed may be helpful to the Court. In keeping with the best traditions of the Bar and the collegial spirit in which the matter before me was argued, both Mr Lamplough and Mr de Beer had no objection to Mr Seale being indulged. As a result, Mr Seale made submissions which elicited a short reply from Mr Lamplough.

Issues

arising for adjudication

[16] The application by Hollard raises the following issues for

determination:

- (a) First, whether the substitution notice constitutes an irregular step under rule 30 and falls to be set aside in terms thereof;
 - (b) Secondly, and regardless of the outcome in (a), whether Le Bonheur is, in law, entitled to file the substitution notice under rule 16. This depends on whether Le Bonheur (or Hollard) is the plaintiff 'party' in the main action; and
 - (c) Thirdly, and only if the issue in (b) is decided in Le Bonheur's favour, then the issue arises whether any substitution of attorneys would be ineffective by virtue of the common law doctrine of subrogation. This issue requires a determination of whether that doctrine results in Hollard taking transfer of Le Bonheur's procedural rights in its claim against Stellenbosch Vineyards, thereby granting only Hollard (not Le Bonheur) the authority to appoint attorneys to act in the main action and to terminate their mandate to act.
- [17] Each of these issues is discussed below. To do so requires a narration of the salient common cause facts. These are distilled from Le Bonheur's summons in the main action and from Hollard's answering affidavit in the dismissal application.

Relevant facts for adjudication of Hollard's challenge to the substitution notice

[18] On or about 11 January 2017, a written warehousing storage and services agreement (the warehousing agreement) was concluded between Le Bonheur and Stellenbosch Vineyards. In accordance with that agreement, Le Bonheur took occupation of certain commercial premises owned by Stellenbosch Vineyards located at Welmoed Winery, R310 Lynedoch/ Baden Powell Drive in the district of Stellenbosch. On 23 October 2018, and while Le Bonheur's goods were being stored at these premises for reward, a fire broke out which caused Le Bonheur to suffer a loss of its inventory. The value of its losses caused by, and/or associated with, the fire was quantified to be R12 643 936,05. These damages form the subject of the lawsuit in the main action against Stellenbosch Vineyards.

[19] At all material times to the fire occurring at the defendant's warehouse, a contract of insurance existed between Le Bonheur and Hollard with policy no. S[...] (the insurance policy). Pursuant to its loss of inventory in the fire, which loss was covered by the insurance policy, Le Bonheur lodged an insurance claim with reference S[...]2. Hollard indemnified Le Bonheur fully for its losses.

[20] In 2020, Clyde & Co were appointed by Hollard for purposes of investigating the merits of a claim against the third-party wrongdoer. To that end, on 20 October 2020, Clyde & Co sent an email to Le Bonheur requesting some information. These were provided by Le Bonheur. In that email, the following was written by Clyde & Co:

'We confirm that we act on behalf of your insurer, Hollard Insurance Company Ltd (our client) in considering a potential recovery in the names of L' Avenir Wine Estate and Le Bonheur Wine Estate (you) against Stellenbosch Vineyards (Pty) Ltd (Stellenbosch Vineyards) and/or Quality Bottling Services (QBS) in respect of a devastating fire that occurred at Stellenbosch Vineyards' premises on the morning of the 23 October 2018 (the fire).

You lodged claims with our client for losses under your respective insurance policy and our client, in terms of an agreement of loss, indemnified you in the amounts of R4 681 194.00 and R12 643 936.05 respectively.

Our client now seeks to recover these amounts from Stellenbosch Vineyards and/or QBS by virtue of the doctrine of subrogation. In an insurance context, an insurer who has indemnified an insured is entitled to claim, in the name of the insured (i.e. you), from the wrongdoer (i.e. Stellenbosch Vineyards or QBS) and in essence entails the insurer stepping into the shoes of the insured against the wrongdoer. ...' (Emphasis added)

[21] On 23 June 2021, and following the conclusion of its inquiry, Clyde & Co issued a letter of demand to Stellenbosch Vineyards demanding payment of R12 643 936,05 to 'compensate our client for its loss'. The letter of demand informed the addressee in paragraph 1 that Clyde & Co 'act for Le Bonheur Wine Estate (Pty) Ltd (our client)'. Paragraph 12 read: 'Our client holds you liable for the loss it sustained.' The final paragraph read: 'Our client's rights are reserved.' Accordingly, I find that, at that time, Clyde & Co acted for two principals with aligned interests: Hollard and Le Bonheur.

[22] I pause to mention that, despite paragraph 16 of the letter of demand calling upon Stellenbosch Vineyards to forward the letter to its insurers 'if you are insured', the letter of demand (and the subsequent summons) made no mention of the following: (i) Le Bonheur was insured for the losses suffered; (ii) Le Bonheur had been indemnified by its insurer; (iii) Le Bonheur's claim was subrogated in favour of its insurer; and (iv) the insurer of Le Bonheur is seeking a reimbursement pursuant to its right of subrogation and that the claim against Stellenbosch Vineyards is being pursued in Le Bonheur's name as the insured. I revert later to the non-disclosure aspect when discussing how this practice is inconsistent with the constitutional

value of openness and ‘the requirement of transparency that underlies all litigation’ (Rand Mutual Assurance Co (Pty) Ltd v RAF [2008] ZASCA 114; 2008 (6) SA 511 (SCA) para 23). In my view, the practice of non-disclosure of the foregoing material facts ought not to be tolerated.

[23] Pursuant to Stellenbosch Vineyards’ failure to comply with the demand, an action was launched as foreshadowed in Le Bonheur’s letter of demand. Its citation in the particulars of claim (the POC), which follows the citation in the summons, reads:

‘The Plaintiff is LE BONHEUR WINE ESTATE (PTY) LTD, a company incorporated in accordance with the laws of South Africa, with registration number 2016/320022/07 and having its registered address and principal place of business at L’ Avenir Wine Estate, R44 Klapmuts Road, Stellenbosch, Western Cape.’

[24] As with the letter of demand, the POC makes no reference to the insurance policy, nor to the compensation paid to Le Bonheur, nor to the fact that the claim is subrogated and being pursued by Hollard in the cited plaintiff’s name. Instead, after pleading its causes of action, Le Bonheur (not Hollard) alleges and claims:

‘10. The defendant is liable to pay the plaintiff the value of the said wine in an amount of R12 452 637.00. ...

14. In the premises the defendant is liable to pay the plaintiff the amount of these additional costs as damages.
15. The defendant’s total liability to the plaintiff is for payment of R12 643 936.05.
16. Despite demand made on 23 June 2021, the defendant has failed and/or refused to pay the sum of R12 643 936.05 to the plaintiff. ...

WHEREFORE the plaintiff claims:

1. Judgment against the defendant for payment of R12 643 936.05. ...’

(Emphasis added)

[25] The summons and the POC is signed by Clyde & Co in its capacity as ‘Attorneys for the Plaintiff’. Accordingly, ex facie the summons and the POC, Clyde & Co represented to this Court and its Registrar, and to the defendant (and the public at large) that it is Le Bonheur’s attorney and sues on its behalf and for its benefit. All other notices filed by Clyde & Co in the main action is to the same legal and factual effect.

