



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

JUDGMENT

Unreportable

Case no: 24550/2024

In the matter between:

AFGRI GRAIN MARKETING

Applicant

a division of AFGRI AGRI SERVICES (PTY) LTD

(Registration No.: 1995/005872/07)

and

MARIA ELIZABETH DE VRIES N.O.

First Respondent

(cited herein in her capacity as trustee of the BERG EN SEE

FAMILIE TRUST, I[...])

GERRIT DAWID DE VRIES N.O.

Second Respondent

(cited herein in his capacity as trustee of the BERG EN SEE

FAMILIE TRUST, I[...])

MARIA ELIZABETH DE VRIES

Third Respondent

GERRIT DAWID DE VRIES

Fourth Respondent

DEON MARAIS N.O.

Fifth Respondent

**(cited herein in his capacity as trustee of the BERG EN SEE
FAMILIE TRUST, I[...])**

Coram: LOUW AJ

Heard: 7 May 2026

Delivered: 7 September 2026

Summary: Summary Judgment – Rule 32 – Grain purchase agreement and alleged suretyship – Agreement, suretyship, quantum and alleged overpayment disputed – Correspondence relied upon as acknowledgement of debt susceptible to differing interpretations – Supplementary explanatory note creating further uncertainty regarding the calculation of the claim and relief sought – Respondents disclosing bona fide defences and triable issues – Summary judgment refused – Leave to defend granted – Costs on attorney and client scale awarded against applicant.

ORDER

1 The application for summary judgment is refused.

- 2 The respondents are granted leave to defend the action.
- 3 The applicant shall pay the costs of the application for summary judgment on an attorney and client scale, including the costs of counsel on scale B, as taxed or agreed.

JUDGMENT

Louw AJ:

Introduction

[1] The applicant, Afri Grain Marketing, a division of Afgri Agri Services (Pty) Ltd ('the applicant' and plaintiff in the main action), seeks summary judgment against all five respondents (defendants in the main action), alternatively against the third and fourth respondents only, for payment of R573 127.11, together with interest thereon at the rate of 11.75% per annum from the date of *mora* until final payment, and costs of suit on the attorney and client scale.

[2] The main proceedings concerns an alleged agreement in terms of which the applicant agreed to purchase 9.188 metric tons of grain from the Berg & See Familietrust ('the Trust'). It also concerns a deed of suretyship in terms of which the third and fourth respondents apparently bound

themselves in writing as sureties and co-principal debtors, jointly and severally, for the due performance by the first, second and fifth respondents, acting on behalf of the Trust, of their obligations arising from the agreement.

[3] The applicant alleges that it erroneously paid an amount of R515 585.25 to the Trust. It further alleges that a second payment of R61 089.31 was also made to the Trust in error and that, despite efforts to do so, the applicant was unable to stop or reverse that payment. As a result, the applicant seeks repayment of the total amount allegedly paid in error.

Factual background

[4] It is common cause that the Trust and the applicant engaged in previous transactions involving the sale and delivery of grain. It is not, however, common cause that the agreement relied upon by the applicant in these proceedings was concluded between the parties, which issue remains squarely in dispute.

[5] The applicants' current claim arises from allegations that it overpaid the Trust in the amounts of R515 585.35 and R61 809.31, respectively, pursuant to a grain supply transaction concluded with the Trust. The alleged overpayments are founded upon a supply/sale agreement said to have been concluded between the applicant and the Trust, the terms of which are contained partly in a written agreement and partly in the applicant's General Terms and Conditions incorporated therein by reference. The applicant further alleges that the third and fourth respondents bound themselves as

sureties and co-principal debtors for the obligations of the Trust arising from the agreement.

[6] The sale agreement, titled ‘Bevestiging van Graan-Aankoop (Gapingskontrak)’ relied upon by the applicant, is a grain sale agreement dated 11 November 2022 and allegedly concluded on 5 December 2022 between the applicant and the Trust (‘sale agreement’).¹ The sale agreement reflects Mr Frikkie Barnard as the representative of the applicant, being the purchaser, and bears his signature, which was appended at Moorreesburg on 5 December 2022. Mr Barnard’s name appears beneath his signature.

[7] The Trust is identified in the sale agreement as the seller. The sale agreement also bears a signature purportedly appended on behalf of the Trust at Tulbagh on 5 December 2022. However, no name appears beneath that signature, and neither the agreement nor the papers before this Court contain a trust resolution or any other document identifying the signatory or evidencing that person’s authority to act on behalf of the Trust. Furthermore, the signature itself is illegible and does not permit the identity of the signatory to be ascertained from the face of the document.

[8] The sale agreement contains a material term providing that, where the seller is a trust, the signatories to the agreement bind themselves as sureties and co-principal debtors, jointly and severally, for the due performance of the seller’s obligations under the agreement.² No separate deed of suretyship was concluded between the parties. Instead, the applicant relies on the sale

¹ The Agreement is attached to the particulars of claim and marked annexure ‘POC1’ (see Court Index – Main Application at 14-17).

² See clause 12.5.2 of the agreement attached as ‘POC1’ to the particulars of claim (see Court Index – Main Application at 15).

agreement itself, which incorporates by reference the document titled ‘Afgri Grain’s General Terms and Conditions for the Purchase of Grain’.³ The applicant contends that the suretyship is contained in the sale agreement itself and derives from the provisions of that agreement read with the incorporated General Terms and Conditions for the Purchase of Grain.

