



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

Not reportable

Case No: 2025-151382

In the matter between:

ABL FARMING (PTY) LTD

Plaintiff

and

ML FRUITS (PTY) LTD

Defendant

Coram: Anderssen AJ

Heard: 6 July 2026

Delivered: Electronically on 7 August 2026

Summary: Application for leave to appeal – no reasonable prospects of success
– no other compelling reason – application refused

ORDER

1. The application for leave to appeal is refused.
2. The defendant is ordered to pay the costs including the costs of counsel on Scale B.

JUDGMENT

Anderssen AJ:

INTRODUCTION

- [1] The defendant (“*ML Fruits*”) seeks leave to appeal to the full court against the whole of the judgment and the order as delivered on 22 May 2026, which granted summary judgment in favour of the plaintiff (“*ABL*”).
- [2] In terms of section 17(1) of the Superior Courts Act¹ I must consider whether the appeal would have a reasonable prospect of success or whether there is some other compelling reason why the appeal should be heard.
- [3] ML Fruits seek leave to appeal as it avers that the court erred in finding that it did not disclose a *bona fide* defence within the meaning of Rule 32(3)(b). The errors in findings that ML Fruits complain about are:
- [3.1] firstly, the finding that *mora* had not been claimed or established;
- [3.2] secondly, the finding that ML Fruits had not shown the lost profits to be a natural consequence of ABL’s breach of the agreement;
- [3.3] thirdly, the finding that ML Fruits elected not to answer all the allegations to the effect that there were no discussions or requests made about the delivery of guavas;

¹ 10 of 2013.

- [3.4] fourthly, the finding that ML Fruit's approach to formulating the relief sought in reconvention fairly led to the conclusion that its defence is not bona fide;
- [3.5] fifthly, the finding that the claim in reconvention may be one where the issues of liability and quantum are interlinked in such a manner that the one cannot be decided without the other;
- [3.6] sixthly, the finding or the doubt expressed that an unquantified counterclaim cannot give rise to a *bona fide* defence;
- [3.7] seventhly, the court's reliance on the cases of **BKB Limited**, **Masana Petroleum** and **Van den Berg Attorneys** as these are distinguishable;
- [3.8] eighthly, the finding that ML Fruits was no longer willing to adhere to its agreement with ABL to purchase all of the guavas harvested by ABL.

DISCUSSION

- [4] During the hearing Mr Quinn took me to the **Fiat** judgment² and submitted that it was not seriously disputed by ABL that there was an agreement between the parties that ML Fruits would buy guavas from ABL. ML Fruits had pleaded that the express, tacit and/or implied terms of the agreement were that ABL would sell to ML Fruits all of the tomatoes and guavas harvested by ABL during the 2025 harvest season and that ML Fruits would make payment for the tomatoes and guavas at their prevailing

² **Breitenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T).

market price, weekly in arrears. ABL failed to deliver the guavas and was thus in breach of the agreement. The repudiation of the agreement that ABL relied on, is 'an incomplete thought' as ABL neither cancelled the agreement nor claimed specific performance. Mr Quinn pointed out that pleadings can be amended and that ML Fruits' failure to amend (after they were alerted to the difficulties in the plea and counterclaim by ABL in the exception that was noted and the application for summary judgment) must be weighed up against ML Fruit's entitlement to the relief sought.

[5] As regards the counterclaim, Mr Quinn submitted that it is permissible to claim for damages in a two-stage enquiry. The counterclaim is formulated, firstly, in the form of a declarator – that ABL is liable to ML Fruits to pay damages because of the failure to deliver guavas – and, secondly, for the determination of the *quantum* of damages at a postponed date. I agree with Mr Quinn that this approach is permissible.³ What I expressed doubt about in my judgment, is whether such a counterclaim can defeat a summary judgment application because it may not meet the requirement that a defence must be disclosed 'fully'. The question is whether this approach is sufficient to ward off a claim for summary judgment. Mr Wessels argued that it is not because the defence lacks the necessary detail and, as pointed out in the exception, the current formulation of the defence in the plea and counterclaim is problematic.

[6] I was of the view that the facts relied upon by the deponent of ML Fruits' answering affidavit made it clear that the counterclaim – arising from the

³ **Cadac (Pty) Ltd v Weber-Stephen Products Company and Others** (530/09) [2010] ZASCA 105 (16 September 2010); [2011] 1 All SA 343 (SCA); 2011 (3) SA 570 (SCA); 2010 BIP 307 (SCA) at para [13].

failure to deliver guavas – may very well be a claim where the issues of liability and *quantum* are so interlinked that a court would be unable to decide the one without the other.⁴ This is the risk inherent to the two-stage enquiry, as the Supreme Court of Appeal warned. The **Cadac**-case confirms that a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication. It is not authority that a counterclaim in these terms will defeat a claim for summary judgment. The approach taken by ML Fruits was inherently risky: Rule 32(3)(b) requires a defendant to disclose ‘fully’ the nature and grounds of the defence and the material facts relied upon therefor.