[26] The first time that Clyde & Co referenced the subrogation and that it acts on instructions of Hollard is in the notice delivered under rule 30(2)(b) dated 2 June 2025 in response to the substitution notice. The relevant part of the rule 30(2) notice reads:

‘BE PLEASED TO TAKE NOTICE THAT the notice of substitution, served via email on Monday 2 June 2025 at 09:16 by Werksman Attorneys, constitutes an irregular step by reason of the plaintiff, being represented by Clyde & Co on instructions of Hollard Insurance Company Limited, consequent on the principle of subrogation, as contractually entitled to in the relevant insurance policy and common law.

Such purported substitution is impermissible and irregular, which this Honourable court should set aside.’ (Emphasis added)

[27] Hollard’s reliance on the principle of subrogation was then amplified in its notice of application filed in support of the application before me (i.e., the rule 30 irregular step application, alternatively for declaratory relief). The relevant part of Hollard’s notice reads:

‘TAKE NOTICE THAT the plaintiff will rely, in support of the application, on:

- i. The fact that The Hollard Insurance Company Limited, the insurer of Le Bonheur, has indemnified Le Bonheur for the loss described in the particulars of claim in this action;
- ii. The fact that Hollard has not authorised Werksmans Attorneys to file the notice of substitution as attorneys of record dated 2 June 2025 and does not authorise Werksmans to represent the plaintiff or to prosecute the further conduct of the action;
- iii. The fact that The Hollard Insurance Company Limited has authorised,

and continues to authorise, Clyde & Co to prosecute the action under this case number in the name of Le Bonheur for the benefit of The Hollard Insurance Company Limited; ...’

[28] It is common cause that the claim of Le Bonheur against Stellenbosch Vineyards for damages suffered by the former as a result of the fire is capable of being subrogated in terms of the insurance policy. The rule 30(2)(b) notice quoted above in paragraph [26] records that Hollard seeks a setting aside of the substitution notice by virtue of its rights flowing ex lege pursuant to the operation of the principle of subrogation as it is ‘contractually entitled to’. This is a reference to general condition no. 9 in the insurance policy. That clause is headed ‘COMPANY’S RIGHTS AFTER AN

EVENT’. In this context, ‘Company’ means Hollard. The clause in question reads:

‘(a) On the happening of any event in respect of which a claim is or may be made under this Policy, the Company and every person authorised by them may, without thereby incurring any liability and without diminishing the right of the Company to rely upon any conditions of this Policy

(i) ...

(ii) take over and conduct in the name of the Insured the defence or settlement of any claim and prosecute in the name of the Insured for their own benefit any claim for indemnity or damages or otherwise and

shall have full discretion in the conduct of any proceedings and in the settlement of any claim. No admission, statement, offer, promise, payment or indemnity shall be made by the Insured without the written consent of the Company.

- (b) The Insured shall, at the expense of the Company, do and permit to be done all such things as may be necessary or reasonably required by the Company for the purpose of enforcing any rights to which the Company shall be, or would become, subrogated upon indemnification of the Insured whether such things shall be required before or after such indemnification...' (Emphasis added)

[29] As is evident from the grounds averred in support of Hollard's application, it is launched as a response to the substitution notice delivered by Werksmans. That notice was merely an implementation of the directors' resolution quoted above in paragraph [3]. The latter development requires some context. In recent years, Le Bonheur and Stellenbosch Vineyards became wholly owned subsidiaries of Advini South Africa (Pty) Ltd. As a result, Le Bonheur and Stellenbosch Vineyards share common directors, as well as share common commercial interests and objectives.

[30] The directors' resolution reveals that the main action between sister companies is viewed as being detrimental to the group's best interest. Therefore, Le Bonheur's directors resolved to end the main action. Acting on Hollard's instructions, Clyde & Co refused to comply with Le Bonheur's instructions, despite being the latter's attorney and agent. Hence, its mandate was revoked. Werksmans was appointed so that Le Bonheur could control the

levers of the litigation and withdraw the main action. Nothing precludes Hollard from pursuing its subrogated claim through any

other way permitted by law. Therefore, Hollard is not without remedy if the substitution notice is held to be valid. At the hearing, Mr Lamplough accepted this as the correct legal position.

Issue 1: Is the substitution notice an irregular step under rule 30?

[31] Rule 30(3) empowers a high court to set aside a 'proceeding or step' which, in the court's opinion, is 'irregular or improper'. It is trite law that rule 30 may only be invoked when a complaint relates to an irregularity in the form of a proceeding or step taken, rather than in relation to a matter of substance. See *Singh v Vorkel* 1947 (3) SA 400 (C) at 406; *Odendaal v De Jager* 1961 (4) SA 307 (O) at 310F-G.

[32] For the reasons that follow, I find that Hollard's complaint regarding the substitution notice served pursuant to rule 16 fails to meet the threshold requirements for a legally effective invocation of rule 30.

[33] A notice appointing a new firm of attorneys could potentially be the focus of a rule 30 complaint. Such a notice advances an action and, as this case shows, may bring the action one step closer to finality. See *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) SA 150 (O) at 152E; *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W) at 153C.

Undoubtedly, the substitution of Clyde & Co with Werksmans will lead to the main action being withdrawn - this is expressly resolved in the directors' resolution. Werksmans has been appointed to ensure that a notice of withdrawal of the main action is delivered.

[34] Hollard's complaint is not that the substitution notice is defective in form or content. Rather, the grounds of its complaint traversed in its rule 30(2)(b) notice (see above in paragraph [26]) is that the substitution notice constitutes an irregular step as it allegedly infringes upon Hollard's rights 'consequent on the principle of subrogation, as contractually entitled to in the relevant insurance policy and common law'. Put differently, Hollard's complaint is that the substitution notice violates its right to mandate the attorney of its choice to prosecute its subrogated claim against Stellenbosch Vineyards.

[35] Quite evidently, Hollard's complaint does not fall within the purview of rule 30. Consequently, the relief it seeks in terms of rule 30 is unsustainable and is refused.

Issue 2: Is Le Bonheur or Hollard the plaintiff 'party' in the main action?

[36] This question holds significance as it will determine whether Le Bonheur was entitled to cancel Clyde & Co's mandate in the main action, subsequently leading to Werksmans delivering the substitution notice pursuant to rule 16(2).

[37] Mr Lamplough advanced the core thesis underpinning his argument as follows: He submitted that it matters not an iota that Hollard's name does not appear anywhere in the pleadings, or on any of the notices filed pursuant to the rules of court. He submitted that, by virtue of subrogation, Hollard is the real plaintiff ex lege, regardless of how the plaintiff is described in the combined summons and the POC, and regardless that Hollard's name is wholly absent from the pleadings. He argued that Hollard's details must be read into all court documents by necessary implication.

[38] This is a novel perspective. I engaged Mr Lamplough on the implications of Hollard being recognised as the 'plaintiff' despite not being joined as a 'party'. I enquired whether this extends to a court order in Le Bonheur's favour. In other words, assuming judgment is granted in favour of Le Bonheur as the cited plaintiff, and the trial court directs the defendant to pay La Bonheur the amount claimed, then would the court order be a judgment in favour of Hollard, even though its name would not appear anywhere in the court's order as judgment creditor? Mr Lamplough's

answer is 'yes'. He submitted that this is how subrogated claims work when an insurer steps into the shoes of an indemnified

insured. He argued that the usual rules applicable to interpreting court orders (see *Eke v Parsons supra*) do not preclude such an interpretive result. I disagree. I can find no legal basis for this, and none were cited by Mr Lamplough either. This is unsurprising in view of the trite legal position regulating the interpretation of documents, such as, pleadings, notices, and court orders.