[9] It is common cause that grain was delivered to various silos during the relevant period. What is disputed, however, is the quantity of grain delivered, the grain in respect of which payment was made, and whether the deliveries correspond with the payments effected by the applicant. The respondents further deny that the applicant overpaid the Trust and dispute both the existence and extent of any indebtedness allegedly owing to the applicant. They challenge the accuracy of the calculations relied upon by the applicant and contend that the true position cannot be determined on the papers. Accordingly, a dispute exists as to whether any amount is owing to the applicant and, if so, the amount thereof and the factual basis upon which it falls to be determined.

[10] The papers reveal a series of communications, particularly from August to October 2023, between Mr Frikkie Barnard, acting on behalf of the applicant, and Mr Cilliè de Vries concerning the applicant’s allegation that it had overpaid for grain. It is, however, unclear from the papers what relationship Mr Cilliè de Vries bears to the Trust, as he is neither identified as a trustee nor reflected as a signatory to any of the relevant agreements.

³ See Afgri Grain’s General Terms and Conditions for the Purchase of Grain attached as ‘POC2’ to the particulars of claim (see Court Index – Main Application at 18-23).

[11] In an email dated 3 October 2023, Mr Cilliè de Vries and Mr Barnard discussed the alleged overpayment. In his response, Mr Cilliè de Vries indicated that the matter would have to be discussed with the Trust's accountant because tax (or VAT) had already been paid on the amount received and any overpaid tax would likewise have to be refunded to the Trust. He further stated that he did not presently have funds available to repay the allegedly incorrect payments. Significantly, Mr De Vries referred to the alleged 'erroneous' payments using the Afrikaans word 'foutiewelike' in quotation marks. The applicant relies on this correspondence as constituting an acknowledgement of indebtedness by the Trust in respect of the alleged overpayment. The respondents, however, dispute that interpretation and contend that the email does not amount to an admission of liability. The meaning and effect of the correspondence, and in particular whether it constitutes an acknowledgement of indebtedness on behalf of the Trust, accordingly form part of the issues in dispute between the parties.

[12] The respondents dispute a number of material aspects of the applicant's claim. They inter alia deny that the alleged grain purchase agreement was concluded with the Trust and further dispute that the third and fourth respondents bound themselves as sureties and co-principal debtors. They deny that any payments were made in error, challenge the alleged indebtedness, and oppose summary judgment.

Arguments before court

[13] Counsel for the respondents, Mr Smit, contends that the threshold for obtaining summary judgment is a high one. The applicant is required to demonstrate both that its claim is unimpeachable and that the respondents have failed to disclose a bona fide defence or any issue fit for trial. Given the nature of summary judgment as an extraordinary remedy, counsel submitted that any genuine dispute of fact or sustainable defence must result in leave to defend being granted.

[14] The respondents' counsel argued that the applicant has fallen short of meeting that standard. The respondents oppose the application on the basis that they have disclosed several bona fide defences which raise triable issues and render summary judgment inappropriate. First, the respondents deny that the third and fourth respondents signed the agreement relied upon by the applicant, whether in a representative capacity on behalf of the Trust or otherwise, on 11 November 2022 or 5 December 2022. On that basis, they dispute that the agreement is binding upon any of the respondents.

[15] Counsel for the respondents submitted that their challenge to the existence and authenticity of the agreement is founded on specific facts and cannot be dismissed as a mere bare denial. In support of this contention, reliance was placed on an email dated 4 April 2024 from the applicant's contract administrator, Ms Danell Mostert, in which she requested that Mr Cilliè de Vries sign and initial what she described as 'this old contract' because the original had allegedly been lost. Counsel argued that this correspondence is difficult to reconcile with the applicant's subsequent reliance on a purportedly signed agreement attached to the summons and

raises a legitimate question as to the provenance and authenticity of the document.

[16] The respondents further relied on discrepancies in the signature attributed to Mr Barnard. Counsel for the respondents submitted that a comparison of the signature appearing on the sale agreement relied upon by the applicant, dated 5 December 2022, with Mr Barnard's known signature contained in an earlier and different sale agreement concluded on 30 May 2022, reveals material differences in both form and appearance.⁴ According to counsel, the signatures do not readily appear to have been made by the same person. This, it was argued, casts doubt not only on the authenticity of Mr Barnard's signature but also on the authenticity of the agreement as a whole and whether it was ever duly executed by the parties.

[17] The respondents' counsel argued that the applicant has failed to identify with any certainty who signed the sale agreement on behalf of the Trust. While alleging that the first and/or second respondents were the signatories, the applicant does not positively identify the person who executed the document. In those circumstances, it was submitted that the respondents cannot be expected to explain or prove the authenticity of a signature relied upon by the applicant. The onus remains on the applicant to establish the authenticity and execution of the agreement.

[18] Accordingly, counsel for the respondents submitted that the existence, authenticity and execution of the agreement are genuinely disputed issues.

⁴ See the sale agreement dated 30 May 2022, referred to in paragraph 28.12 of the opposing affidavit in the summary judgment application and marked 'DV4' (Court Index to the Summary Judgment Application at 51-54). The agreement is not signed on behalf of the Trust.

These issues cannot properly be resolved on the papers and ought to be determined at trial.