- [7] As to the complaints in the notice to the application for leave to appeal, I note the following:
- [8] Obligations imposed by a contract are meant to be performed, and, if they are not performed at all, the party on whom the duty of performance lay, is said to have committed a breach of contract or to be in *mora*. Time is an element common to all contracts and to decide the consequences of failure to perform a contractual obligation timeously, our law employs the concept of *mora*. My judgment dealt with the lack of necessary averments arising from *mora ex re* and *mora ex persona*. I am not persuaded that there are any prospects that a different court would reach a different conclusion.
- [9] The complaints against my findings – such as that ML Fruits elected not to

⁴ The complaint against the finding that ML Fruits had not shown the lost profits to be a natural consequence of ABL’s breach of the agreement cannot be upheld. The complaint misunderstands the finding made.

answer all the allegations (to the effect that there were no discussions or requests made about the delivery of guavas) or that ML Fruit's approach to formulating the relief sought in reconvention fairly led to the conclusion that its defence is not *bona fide* – do not demonstrate a reasonable prospect of success on appeal.

- [10] Leave to appeal may only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. The Supreme Court of Appeal, with reference to the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised, was of the view that, if a reasonable prospect of success is established, leave to appeal should be granted.⁵ Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, ML Fruits needs to convince this court, on proper grounds, that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.⁶

⁵ ***Ramakatsa and Others v African National Congress and Another*** (724/2019) [2021] ZASCA 31 (31 March 2021) at para [10].

⁶ See ***MEC Health, Eastern Cape v Mkhitha*** [2016] ZASCA 176 at para [17].

[11] My judgment highlighted the risk inherent in the approach taken by ML Fruits – which resulted in my finding that they did not meet the requirement of ‘fully’ as set by Rule 32(3)(b), which regulates what is required from a defendant in its opposing affidavit. I illustrated this with reference to certain cases. I agree that the cases of **BKB Limited**, **Masana Petroleum** and **Van den Berg Attorneys** are distinguishable, but I do not agree that my reliance on these cases were misplaced. The cases served as illustrations of when courts granted summary judgment applications because the counterclaims did not meet the ‘fully’ requirement. ML Fruits’ answering affidavit fell short of what was expected of them. The problems regarding *mora*, repudiation, and the contradictions between the pleaded counterclaim and its other admissions in the plea were pointed out to them by ABL but they did not address these. Thus ML Fruits did not meet its obligation, when raising the counterclaim as a *bona fide* defence to a summary judgment application, to provide full particularity of the material facts upon which that claim is based.

[12] Although Mr Quinn did not seek to rely on a compelling reason, I must nevertheless consider whether, if the requirement for reasonable prospects of success are not met, leave to appeal may still be granted under section 17(1)(a)(ii). If there is some other compelling reason why the appeal should be heard, such as conflicting judgments on the legal matter under consideration, an important question of law or matters of unique public interest, I could nevertheless grant leave to appeal. I do not believe that there are any such reasons.

[13] In reaching this conclusion, I take guidance from the Supreme Court of

Appeal in the **Majola**-case:⁷

[25] It is necessary to say something regarding the grant of leave to appeal in cases in which summary judgment has been granted. The purpose of summary judgment is to 'enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim'. It is a procedure that is intended 'to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights'. If a court hearing an application for summary judgment is satisfied that a defendant has no bona fide defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure. This case is a good example. If summary judgment had been refused nearly two years ago, and leave to defend had been granted, the trial would probably have been completed by now.

[14] I was satisfied that ML Fruits has no *bona fide* defence to ABL's claim and granted summary judgment as a consequence. I am not persuaded that there are any reasonable prospects of success on appeal. The summary judgment did not close the door on ML Fruits' counterclaim. Granting leave to appeal now would undermine the very purpose of the summary judgment procedure.

[15] Costs must follow the cause. The application for leave to appeal is refused and the order recorded above.

ANDERSSEN J S

Acting Judge of the High Court

Appearances:

For the applicant / defendant: Adv C Quinn
Instructed by Boy Louw Inc

For the respondent / plaintiff: Adv L N Wessels
Instructed by: Boshoff Brönn Smit

⁷ **Majola v Nitro Securitisation 1 (Pty) Ltd** (567/10) [2011] ZASCA 180 (30 September 2011); 2012 (1) SA 226 (SCA); [2012] 1 All SA 628 (SCA).