[39] Mr Lamplough's aforementioned argument is to the effect that the legal consequences flowing from Le Bonheur's claim being subrogated are, to some extent, interwoven with the basis for the submission that Le Bonheur lacks the right to terminate Clyde & Co's mandate. Consequently, his argument also implies that Le Bonheur does not possess the procedural right under rule 16(2) to issue a notice of substitution in favour of Werksmans. I now proceed to deal with this issue.

[40] Under the next heading, I focus on the issue of whether a transfer of procedural rights ensues when subrogation occurs. In the present context, I deal only with those aspects of Mr Lamplough's submissions which are germane to the application of rule 16(2) and a determination of whether the cancellation of Clyde & Co's mandate, along with the subsequent filing of the substitution notice, is valid and legally effective.

[41] This necessitates a discussion of rules 16(1) and (2), and their application to the facts of this case. For present purposes, the relevant extracts of rule 16 reads:

'(1) If an attorney acts on behalf of any party in any proceedings, such attorney shall notify all other parties of this fact and shall supply an address where documents in the proceedings may be served.

(2)(a) Any party represented by an attorney in any proceedings may at any time, subject to the provisions of rule 40, terminate such attorney's authority to act, and may thereafter act in person or appoint another attorney to act in the proceedings, whereupon such party or the newly appointed attorney on behalf of such party shall forthwith give notice to the registrar and to all other parties of the termination of the former attorney's authority, and if such party has appointed a further attorney to act in the proceedings, such party or the newly appointed attorney on behalf of such party shall give the name and address of the attorney so appointed. ...' (Emphasis added)

[42] Mr de Beer argues that rule 16(1) and (2) applies to a litigant who is cited as a 'party' in the pleadings. He contends that, based on the facts of this matter, rule 16(1) and (2) apply to Le Bonheur (not Hollard). Mr Lamplough, on the other hand, contends that, in the context of insurance litigation involving subrogation, the concept of 'party' in rules 16(1) and (2) encompass an insurer (i.e., Hollard) who sues in an indemnified insured's name (i.e., Le Bonheur) because, in the eyes of the law, the former steps into the shoes of the latter. Resolving this dispute requires an interpretation of the term 'party' as it appears in rule 16(2).

[43] There is scant case law reported on rule 16(2). Neither I nor any of the parties' counsel were able to find any precedent which is on all fours with the facts and circumstances in casu. The issues arising here are novel and are significant in the area of indemnity insurance litigation which occur daily in courts nationally. This situation necessitates judicial scrutiny of the relevant law and its practical implications.

- [44] As a point of departure, the legal status of the Uniform Rules require recital. They are framed by the Rules Board for Courts of Law pursuant to powers granted by Parliament in the Rules Board for Courts of Law Act 107 of 1985. The Uniform Rules, along with any amendment thereto, have the force of law by promulgation through publication in the Government Gazette. This occurs after the rules are approved by the relevant Cabinet Minister for Justice. As such, the Uniform Rules (like all other rules of court) constitute delegated legislation - they are subordinate legislation with statutory force. See *Computer Brilliance CC v Swanepoel* 2005
- (4) SA 433 (T) at 442.
- [45] Section 8(1) of the Interpretation Act 33 of 1957 (Interpretation Act) states that the rules of court regulate the 'practice and procedure of that court' to which the rules relate. In *CT v MT and Others* 2020 (3) SA 409 (WCC) para 19, Rogers J affirmed that 'rules of court ... do not lay down substantive law'. They confer procedural rights only. See *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) para 31.
- [46] Corbett JA, in *Universal City Studios Inc and Others v Network Video (Pty) Ltd* [1986] ZASCA 3; 1986 (2) SA 734 (A) at 754H-I remarked that 'the dividing line between substantive and adjectival law is not always an easy one to draw'. Corbett JA then embraced the following distinction composed by Salmond in *Jurisprudence* 11th ed at 504:
- 'Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.'
- [47] Since the Uniform Rules form part of procedural (i.e., adjectival) law, none of its provisions can be interpreted as conferring on Hollard a substantive right to claim payment from Stellenbosch Vineyards. Moreover, nor can any court rule be interpreted as conferring a right on Hollard to be recognised as a litigant who stands in Le Bonheur's legal shoes; nor can any court rule be interpreted in a way that confers a claim or entitlement to Hollard for damages awarded to Le Bonheur in any court order. See *Fair v SA Eagle Insurance Co Ltd* 1995 (4) SA 96 (E) at 99.
- [48] When interpreting court rules, the process and the legal principles which apply are the same as that used when legislation are generally construed. Interpretation is an objective exercise in a unitary process. In other words, it does not occur in stages. Interpretation entails a cohesive analysis of a text, having regard to its language and context (both internal and external context), and its purpose viewed within its specific contextual environment and surrounds. Court rules are also to be interpreted through the prism of the Constitution and its values. See *Social Justice Coalition and Others v Minister of Police and Others* 2022 (10) BCLR 1267 (CC) paras 51 - 65.

- [49] The term ‘party’ is used multiple times in rules 16(1) and (2). Rule 1 provides definitions for terms used in the Uniform Rules. The meanings assigned in rule 1 apply whenever any term defined therein is used in a court rule, ‘unless the context otherwise indicates’. Rule 1 provides that “‘party’ or any reference to a plaintiff or other litigant in terms, includes such party’s attorney with or without an advocate, as the context may require’. This definition applies to the term ‘party’ in the context of rules 16(1) and (2).
- [50] The heading of rule 16 is ‘Representation of parties’. The heading is a legitimate aide in the interpretation of a court rule. See *Standard Bank of South Africa Ltd v Friedman* 2024
- (3) SA 171 (WCC) para 44 (and the authorities cited at footnote 15). Quite evidently from its heading and the contents of its body, rules 16(1) and (2) deal with the representation of litigants in ‘any proceeding’ before a high court. In other words, their provisions are designed to regulate the representation of persons involved in an action or application as plaintiff/applicant or as defendant/respondent.
- [51] Rule 16 functions within the broader scheme of the Uniform Rules. Under rules 18(1) and 17(3)(a), if a ‘party’ sues and is represented by an attorney when the summons is issued, the summons must be signed by the litigating party or its attorney. Consistent with the letter of demand which had indicated that Clyde & Co acts for Le Bonheur, Clyde & Co signed the summons and the POC in its capacity as the attorneys acting for Le Bonheur as plaintiff. Clyde & Co did not sign this pleading for Hollard.
- [52] In terms of rule 7, an attorney can only act for a ‘party’ who is properly before court if the attorney is duly authorised to act by virtue of a valid power of attorney in its favour. Although rule 7(1) does not make it obligatory for the power of attorney to be filed at court, the document must nevertheless exist because a cited defendant may, within prescribed time limits, call on the attorney to prove his/her authority to act.
- [53] Rule 7 read with rule 16(2) make it plain that a firm of attorneys (such as, Clyde & Co for Le Bonheur) must have a mandate from the cited plaintiff in order to continue to act while the proceedings are ongoing. If not, then the attorney must cease to act.
- [54] An attorney’s mandate may be terminated at any time. See *Pugin v Pugin* 1963 (1) SA 791 (W) at 793F. This is consistent with the common law position - an agent’s authority to act for a principal may be terminated (revoked) by the latter whenever a principal deems it fit to do so. When that eventuality materialises, then an attorney, acting as agent of his/her client as principal is, by operation of law, no longer empowered to carry out any function(s) ordinarily performed by an attorney with authority. This includes, but is not limited to, an attorney not being entitled to accept service of process in the pending litigation, nor to appear in court on behalf of a client who has cancelled the attorney’s authority to act. See *Pugin* supra at 794A - 795F.