[19] Secondly, counsel for the respondents also submitted that the applicant has failed to establish the existence of a valid and enforceable suretyship. They argued that any alleged suretyship is dependent upon the existence and validity of the underlying agreement, which is itself disputed. In addition, while the applicant seeks to hold both the third and fourth respondents liable as sureties, the agreement reflects only a single signature on behalf of the Trust. The respondents' counsel contended that the applicant is unable to identify the purported signatory and has not stated who allegedly bound himself or herself as surety. The respondents accordingly deny that they signed any suretyship and dispute that the requirements of section 6 of the General Law Amendment Act 50 of 1956 have been satisfied. Section 6 requires a contract of suretyship to be embodied in a written document and signed by or on behalf of the surety, failing which the suretyship is invalid. It was further submitted that the applicant's reliance on terms incorporated by reference is insufficient, particularly where the General Terms and Conditions upon which the applicant relies are unsigned.

[20] The respondents' counsel also challenged the completeness of the contractual documents relied upon by the applicant. It was submitted that the document annexed as the General Terms and Conditions is incomplete and disjointed, commencing and ending mid-clause and omitting material provisions. As a result, the respondents contend that they are unable to meaningfully ascertain or plead to the terms upon which the applicant relies. Counsel argued that a defendant is required to answer the case as pleaded

and cannot be expected to reconstruct an incomplete contract from external sources.

[21] The respondents' counsel submitted that where the terms of a contract are incomplete or disputed, such issues are generally unsuitable for determination by way of summary judgment and should be ventilated at trial.⁵ Accordingly, the respondents contended that both the existence and enforceability of the alleged suretyship, as well as the contractual terms upon which the applicant relies, raise bona fide and triable issues which preclude the granting of summary judgment.

[22] Thirdly, the counsel for the respondents submitted that the applicant's claim is founded upon the allegation that only 9.040 tons of wheat were delivered, notwithstanding that payment was made for substantially larger quantities. The respondents dispute this contention and maintain that the Trust delivered significantly greater quantities of wheat during the relevant period. In support of this defence, counsel referred to contemporaneous correspondence from Mr Barnard which, according to the respondents, is consistent with payment being made for wheat delivered and inconsistent with the applicant's assertion that only 9.040 tons were received. The respondents accordingly deny that the first payment constituted an overpayment and contend that a genuine dispute exists regarding the quantity of grain delivered and the value thereof.

[23] In relation to the second payment of R61 809.31, the respondents admitted that the payment was received, but denied that it was made in error.

⁵ While relying on *Delta Finance, a division of Wesbank, a division of FirstRand Bank Ltd v Opperman* (6744/2011) [2011] ZAWCHC 554 (9 December 2011) paras 12-14.

Their case is that the amount represented a residual SAFEX profit arising from grain delivered by the Trust and was properly payable. The respondents' counsel submitted that the nature and purpose of this payment are likewise disputed and raise a further factual issue incapable of resolution on the papers.

[24] Counsel for the respondents further argued that the disputes regarding the quantities delivered, the payments made, and the alleged overpayment directly affect the quantification of the applicant's claim. They contend that the amounts claimed are disputed and that the applicant's calculations are challenged on several grounds.

[25] On that basis, counsel submitted that the applicant's claim is not one for a liquidated amount as contemplated by Rule 32. Counsel argued that the quantification of the claim is dependent upon disputed facts concerning the quantities of grain delivered, the payments made, and the basis upon which any alleged overpayment was calculated. It was submitted that these disputes extend to both liability and quantum and cannot properly be resolved on the papers. Accordingly, the respondents contend that the matter raises bona fide triable issues which ought to be determined at trial after the hearing of evidence.

[26] Lastly, the respondents dispute the applicant's contention that the correspondence between Mr Barnard and Mr Cilliè de Vries dated 3 October 2023 constituted an acknowledgement of debt by the Trust. Counsel submitted that Mr Cilliè de Vries is neither a trustee of the Trust nor a party to these proceedings and that any statements made by him cannot, without

more, bind the Trust. Counsel further argued that, properly construed and read in context, the email does not amount to an admission of liability. Instead, it reflects an attempt to investigate the applicant's allegations and obtain further information. Reliance was also placed on subsequent correspondence in which Mr Cilliè de Vries disputed the applicant's claim and refused to sign a proposed acknowledgement of debt.

[27] In those circumstances, counsel submitted that the correspondence does not constitute an acknowledgement of indebtedness and, at the very least, raises a genuine dispute as to its meaning and effect. This, it was argued, constitutes a bona fide and triable issue which cannot be determined on the papers.

[28] On the strength of these contentions, counsel for the respondents submitted that each of the defences advanced raises a genuine dispute of fact and, individually and cumulatively, constitutes a bona fide defence to the applicant's claim. It was accordingly argued that the matter is not suitable for summary judgment and ought to proceed to trial.

[29] Counsel for the applicant, Ms Van der Westhuizen, rejected the respondents' contention that they had disclosed any bona fide defences. She was critical of both the manner in which the defences were advanced and the substance of the explanations provided, submitting that the respondents had failed to engage candidly with the material allegations against them. The applicant's counsel argued that, whilst the respondents admit that grain was delivered, they deny virtually all other material allegations forming the basis of the applicant's claim. According to her, these denials are inconsistent with

the undisputed facts and amount to little more than bare assertions. She contended that the respondents have not been forthcoming with this Court and that the purported defences are disingenuous, lacking in bona fides, and constitute sham defences incapable of raising genuine triable issues.

