DOES THE DOCTRINE OF SUBROGATION AMOUNT TO UNJUST ENRICHMENT FOR THE INSURER?

By Ndateelela Nelao Shilongo

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE BACHELORS OF LAWS (LLB) DEGREE

In the Subject

INSURANCE LAW

At the

UNIVERSITY OF NAMIBIA

Declaration

I, the undersigned, hereby declare that the work contained in this Dissertation for the purpose of obtaining my LLB Degree is my own original work and that I have not used any other sources than those listed in the Bibliography and quoted in the references.

…… ……..

N N Shilongo Date

Supervisor’s Certificate

I, E. N. Namwoonde, hereby certify that the research and writing of this Dissertation, was carried out under my supervision.

…… ……..

E Namwoonde Date

DEDICATION

I dedicate this dissertation to my loving father and provider Tate Solomon Shilongo Shilongo.

ACKNOWLEDGMENT

I would like to express my outmost gratitude and thanks to my exceptional supervisor Ms. Emilier Namwoonde for her encouraging words, dedication and most importantly patience in the delivery of this work. Her commentary and guidance has made the completion of this paper possible. Thank you very much.

I wish to thank my family for their support throughout my research, especially my beloved mother who has inspired me to be the best I can be. I further would like to thank my friends and class mates for the five year journey that has been filed with exciting experiences and great joy. I would like to extend my heart felt gratitude to the lectures of the Faculty of Law and the University at large for teaching me the discipline of law.

Above all, I give all glory to Jesus Christ, for giving me a mind like his. He has given me the wisdom and ability to allow me to accomplish this work. Through him, all things are possible!

.

ABSTRACT

The doctrine of subrogation seeks to prevent the insured from getting double compensation, on the basis of unjust enrichment. While subrogation is meant to prevent an insured from making a profit, this principle is not applied to the insurers who, if they successfully recoup money paid out on a claim, have lost nothing and are entitled to retain the premiums. The fact that the insurer can sue a third party on behalf of the insured or can claim from the insured to reimburse him out of the proceeds of the claim of the insured against third parties for loss seems to be an unjust enrichment for the insurer.

This study serves as to trace the origin of the doctrine of subrogation in the English law and its development and application the South African and Namibian law. The repercussions of this doctrine being used as a basis for the insurers to unjustly enrich themselves by using their client's name; is the essence of the study as it's a problem for the Namibian consumers. The study further looks at the need for consumers to be protected from the insurance service providers.

TABLE OF CONTENT

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

The law of Insurance in Namibia as it stands today is greatly influenced by South African law, due to our colonial history. In terms of the Administration of Justice Proclamation 1919[1] the Roman-Dutch law as existing and applied in the Province of the Cape of Good Hope at the coming into effect of this Proclamation shall from and after the said date, be Common Law of the Protectorate and all Laws within the Protectorate in conflict therewith shall to the extent of such conflict be repealed[2]. The Insurance Act 27 of 1943, the Compulsory Motor Vehicle Insurance Act 57 of 1972 and the Insolvency Act 24 of 1936 applied to South West Africa prior to the independence of Namibia[3]. In terms of Article 140(1) of the Namibian Constitution all laws in force immediately before the date of independence shall remain in force until repealed or amended by the Act of parliament or until they are declared unconstitutional by a competent court[4] .Article 66 (1) further add that "all common law of Namibia in force at the date of independence shall remain valid to the extent to which such common law does not conflict with this Constitution or any other statutory law". The law of Insurance in Namibia is regulated by the Long-Term Insurance Act 5 of 1998 and Short-Term Insurance Act 4 of 1998.

The Doctrine of Subrogation was introduced in South African law from the English law by the case *of Ackerman v Loubster*[5]. Subrogation means the substitution of one person for another so that the person substituted or subrogated succeeds to the rights of the person whose place he takes[6]. The Subrogation doctrine of insurance law embraces a

[1] Proclamation 21 of 1919.
[2] Davis D (4th Ed.)(2006) Gordon and Getz on The South African Law of Insurance. Cape Town. Juta & Co, Ltd. P 5.
[3] Ibid.
[4] Constitution of the Republic of Namibia 1 of 1990.
[5] 1918 OPD 31
[6] Reinecke M, S Van Der Merve, J Van Niekerk, P Havenga(2002) General Principles of Insurance Law. Durban. LexisNexis Butterworths. p257.

set of rules providing for the reimbursement of an insurer, which has indemnified its insured under a contract of indemnity insurance[7]. Subrogation is divided into two forms, equitable subrogation and conventional subrogation. Equitable subrogation arises by operation of the law while conventional subrogation arises by virtue of contract between the parties or by the statue[8].

Subrogation applies to every form of indemnity insurance, such as fire, liability insurance and motor vehicle insurance[9].The doctrine expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of the latter's right and remedies against third parties. The doctrine of subrogation serves to prevent the insured from obtaining more than a full indemnity[10]. According to *Reinecke*[11] the idea of subrogation is that a third party who had paid the debt of another was entitled to succeed to the rights of the creditors against a debtor. The basis of the doctrine is based on the rule that it serves to avoid unjust enrichment of the insured at the expense of the insurer[12]. The doctrine of subrogation is concerned solely with the insurer's right to be dominius litus and the insurers' right of recourse should be explained on the basis of unjust enrichment. Consumers have little protection from large insurance companies; consumers have limited options when faced with an infringement of their rights, as the law favours the service providers.

1.2 STATEMENT OF THE PROBLEM

The doctrine of subrogation seeks to prevent the insured from getting double compensations, on the basis of unjust enrichment. The right of compensation either

[7] Ibid.p289.
[8] O'Brien, J (1988) Vol 2. Distinct Subrogation Issues: Pandora's Box. O' Briesn & Hennessy Educational Series.p1.
[9] Ackerman v Loubster 1918 OPD 31
[10] Lowry J, P Rawlings (2nd Ed)(2005) *Insurance Law: Doctrines and Principles.*Oregon. Hart Publishing. p288.
[11] Reineke M, S Van Der Merve, J Van Niekerk, P Havenga(2002) General Principles of Insurance Law. Durban.Lexis Nexis Butterworths.p278.
[12] Ibid.

voluntarily or by a Court order against a third party is awarded to an insurer. Meaning the insurer has the right to be double compensated for damage suffered and claimed by the insured; however, according to the doctrine of subrogation this does not amount to unjust enrichment. This paper attempts to examine whether the insurer suing in the insured's name and retaining the proceeds is justifiable.

According to *Lowry* and *Rawlings*[13] the main purpose of subrogation is rather to provide the insurer with a right of recourse. By affording the insurer a right of redress, the cost of insurance to the public is kept down since the insurer can recoup its loss from source other than premium income. However it is not clear how the likelihood of recouping claims enter into the calculation of premium, and this invites the conclusion that insurers see any money they do recoup as a windfall[14].It was suggested by Lord Denning in the case of *Morris v Ford Motor Co Ltd*[15] that while subrogation is meant to prevent an insured from making a profit, this principle is not applied to the insurers who, if they successfully recoup money paid out on a claim, have lost nothing and are entitled to retain the premiums. On assuming the risk, the insurers do not know that if a loss occurs they will be able to recoup the money paid and premium is considered for assuming this uncertainty.

Most of the time Consumers are not aware of what they are signing away and there is no legal requirement to explain all the terms of the policies. Namibian consumers are suffering enormous weight of "small print" and tedious "terms and conditions" when almost buying anything under the sun[16]. Many consumers fall on a daily basis in a trap of unfair stipulations in contracts of warranties on services and product liability[17].

