**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: A423/2012**

**Date of hearing: 12/March/14**

**Date: 11 August 2014**

**E BUNTON** **1st APPELLANT**

**P BUNTON** **2ndAPPELLANT**

**and**

**W A COETZEE** **1st RESPONDENT**

**AUTO & GENERAL INSURANCE CO LTD** **2nd RESPONDENT**

**JUDGMENT**

**KHUMALO J**

INTRODUCTION

[1] With leave granted by the Deputy Judge President Van der Merwe (as he then was) of the North Gauteng High Court, the Appellants are appealing against the decision of Motata J, dismissing the counterclaim/claim of the 2nd Appellant, P Bunton, (referred to in the action as "Plaintiff in reconvention") against Auto and General Insurance , the 2nd Respondent (Third Party in the action) for indemnity against liability to a claim

instituted by W Coetzee, the 1st Respondent (Plaintiff in the action) against S T Bunton, the 1st Appellant, (Defendant in the action) who is the 2nd Appellant's daughter for an amount of R80 000.

[2] For reasons indicated hereafter, with the exception of the 2nd Appellant and 2nd Respondent, the parties will be referred to as in the action to avoid any misunderstanding and for ease of reference.

[3] The Plaintiff had sued the Defendant for damages to his motor vehicle in the amount of R85 000 following-on a collision between his motor vehicle, a BMW ("the BMW") with registration number B[...] GP and another motor vehicle a Ford Fiesta with registration number K[...] GP that was driven by the Defendant but for which the 2nd Appellant_carried the risk of benefit and loss as owner.

[4] The 2nd Appellant at all relevant times held a comprehensive insurance policy with the 2nd Respondent, Auto and General, a short term insurance company with limited liability duly registered and incorporated in terms of the Short Term Insurance Act, 53 of 1998 (Insurance Act").

[5] After service of the summons by the Plaintiff on the Defendant, the 2nd Appellant who was not cited in the summons had sought to bring a counterclaim against the Plaintiff as if he was a party to the action, seeking an order for the payment for damages to the Ford Fiesta. Subsequent to filing a Plea and counterclaim, he served a Third Party Notice on the 2nd Respondent, claiming that the 2nd Respondent is liable to indemnify him under and in terms of the policy in the event the court finds that he is liable for the said damages claimed by the Plaintiff. That was the basis of his claim, a fact that seems to have been overlooked when the leave to appeal was granted.

[6] In the Third Party Notice, the Plea as well as in the Counterclaim, 2nd Appellant refers to himself as the Defendant and Plaintiff in reconvention, even though he is not cited as the Defendant in the summons. Nowhere in his papers or pleading does he refer to the actual Defendant, his daughter, S T Bunton nor does he indicate that it is against her liability that he requires the 2nd Respondent to indemnify him. He nevertheless proceeded to refer to himself incorrectly as the Plaintiff in reconvention, an incongruity the court a quo found to be a misnomer but held in the leave to appeal otherwise as being appropriate, hence leave granted. I agree with the court a quo and deem it inappropriate in this appeal, to refer to the 2nd appellant as the plaintiff in reconvention.

Capacity to counterclaim

[7] In view of the fact that the 2nd Appellant was not a Defendant that was being sued in the summons or the

person who was alleged to be liable to the Plaintiff in that action, directly or vicariously, he does not have the capacity to counterclaim as a Plaintiff in reconvention. Rule 24 (1) of the High Court Rules' very simply and clearly pronounces as follows:

> '**A Defendant** who counterclaims shall, together with his Plea, deliver a claim in reconvention setting out the material facts thereof in accordance with Rule 18 and 20 unless the Plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in portion of the document containing the Plea, but headed "Claim in Reconvention". It shall be **unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention.'** (my emphasis)

[8] The key words of the subrule are **'a Defendant'.** That means the rule is, only the Defendant or a defending party in the action can counterclaim. A counterclaim is filed as part of the Defendant's answer to the original claim. Consequently a counterclaim must be made against the initiator of the lawsuit being a party who must have previously {as in the present action) made a claim against the claiming party. In this action the Plaintiff has not cited or in his original claim made a claim against the 2nd Appellant that could have suited the latter to bring a counter claim.

