

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No: 2025/101344

Reportable: NO
Of interest to other Judges: NO
Revised: NO
Date: 24 June 2026 Shadrack Tebeile AJ
Signature: _____

In the matter of:

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD

Plaintiff

and

FENSHAM GROUP (PTY) LTD

First Defendant

JOHN ANDREW FENSHAM

Second Defendant

OLGA FENSHAM

Third Defendant

Heard on : 29 April 2026

Decided on : 24 June 2026

JUDGMENT

TEBEILE AJ:

Introduction

[1] This is an application for summary judgment brought by the plaintiff, Scania Finance Southern Africa (Pty) Ltd, against the first, second and third defendants (“the defendants”). The plaintiff seeks payment of the sum of R13 448 064.46, together with interest and costs on the attorney and client scale.

[2] The application arises from a fleet finance arrangement wherein the plaintiff entered into various written financial lease agreements with North Shore Trading 140 (Pty) Ltd (“North Shore”), a company that was subsequently placed into liquidation. The defendants bound themselves as sureties and co-principal debtors for the obligations of North Shore.

[3] The defendants oppose the application for summary judgment, raising several defences:

- 3.1. That the plaintiff lacks *locus standi* due to the absence of a valid resolution authorising the institution of proceedings;
- 3.2. That the plaintiff’s claim for the unexpired term of the lease constitutes a penalty subject to reduction under the Conventional Penalties Act 15 of 1962;
- 3.3. That the vehicles were sold without proper valuation and at below-market prices;
and
- 3.4. That the defendants have instituted third party proceedings against Tata Automobile Corporation SA (Pty) Ltd (“TACSA”) for a contribution and/or indemnification

arising from TACSA's breach of a service and maintenance agreement, which breach directly caused the financial collapse of North Shore.

The parties

[4] The plaintiff is Scania Finance Southern Africa (Pty) Ltd, a private company duly incorporated under the laws of the Republic of South Africa, with its principal place of business in Roodepoort, Gauteng. The plaintiff is a credit provider and financier of commercial vehicles.

[5] The first defendant is Fensham Group (Pty) Ltd, a private company with its registered address in Rustenburg, North-West Province.

[6] The second and third defendants are, Mr John Andrew Fensham and Ms Olga Fensham, and they are both the directors of the first defendant and the sureties in this matter.

[7] The third party, TACSA, is a company duly registered in South Africa with its registered address in Germiston, Gauteng. TACSA was the service and maintenance provider for the Daewoo fleet operated by North Shore.

Factual background

[8] The plaintiff concluded various written financial lease agreements with North Shore, the principal debtor. The last agreement was entered into on 20 December 2022, comprising general terms and conditions, transaction schedules, and a consolidation of debt agreement concluded on 22 February 2023. Pursuant to these agreements, the plaintiff

granted North Shore the use and possession of 15 Scania trucks described in Schedule 1 to the consolidation agreement. The plaintiff was entitled to receive monthly rental payments as stipulated in the agreement.

[9] On or about October 2023, North Shore fell into arrears and was therefore in breach of the agreement. The plaintiff addressed letters of demand to North Shore on 30 October 2023, 26 February 2024, and 29 February 2024 respectively. Notwithstanding these demands, North Shore failed to remedy the breach.

[10] On 7 March 2024, the plaintiff communicated a notice of termination to North Shore. After termination, North Shore voluntarily surrendered the vehicles. The plaintiff sold the vehicles and credited the proceeds to North Shore's account, leaving an alleged shortfall of about R13 448 064.46.

[11] On 23 April 2023, the directors of North Shore adopted a resolution to voluntarily place North Shore in business rescue. The business rescue proceedings were subsequently terminated, and on 5 September 2024, North Shore was placed in provisional liquidation. A final winding-up order was granted on 31 October 2024.

[12] The plaintiff proved its claim against North Shore at the first meeting of creditors on 10 June 2025 and now elects to claim directly from the sureties.

