

IN THE HIGH COURT OF SOUTH AFRICA /ES
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 23049/2002

DATE: 8/6/2007

REPORTABLE

IN THE MATTER BETWEEN:

W A COETZEE

PLAINTIFF

AND

MS ESTEE BUNTON

DEFENDANT

AND

PIETER BUNTON

PLAINTIFF IN RECONVENTION

AND

AUTO & GENERAL INS CO LTD

THIRD PARTY

JUDGMENT

MOTATA, J

[1] On 26 June 2001 along Duxbury Road, Hillcrest, a collision occurred between a 1984 Ford Escort XR3 motor vehicle bearing the registration letters and numbers KYP 502 GP and a BMW motor vehicle bearing the registration letters BLESS-U GP. This action arises out of and pertains to such motor vehicle collision and its aftermath.

[2] At the time of the aforesaid collision the Ford Escort was the property of Pieter Bunton (the plaintiff in reconvention) being driven by his daughter, Estee Bunton (the defendant herein). The plaintiff bore the risk of a hire purchase of the BMW and he was the driver of the BMW.

[3] The plaintiff sued for recovery of his alleged damages to such BMW motor vehicle in the sum of R116 000,00.

[4] In this case the defendant and the plaintiff in reconvention are two different persons.

[5] The net result of the collision is that the defendant, Ms Estee Bunton, is liable in law for the damage caused to the motor vehicle of the plaintiff and as a result of the collision to the extent of R80 000,00 plus legal costs.

[6] The defendant, Ms Estee Bunton, is the daughter of the plaintiff in reconvention, is a duly licensed driver and was at all times the authorised and regular driver of the motor vehicle of the plaintiff in reconvention. The plaintiff in reconvention is Pieter Bunton, a major male, who was at all relevant times a policy holder of a comprehensive insurance policy in respect of the Ford Escort XR3 motor vehicle driven by the defendant at the time of the collision.

[7] The third party is Auto & General Insurance Co, a short term insurance company with limited liability duly incorporated and registered as such according to the laws of the Republic of South Africa who in its plea in terms of paragraph 2 admitted the allegations.

[8] It is common cause between the parties that there existed and at all relevant times was in force an insurance policy between the third party and the plaintiff in reconvention. The latter's due compliance with that policy is not in issue, save with regard to the question of notice which I shall deal with hereinafter.

[9] The plaintiff in reconvention and/or the defendant seeks indemnification from the third party in respect of the sum of R80 000,00 plus costs to which the plaintiff is entitled. There is no dispute that the policy entitles the plaintiff in reconvention and/or the defendant to such indemnity provided due notice was given. The third party repudiated the claim citing intake of liquor by the defendant. But this is not persisted in by the third party.

[10] The sole basis of the third party's denial of liability under the policy is the question of whether due notice was given to the third party of the claim by the plaintiff.

[11] It is not disputed that immediately after the collision on 26 June 2001 a claim was submitted to the third party under and in terms of the policy in respect of the damage to the Ford Escort XR3. This was repudiated by the third party in its letter dated 3 July 2001. The plaintiff in reconvention decided not to pursue a claim for his own damages.

[12] The matter is settled between the plaintiff in reconvention and the defendant. The question which remains is whether the third party is liable to the plaintiff in reconvention and if so the plaintiff in reconvention seeks that the third party indemnify him with the amount claimed plus costs of these proceedings.

[13] Before this court two witnesses testified namely the plaintiff in reconvention and

the defendant in convention. The plaintiff in reconvention apprised the court of the policy he had with the third party and a repudiation of the matter by the third party. The third party closed its case without leading evidence.

[14] In this case the defendant and the plaintiff in reconvention are two different persons. However, by agreement between the plaintiff and the defendant the plaintiff in reconvention was permitted to institute the counter-claim although he is not the defendant.

[15] The Uniform Rules of Court rule 24(1) provides for the institution of a counter-claim by the defendant. It does not envisage the institution of a counter-claim by anyone other than the defendant. The purpose of allowing a counter-claim is to obtain finality in litigation *ut sit finis litium*. It excludes the necessity of a separate cross-action and constitutes a convenient surrogate for an independent action. In the present case, the subject matter of the claim and counter-claim is in so far as liability is concerned, identical although this is not a requirement for a counter-claim. The reciprocal claims in this case arise out of the same incident. Both plaintiff and Pieter Bunton have valid independent claims for damages but stemming from the same incident. Both claims lie against the tortfeasors. The difficulty arises simply because Pieter Bunton was not driving his car himself at the time. The driver was the defendant his daughter. Strictly speaking plaintiff's claim lies against her. This is not a case in which the owner, Pieter Bunton, is in any way liable as owner for defendant's driving. On the other hand, Pieter Bunton's claim against the plaintiff (who was probably driving his own vehicle) is not subject to any apportionment.