[9] The words **'it is unnecessary to repeat in the counterclaim the names or description of the parties to the proceedings'** are also very key in that as a general rule, counterclaims involve the original parties named in the action. So their names and description would not change or be substituted in the claim in reconvention as it is generally the same parties involved. Their claims would be reciprocal.

[10] The 2nd Appellant, has as well not alleged in his papers to have been joined as a joint wrongdoer by any of the original parties to the action. In that instance, he is not one of the parties to the action and as a non-party to the suit he lacks the legal standing to file a Plea or Counterclaim. The Plaintiff in his Plea to the Counterclaim contested the 2nd Appellant's legal standing. He specifically stated that "Pieter Bunton, a major male has no legal capacity to institute a counterclaim in this matter as he is not a party to the proceedings". Such contention was at no time and any stage of the proceedings withdrawn. The court a quo was therefore correct to find 2nd Appellant non-suited.

Third Party Notice

[11] With regard to issuing a Third Party Notice, that is again, a prerogative of a party in an action who claims to be entitled to a contribution or indemnification by a Third Party in respect of any relief claimed against him, to issue such a notice. In this matter there is no relief that is being sought against the 2nd

Appellant. He is not a party in the action. He also seeks to be indemnified against a relief that is being claimed against a person for whom he is not vicariously liable.

[12] Furthermore, the claim he sought to bring by a Third Party notice constitutes a separate action with different parties based on a contract and does not belong under this action. The subrule provides for only one action and that is necessarily the one initiated by the Plaintiff to which 2nd Appellant is not a party; see *M C C Contracts (Pty) Ltd v Coertze* 1998 (4) SA 1046 (A) at 1049G -1 and 1050 A-B. Based also on that ground, he does not only lack the capacity to issue the Third Party Notice, but his Notice is also substantively flawed. His claim according to the allegations in his Third Party Notice is based on delict, which is whether or not he is legally obliged to compensate the Plaintiff for her damages whilst the indemnification that he sought to claim was founded on the terms of the insurance contract. The two cannot be equated. The claim under the insurance contract is therefore misconstrued and falls foul to the provisions of Rule 13 (1) (b); see *Dodd v Estate Cloete and Another* 1971 (1) SA 376 (EC) specifically at 379G. The rule requires that any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them. See Cooper's Delictual liability in Motor Law at 457, Juta illustrates an example of the Road Accident Fund's Claims. The claim against the Third Party has therefore got to stand on its own, unlike in the 2nd Appellant's Third Party Notice, wherein he states in the particulars of claim, that:

> 'In the event of this Honourable Court finding that the Defendant is liable to the Plaintiff for the said damages claimed by the latter, Defendant will aver that the Third Party is liable to indemnify the Defendant in respect of such damages under and in terms of the policy.'

[13] The Defendant in the action is S E Bunton. It is obvious that as 2nd Appellant is not the Defendant, a judgment or an order finding him liable to the Plaintiff could not be made in that action. He also was not eligible to be substituted or joined as a co-defendant that has a substantive interest in the matter due to the fact that he would not suffer any prejudice by a judgment granted against the Defendant, the driver of the Ford Fiesta at the time of the accident. 2nd Appellant was not legally responsible for the Defendant. He is therefore not legally obliged to compensate the Plaintiff for any liability arising from the Defendant's negligence. For that reason he not only did not have capacity to bring a Third Party Notice as a non party to the action, he also did not have the capacity to be sued. Hence the action between the Plaintiff and Defendant was resolved with the Defendant held to be liable for the damages suffered by the Plaintiff in the amount of R80 000.

[14] The principle of *locus standi in judicio* essentially relates to the right or legal capacity of a party to sue

or be sued; see *United Watch and Diamond (Pty) Ltd* v *Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415A where the court outlined the test for determining this right or legal capacity, stating that:

> "to establish that one has *locus standi in judicio*, one must show,... that he has an interest in the subject matter of the judgment or order sufficiently direct or substantial..."

In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 631 at 637 it was elucidated that:

> 'If a party has a direct and substantial interest in the order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party he is a necessary party and should be joined in the proceedings"

This can only be on application to the court by a party with a *locus standi.* On the basis of the papers and the evidence that was before the court a quo, 2nd Appellant did not have the *locus standi in judicio,* to file a Plea, institute a counterclaim or issue a Third Party Notice.