[30] Applicant's counsel submitted that the respondents have failed to make a full and frank disclosure of their defence. Despite denying that the grain purchase agreement was concluded on behalf of the Trust, they provide no explanation as to who concluded the agreement on the Trust's behalf or on what basis the undisputed grain deliveries were made to the applicant. Counsel accordingly argued that the respondents' denials are not bona fide and that the purported defences constitute sham defences raised solely to resist summary judgment.

[31] Counsel for the applicant submitted that the legal principles regulating summary judgment are well established. She contended that a defendant opposing summary judgment must satisfy the court, by affidavit, that he or she has a bona fide defence to the action and must fully disclose both the nature and grounds of that defence, together with the material facts upon which it is founded. Reliance was placed on *Breytenbach v Fiat SA (Edms) Bpk*⁶ and *Something Different Concepts and Shows CC and Another v South African Securitisation Programme (RF) Ltd and Others*,⁷ where it was emphasised that a defendant must place sufficient facts before the court to enable it to determine whether a defence disclosed, if proved at trial, would constitute a valid answer to the claim.

⁶ 1976 (2) SA 226 (T).

⁷ (A200/2023) [2024] ZAWCHC 103 (19 April 2024).

[32] Applicant's counsel further submitted that it is not sufficient for a defendant merely to profess a lack of knowledge of the plaintiff's allegations or to cast vague suspicion upon the plaintiff's case. A defendant is required to formulate the factual basis of the defence with sufficient clarity and particularity to demonstrate that a genuine and triable dispute exists. In this regard, counsel for the applicant relied on *Chambers v Jonker*⁸ and *Standard Bank of South Africa Ltd v Roestoff*,⁹ where the courts stressed that the opposing affidavit must disclose facts which, if established at trial, would constitute a good defence in law.

[33] Counsel for the applicant submitted that, although courts approach affidavits resisting summary judgment with a measure of indulgence, vague, sketchy or bald allegations may properly be considered when considering whether the defence is bona fide. She contended that the court must evaluate whether the facts disclosed constitute a genuine and bona fide defence, rather than merely accepting conclusory or unsupported denials at face value.¹⁰

[34] Counsel for the applicant submitted that the purpose of summary judgment is to prevent defendants who lack a bona fide defence from delaying the enforcement of valid claims. At the same time, defendants who raise genuine and triable disputes should be afforded the opportunity to proceed to trial.¹¹ Counsel further relied on *Pansera Builders Suppliers (Pty)*

⁸ 1952 (4) SA 635 (C) at 638.

⁹ 2004 (2) SA 492 (W) at 499C-E.

¹⁰ Relying on *Roestoff* above fn 9 and *Metcash Trading Africa (Pty) Ltd v Wehliye* 2024 JDR 0318 (GJ).

¹¹ Relying on *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at paras 32-33.

Ltd v Van der Merwe t/a Van der Merwe's Transport,¹² submitting that a court must determine the matter on the facts placed before it and not on speculation or conjecture. She argued that where a defendant advances a positive defence, it must be supported by sufficient factual material and particularity, and that a defence disclosed only in skeletal or conclusory terms is insufficient to resist summary judgment.¹³

[35] The applicant's counsel also submitted that bona fides required more than mere honesty of purpose.¹⁴ A defendant must disclose an actual defence recognised in law and support it with sufficient factual material. Accordingly, she contended that vague, ambiguous or contradictory allegations cannot satisfy the requirements of Uniform Rule 32 and may indicate the absence of a bona fide defence.

[36] Counsel for the applicant submitted that the respondents' bare denial of the signatures appearing on annexure 'POC1' in the matter before this Court does not constitute a bona fide defence. She relied on *Aphane v Standard Bank of South Africa Ltd*¹⁵ to argue that a litigant could not simply deny a signature without placing supporting facts before the court. She agreed that a valid suretyship must comply with section 6 of the General Law Amendment Act and that the material terms of the suretyship must be contained in the written document.¹⁶ She further relied on *Trust Bank van Afrika Bpk v Sullivan*¹⁷ and *Odendal and Another v Structured Mezzanine*

¹² 1986 (3) SA 654 (C) at 659C.

¹³ Relying on *Standard Bank of South Africa Ltd v Roestoff and Metcash Trading Africa (Pty) Ltd v Wehliye* 2024 JDR 0318 (GJ).

¹⁴ Relying on *B Kaplan Estates (Pty) Ltd v Eastern Metropolitan Substructure* 1999 (2) SA 1017 (W).

¹⁵ 2020 JDR 2454 (GP).

¹⁶ Relying on *Industrial Development Corporation of South Africa Ltd v Silver* 2003 (1) SA 365 (SCA).

¹⁷ 1979 (2) SA 765 (T).

Investments (Pty) Ltd,¹⁸ submitting that a deed of suretyship need not be contained in a standalone document and may be read together with the principal agreement and any terms validly incorporated by reference.

[37] Thus, applying these general principles, the applicant's counsel submitted that the respondents had not alleged that an unauthorised person acted on behalf of the Trust, nor did they identify who concluded the transaction if not the trustees. Given the undisputed delivery of grain by the Trust to the applicant, she argued that the respondents' bare denial of the signatures, without any explanation as to who represented the Trust, was not bona fide and failed to disclose a genuine or triable defence. She therefore contended that the applicant's cause of action against the Trust and the sureties remains intact.

