



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

CASE NUMBER: 2022-20582

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

DATE: 23/10/2025

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In the matter between: -

GUARDRISK INSURANCE COMPANY LIMITED

[REGISTRATION NUMBER: 1992/001639/06]

Applicant

and

BASIL READ HOLDINGS LIMITED

[REGISTRATION NUMBER: 1984/007758/06]

First Respondent

BASIL READ LIMITED (in business rescue)

[REGISTRATION NUMBER: 1962/002313/06]

Second Respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 23 October 2025.

F. BEZUIDENHOUT AJ:

INTRODUCTION

1. The applicant is seeking judgment against the first respondent for the payment of a combined sum of money totalling R31,050,000.00, plus interest thereon, and costs of suit.
2. According to the joint practice note filed by the parties, the following issues are common cause between them:-
 - 2.1 The deponent to the founding papers and his authority;
 - 2.2 The citation of the parties;
 - 2.3 The execution, conclusion and terms of the reciprocal deed of indemnity and suretyship ("*the indemnity*");
 - 2.4 The guarantee;
 - 2.5 The second respondent is under business rescue;
 - 2.6 Demand was made on the respondents.
3. In light of the business rescue, the applicant seeks no relief against the second respondent.

4. The first respondent's opposition against the money judgment is that it was not a party to the memorandum of agreement ("MOA") and did not give any undertaking that it would indemnify the second respondent's obligations under it. The first respondent submits further that it was only obliged to pay a claim under the counter-indemnity if the claim was within the terms of the guarantee. Since the claim did not fall within that purview, the applicant was not obliged to pay. It was also argued that the payments of the applicant unto the other parties to the MOA, were made in terms of that agreement and not in terms of a formal demand as contemplated by the guarantee, and thus the respondents ought not have to indemnify the applicant for such payments.
5. The applicant contends that there is no merit to the opposition. This is what the Court is called upon to determine.

SALIENT FACTS

6. On or about 4 December 2015, at Boksburg, the first and second respondents (collectively referred to as "*the respondents*") executed the indemnity a in favour of the applicant. In terms of this instrument:-
 - 6.1 The respondents undertook to indemnify and hold harmless the applicant against any and all claims, liabilities, damages, disbursements, expenses or losses of whatsoever nature, arising out

of or in consequence of the applicant having issued, or subsequently issuing, any guarantee on behalf of the respondents;

6.2 The respondents bound themselves as co-principal debtors and sureties *in solidum*, thereby assuming liability for any such exposure incurred by the applicant.

7. Pursuant to a formal request made by the second respondent, the applicant, on or about 8 January 2016, at Sandton, issued the guarantee in favour of the South African National Roads Agency SOC Limited ("*SANRAL*"), in the quantum of R55,549,870.48, to secure the second respondent's contractual obligations under a construction contract ("*the contract*").
8. After encountering financial difficulties, and on the 15th of June 2018, the second respondent placed itself under business rescue and was unable to complete the contract due to a lack of funds, thereby triggering the guarantee's operative provisions and necessitating remedial action¹.
9. As a result, the applicant, SANRAL, Raubex and the second respondent entered into a memorandum of agreement ("*MOA*") in terms whereof the second respondent ceded and assigned, on an out-and-out basis, all of its rights title and interest in and to the contract with SANRAL to Raubex for

¹ Clause 3 of the guarantee.

the completion of all outstanding works ("*the cession*"). Raubex accepted the cession and SANRAL consented thereto.

10. In accordance with the terms of the cession, and as guarantor, the applicant would be called upon to make payment of an amount of R26,700,000.00 plus Vat for the additional cost of completion of the outstanding works under the contract.
11. Pursuant to MOA and in discharge of its obligations as guarantor, the applicant effected the following payments:-
 - 11.1 A sum of R3,450,000.00 to Raubex on or about 7 November 2019, in part payment of the applicant's obligations under the cession;
 - 11.2 A sum of R27,600,000.00 to the nominee of Raubex on 14 April 2020, in accordance with the applicant's obligations under the cession.
12. On the 14th of June 2021, the applicant through its attorneys demanded payment from the respondent under the indemnity.

ARGUMENT ON BEHALF OF THE FIRST RESPONDENT

13. The first respondent argued that the counter-indemnity is security provided by the applicant to secure the second respondent's obligations under the construction contract with SANRAL which does not include the MOA and Raubex's obligations once the construction contract was ceded to Raubex under the MOA.