[13] On 27 January 2023 at Rustenburg, the defendants bound themselves as sureties and co-principal debtors, jointly and severally and in solidum with North Shore, in favour of the plaintiff. The Deed of Limited Suretyship includes, inter alia:

- 13.1. Clause 1: The sureties bind themselves for the performance of all obligations of North Shore to the plaintiff, past, present or future.
- 13.2. Clause 14: A certificate signed by any director or authorised official of the plaintiff shall be *prima facie* proof of indebtedness.
- 13.3. Clause 28: The sureties waive the benefits of excussion, division, and *de duobus vel pluribus reis debendi*.

The defendants' defence and third party proceedings

[14] On 22 August 2025, the defendants served a special plea (challenging the plaintiff's *locus standi*) and a plea on the merits. On 12 September 2025, the defendants issued a third party notice against TACSA in terms of Rule 13 of the Uniform Rules of Court.

[15] The defendants' case against TACSA is that on 25 January 2021, North Shore, represented by the second defendant, entered into a written service and maintenance agreement with TACSA. The material terms of that agreement included that TACSA would:

- 15.1. Perform all routine maintenance and service work on the vehicles;
- 15.2. Perform repairs arising from fair wear and tear;
- 15.3. Attend to breakdowns and be responsible for transportation to the nearest TACSA-approved workshop; and
- 15.4. Perform all work with reasonable care and skill and within a reasonable period.

[16] The defendants allege that TACSA breached the service and maintenance agreement by failing adequately to maintain and service the vehicles. They further allege that during

the period from August 2021 to July 2024, the vehicles experienced approximately 1 357 recorded breakdowns. The defendants have attached a detailed breakdown schedule to their papers in this application. They allege that as a result of the alleged breakdowns, North Shore suffered standing time, incurred additional expenses for repairs and maintenance, lost client contracts (including the refusal of mines to allow access to the Daewoo fleet due to failed safety inspections), and ultimately sustained damages calculated at approximately R83 011 626.02 (calculated at an average of R18.50 per kilometre for kilometres not travelled due to standing time).

[17] The defendants contend that TACSA's breach directly caused North Shore's inability to service its monthly payments to the plaintiff, which in turn led to the cancellation of the lease agreements and the institution of these proceedings.

The application for summary judgment

[18] In September 2025, the plaintiff launched this application for summary judgment. The plaintiff's founding affidavit was deposed to by Ms Maureen Permal, a business support employee of the plaintiff, who stated that she was duly authorised to depose to the affidavit.

[19] The plaintiff submitted that the defendants' plea raised no bona fide defence and that the appearance to defend was entered solely for the purpose of delay. The plaintiff argued that:

19.1. The suretyship agreement is clear and enforceable;

19.2. the defendants have waived the benefits of excussion, division and *de duobus vel pluribus reis debendi*;

19.3. The claim for liquidated damages in clause 101(c) of the lease agreement is enforceable and not a penalty; and

32.1. The absence of a resolution is a technical defence that has been cured by the production of a resolution authorising the proceedings.

[20] The matter was initially set down on the unopposed motion roll for 13 October 2025. However, on 8 October 2025, the plaintiff filed a notice of removal in terms of which the application was removed from the roll because the matter had become opposed.

[21] On 24 February 2026, Khaba AJ granted an order in an interlocutory application compelling the defendants to file their heads of argument. The summary judgment application was thereafter set down for hearing on the opposed motion roll and was eventually heard on 29 April 2026 before this court.

Legal principles governing summary judgment

[22] The principles applicable to summary judgment applications are well-established and bear repetition.

[23] Rule 32(3)(b) of the Uniform Rules of Court requires that a defendant opposing summary judgment must satisfy the court by affidavit that he has a bona fide defence to the action and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[24] In *Breitenbach*¹ it was held that the doors of the court should be closed to a defendant only if “there is no doubt but that the plaintiff has an unanswerable case.”² However, the court cautioned that this dictum goes too far in favour of defendants, and that the proper approach is to assess whether the defendant has disclosed a reasonable possibility that the defence may succeed at trial.

