IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

CASE: 2195/2024

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED
[redacted]
12 May 2026
DATE SIGNATURE

In the matter between:

UNISTRANS FREIGHT FORWARDING AND CLEARING (PTY) LTD	**APPLICANT**
And	
DIVERSE PLC (PTY) LTD	**1ST RESPONDENT**
LIZETTE KOEDYK	**2ND RESPONDENT**

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12 May 2026 at 10h00.

JUDGMENT

MANGENA AJ:

[1] Unitrans Freight Forwarding and Clearing (Pty) Ltd, (Unitrans) instituted proceedings against Diverse PLC (Pty) Ltd and Ms Lizette Koedyk (defendants) for payment of a total sum of R11 245 979.59 jointly and severally, the one paying the other to be absolved. Unitrans wants interest to be paid on the amount claimed a *tempore mora* together with costs of suits.

[2] The claim, according to the particulars of claim, arises out of the following summarised facts: During the year 2020 Unitrans appointed Diverse PLC as its agent for cross border movement of cargo and related services at the Lebombo Border Post. In terms of the agreement, so it is alleged, Unitrans would act as the clearing agent for customs purposes in relation to consignments of fuel imported from Mozambique into South Africa in transit to Diverse PLC customers based in Zimbabwe and Botswana. Diverse PLC will be responsible for the transportation of the fuel to its customers in accordance with the export entries and was required to present export acquittal documents to SARS at the Lebombo Border Post. For this purpose, Unitrans was required to comply with all licence requirements as a remover of goods and to provide the necessary security for payment of duties and levies to the South African Revenue Services when they fall due. In return for its services as a clearing agent Unitrans would be paid an agreed alternatively customary and further alternatively reasonable sum of money.

[3] Unitrans says it complied with its obligations and alleges that Diverse PLC breached its obligations by failing to ensure that the consignment of fuel was exported to its customers in Zimbabwe and Botswana. The breach resulted in SARS, acting in terms of the provisions of the Customs and Excise Act 91 of 1964 demanding payment of a total sum of R11 245 979. 59 from Unitrans as the clearing agent.

[4] Unitrans says that it is disputing liability for the amount demanded but made a payment of R4 616 990 .59 to SARS in accordance with the "pay now and argue later" principle.

[5] The claim is defended and a plea is yet to be filed. The defendants have excepted to the particulars of claim. As for the first defendant Diverse PLC, it is averred that the particulars of claim are bad in law alternatively lack the necessary averments to sustain a cause of action. In support of this exception, Diverse PLC says that Unitrans does not explain the basis for its entitlement for payment of the difference between what it claims and what it paid to SARS arguably under protest and without admission of liability. It says that when the particulars of claim are read in their entirety, it is unclear whether Unitrans has suffered patrimonial loss in the amount claimed as same is disputed and there is a balance of R6 629 000.00 unaccounted for.

[6] On behalf of the second defendant, Ms Koedyk, the essence of the exception is that the claim is legally incompetent as Unitrans failed to establish a legal basis for its delictual claim for pure economic loss. The argument being made on behalf of the second defendant is that no wrongfulness can be attributed to her arising out of a breach of contract.

[7] Confronted with the exceptions mentioned above Unitrans filed a notice of amendment in which it sought to cure the complaints raised by the defendants in their exceptions.

[8] The defendants objected to the proposed amendments on the basis that they are insufficient to cure the deficiencies in the particulars of claim. To this end, they filed a notice of objection to the amendment.

[9] At the hearing of the matter I enquired from the parties what the status of the exceptions were in view of the proposed amendments. Mr Fasser who appeared for the defendants

said that a ruling is required on the amendment and in the event that it is found that it does not cure the defect, the exception succeeds and the defendants are entitled to their costs. If the amendment application succeeds, the exception as raised against the original particulars of claim succeeds and the defendants become entitled to the costs.

[10] Mr Vorster who appeared for Unitrans says that I am only required to consider whether Unitrans has made a case for an amendment. If the answer is yes, the exceptions upon which the objections are based fall off. If the proposed amendments are insufficient to cure the defects in the particulars of claim, the application should be refused.

[11] The difficulty with Mr Fasser's submission is that the exceptions have not been enrolled for hearing and are not before me. What is before me are the objections. On the authority of *Nxumalo v First Link Insurance Brokers (Pty) Ltd*, 2003 (2) SA 620, I will consider both the application for amendment and the exceptions upon which the objections are based.

[12] The approach to exceptions was stated by the Supreme Court of Appeal in *Luke M Tembani & Others v President of the Republic of South Africa and Another,* 2023 (1) SA 432 (SCA)[1] as follows:

> *"Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient,*

[1] Luke M Tembani and Others v President of the Republic of South Africa and Another (167/2021) [2022] ZASCA 70; 2023 (1) SA 432 (SCA) (20 May 2022).

who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts."

