THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20794/2014

In the matter between:

ESTEE BUNTON	**FIRST APPELLANT**
PIETER BUNTON	**SECOND APPELLANT**

and

W A COETZEE	**FIRST RESPONDENT**
AUTO & GENERAL INSURANCE CO LTD	**SECOND RESPONDENT**

Neutral citation: *Bunton v Coetzee* (20794/2014) [2016] ZASCA 31 (23 March 2016)

Coram: Navsa ADP, Tshiqi, Seriti and Swain JJA and Fourie AJA

Heard: 14 March 2016

Delivered: 23 March 2016

Summary: Civil Procedure – agreement by parties aimed at achieving inexpensive and expeditious completion of litigation – high court erroneously refusing to permit agreed procedure.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Khumalo J with Tlhapi J and Mushasha AJ concurring, sitting as court of appeal).

1 The appeal is upheld.
2 The second respondent, Auto & General Insurance Co Ltd is ordered to pay the costs of appeal of the first appellant, Estee Bunton and the second appellant, Pieter Bunton.
3 The order of the full court is set aside and replaced with the following order:
'(a) The appeal is upheld.
(b) The second respondent, Auto & General Insurance Co Ltd is ordered to pay the costs of the first appellant, Estee Bunton and the second appellant, Pieter Bunton.
(c) The order of the trial court is set aside and replaced with the following order:
''The third party, Auto & General Insurance Co Ltd, is ordered to indemnify the first defendant, Estee Bunton and/or the second defendant, Pieter Bunton, in the amount of R80 000 plus legal costs, in respect of the claim of the plaintiff, W A Coetzee.
The third party is ordered to pay the costs of the first and second defendants.'''

JUDGMENT

Swain JA (Navsa ADP, Tshiqi and Seriti JJA and Fourie AJA concurring):

[1] This appeal has its origins in a collision which took place on 26 June 2001 between a motor vehicle driven by the first respondent, Mr W A Coetzee and a motor vehicle driven by the first appellant, Ms Estee Bunton. The motor vehicle driven by Ms Bunton was owned by her father the second appellant, Mr Pieter Bunton and

insured by him with the second respondent, Auto & General Insurance Co Ltd (Auto & General).

[2] In terms of the schedule to the policy of insurance, Ms Bunton was specified as the regular driver of the motor vehicle in question. Auto & General undertook to compensate the insured, Mr Bunton, against any damage caused to another person's property where the regular driver, Ms Bunton was responsible in law for the damage caused by the collision.

[3] Mr Coetzee as plaintiff, instituted action against Ms Bunton as defendant, alleging that she was the sole cause of the collision. He claimed that his vehicle was damaged beyond economical repair and she was accordingly obliged to make payment of the sum of R116 000 to compensate him for his loss. Ms Bunton filed a plea denying that she was the sole cause of the collision and in turn alleged that Mr Coetzee was the sole cause. Together with the plea a counterclaim was filed in which Mr Bunton was reflected as the plaintiff in reconvention. Mr Bunton then served a Third Party Notice upon Auto & General claiming an indemnity in respect of any damages which he and / or Ms Bunton might be ordered to pay to Mr Coetzee. In the Third Party Notice it was alleged that 'the defendant is Pieter Bunton' which Auto & General simply denied in its plea. If Auto & General wished to object to the procedure adopted by Mr Bunton, it should have served a notice in terms of rule 30 of the Uniform Rules specifying the irregularity complained of. By pleading and not doing so, Auto & General took a further step in the proceedings and was precluded in terms of rule 30(2)*(a)* from thereafter objecting to the procedure. If Auto & General wished to challenge the locus standi of Mr Bunton to join it as a third party, it should have raised this expressly by way of a special plea. Mr Coetzee in his plea to the counterclaim denied that Mr Bunton had legal capacity to institute a counterclaim, as he was not a party to the proceedings. This resulted in a replication being filed by Mr Bunton in which he alleged that Mr Coetzee had agreed during October 2002, that he could institute a counterclaim despite the fact that he was not a party to the proceedings and that the Apportionment of Damages Act 34 of 1956 would apply to both the claims of Mr Coetzee and the counterclaim of Mr Bunton. Mr Coetzee thereafter accepted that such an agreement had been reached.

[4] A rule 37 pre-trial conference was thereafter held attended by the legal representatives of all of the parties. The minutes of the conference that were signed by the representatives of Mr and Ms Bunton, as well as the representatives of Auto & General, record that it was agreed between Mr Coetzee and Mr and Ms Bunton that Mr Bunton was permitted to claim his damages by way of a counterclaim. It also recorded that he joined Auto & General on the basis of a policy of insurance, in terms of which Auto & General was obliged to indemnify him and / or Ms Bunton against the claim of Mr Coetzee. In response Auto & General simply denied that it was liable to indemnify Mr / Ms Bunton and did not record any objection it had to Mr Bunton's right to join it as a third party and himself to be a party to the litigation. It was also agreed by the appellants that Mr Coetzee was entitled to payment of the sum of R80 000 with costs, without opposition by the representatives of Auto & General. In the light of the fact that the only substantive defence raised by Auto & General was that proper notice was not given to it in terms of the policy by Mr Bunton, which defence was revealed in evidence to be groundless, it is difficult to see why at the trial Auto & General's counsel sought to persuade the trial court (Motata J) that Mr Bunton was not properly before the court. The accident occurred almost 15 years ago and has spawned a great deal of litigation in the interim, over the princely sum of R80 000. Tellingly, however, at the final hurdle, namely the present appeal, Auto & General chose to abide the outcome.