Under most insurance policies and subrogation receipts, the insurance company is given the right to file suit in the name of the insured. Traditional subrogation lawyers will warn against naming the insurance company as the plaintiff; the theory behind this

[13] Lowry J, P Rawlings (2nd Ed) (2005) *Insurance Law: Doctrines and Principles.*Oregon. Hart Publishing. P303.
[14] Ibid.
[15] 1973 1 QB 792
[16] Gaomab, M(2011) *Consumer Protection an absolute Necessity in Namibia*!. Available at http://milton-louw.blogspot.com. Last accessed on 4th April 2011.
[17] Shejavali, N(2009).*Namibia: Consumer Protection Legislation in Starting*. Available at http://allafrica.com. Last accessed on 4th April 2011.

position is that judges will look less favorable on an insurance company as a plaintiff than as they will on an individual[18]. This position questions the legality of subrogation before the courts of law.

The doctrine flows from the principle that an insured is entitled to a full indemnity, full compensation for his lost but nothing more. The insured pays premium to insurer for security incase something happens. It is out of those premiums that the insurer pays the insured for the loss they have suffered, now why does the insured get the right to sue a third party for the loss they have incurred from paying out premium? The fact that the insurer can sue a third party on behalf of the insured or can claim from the insured to reimburse him out of the proceeds of the claim of the insured against third parties for the loss seems to be an unjust enrichment.

Law researcher at the Ministry of Justice Henry Simon Line summarily states at a seminar aimed toward consumer protection legislation for Namibia[19] that: "consumers in Namibia are not protected". He further adds that Namibian consumers have been "experiencing unscrupulous and unfair practices, and that existing avenues to obtain redress are inadequate or completely absent. The doctrine of subrogation is proving to be a conflicting clause in the law of Insurance that needs to be redressed.

The doctrine of subrogation is said to be a naturale of the contract of indemnity insurance[20], however if this is the case, why does the insured have to consent to institute actions on behalf of the insurer. Incase of naturale no consent is required and the right is conferred by the operation of the law.

1.3 OBJECTIVES OF THE STUDY

[18] O'Brien, J. (1988) Vol 2. *Distinct Subrogation Issues: Pandora's Box*. O' Briesn & Hennessy Educational Series.p 16.

[19] Shejavali, N(2009).Namibia: *Consumer Protection Legislation in Starting*. Available at http://allafrica.com/stories/200909180643.html; last accessed on 4th April 2011.

[20] Reineke m, S Van Der Merve, J Van Niekerk, P Havenga(2002) *General Principles of Insurance Law*. Durban.Lexis Nexis Butterworths

- The study's limitation to the doctrine of subrogation which forms part of the law of insurance**.** Insurance companies assume the risk for associated with annuities and insurance policies and assign premiums to be paid for policies.

- The investigation of the lawfulness of the doctrine of subrogation aiming to prevent an insured from making a profit, however this principle is not applied to the insurers who, if they successfully recoup money paid out on the a claim, have lost nothing and are entitled to retain premiums.

- Demonstrate that the traditional position that the doctrine of subrogation is said to be a naturale of the contract of indemnity insurance, is contradictory, due to the fact that the insured have to consent institute of actions on behalf of the insurer, since incase of naturale no consent is required and the right is conferred by the operation of the law.

- To encourage Namibia to follow the lead of South Africa, as recent cases of consumer abuse had emerged to be on the rise; there is clearly a need for more Consumer Protection Legislation.

- Hence, the object of this paper is to make the Namibian Nation as well as Law Reform and Development Commission aware of the unjust effects of the doctrine of Subrogation in Insurance law towards the insured.

1.4 SIGNIFICANCE OF THE STUDY

The importance of the study of this doctrine is to assess whether it amounts to unjust enrichment for the insurer. If it does amount to unjust enrichment, the exciting

legislations must be reviewed to prevent insurers from abusing this doctrine to enrich themselves, by using their client's names.

1.5 THE RESEARCH QUESTIONS

1. What mischief did the doctrine of subrogation try to remedy?

2. Does Subrogation amount to unjust enrichment for insurers?

3. Does Subrogation deprive insured their rightful claim against third parties

4. Whether the doctrine of subrogation is another form of exploitation of Consumers by Service providers

5. How can we reconcile the principle of insurance and subrogation?

1.7 DISSERTATION OUTLINE

Chapter One deals with the general introduction to the content of the paper, it contains the statement of the problem, the objectives of the study, the importance of the study, the study methodology and the research questions.

Chapter Two deals with the historical backgrounds and development of the doctrine of subrogation in insurance contract of indemnity.

Chapter Three deals with Subrogation and the doctrine of unjust enrichment

Chapter Four is Consumer Protection and the Doctrine of Insurance

Finally, Chapter Five compromises of the conclusions and some recommendations as to reduce the abuse of the doctrine of subrogation by insurers.

1.8 LITERATURE REVIEW

The Insurance industry provides protection against financial losses resulting from variety of hazards. By purchasing insurance policies, individuals and business can receive reimbursement for losses due to car accidents, thefts of property, and fire and storm damage; medical expenses and loss of income due to disability or death[21]. According to *Joubert*[22] the primary purpose of subrogation is perceived to be the upholding of the principle of preventing the insured from retaining compensation from both the insurer and third party. However the principle of indemnity may be maintained without recourse to the doctrine of subrogation by simply releasing the third party from liability to the extent that the insured's loss is covered by insurance[23]. *Lowry* and *Rawlings* indicated that while subrogation is meant to prevent an insured from making a profit, this principle is not applied to the insurers who, if they successfully recoup money paid out on a claim, have lost nothing and are entitled to retain the premiums. On assuming the risk, the insurers do not know that if a loss occurs they will be able to recoup the money paid and premium is considered for assuming this uncertainty[24]. According to *Christie*[25] subrogation in terms of South African law subrogation would amount to a naturale of the contract of indemnity insurance.

Namibian Consumers are suffering enormous weight of "small print" and tedious "terms and conditions" when almost buying anything under the sun[26]. Law researcher at the Ministry of Justice Henry Simon Line summarily states at a seminar aimed toward consumer protection legislation for Namibia[27] that: "consumers in Namibia are not protected". He further adds that Namibian Consumers have been "experiencing unscrupulous and unfair practices, and that existing avenues to obtain redress are

[21] http://www.bls.gov/oco/cg/cgs028.htm. Last assessed 4 May 2011
[22] Joubert, W,A (2002) Insurer's Right to Subrogation. *The law of South Africa.* Vol 12 .p304.
[23] Reineke M, S Van Der Merve, J Van Niekerk, P Havenga(2002) General *Principles of Insurance Law.* Durban.Lexis Nexis Butterworths.
[24] Lowry J, P Rawlings (2nd Ed) (2005) *Insurance Law: Doctrines and Principles. Hart Publishing*. Oxford
[25] Christie R (5th Ed) (2006) The *Law of Contracts in South Africa*. Durban. LexisNexis Butterworths.
[26] Gaomab, M (2011) *Consumer Protection an absolute Necessity in Namibia*!. Available at http://milton-louw.blogspot.com. Last accessed on 4 May 2011.

inadequate or completely absent[28]. *Joubert* examined the shortcoming of the doctrine of subrogation, and various proposals for reform have been put forward in academic circles. It has even been suggests that the doctrine of subrogation should be abolished[29].Namibia as a member state of the UN Charter should refer to guidelines for consumer protection to provide a valuable tool for national policy development in Namibia[30].

Subrogation actions attract criticism as follows. Firstly, it must be rare for an insurer to exercise subrogation rights except against a defendant who is also insured, there will be little point otherwise. This will be wasteful and expensive in resources; it unnecessarily promotes multiple insurance, requiring that the same risk be covered both by the first party and third party policies. Secondly if the defendant is not insured, insured throwing liability on the defendant relieves the insurer who has been paid to assume the risk in question and who is able to distribute the cost among the premium-paying public. Subrogation may work to curtail the very essence of insurance, which is risk distribution[31]. In the case of *Morris v Ford Motor Co*[32], under an agreement between Ford and a Cleaning firm, the latter agreed to indemnify Ford for the negligence of the employees of either company. Morris was injured by the negligent act of a Ford employee. He successfully sued Ford; Ford sought an indemnity from the cleaning firm; and the Cleaning firm claimed that, since they were indemnifying Ford, they were entitled to sue Ford's negligent employee. The Court of Appeal refused to compel Ford to lend its name to such action. Lord Denning MR argued that it was unjust to force the employer to lend its name to an action against an employee since it could danger industrial relation. He added:

> "where the risk of a servant's negligence is covered by insurance, his employer should not seek to make that servant liable for it. At any rate, the courts should not compel him to allow his name to be used to do it."