[13] Against the abovementioned guidelines I proceed to consider the application for amendment and the objection thereto by the defendants. I propose to start with the exceptions raised.

Exception by Diverse PLC

[14] As indicated above Diverse PLC takes issue with the part payment made by Unitrans and its reliance on the "pay now and argue later" principle. It says by adopting this position, Unitrans disputes liability and therefore is not indebted to SARS as it paid "under protest". Because it is not indebted to SARS, Unitrans does not have a complete cause of action against Diverse PLC. For this contention, Mr Fasser called in aid Commissioner for *Inland Revenue v First National Industrial Bank Ltd,* 1990 (3) SA 641 (A).

[15] The reliance on this case to support an exception for lack of cause of action is misplaced. Payment "under protest" serves to reserve the right to recover payment in the event it is subsequently established that it was not due. It does not extinguish liability to pay on the part of the debtor. This is so because SARS has in its letter of demand made it clear that "any objection of our demand lodged... in terms of the Act does not suspend payment" and that legal steps will be taken without further notification. The only sensible thing for Unitrans to do was to pay to avoid bad credit and protect its relationship with SARS. In doing so, it was not waiving its right to claim a refund or sue for its total loss or damages as per the demand from SARS. I therefore do not agree with Mr Fasser that Unitrans is not

entitled to claim the full debt demanded by SARS because it paid under protest. As I see it Unitrans remains indebted to SARS notwithstanding its protest and the reservation of its rights to reverse the payment. If it subsequently succeeds to get the payment reversed, Diverse PLC will equally be entitled to a refund based on unjustified enrichment. What Diverse PLC cannot do is to frustrate the claim on the basis of an exception that the particulars of claim lacks necessary averments to complete a cause of action.

Exception by Ms Koedyk

[16] Ms Koedyk says that the claim against her is for pure economic loss allegedly suffered by Unitrans as a result of her failure to ensure that Diverse PLC performs its obligations under the contract. She contends that this claim is bad in law as she does not owe any legal duty to prevent pure economic loss to Unitrans. In support of this contention, I was referred to a plethora of cases which served before various courts including the constitutional court.

[17] Shorn of frills, the essence of the exception is that Ms Koedyk denies liability for the debt and contends that she was neither negligent nor does she owe any legal duty to Unitrans regarding the performance of obligations by Diverse PLC. There was, according to her, no wrongfulness on her part to attract delictual liability.

[18] As I see it, the contentions above are sufficient to constitute a defence to the claim. Once the trial court has heard the evidence presented by the parties, it will assess the basis upon which it is contended that Ms Koedyk owed a legal duty to Unitrans. As part of the wrongfulness enquiry the court will determine whether there has been a breach of a legal duty not to harm Unitrans. Negligence as an element of fault will also need to be proved. If it is found that no such duty exists, the claim will fail. See *H v Fetal Assessment Centre,* 2015 (2) SA 193 (CC) par 69 and 70.

[19] In my view whilst I accept that an exception can be raised against a claim for pure economic loss, it is not in every instance that such an exception should be upheld. In this case the particulars of claim contains the necessary averments to complete a cause of action and the defendants should be able to plead in line with their defence (if any).

[20] Regarding costs, the defendants were not frivolous in their objection to the initial particulars of claim. The exceptions necessitated the amendment of the particulars of claim. They are entitled to a remission of costs. The applicants whilst successful should not get their full costs of this application.

[21] In the results, the following orders are made:

1. The objection to the amendment and the exceptions underlying them are dismissed;

2. The proposed amendments to the particulars of claim as contained in the notice of motion are allowed;

3. Plaintiff/Applicant is granted leave to effect the amendment.

4. The respondents are ordered to pay 50% costs of the application for amendments on scale B of the High Court tariffs.

[redacted]

M I MANGENA

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

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Date of Hearing:	12 February 2026
Date of delivery:	12 May 2026

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION MBOMBELA (MAIN SEAT)

CASE NUMBER: 2195/2024

BEFORE THE HONOURABLE JUDGE MANGENA AJ

DATE: 12 MAY 2026

In the matter between:

UNISTRANS FREIGHT FORWARDING AND CLEARING (PTY) LTD	**APPLICANT**
And	
DIVERSE PLC (PTY) LTD	**1ST RESPONDENT**
LIZETTE KOEDYK	**2ND RESPONDENT**

COURT ORDER

The Judge heard the matter on 12 February 2026 and electronically circulated the judgment on 12 May 2026 and gave an order in paragraph "21" as follows:

"[21] In the results, the following orders are made:

1. The objection to the amendment and the exceptions underlying them are dismissed;

2. The proposed amendments to the particulars of claim as contained in the notice of motion are allowed;

3. Plaintiff/Applicant is granted leave to effect the amendment.

4. The respondents are ordered to pay 50% costs of the application for amendments on scale B of the High Court tariffs."

SOUTH AFRICA

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SOUTH AFRICA

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