[38] Applicant's counsel submitted that the respondents' professed inability to understand how the applicant's claim was calculated is unsustainable. She pointed out that the particulars of claim expressly set out the basis of the calculation, namely that the amount of R515 585.25 represented the value of 81 tons of wheat at an agreed price of R6 365.25 per ton, while only 9.040 tons were allegedly delivered despite payment having been made for 81 tons. She argued that the calculation is clearly pleaded and capable of being understood by the respondents.

[39] Applicant's counsel further submitted that the respondents fail to deal meaningfully with material correspondence annexed to the particulars of claim. In particular, she referred to an email dated 19 September 2023 from Mr Barnard to Mr Cilliè de Vries recording a discussion and reflecting that

¹⁸ (482/13) [2014] ZASCA 89 (30 May 2014).

the Trust would repay the amounts of R515 585.25 and R61 809.31. Counsel for the applicant emphasised that, in the response dated 3 October 2023, no denial of liability for those amounts was advanced. According to the applicant's counsel, the respondents' failure to provide any substantive explanation for this correspondence significantly undermines their present denial of indebtedness and supports the inference that the indebtedness was acknowledged at the time.

[40] Applicant's counsel also emphasised that the parties had engaged in previous grain transactions. She contended that the disclosure of an earlier agreement concluded on 30 May 2022 demonstrates that the Trust was familiar with the applicant's pricing and calculation methodology and had an established commercial relationship with the applicant. In those circumstances, she argued that the respondents' assertion that they do not understand how the claim was calculated is neither bona fide nor capable of raising a genuine triable issue. Accordingly, counsel submitted that this defence should be rejected as lacking substance.

[41] The respondents' counsel argued that summary judgment should be granted only in clear cases and that, under Rule 32, an applicant must meaningfully engage with the defendant's pleaded defence and explain why it is not bona fide and raises no triable issue.¹⁹ Counsel further reasoned that the court is not called upon to determine the merits of the dispute, but only whether the respondents have disclosed a genuine and bona fide defence. The enquiry is a limited one, namely whether the defendant has disclosed a

¹⁹ Reliance was placed on *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para 22.

genuine and bona fide defence, rather than a sham defence advanced merely for purposes of delay.²⁰

[42] Counsel for the respondents submitted that, to resist summary judgment, a defendant need only disclose the nature and grounds of a bona fide defence and the material facts upon which it is based, and is not required to prove the defence or show that it will probably succeed at trial.²¹ Counsel argued that, where a bona fide defence or triable issue is disclosed, summary judgment must be refused and the matter allowed to proceed to trial.

[43] Against this legal framework, the enquiry is a narrow one. The question is whether the respondents have disclosed bona fide defences which, if established at trial, would constitute valid answers to the applicant's claim. If those defences raise triable issues, summary judgment cannot be granted.

Supplementary explanatory note requested by this Court

[44] During the hearing, this Court experienced considerable difficulty in following the applicant's explanation of how the amount claimed had been calculated. The manner in which the grain deliveries, alleged overpayments and resulting indebtedness were presented did not clearly demonstrate how the liquidated amount claimed was derived. This Court accordingly posed a

²⁰ Relying on *Tumileng* above fn 19 at para 23.

²¹ In support of this submission, reliance was placed on *Tumileng* above fn 19 at paras 13 and 24, and *K2012020306 (Pty) Ltd and Another v De Wet NO and Others* (2022/009661; 2023/132503) [2025] ZAGPJHC 1236 (17 November 2025) at para 28.

number of questions to counsel for the applicant in an attempt to obtain clarity regarding the calculation of the alleged overpayment.

[45] Significantly, after counsel for the respondents had challenged the calculation and composition of the amount claimed, counsel for the applicant adopted a different position and indicated that, for purposes of the summary judgment application, the amount of R61 809.31 need not be considered. Counsel was, however, careful to state that the applicant was not abandoning that portion of its claim and reserved its right to pursue it at a later stage. Neither the respondents nor this Court were able to discern the precise effect of this shift in stance, or its implications for the relief sought. In the circumstances, this Court requested counsel for the applicant to furnish a note explaining the applicant's position and clarifying the basis upon which the respondents' alleged indebtedness was calculated.

[46] A similar difficulty arose in relation to the applicant's claim against the alleged sureties. Throughout her submissions, counsel for the applicant maintained that the applicant was unable to identify the person who had signed the sale agreement on behalf of the Trust, but nevertheless contended that the signatory was either the third or fourth respondent and that one or both remained liable as sureties. However, in response to the respondents' denial that either of them had signed the agreement, and following questions from this Court regarding the identity of the alleged surety, counsel adopted a further and seemingly different position. She indicated that, for purposes of the present application, the applicant would pursue its claim only against the Trust and would not seek summary judgment against the alleged sureties. Counsel simultaneously emphasised that the applicant was not abandoning

its claims against the third and fourth respondents and reserved its right to pursue those claims subsequently. This apparent departure from the position initially advanced generated uncertainty as to the precise scope of the relief sought and the basis upon which the application was being pursued. In order properly to understand the applicant's position, this Court likewise directed that this issue be addressed in the explanatory note.