- [55] The importance of an attorney having an authority to act cannot be overstated. The question of authority has been litigated repeatedly, especially regarding the power of an attorney to validly settle or compromise a lawsuit. See, for e.g., MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another 2010 (4) SA 122 (SCA); and Cloete v Van Zyl (3384/2017) [2024] ZAECKMHC 48 (2 May 2024).
- [56] This is pertinent in casu because the directors' resolution expressly authorise Werksmans to withdraw the main action where Le Bonheur is the cited 'plaintiff', provided the withdrawal occurs 'on the basis that each party shall bear its own costs'. To give effect to this intention will involve negotiations between the attorneys for Le Bonheur and Stellenbosch Vineyards. That, in turn, requires a valid mandate to settle the case on the basis indicated. Clyde & Co does not have such a mandate.
- [57] It is undisputed that Le Bonheur greenlighted the main action. However, it has withdrawn its consent to litigate and revoked Clyde & Co's authority to continue acting on its behalf. Usually, this would be the end of the matter. But Hollard rejects this.
- [58] Hollard's counsel argues that, under the rules of court properly interpreted, Hollard is the 'true plaintiff' in the main action. For the further reasons enumerated in the succeeding paragraphs (i.e., over and above those discussed above), I disagree.
- [59] In terms of rule 17(1), '[e]very person making a claim against any other person may ... sue out a summons or a combined summons'. In this context, the term 'person' bears its broad meaning as defined in s 2 of the Interpretation Act. That definition includes within its ambit the following categories of juristic entities:
- '(b) any company incorporated or registered as such under any law;
 - (c) any body of persons, corporate or unincorporate'.
- [60] Rule 18(2) provides that in an action proceeding, the 'party' suing and the 'party' being sued must be 'described' in the summons or combined summons (as the case may be). Rule 18(10) states that '[a] plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof'.
- [61] An application of the provisions in rules 17 and 18 when properly interpreted leads me to the ineluctable conclusion that the 'party' suing Stellenbosch Vineyards for damages is the private company 'described' in the combined summons and the POC as the plaintiff, namely, Le Bonheur. See above in paragraphs [23] and [24].
- [62] Rule 15 prescribes a procedure by which the identity of a litigating 'party' before court may be altered owing to a material change in his/her/its legal status (such as, through death or insolvency or liquidation; or a minor reaching the age of majority who wishes to substitute a guardian that, in terms of a recognised rule of procedure, sued in the guardian's name for the benefit of a disclosed (i.e., named) minor child).

[63] There is no rule of procedure which allows one registered company (i.e., Hollard) to sue a defendant (i.e., Stellenbosch Vineyards) for damages in the name of another registered company (i.e., Le Bonheur). The absence of such a procedural rule is consistent with the principle that, under our law, every registered company possess its own corporate identity and separate juristic personality. See *Ex parte Gore NO and Others NNO* (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in

liquidation) and its subsidiaries) [2013] 2 All SA 437 (WCC).

[64] In *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA) para 24, Mabindla-Boqwana JA reaffirmed the long-standing principles that a ‘company’s legal persona cannot be ignored at the choosing of a party’. She held that ‘the separate personality is “no mere technicality”. It is foundational to company law. A party cannot simply disregard the ‘corporate veil’; it must be permitted by law to do so.’ These principles are apposite in the present context as well – they reinforce my view that Hollard cannot, without more, plant itself into the main action as plaintiff and, effectively, supplant Le Bonheur. Hollard must follow the rules of court.

[65] The something ‘more’ envisaged in the preceding paragraph entails Hollard making use of the relevant court procedure to join issue with the defendant. By virtue of the doctrine of subrogation, Hollard has an interest in the outcome of the main action. If it wishes to protect that interest as a litigant with procedural rights, it must formally become a ‘party’ in its own name pursuant to, for e.g., rule 10 (joinder of parties and causes of

action), or rule 12 (intervention as plaintiff). What Hollard may not do is to litigate in the shadows and then, when things go awry, emerge and stand in the light, then proclaim itself to be the ‘true plaintiff’ with procedural rights under the rules of court. Those rights are reserved for a ‘party’ properly before court who is joined in the pleadings as a litigant (i.e, ‘party’). Hollard is not a ‘party’ as statutorily defined.

[66] Our law permits insurers (and other well-resourced third parties), to fund litigation for the benefit of a litigating party. The phenomenon of funded litigation is increasing. Often, funders control the levers of litigation. What is not allowed under our court rules is for an insurer (or other third-party funder) who litigates in the name of someone else to assert that he/she/it is the true ‘party’ before court and is entitled to the suite of procedural rights reserved for litigants cited in the pleadings. The fact that an insurer (or other third party) is funding the litigation; and/or is allowed to select the lawyers appointed to deal with the case; and/or has a financial interest in the successful prosecution of the litigation (whether due to subrogation or on some other basis), is of no moment under our court rules. Hollard seeks to ignore all this.

[67] On its own version, Hollard has been litigating anonymously in this Court. When consideration is given to the contents of rules 10, 12, 15, 17, and 18, it becomes evident that the Uniform Rules do not permit anyone to litigate anonymously. Put differently, a ‘party’ (as defined) is a litigant described in the pleadings and who litigates openly and transparently

before a court. Litigating in the long shadow of another is antithetical to our constitutional values which must infuse litigation. This is underscored in *Arendsnies Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) para 19 as follows:

‘With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing. ... And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice ... Considerations of justice and fairness are of prime importance in the interpretation of procedural rules.’ (Authorities omitted)

[68] Our courts permit insurers to pursue subrogated claims in an insured’s name as if they were the insured, despite this being described as ‘a less than desirable practice’ and fraught with ‘anomalies’. See *Rand Mutual Assurance Co supra* paras 23 - 24. This does not imply that insurers have a license to sue anonymously. Doing so is contrary to the spirit and, as discussed above, the letter of our court rules. Mr Lamplough submitted that *Goodwin Stable Trust v Duohehex (Pty) Ltd* 1998 (4) SA 606 (C) and *Smith v Banjo* 2011 (2) SA 518 (KZP) are authority for the proposition that Hollard can litigate anonymously. He argued that these cases affirm that there is no duty on Hollard to disclose the fact of subrogation. For the ensuing reasons, I disagree.

