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

Reportable

Case No.: A260/2025

In the matter between:

MAGANATHAN PADAYACHEE	First Appellant
SHARNETHA HARILAL	Second Appellant
SHERILEE PADAYACHEE	Third Appellant
And	
SUNWEST INTERNATIONAL (PROPRIETARY) LIMITED	Respondent

Coram: Francis J, Mapoma AJ et Louw AJ
Heard: 5 June 2026
Delivered: 10 June 2026

ORDER

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1. The appeal is dismissed.

2. The appellants are ordered, jointly and severally, the one paying the other to be absolved, to pay the respondent's costs of the appeal on scale C, including the costs of two counsel where so employed.

JUDGMENT

FRANCIS J:

Introduction

[1] This is an appeal against the judgment and order of Andrews AJ delivered on 26 November 2024. The learned judge upheld, with costs, the respondent's exception to the appellants' counterclaim and afforded the appellants 20 days to amend. She refused leave to appeal on 12 March 2025. Leave was subsequently granted on petition by Makgoka JA and Henney AJA on 25 June 2025.

[2] The appellants were the defendants in the action. For convenience, I refer to them as the defendants when dealing with proceedings in the court below and as the appellants in this appeal. I refer to the respondent, Sunwest International (Pty) Ltd, as Sunwest.

[3] The appeal concerns two questions relating to the law of exceptions. The first is which pleading a court must consider when an exception is taken to a counterclaim. The second is the test that governs such an exception.

The pleadings

[4] Sunwest is the licensed operator of the GrandWest Casino in Cape Town. According to its particulars of claim, the appellants discovered between 26 and 29 January 2023 that slot machine 72504 was malfunctioning. They exploited the fault to accumulate credits of approximately R6.2 million. They withdrew some R2.59 million and had the balance transferred to an account at the Sibaya Casino for later withdrawal. Sunwest claims repayment. It contends that the appellants were bound by its terms and conditions of play, which they accepted, expressly or tacitly, upon entering the casino.

[5] In their plea, the appellants admit that they were at GrandWest on the relevant dates and that they gambled there. They deny the terms relied upon by Sunwest. They then counterclaim. They allege that in about January 2023, at Cape Town, each of them concluded a tacit agreement with Sunwest, which acted through "a duly authorised representative". The terms they plead are these: that they would gamble at the casino using MVG cards and/or day visitor cards; that they would deposit money on those cards or draw on existing credits; that they would be free to withdraw any accumulated credits whenever they chose and on demand; and that Sunwest would pay out those credits.

[6] Sunwest delivered a notice under rule 23(1) raising two complaints. First, the counterclaim did not identify who had represented Sunwest. Second, it did not plead the conduct from which the tacit agreement was to be inferred. The appellants did not respond. The exception followed. Andrews AJ upheld it with costs and granted the appellants twenty days to amend. They did not amend. Instead, they sought leave to appeal.

The approach to an exception

[7] The principles are well settled. On exception, the court reads the pleading as it stands and accepts its factual allegations as true. The court will not, however, accept inferences or conclusions of law unsupported by the pleaded facts, nor allegations that are plainly false or too improbable to be proved. The excipient must show that, on every reasonable reading, the pleading discloses no cause of action.

[8] Exceptions should be approached sensibly, not with an eye to technical points. As Harms JA observed in *Telematrix*[1], they serve as a useful mechanism to weed out claims that are bad in law. Over-technicality defeats that purpose. This Division has made the same point in *Titan Asset Management*[2]: an exception is good where the pleading, on every interpretation reasonably open to it, is bad in law because it discloses no recognised cause of action.

[9] Where the complaint is that a pleading is vague and embarrassing, the court considers two questions: whether the pleading lacks particularity to the point of vagueness, and whether that vagueness embarrasses the excipient to the extent of prejudice in pleading to it. The complaint must go to the cause of action as a whole, not to individual averments. The lack of particularity in specific averments is addressed by rule 30, read with rule 18(12). The appellants correctly emphasised the distinction between an exception under rule 23, which strikes at the root of the cause of action, and a rule 30 application, which deals with particularity. That distinction is common cause. What is in dispute is on which side of the line this counterclaim falls.

The first ground: which pleading falls to be considered

[10] The appellants' first ground is that Andrews AJ should have confined herself to the counterclaim, taken every allegation in it as true, and not looked at Sunwest's

[1] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3.