---

[28] Shejavali, N (2009).Namibia: Consumer Protection Legislation in Starting. Available at http://allafrica.com/stories/200909180643.html; last accessed on 4 May 2011.
[29] Joubert, W,A (2002) Insurer's Right to Subrogation. *The law of South Africa.* Vol 12 .p304.
[30] Available at http://www.namibiacompetitionlaw.info Last accessed on 4 May 2011.
[31] Birds, J & Hird, N, J (5th Ed.)(2001*) Birds' Modern Insurance Law*.London. Sweet & Maxwell.
[32] 1973 1 QB 792 (CA)

He based his refusal on the ground that as subrogation originated in equity the court had discretion to compel the employer and would refuse where it was unjust. He added that if subrogation originated in an implied term in the contract, then in this case he would imply such term.

1.6 RESEARCH METHODOLOGY

The research was qualitative; the author mainly employed ‘Desktop Research’. During the main study academic writings of authors and scholars on the subject, books, internet sources and case law were utilized. Many of the articles written by scholars of insurance law and many of them express their opinions on the issue, these opinions have been taken into consideration by the author, as the opinion of others are also of vital importance. The author has visit several libraries such as the University of Namibia Library, Supreme Court Library, the Law Society Library and the Human Rights Documentation Centre at the University of Namibia and their resources, to establish the effect of the doctrine of subrogation in Namibia law.

CHAPTER TWO

BACKGROUND OF THE DOCTRINE OF SUBROGATION

2.1 INTRODUCTION

Subrogation applies to all insurance contracts which are contracts of indemnity that is particularly to contract of fire, motor, property and liability insurance[33]. Subrogation does not apply to life insurance and prima facie accident insurance. However since payment under an accident policies are paid according to a fixed scale, it is possible to have such policies whereby payment is on an indemnity basis, and therefore this policy should attract the right to subrogation[34]. *Robert Merkin*[35] describes subrogation as follow

> "By virtue of this doctrine, if the assured has ways and means open to him to repair his loss, otherwise than at his own expense, or at the cost of his insurer, he must either cede such ways and means to the insurer on being paid the amount of his loss in full, or, if he has not been fully indemnified, he was exercise such ways and means for the benefit of the insurer."

In this way the assured is prevented from obtaining both insurance money and damages from third party, and the third party is prevented from taking advantage of the assured's policy by being exempted from liability[36].

The principle was articulated most vividly by McCardie J[37]as follows:

> "The principle of subrogation is ever a latent and inherent ingredient of the contract of indemnity, but… it does not become operative or enforceable until actual payment be made by the insurer. It derives its life from the original contract. It gains its operative force from the payment under the contract. Not till

[33] Birds, J & Hird, N, J (5th Ed.)(2001*) Birds' Modern Insurance Law*.London. Sweet & Maxwell.p286.
[34] Ibid.
[35] Merkin, R (7th Ed) (1997)*Colinvaux's Law of Insurance.*London. Sweet& Maxwell.p173.
[36] Ibid.
[37] Bennett, H, N. (1996) *The Law of Marine Insurance*. Oxford.Clarendon Press.p403.

payment is made does the equity, hitherto is suspense, grasp and operate upon the assured's choses in action. In my view the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity."

2.2 THE ORIGIN OF THE DOCTRINE OF SUBROGATION

In the Cape Colony, English law governed the question of fire, life and marine assurance, for over a century unless inconsistent with colonial legislation[38]. These Statues were repealed by section 1 of the Pre-Union Statue Law Revision Act 43 of 1903. Since 13 April 1977, Roman-Dutch law applies to all cases of insurance business throughout South Africa.

The Doctrine of Subrogation was introduced in South African law by the case of *Ackerman v Loubster*[39], where the doctrine was received into our law from English law. The case of *Castellain v Preston*[40] and *Commercial Union Insurance Co of SA v Lotter*[41] the Court considered

a) The insurer's right to take charge of legal proceedings against third parties who are liable to the insured for insured for loss; and
b) The insurer's right of recourse against the insured to reimburse out of the proceeds of the claim of the insured against third parties for its loss

There have been some disputes as to the true origin of the doctrine of subrogation. Some authors claim to have found traces of subrogation in Roman law[42]. Subrogation was probably first developed in England in the Courts of Chancery and Admiralty and a

[38] S2 of the Cape General Law Amendment Act 8 of 1879 and a similar provision in Ordinance 5 of 1902 achieved the same result in the Orange Free State.
[39] 1918 OPD 31.
[40] 1883 (11) QBD 380 (CA).
[41] 1999 (2) SA 147 (SCA).
[42] Ibid.p 287.

number of authorities refer to it as a creature of equity[43]. On the other hand, modern cases, particularly in judgments delivered by Lord Diplock, refer to it as a common law doctrine arising out of a term implied into every contract of indemnity insurance. In the case of *Napier v. Hunter*[44] the opinions contained review of the history the doctrine of subrogation that indicates that the very least it developed in equity as well as at common law. In the words of Lord Templeman:

> "The principles which dictated the decisions of our ancestors and inspired that reference to the equitable obligations of an insured person towards an insurer entitled to subrogation are discernible and immutable. They establish that such an insurer has an enforceable equitable interest in the damages payable by the wrongdoer."[45]

The equitable interest of the insurers was to be satisfied by saying that they had a lien or charge over the money in question, rather than by saying that the money was impressed with a trust[46]. If insured who receives the money goes bankrupt, if a company goes into insolvent liquidation, the insurer can recover the money without regard to the claims of other creditors. Money paid into the court for the benefit of the insured may be subject to a lien in favour of the insurers which can take priority over any claim[47]**.** Subrogation is a legal doctrine supported by equity, since it is applicable to be modified, excluded or extended by contract[48].

2.3 FUNDAMENTALS OF SUBROGATION

The case of *Castellain v Preston*[49] summarized the rights the insurers acquire through subrogation as follows:

---

[43] Morris v. Ford Motor Co. Ltd [1979] 1 Q.B.792
[44] [1993] 2 W.L.R 42
[45] Ibid.p64.
[46] Birds, J & Hird, N,J(5th Ed.)(2001*) Birds' Modern Insurance Law*.London. Sweet & Maxwell.p287.
[47] Ibid.
[48] Ibid. p289.
[49] 1883 11 QBD 380

> "As between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or conditions the loss against which the assured is insured, can be, or has been dimished."

In this leading case of *Castellain v Presto* the first aspects of the doctrine of subrogation was addressed explicitly; that the insured cannot make a profit from his loss and that for any profit he does make he is accountable in equity to his insurer[50]. The rule that the insured cannot profit from his loss is subject to three limitations. Firstly he is accountable only when he has been fully indemnified. Secondly if he leaves a gift following the loss, thirdly if a surplus results after the insurer has recovered back its money, it seems that the insured is entitled to keep it[51].