[69] *Goodwin Stable Trust supra* serves as clear authority that insurers who litigate in an insured’s name without disclosing the existence of subrogation imperils the integrity of the lawsuit. The consequences of non-disclosure, with which I align myself, was explained by Selikowitz J as follows, albeit in the context of arbitration (at 624):

‘Litigation in the name of another without disclosure of that fact whether it arises by agency or otherwise raises the spectre of champerty. ... Natural justice and in particular the idea of fairness requires that such a party should know precisely against whom the arbitration is being conducted. Many decisions in regard to both litigation and arbitration, including whether to proceed or not as also whether to compromise and settle are made in the light of the identity of the opposing parties and their relationships to one another. Their existing and possible future relationships through circumstances such as a continuing or potential business relationship are just some of the factors which may influence their actions. The known ability of an opposing party to perform in terms of an award is also a factor which determines the conduct of proceedings, which

in turn involves the expenditure of moneys.’ (Emphasis added)

[70] Contrary to Mr Lamplough’s contention, *Smith v Banjo supra* also does not assist Hollard. In that case, Patel DJP (et Nkosi AJ concurring) held:

‘The involvement of the insurer in a lawsuit is irrelevant and therefore it is not necessary to plead such involvement. ... I agree with the plaintiff’s submission that from a practical perspective the insurer’s involvement in the suit is irrelevant. For this reason it is clearly not necessary for the plaintiff to plead the insurer’s involvement in the suit.’ (para 12)

[71] In this extract, Patel DJP merely states that ‘the involvement’ of an insurer in a lawsuit need not be pleaded. In the context of the extract read as a whole, the court held that it is not necessary to plead the practical aspects of an insurer funded lawsuit, (such as, the fact that an insurer pays the legal costs; or that the insurer

has appointed an attorney). This decision does not imply that disclosures of the kind envisaged in Goodwin Stable Trust *supra* at 624 and in *Nkosi v Mbatha* (AR20/10) [2010] ZAKZPHC 38 (6 July 2010) para 18 (see below in paragraph [75]) ‘is irrelevant’. Moreover, disclosure promotes adherence to constitutional grundnorms (basic norms) during judicial proceedings involving the recovery of subrogated insurance claims.

[72] Patel DJP’s quoted statement at para 12 is, at best, obiter. This is because the dispute in the appeal was resolved without the court needing to engage the issue of subrogation. This is clear from the following extract:

‘It is in my view unnecessary to consider the question as to whether or not the present matter involves a subrogated claim. Subrogation is at best a collateral fact which is not capable of affording any reasonable presumption or inference as to the principal matter in dispute.’ (para 10)

[73] To the extent that Patel DJP’s statement in para 12 aligns with Mr Lamplough’s contention, which I do not consider to be the position, then I am constrained not to follow it. I consider it to be incorrect. The contrary view articulated in Goodwin Stable Trust *supra* and *Nkosi v Mbatha supra* is, in my view, the correct one. To the extent that the latter judgment holds (at para

18) that subrogation must be proved when an insurer sues in an insured’s name, I express no view thereon (this is a matter for the trial court to decide). I merely hold that when insurers pursue subrogated claims in an insured’s name as permitted by law, then disclosure of facts of the kind envisaged above in paragraphs

[22] and [24] ought to appear in the pleadings of the party suing.

[74] In my view, there is no justification in logic or law for exempting an insured and an insurer from the obligation to disclose the fact of indemnification and the presence of a subrogated insurance claim. Meanwhile, victims of motor vehicle accidents who pursue claims against the Road Accident Fund (RAF) are obliged to disclose to the RAF, during the litigation process, the fact that a medical insurance scheme indemnified the claimant for past medical expenses, which monies are sought to be recovered from the RAF for reimbursement to the insurer. See *Discovery Health (Pty) Ltd v RAF and Another* 2025 (3) SA 225 (GP). The promotion of equality among litigants suing for damages to reimburse insurers favour the

imposition of a similar duty on an indemnified insured and its insurer to disclose the existence of subrogation.

[75] Public policy also favours disclosure. Non-disclosure encourages a practice that promotes unfairness through secrecy in litigation, rather than frankness and transparency. To protect the integrity of an action proceeding requires that the pertinent facts identified above be disclosed. By courts not obliging disclosure gives judicial cover to litigants seeking to conceal the subrogation and avert potential defences to a claim based on subrogation. As was submitted by Mr Seale, defences may include the incurrance of double compensation to an insured owing to a prior liquidation or de-registration of an insurer. The dangers inherent in courts not obliging disclosure was exposed by Madondo J (et Mnguni J concurring) in *Nkosi v Mbatha* supra para 18:

‘In the request for further particulars the plaintiff was specifically asked whether her motor vehicle was at the time of the collision insured, and whether she had personally paid for the repairs. The plaintiff refused to answer the questions posed to her on the ground that the information requested was not required for pleading. In my view, the plaintiff had thereby misled the defendant as to the time and correct state of events and as to the nature of her claim.’ (Emphasis added)

[76] The SCA, in *Rand Mutual Assurance Co* supra para 19, discussed English law which compels insurers with subrogated claims to sue in an insured’s name. The SCA held that ‘[t]his requirement gives rise to a number of procedural anomalies’. The SCA then posed the question whether this requirement ‘is consonant with our constitutional values and our law of procedure’ (para 23). It answered ‘no’ for the following reasons:

‘To require a party to litigate in the name of another appears to me to fly in the face of the requirement of transparency that underlies all litigation. The rule serves no public interest in modern times, as appears from the position in the USA. It is formalistic and creates anomalies. It enables the insurer to litigate in the name of the insured without taking any risks as far as litigation costs are concerned. The

supposed advantage, namely that the insurance company may be able to retain its anonymity, is clearly not to the advantage of the wrongdoer and also probably not to that of the insured.’ (Authorities omitted) (Emphasis added)

[77] Harms ADP held that the practice of suing in an insured’s name is ‘less than desirable’ (para 24) – it is inconsistent with our normative value system. However, he held that this long-standing practice ought not be abolished by judicial fiat. This decision was taken in the interests of promoting legal certainty, a basic tenet of the rule of law entrenched as a foundational value in s 1(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Harms ADP wrote:

‘This court is reluctant to interfere with settled legal principles even when they have their origin in an incorrect interpretation of the law because members of the public may have arranged their affairs on the assumption that they were settled.’ (para 24)

[78] The kernel of the SCA’s decision on the procedural issue is encapsulated in the following extract:

‘Consequently, this judgment does not hold that the insurer must litigate in its own name and may not litigate in the name of the insured. What it does hold is that the English rule in its stark form cannot be justified and that, unless the wrongdoer will be prejudiced in a procedural sense, courts may permit the insurer to proceed in its own name. It might be necessary to adapt other procedural rules in such an event as requiring, by analogy with Uniform rule 35(5)(b), discovery by the insured.’ (para 24)

[79] Accordingly, Rand Mutual Assurance Co *supra* adopts the position in American and Continental law, namely, that an insurer can sue in its own name for recovery of monies under a subrogated claim. This is geared ‘to avoid confusion over the identity of the real plaintiff’ (para 19). However, unlike other legal systems, ours provides an insurer with an election: it can choose to sue in its own name; or it can litigate through the persona (i.e., identity) of its insured. In cases where the latter option is selected, the indemnified insured exists as a legal person with its own legal personality. That juridical fact cannot be ignored. In the lawsuit which is instituted, the insured (not the insurer) is the real plaintiff suing for judgment (as is the position of Le Bonheur and countless other insured whose identities are used in insurance related litigation).

[80] Mr Lamplough argued that the two options have the same effect in law. I find that logic dictates that when the SCA held that insurers may choose between different procedures to pursue the same subrogated claim, it must have envisaged that the legal consequences for each procedural regime would differ. If not, then why have two processes? For all these reasons (as amplified under the next heading), I find that when Hollard elected to litigate in Le Bonheur’s name, the former did not supplant the latter as litigant. Therefore, Le Bonheur’s procedural rights did not vest in Hollard.