[25] In *Shepstone*³ Miller J held that “a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial.”⁴

[26] In *Mowschenson*⁵ Marais J stated that the remedy of summary judgment is “an extraordinary remedy, and a very stringent one , in that it permits a judgment to be given without trial” and “closes the doors of the Court to the defendant”.⁶ This can only be done if “there is no doubt but that the plaintiff has an unanswerable case”.⁷

[27] Importantly, in *Maharaj*⁸ the court correctly opined:

“The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised... The grant of the remedy is based upon the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus or bad in law”⁹

¹ *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227E-F

² Id at 227E-F

³ *Shepstone v Shepstone* 1974 (2) SA 462 (N).

⁴ Id at 467H.

⁵ *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W).

⁶ Id at 366E-F.

⁷ Id.

⁸ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

⁹ Id at 423F-G.

[28] In *First National Bank of SA Ltd v Myburgh and Another*¹⁰ the court held that because of the drastic nature of summary judgment, the court has a discretion in terms of Rule 32(5) to grant the defendant leave to defend the action, even where he has failed to disclose fully the nature and grounds of a bona fide defence and the material facts relied upon by him, as contemplated in Rule 32(3)(b). It was held that the court will grant summary judgment only where the plaintiff has an unanswerable case, and if it has the slightest doubt, the court will not grant summary judgment.

Analysis of the defences

Locus Standi / Absence of a resolution

[29] The defendants raised a special plea that the plaintiff has failed to annex a valid resolution authorising the institution of these proceedings. The plaintiff submits that this defence is without merit and not a bona fide defence because a valid resolution authorizing the legal proceedings was provided and is attached as annexure “FA1” to the summary judgment application. It was further submitted by the plaintiff that the defendants have been aware of this resolution but have not withdrawn their special plea and argued that this is merely a delaying tactic.

[30] In my view, this defence is no longer a triable issue. The plaintiff has now produced a resolution, and the defendants did not seriously persist with this defence in argument

¹⁰ 2002 (4) SA 176 (C).

including at the hearing of the application for summary judgment. I am satisfied that the plaintiff has *locus standi* to bring these proceedings. In my view, to the extent that this was a defence, it has been cured.

The penalty clause and the Conventional Penalties Act 15 of 1962

[31] It was submitted on behalf of the defendants that clause 101(c) of the general terms and conditions, which entitles the plaintiff to claim “an amount equal to the amounts that would be payable for the unexpired term of lease as liquidated damages” constitutes a penalty as defined in the Conventional Penalties Act 15 of 1962 (“the Act”).

[32] Section 1 of the Act defines a penalty as:

“[A]ny stipulation in terms of which any person who fails to perform any act in terms of a contract, or who performs such act late or in a defective manner, is bound to pay to another person a sum of money or to deliver anything to another person, or to do or to refrain from doing something, irrespective of whether such stipulation is contained in a contract which also provides for the performance of that act.”

[33] Section 3 of the Act provides:

“If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances.”

[34] In *Claude Neon Lights (SA) Ltd v Schlemmer*¹¹ Milne J held that a claim for the full balance of rentals for the unexpired term of a lease, without a discount for accelerated payment, constitutes a penalty and may be reduced by the court. Milne J held that:

“It follows that in terms of sec. 3 of the Act, if it appears to the Court that such penalty is out of proportion to the prejudice suffered by the plaintiff by reason of the defendant’s default, the Court may, subject to the proviso to sec.3 ‘reduce the penalty to such extent as it may consider equitable in the circumstances’”.¹²

[35] The critical issue in the present case is that the defendants have not quantified the extent to which they contend the penalty should be reduced.

[36] It was submitted on behalf of the plaintiff that the plaintiff acted reasonably and in good faith to mitigate its damages in that: (1) the lease agreement and the consolidation agreement explicitly authorised the plaintiff (creditor) to sell the goods at its sole discretion, by public auction or otherwise, and to credit the net proceeds to the debtor’s account; (2) the sale was conducted transparently, and the proceeds were credited to North Shore’s account, resulting in the reduced claim of R13.45 million from the original R35.9 million; (3) the counterclaim is unliquidated, speculative, and based on the defendants’ unsubstantiated opinion about market value.

¹¹ 1974 (1) SA 143 (N).

¹² Id at 147D-E.

