REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 2022-025434

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

Date: 23 February 2026 E van der Schyff

In the matter between:

ABSA BANK LIMITED	EXIPIENT / PLAINTIFF
and	
EAST COMPANY AUTO SALES CC	FIRST RESPONDENT / DEFENDANT
RIAAN NICOLAAS VILJOEN	SECOND RESPONDENT / DEFENDANT
CORNE BRITS	THIRD RESPONDENT / DEFENDANT

JUDGMENT:

Van der Schyff J

[1] This is an exception raised by the plaintiff against the second defendant's conditional counterclaim. The parties are referred to as in the action.

[2] The plaintiff raised an exception on the ground that the counterclaim is vague and embarrassing. In four instances, the plaintiff avers that non-compliance with Rule 18 caused the embarrassment. Counsel for the second defendant submitted that reliance on non-compliance with Rule 18 in an exception is misplaced, since Rule 18(12) provides that a pleading that does not comply with the provisions of the rule is an irregular step. The opposite party shall be entitled to act in accordance with Rule 30.

[3] The core question is whether the conduct complained of, while categorised as an irregularity under Rule 30, also renders the counterclaim vague and embarrassing. If the Plaintiff is unable to plead to the counterclaim and suffers serious prejudice as a result, the exception must succeed. It is irrelevant that the plaintiff could have invoked Rule 18(12); the availability of one procedural remedy does not exclude another where the pleading is fundamentally defective.

The parties' averments and submissions

[4] The plaintiff's cause of action against the first defendant is premised on the first defendant's breach of the terms of an overdraft agreement concluded on 2 October 2013 and a loan agreement concluded on 23 May 2019. The first defendant was represented by the third defendant at the time the agreements were concluded.

[5] The plaintiff's cause of action against the second defendant is based on a suretyship entered into on 6 September 2005. The second defendant bound himself as surety and co-principal debtor with the first defendant in favour of the plaintiff for due payments of all amounts owed to the plaintiff, together with interest and costs.

[6] The second defendant pleads that he was a member of the first defendant until 30 May 2007. He sold his membership interest in the first defendant to the third defendant on or about 30 May 2007. As part of the agreement concluded between the first and third defendants, the third defendant undertook to do all things and sign all documents necessary to release the second defendant as surety from all of

the first defendant's obligations. The third defendant also agreed to step in on behalf of the second defendant to take all necessary steps to prevent any action against the second defendant, including prompt payment of any claim against the second defendant, as surety or co-principal debtor, with the first defendant in the event that he had not been released as surety. Upon the sale of the second defendant's membership interest in the first defendant-

> "…the third and/or second defendant attended upon the plaintiff for the release of the second defendant as surety and co-principal debtor from the obligations of the first defendant to the plaintiff. Pursuant to such endeavours and the internal processes and documentation of the plaintiff (which the second defendant will seek discovery of) the second defendant was released by the plaintiff during May/June 2007 from any surety and co-principal debtor relationship for the debts of the first defendant to the plaintiff in terms of which the plaintiff confirmed through its duly authorized representatives at the said time that the second defendant was no longer bound as a surety and co-principal debtor. The aforesaid was further conveyed through (*sic)* the representation of the authorized representatives of the plaintiff…
>
> The second defendant, on a further occasion during June 2007, telephonically contacted the representatives of the plaintiff to confirm his release as a surety and co-principal debtor for the obligations of the first defendant to the plaintiff, as had been confirmed before, and this was again confirmed."

[7] The second defendant then filed a conditional counterclaim to be considered in the event that the court finds that the second defendant is liable to the plaintiff in the amounts set out in the plaintiff's particulars of claim in the amounts of R 467 421.00 (Claim A) and R21 112.43 (Claim B), respectively.

[8] In its particulars of claim, the second defendant pleads that pursuant to the business relationship and facilities granted in terms thereof by the plaintiff to the second defendant, a duty of care not to misrepresent any facts surrounding the

alleged banking facilities and more specifically the extent, operation, and existence of any security attached thereto, arose.

[9] With reference to the steps set out in the plea, the second defendant avers that both he and the third defendant took steps together with the plaintiff in respect of obtaining the release of the second defendant as aforesaid and obtained the purported release, and was advised of same by the plaintiff not only at the time of the sale but also again during June 2007. This, the second defendant avers, constituted a representation that he had been released from his suretyship for the first defendant's obligations to the plaintiff. This representation was made in circumstances where the second defendant was not released from the suretyship, which remained operative, binding, and valid on the second respondent. The plaintiff breached its duty of care toward the second defendant and was negligent in several aspects, among others, because the plaintiff failed and/or neglected to make all the necessary investigations and enquiries in terms of making the said representation to the first, second and/or third respondents; the plaintiff did not take reasonable care in establishing the correctness of the representation or make proper enquiries as to the correctness thereof; the plaintiff did not have proper 'checks and balances" control mechanisms and procedures in place to establish and confirm the accuracy of the representation, the plaintiff did not have proper procedures in place to and did not ensure that its agents and/or employees were adequately trained in respect of making the representation.

[10] As a consequence, the second defendant conducted his affairs without regard to the suretyship as a result of which he suffered loss or damages "in the amount of the Judgment granted by the Court in circumstances where he believed and understood that he had been released from the said suretyship and where the second defendant needs to be placed put (*sic)* into the position he was in before the misrepresentation and the Judgment."