[81] My conclusion that Hollard did not become a ‘party’ in the main action is buttressed by the decision in *Cloete v Van Zyl supra*. This case involved Hollard. Van Zyl was sued for R1 398 132.00 in damages suffered by Cloete’s property in a fire allegedly caused by Van Zyl. After Hollard repudiated Cloete’s claim, the latter sued Van Zyl. It was common cause that Hollard appointed an attorney, Mr Buchner, to defend Van Zyl and that Hollard paid his fees by virtue of the principle of subrogation.[1]

[82] Van Zyl, duly represented by Mr Buchner, concluded a settlement with Cloete on the merits (i.e., as to liability for the fire). Before receiving Hollard’s response, Mr Buchner informed Cloete’s attorney that Van Zyl accepted the settlement terms. Problems emerged when Hollard rejected the settlement.

- [83] When Hollard's refusal to agree to the settlement became known to Van Zyl, he sought to revoke the settlement. He realised that he would be personally liable for the quantum of damages, as he conceded the merits of Cloete's claim. Cloete refused to accept Van Zyl's purported cancellation of the settlement. Cloete then applied to court for an order confirming the settlement on the issue of merits. Cloete prevailed.
- [84] In the course of upholding the validity of the settlement and making it an order of court binding on Van Zyl (not Hollard), the high court held that 'Hollard Insurance is not a party to the proceedings, therefore, whether it later denied liability or repudiated the defendant's claim is irrelevant' (para 28). This was held to be the position, despite the application of the principle of subrogation in that case. The high court held further that Mr Buchner, who was appointed by Hollard, was duly authorized to act for Van Zyl in the litigation. This was based on the fact that Hollard was not a party to the litigation, despite Hollard paying the legal fees. The high court also held that when Mr Buchner communicated to Cloete's attorney that settlement had been reached with Van Zyl, Mr Buchner was duly authorized to act for Van Zyl and to bind him to the terms of settlement. For this reason, Hollard was free to reject settlement.
- [85] The guiding principles emerging from *Cloete v Van Zyl supra* affirm that the conclusions I reached are consistent with a proper interpretation of the relevant Uniform Rules and their application to the facts before me. A final hook used by Hollard to hang its challenge to the substitution notice filed by Werksmans is its contention that Le Bonheur cannot terminate Clyde & Co's mandate because Hollard appointed the law firm in the exercise of its common law rights under the principle of subrogation.
- [86] As will become evident from my discussion under the next heading, the principle of subrogation does not involve the transfer from, or surrender by, an insured to an insurer of the right to select and appoint an attorney who will conduct the litigation on behalf of the insured. That right remains vested with the insured in whose name the litigation is conducted. This legal position is accepted by Hollard in its standard terms and conditions of insurance. In accordance with *Rand Mutual Assurance Co Ltd supra* para 18, clause 9 of the insurance policy deals with subrogation. The source of Hollard's entitlement to participate in the selection and appointment of an attorney for the recovery of monies under its subrogated claim is found in clause 9(b) quoted above in paragraph [28].
- [87] In terms of clause 9(b), Le Bonheur is obliged to, 'at the expense of the Company [i.e., Hollard], do and permit to be done all such things as may be necessary or reasonably required by the Company for the purpose of enforcing any rights to which the Company shall be, or would become, subrogated upon indemnification of the Insured'. It goes without saying that this includes the appointment of an attorney.

- [88] Consequently, Clyde & Co's appointment occurred with Le Bonheur's consent, whether expressly or impliedly by conduct. That consent was necessary in law. By virtue of rule 7 (discussed earlier in this judgment), without Le Bonheur's consent as plaintiff, Clyde & Co could not lawfully institute the main action against the defendant.
- [89] In these circumstances, owing to Clyde & Co's refusal to carry out the instructions of Le Bonheur's directors, they acted lawfully by revoking Clyde & Co's authority to continue to act as agent on behalf of Le Bonheur in the main action conducted in its name. Indeed, I find that, owing to Clyde & Co's conflicted position by reason that it was serving two masters (or principals) whose interests were no longer aligned, it was prudent for Le Bonheur's directors to terminate Clyde & Co's mandate when they did. The situation was simply untenable.
- [90] For all these reasons, I conclude that the substitution notice delivered by Werksmans is valid and legally effective for all purposes arising under rule 16(2).

Issue 3: Does subrogation vest Hollard with Le Bonheur's rights?

- [91] I now deal with an alternative argument advanced by Mr Lamplough. He argued that even if Hollard is not a 'party' in the technical sense defined in the rules of court (as I held above), then that is not dispositive of the dispute. He argued that Hollard's position as the de facto and de jure plaintiff also arises from the common law of subrogation. He argued that once Hollard compensated Le Bonheur the R12,6m, Hollard stepped into the insured's shoes for all purposes in law as regards the subrogated claim. He argues that this implies the following: (i) At common law, Hollard does not have a claim against Le Bonheur but rather a claim against the wrongdoer. Le Bonheur's substantive right to be compensated is transferred, ex lege, to Hollard; (ii) At common law, this leads to all procedural rights to enforce the substantive right being vested in Hollard (not Le Bonheur); and (iii) The procedural rights include: (a) to appoint and to remove an attorney; and (b) to issue summons in Hollard's own name or in Le Bonheur's name (as recognised in *Rand Mutual Assurance Co supra*).
- [92] Flowing from this argument, I enquired of Mr. Lamplough regarding his perspective on Le Bonheur's legal status in the main action where it is described as the 'plaintiff'? His response was straightforward (yet drastic): He said that, in law, by reason that Le Bonheur was fully indemnified by Hollard, all Le Bonheur's erstwhile procedural rights vest in Hollard. Therefore, so his argument went, Le Bonheur has no rights of such a nature vested in it any longer. The use of its name in the main action is, so it was argued, a right enjoyed by Hollard by virtue of the decision in *Rand Mutual Assurance Co supra*. Mr Seale described these propositions as 'absurd'. He submitted that this argument would, if endorsed, lead to several anomalies. I agree.
- [93] When properly understood, Mr Lamplough's argument creates 'anomalies' of the kind envisioned by Harms ADP in *Rand Mutual Assurance Co supra* para 23. See above in paragraph [76]. Anomalies are to be averted. It cannot be that our common law of

subrogation relegates Le Bonheur (and other similarly positioned indemnified insured whose identities are used in litigation) to being a litigant in name only. Le Bonheur cannot hold mere spectator status in a lawsuit conducted in its name and through its legal identity with all the associated litigation risks (such as, exposure to an adverse cost order), but in which action Le Bonheur is helpless as a non-paying spectator imbued with no procedural rights as all these rights vest in Hollard. In my view, this is untenable as a matter of law - it breeds unfairness and fosters injustice during litigation.