14. It submitted further that it was not a party to the MOA and did not provide any indemnity for any payments made on the second respondent's behalf under the MOA. Accordingly, the claim did not fall within the purview of the guarantee and accordingly the applicant was not obliged to make payment.

DELIBERATION

15. The indemnity expressly contemplates liability for all and any losses, costs, or expenses of whatsoever nature incurred by the applicant by reason or in consequence of issuing a guarantee on behalf the respondents.
16. The first respondent's obligations flow from the indemnity, not from the MOA. Its non-participation in the MOA is of no consequence as the MOA served merely as a loss mitigation mechanism designed to preserve value and reduce the applicant's exposure under the guarantee. The indemnity's operation is not dependent upon the MOA.
17. In any event paragraph 3.1.2 of the MOA provides:-

"Guardrisk has at the instance and request of the Contractor, issued the Guarantee in favour of the employer, in terms of which Guardrisk guaranteed the due fulfilment by the contractor of its obligations in terms of the contract and undertook to pay, on demand, costs or damages suffered by the employer as described in the guarantee and the contract."

18. It is trite that the legal effect of a performance guarantee is that it creates an obligation to pay upon the happening of an event.² The Supreme Court of Appeal explained the workings of a guarantee as follows:³-

*"[20] The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of a contractual obligation on the part of a bank to pay the beneficiary (seller). **This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. The bank's liability to the seller is to honour the credit.** The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary. This exception falls within a narrow compass and applies where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank documents that to the seller's knowledge misrepresent the material facts."* (emphasis added)

² Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others 2010 (2) SA 86 (SCA); par [19].

³ Lombard *supra* par [20].

19. The effect of the guarantee in this matter is no different. The payments made by the applicants in terms of the MOA arose from the issuing of the guarantee in favour of the second respondent, which liability was compromised in order to reduce the indebtedness of the respondents. However, the claim remains based on the indemnity and the guarantee and not on the compromise agreement (the MOA).⁴
20. Further, the first respondent's co-principal and in solidum liability renders it fully accountable for losses, irrespective of how the applicant chose to manage or structure its exposure. Moreover, clause 6 of the indemnity provides an explicit waiver of legal exceptions, including cession of action. This waiver precludes the first respondent from resisting liability on the basis that the principal obligation has been ceded.
21. Therefore, the cession to Raubex did not extinguish the second respondent's liability under the indemnity. It simply reassigned performance obligations to a third party, however, the liability for historic default remain extant.
22. Ultimately, the indemnity expressly contemplates liability for all and any losses, costs, or expenses of whatsoever nature incurred by the applicant by reason or in consequence of issuing a guarantee on behalf of either respondent. The payments made by the applicant to Raubex were clearly necessitated by the failure of the second respondent to perform under its

⁴ Bonifacio and another v Lombard Insurance Company Limited 2024 JDR 2278 (SCA) para [16] and [24].

contract, an event which would foreseeably give rise to claims under the guarantee.

23. In my view, that the payments were not triggered by a formal demand is immaterial. The indemnity is engaged upon the applicant incurring any liability, contingent or actual, arising from the issuance of the guarantee and not solely upon receipt of a formal demand.
24. The first respondent also submitted that the application is premature because the applicant did not comply with Rule 41A. The applicant filed a notice in terms of Rule 41A indicating that the dispute between the parties is incapable of resolution by mediation as the dispute related to issues of law.
25. A party's election not to engage in mediation does not impact upon the validity and correctness of a judgment granted.⁵
26. In the premises, I find that the grounds of opposition have no merit and that the applicant is entitled to payment as claimed.

ORDER

I accordingly grant an order against the first respondent in the following terms: -

1. Payment in the sum of R27,600,000.00;
2. Interest on the sum of R27,600,000.00 at the prescribed legal prime overdraft rate of ABSA Bank of South Africa Limited, plus two percent (2%) from 16 April 2020;

⁵ Sibanda v Firststrand Bank Limited 2022 JDR 3520 (GJ)

3. Payment in the sum of R3,450,000.00;
4. Interest on the sum of R3,450,000.00 at the prescribed legal prime overdraft rate of ABSA Bank of South Africa Limited, plus two percent (2%) from 8 November 2019;
5. Costs of the application on the attorney and client scale, including the costs of counsel, where so employed, on Scale B.



F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 6 March 2025

DATE OF JUDGMENT: 23 October 2025

APPEARANCES:

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