[11] The first ground of exception raised concerns a document referred to by the second defendant in the counterclaim that was not attached to it. The second defendant subsequently amended its counterclaim, removing any reference to documentation. As such, this ground, as it is phrased relating to the second

defendant's reliance on an unattached document to provide evidence of misrepresentation, is moot.

[12] The second ground of the exception concerns the second defendant's reference to steps taken with the second defendant, third defendant and the plaintiff to release the second defendant as surety at the time of the sale of his membership interest in the first defendant and again in June 2007, without stating with particularity as to what steps were taken, and no proof of such steps are attached to the counterclaim. The plaintiff also takes issue therewith that the second defendant failed to state with any particularity or sufficient particularity the exact date, time, and manner, and who allegedly represented the plaintiff when the plaintiff allegedly released the second defendant as surety and co-principal debtor.

[13] The third ground of exception relates to the plaintiff's alleged false representations and negligence. The plaintiff avers that the second defendant failed to state with sufficient particularity the exact date, time, and/or manner, and who allegedly represented the plaintiff when the alleged false representation was made.

[14] The fourth ground of exception is that the second defendant avers that he suffered patrimonial loss and or damages but fails to quantify the damages suffered by the alleged misrepresentations. The plaintiff submits that the second defendant cannot rely on the plaintiff's claims in the plaintiff's cause of action to substantiate its own claim. I deem it necessary to deal with this ground immediately. The nature of the claim, as a conditional counterclaim, informs the quantification of the alleged damages that stand to be suffered by the second defendant if the plaintiff succeeds in its claim. I am therefore of the view that the counterclaim is sufficiently quantified and that there is no merit in this ground of exception.

[15] The final ground of exception is that the counterclaim is self-contradictory and instituted against the wrong party. The plaintiff explains that, in paragraph 17 of the counterclaim, the second defendant avers that the third defendant "had to do all things necessary to obtain the release of the second defendant as surety". The plaintiff cannot plead to the averment that the third defendant had an obligation to release the second defendant as surety.

[16] In making submissions regarding the second and third grounds of exception, counsel for the second defendant submitted that it is trite that evidence should not form part of pleadings. In addition, counsel submitted that the plaintiff failed to demonstrate any prejudice if the exception is not upheld. Regarding the final ground of exception, that paragraph 17 of the counterclaim is self-contradictory, counsel for the second defendant submitted that this complaint ignores that the averments are extended to include reference to the plaintiff, and advice provided by the plaintiff as well.

Discussion

[17] In dealing with the remainder of the grounds of exception, it is necessary to emphasise the well-known principles that an overly technical approach should be avoided when exceptions are considered, and that pleadings must be read as a whole when an exception is considered.[1] When an exception is raised that a pleading is vague and embarrassing, a two-fold consideration is required:[2]

> "(i) whether the pleading lacks particularity to the extent that it is vague; and (ii) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial."

[18] While the second defendant is correct that a defendant is not required to plead the evidence, or *facta probantia*, the flip side is that the *facta probanda* must be pleaded. Rule 18(6) explicitly states that a party who relies on a contract shall state whether the contract is written or oral, and when, where, and by whom it was concluded. In this matter, the plaintiff is expected to answer a claim that an undertaking was given at an unspecified time by an unidentified employee of the plaintiff, stating that the second defendant's suretyship would be terminated. The date and location of the undertaking, and the identities of the alleged role-players,

[1] *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 9GSJ) at 374G.
[2] *Merb (Pty) Ltd v Matthews* (2020/15069) [2021] ZAGPJHC 693 (16 November 2021) at para [13]. Footnotes omitted.

are not disclosed. Neither are the steps that the plaintiff's representative allegedly undertook stated. These voids in the counterclaim render it vague and embarrassing. The plaintiff cannot be expected to formulate a plea and prepare properly for trial. It will be embarrassed in conducting the trial since it cannot prepare to answer the second defendant's counterclaim due to the counterclaim being too vague.

[19] As for the ground of exception that the second defendant's counterclaim is self-contradictory, I find no merit in the ground. The paragraph referred to must not be read in isolation but in the context of the counterclaim as a whole.

[20] Since the exception in its entirety revolves around the issue of the counterclaim being vague and embarrassing, this court is not called upon to pronounce on the question as to whether a general duty of care exists between a bank and a surety. The issue thus falls outside the exception under consideration.

ORDER

In the result, the following order is granted:

1. **The plaintiff's exception is upheld.**
2. **The second defendant is granted the opportunity to file an amended counterclaim within 20 (twenty) days of this order, failing which the second defendant's counterclaim will be regarded to be dismissed.**
3. **The second defendant is to pay the costs of the exception.**

E van der Schyff

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. In the event that there is a discrepancy between the date the judgment is signed and the date it is uploaded to CaseLines, the date the judgment is uploaded to CaseLines is deemed to be the date that the judgment is handed down.

For the excipient:	Adv. J Minnaar
Instructed by:	Hammond Pole Majola Inc.
For the second respondent:	Adv. H West
Instructed by:	Gishen Gilchrist Inc.
Date of the hearing:	18 February 2026
Date of judgment:	23 February 2026