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| Reportable:                        | YES/NO |
| Circulate to Judges:               | YES/NO |
| Circulate to Magistrates:          | YES/NO |
| Circulate to Regional Magistrates: | YES/NO |



IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 398/2022

In the matter between:

ASSMANG (PTY) LTD BLACK ROCK MINE                      Excipient/1<sup>st</sup> Defendant

and

PATRICK THUPAYABOTLHE MAJENG                      Respondent/Plaintiff

In re:

PATRICK THUPAYABOTLHE MAJENG                      Plaintiff

and

ASSMANG (PTY) LTD BLACK ROCK MINE                      First Defendant

RAND MUTUAL ASSURANCE COMPANY LTD                      Second Defendant

Coram: Lever J

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JUDGMENT

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Lever J

1. This is an exception that was argued before me in open court on the 21 October 2022. At the hearing hereof Ms Nxumalo, who appeared for the respondent/plaintiff, indicated that the respondent had already filed a Notice of Intention to Amend his Particulars of Claim. Such notice to amend was not on my file. Ms Nxumalo handed a copy, stamped by the Registrar, to me together with a stamped copy of what purported to be the amended Particulars of Claim.
2. I pointed out that in terms of Rule 28 of the Uniform Rules of Court (the Rules) the excipient had 10 days in which to object to the proposed amendment. This was also correctly reflected on the Notice of Intention to Amend. Ms Erasmus, who appeared for the excipient, indicated that the excipient was still considering whether to object to the proposed amendment or not.
3. Both the Notice of Intention to Amend and the purported amended Particulars of Claim bore the Registrar's date stamp of the 18 October 2022. In other words, both the Notice of Intention to Amend and the purported amended Particulars of Claim were filed on the same day. These documents were filed only two clear court days before the hearing of this matter. Ms Nxumalo acknowledged that the excipient had 10 days after the Notice of Intention to Amend was filed to object to the proposed amendment. In these circumstances I handed the purported amended Particulars of Claim back to Ms Nxumalo.

4. At the time that this matter was heard, the excipient had the right to either object to the amendment under the provisions of Rule 28, or deal with it as an irregular step under the provisions of Rule 30.
5. The respondent had filed his Heads of Argument late. Such Heads of Argument were only filed on the 21 October 2022. The respondent sought condonation for filing his Heads of Argument outside the time it was required to be done. In the interests of handling the matter as cost effectively and as expeditiously as possible I granted such condonation and accepted the proffered Heads of Argument.
6. Turning now to the merits of the exception itself. The exception filed by the excipient/first defendant is that the Particulars of Claim do not disclose a cause of action.
7. It is well established, that for the purpose of deciding an exception, the facts pleaded in the Particulars of Claim are accepted as correct.<sup>1</sup> The question is, in the circumstances of this case, do such facts disclose a cause of action or not.
8. It appears from the relevant Particulars of Claim that the respondent/plaintiff was an employee of the excipient/first defendant at the material time. It further appears that an accident occurred at the

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<sup>1</sup> STEWART & ANOTHER v BOTH A & ANOTHER 2008 (6) SA 310 (SCA) at 313F.

excipient/first defendant's mine whilst the respondent/plaintiff was on duty. The plaintiff was injured in such accident.

9. The excipient/first defendant excepted to this claim as not disclosing a cause of action on the basis that: Respondent/plaintiff was an employee of the excipient/first defendant; The provisions of section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) applied in the said circumstances; There was no obligation on the excipient/first defendant to compensate the respondent/plaintiff in those circumstances; By virtue of the provisions of section 35(1) of COIDA, the respondent/plaintiff's common law right to make such claim has been extinguished; and respondent/plaintiff has not pleaded any circumstances which would place its claim outside the purview of section 35(1) of COIDA.

10. Section 35(1) of COIDA reads as follows:

"35(1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

11. In the Notice of Intention to Amend the respondent/plaintiff seeks to couch his claim under the provisions of the Occupational Diseases in



Mines and Works Act<sup>2</sup> (ODIMWA). Ms Nxumalo also tried to invoke the provisions of the Occupational Health and Safety Act as well as the Mining Safety Act. Neither Act is dealt with in the Notice of Intention to Amend. Nor does Ms Nxumalo refer to any section of such Act specifically or explain why I should have regard to such Acts.