[5] When at the commencement of the trial, counsel for Auto & General submitted that Mr Bunton was not a party to the proceedings and was not entitled to file a counterclaim, or to join Auto & General as a third party, counsel for Mr Bunton responded by stating that Auto & General had failed to challenge the procedure in terms of rule 30, or had failed to 'except' to its joinder and was not entitled to challenge Mr Bunton's agreed status as a party to the proceedings.

[6] The trial court (Motata J) however made no reference in its judgment to the issue of whether Auto & General had agreed to this procedure, or had failed to object to it in terms of rule 30, or had failed to challenge Mr Bunton's locus standi and decided the case simply on the basis that the procedure adopted by the parties was not permitted by the Uniform Rules of Court. The claim by Mr Bunton and / or Ms

Bunton to be indemnified by Auto & General in the agreed amount of R80 000, was accordingly dismissed with costs.

[7] Leave to appeal to the full court was granted to Mr and Ms Bunton by Van der Merwe J in the absence of Motata J, as he was indisposed. Leave was granted on the basis that the minutes of the rule 37 Conference had defined the issues between the parties. Van der Merwe J stated that he could not understand why Motata J had gone beyond the agreement between the parties and non-suited Mr and Ms Bunton. He was accordingly satisfied that there was a reasonable prospect another court may come to a different conclusion.

[8] The appeal court (Khumalo J with Tlhapi J and Mushasha AJ concurring) referred to the appellants' (Mr and Ms Bunton) allegation that the trial court erred in ignoring the agreement between the parties as recorded in the minutes of the rule 37 Conference. It also referred to the fact that Auto & General in their plea to the Third Party Notice clearly stipulated that Mr Bunton lacked legal capacity to counterclaim as he was not a defendant in the action. However, as pointed out above, the plea of Auto & General simply denied that Mr Bunton was a defendant, but it did not expressly challenge his locus standi by way of a special plea. Indeed it appears to have acquiesced in the agreement. It noted that Mr Coetzee had not signed the rule 37 Minutes and that this deficiency had not been explained. It was quite clear, however, from the record of the proceedings before the trial court, that Mr Coetzee did not participate in those proceedings, because his claim had been settled in accordance with the agreement set out in the rule 37 Minutes. It also noted that the rule 37 Minutes did not record any agreement regarding the Third Party Notice. However, as pointed out above, all that Auto & General denied at the conference was that it was obliged to indemnify Mr Bunton and / or Ms Bunton, but it did not record any objection to the procedure adopted by Mr Bunton in joining it as a third party or raise any challenge to his locus standi to do so.

[9] The court a quo made no finding on the issue that Auto & General agreed to the procedure, or should be held to have done so. It decided the matter on the basis that Mr Bunton lacked locus standi to sue and be sued. It held that locus standi was

a matter of law and could not be conferred by consent or condonation. Accordingly he was not entitled to invoke the provisions of rule 13 to join Auto & General as a third party to the proceedings. It held that the trial court was entitled to go beyond the alleged agreement between the parties 'as it needed to preside over a due process' and 'parties to legal proceedings could not by agreement compel a court to decide a case on an incorrect legal basis'. The appeal was accordingly dismissed without any order as to costs. The present appeal which Mr Coetzee and Auto & General do not oppose, is with the special leave of this court.

[10] In my view, the court a quo erred in defining the locus standi of Mr Bunton as the issue that the parties' agreement sought to address. In terms of the policy of insurance that Mr Bunton concluded with Auto & General, he had locus standi to claim an indemnity from it. He also had locus standi to claim damages from Mr Coetzee resulting from damage caused to his motor vehicle, as a result of the negligent driving of Mr Coetzee. The parties' agreement was aimed solely at the procedure to be followed.

[11] In *Federated Trust Ltd v Botha* 1978 (3) 645 (A) at 654D it was stated that:

'The court does not encourage formalism in the application of the Rules. The Rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts.'

It is quite clear that the agreement concluded between the parties did not prejudice any party and had as its object, the inexpensive and expeditious completion of the litigation between all of the parties.

[12] The trial court and the court a quo accordingly erred in ignoring the agreement concluded between the parties and dismissing the claim of Mr Bunton and / or Ms Bunton to be indemnified by Auto & General in the sum of R80 000 plus costs.

[13] The following order is granted:

1 The appeal is upheld.

2 The second respondent, Auto & General Insurance Co Ltd is ordered to pay the costs of appeal of the first appellant, Estee Bunton and the second appellant, Pieter Bunton.

3 The order of the full court is set aside and replaced with the following order:

‘(a) The appeal is upheld.

(b) The second respondent, Auto & General Insurance Co Ltd is ordered to pay the costs of the first appellant, Estee Bunton and the second appellant, Pieter Bunton.

(c) The order of the trial court is set aside and replaced with the following order:

‘‘The third party, Auto & General Insurance Co Ltd, is ordered to indemnify the first defendant, Estee Bunton and/or the second defendant, Pieter Bunton, in the amount of R80 000 plus legal costs, in respect of the claim of the plaintiff, W A Coetzee.

The third party is ordered to pay the costs of the first and second defendants.’’’

K G B Swain
Judge of Appeal

Appearances:

For the First and Second Appellant:	G B Botha SC
	Instructed by:
	G P Venter Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For the First and Second Respondent:	No appearance
	Instructed by:
	Savage Jooste & Adams Inc, Pretoria