- [94] Mr Lamplough's proposition referred to above in paragraph [92] erodes to nothingness the procedural rights of Le Bonheur as a plaintiff 'party' under the rules of court. Such a result cannot be countenanced because it is incongruous with the spirit and objects of the Uniform Rules which is, in turn, underpinned and informed by the contents of s 34 in the Constitution.[2] See Social Justice Coalition *supra* paras 48 - 52.
- [95] Le Bonheur asserts its procedural rights as a litigant in the main action. Le Bonheur calls on this Court to safeguard its position as a plaintiff (and, in effect, protect the position of all similarly placed indemnified insured whose identities are used daily in civil litigation for the recovery of subrogated insurance claims). For the reasons given above and amplified further below, I find that the arguments advanced for Hollard's benefit as regards the transfer of all procedural rights from Le Bonheur as the indemnified insured to Hollard when subrogation occurs, is unsustainable in law.
- [96] If our common law of subrogation has the effect of rendering hollow an insured's procedural rights in litigation, as envisioned by Mr Lamplough's argument, then that position was changed through legislation in the form of the rules of court. On the basis outlined above in paragraph [44], the Uniform Rules constitute subordinate legislation with statutory force. As legislation, they can alter the common law.
- [97] The rules of court confer procedural rights. See Social Justice Coalition *supra* para 55. For the reasons outlined in this judgment pertaining to issue no. 2, Le Bonheur qualifies as a 'party' within the meaning of that term in rule 16 and the Uniform Rules read as a whole. If the common law of subrogation took away the procedural litigation rights enjoyed by Le Bonheur as an indemnified insured in whose name and identity a civil litigation claim is pursued, then those procedural rights were restored by the Uniform Rules. It amended the common law position (assuming, for present purposes, that the position sketched by Mr Lamplough indeed prevails at common law). The amended position contemplated here would apply from the moment that the summons in the main action was issued and Le Bonheur became a plaintiff 'party' therein.

[98] The rights-based interpretation of the rules of court advanced here aligns with the value-based interpretive methodology which this Court is enjoined to promote by virtue of s 39(2) of the Constitution.[3] See Social Justice Coalition *supra* paras 65, 85. The Uniform Rules qualify as ‘legislation’ within its context. All rules of court are enactments having the force of law. Therefore, the court rules qualify as ‘law’ within the definition of this term in the Interpretation Act.[4]

[99] To sum up: The preceding discussion shows that, on a proper understanding of our prevailing jurisprudence, there is no transfer of rights at common law of the nature advocated for the benefit of Hollard. This raises the next sub-question arising for adjudication in this matter: what is the nature and extent of the rights of an insurer (such as, Hollard) who has fully indemnified an insured (such

as, Le Bonheur)? I will now address this legal issue, but only to the extent necessary for present purposes.

[100] As a starting point, it bears stating that there is a conceptual issue which appears to bedevil the subject of subrogation in insurance law. Mr de Beer points out that the notion of an insurer stepping into an insured’s shoes as creditor is, as Mr Lamplough’s arguments show, mistakenly understood in a literal sense rather than in its intended metaphorical sense. I agree. The following extract in Joubert (ed) *The Law of South Africa* vol 12 (first re-issue) para 373 (quoted with approval in *Rand Mutual Assurance Co supra* para 12) shows clearly that subrogation in the context of insurance was never intended to imply a substitution of the insured by the insurer:

‘In its literal sense, the word “subrogation” means the substitution of one party for another as creditor. In the context of insurance, however, the word is used in a metaphorical sense.

Subrogation as a doctrine of insurance law embraces a set of rules providing for the reimbursement of an insurer which has indemnified

its insured under a contract of indemnity insurance. The gist of the doctrine is the insurer’s personal right of recourse against its insured, in terms of which it is entitled to reimburse itself out of the proceeds of any claims that the insured may have against third parties in respect of the loss.’ (Emphasis added)

[101] This locus classicus statement reveals that, under the subrogation doctrine, a ‘personal right’ is acquired by an insurer against an indemnified insured for a reimbursement ‘out of the proceeds of any claims that the insured may have against third parties in respect of the loss’. In other words, when subrogation applies, an insurer’s claim lies against an indemnified insured who, in turn, has a claim against the third-party wrongdoer for compensation in respect of any damages caused. This probably explains, at least in part, why, in practice, insurers assume the insured’s identity and then sue the wrongdoer in the insured’s name.

[102] Our case law makes it clear that subrogation does not bring about a transfer of substantive or procedural rights from an insured to an insurer resulting in an insurer substituting an insured as creditor. I list a few illustrative examples only. The following was stated in *Rand Mutual Assurance Co supra* para 9:

‘I accordingly agree with the respondent’s counsel who argued that ... a mutual association is nothing other than an insurer; and that once the mutual association has indemnified the employer by paying compensation in full to the employee, the association may exercise the right of recourse against a third party by either obtaining a cession from the employer or by bringing a subrogated claim for recovery under s 36(1)(b).’ (Emphasis added)

[103] In *Goodwin Stable Trust supra* at 623, Selikowitz J referred to Joubert (ed) *LAWSA* vol 12 paras 222 - 226 as authority for his conclusion that, as a matter of law, ‘[s]ubrogation does not involve a cession or a transfer of the insured’s rights against the third person’. *Smith v Banjo supra* is another example of the point being made here. There, Patel DJP held that when an insurer sues in an insured’s name, then the parties to that suit, namely, the insured and the third-party wrongdoer, ‘have the same rights and duties as they would have had had the matter not been a subrogated claim’ (para 12). In other words, the rights and duties of the litigants remain unchanged by the subrogation. The litigation continues between the parties as though subrogation did not exist. This makes sense owing to the fact that, as this judgment holds, an insurer with a subrogated claim is not a ‘party’ to the action, nor has any procedural rights under the court rules. It is the insured who sues for judgment (not the insurer).

[104] A further indicator of the absence of any transfer of rights from an indemnified insured to an insurer appears from *Nkosi v Mbatha supra*. In that case, Madondo J described the insured as a ‘trustee for any compensation paid to him or her by the wrongdoer and is bound to hand over to the insurer whatever money he or she receives from the wrongdoer’ (para 13). Madondo J affirmed that when an insurer sues in an insured’s name in relation to a subrogated claim, it is the insured who, as plaintiff, becomes the judgment creditor if the claim succeeds. It is also the insured who, in accordance with a court order, recovers the judgment debt with costs and ‘would be obliged to hand the recovered amount over to the insurer’ (para 15).

[105] All these considerations destroy the substratum of *Hollard’s* case that, at common law, subrogation results in a transfer of rights (both substantive and procedural) from *Le Bonheur* to *Hollard* by virtue that the latter indemnified the former in fulfilment of its obligations under an insurance contract. Thus, the issues crystallised above in paragraph [16(c)] are decided against *Hollard* and in *Le Bonheur’s* favour.

