

***FORM A***  
**FILING SHEET FOR EASTERN CAPE HIGH COURT, MTHATHA JUDGMENT**

PARTIES:      **Ntombifuthi Mtshwelo**

**VS**

**RAF**

- Case No.: 1040/2009
- Magistrate:
- High Court:      **EASTERN CAPE HIGH COURT, MTHATHA**

DATE HEARD: 17<sup>th</sup> Sept. 2009

DATE DELIVERED: 22 Sept 2009

JUDGE(S): Dawood J

LEGAL REPRESENTATIVES –

*Appearances:*

- a)      for the Plaintiff: Mr. Kunju
- b)      for the Defendant: Mr. Mafunda

*Instructing attorneys:*

- 1)      Plaintiff: S. Booie & Sons C/O Jolwana Mgidlana Inc.
- 2)      Defendant: Messrs Potelwa & Co.

CASE INFORMATION -

- a)      *Nature of proceedings:* Civil – Rule 23 of the Uniform Rules.

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE HIGH COURT: MTHATHA)**

In the matter between:

CASE NO. 1040/2009

NTOMBIFUTHI MTSHWELO

Plaintiff

AND

ROAD ACCIDENT FUND

Defendant

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**JUDGMENT**

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**DAWOOD, J:**

[1] The Plaintiff has excepted to the Defendant Plea in terms of Rule 23 of the Uniform Rules of court on the basis that the Defendant's plea lacks averments that are necessary to sustain a defence and that the plea does not justify the conclusions drawn therein.

[2] The complaints apparently are directed at paragraph 3; 4; 5 and 6 of the Defendant's plea which in dealing with the various aspects of the Plaintiff's particulars of Claim state as follows:-

*“ The Defendant has no knowledge of the allegations herein, does not admit the same and puts the Plaintiff to the proof thereof. Defendant further reserves the right to lead evidence in rebuttal of evidence to be led by the Plaintiff in this regard.”*

[3] Rule 22 (2) of the uniform rules of court reads as follows:-

*“ The defendants shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or **state which of the said facts are not admitted and to***

*what extent, and shall clearly and concisely state all the material facts upon which he relies.”(my underling)*

[4] In **Wilson v South Africa railways and Harbors 1981 (3) S.A 1016 (C)** it was held that the defendant has in terms of Supreme Court rule 22 (2) a right to plead non-admission where it has no knowledge of certain facts.

[5] The Defendant herein claims that this is the situation in the present case.

[6] The Defendant has effectively stated that it has no knowledge of the following:-

- b) The collision;
- c) The negligence of the insured driver;
- d) The fact that the deceased died as a result of the injuries sustained in the collision;

- e) That he was married to the Plaintiff and was the father of the minor children;
- f) What the deceased date of birth was, and of his employment details;
- g) That the deceased enjoyed good health;
- h) That the deceased would have worked until normal retirement age;
- i) That the plaintiff and minor children were dependant on the deceased for support and he was legally obliged to support them in the amount set out;
- j) That the Plaintiff was married in terms of Customary Law to the deceased;
- k) That the Plaintiff and minor children have due to the wrongful act of the driver lost their right to support;
- l) That the Plaintiff has complied with the Act and the Defendant's further requirements.

- [7] If regard is had to the averments that it has denied knowledge of one cannot state that it is unreasonable for it to say that it lacks knowledge thereof and wants the Plaintiff to prove the same, in the circumstances of this case.
- [8] The nature and form of the Plea can clearly be criticized and be said to be undesirable but this unfortunately does not of necessity translate into it being excipiable.
- [9] Mr Mafunda in his heads of argument stated that the Defendant would still not have knowledge of the facts founding the cause of action or the circumstances surrounding the collision, even if the court were to uphold the exception and accordingly would not be in a position to admit, deny or confess and avoid, as the case may be and the order will as a result be unenforceable.
- [10] One has to take at face value the Defendant's contention that it genuinely has no knowledge of these allegations.

- [11] It is evident that some of the averments would be peculiarly within the knowledge of the Plaintiff, despite the fact that the Plaintiff would have supplied the Defendant with most of the information.
- [12] The frustration of the Plaintiff is fully appreciated
- [13] Due cognizance has been taken of the submissions made by the Plaintiff's legal representative, both in his Heads of Argument and in court.
- [14] Mr Kunju, referred to the case of **Radebe v Eastern Transvaal Development Board 1988 (2) S.A 785@793** to support his argument that the Defendant ought to state what facts it relies upon to state that it has no knowledge. This case however dealt with an application and not an action. One of the cases relied upon by the learned Judge in Radebe's case was **Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) S.A 464 (D) @ 469** – where the learned Miller, J stated:-

*“Where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner’s favour, an objection that it does not support the relief claimed is sound.”*

[15] These cases unfortunately do not advance Mr Kunju’s argument nor are they support for his contention, regarding the exception that has been taken to the Defendant’s Plea.

[16] The defendant, undoubtedly is in a position to verify some if not most of the information supplied by the Plaintiff and pleaded in

the particulars of claim, instead of putting the Plaintiff through the undue hardship, delay and expense of protracted litigation.

[18] The plea may not be excipiable but the Defendant should not hide behind technicalities to avoid its obligation to road users, and claimants with legitimate claims, by its dilatory conduct.

[19] The defendant has the means and the infrastructure to verify information supplied to it by claimants and conduct the necessary investigations if necessary, even prior to the institution of legal proceedings and should not be remiss in its duty, to expeditiously and efficiently settle legitimate claims, without incurring unnecessary costs.

[20] It is on this basis that I am exercising my discretion and not awarding the Defendant any costs despite my findings.

[21] I accordingly make the following order:-

[1] The Exception is dismissed; and

[2] Each party to pay its own costs.

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F.B.A Dawood  
Judge of the High Court  
DATE HEARD

- 17 September 2009

DATE JUDGMENT HANDED DOWN - 22 September 2009

FOR THE PLIANTIFF - Mr Kunju

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FOR THE DEFENDANT - Mr Mafunda

DEFENDANT'S ATTORNEY - Messrs Potelwa & Co.  
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