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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable
Case no: 3860/2020

In the matter between:

AMANDA MACPHERSON

Plaintiff

and

SEABOURNE INXPRESS (PTY) LTD

First Defendant

PROTEA ELECTRONICS (PTY) LTD

Second Defendant

Coram: NJOKWENI AJ
Heard on: 20 NOVEMBER 2025
Delivered on: 21 MAY 2026

Summary: Law of contract – validity of a contract – animus contrahendi – *ad idem* requirement – uniform rule 18 – admissibility of hearsay – section 3 of the Law of Evidence Amendment Act 45 of 1988 – evidentiary burden – balance of probabilities – credibility findings – adherence to issues in pleadings – costs.

ORDER

1. The Plaintiff's claim is dismissed.

2. The Plaintiff to pay the First Defendant's costs of suit, inclusive of the costs of the hearing of the trial on 6 and 7 November 2025, with Counsel's fees to be taxed on scale B.

JUDGMENT

NJOKWENI AJ

INTRODUCTION

1. It is often said that 'he who alleges must prove'. The court in *Pillay v Krishna and Another*¹ addressed the basic rules governing the incidence of the burden of proof.

The court said the following:

'If one person claims something from another in the Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: ". . . Where the person against whom the claim is made is not content with a mere denial of the claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld, he must satisfy the Court that he is entitled to succeed on it. . . . But there is a third rule, which Voet states . . . as follows: "He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute." . . . The onus is on the person who alleges something and not on his opponent, who merely denies it.

2. This is at the heart of a legal battle between Mrs Amanda MacPherson ("Plaintiff"), a businesswoman and a Laser hair removal therapist from Cape Town, and two companies she allegedly entrusted with transporting her Lightsheer ET Laser machine, valued at R711,160.00 (the "Laser machine"). These two companies are: Seaborne Inexpress (Pty) Ltd, as the First Defendant (Inexpress), a logistics company with a footprint throughout the country (including Cape Town), and Protea Electronics (Pty) Ltd (Protea), as the Second Defendant, an electronics company, as the name suggests.

3. What started as a simple agreement to deliver the Laser machine from Cape Town to Johannesburg has spiralled into a hotly contested court action, with

¹ 1946 AD 946.

allegations of negligence, breach of duty of care, and a missing Laser machine. The Plaintiff instituted a legal action in this Court, fighting to hold Inxpress and Protea accountable for what she claims is a breach of contract. Alternatively, a breach of legal duty by the Defendants through negligent conduct. The Plaintiff seeks damages of R711,160.00 from the Defendants, jointly and severally, for the loss of the Laser machine. Has she succeeded in proving her allegations against these companies, or at least one of them? The decision and reasons of the Court appear below in this judgment.

RELEVANT BACKGROUND FACTS

4. The plaintiff issued a combined summons in this Court on 20 February 2020. The plaintiff's claim is set out in the original particulars of claim attached to the summons (POC).

The POC

In the POC, the plaintiff *inter alia* alleged that:

- a. In August 2018, the plaintiff (represented by James MacPherson) entered into an oral agreement with Protea (represented by Shaun Kerr).
- b. In terms of the oral agreement, Protea undertook to arrange collection and conveying of a Lightsheer ET Laser machine ("Laser machine") from the offices of SBSS in Cape Town to Protea's premises in Johannesburg for the normal carrier fee charged by Inxpress and in terms whereof, Inxpress owed to the Plaintiff the liability for, alternatively the risk in and to, the Laser machine, a duty of care to ensure that the Laser machine is delivered in the same condition as collected from SBSS offices in Cape Town.
- c. Protea in turn contracted Inxpress to collect and convey the Laser machine from SSBS and deliver same to Protea's premises in Johannesburg.
- d. despite the terms of the oral agreement between Plaintiff and First Defendant, alternatively Second Defendant, First Defendant failed to deliver the Laser machine at the agreed delivery address.
- e. First defendant was responsible for collecting, transporting, and delivering the Laser machine in the same condition as it was collected.
- f. On 16 August 2019, Inxpress collected the Laser machine but failed to deliver it to the agreed destination.
- g. Inxpress' employees instructed SBSS staff not to specify the Laser machine's description or value on the waybill, allegedly to prevent theft. The Laser machine, valued at R711,160, was lost or damaged during transit. The plaintiff claims that the first and/or second defendant breached their duty of care by failing to safeguard the Laser machine, ensure proper handling, and deliver it in its original condition. As a result, the plaintiff is seeking damages of R711,160 for the loss of the Laser machine.

5. Inexpress defended the action by filing a notice of intention to defend on 3 March 2020.

The exceptions and irregular step proceedings

6. Subsequently, Inexpress delivered an exception on 23 March 2020 on the basis that the POC lacks the necessary averments to sustain a cause of action against Inexpress in contract or in delict. Alternatively, on the basis that the POC is vague and embarrassing because the Plaintiff allegedly failed to plead a factual basis on how the alleged duty arises. On 15 October 2020, Inexpress' exception was argued on the basis of opposition before Mantame J, who dismissed it on 29 October 2020 for procedural irregularities.

7. Inexpress delivered a straight exception to the POC dated 17 December 2020. The basis of the exception was that the POC lacked the necessary averments to sustain a cause of action against it, either in contract or in delicts. The exception was argued before Saldanha J on 26 October 2021, and the Plaintiff was afforded an opportunity to amend the POC within 15 days of the granting of that order, and First Defendant's right to file a further exception, if necessary, was reserved. Alas! The Plaintiff failed to amend the POC in terms of the Order of Saldanha J.

8. Inexpress then filed an affidavit in support of an intended application for the dismissal of Plaintiff's action or Inexpress's absolution from the instance as a result of non-compliance with the order of Saldanha J.

9. The Plaintiff then delivered a notice in terms of uniform rule 30(2)(b) dated 23 February 2022. The heading reads: "**NOTICE IN TERMS OF RULE 30(2)(b) TO THE IRREGULAR PROCEEDING OF FILING OF A SUPPLEMENTARY AFFIDAVIT IN THE NOTICE 23 EXCEPTION**". This notice purported to be an objection against Inexpress' filing of an affidavit (without leave being granted to amend Inexpress' rule 23(1) notice and leave to file the "irregular affidavit". However, the Plaintiff's rule 30(2)(b) notice called upon Protea to remove the affidavit of Mr M Hoeksema (First Defendant's Attorney) in support of an intended application for the dismissal of Plaintiff's action. As a result, Inexpress did not remove the affidavit of Mr Hoeksema because the notice of removal thereof was calling Protea to do so.

10. Eventually, on 7 March 2022, the Plaintiff filed an application in terms of uniform rule 30 for the setting aside of Mr Hoeksema's affidavit as an irregular step and for its removal from the court file. This application culminated in an order by agreement being issued by De Wet AJ on 10 March 2022, granting Plaintiff leave to amend the POC within 15 days in terms of uniform rule 28.

Plaintiff's first rule 28 notice

11. In an attempt to cure the alleged defect in the POC, the Plaintiff delivered a notice of intention to amend dated 28 March 2022. On 11 April 2022, Inexpress objected to the notice of intended notice on intention to amend in terms of uniform rule 28(3) on the basis that the intended amendment to the POC, even if effected, would be excipiable because it lacks necessary averments to sustain a cause of action.

12. On 7 March 2023, Saldanha J again granted the Plaintiff an indulgence to amend, within 15 days of that order, the POC dated 19 February 2020. In addition, the Saldanha J granted leave to Inexpress to apply on notice to the Plaintiff for dismissal of Plaintiff's claim with costs in the event of the Plaintiff failing to file a notice of intention to amend timeously, alternatively to effect the proposed amendment in terms of rule 28, alternatively to file an application for leave to amend in the event of an objection by Inexpress to a notice of intention to amend.

The second rule 28 notice

13. On 27 March 2023, the Plaintiff delivered a second notice of intention to amend the POC. In this new notice of amendment, the Plaintiff alleges that she concluded a partly written and partly oral agreement with Inexpress in terms of which Inexpress agreed to transport the Laser machine from Protea's offices in Cape Town to the latter's Johannesburg offices. The plaintiff also alleges that the express, alternatively implied, alternatively tacit terms of the agreement, *inter alia*, imposed a legal duty on Inexpress to transport the Laser machine with the reasonable skill and care expected of a courier and a transport company. On 12 April 2023, Inexpress delivered a notice of objection to the Plaintiff's intended second amendment to the POC. On 28 April 2023, the Plaintiff then filed an application for leave to amend in terms of uniform rule 28(4). My emphasis

14. On 2 November 2023, the Plaintiff's application for leave to amend the POC was served before Salie J, who granted leave to amend. Notably, she found that the intended amendment does not introduce a new cause of action and thus the issue of prescription does not arise. The Plaintiff subsequently delivered the amended POC on 15 November 2023.

Inexpress' Special Plea

15. Inexpress delivered a plea and special plea of prescription to the amended POC dated 15 January 2024. The Plaintiff failed to file any replication to both the plea

and special plea. The special plea was later abandoned, and therefore, is irrelevant in this judgment.

Inexpress Plea on Merits

16. Inexpress pleaded that no agreement existed between the Plaintiff and Inexpress, for the following reasons:-

- a. An application for credit, which also constitutes an agreement (hereinafter "the agreement"), was concluded between the First-and Second Defendant in terms of which Inexpress would transport the Laser machine;
- b. A copy of the agreement, together with the relevant terms and conditions thereto, is attached to Inexpress' Plea;
- c. It is pleaded that the terms of the agreement as well as the terms and conditions thereto, be incorporated thereto;
- d. Inexpress was to transport the Laser machine on Protea's behalf.

17. After the looting of the Laser machine, and on 19 August 2019, the Second Defendant's Logistics Manager, Mr. Abdul Casoo, requested from Inexpress the relevant details of the looted Laser machine in order for Protea to claim from its insurance. It is specifically denied that any agreement was entered into between the Plaintiff and Inexpress. It is therefore pleaded that the Plaintiff has no basis in law to claim from Inexpress, and the Plaintiff is put to the proof thereof.

18. The parties reached *litis contestatio* (close of pleadings) with no prospects of settlement in sight. The matter then proceeded to trial before me, and after each party's case was closed, I reserved judgment and requested written submissions from counsel for both parties. Counsel duly delivered their written submissions. I am grateful.

ISSUES FOR DETERMINATION

19. After *litis contestatio*, the issues for determination had crystallised, and the stage was set for trial, at which the parties would adduce their evidence and cross-examine each other's witnesses. The crystallised issues for determination are:

- a. Whether the Plaintiff has proven a conclusion of a carriage contract (to wit: carriage of the Laser machine) with Inexpress. If not, is Inexpress liable for loss or damage to the Plaintiff's Laser machine whilst being transported by Inexpress.
- b. The admissibility of the alleged hearsay evidence of:
 - aa. Mrs Harris for Inexpress.
 - bb. The Plaintiff.
- c. Is it permissible for a party in litigation to make out a new case in argument (both written and oral)?

THE EVIDENCE AT TRIAL

20. It is important to highlight that the case that Inexpress had to meet at the trial is pleaded in the amended POC, and Inexpress's defence is set out in the plea.

Plaintiff's case

21. The Plaintiff testified in August of 2019, was a business owner and a laser hair removal therapist. The Plaintiff practised under the name Body Laser and utilised a highly technical Laser machine (which requires specialised training for) to perform Laser hair removal treatments on her clients. The Plaintiff testified that the Laser machine she used was a class 4 Laser machine, which the Plaintiff purchased in 2004 for \$73 000.00 (seventy-three thousand Dollars). At the time the Laser machine was purchased, the exchange rate was R6.74 to the dollar. The Plaintiff needed to courier the Laser machine from Cape Town to Johannesburg for service.

22. Both the Plaintiff and Mr MacPherson testified that the Plaintiff instructed Mr MacPherson to take the Laser machine to SBSS's office at [...] P[...] Road, V&A Waterfront, Cape Town and arrange for couriers to transport it to Johannesburg. SBSS is a company in which the Plaintiff was, and still is, the sole director and shareholder. SBSS specialises in the sale and service of broadcasting equipment.

23. Mr MacPherson testified that he accordingly instructed Abdul Casoo ("Mr Casoo"), the logistics manager of Protea, to arrange the courier of the Laser machine and Najma Hoosain ("Ms Hoosain"), the office administrator of SBSS, to package the Laser machine.

24. The Plaintiff testified about an email sent by Mr Casoo to Inexpress dated 16 August 2019 in which Mr Casoo instructed Inexpress to collect the Laser machine from SBSS's offices and deliver it to Protea's offices in Johannesburg by road. Ms Hoosain was copied in this email. The Plaintiff testified (without more) that Inexpress would be responsible should the Laser machine be damaged, as they were responsible for its safe transport.

25. Ms Hoosain's evidence is that she carefully packaged the Laser machine for transport and testified that she placed fragile stickers on its packaging. Ms Hoosain filled out the following parts of Inexpress' waybill in respect of the carriage of the Laser machine:

- a. The details of the companies from which and to which the courier must deliver;
- b. the sender's name and contact number;
- c. the receiver's name; and

d. sender's name, signature and date thereof at the bottom left of the waybill.

26. Ms Hoosain's evidence is that she was familiar with the courier person who arrived to collect the Laser machine and that his name was Ricardo. Ricardo informed Ms Hoosain not to fill out the description of contents space on the waybill if the goods being couriered were of a high value, as there this increased the risk of theft. Ms Hoosain testified that this was common practise when utilising the services of Inexpress.

27. Mr MacPherson, during his testimony, referred to a different waybill of Inexpress, which was for the carriage of a camera lens that SBSS had bought and received from a competitor, Visual Impact. Similar to the waybill in this matter, Visual Impact did not include a 'description of content' due to the high value of the camera lens being transported.

28. Ms Hoosain testified that Ricardo filled out the dimensions and weight of the Laser machine and that, usually, the courier also filled out the account number; however, on this waybill, it was left blank. Ms Hoosain filled out the receiver's name as Abdul/James because the Laser machine would arrive at Protea's office in Johannesburg, and Mr Casoo would take receipt of it, after which Mr MacPherson would ultimately collect it from Mr Casoo to get it serviced.

29. Mr Macpherson testified similarly to Ms Hoosain in this regard. Ms Hoosain's evidence in this regard was uncontested. It is common cause that the Laser machine was collected and, during transit, was involved in an accident and thereafter stolen from the delivery truck carrying it. The Plaintiff read out the contents of an email sent by a representative of Inexpress to Mr Casoo on 19 August 2019,0 in which Inexpress informs Mr Casoo of the aforesaid events and apologises for any inconvenience to Mr Casoo or his client.

30. Mr MacPherson testified that Mr Casoo had informed him of the aforesaid email while he was in a meeting and informed him of what had happened. Mr MacPherson was referred to an email he sent to Chris Piers, an employee of Protea, which evidenced that he was, at all times, the person responsible for settling the freight bill on behalf of his wife. Mr MacPherson never settled the invoice, as he said no invoice had ever been sent to him and he presumed this was because the laser machine was never actually delivered.

31. The Plaintiff testified that she was very distressed when she received the news that the Laser machine had been stolen. The Laser machine was her sole source of income, and she had clients who relied on her to continue their treatments. The Plaintiff explained to the Court that she and Mr MacPherson had been in contact with a representative of Inexpress, Madeeka Jacobs ("Ms Jacobs"), who requested

documentary proof of ownership of the Laser machine and would send this through as a claim from their insurance.

32. The Plaintiff testified to this with reference to the email correspondence between her and Ms Jacobs, which shows that she emailed proof of ownership to Ms Jacobs. The subject line of the e-mail contained the waybill number. The Plaintiff followed up with Inexpress regarding her claim and was put in contact with a different Inexpress representative, Nandi Swart ("Ms Swart"). On 22 October 2019, the Plaintiff emailed Ms Swart and thanked her for the telephone conversation they had had about the Plaintiff's claim and asked to please be kept updated about the status of the claim. On 5 November 2019, the Plaintiff sent a follow-up email to Ms Swart regarding the status of her claim.¹⁰ Similarly, the subject line of the e-mail was the waybill number.

33. The Plaintiff explained to the Court that she never received any response to either of the aforementioned emails, and furthermore that she followed up numerous times as to the status of her claim by calling and emailing Inexpress, to no avail. The Plaintiff testified that to this day she has not been compensated for the loss of the Laser machine.

Inexpress' case

34. Inexpress called only one witness to testify - its managing director Ezelle Harris ("Ms Harris"). Ms Harris has been in the courier industry since 1994 and started Inexpress in 2004. Inexpress is predominantly a domestic courier. Ms Harris is the managing director of Inexpress. Ms Harris' responsibilities in Inexpress relate to ensuring that the business is running as it should, which includes oversight of staff training and general business compliance. Ms Harris was asked during examination-in-chief whether it is typical for Inexpress to enter into an oral agreement, to which Ms Harris responded - no, usually Inexpress would enter into a written agreement before Inexpress would undertake a delivery.

35. Inexpress received a request for a delivery from Protea, which was typical of Protea to send. There was no indication it was for or on behalf of someone else until after the accident and subsequent looting of the delivery truck which was carrying the Laser machine

36. Ms Harris' evidence is that Inexpress still deals with Protea as of the date of Ms Harris' testimony. Ms Harris testified that every client seeking to utilise Inexpress's courier services must complete a credit application, which includes the standard terms and conditions that Inexpress requires its clients to sign. The credit application Ms Harris was referred to was Protea's application to Inexpress.

37. The aforesaid invoice was paid by Protea on 30 September 2019, together with payment for other goods transported under a different freight. Under cross-

examination, Ms Harris was referred to an email sent by Mari Schwartz ("Ms Schwartz"), an employee of the First Respondent, to Mr Casoo on 19 August 2019. It was pointed out to Ms Harris that the aforesaid email states: "shipped by SBSS" and "consigned to Protea Electronics". SBSS is the company owned by the Plaintiff. Ms Harris testified that all this meant was that the package was sent by SBSS and was to be delivered to Protea.

38. Ms Harris testified that it was possible for customers to ship items which they do not own. Ms Harris was referred to an email sent to her by Ms Swart on 28 February 2020. Ms Harris testified that Inexpress had utilised a third-party service provider, Emit, to courier the Laser machine. Ms Swart informed Ms Harris in the aforesaid email that the Plaintiff's claim had been submitted to Emit but rejected because the Plaintiff did not have a service level agreement with Inexpress. Ms Swart further informed Ms Harris in the aforesaid email that she had also been told not to submit a claim through Inexpress's insurance company, Bruvos.

39. No instruction was received directly from the Plaintiff regarding the transportation of the Laser machine. Such instruction was received from Mr Abdul Casoo on behalf of Protea. There were no prior discussions with the Plaintiff or Mr MacPherson regarding the transport of the Laser machine. At the time of the said instruction, Protea was already a standing client of Inexpress, which has a credit facility with Inexpress, and further, any transport for Protea is subject to Inexpress' Standard Conditions of Agreement.

40. Inexpress would not have concluded an oral agreement with the Plaintiff. Any agreement with any client would be subject to Inexpress' Standard Conditions of Agreement. Since the instruction came from Protea, the transport of the Laser machine was subject to Inexpress' Standard Conditions of Agreement. The said Standard Conditions of Agreement limits Inexpress' liability.

41. Inexpress did not assume liability for the Plaintiff's loss by responding to her emails requesting documents for insurance purposes. Inexpress followed its internal processes, after which any claim was rejected because the Plaintiff was not the contracting party.

LAW AND ANALYSIS

42. In this case, the Plaintiff sues Inexpress on a partly written and partly oral contract. Uniform rule 18(6) thus finds application, and it provides:

"A party who in such party's pleading relies upon a contract shall state whether the contract is written or oral, when, where and by whom it was concluded, and if the contract is in writing, a copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

43. Rule 18(6) speaks of a party who, in his pleading, relies on a contract or part thereof. A party clearly relies upon a contract when it uses it as a link in the chain of its cause of action.²

44. The Plaintiff attached the amended POC as POC1, which she contends is the written part of the agreement. Accordingly, the Plaintiff uses POC1 as a link in the chain of her cause of action. However, this purported written part of the agreement poses fundamental difficulties for the Plaintiff's case, namely:

- a. From a plain reading, the agreement constitutes an agreement (collection instruction) between Second Defendant, represented by Mr Abdul Casoo, and Inexpress, represented by Ms Kimberley Zhou;
- b. Ms Zhou's response to Mr Casoo states: "*Thank you for your collection request*", referencing the request from Mr Casoo.
- c. Nowhere does the name or details of the Plaintiff appear;
- d. No instruction from the Plaintiff to Inexpress is apparent from the alleged agreement.

45. In fact, the instruction expressly and clearly emanated from Mr Casoo at Protea via email. Accordingly, POC1 does not support the Plaintiff's allegation of conclusion of an agreement with Inexpress.

46. In its plea, Inexpress denies concluding the alleged carriage agreement with the Plaintiff or any agreement whatsoever for that matter, so it was incumbent upon the Plaintiff to adduce evidence at trial to prove the conclusion of the alleged partly written and partly oral agreement and its terms. If, at the end of the trial, the Plaintiff fails to prove, on the balance of probabilities, the existence of the alleged contract, then that is the end of the matter. Accordingly, I proceed to determine this issue and, in doing so, I have considered the applicable legal principles, the pleadings, practice notes, and evidence led at trial.

47. The basis of the contract is to be found in detrimental reliance on the appearance of agreement, or, in simple terms, in the reasonable belief in the existence of consensus, induced by the conduct of the other party. It gives effect to a reasonable belief. The so-called reliance theory.

48. Our law of contract, unlike English law, enforces promises seriously made, not bargains. Not all promises are enforced, only those made seriously and deliberately and with the intention that lawful obligation should be established. Mere serious agreement between parties is sufficient to constitute a contract. Our law is also

² *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 953A; and *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 193H.

practical enough to recognize that it must, as a general rule, concern itself with the external manifestations, and not the person who expresses his or her intention in relation to the formation of a contract. The decisive question is often not what he or she subjectively intended, but what it led the other party, as a reasonable person, to believe was his or her intention.³ Before a contract can be formed, there must be consensus. Once consensus is realised, offer and acceptance come into play.

49. Hence, the written part of the impugned agreement (POC1) does not prove its formation; the Court must also consider the impugned oral agreement between the parties. Of course, the Plaintiff bears the burden of proof on a balance of probabilities.

The Pleadings

50. In August 2018, the plaintiff (represented by James MacPherson) entered into an oral agreement with Protea (represented by Shaun Kerr). Plaintiff's Rule 30(2)(b) notice of 23 February 2022 called upon Protea to remove the affidavit of Mr M Hoeksema (First Defendant's Attorney) in support of an intended application for the dismissal of Plaintiff's action. The Rule 30(2)(b) notice was followed by an application in terms of Rule 30 of 7 March 2022, and in this Rule 30 application, once again, the Plaintiff states that the Rule 30(2)(b) notice was served on Protea, who did not respond to that notice, and it was claimed that the Plaintiff was entitled to bring the Rule 30 application for removal of an affidavit filed for Inexpress.

51. In the Plaintiff's first Rule 28 notice of 28 March 2022, the Plaintiff alleged that she entered into an oral agreement with Protea, the latter represented by Shaun Kerr and Abdul Casoo and the Plaintiff represented by Mr MacPherson. In the second Rule 28 notice of 28 March 2023, the Plaintiff inter alia alleges that:

- a. On 16 August 2019, she entered into a partly written, partly oral agreement with Inexpress
- b. The latter was represented by Kimberly Zhou, and she was represented by Mr MacPherson.
- c. Inexpress was to collect the Laser machine from Protea's offices, at [...] P[...] Road, V&A Waterfront, Cape Town.

52. Plaintiff's counsel filed a practice note on 20 October 2025, 15 days before the trial commenced. Notably, in paragraph 2 thereof, she inter alia states:

³ Cameron J, *Kwazulu-Natal Liaison Committee v MEC for Education KZN* 2013 4 SA 262 (CC).

“2. Nature of the application

1. The Plaintiff entered into an **oral agreement with the Second Defendant** for the collection of and delivery of a Light Shear ET Laser machine (“Laser machine”).
2. The first defendant collected the Laser machine from the Second Defendant’s premises on 16 August 2019...”

53. The reference to the nature of the application in the practice note demonstrates careless drafting, as these are not application proceedings but an action. The drafter of the note clearly cut and pasted from a precedent. Secondly, again, it is stated that the Plaintiff concluded an oral agreement with the Second Defendant, not the First Defendant.

54. From the Plaintiff’s pleadings, there is one constant who allegedly represented the Plaintiff in the conclusion of the impugned contract, either with Inexpress or Protea, namely Mr MacPherson. The offices from which the Laser machine was collected in August 2018 or August 2019 were those of Protea (then known as SBBS (Pty) Ltd). Mr MacPherson was employed by Protea at the time. Mr MacPherson testified under cross-examination and re-examination that he delegated his duties to Mr Abdul Casoo (Protea’s logistics manager) regarding the arrangement of the courier service. Clearly, the two are acquaintances and colleagues.

55. If Mr Casoo acted as Mr MacPherson’s representative when he sent the instruction email to Inexpress for the collection of the Laser machine from Protea’s office at [...] P[...] Road, V&A Waterfront, Cape Town, he could have stated so in his email to avoid any confusion about who sought Inexpress courier services regarding the transportation of the Laser Machine. This must be the case because Protea was, and still is, an Inexpress client. Moreover, Mr Casoo sent the said email from Protea’s email domain, namely: “A[...].”

56. After the Laser machine was looted, Mr Abdul Casoo requested from Inexpress the relevant details of the looted Laser machine so that Protea could claim from its insurance. Protea was invoiced by Inexpress for the transportation of the Plaintiff’s Laser machine, although the machine was lost during transit. Then, on 30 September 2019, Protea paid Inexpress’s invoice.

57. It remains a mystery to me how both Mr MacPherson and Mr Casoo could not know the exact date the alleged agreement was concluded and between which parties. This is because the incident of loss of the Laser machine occurred between 17 and 19 August 2018 or 2019; the following month, Protea paid Inexpress’s invoice for the transportation of the lost Laser machine. Both Mr Casoo and Mr MacPherson were employed by Protea at the time. A million-dollar question? Why did Protea pay Inexpress invoice for the transportation of the Laser machine, if Protea had never

contracted Inexpress for the transportation thereof? To make matters worse, Mr Casoo was Protea's logistics manager who handled Protea's insurance claim.

58. In the amended POC delivered on 15 November 2023, the Plaintiff avers that Protea's offices at [...] P[...] Road, V&A Waterfront, were in August 2019 known as SBSS (Pty) Ltd, and in the Plaintiff's heads of argument, it is submitted that SBSS is a company which the Plaintiff was and still is the sole director and shareholder and which specialises in the sale and service of broadcasting equipment.