In the later passage of this judgment the second aspect are identified, this is the right of the insurer who has indemnified his insured to step into the shoes of the insured[52]. In his name pursue any right of action available to the insured which may diminish the loss insured against. The insured's right will be to sue a third party to pay damages in tort or for breach of contract or under a statutory right or liable to provide an indemnity to the insured, the third party's liability being in respect of the event for which the insured has recovered from their insurer. If the insured has been fully indemnified, but he also receives a gift from another to mitigate the effect of his loss, he will normally have to

[50] Birds, J & Hird, N(5th Ed.)(2001*) Birds' Modern Insurance Law*.London. Sweet & Maxwell.290.
[51] Ibid.p291.
[52] Ibid.

account to his insurers for the amount of the gift[53] . The insured can if necessary, be compelled to lend his name for purposes of the action[54].

An insurer is entitled not only to the advantage of its insured's remedies against third parties who are contractually, delictually or otherwise liable for compensation of the loss[55]. The insurer is entitled to every other right, provided it serves as a total or partial substitute for the insured interest. In the case of *Simpson v Thomson*[56] it was decided that where two ships belonging to the same insured collided, the insurer of the ship not at fault could not recover from the owner for the negligence of the other ship since the owner could not bring an action against himself.

2.4 LIMITATION OF SUBROGATION IN TERMS OF APPLICATION

If there happens to be a surplus after the insurers have recovered their money, the insured is entitled to keep it, in other words the insurers' subrogation rights extend only to the amount they actually paid to the insured.[57]The doctrine flows from the principle that an insured is entitled to a full indemnity, full compensation for his lost but nothing more[58]. According to the case of *Visser v Incorporated General Insurance Ltd*[59] the insurer must have compensated fully for his loss. The doctrine of subrogation is corollary of the principle of indemnity[60].

The economic advantage of insuring is of spreading the risk or loss over a certain period[61]. The basic arrangements: by paying premiums the insured secures cover against the happening of a stipulated peril that, if they occur, may cause him loss[62]. The

---

[53] Ibid. p295.
[54] King v Victoria Insurance Co. Ltd [1896] A.C. 250
[55] Reineke, M,Van Der Merve,S, Van Niekerk,J, Havenga,P (2002) *General Principles of Insurance Law.* Durban.Lexis Nexis Butterworths.p 281.
[56] (1877) 3 App Cas 279.
[57] Ibid.
[58] Morris v Ford Motor Co Ltd 1973 QB 792
[59] 1994 (1) SA 472 (T)
[60] Reinecke M, S Van Der Merve etla.(2002) *General Principles of Insurance Law*. Durban. LexisNexis Butterworths. p257.
[61] Gibson J, V, Coenraad. (8th Eds)(2003)*South Africa Merchantile and Company Law*. Juda and Company Ltd. Landowne. P 486.
[62] Ibid.

case of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*[63] the Court showed how the international law of marine insurance was received by the English courts, and stated that both Roman-Dutch and English courts law of marine insurance stem from the same original sources.

In the case of *Scottish Union & National Insurance Co. v Davis*[64] the court held that "you only have a right to subrogation in a case like this when you have indemnified the assured". It was not clear from this decision whether the insured must merely be fully indemnified within the terms of the policy before the duty to account arises or whether he must be fully compensated[65]. In the case of Napier v. Hunter[66] Lord Jauncery held:

> "When an insured loss is dimished by a recovery from a third party, whether before or after any or after any indemnification has been made, the ultimate loss is simply the initial loss minus the recovery and it is that sum to which provision of the policy of the assurance apply including any provision as to an excess."

In the event of a collision for which a third party is liable, an assured may well receive by way of damages an amount in excess of what he is entitled to claim under the policy[67].The insurer may after having indemnified the assured for his loss, by exercising his right of subrogation recover from the wrong-doer a sum in excess of what he has paid to the assured[68].

The simplest case of subrogation is in delict, where the loss of the insured's property is attributable to a third party's culpa or dolus[69]. A landlord's insurer may enforce his rights against the tenant. When a person insured his house and then sold it, receiving part of the purchase price in cash, and the balance by a bill of exchange, it was held that, on paying the insured seller's claim following a fire, the insurer was entitled *pro tanto* to the

[63] 1985 (1) SA 419 (A)
[64] {1970} 1 Lloyd's Rep.1
[65]Birds, J & Hird, N (5th Ed.)(2001*) Birds' Modern Insurance Law*.London. Sweet & Maxwell.p.291.
[66] 1993 2 W.L.R. 42
[67] Hodges, S(1996) *Law of Marine Insurance.*London*.Cavendish Publishing Limited*.p11.
[68] Ibid.
[69] Davis D (4th Ed.)(2006) *Gordon and Getz on The South African Law of Insurance.* Cape Town. Juta & Co, Ltd. P 259.

insured's remedy on the unpaid bill against the purchaser[70]. The insurer can be subrogated only to actions which the insured could himself have brought. In the case of *Ackerman v Loubster* Ward J said "The right of the insurer is merely to make such claim for damages as the insured could have made and when the latter cannot assert a claim for damages against the wrongdoer, neither can the insurer do so". For instance where the insured's wife feloniously burnt the insured property, it was held there was no cause of action to which the insurer could be subrogated as the insured had no claim against the wife.

Since an insurer's right to subrogation is derived from the contract of insurance, no subrogation can take place where an insurer has paid for loss in terms of an invalid agreement of insurance. In instances where insurer made an out-and out ex gratia payment, it seems that no right of subrogation exists[71]. In order for an insurer to exercise its right to subrogation, the insurer must both have admit and pay everything due by it in respect of the particular claim of insured. It is a requirement for subrogation that the insured must first be fully compensated before the insurer may lay claim to any moneys received by the insured from the third party. An insurer can claim subrogation only if the insured has a right against a third party, which is susceptible to subrogation[72].

[70] Ibid.
[71] Reineke m, S Van Der Merve, J Van Niekerk, P Havenga(2002) *General Principles of Insurance Law*. Durban.Lexis Nexis Butterworths.p283.
[72] Ibid. p284.

CHAPTER THREE

THE DOCTRINE OF SUBROGATION V THE DOCTRINE OF UNJUST ENRICHMENT

3.1 THE INSURANCE CONTRACT AND SUBROGATION

Like any other contract, an insurance contract is concluded when the parties agree to be bound in accordance with certain terms. The must be an offer by one party, and an acceptance in terms in which it was made, by the other[73].Van Der Keessel[74] defines an insurance contract as "…a contract nominate, consensual and of good faith, whereby in consideration of a certain price or premium, the losses which may arise from the danger to the property of another are undertaken to be made good". Grotius defines insurance as "an agreement whereby one person takes upon himself the risk of an uncertain danger apprehended by another, and the latter in his turn binds himself to pay the former a premium[75]. The first requirement of an insurance contract you secure to yourself some benefit, usually a certain sum of money, upon the happening of some event. There must be either uncertainty whether the event will happen or not, or if the event is one which must happen some time, there must be uncertainty as to the time at which it will happen[76]. Insurance is a contract of the utmost good faith between an insurer and an insured whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money or its equivalent on the happening of a specified uncertain event in which the insured has some interest[77].

[73] Davis D (4th Ed.)(2006) *Gordon and Getz on The South African Law of Insurance*. Cape Town. Juta & Co, Ltd.p.133.
[74] Ibid.p79.
[75] Ibid.
[76]Ibid.p80.
[77] Ibid.p80.

3.1.2 UNJUST ENRICHMENT

Unjust enrichment is used to describe the situation where there has been a transfer of value from the estate or patrimony of one legal subject to another without legal cause. The patrimony of the enriched party is increased unjustifiably while that of the impoverished party is decreased as a result of such transfer[78]. Unjustified enrichment can be defined as[79]:

> "an obligation arising whenever one person's estate has been increased at the expense of another person's estate and sufficient legal ground (causa) for the retention of such increase is lacking".

The object of enrichment liability is to retransfer the ownership or possession of the property in question, but where this is not possible to compensate the impoverished party by payment of an amount of money for its impoverishment to the extent the enriched party is still enriched[80]. The question that needs to be answered is whether the enrichment occurred without a legally acceptable or recognised ground that is sine causa in circumstances which make it reasonable to expect the enriched to return the property received or to compensate the impoverished person[81]. There has been general consensus that the enrichment principle in Roman law mentioned by the court was a principle and not a general cause of action.