Calculation of the claim and the amount of R61 809.31

[47] As to the calculation of the claim, the applicant's counsel submitted in her explanatory note that the applicant's cause of action was fully set out in the particulars of claim. According to the applicant, only 9.04 tons of grain were ordered and delivered, but payment was mistakenly made for 90.4 tons. On that basis, the applicant contended that it overpaid the Trust in respect of 81 tons of grain, amounting to R515 586.26. Counsel explained that the amount of R61 809.31 related to a stop-payment transaction which the applicant was allegedly unable to reverse. During argument, counsel elected not to rely on the latter amount for purposes of the summary judgment application, whilst expressly reserving the applicant's right to pursue it in the main action.

[48] Counsel for the respondents submitted that the applicant's supplementary explanation/note only served to highlight the uncertainties in its calculation of the alleged indebtedness. It was pointed out that the particulars of claim, the supplementary note and the applicant's submissions relied on different quantities and different values per ton of wheat, producing materially different outcomes. According to the respondents'

counsel, the applicant's own pleadings suggest different rates of R5 703.38 per ton, R6 365.25 per ton and R6 376.25 per ton.

[49] Counsel for the respondents further argued that the applicant's supplementary note contradicts its particulars of claim regarding the treatment of the amount of R61 809.31 and the value attributed to the 9.04 tons of grain allegedly delivered. These inconsistencies, it was submitted, demonstrate that the applicant's claim is neither straightforward nor readily ascertainable. The respondents therefore maintained that the alleged indebtedness is disputed both in principle and in quantum and that the applicant has failed to demonstrate that its claim constitutes a liquidated amount capable of determination by way of summary judgment.

Concession, abandonment or election regarding the suretyship claim

[50] In response to this court's request for clarification regarding the applicant's decision not to pursue summary judgment against the third and fourth respondents in their capacities as alleged sureties, the applicant's counsel submitted that this did not amount to a concession that the respondents' defence was good in law. Rather, it constituted a strategic election by the applicant, as *dominus litis*, to limit the relief sought for purposes of the summary judgment application. Counsel contended that the applicant continued to maintain that the respondents' defences to the suretyship claim lacked merit and relied on *Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited*²² and *Saayman v Road*

²² (CCT 290/20) [2022] ZACC 28; 2023 (12) BCLR 1535 (CC) (20 July 2022).

*Accident Fund*²³ for the proposition that statements made by counsel during argument do not necessarily constitute binding concessions or admissions.

[51] Counsel for the respondents submitted that the applicant originally sought summary judgment against all the respondents, alternatively against the third and fourth respondents only, and persisted with that relief until the hearing. It was only at the commencement of the argument that the applicant indicated that it would no longer pursue summary judgment against the third and fourth respondents.

[52] The respondents' counsel argued that, in the context of summary judgment proceedings, this could only mean that the applicant accepted that the third and fourth respondents had raised bona fide defences and triable issues sufficient to defeat summary judgment. Whilst those defences may still have to be determined at trial, counsel submitted that they had at least met the threshold required under Rule 32. The respondents further contended that the applicant's attempt to distinguish between a 'concession', 'abandonment' and an 'election' is merely semantic and does not explain why the applicant persisted with the application against the alleged sureties until the morning of the hearing. Counsel also criticised the applicant for failing to address the difficulties arising from the existence of only one signature on the alleged deed of suretyship and for failing to indicate what relief was sought in respect of the third and fourth respondents once the summary judgment claim against them was no longer pursued.

The email of 3 October 2023 as an acknowledgement of debt

²³ 2011 (1) SA 106 (SCA) at para 12.

[53] This Court also asked for the explanatory note to provide authority that the email from Mr De Vries dated 3 October 2023 constituted an acknowledgement of debt. Regarding the email dated 3 October 2023, counsel submitted that the applicant did not rely upon it as a formal acknowledgement of debt, but rather as written evidence of an acknowledgement of indebtedness. Counsel argued that, when read in the context of the preceding correspondence, Mr Cilliè de Vries did not deny the overpayment alleged by the applicant and instead indicated that the funds were not immediately available but would be repaid once certain financial matters had been attended to. Reliance was placed on *Cell C Service Provider Co (Pty) Ltd v NZ Fruits (Pty) Ltd*,²⁴ *Fluxmans Incorporated v Barata Projects CC*²⁵ and *C Steinweg Logistics (Pty) Ltd v Darier Alloy CC*²⁶ for the proposition that emails may, depending on their wording and context, constitute acknowledgements of indebtedness. Counsel therefore contended that the email constituted evidence that the indebtedness had previously been recognised by Mr De Vries on behalf of the Trust.

[54] In response to the applicant's reliance on the email of 3 October 2023, counsel for the respondents submitted that the applicant had lost sight of the true enquiry in summary judgment proceedings. Counsel argued that Mr Cilliè de Vries is neither a trustee of the Trust nor a party to the proceedings and that the applicant has not alleged or established any authority on his part to bind the Trust. Accordingly, there is no basis upon which his email can

²⁴ 2021 JDR 1279 (LP).

²⁵ 2021 JDR 2525 (GJ).

²⁶ 2020 JDR 0189 (GJ).

automatically be treated as an acknowledgement of indebtedness by the Trust.