Hollard joined as co-plaintiff in its own name: subrogation as a cause of action

- [106] My conclusions regarding issue nos. 1, 2, and 3 paves the way for Werksmans to deliver the notice of withdrawal intended by Le Bonheur's directors in their resolution quoted above in paragraph [3].
- [107] A withdrawal of the main action would place Hollard in an invidious position. It would have to commence a new action against Stellenbosch Vineyards and in its own name by reason that Le Bonheur revoked its consent for a lawsuit in its name. [I do not engage the question whether Le Bonheur's conduct constitutes a breach of the insurance policy. That issue may yet be a cause for further litigation and may come before this Court at a future date.]
- [108] Litigation de novo would be time-consuming and at substantial additional cost to Hollard (i.e., over and above the costs it already incurred to fund the main action). I agree with Mr Lamplough that these considerations ought not to be overlooked and that Hollard ought to have an effective remedy in these circumstances. It is with this in mind that I consider how the main action ought to be conducted further.
- [109] Fairness, although engrained into the rule of law, is, on its own, a bedrock value which must infuse all forms of dispute resolution regulated by s 34 of the Constitution quote above in footnote 2. See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) paras 69 - 79. Section 34 encompasses a right to bring a dispute to court, a right to have it litigated to finality, and a right to have it decided. See *Social Justice Coalition* supra paras 60, 134 - 137. The rules of court set out the forms and processes involved in giving practical expression to these rights in an efficient and expeditious way. See *Social Justice Coalition* supra paras 57 - 58.
- [110] Fairness must permeate every facet of a judicial proceeding so that fairness protects the parties involved and those with an interest therein, to the extent required by context. As already recorded earlier, Hollard has an interest in the outcome of the main action. This is common cause. By allowing fairness to play an equitable role in maintaining a healthy balance between the various interests at play in the main action, fairness promotes justice for all and protects judicial integrity in the administration of justice in the main action for all affected parties and interested persons. This, in turn, promotes the public's confidence in the judiciary which is essential for its efficacy.
- [111] Hollard believed it instituted its subrogated claim via the main action. That action was certified to be trial ready. Withdrawal thereof is imminent. Once effected, Hollard would not be able to proceed to trial. It would have to institute legal action afresh, a costly result that would substantially and unreasonably delay Hollard's pursuit of its claim. All this threatens with infringement Hollard's right of access to the court under s 34 of the Constitution. See *Social Justice Coalition* supra para 134.
- [112] In *Social Justice Coalition* supra para 137, it was held:

‘By reason of the fact that judicial officers preside over the courts to which they are appointed, they bear the principal, but not exclusive, duty to ensure that the disputes that come before their courts are decided fairly, in public hearings, and within a reasonable time. That duty is plainly owed to the judiciary, as an institution. But it is also owed to everyone who looks to the courts to secure justice and enjoys the right of access to the courts that section 34

provides.’ (Emphasis added)

[113] Given the peculiar circumstances of this case, it is incumbent that I “‘forge new tools” and shape innovative remedies’ (Fose v Minister of Safety and Security [1997] ZACC 6; 1997 (3) SA 786 (CC) para 69). When a constitutional right is infringed or at risk of possible infringement, ‘it is for courts to craft effective,

just and equitable remedies’ (Mwelase v Director-General, Department of Rural Development and Land Reform 2019 (6) SA 597 (CC) para 69). A superior court can do so as part of its inherent powers conferred in s 173 of the Constitution, namely, to regulate

its own processes.

[114] In S v Molaudzi 2015 (2) SACR 341 (CC) para 33, it was held:

‘This inherent power to regulate process does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties.’ (Emphasis added)

[115] On this basis, I will grant an order that Hollard is joined as the ‘Second Plaintiff’ to the main action. Le Bonheur will forthwith be the ‘First Plaintiff’. Hollard will be afforded an opportunity to use rule 28 for purposes of amending the Combined Summons and the POC by adding the details of its description. It may have to effect further amendments to the POC as may be contextually required including, but not necessarily limited to, pleading subrogation and an appropriate remedy. Pending these amendments, Le Bonheur will be precluded from withdrawing the main action.

[116] In view of the anomalies alluded to in Rand Mutual Assurance Co supra para 23 and the risks associated with insurers suing in an insured’s name (as this judgment illustrates), it remains

unclear as to why insurers approach their election as an ‘either or’ choice: either sue in their own name or sue in an insured’s name. There are benefits to pursuing a subrogated claim as a joint action. For e.g., it avoids (or substantially reduces) the potential ‘anomalies’ alluded to in Rand Mutual Assurance Co supra para 23; both the insured and the insurer have procedural rights; insurers may still control the litigation if its interests

align with that of the insured; and, if the claim succeeds, a court order is issued in which an insurer is a judgment creditor with enforceable rights.

[117] Despite the English law origins of the doctrine of subrogation, our constitutional order impelled recognition of an insurer's right to institute legal action in its own name for purposes of recovering from a wrongdoer a sum which is re-imbursive compensation arising from the same factual circumstance(s) which led to the insurer indemnifying its insured in the first place under the terms of an insurance contract.

[118] In our constitutional era, the common law of subrogation was developed by judicial fiat in *Rand Mutual Assurance Co supra* from the mould incorporated into our law of insurance in pre-constitutional times. By recognising that insurers have a right

to sue in their own names, the SCA, by necessary implication, recognised that a subrogated claim in the hands of an insurer gives

rise to a separate cause which can sustain an action. This is affirmed, correctly so in my view, in *Nkosi v Mbatha supra*. The contrary view expressed by certain writers is misdirected.[5]

[119] When an insurer is joined as a co-plaintiff with an indemnified insured, as I will direct in relation to the main action, then, in my view, an insurer ought to seek at least the following twin remedies:

(i) first, an order confirming the validity of the insurer's subrogated claim; and (ii) secondly, an order which, flowing from the case pleaded by the insured and/or insurer as co-plaintiffs (as the case may be), directing that a fixed sum (or such other sum as may be determined by the trial court) be paid to the insurer by the cited defendant as a reimbursement pursuant to the insurer's rights under the terms of subrogation agreed to with the insured co-plaintiff.

[120] The formulation of the relief envisaged in the preceding paragraph is based, partly, on the requirements for a valid claim predicated on subrogation (see *Nkosi v Mbatha supra* para 16) and, partly, on the underlying purpose of an insurer's claim.

Costs

[121] There is no reason why costs should not follow success. *Le Bonheur* was successful in resisting *Hollard's* application. The joinder of *Hollard* as a litigant does not detract from this fact. Counsel's fees will be granted on scale C of the tariff.

[122] In exercising my discretion on costs, I took into consideration the factors listed in Uniform Rule 67A(2) and (3)(b). Importantly, *Hollard* appointed a silk to argue its application. This is an indication that the issues involved had complexity which warranted an advanced level of knowledge and technical expertise of senior practitioners. This is further borne out by the contents of this

judgment.

Order

[123] In the result, the following orders are made:

- (a) The application by Hollard is dismissed with costs, such costs for Le Bonheur's counsel shall be on tariff Scale C;
- (b) Hollard is, with immediate effect, joined as co-plaintiff to the main action. Hollard will be the 'Second Plaintiff' and Le Bonheur the 'First Plaintiff';
- (c) Hollard is granted 30 court days from date of this order to file a notice of intention to amend the Combined Summons and the Particulars of Claim in all necessary respects; and
- (d) Prior to the lapse of the 30-day period referred to in (c) above and pending the effecting of the amendments envisaged in (c) if notice thereof is given, the main action in this matter may not be withdrawn

by La Bonheur or anyone else acting on its behalf, nor may the defendant's dismissal application or the trial in the main

action be enrolled for hearing.

FAREED MOOSA

ACTING JUDGE OF THE HIGH COURT

Appearances

For Plaintiff:

M de Beer

Instructed by:

Werksmans Attorneys

For Hollard:

A J Lamplough SC

Instructed by:

Clyde & Co Inc Attorneys

For Defendant:

M Seale SC and A Walters

Instructed by:

Mellows & De Swardt Inc Attorneys

For First & Second

Third Party:

Mr Tyler

Instructed by:

Dicks van der Merwe Attorneys

[1] Cloete v Van Zyl *supra* para 19.

[2] Section 34 of the Constitution reads: ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

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[3] Section 39(2) of the Constitution reads: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

[4] Section 2 of the Interpretation Act defines ‘law’ to mean ‘any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law’.

[5] See, for e.g., A Smith ‘Does subrogation constitute a new cause of action to be pleaded?’ 2021 (May ed) De Rebus 18.

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Prepared on 10 October 2026 · Esheria