3.1.2 GENERAL REQUIREMENTS FOR UNJUST ENRICHMENT

There are no general enrichment actions in South African law. A number of general requirements and principles have been recognised which underlie all the recognised enrichment actions. These requirements must be met before any enrichment liability will

[78] Eiselen,S,Pienaar, G.(2nd Ed.)(1999)*Unjustified Enrichment: A Casebook*.Butterworths.Durban.p3.
[79] Ibid.
[80] Ibid.
[81] Le Roux v Van Biljon and Another 1956 (2) SA 17 (T)

come into existence. The specific requirements of each of the actions must be met as well[82].

a) The defendant must be enriched. The enrichment may consist of the increase of the defendant's estate due to the enrichment facts, a decrease in its liabilities due to those facts, a non-decrease in its assets which would have taken place save for those facts and non-increase in liabilities that would have taken place save for the enrichment facts.

b) The plaintiff must be impoverished. The impoverishment may consist of a decrease in the assets of the defendant's estate due to enrichment facts, a non-increase in its estate due to those facts, an increase in its liabilities due to those facts or non-decrease in its liabilities due to those facts. Insured estate does not increase, as the money paid by insurer is replacing the damage or loss incurred. It does not replace the money she spent on premium as the money is used to recover the loss and the insured is now declared high risk, despite the fact that they did not cause the loss intentionally and their premium increase and that in turn become impoverished.

c) The enrichment of the defendant must have been at the expense of the plaintiff. There must therefore be a casual link between the enrichment and the impoverishment.

d) The enrichment must have been unjustified or *sine causa*. This requirement entails the absence of a legally recognized ground for the enrichment. There must therefore be no sufficient legal ground such as a contract which justifies or entitled the enriched party to keep the value received.

The requirements do not mention that there should be a causal nexus between the impoverishment and the enrichment. All that is required to be proven is that the

[82] Eiselen,S, Pienaar, G.(2nd Ed.)(1999)*Unjustified Enrichment: A Casebook*.Butterworths.Durban.p25.

enrichment took place as a result of the impoverishment of the other party. There must be a logical and legal link between the transfer of the value from the one party and the receipt of that same value by the other party[83].

According to the doctrine of Subrogation, the insured is unjustly enriched if he sues the third party for the loss he has been compensated by insurer. However the insurer's right to go after the third party in the name of the insured can be considered to be "indirect enrichment. Indirect enrichment refers to [84]those situations where there is no direct dealing between the enriched and impoverished party put the enrichment ensues due to the involvement of a third party.

3.2 SUBROGATION AND ENRICHMENT

The fundamental principal of indemnity insurance contract is that the assured, in case of loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified[85]. This is the foundational principle of insurance law, every other proposition variance with it is wrong[86]. In terms of the case of *Castellain v Preston*[87]

> As between the underwriter and the assured the underwriter is entitled to the advantages of every right of the assured, whether such rights consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could and could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been dimished.

---

[83] Ibid.p70.
[84] Ibid.p71.
[85] Lowry J, P Rawlings (2nd Ed) (2005*) Insurance Law: Doctrines and Principles*. Hart Publishing. Oxford.p288.
[86] Ibid.
[87] Gibson J, V, Coenraad. (8th Eds)(2003)*South Africa Merchantile and Company Law*. Juda and Company Ltd. Landowne. P486.

In terms of the above case it was highlighted that in terms of subrogation the insurer is entitled to the advantages of every right of the insured, whether such rights arise from the contract has been fulfilled or unfulfilled. The case of *Ackerman v Loubster* Ward J supported this by saying "An accident policy is a contract of indemnity and from that it follows that the insurers who have indemnified the insured are entitled upon the principle of subrogation to the advantage of every right vested in the latter. The case of *Avex Air (Pty) Ltd v Borough of Vryheid*[88] the insurer cannot so sue for that part of the loss only for which it is liable under the relevant policy of insurance and which it has paid and leave the balance of the loss to be recovered by the party who suffered the loss, for a single cause of action cannot support a plurality of claims.

In terms of the requirements for unjust enrichment, the defendant must be enriched. The enrichment may consist of the increase of the defendant's estate due to the enrichment facts, a decrease in its liabilities due to those facts[89]. The insurer is paid premium by the insurer monthly or according to the agreement. The premium is set by the insurers at a level to attract business, but that also reflects the risk of a claim by this insured and, across the business as a whole, is likely to result in a profit[90]. The insurers are entitled to retain the premium until the risk occurred, when they are obliged to pay out. The doctrine of subrogation allows the insurer to retain the premium during the time the insured suffers no loss and as well the amount a third party compensates the insured for the same loss that the insurer covered. The insurer's estate is enriched when they claim from the third party or they claim from the insured the money paid by the third party. The insurer pays out of the premium the insured paid to them in the event of loss suffered by insured. There is no justification as to reason the insurer must reimburse themselves for the loss they suffered by paying the insured, from the third party[91].

The justification under subrogation that the insured should be compensated for the actual loss against which the policy has been made, shall be fully indemnified, but shall

[88] 1973 (1) SA 617 (A) at 625.
[89] Lowry J, P Rawlings (2nd Ed) (2005*) Insurance Law: Doctrines and Principles*. Hart Publishing. Oxford.p288
[90]Ibid.p131.
[91] Ibid.

never be more than fully indemnified. The onus to compensate fully lies on the insurer being a party to the insurance contract and not to third parties. Out of the pool of premiums collected from many insured, an indemnity is paid to the individual who suffers loss caused by an insured peril[92].

3.3 PRIVITY OF CONTRACT AND SUBROGATION

The insurance contract was defined by the case of *Lake & others NNO v Reinsurance Corporation Ltd & others*[93]

"Insurance is a contact between an insurer and an insured undertakes in return for the payment of a price or premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest.

An insurance contract is concluded between the insured and the insurer in return; for the payment of premium by the insured to the on condition that the insurer will compensate the insured for their loss on the happening of a specified uncertain event. The basic idea of contract being that people must be bound by the contracts they make with each other it would obviously be ridiculous if total strangers could sue or be used on contracts which they were in no way connected[94]. The doctrine that prevents this situation arising is the doctrine of privity of contract: parties who are not privy to contract cannot be sued or sue on it. The doctrine of subrogation undermines the doctrine of privy of contract. The insurance contract is concluded between the insurer and the insured, subjecting the payment of compensation to a third party who is not party to the insurance contract is goes against the doctrine of privity of contract[95]. The insured agrees to pay a premium and the insurers promise to pay a benefit in the event of a loss arising that falls within the terms of the policy, the doctrine of subrogation defeats or delays the payment of compensation since the third party has to be involved in the

[92] Ibid.
[93] 1967 (3) SA 124 (W) at 480
[94] Christie,R,H.(2nd Ed)(1991)*The Law of Contracts in South Africa.*Butterworths.Durban.p310.
[95] Ibid.

proceedings. The third party is not party to the insurance contract and despite being the possible cause of the loss, he should not be made part of the proceedings[96].

The plaintiff must be impoverished. The impoverishment may consist of a decrease in the assets of the defendant's estate due to enrichment facts, a non-increase in its estate due to those facts, an increase in its liabilities due to those facts or non-decrease in its liabilities due to those facts. The doctrine of subrogation seeks to prevent the insured from getting double compensation, on the basis of unjust enrichment[97]. Insured estate does not increase, as the money paid by insurer is replacing the damage or loss incurred. It does not replace the money she spent on premium as the money is used to recover the loss. The fact that the insured cannot institute actions against the third party that caused his loss and retains the profits means that the insured is impoverished for that amount as their assets decrease. Since the insured may have suffered loss not covered by the insurer and they forfeit their chances of claiming it from the third party as the insurer is the dominus litus and will only sue for the exact amount they compensated the insured for[98].