[16] Counsel for the defendant and plaintiff in reconvention argued that it seems

convenient for the two actions to be dealt with simultaneously and to subject the claim of Pieter Bunton directly to possible apportionment in the event of the defendant being found to have been negligent with regard to the collision. The question arises, can this situation validly have been effected by the parties? By virtue of rule 24(5) a counter-claim brought other than in accordance with rule 24 is an irregular proceeding as contemplated in rule 30.

[17] Rule 24(1) contemplates consent by the plaintiff for the late institution of a counter-claim. Rule 24(2) contemplates with the leave of the court, the institution of a counter-claim by the defendant against a stranger. Neither provision, however, covers the present situation.

[18] The defendant could not have joined her father Pieter Bunton as a third party in terms of rule 13 as she seeks neither an indemnity nor a contribution from him and such joinder furthermore creates no *lis* between the plaintiff and the third party. Pieter Bunton is not a co-defendant.

[19] The institution of a counter-claim by someone other than the defendant is an eventuality not contemplated in the rules of court.

[20] In the present case there is a further complicating feature. That is the introduction by the plaintiff in reconvention of a third party to the action. This factor involves a consideration of the rights of such third party. It is no longer simply a matter of the convenience of the two claimants inter parties.

[21] The plaintiff in reconvention as it turned out, joined Auto & General Insurance Co Ltd as a third party herein.

[22] In terms of rule 13 "any party to an action is entitled to invoke the rule". The purpose of rule 13 is to avoid a multiplicity of actions and to this end introduces a procedure whereby a person not a party to the action can be brought before the court and have his obligation, if any, to pay a contribution or indemnity determined together with those of other defendants.

[23] This brings one back to the question of whether Pieter Bunton can properly be regarded as a party to "the plaintiff's action against the defendant" and indeed as "a plaintiff in reconvention" for purposes of rule 13. This could well be served by the plaintiff in reconvention having instituted an action against the third party namely Auto & General Insurance Co Ltd as a defendant and applied to court that for convenience

both matters can be heard at the same time as the subject-matter in both cases is identical. This is the procedure allowed. Mr Pieter Bunton as the plaintiff in reconvention is not a party to the proceedings and the defendant has to pay the amount claimed by the plaintiff and not Pieter Bunton. The procedure by Pieter Bunton is wrong. The plaintiff in reconvention has not followed the correct procedure in terms of the contract with the third party.

[24] In the light of the foregoing considerations the procedure adopted by the parties is not appropriate. Indemnity or contribution can only be founded on contract or in a statute. In the present case the plaintiff in reconvention claims from the third party not damages but an indemnity on the basis of an insurance contract. The procedure adopted by the plaintiff, the defendant and the plaintiff in reconvention is an unusual one.

[25] The net result of the collision is that the defendant, Ms Estee Bunton, is liable in law for the damage caused to the motor vehicle of the plaintiff in and as a result of the collision to the extent of R80 000,00 plus legal costs.

[26] The plaintiff in reconvention and/or the defendant seeks indemnification from the third party in respect of the sum of R80 000,00 plus costs to which the plaintiff in reconvention is not entitled to.

[27] The initial ground of repudiation, namely the intake of liquor by the defendant, was not persisted in by the third party. The sole basis of the third party's denial of liability under the policy is the question of whether due notice was given to the third party of the claim by the plaintiff.

[28] In the light of the foregoing the claim by the plaintiff in reconvention and/or the defendant in the sum of R80 000,00 plus costs is dismissed with costs.

J MOTATA
JUDGE OF THE HIGH COURT

23049-2002

HEARD ON:
FOR THE PLAINTIFF:

INSTRUCTED BY:
FOR THE DEFENDANT:
INSTRUCTED BY:
FOR THE PLAINTIFF IN RECONVENTION:
INSTRUCTED BY:
FOR THE THIRD PARTY:
INSTRUCTED BY: