IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

~~Reportable~~ / Not reportable

CASE NO: 17699/2018

In the matter between:

WAYNE BENGSTON First Applicant / First Defendant

WAYNE BENGSTON N.O Second Applicant / Second Defendant

DONALD BENGSTON N.O Third Applicant / Third Defendant

(Second and Third Defendants in their capacity as the duly appointed Trustees of the Five B Trust Master's Ref: I[...])

CASADOBE PROPS 1 (PTY) LTD Fourth Applicant / Fourth Defendant

(Registration: 2002/026066/07)

and

DEON WAYNE PREUSS N.O First Respondent / First Plaintiff

THE TRUSTEES FOR THE TIME BEING Second Respondent / Second Plaintiff
OF THE DW PREUSS TRUST (I[...])

in re:

In the matter between:

DEON WAYNE PREUSS	First Plaintiff
THE TRUSTEES FOR THE TIME BEING OF THE DW PREUSS TRUST (I[...])	Second Plaintiff

and

WAYNE BENGSTON	First Defendant
WAYNE BENGSTON N.O	Second Defendant
DONALD BENGSTON N.O (Second and Third Defendants in their capacity as the duly appointed Trustees of the Five B Trust Master's Ref: I[...])	Third Defendant
CASADOBE PROPS 1 (PTY) LTD (Registration: 2002/026066/07)	Fourth Defendant
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fifth Defendant
STANDARD BANK OF SA LTD	Sixth Defendant

Coram: **Honourable Madam Justice Slingers**
Heard: **11 September 2025**

Delivered: 16 September 2025

ORDER

(a) the point *in limine* is dismissed;

(b) The exception is upheld;

(c) The defendants are afforded fifteen (15) court days from the handing down of this order to amend their counterclaim in order that it sustains a cause of action and is no longer vague and embarrassing;

(d) Should the defendants fail to amend their counterclaim within 15 court days, as set out in paragraph (ii) above, the counterclaim will be set aside;

(e) The costs of the exception shall be paid for by the first to third defendants jointly and severally, the one paying to absolve the other.

JUDGMENT

Background

1. The plaintiffs instituted action proceedings against the defendants as a result of the first defendant allegedly causing the resignation of the first plaintiff, on or about 8 June 2015, as a director of the fourth defendant and transferring the shares held by the DW Preuss Trust in the fourth defendant to the Five B Trust.[1]

2. On 19 June 2024, the plaintiffs filed their amended declaration. On or about 16 August 2024, the first to fourth respondents **('the respondents')** filed their plea together with a counterclaim. On or about 31 October 2024, the plaintiffs excepted to the respondents' counterclaim. It is this exception which serves before me.

The exception

[11] In this judgment the parties shall be referred to as they are in the main action.

3. The plaintiffs except to the counterclaim on two grounds. The first one is that the counterclaim failed to disclose a cause of action. The second ground is that the counterclaim is vague and embarrassing as it fails to set out the necessary averments establishing *locus standi* on the part of the respondents.

4. In support of the first ground of exception, the plaintiffs argue that the defendants are claiming damages from the plaintiffs but do not specify whether or not the claim is based in delict or in contract. If the counterclaim is based in delict, then the respondents have failed to allege negligence or wrongfulness on the part of the plaintiffs. Furthermore, they have failed to allege that the plaintiffs breached a common law right, statutory duty or duty of care. The counterclaim also omitted to set out any causal link between the damages suffered by the respondents and the actionable conduct of the plaintiffs.

5. If the cause of action was based in contract then the counterclaim is deficient as it does not disclose any of the required averments necessary to sustain a cause of action based on a contractual relationship between the parties.

6. In support of the second ground of exception, the plaintiffs argue that the defendants' counterclaim is premised on the alleged loss of two immovable properties but they fail to set out the facts necessary to establish the ownership of or a financial interest in the two properties in question.

7. Subsequent to the filing of the exception, the defendants filed a notice of intention to amend their counterclaim in accordance with Rule 28. However, this amendment was not intended to address the objections raised by the plaintiff but were of a cosmetic nature. For this reason, the parties agreed that the hearing of the exception should proceed.

The counterclaim

8. Whilst the defendants contest the authority of the second plaintiff to institute the proceedings on behalf of The DW Preuss Trust (I[...]), they do not dispute the identity of the parties as set out in the amended declaration.

9. Thus, it can be accepted that the first defendant is an adult male person, that the second and third defendants are acting in their representative capacity as the duly appointed trustees of the Five B Trust (I[...]) and the fourth defendant is a private company with limited liability duly incorporated and registered with the company laws of South Africa.

10. The counterclaim pleads that the contents of the plea be incorporated into the counterclaim. It pleads further that:

> *'7. Subsequent to Plaintiffs obtaining the interdict on 29 September 2015, Fourth Defendant's bank account was unlawfully frozen by Fourth Defendant's banker, <u>erroneously acting pursuant to a court order which had lapsed due to Plaintiffs' failure to proceed in accordance therewith,</u> leaving the First to Fourth Defendants in a position of not being able to continue trading.*
> *8. The consequence of the aforementioned was that First to Third Defendants had to sell assets for less than the actual value in order to keep Fourth Defendant financially operational, as Fourth Defendant was not in any position to pay its own debt and/or expenses.*
> *9. In order to do so, First to Third Defendants <u>had to sell two of the properties under their control and which include the following:</u>*
> *….*
> *…*
> *10….*
> *11. Due to Plaintiffs having failed, to bring the dispute which forms the subject of the action in convention, <u>and which was based on fraudulent misrepresentation as set out in paragraphs 10 and 11 (including the sub-paragraphs thereto) of Plaintiffs Declaration</u> before Court in accordance with the Court Order dated 29 September 2015, First to Fourth Defendants suffered damages in that:'*[2]

11. The defendants pray for judgment read as follows:

[2] The counterclaim has been quoted as if the proposed amendment had been made, with the underlining portions reflecting the proposed amendment.

*“**WHEREFORE** Defendant prays for an Order against Plaintiffs in the following terms:*

(a) that judgment be granted against Plaintiffs, the one paying the other to be absolved;

(b) payment of an amount of R22 332 398,30;

(c) interest on the amount of R22 332 398,30 at the rate of 12.5% from 29 September 2015 until date of settlement;

(d) Further and/or Alternative relief;

(e) Costs of Suit.’

The *in limine* point

12. In opposing the exception, the defendants took the point *in limine* that the exception was not raised within the time period provided for in Rule 23(1) and therefore, in the absence of seeking condonation, the plaintiffs were *ipso facto* barred from bringing the exception.

13. As shown below, the exception is a pleading. When an exception is taken to a declaration or a combined summons, the plaintiff cannot object to the exception on the basis that it was delivered out of time in the absence of a notice of bar in terms of Rule 26.[3] Similarly, when an exception is taken to a counterclaim to which a party is required to plead, the plaintiff in the counterclaim cannot object to the exception on the basis that it was delivered out of time in the absence of a notice of bar in terms of Rule 26. In those circumstances where the pleadings have not closed there is no automatic bar when a party fails to file a pleading within the time period provided for in the Rules of Court and a notice of bar is required.[4]

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[3] *Hill NO v Brown* WCC 3069/20 (3 July 2020); See also Erasmus Superior Court Practice – RS 26, 2025 D1, Rule 23-22 (Jutustat)

[4] *Tyulu and Others v Southern Insurance Association Ltd* 1974 (3) SA 726 E; see also *Landmark Mthatha (Pty) Ltd v Kings Sabata Dalindyebo Municipality and Others: In Re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others* 2010 (3) SA 81 (ECM)

14. In this matter, the defendants did not place the plaintiffs under bar to plead to the counterclaim and elected not to file a notice in terms of Rule 26. Consequently, the defendants cannot object to the filing of the exception outside the time provided.

15. Therefore, there is no merit to the point *in limine.*

The first ground of exception

16. I turn now to the first ground of exception.

17. In determining the first ground of the exception, the court will accept, as true, the allegations set out in the counterclaim in order to assess whether or not it discloses a cause of action. The exception can only be upheld if, on every. construction thereof it fails to sustain a cause of action.