[2] *Titan Asset Management (Pty) Ltd and Others v Lanzerac Estate Investments (Pty) Ltd and Another* [2023] ZAWCHC 136; [2023] 3 All SA 589 (WCC) para 11.

particulars of claim, particularly the disclaimer notices and the regulatory framework pleaded there. The premise has some force, but the conclusion does not follow.

[11] It is true that the pleading under attack is the counterclaim and that its allegations are assumed to be true. A counterclaim is a claim in its own right. Rule 24 allows a defendant to advance it much as if it were a separate action. If Sunwest suggested, and Andrews AJ accepted, that the particulars of claim's allegations had to be taken as true, that was loosely expressed. On exception to a counterclaim, it is the counterclaim that is scrutinised. Nevertheless, a counterclaim is pleaded in the same suit and pleadings are read as a whole. Where a party's admissions in one pleading cannot be reconciled with the case it advances in another, the court may take the contradiction into account. Reading the counterclaim together with the appellants' admissions in their plea was therefore permissible.

[12] I must be clear about the limits of this approach. The exception targeted the counterclaim alone. The disclaimer notices and the regulatory framework pleaded in Sunwest's particulars of claim play no role in determining whether the counterclaim discloses a cause of action, and I have not relied on them for that purpose. Read fairly, the judgment below did not use them in that way either. The references to them and to the appellants' admitted MVG membership provided context only. If the order below requires support, it is to be found in the counterclaim itself.

[13] The first ground therefore fails. Any looseness in the statement of the principle did not affect the outcome.

The second ground: pleading a tacit agreement

[14] The appellants' second complaint is the substantial one. They contend that Andrews AJ held them, at the exception stage, to the burden of proof they would bear only at trial. They are correct that, in pleading, a litigant need allege only the facts that would entitle him to judgment if proved. He need prove nothing in the pleading itself.

This is the familiar distinction between the *facta probanda*, which must be pleaded, and the *facta probantia*, which need not be.

[15] That does not resolve the issue, however, because it leaves open what the *facta probanda* of a tacit agreement are. That is a question of substantive law. In essence, the law of contract, not the rules of evidence or procedure, prescribes what must be alleged.

[16] On this point the law is settled. For a time, the test for a party's intention to conclude a tacit contract was thought to sit awkwardly between two formulations. The stricter test, from *Ocean Commodities*[3], required unequivocal conduct admitting of no other reasonable interpretation than that the parties had contracted on the terms alleged. The more relaxed approach, preferred by Corbett JA in *Joel Melamed*[4], allowed a court to find a tacit contract where, on a balance of probabilities, the most plausible inference from all the proved facts was that a contract had been concluded. The supposed conflict was resolved by the Supreme Court of Appeal in *Nurcha*[5]. Adopting what Heher JA had said in *Butters v Mncora*[6], the court held that a party alleging a tacit contract need show no more than unequivocal conduct by the other party from which consensus may be inferred on a balance of probabilities, the ordinary civil onus.

[17] On any of these formulations, the conduct of the parties lies at the heart of the enquiry, for it is from that conduct that agreement is inferred. A party relying on a tacit contract must therefore plead facts that, if proved, could support the inference. Those facts must include, at minimum, the conduct itself in its essential shape, namely who acted and what they did. Without that, the other side cannot sensibly plead to the claim, and the court cannot determine whether a cause of action has been made out.

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[3] *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 292B–C.
[4] *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 164G–165G.
[5] *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd* 2019 (3) SA 379 (SCA) paras [16] – [21].
[6] *Butters v Mncora* [2012] ZASCA 29; 2012 (4) SA 1 (SCA) para 34.

[18] This principle is not new. In *Roberts Construction*[7] the Appellate Division observed that a party relying on an implied (that is, tacit) contract could hardly avoid disclosing that fact, and that stating "when, where and by whom" the contract was made would, in many cases, involve setting out the conduct relied upon. This accords with rule 18(6), which requires a party relying on a contract to state whether it is written or oral and when, where and by whom it was concluded. For a tacit contract, the identity of the persons through whom it was made, and the conduct from which it is to be inferred, form part of the *facta probanda*. The person to be held to a tacit contract must have known of all the circumstances of the transaction, and the conduct relied upon must be unequivocal.

[19] It follows that Andrews AJ's reference to unequivocal conduct and to a balance of probabilities was not, as the appellants contended, the introduction of the trial standard through the back door. It was a statement of the substantive law that informs a pleader what must be alleged. The appellants did not have to prove their tacit agreement on exception, but they had to plead facts capable of establishing it. Read as a whole, the judgment required no more than that.