12. However, the respondent/plaintiff in its Notice of Intention to Amend does not set out facts and/or circumstances that would exclude his claim from the operation of s35(1) of COIDA. The Notice of Intention to Amend is itself a tacit acknowledgement that the exception is a good one. This is reinforced by the fact that the said Notice of Intention to Amend doesn't deal with s35(1) of COIDA at all. In addressing argument to this court in the respondent/plaintiff's Heads of Argument and in her Oral address Ms Nxumalo does not deal with s35(1) at all nor does she submit that ODIMWA ousts s35(1) of COIDA in the particular circumstances of the respondent/plaintiff's case.

13. Ms Nxumalo's argument on behalf of the respondent/plaintiff as I understood it was that I must judge the exception on the current state of the pleadings. The difficulty I have with her submission is that she includes the amendment in the current state of the pleadings. On the facts as set out above the amendment has not yet been effected.

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<sup>2</sup> Act 78 of 1973.

14. In support of her argument Ms Nxumalo referred to an unreported judgment of Mr Justice Koen in the matter of THE MEC FOR HEALTH, FOR THE KWAZULU-NATAL PROVINCE & 2 OTHERS v MEDICAL INFORMATION TECHNOLOGY SA (PTY) LTD handed down in the Kwazulu-Natal Division, Pietmaritzburg on the 8 June 2022.
15. The difference between the facts of the matter decided by Koen J in the above matter and the present matter is that in the MEC Health KZN matter the amendment had been effected after the 10-day period contemplated in Rule 28 without their being any objection to such amendment, which was subsequently effected. In the present matter the excipient/first defendant at the date of the hearing of this matter had been afforded no such opportunity. Accordingly, the present matter will have to be decided on the basis that the proposed amendment has not as yet been effected and cannot be considered part of the pleadings.
16. Ms Nxumalo also referred me to the judgment of Justice Malindi in the matter of MADIRO v MADIBENG LOCAL MUNICIPALITY and 1 OTHER<sup>3</sup>. My reading of the judgment of Malindi J supports my reasoning as set out above and not the submission made on behalf of the respondent/plaintiff herein.

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<sup>3</sup> SAFLII (16592/2018) [2021] ZAGPPHC 667 (12 September 2021)

17. Accordingly, I find that the exception is still apposite and is a good exception and the respondent/plaintiff has not raised facts that respond directly to such exception. Consequently, I must uphold the exception.
18. As an aside I note that the definition section of ODIMWA does not on the face of it allow for the respondent's claim as it is couched in the proposed amendment. However, it is not for me to decide the proposed amendment. That will be done at the appropriate time. As indicated above the exception was decided on the papers as they stood when the exception was argued.
19. Ms Erasmus conceded that it would not be appropriate to strike out the respondent/plaintiff's claim at this point. The respondent/plaintiff will be given a chance to pursue his contemplated amendment in accordance with the Rules.
20. The only outstanding issue is the issue of costs. The Notice of Set Down for the exception was served and filed on the 28 June 2022. The Notice of Intention to Amend was served and filed on the 18 October 2022. This afforded only two clear court days before the hearing on the 21 October 2022. At this point the excipient/first defendant was already committed to the costs of an opposed exception. In these circumstances, it would be unreasonable to deprive the excipient/first defendant of its costs.



In the circumstances, the following order is made:

- 1) The exception is upheld.
- 2) The respondent/plaintiff is afforded the opportunity to pursue its proposed amendment in accordance with the Rules.
- 3) Should the respondent/plaintiff fail to pursue such amendment or in the event of such amendment being refused after it has been considered by this court, then, subject to any further order the court considering such amendment might make, the excipient/first defendant is granted leave to make an application on these papers, duly supplemented, if required, to have the plaintiff's claim struck out.
- 4) The respondent/plaintiff will pay the costs of the exception on the ordinary party-and-party scale.

  
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Lawrence Lever  
Judge  
Northern Cape Division, Kimberley

**APPEARANCES:**

Excipient/1<sup>st</sup> Defendant:            ADV S ERASMUS oio HAARHOFFS INC.

Respondent/Plaintiff:            ADV R NXUMALO oio LULAMA LOBI INC.

Date of Hearing:                    21 October 2022

Date of Judgment:                28 October 2022