59. It is worth noting that this action was instituted 6 months after the loss of the Laser machine, and yet it would appear from the pleadings that different instructions were given to the Plaintiff's attorneys. This is because Mrs MacPherson, as the SBSS director, shared offices with Protea at the time of the Laser machine's loss. She had access to both Mr MacPherson and Mr Casoo to obtain clarity on the exact date of the alleged contract's conclusion with Inexpress and its terms.

60. Mr Casoo was not called to testify during the trial. It took the Plaintiff and Mr MacPherson more than 3 years from the date of loss of the Laser machine to realise that the Plaintiff had concluded a contract with Inexpress, not Protea.

61. The history of this matter, distilled from the pleadings and viva voce evidence at trial, suggests a convoluted attempt to impose liability on Inexpress by alleging a contract between her and Inexpress, without any factual basis or evidence to support it.

62. Save for pleading, Inexpress would charge its usual courier fee; no other obligations of the Plaintiff in terms of the alleged agreement are pleaded. For example, by when such fee is payable by the Plaintiff and what happens if the laser machine is damaged in transit to Johannesburg. No breach provisions are pleaded. Contrast this with Ms Harris' evidence. Ms Harris has been in the courier industry since 1994 and started Inexpress in 2004. Inexpress is predominantly a domestic courier. Ms Harris is the managing director of Inexpress. Ms Harris' responsibilities at Inexpress include ensuring the business is running as it should, including oversight of staff training and general business compliance. Ms Harris was asked during examination-in-chief whether it is typical for Inexpress to enter into an oral agreement, to which Ms Harris responded: "No, usually Inexpress would enter into a written agreement before undertaking a delivery."

63. Mr MacPherson and the Plaintiff attempted to use the reference in the waybill to SBSS and Inexpress as a link between the conclusion of the impugned agreement. Further, they attempted to argue that, at some stage, Inexpress employees seemed willing to claim for the loss of the laser machine from Inexpress insurance (which never happened), as a fact to be considered in proving the

conclusion of the impugned contract. However, both these attempts have been answered by Ms Harris.

64. Ms Harris's position is that the waybill is only valid for the contracting party (Protea), and Inexpress's insurance obligations do not extend to Ms Hoosain, as she was not their direct client. Any communications with the Plaintiff were not an acceptance of liability or a willingness to process her insurance claim.

Admissibility of hearsay evidence

65. The Plaintiff challenged the admissibility of Ms Harris' evidence on the basis that it was hearsay evidence. Inasmuch as Protea did not challenge the admissibility of the evidence of the Plaintiff and Mr MacPherson apropos the conclusion of the impugned agreement between the parties, I have deemed it appropriate and fair to consider the admissibility of their evidence regarding the same issue in dispute in this case. "What's good for the goose is good for the gander".

66. As a general rule of the Law of Evidence of South Africa, hearsay evidence is not admitted. Hearsay evidence is defined in section 3(4) of the Law of Evidence Amendment Act, No. 45 of 1988 (LEAA) as:

"evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

67. The exception to this rule is regulated by section 3 of the Law of Evidence Amendment Act 45 of 1988:

"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:-

- (a) each party against whom the evidence is to be adduced agrees to the admission of the evidence at such proceedings; or
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at the proceedings; or
- (c) the Court, having regard to:-
 - (i) the nature of the proceedings
 - (ii) the nature of the evidence
 - (iii) the purpose for which the evidence is tendered
 - (iv) the probative value of the evidence
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends
 - (vi) any prejudice to a party which the admission of such evidence might entail.
 - (vii) any other factor which should, in the opinion of the court, be taken into account, is of the opinion that such evidence should be admitted in the interest of justice."

68. In the amended POC, the Plaintiff pleads that she was represented by Mr MacPherson when the impugned contract was concluded. But during his evidence in Court, Mr MacPherson testified that he did not personally arrange the courier for the Laser Machine but delegated his duties to the Plaintiff to arrange the courier for the Laser Machine to Mr Casoo. The involvement of Mr Casoo is first mentioned at trial and in the Plaintiff's heads of argument. The parties are limited to their pleadings; a pleader cannot be allowed to direct the attention of the other party to one issue, and then, at the trial, attempt to canvass another.⁴ For this reason, and to prevent surprise, pleadings must be articulate and sound; the cause of action or defence must clearly appear from the factual allegations.⁵ In *Robinson v Randfontein Estates GM Co Ltd*⁶, where Innes J (as he then was) stated:

'The object of pleading is to define the issues, and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits, the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.'