[55] Counsel further submitted that the authorities relied upon by the applicant are distinguishable. The decisions in *Cell C*²⁷ and *Fluxmans*²⁸ arose in the context of insolvency and winding-up proceedings, while *Steinweg*²⁹ concerned clear and unequivocal admissions of liability. By contrast, the present email forms part of a broader exchange of correspondence and includes the word ‘foutiewelik’ (‘erroneously’) in quotation marks. Counsel argued that, when the correspondence is considered as a whole, the meaning and effect of the email remain genuinely disputed and raise a triable issue incapable of determination on affidavit. The respondents accordingly persisted in their contention that the email does not constitute an acknowledgement of debt.

Issues to be determined

[56] The central question is whether the applicant has satisfied the requirements for summary judgment against all five respondents, alternatively, the third and fourth respondents only. Conversely, the Court must consider whether the respondents have demonstrated the existence of a bona fide defence and disclosed facts giving rise to triable issues warranting leave to defend.

Costs

²⁷ *Cell C* above fn 24.

²⁸ *Fluxmans* above fn 25.

²⁹ *Steinweg* above fn 26.

[57] Both parties sought costs on the attorney-and-client scale, particularly on Scale B. Counsel for the respondents submitted that, should the application be dismissed, a punitive costs order in terms of Rule 32(9)(a) is warranted. It was argued that the applicant persisted with the summary judgment application despite the existence of multiple bona fide defences and clear triable issues. The respondents' counsel further contended that the applicant incorrectly characterised its claim as one for a liquidated amount and sought final relief in circumstances plainly unsuitable for summary adjudication. Reliance was placed on *Tumileng*,³⁰ where it was recognised that an applicant who invokes the summary judgment procedure despite being aware, or reasonably ought to be aware, of a bona fide defence may be exposed to an adverse costs order. Counsel accordingly submitted that the applicant's conduct justified an award of costs on the attorney-and-client scale.

Legal principles and discussion

[58] The principles governing summary judgment are well established. 'The summary judgment procedure is intended to protect a plaintiff who is entitled to money from being delayed where there is no arguable defence.'³¹ It is not, however, intended to deprive a defendant who has disclosed a bona fide defence or a triable issue of the right to have the matter determined in the ordinary course at trial.³² It is intended to prevent sham defences.³³

³⁰ *Tumileng* above fn 19.

³¹ *Something Different* above fn 7 at para 13.

³² *Eclipse System and Another v He & She Investments (Pty) Ltd and A Related Matter* 2020 (6) SA 497 (WCC) at paras 10-11.

Summary judgment should therefore be granted only where the plaintiff has clearly established its claim and the defendant has failed to disclose a bona fide defence or a genuine issue for trial.³⁴ Although traditionally described as an extraordinary and stringent remedy, the procedure is not intended to deprive a defendant with a sustainable defence of a hearing; it is drastic only for a defendant who has no defence.³⁵ In *Something Different*,³⁶ a full court in this Division reaffirmed that summary judgment is inappropriate where the defendant raises a defence that gives rise to a genuine triable issue, and that the court's function is not to determine the probabilities or resolve factual disputes on affidavit, but merely to decide whether a bona fide and legally cognisable defence has been disclosed warranting a trial.

[59] The remedy must furthermore be applied consistently with the right of access to courts guaranteed by section 34 of the Constitution.³⁷ A defendant opposing summary judgment must disclose the nature and grounds of a bona fide defence and the material facts upon which it is founded, failing which summary judgment may be granted.³⁸ Although the defence need not be pleaded with the precision of formal pleadings, it must be disclosed with

³³ *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 11C-G and *Something Different* above fn 7 at para 13.

³⁴ *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 102E.

³⁵ *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) at para 4 and *Joob* above fn 11 at para 32.

³⁶ *Something Different* above fn 7 at paras 13-17.

³⁷ *Something Different* above fn 7 at para 15 and *Firststrand Bank Limited t/a Wesbank v Maenet JA Attorneys Inc* (8557/2021) [2021] ZAGPPHC 612 (17 September 2021) at para 2.

³⁸ *Absa Bank Ltd v Noniki Trading CC and Others; Absa Bank Ltd v Ikroza Enterprise Solutions CC and Others; Absa Bank Ltd v Hqubela Trading CC and Others* (404/2011; 405/2011; 407/2011) [2011] ZAECHGHC 15 (7 April 2011); [2011] JOL 27204 (ECG) at para 11; and *Something Different* above fn 7 para 15.

sufficient particularity to show that it is bona fide, and where the court entertains the slightest doubt, summary judgment should be refused.³⁹

[60] The present application does not call upon this Court to resolve the factual disputes between the parties or to determine the ultimate merits of the applicant's claim. The decisive question is whether the respondents have disclosed a bona fide defence and raised triable issues which justify the matter proceeding to trial. The question is thus whether the respondents in the case before me have raised triable issues which ought properly to be determined at trial.

[61] In my view, the disputes raised by the respondents go to the very foundation of the applicant's claim. They concern the existence and authenticity of the alleged grain purchase agreement, the identity and authority of the person who allegedly signed on behalf of the Trust, the validity and enforceability of the alleged suretyship, the completeness of the contractual terms relied upon by the applicant, the quantities of grain delivered, the basis upon which payments were made, the calculation and quantification of the alleged overpayment, and the proper interpretation of the correspondence upon which the applicant relies as an acknowledgement of indebtedness. These are not peripheral issues. If established at trial, they would constitute valid answers in law to the applicant's claim.