3.4 SUBROGATION IS NOT A FORM OF CESSION

The insurance contract is complete and enforceable once the parties have agreed upon its essential elements and terms[99]. Insurance contracts usually contains an express provision that entitles an insurer to conduct proceedings in the name of the insured against a third party for the recovery of compensation for the loss suffered and insured against, whether or not the insured has been compensated fully. In *Manley van Niekerk (Pty) Ltd v Assegai Safaris* and *Film Production (Pty) Ltd*[100], for example the policy stated:

---

[96] Ibid.
[97] Ibid.p311.
[98] Ibid.p312.
[99] Gibson J, V, Coenraad. (8th Eds)(2003)*South Africa Merchantile and Company Law*. Juda and Company Ltd. Landowne.p502.
[100] 1977 (2) SA 416 (A) at 420

'the insurer shall be entitled if it so desires…to prosecute in the name of the insured at its own expenses and for its own benefit any claim for…damages…against any person and shall have full discretion in the conduct of any proceedings… and the insured that give all such information and assistance as the company may require"

The insured, being contractually bound to ceded their right against the third person, causes their direct impoverishment and the enrichment of the insurer. The transfers of rights embodied in the policy are transferred either collectively or separately by an agreement known as a cession[101], although an agreement cession is not a contract. Cession is an act of transfer of a right, usually but not invariably accompanied by a contract, that is, that a price is payable for the cession. The insurer according to the case of *Ackerman v Loubster* has rights against third parties who are liable to compensate the insured for his loss. The doctrine of subrogation in itself does not give the insurer this right to claim from the third party by operation of the law or otherwise. There is no automatic cession of right by the insured; according to the case of *Schoonwinkel v Galatides*[102] the parties are free to agree to a cession to the insurer by the insured of the insured's right against third parties. Unless cession takes place, legal proceedings must be brought in the name of the insured, who procedurally is considered as the plaintiff[103].

By virtue of the doctrine of subrogation the insurer is contractually entitled to enforce these rights on behalf of the insured[104]. If the proceedings are successful, judgment is given in favour of the insured and the judgment debtor must pay his debt to the insured. The insurer is entitled to be reimbursed out of the proceeds[105]. According to *Joubert*[106] the advantage of the insurer being the dominus litus can ensure that the action is in fact brought against the third party and that the proceedings are properly conducted.

---

[101] Nienaber P, M Reinecke (2009*) Life Insurance in South Africa A Compendium*. Durban. NexisNexis.p 313.
[102] 1974 (4) SA 507 (T)
[103] Gibson J, V, Coenraad. (8th Eds)(2003)*South Africa Merchantile and Company Law*. Juda and Company Ltd. Landowne.p529.
[104] Joubert, WA (2002) *Insurer's Right to Subrogation*. *The law of South Africa.* Vol 12.298
[105] Ibid.p298.
[106] Ibid.

Cession is an actual transfer of rights; the insured cedes his right of suing a third party for the loss they caused to the insurer. However, despite that cession the insurer still sues in the name of the insured, instead of the name of the insurer who has the right to go after the third party due to the cession. This seems to defeat the whole purpose of a cession. It is questionable, since the insurer does not want to sue the third party using their own name. Gibson[107] justified it saying this allows the insurer to sue without the publicity attendant upon the use of its own name. It is common practice for Companies to institute actions on behalf of their clients. Insurers seem to be hiding behind their clients to get a favorable ruling in the courts to further profit themselves.

The status of the insurer appears to be noting other than that of a person authorized to represent the insured in enforcing his claim against the third party. An insurer who wants to proceed in the insured's name must obtain the consent of the insured's, which he is bound to give, provided that the insurer tenders a proper indemnity as to costs[108]. A refusal to grant permission amounts to a breach of contract by way of repudiation. Specific performance must be available to the insurer. The insurer will be entitled to claim damages or even rescind the contract[109]. The insured is compelled to give his consent or else he risks the repercussions. The insured initially cedes his right to sue the third party when the contract of insurance is entered into through a cession agreement. Once the right has been ceded, the cedent is divested of it and the cessionary succeeds him in every respect as the new holder of the right. Having ceded the right, the cedent cannot cede it again, but the cessionary, as the new holder of the right is of course free to do so[110]. However the insured is still contractually obliged to give consent to the insurer to institute actions in the insured's name.

According to *Reinecke*[111] subrogation is not a form of cession, as cession involves a transfer of a right by means of a real agreement. It has been suggested that subrogation

[107] Gibson J, V, Coenraad. (8th Eds)(2003)*South Africa Merchantile and Company Law*. Juda and Company Ltd. Landowne.p529.
[108] Ibid.p529.
[109] Joubert, WA (2002) *Insurer's Right to Subrogation*. *The law of South Africa.* Vol 12.p299.
[110] Nienaber P, Reinecke, M (2009) *Life Insurance in South Africa A Compendium*. Durban. NexisNexis.p 314.
[111] Reineke, M,Van Der Merve, S,Van Niekerk,V, Havenga, P (2002) *General Principles of Insurance Law*. Durban.Lexis Nexis Butterworths.p 280.

confers a right on the insurer to claim cession of the insured's right against third parties. It will be a prerequisite by the insured that insurer the insurer pays the insurance money due under the contract[112]. Despite *Reinecke's* opinion subrogation cannot be enforced unless a ceding of right has taken place, one cannot be enforced without the other. Subrogation means the substitution of one person got another so the person that the person substituted or subrogated succeeds to the rights of the person whose place he takes[113].

Since cession protects the insurer, once a cession has taken place, the cedent (the insured) cannot sue for the benefit of the cessionary (the insurer), unless he has authority to act on behalf of the cessionary and institutes the action in the name of the cessionary[114].

The insured must respect his dormant right and refrain from acting in a manner that will prejudice the insurer, especially when exercising his remedies against third parties[115]. If the insured a third party from liability after the occurrence of the loss but before he has received payment from the insurer, the insurer may exercise its remedies for breach of contract and avoid liability for the claim concerned[116]. Finally, any cost awarded in favour of the third party who defends the case are recoverable by such third party from the insured and the insurer. Since the actions are brought in the name of the insured. For this reason since the benefit is really the insurer the insured claim the cost form the insurer. The insured tends to demand a proper indemnity against costs before allowing the insurer the use of his name on proceedings against the third party.

[112] Ibid.
[113] Davis D (4th Ed.)(2006) *Gordon and Getz on The South African Law of Insurance*. Cape Town. Juta & Co, Ltd.p257.
[114]Ibid.
[115] Ibid.p300
[116] Ibid.p.301.

CHAPTER FOUR

CONSUMER PROTECTION AND THE DOCTRINES OF SUBROGATION

4.1 Introduction

Namibia is a prosperous, middle-income country, with an estimated GDP per capita of US$ 1,800 camouflages huge income disparities, presenting one of Namibia main economic problems. The majority of the population is poor, with limited access to social services in certain areas[117]. The insurance market has increasingly emerged in Namibia since independence; these can be attributed to the introduction of compulsory motor and health, links with credit provision and the growth of micro-insurance technology[118]. A large percentage of the Namibian public like many emerging markets lacks a history of using sophisticated financial products. Weak consumer protection and a lack of financial literacy can render households vulnerable to unfair and abusive practices by financial institutions[119]. The need for consumer protection arises from imbalance of power, information and resources between consumers and their financial service providers, placing consumers at a disadvantage[120]. Insurance is categorized as credence good, the insurance sector relies heavily on the public's trust that it will deliver what it promises[121].