[37] The plaintiff argued that a vague, unquantified counterclaim that is unlikely to extinguish the main debt does not constitute a valid defence to summary judgment.

[38] It is trite that in application for summary judgment, the question is whether there is a reasonable possibility that the defence may succeed at trial. In my view, the defence that clause 101(c) constitutes a penalty is a triable issue. There is a reasonable possibility that at trial, the trial court may reduce the claim for the unexpired term of the lease under section 3 of the Act. I am of further view that, although this defence alone would not be sufficient to resist summary judgment, it is a relevant factor to be considered together with the other defences.

The valuation and sale of the vehicles

[39] The defendants contend that the plaintiff sold the vehicles without proper appraisals to determine their true market value. The defendants' plea states:

“While the vehicles were returned to Scania, there were no appraisals performed to determine their true or reasonable market related value.”

[40] In *Citibank NA, South Africa Branch v Paul NO and Another*¹³, the court dealt with a similar issue. In that case, the termination agreements provided that the value of the goods would be determined either by an appraiser nominated by the bank or by the net amount realised on a sale. The court held that parties are free to depart from common-law prescripts

¹³ 2003 (4) SA 180 (T).

by agreement,¹⁴ and the credit receiver cannot insist on being credited with the actual market value where the agreement provides otherwise.

[41] However, in *Mufamadi and Others v Dorbyl Finance (Pty) Ltd*¹⁵, Smalberger JA confirmed that a clause giving the credit grantor the right to determine the value of goods is not necessarily contrary to public policy, provided that the clause contemplates a bona fide valuation or sale at arm's length¹⁶.

[42] In the present case, the defendants have raised a factual dispute about whether the sales were conducted at arm's length and whether the prices obtained were reasonable. The defendants point to the weak Rand and the purported increase in the market value of commercial vehicles. In my view, while these allegations are not fully particularised, they are sufficient to raise a triable issue. This is a matter for evidence at trial, not for summary judgment proceedings.

The third party proceedings against TACSA

[43] The defendants raised a defence of third party claim against TACSA. The defendants have issued a third party notice in terms of Rule 13, seeking a contribution and/or indemnification from TACSA on the ground that TACSA's breach of the service and maintenance agreement caused North Shore's financial demise.

¹⁴ It at para 25.

¹⁵ 1996 (1) SA 799 (A).

¹⁶ Id at 803I-805B.

[44] The defendants have provided detailed allegations in their annexure to the third party notice, including:

44.1. The Service and Maintenance Agreement concluded between North Shore and TACSA on 25 January 2021;

44.2. The material terms of that agreement, including TACSA's obligation to perform maintenance and repairs with reasonable care and skill;

44.3. The alleged breach by TACSA, evidenced by approximately 1,357 breakdowns between August 2021 and July 2024;

44.4. The damages suffered by North Shore, quantified at approximately R83 011 626.02, supported by spreadsheets detailing kilometres lost and revenue lost due to breakdowns; and

44.5. The causal link between TACSA's breach and North Shore's inability to service its payments to the plaintiff.

[45] The question is whether the existence of third party proceedings can constitute a defence to an application for summary judgment. In my view, it can, in appropriate circumstances.

[46] In my view, the third party claim against TACSA is not merely a collateral matter; it goes to the very heart of the defendants' defence. The defendants contend that North Shore would have been able to meet its obligations to the plaintiff but for TACSA's breach.

[47] The causal chain pleaded by the defendants is that the breaches of a maintenance agreement by TACSA directly caused North Shore's financial failure, which in turn caused the breach of the lease agreement with the plaintiff and the resulting shortfall for which the defendants are now being sued as sureties.

[48] If the defendants can prove at trial that TACSA's breach was the effective cause of North Shore's default, then the defendants' liability as sureties may be affected. While the defendants remain liable as co-principal debtors, the extent of the plaintiff's damages may be reduced if the plaintiff was under a duty to mitigate its damages or if the loss was caused by the act of a third party.

