

**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA  
(MPUMALANGA DIVISION, MBOMBELA)**

- (1) REPORTABLE:NO  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED: YES

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09/07/2024

**CASE NO: 5553/2023**

In the matter between:

**TRACEXPRESS (PTY) LTD**

Plaintiff

and

**XSUN TRANSPORT (PTY) LTD**

Defendant

*This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 09 July 2024 at 10:00.*

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## J U D G M E N T

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### **MASHILE J:**

[1] This is an exception raised by the Defendant (Xsun Transport”) against the amended particulars of claim of the Plaintiff (“Tracexpress”). The exception is twofold. Firstly, the particulars of claim lack the necessary averments to sustain a cause of action and/or secondly, that they are vague and embarrassing. It appears that there was a first exception to which Tracexpress responded by amending its particulars of claim. The complaints concerning the amended particulars of claim are believed to persist hence this second exception. The exception is opposed by Tracexpress as baseless.

### **FIRST COMPLAINT**

[2] The first complaint arises from Paragraph 4 of the amended particulars of claim where Tracexpress pleads that:

*“On or about 2<sup>nd</sup> of July 2021, Mr. Hander van Graan a manager of the Defendant telephoned the Plaintiff to set up vica voce [sic] or otherwise and oral agreement between the Plaintiff and the Defendant”. The Plaintiff pleads further in paragraph 4.1.2.2 that:*

*“The operators at the Defendant will prepare a load confirmation, delivery note, final weight ticket and agree on the price for the transportation of the Defendant’s goods...”*

[3] Xsun Transport states that if one has regards to the amended particulars of claim, it stands to reason that each supposed load/delivery instruction constitutes a discrete and independent agreement subject to variances in pricing. While that is the case, not a single of these alleged agreements have been appended to the amended particulars of claim.

As though that was not enough, Tracexpress has not fully pleaded the terms of these agreements. As such, states Xsun Transport, it is unable to plead to these vague and ambiguous allegations.

[4] Similarly, Tracexpress pleads that the operators of Xsun Transport carry responsibility for the preparation of the load confirmation and pricing, yet it fails and/or refuses to disclose who these operators were at the time when the purported transport agreements were concluded. Tracexpress has therefore failed to adhere to the Uniform Rules of Court and no cause of action can be said to have been made out. In the alternative, Xsun Transport is unable to plead to the particulars of claim because of the ambiguity and vagueness of the allegations.

[5] Tracexpress further pleads in the next sub-paragraphs of the amended particulars of claim that it transferred goods on behalf of Xsun Transport in exchange for a service fee. The fee would be charged against it in accordance with an invoice, which Tracexpress would render to Xsun Transport. Xsun Transport contends that Tracexpress fails to disclose when the goods were transported and to whom they were delivered.

[6] Tracexpress also fails to mention the amount of the service fee and/or how such fee was calculated. Tracexpress is silent on who agreed to the service fee. Tracexpress also does not disclose where, when and/or by whom such instruction to transport the goods were received and by whom was it given.

## **SECOND COMPLAINT**

[7] Here the complaint is that at Paragraph 4.1.2.3 of the amended particulars of claim, Tracexpress refers to a supposed delivery note annexed as Annexure “OS45” without mentioning to which agreement it belongs. Moreover, says Xsun Transport, the annexure is unclear, illegible and confusing. As such, Xsun Transport contends that it is unable to gather the relevant information from the annexed documents to meaningfully plead to the particulars of claim. Additionally, the balance of the annexures attached to the particulars

of claim are nonsensical, undecipherable and do not display the relevant information necessary to enable Xsun Transport to meaningfully plead to the amended particulars of claim.

[8] The question that requires the attention and determination by this Court is whether the two grounds of exception raised by Xsun Transport are well-founded. If this Court finds that they are, the exceptions must be upheld and if not, they will stand to be dismissed.

[9] Prior to embarking on evaluation of the issues, it will always be advisable to first set out what the guiding legal principles are on the subject. In this regard, Xsun Transport has referred to Uniform Rules of Court 18(4) and (6). Rule 18 deals with matters concerning pleading generally. Sub-rules (4) and (6) respectively provide that:

*“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.” And*

*“A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”*

[10] At Page 558 of the Civil Practice of The High Courts of South Africa, Vol 1 - Juta - by *Herbstein & Van Winsen* the following is stated: *“The function of pleadings “is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties”.*

[11] In *Kali v Incorporated General Insurances Ltd*<sup>1</sup> the Court said that the parties are limited to the pleadings delivered as a party will not be allowed to direct the attention of

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<sup>1</sup> 1976 (2) SA 179 (D) at 182A

his opponent to one issue and come to Court to canvass another. Accordingly a pleading should be so phrased that the opposite party may reasonably and fairly be required to plead thereto.<sup>2</sup>

[12] The above is so because, amongst other things, the pleadings “*enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings an appropriate method of trial can be determined*”.<sup>3</sup> To achieve this objective a pleading should be precise. In particular it should not be vague and embarrassing: nor lack averments necessary to sustain a cause of action.