The development of insurance industry came with a number of common undesirable practices such as poor practices including unrealistic benefit illustrations, non disclosure of the real cost of the products, misleading advertisements, unfair claims settlement

---

[117] Available at http://www.iss.co.za/af/profiles/Namibia/Economy.html Namibia - Economy. Last accessed on 2 October 2011.

[118] Lester,R(2009) *Consumer Protection Insurance*.Global Capital Markets Development Department. The world Bank.p1.
[119] Ibid.p3.
[120] Ibid.
[121] Ibid.

practices, selling tied to other products or services and not selling to identifies[122] to mention a few .

4.2 CONSUMER PROTECTION AGAINST THE DOCTRINE OF SUBROGATION

Consumers may often have a limited understanding about their policy or the policies they are looking to purchase. The terminology in policy documentation can be confusing[123]. The use of technical terms might not be understood by consumers. Because consumers might not be making fully informed purchasing decision, problems may be highlighted when claims arise after the loss has occurred[124]. Modern consumer law can be said to be based on an attempt to rectify the inequality of bargaining power which is said to exist between individual consumers and the more powerful supplier of goods and services with whom he deals[125]. The consumer does not have the ability to acquire the necessary information to be on the same level as the supplier with whom he deals. The other issue is that the cost of seeking redress is too great[126].

In order for the market to function in an efficient manner, consumers need to be supplied with adequate information about the quality of the service from competing traders and about the terms on which those traders are prepared to do business. If the consumer is adequately informed, he can indicate his preference and lead to competition between those traders to satisfy those preference[127].

Consumer protection against service providers has been a heated debate for academic and law reformers ever since April 2011 when the South African Consumer protection Legislation had been signed, to come into force next year[128]. The law of insurance as it stands today under Namibian law is very much in favour of the service provider, whilst insured are exploited through high premiums and unreasonable clauses in insurance

[122] Ibid.p3.
[123] Australian Securities and Investment Commission (2000) Consumer *Understanding of Flood Insurance*. Report 7.p 9.
[124] Ibid. p 10.
[125] Oughton, D,J Lowry(1997) *Text on Consumer Law*. Blackstone Press Limited. Great Britain.p15.
[126] Ibid.
[127] Ibid.
[128] Summary Workshop notes

policies. As a result most insured never get paid compensation for their loss, due to the unfavorable terms of the insurance policies. The doctrine of subrogation serves as another contractual clause that allows the insurer to use the insured name to further their financial interest[129].

Most of the contractual terms in insurance contracts are non-negotiable and can be unfair to the consumer. A term is considered unfair when it is contrary to the requirement of good faith and causes a significant imbalance it causes an imbalance in the parties rights and duties under the contract to the detriment of the consumer[130]. Well-organized businesses imposed take-it or-leave terms upon individual consumers and consumers are unable to protect themselves against this power[131]. *David Slawson*[132] argues in his article that the standard form of consumer contracts is essentially undemocratic 'private legislation', imposed upon customers by large private organizations. He concluded by saying the overwhelming proposition of standard forms are 'not democratic because they are not, under reasonable test, the agreement of the consumer...recipient to whom they are delivered…the form may be part of an offer which the consumer has no reasonable alternative but to accept. Consumer freedom is to negotiate contracts was dead in consumer transactions[133].

The Insurance Sector because of a history of weak regulation and misuse of taxation and capital transfer purposes and the universal requirement that certain classes of insurance be mandatory inevitably means the is a need for the introduction of specific consumer protection laws and systems[134]. The opaque nature of the insurance contract demands for the supervision of the consumer protection. Insurance contracts offer contingent intangible service delivered sometimes after the contract is entered into and

[129] Ibid.
[130] Lowe, R,G Woodroffe(1999) *Consumer Law and Practice*.(5th Ed)(1999) Sweet & Maxwell.London.P151.
Unfair Contract Terms Directive 1995 Regulation 4 Article 3.1 (1).
[131] Ramsay,I(2007) *Consumer Law and Policy: Text and Materials on Regulating Consumers Markets*. Hart Publication. Oxford.P159.
[132] Ibid.
[133] Ibid.
[134] Ibid.

the enforced use of standard contract subject to adhesion rules and the complexity of relevant law[135].

4.3 MISREPRESENTATION BY THE INSURANCE AGENT

The main commercial reasons for most insurance transactions lie in the economic advantage of spreading the risk of loss. Insurance contracts are based on products sold by insurance agents. Insurance policies are affected either through brokers, or agents and employees of insurance companies. At law a principal is bound by the acts of an agent with respect to matters which the agent has either actual or ostensible authority to conduct on behalf of his principle[136]. An insurance agent acts as either the employee off the insurer or its mandatory. As far as their functions are concerned, *in Dicks v South African Mutual Fire & General Insurance Co Ltd*[137] Miller J stated:

'The function of an insurance agent is generally to canvass insurance business for his principal and to his end he is normally supplied with proposal forms and authorized to receive duly completed and signed proposals for transmission to the appropriate office of his principal.'

Insurance contracts are legal contracts with legal terms; sales agents do not have legal background. Sometimes they omit to explain to client's important information, which if excluded affects the success of the subsequent claims, if the insurance agent omits information; the insurance company is not liable for the actions of the agent[138].

Insurance agents may receive information from prosper but may fails to transmit such material information to principal, the insurer. In terms of the doctrine of constructive notice, knowledge of such information can be imputed to the principal[139]. The insurance contracts contain legal terms and conditions, the agents do not always have a legal

[135] Lester,R(2009) *Consumer Protection Insurance*. Global Capital Markets Development Department. The world Bank.p6.
[136] Oughton, D, J Lowry(1997) *Text on Consumer Law*. Blackstone Press Limited. Great Britain.p15
[137] 1963 (4) SA 501 (N) at 504'
[138] Summary Workshop notes.
[139] Gibson J, V, Coenraad. (8th Eds)(2003)*South Africa Merchantile and Company Law*. Juda and Company Ltd. Landowne.p512.

background. They are not able to explain those terms to prospers and may even misinterpret certain terms like subrogation. The insured enter these insurance contracts, signing away their rights due to misrepresentation by the agents.

Insurers take precautions to protect their interest by including certain provisions in their policies such as the 'transfer of agency clause that states that the person completing the proposal form is deemed to be the agent of the prosper and not the insurer or a 'basis of contract clause' that states that only information in the proposal form binds the company and such information forms part of the insurance contract[140].

4.4 LONG-TERM INSURANCE ACT 5 OF 1998 AND SHORT-TERM INSURANCE ACT 4 OF 1998

Namibia does not have a Consumer Protection Legislation in place, consumers have to improve standards of consumer protection and promote the historically disadvantaged market participant's rights. South Africa Consumer Protection Act came into force in October 2010[141]. This Act applies to goods and services nationally promoted or supplied. "Service" includes services provided by insurance companies. Until the consumer Protection Legislation comes into force, consumers have to rely on the following legislations for protection.