[49] Importantly, the third party proceedings under Rule 13 are designed precisely for situations where a defendant claims a contribution or indemnification from a third party in respect of the plaintiff's claim. Rule 13(1) provides:

“Where a defendant claims as against any person not already a party to the action (such person hereinafter called the third party) that he is entitled to a contribution or indemnification in respect of the plaintiff's claim, he shall be at liberty to issue a third party notice.”

[50] The fact that the defendants have properly issued a third party notice, and that notice has been served on TACSA, is a strong indicator that the defence is bona fide. TACSA has entered an appearance to defend. In my view, the third party notice is therefore a live issue in the litigation.

[51] The defendants have provided extensive factual allegations, including a breakdown schedule of damages. I am of the view that the mere fact that the counterclaim is unliquidated does not automatically disqualify it as a defence to summary judgment. In *Truter v Degenaar*¹⁷, Van Dijkhorst J held that claims and counterclaims ought ordinarily to be considered *pari passu*, and the court has a discretion to order that they be heard together.¹⁸ That is precisely what the defendants seek: a trial in which both the plaintiff's claim and the third party claim against TACSA are adjudicated together.

[52] I am satisfied that the third party proceedings against TACSA constitute a bona fide defence that is triable. There is a reasonable possibility that at trial, the defendants may establish that TACSA's breach caused North Shore's financial difficulties, which in turn may affect the quantum of the plaintiff's claim or entitle the defendants to an indemnification or contribution.

[53] Having considered the defendants' opposing affidavit and the annexures thereto and the plaintiff's documents filed for the relief sought, I am not persuaded that the plaintiff has an unanswerable case. On the contrary, there are several triable issues:

53.1. Whether clause 101(c) of the lease agreement constitutes a penalty subject to reduction under the Conventional Penalties Act;

53.2. Whether the vehicles were sold at market-related prices and whether the plaintiff properly mitigated its damages;

¹⁷ 1990 (1) SA 206 (T).

¹⁸ *Id* at 210H-211G.

53.3. Whether TACSA's breach of the service and maintenance agreement caused or contributed to North Shore's default; and

53.4. Whether the defendants are entitled to a contribution or indemnification from TACSA in respect of any amount they may be ordered to pay to the plaintiff.

[54] The third party claim against TACSA is the most substantial of these defences. It raises complex factual and legal issues that cannot be determined on paper. Evidence will be required from witnesses, including representatives of the plaintiff, the defendants, and TACSA, as well as expert witnesses on the valuation of the vehicles, the cause of the breakdowns, and the quantification of the alleged damages.

[55] It cannot be gainsaid that summary judgment should not be granted where there is a genuine dispute of fact on a material issue. In my view, the third party claim gives rise to precisely such a dispute.

[56] The plaintiff argued that the defendants remain liable as co-principal debtors and that the third party claim is a separate matter that does not affect the plaintiff's right to summary judgment. I do not agree. The third party claim is intimately connected to the plaintiff's claim because it goes to causation and the quantification of damages. If the defendants can establish at trial that TACSA's breach was the cause of North Shore's default, that may have an impact on the amount for which the defendants are liable, or on their right to an indemnification.

[57] Moreover, the overarching principle of our law is that summary judgment is an extraordinary remedy that should not be granted when there is a reasonable possibility that

a defence may succeed. The court should err on the side of caution and allow the matter to proceed to trial where the issues are complex and factual disputes exist. In my view, it is best that the defences be referred to trial.

Conclusion

[58] For the reasons set out above, I find that the defendants have disclosed a bona fide defence to the plaintiff's claim. The defences raised by the defendants are substantial and raise complex factual and legal issues that require a trial.

[59] The application for summary judgment is accordingly dismissed. I am of the view that, in avoidance of prejudice, appropriate costs order is that costs should be costs in the cause.

Order

[60] In the result, I make the following order:

1. The plaintiff's application for summary judgment is dismissed.
2. The defendants are granted leave to defend the action.
3. Costs in the cause.



SHADRACK TEBEILE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

For the Plaintiff:

Adv BD Hitchings

Instructed by:

Senekal Simmonds Inc

For the Defendants:

Adv T Lauré

Instructed by:

Oosthuizen Caine Inc

Date of Hearing: 29 April 2026

Date of Judgment: 24 June 2026