

Subrogation has Limits: Insurers and Discovery Affidavits

By **Lauren Squier** (Partner),
Lindelwa Magwaza (Associate), and
Suzan Ndobe (Candidate Attorney)

30 April 2026

Nemukula v Treptow (2024/105499) [2026]
ZAGPJHC 40 (26 January 2026)

INTRODUCTION

Subrogation is a well-established principle of insurance law. Subject to the policy wording, once an insurer has indemnified its insured in respect of an insured loss, the insurer is generally entitled to step into the shoes of the insured and to exercise the rights of the insured against third parties responsible for the loss occasioned. However, the insurer's entitlement to enforce the insured's rights is not without limitation.

The recent decision of the Gauteng Division, Johannesburg High Court ("**the Court**") in *Nemukula v Treptow* (2024/105499) [2026] ZAGPJHC 40 provides much clarity on the procedural limits of subrogation, particularly in relation to the correct deponent to a discovery affidavit.

BACKGROUND

The dispute arose from a pending action in which the applicant instituted a claim against the respondent. Following the close of pleadings, the applicant served a notice on the respondent, calling upon him to make discovery on oath of all documents relevant to the matters in dispute. The respondent's attorneys served an unsigned discovery affidavit deposed to by a representative of the respondent's insurer.

The applicant rejected the discovery affidavit contending that it was non-compliant with the Uniform Rules of Court. An application was accordingly brought in terms of Uniform Rules, to compel the respondent to deliver a compliant discovery affidavit.

In response to the application to compel, the respondent's attorneys stated that the insurer had indemnified the respondent against damages arising from a motor vehicle collision and was exercising rights of subrogation. Critically, the insurer was not cited, joined, or substituted as a party to the proceedings.

The central issue before the Court was therefore whether a discovery affidavit deposed to by a non-party insurer,

purporting to exercise rights of subrogation, complied with the Uniform Rules and was valid for purposes of the action.

LEGAL FRAMEWORK GOVERNING DISCOVERY

Rule 35(1) provides that any party to action proceedings may, by notice, require any other party to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in dispute which are, or have at any time been, in the possession or control of such party. The rule is explicit: the obligation to discover rests on a party to the litigation.

Rule 1 of the Uniform Rules defines a "party" as including a plaintiff, defendant, applicant, respondent, or other litigant, and, where the context requires, such party's attorney with or without an advocate. The Uniform Rules do not contemplate that a non-party may assume the procedural obligations of a litigant absent formal joinder, third-party notice, or substitution.

A discovery affidavit is not a mere formality. It is a sworn statement made under oath regarding the existence, possession, and whereabouts of relevant documents. It is a procedural mechanism designed to ensure fairness and transparency, and it carries serious consequences for the litigant in the event of non-compliance with the Uniform Rules.

THE NATURE OF SUBROGATION

Subrogation operates as a derivative right. Upon indemnification (and subject to the policy wording), the insurer is generally entitled to step into the shoes of the insured and to exercise such rights as the insured had against third parties responsible for the loss. However, subrogation regulates the internal relationship between the insurer and the insured and it does not confer procedural party status upon an insurer in existing litigation to which it has not been joined.

The courts have consistently held that subrogation entitles an insurer to act in the name of the insured, but it does not confer independent legal standing. In *Commercial Union Insurance Co of SA Ltd v Lotter*¹, the

Court restated that subrogation entitles an insurer to enforce the insured's rights against third parties, but only to the extent that such rights validly existed in the insured initially. In *Rand Mutual Assurance Co Ltd v Road Accident Fund*² the Supreme Court of Appeal confirmed that subrogation is a derivative right, enforceable through the insured, that does not render the insurer a party to the action.

PROCEDURAL LIMITS OF SUBROGATION IN LITIGATION

The Court referred to the decision in *Esperance Vineyards Farming (Pty) Ltd v Liebenlogistics (Pty) Ltd*³, in which the Western Cape Division of the High Court rejected an insurer's attempt to depose to a discovery affidavit on behalf of the insured. That decision reaffirmed the following principles:

- subrogation does not dispense with the procedural requirement that the party to the litigation must swear to discovery; and
- if documents are in the possession of an insurer, the litigant must nevertheless personally depose to the discovery affidavit and may state, under oath, that the documents are held by the insurer.

COURT FINDING

The Court accordingly held that the discovery affidavit in question was defective in its non-compliance with Rule 35 and it was ordered to be set aside. The respondent was directed to deliver a compliant discovery affidavit, deposed to by himself.

KEY IMPLICATIONS FOR INSURERS AND LEGAL PRACTITIONERS

This judgment reinforces several important principles, namely:

- subrogation does not, in itself, confer party status upon an insurer in pending litigation to which it has not been joined;
- procedural obligations, including the duty to depose to discovery affidavits, remain with the cited party; and
- if an insurer wishes to participate directly in the conduct of litigation by asserting its subrogated rights, the Uniform Rules provide mechanisms for joinder or substitution. Until such steps are taken, the procedural obligations remain those of the cited party.

CONCLUSION

The decision serves as a caution against informal procedural shortcuts, even where insurers play a substantive role in the conduct of litigation behind the scenes.

While subrogation entitles an insurer to the benefit of the insured's rights against third parties, it does not, without formal procedural steps, confer party status in pending proceedings. While subrogation operates between an insurer and an insured, it does not serve to rewrite the Uniform Rules of Court.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated herein.

¹1918 OPD 31 at 36

²1999 (2) SA 147 (SCA)

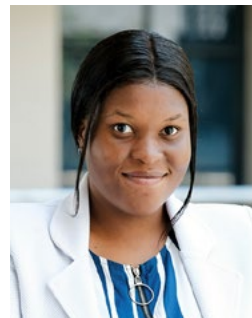
³(2024/105499) [2026] ZAGPJHC 40 para 9.



Lauren Squier
(Partner)



Lindelwa Magwaza
(Associate)



Suzan Ndobe
(Candidate Attorney)