[15] The Appellants allege, as their ground for appeal that the court a quo erred in ignoring the agreement between the parties consenting to 2nd Appellant's counterclaim and Third Party Notice to be regular as recorded in the pretrial minute. Their Counsel argued that the parties can go beyond the rules and that the agreement was a sensible arrangement eminently suitable to airing the real dispute between the parties. Leave was also granted on the basis that another court might arrive at a different conclusion and not go beyond the agreement in non-suiting the 2nd Appellant.

[16] The Plea filed by the Plaintiff to the said counterclaim, clearly stipulates that 2nd Appellant lacks the legal capacity to counterclaim as he is not the Defendant in the action. The pre-trial minute does not bear the signature of the Plaintiff. Such deficiency was not explained, since the matter only proceeded to trial against the 2nd Respondent even though the counterclaim was purportedly against the Plaintiff in the action. The alleged pre-trial minute does not mention an agreement on the Third Party Notice but only that the Plaintiff, Defendant and Plaintiff in reconvention (2nd Appellant) agreed to 2nd Appellant's counterclaiming for his damages. The heads of argument on appeal further refer the court to a letter dated 20 August 2002, before *litis contestatio,* wherein the Plaintiffs attorneys allegedly confirmed that the Defendant can file his counterclaim. The Plaintiff subsequently issued summons only against the existent Defendant on 22 August 2002, non- suiting 2nd Appellant for any participation in the action.

[17] Can the court condone or endorse the breach of its rules and or the lack of *iocus standi in judicio* of a party in an action due to an agreement between the parties, in the second scenario, to bestow on or afford a

party a standing that he legally does not have. What must be taken into consideration is that what is in issue is the *locus standi in judicio* of the 2 Appellant to litigate in the action not just a defect in the proceedings that he has taken in this action. The principle that a party is not entitled to resile from such an agreement applies to an agreement concerning a fact; an agreement relating to law is not binding upon the parties or the court; see *Aegis Insurance Co Ltd* v *Consani NO* 1996 (4) SA 1 (A).

[18] As concerns the rules of procedure, the court has discretion whether or not to condone a defect depending on whether or not there will be prejudice and the interest of justice is not compromised. The discretion is imposed purely because the purpose of impressing on the rules of procedure is to facilitate finalization and expediency; see *Ncoweni v Bezuidenhout* 1927 CPD 130. Hence the adage that rules are there for the court not the court for the rules. In that instance the court can take into consideration the agreement or consent of the parties even though it is not bound by such agreement.

[19] *Locus Standi* is a matter of law and cannot be conferred by consent or condonation of the court, *Exparte Johannesburg Congregation of the Apostolic Church* 1968 (3) SA 377 (W). In *Rapotsonyane v Sekhukhu Syndicate* 2006 (2) BLR 607 CA, the court adopted the analysis of the law in *Morenane Syndicate and Others v Loeto* {2005} 2 B.L.R. 37 by Kirby J that:

> "1. Locus standi is fundamental to due process without it the proceedings are invalidated.
>
> 2. Locus standi is a matter of law and cannot be conferred by consent or by the condonation of the court.
>
> ..."

[20] The 2nd Appellant sought to invoke the Rule 13 proceedings to join a Third Party to the action and to counterclaim against the initiator of the proceedings whilst lacking the *locus standi* to sue and be sued. Parties to legal proceedings could not by agreement, compel a court to decide a case on an incorrect legal basis. The court a quo was entitled to go beyond the alleged agreement of the parties as it needed to preside over a due process. In *Fawu O.B.O Thondiwe Labane and Others v Tai Yuan Garments (Pty) Ltd* 2013 LSLC 22, the court *mero motu* raised the point of lack of *locus standi* of the Applicant Union that sought to join the employees in an Application it instituted. The court refused to condone the breach of its rules and found it improper to join parties to a party lacking capacity. The logic being that, if it is found that the main party has no *focus standi,* a joinder application by such a party would not sustain. A counterclaim would follow the same logic.

[21] Under the circumstances, 1 propose that the following order be made

[21.1] The appeal is dismissed.

**N V KHUMALO J**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION: PRETORIA**

I agree

**M J MUSHASHA AJ**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION: PRETORIA**

I agree and it is so ordered

**V V TLHAPI J**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION: PRETORIA**

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