[62] The applicant placed considerable reliance on the correspondence between Mr Barnard and Mr Cilliè de Vries dated 3 October 2023 as

³⁹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G-426; *Joob* above fn 11 at para 32; *First National Bank of SA Ltd v Myburgh and Another* 2002 (4) SA 176 (CPD) at para 9; and *Something Different* above fn 7 at para 17.

evidence of an acknowledgement of indebtedness. The significance of Mr Cilliè de Vries's use of the word 'foutiewelike' in quotation marks is itself open to differing interpretations. On the one hand, it may support the inference that he was referring to the payments alleged by the applicant to have been made in error. On the other hand, the use of quotation marks may indicate that he was merely adopting the applicant's description of the payments without accepting that characterisation. The proper meaning and effect of the correspondence is therefore a matter best determined at trial.

[63] The difficulties that emerged from the explanatory note requested by me reinforce, rather than diminish, my conclusion. The purpose of requesting the note was to obtain clarity regarding the calculation of the alleged indebtedness and the precise relief sought by the applicant. Regrettably, the note did not achieve that objective. Instead, it highlighted further inconsistencies concerning the quantities relied upon, the values attributed to the grain delivered, the treatment of the amount of R61 809.31, and the basis upon which the applicant contends that its claim constitutes a liquidated amount.

[64] Particularly troubling was the applicant's change in position during argument, which introduced further uncertainty regarding the basis upon which the application was pursued. The applicant initially sought summary judgment against all respondents, alternatively against the third and fourth respondents only. During the hearing, however, counsel indicated that the amount of R61 809.31 would no longer be relied upon for purposes of the application, whilst reserving the right to pursue it later. A similar course was adopted in relation to the alleged sureties, with counsel indicating that

summary judgment would no longer be pursued against the third and fourth respondents, notwithstanding that such relief was expressly claimed. While the applicant was entitled to formulate its case as it considered appropriate, these late shifts in position created uncertainty regarding both the basis and scope of the relief sought. Far from strengthening the applicant's case, they served to underscore the existence of disputes which cannot satisfactorily be resolved in summary proceedings.

[65] The authorities make clear that summary judgment should be granted only where the plaintiff's claim is clear and the defendant has failed to disclose a bona fide defence or triable issue. The procedure is not intended to shut the doors of the court to a defendant who raises disputes that require proper ventilation at trial.⁴⁰

[66] Applying those principles, I am unable to conclude that the respondents have advanced sham or illusory defences. On the contrary, the respondents have disclosed factual and legal disputes which are genuine, material and capable, if established at trial, of defeating all or part of the applicant's claim. The respondents are not required at this stage to prove those defences or demonstrate that they will probably succeed. It is sufficient that they have disclosed bona fide defences raising triable issues. In my view, they have done so.

[67] The case before me is not one of those clear cases for which the summary judgment procedure was designed. To grant summary judgment in the circumstances would require this Court to determine contested factual

⁴⁰ See, eg, *Maharaj* above fn 39; *Majola* above fn 33 at 232F-G; *Joob* above fn 11; *SA Bank of Athens* above fn 34; *Tumileng* above fn 19; *Maenet* above fn 37 at para 1; and *Something Different* above fn 7 at para 13.

issues and to draw conclusions on matters which ought properly to be resolved after the hearing of evidence. The interests of justice accordingly require that the respondents be afforded the opportunity to defend the action and have the disputes ventilated at trial.

[68] Counsel for the respondents submitted that even if the court were not persuaded that the respondents had disclosed bona fide defences, Rule 32(8) confers a discretion to refuse summary judgment and grant leave to defend. Counsel argued that the disputes concerning the agreement, the alleged suretyships, the payments made, and the quantification of the claim are genuine and material disputes that are unsuitable for determination on affidavit.

[69] I agree. The disputes raised by the respondents go to the heart of the applicant's claim and cannot be dismissed as sham defences. They raise triable issues which are more appropriately determined at trial after the hearing of oral evidence. In the exercise of my discretion under Rule 32(8), I am satisfied that summary judgment should be refused and that the respondents should be granted leave to defend the action.

[70] As regards costs, both parties sought costs on the attorney-and-client scale. The respondents have been successful, and the ordinary rule is that costs follow the result. However, this matter involves more than a mere failure by the applicant to obtain summary judgment. The applicant persisted with the application notwithstanding substantial disputes concerning the existence of the agreement, the alleged suretyship, the quantification of the claim and the basis upon which it was alleged to be liquidated. The

subsequent explanatory note failed to clarify those difficulties and instead exposed further uncertainty in the applicant's case. In these circumstances, I agree with counsel for the respondents that a punitive costs order is warranted. The respondents should not be left out of pocket for having been required to oppose an application in circumstances where bona fide defences and triable issues were plainly disclosed.

[71] The application for summary judgment must therefore fail, and the respondents are entitled to leave to defend the action together with their costs on the attorney-and-client scale.

Order

[72] The following order is made:

- 1 The application for summary judgment is refused.
- 2 The respondents are granted leave to defend the action.
- 3 The applicant shall pay the costs of the application for summary judgment on an attorney-and-client scale, including the costs of counsel on scale B, as taxed or agreed.

M LOUW
ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant: Adv M van der Westhuizen
Instructed by: GMI Attorneys Inc, Pretoria
c/o Bisset Boehmke McBlain, Cape Town

For respondent: Adv L J Smit
Instructed by: De Vries, De Wet & Krouwkam Attorneys, Worcester
c/o Chris Fick & Associates, Cape Town