69. It is trite that the court must look at the substantial issue between the parties and not blindly follow the *ipsissima verba* of the pleadings. It is, however, not open to the court to adjudicate the case on the basis of issues which are not cognizable or derivable from the pleadings.⁷ The cardinal rules in regard to pleadings should be properly observed, and the trial should not be allowed to become a 'free-for-all' with a complete disregard of the issues raised on the pleadings.⁸

70. Neither Mr MacPherson nor the Plaintiff concluded the alleged agreement with Inexpress; as such, the alleged oral part of the purported agreement and its terms were neither negotiated nor concluded by either of them, but by Mr Casoo. So, the probative value of the evidence on the conclusion of the alleged agreement by the Plaintiff and Inexpress, including its terms, depends on the credibility of Mr Casoo. He was not called to testify, and no explanation or reason was advanced why that

⁴ *DB v CB* 2024 (5) SA 335 (CC) at paragraph [44].

⁵ *Al Mayya International Limited (BVI) v DPP Valuers (Pty) Ltd* (unreported, WCC case no A166/2022 dated 31 July 2024 — a decision of the full court) at paragraph [11] and the cases there referred to.

⁶ 1925 AD 173 at 198.

⁷ *DB v CB* 2024 (5) SA 335 (CC) at paragraph [44]. See also Desmond Francke 'Maintaining judicial boundaries: The importance of adhering to the issues in pleadings' 2024 (September) *De Rebus* 26. Heads of argument are not evidence. They should contain argument based on the pleadings and evidence/affidavits in opposed applications. It is irregular to raise a potential defence for the first time in heads of argument, especially where the facts have not been fully canvassed (*Janse van Rensburg v Obiang* 2023 (3) SA 591 (WCC) at paragraphs [22]–[24]). See also *Montle and Neo Transport Service v Engen Petroleum Limited* (unreported, WCC case no 20420/2022 dated 18 August 2023) at paragraphs 41–45.

⁸ *Media 24 (Pty) Ltd v Nhleko* (unreported, SCA case no 109/22 dated 29 May 2023) at paragraph [18].

evidence was not given by Mr Casoo, upon whose credibility the probative value of such evidence depends.

71. Given the nature of these proceedings, evidence and purpose for which this evidence was tendered, I accordingly find that it will be prejudicial to Inexpress if such evidence were to be admitted, and not in the interest of justice to do so. By contrast, Ms Harris's evidence was based on her personal experience as the founder and managing director of Inexpress. Surely, she knows and manages the operation procedures of Inexpress. She duly made concessions where necessary and, in some instances, contradicted herself. However, such contradictions were not material.

72. In evaluation of the evidence in its totality and on a balance of probabilities, I thus accept the evidence of Ms Harries as credible, probable and reliable. However, I find the evidence of Mr MacPherson and the Plaintiff to be inadmissible hearsay. In addition, I did not find Mr MacPherson and the Plaintiff to be reliable witnesses, and I reject their evidence for reasons discussed above.

CONCLUSION

73. For reasons best known to her, the Plaintiff belatedly pursued a very ambitious but unmeritorious claim against Inexpress, when, all along, her claim was against Protea. Hanging her jacket where she can't reach it, alas! In the end, it has proven a futile task.

74. Having considered the relevant facts of this matter, the conspectus of evidence, and the applicable law, I have reached an inescapable conclusion that the Plaintiff has always known that she entered into an agreement with Protea, not with Inexpress. The belated attempt to shift liability from Protea to Inexpress occurred post facto. I do not know the reason behind it, and, as tempting as the facts are, I refuse to venture into conjecture.

75. There is just no factual basis or evidentiary material to persuade me that the Plaintiff entered into the impugned agreement with Protea. There was never any meeting of the minds as to the subject matter and terms (transportation of the laser machine by Inexpress at the instance of the Plaintiff) – The parties were never at *ad idem*. The plaintiff has failed to prove the necessary *animus contrahendi* (intention to contract).

76. Accordingly, I could not, on a balance of probabilities, find in favour of the Plaintiff. The Plaintiff has failed to discharge the burden of proof. I am not persuaded that the Plaintiff has proven an agreement with Inexpress, as pleaded, or at all. Accordingly, it is not necessary to consider terms of a non-existent contract - "*Ex nihilo nihil fit*," goes the classic adage: nothing comes from nothing.

ORDER

77. As a result, I make the following order:

1. The Plaintiff's claim is dismissed.
2. The Plaintiff to pay the First Defendant's costs of suit, inclusive of the costs of the hearing of the trial on 6 and 7 November 2025, with Counsel's fees to be taxed on scale B.

P. NJOKWENI

ACTING JUDGE OF THE HIGH COURT

WESTERN CAPE

Appearances

For the Plaintiff: **Mrs MA McChesney**

With her: **Mr L Tully**

Instructed by: **VGV attorneys**

For the First Respondent: **Mr EL Smit**

Instructed by: **Hatstone Lawyers Inc.**