Application to the counterclaim

[20] Measured against these principles, the counterclaim is deficient in two material respects.

[21] The first deficiency is that it does not identify through whom Sunwest is said to have contracted. A company can act only through natural persons. To plead that Sunwest acted through "a duly authorised representative" is to plead the very conclusion that the appellants must establish. They were asked in the rule 23 notice to name that person and declined to do so. They were given a further opportunity by the order granting leave to amend and again declined. Whatever may be made of that in due course, the omission is not, as a matter of substantive law, a mere evidential detail

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[7] *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A).

that can be left to discovery. It is part of what must be pleaded. Without it, Sunwest cannot test whether the person said to have acted for it had the necessary authority or the knowledge of all the circumstances required by law.

[22] The second deficiency is that the counterclaim pleads no conduct from which the tacit agreement is to be inferred. It moves directly from the bare assertion that the parties "concluded a tacit agreement" to a list of its terms. That is to plead a conclusion. The conduct relied upon must appear from the pleading because, in a tacit contract, the conduct is the foundation of the claim. This does not require a full evidentiary account of the conduct, only its essential character.

[23] The appellants' own plea creates a further difficulty. They admit that they are MVG members and that they played at GrandWest using their MVG and day-visitor cards. Sunwest pleads, as a term of that admitted relationship, that it may adjust or revoke credits and benefits if its systems malfunction. The tacit agreement now contended for, namely an unfettered right to withdraw "any" accumulated credits at the appellants' sole discretion and on demand, does not sit easily with that admitted term. Sunwest relied on *Pan American World Airways*[8] and *Cash Converters*[9] for the proposition that a tacit term cannot be read in against an express one. Those cases concern the importation of terms into an existing contract rather than the assertion of a free-standing tacit contract, and I would not decide the matter on them. The inconsistency is nevertheless relevant. When read with the admissions in the plea, it renders the counterclaim more obscure and confirms that Sunwest is left to plead to a case that, as it stands, cannot fairly be answered.

[24] Taken together, these shortcomings render the counterclaim vague and embarrassing. They go to the root of the cause of action, not to incidental averments. The complaint was rightly brought under rule 23 rather than rule 30.

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[8] *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175.
[9] *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* [2002] ZASCA 66; 2002 (5) SA 494 (SCA) paras 1–2 (per Brand JA).

The reasoning of the court *a quo*

[25] The appellants criticised Andrews AJ's finding, in paragraph 38 of her judgment, that they had not "furnished sufficient facts to sustain the Defendants' Counterclaim". They argued that this showed she had misunderstood the exception enquiry, in which proof plays no part. Read in context, the word "furnished" clearly refers to what had been pleaded, not what had been proved. I do not read the judgment as a whole as having required proof of the tacit agreement at the exception stage. The finding, properly understood, was that the *facta probanda* had not been alleged.

[26] Nor is there merit in the complaint that Andrews AJ considered embarrassment when it had not been argued. Embarrassment is the second leg of the very enquiry that this type of exception requires, and the court was obliged to undertake it. Even if some part of the reasoning below could be read as straying into the merits, that does not affect the outcome. On the strictest application of the pleading rules, the counterclaim is deficient for the reasons given above.

Leave to amend

[27] The order below granted the appellants twenty days to amend. That is the usual course when an exception succeeds. The purpose is to dispose of the defective pleading, not necessarily the underlying claim. The appellants had that opportunity and chose not to use it. That was their choice, but it provides no reason to set the order aside now.

Costs

[28] Costs should follow the result. Sunwest sought costs of counsel on scale C. Given the amount at stake, the complexity of the matter, and its importance to the parties, scale C is appropriate.

Order

[29] I make the following order:

1. The appeal is dismissed.

2. The appellants are ordered, jointly and severally, the one paying the other to be absolved, to pay the respondent's costs of the appeal on scale C, including the costs of two counsel where so employed.

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M FRANCIS

Judge of the High Court

I agree.

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Z L MAPOMA

Acting Judge of the High Court

I agree.

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M LOUW

Acting Judge of the High Court

Appearances:

For Appellants:	Adv D Williams
Instructed by:	Harkoo, Brijlal & Reddy Inc
	c/o Bisset, Boehmke McBlain Attorneys
For Respondent:	Adv A B Berkowitz
Instructed by:	Knowles Hussain Lindsay Inc.
	c/o Abrahams & Gross