The Long-Term Act[142] and Short-Term insurance Act[143] protect policy holders, through Section 67(1) and Section 66 of which protects against the Misleading, false and deceptive statements it states as follows:

(1) Any person who-

(a) makes any statement, promise or forecast knowing it to be misleading, false or deceptive; or *(b)* willfully conceals any material facts; or *(c)* negligently makes any statement, promise or forecast which is misleading, false or deceptive, for the purposes

[140] Ibid.p513.
[141] http://www.polity.org.za/article/the-impact-of-the-consumer-protection-act-on-insurance-2009-09-11
[142] Act 5 of 1998
[143] Act 4 of 1998

of inducing or attempting to induce any other person, whether or not such other person is the person to whom the statement, promise or forecast was made or from whom the material facts were concealed-

(i) to enter into or offer to enter into or to refrain from entering into or offering to enter into any domestic policy with a registered insurer or reinsurer; or (ii) to exercise or refrain from exercising any rights under such policy, shall be guilty of an offence and on conviction be liable to a fine not exceeding N$15 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(2) Where any person has been convicted in terms of subsection (1)- *(a)* the registered insurer or reinsurer concerned shall not be entitled to enforce any such policy which a person was induced to enter into unless so requested in writing by the person so induced; and *(b)* the person who was induced to enter into such policy shall be entitled to cancel such policy and to recover from the registered insurer or reinsurer concerned any money or other property paid or transferred by him or her under such policy, together with such compensation for any loss sustained by him or her as a result of such payment or transfer as he or she and the registered insurer or reinsurer concerned may agree upon or a competent court may determine, but if the person so induced exercises his or her right of recovery he or she shall not be entitled to any benefits under such policy and shall repay any such benefits received by him or her; and *(c)* the person who was induced to exercise or refrain from exercising any rights under such policy shall, within 90 days after the conviction, be entitled to nullify the action he or she was induced to take and to exercise or refrain from exercising his or her said rights in such manner as he or she may determine regardless of any time limit that may have existed in respect of the exercise of those rights.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

Insurance is no longer simply seen as a private contractual relationship between an insurer and an insured, it is a social policy that must be considered. The law makers have shown little interest in effecting reform, in spite of the occasional promptings of law reform bodies, and indeed the insurance industry has been exempted from changes in the law that apply to other contracts[144]. The insurance industry in Namibia has increasingly become vast over the past 20 years. The insurance contract is unusual in that while the insured is required to perform by paying premium, the insurer is only called to perform (if ever) at some distant point in the future[145].

As mentioned above the right of subrogation triggers only when the insurers have paid the insured under the policy. Where the insured, having fully indemnified by his or insurers, goes on the recover damages from the same loss against the third party, the award will be held on constructive trust for the insurers[146]. If the insured was entitled to keep both the insurance money and the damages awarded, he or she would be double compensated[147]. The insured in this situation will be unjustly enriched at the expense of insurers. The doctrine of subrogation was received in Namibian law from the South African Colonial regime. It is evident from the above chapters that the doctrine of subrogation is another doctrine disguised with legal justification to allow insurers to abuse their consumers. The principle of unjust enrichment should apply both ways. The insured pays premiums and it is out of those premiums he or she should be reimbursed for the loss they have suffered. The doctrine of privity of contract prevents parties who are not privy to contracts to be sued or sue on it. The involvement of third parties is

[144] Lowry J, P Rawlings (2nd Ed)(2005) *Insurance Law: Doctrines and Principles.*Oregon. Hart Publishing. p 8.
[145] Ibid.p11.
[146] Oughton, D, J Lowry(1997) *Text on Consumer Law*. Blackstone Press Limited. Great Britain.p300.
[147] Ibid.

ruled out by this doctrine. Insurance law is subject to the law of contract and the doctrine of subrogation undermines the doctrine if privy of contract[148].

Chapter 4, above clearly illustrates the magnitude of the negatives repercussions, which insurance has on the consumers and the economy. The sad part is that while we continue to be without Consumer Protecting Legislation, the consumer continues to be financially exploited by the big Insurance Companies. The current legislations in operation are not sufficient to obliterate the danger faced by consumers daily. There are talks of a new Consumer Protection Legislation under way. Ideally the Consumer Protection Legislation should be supported by formulation of more specialized Legislations tackling specific industries. For instance an Act that forces on insurance only, as there are certain issues that need to be addressed heads on, as opposed to a general Legislation. Such as the doctrine of Subrogation as discussed above, there is no legal justification for having it in our law. There seems not to be an amicable solution to reconciling the doctrine of subrogation with insurance law.

The proposed Consumer Protection Legislation should provide for clear rules on consumers in the area of insurance, and there should be adequate institutional arrangements for implementation and enforcement of consumer protect rules. The law should prioritize a role for a private sector, including voluntary consumer protection organizations and self-regulatory organizations[149]. A well-designed consumer protection framework can help reduce the imbalances of power and information between consumers and financial institutions[150].

[148] Christie,R,H.(2nd Ed)(1991)*The Law of Contracts in South Africa.*Butterworths.Durban.p310.

[149] Lester,R(2009) *Consumer Protection Insurance*. Global Capital Markets Development Department. The world Bank.p6.

[150] Ibid.

BIBIOGRAPHY

Books

Australian Securities And Investment Commission (2000) Consumer Understanding Of Flood Insurance. Report 7.

Available At Http://Www.Iss.Co.Za/Af/Profiles/Namibia/Economy.Html Namibia - Economy. Last Accessed On 2 October 2011.

Christie R (5th Ed) (2006) The Law Of Contracts In South Africa. Durban. Lexisnexis Butterworths

Davis D (4th Ed.)(2006) Gordon And Getz On The South African Law Of Insurance. Cape Town. Juta & Co, Ltd

Gaomab, M(2011) Consumer Protection An Absolute Necessity In Namibia!. Available At Http://Milton-Louw.Blogspot.Com. Last Accessed On 4th April 2011

Gibson J, V, Coenraad. (8th Eds)(2003)*South Africa Merchantile And Company Law*. Juda And Company Ltd. Landowne

Joubert, WA(2002) Insurer's Right To Subrogation. *The Law Of South Africa.* Vol 12

Lester,R(2009) Consumer Protection Insurance. Global Capital Markets Development Department. The World Bank.

Lowe, R, G Woodroffe(1999) Consumer Law And Practice.(5th Ed)(1999) Sweet & Maxwell.London.P151

Lowry J, P Rawlings (2nd Ed) (2005) Insurance Law: Doctrines And Principles. Hart Publishing. Oxford

Lowry J, P Rawlings (2nd Ed)(2005) *Insurance Law: Doctrines And Principles.*Oregon. Hart Publishing

Merkin R(7th Ed)(2001)Colinvaux's Law Of Insurance. London. Sweet & Maxwell

Nienaber P, M Reinecke (2009) Life Insurance In South Africa A Compendium. Durban. Nexisnexis.

O'Brien, J. (1988) Vol 2. *Distinct Subrogation Issues: Pandora's Box*. O' Briesn & Hennessy Educational Series

Oughton,D, J Lowry, J(1997) Text On Consumer Law. Blackstone Press Limited. Great Britain

Ramsay,I (2007) Consumer Law And Policy: Text And Materials On Regulating Consumers Markets. Hart Publication. Oxford.

Reinecke M, S Van Der Merve Etla.(2002) General Principles Of Insurance Law. Durban. Lexisnexis Butterworths

Reineke ,M, S Van Der Merve, J Van Niekerk, P Havenga(2002) General Principles Of Insurance Law. Durban.Lexis Nexis Butterworths

Shejavali, N(2009).Namibia: Consumer Protection Legislation In Starting. Available At Http://Allafrica.Com/Stories/200909180643.Html; Last Accessed On 4th April 2011
Thomas R (1996) The Modern Law Of Marine Insurance.Bridgend.Mid-Glamorgan

CASES

Ackerman v Loubster 1918 OPD 31

Castellain v Preston 1883 (11) QBD 380 (CA).

Dicks v South African Mutual Fire & General Insurance Co Ltd 1963 (4) SA 501 (N) at 504

In Manley van Niekerk (Pty) Ltd v Assegai Safaris and Film Production (Pty) Ltd 1977 (2) SA 416 (A) at 420

Lake & others NNO v Reinsurance Corporation Ltd & others 1967 (3) SA 124 (W) at 480

Morris v Ford Motor Co 1973 1 QB 792 (CA)

Morris v Ford Motor Co Ltd 1973 1 QB 792

Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A).
Napier v. Hunter 1993 2 W.L.R. 42

Schoonwinkel v Galatides 1974 (4) SA 507 (T)

Scottish Union & National Insurance Co. v Davis {1970} 1 Lloyd's Rep.1.
Simpson v Thomson (1877) 3 App Cas 279

Visser v Incorporated General Insurance Ltd 1994 (1) SA 472 (T).