18. Further, in determining the exception, the court must consider the pleadings holistically and as a whole.[5]

19. It is trite that an exception on the ground that the particulars of claim lack the necessary averments to sustain a cause of action constitutes a pleading.[6] If the court concludes that irrespective of the facts which may emerge at the trial, that the particulars of claim are incapable of sustaining a cause of action then it should uphold the exception.[7]

20. *Cause of action* is every fact necessary for the claimant to prove an enforceable claim and includes every material fact entitling a claimant to their claim. It includes all that a claimant must set out in the declaration in order to disclose a cause of action.[8]

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[5] *Merb (Pty) Ltd v Matthews*

[6] *Alexia Kobusch and Others v Wendy Whitehead* (515/2023) [2-25] ZASCA 24; 2025 (3) SA 403 (SCA) (27.3.2025)

[7] *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at paragraph [16]

[8] *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* 2020 (1) SA 327 (CC)

21. The defendants allege in their heads of argument that their counterclaim is neither based on a delict nor a contract but on the fact that the plaintiffs caused the defendants harm by *fraudulently misrepresenting* that the defendants were not authorized to effect transfer of the plaintiffs' shares in the fourth defendant to first and/or second and third defendants.

22. However, a consideration of the counterclaim will show that it is based on the defendants suffering pure economic loss. Therefore, in accordance with the decision of the Supreme Court of Appeal in *Hlumisa Investment Holdings RF Ltd v Kirkinis*[9]the defendants had to set out facts on which they allege that the loss had been wrongfully caused. They did not do so. The defendants state that they suffered the loss *'because of Plaintiffs ill-founded interdict'.* No facts are set out in support of the conclusion that the interdict was ill founded.

23. In any event, while the plaintiffs can apply for the interdict, it is the court which grants it. No facts are set out why the granting of the interdict was wrongful or erroneous.

24. Furthermore, no causal link between the conduct of the plaintiffs and the loss suffered is pleaded and/or set out in the counterclaim. Rather, it is the conduct of the defendants' bankers which resulted in the action causing the loss.

25. On every possible construction the counterclaim does not address wrongfulness nor causation and therefore, does not set out the necessary averments to sustain a cause of action.

The second ground of the exception

26. I turn now to the second ground of the exception.

27. The second ground of exception is that the counterclaim is vague and embarrassing.

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[9] 2020 (5) SA 419 (SCA

28. The counterclaim is based on the averments that the first to third defendants were forced to sell two properties at a price less than their actual value as opposed to developing them. Consequently, the first to third defendants suffered damages. The counterclaim ends with a prayer that the defendant prays for judgment against the plaintiffs for damages in the amount of R22 332 398,30. It does not specify which defendant. During the hearing of the matter, the defendants' counsel conceded that this was an error and that it should be defendants, and not defendant. However, he was unable to state whether it would simply for the first to third defendants or all four defendants, in light of the fact that no loss had been averred on the part of the fourth defendant.

29. Furthermore, and as correctly argued by the plaintiffs, no distinction is made between the loss suffered by the first defendant, who is a natural person and the second and third defendants who represent a trust. The loss averred is simply lumped together on the assumption that they are entitled collectively to a single globular amount.

30. In its amended form, the counterclaim is that the property was under the control of the first to third defendants. The nature, source and extent of this control are not set out. The counterclaim does not set out any facts to show that the control alleged amount to a financial interest and/or ownership which caused the defendants financial harm when the properties were purportedly sold below their value.

31. In the circumstances, the plaintiffs are unable to plead to the counterclaim. As set out in the plaintiffs' heads of argument:

> *'27.2 Without this fundamental particularity, the Excipients cannot plead. They cannot admit that the Trust owned a property while denying that the individual did. They cannot raise a defence against one claimant (for example, a contractual limitation of liability) that may not be applicable to the other. This is not a matter that can be cured by a request for further particulars; it strikes at the very root of the formulation of the cause of action. The entire claim, is premised on a legally incoherent jumbling of different*

parties and their distinct potential losses, which is the very definition of a pleading that I vague and embarrassing, and which causes serious prejudice.'

32. Therefore, the second ground of the exception is also upheld.

Conclusion

33. In the circumstances, I make the following orders:

(i) the point *in limine* is dismissed;

(ii) the exception is upheld;

(iii) the defendants are afforded fifteen (15) court days from the handing down of this order to amend their counterclaim in order that it sustains a cause of action and is no longer vague and embarrassing;

(iv) should the defendants fail to amend their counterclaim within 15 court days, as set out in paragraph (ii) above, the counterclaim will be set aside;

(v) the costs of the exception shall be paid for by the first to third defendants jointly and severally, the one paying to absolve the other.

HM SLINGERS

JUDGE OF THE HIGH COURT

16.09.2025

Appearance

For the Applicants:	Mr. Morne Basson
As instructed by:	Terblanche Inc.
	Johan Victor Attorneys
For the Respondents:	Mr. JT Benade

As instructed by: Smith Tabata Buchanan Boyes