[13] A pleading is vague and embarrassing when “*it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on...*”.<sup>4</sup> A pleading is also vague and embarrassing when an intelligible cause of action cannot be gathered from it.<sup>5</sup>

[14] Reading the amended particulars of claim, it is manifest that the agreements upon which Tracexpress relies are oral. It is a requirement of Rule 18(6) that in those circumstances a party pleading such an agreement ought to set out in full the terms of the oral agreements failing which the particulars of claim will lack averments necessary to sustain a cause of action. The averment of an oral agreement without pleading their full terms is also vague and embarrassing in the sense that Xsun Transport does not know the terms. As such, it is embarrassed because of which it is prejudice as it cannot plead thereto.

[15] The load delivery instructions amount to written distinct and separate agreements and there is no argument to the contrary by Tracexpress. Accepting that to be the position, Tracexpress has neither attached the load delivery instructions to the amended

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<sup>2</sup> Trope v South African Reserve Bank 1992 (3) SA 208 (T)

<sup>3</sup> Jowell v Brandwell-Jones 1998 (1) SA 836 (W) at 899-903

<sup>4</sup> Leathern v Tredoux 1911 NPD 346 at 348

<sup>5</sup> Keeley v Heller 1904 TS 104, Factory Investments (Pty) Ltd v Record Industries Ltd. 1957 (2) SA 306 (T)

particulars of claim, nor has it pleaded the terms thereof. Xsun Transport is, like in the case of the oral agreement, equally embarrassed due to the vagueness. It is as such, prejudice because it is unable to plead to the amended particulars of claim.

[16] Tracexpress alleges that the operators of Xsun Transport carry responsibility for the preparation of the load confirmation and pricing. In doing this, it omits to mention who these operators were when the transport agreements were concluded. Needless to state that in the absence of disclosure of the operator's names, the particulars of claim are rendered vague and embarrassing and Xsun Transport is indubitably prejudiced because it cannot plead to the claim. To state the obvious – the names are significant to avoid any person claiming to have been an operator for Xsun Transport at the time when the converse is true.

[17] Turning to the allegation that Tracexpress transferred goods on behalf of Xsun Transport in exchange for a service fee and that the fee would be charged against it in accordance with an invoice, which Tracexpress would render to Xsun Transport. The unmistakable difficulty here is, as pointed out by Xsun Transport, that Tracexpress fails to mention when and where were the goods conveyed. Additionally, Tracexpress is silent on who received the goods when they were delivered at their destination. Again, without these particulars, the amended particulars of claim are vague and embarrassing. For that reason, Xsun Transport is prejudice insofar as it is unable to plead to the claim

[18] Also stemming from the preceding allegation is that Tracexpress omits to state the amount of the service fee and how it computed it. In fact, there is a conglomerate of questions that arise because of the allegation above. In addition to what I have already stated - Tracexpress is mute on who agreed to the service fee, where, when and who gave instructions to transport and who received them.

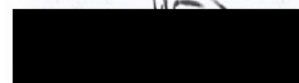
[19] I am mindful that it can be contended that these defects in the particulars of claim can be cured by a request for further particulars for trial. Well, that is not the assertion on

which Tracexpress relies and in any event, not all the defects in this specific instance can be remedied by request for further particulars for trial.

[20] Lastly, Xsun Transport refers to Annexure "OS45" and points out that without Tracexpress stating the agreement with which it is associated, the annexure is vague leaving it embarrassed and unable to plead to the amended particulars of claim and therefore prejudiced. That is not the only problem though. The annexure is evidently undecipherable and illegible to the naked eye. It would not only be unfair but also unreasonable to expect any person to make out the contents of the annexure. Insofar as the other annexures are concerned, I am unable to conclude that they are nonsensical, unclear and illegible. That is, in any case, of little assistance to Tracexpress in view of the outcome of this judgment.

[21] In the result, the two exceptions are upheld in consequence of which I make the following order:

1. The Court upholds the two exceptions with costs;
2. The particulars of claim are struck off and Xsun Transport is directed to amend its particulars of claim within 10 days of the date of this order.



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**B A MASHILE**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**MPUMALANGA DIVISION, MBOMBELA**

**APPEARANCES:**

**Counsel for the Plaintiff:**  
**Instructed by:**

**Mr FM Makhanya**  
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**C/O Nomaswazi Shabangu Attorneys**

**Counsel for the Defendant / Excipient:  
Instructed by:**

**Adv JA Van Wyk  
Swanepoel & Partners Inc**

**Date of Judgment:**

**09 July 2024**