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

CASE NO.: 114928/2024

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

DATE: 21/11/2025

SIGNATURE

In the matter between:-

ENGIE-PELE SANNASPOS SOLAR PV CONSORTIUM

First Applicant

SANNASPOS SOLAR PV (PROPRIETARY) LIMITED

Second Applicant

v

**THE DIRECTOR GENERAL OF MINERAL RESOURCES
AND ENERGY**

First Respondent

ABSA BANK LIMITED

Second Respondent

IPP OFFICE

Third Respondent

THE MINISTER OF ELECTRICITY AND ENERGY

Fourth Respondent

NATIONAL TREASURY

Fifth Respondent

DEVELOPMENT BANK OF SOUTH AFRICA

Sixth Respondent

THE MINISTER OF MINERAL RESOURCES AND ENERGY

Seventh Respondent

THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY

Eighth Respondent

Heard on: 04 September 2025

Delivered: 21 November 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 21 November 2025.

Summary:

1. The core dispute for determination is when did the Preferred Bidder Guarantee lapse. The parties presented differing interpretations as to how the “Bid Validity Period” is determined in accordance with the bidding documents, primarily in the RFP and the Signed Implementation Agreement as well as the Preferred Bidder Guarantee.
2. The rules of interpretation have been settled by our higher courts, namely in the **Endumeni** and **Fidelity Security Matters** cited in the judgment.

3. On interpreting the relevant documents referred to, together with the language used, the context and the purpose for which they were prepared and in the eyes of a reasonable commercial person. I find that the Preferred Bidder Guarantee lapsed when they Signed Implementation Agreement lapsed.
4. The Consortium has further met the requirements for both declaratory relief and final interdictory relief.

ORDER

It is ordered:-

1. The Preferred Bidder Guarantee lapsed on 30 November 2023;
2. The Director-General of Mineral Resources (the DG) and the Department of Mineral Resources and Energy are directed to release the Preferred Bidder Guarantee by returning it to the first applicant, alternatively to ABSA, and are further interdicted and prohibited from making any demands in terms of the Preferred Bidder Guarantee;
3. ABSA is directed not to make any payment pursuant to any demand issued under the Preferred Bidder Guarantee; and
4. The first, third, fourth and seventh respondents are ordered to pay the costs of this application on Scale C, which costs are consequent upon the employment of two counsel.

JUDGMENT

KOOVERJIE J

- [1] This matter turns on the interpretation of the Preferred Bidder Guarantee which was issued by Absa Bank in the sum of R15 million in favour of the first respondent, the Director-General of the Department of Mineral Resources and Energy (“the DG”). The core issue for determination is when did Preferred Bidder Guarantee lapse? For the purposes of this judgment, the applicants will be referred to as the “Consortium” and the first respondent as the “Department”.
- [2] The applicants essentially seek relief to the following effect:
- 2.1 a declaratory order confirming that the Preferred Bidder Guarantee lapsed on 8 December 2022, alternatively on 30 November 2023;
 - 2.2 an interdict against the Department from making any demand under the Preferred Bidder Guarantee and release same to the first applicant, alternatively the second respondent.

BACKGROUND

- [3] The following facts are not in dispute. In October 2021, the first applicant, Engie-Pele Sannaspos Solar PV Consortium (“the Consortium”) was appointed as a

preferred bidder in terms of the Department's renewable energy programme, namely the Renewable Energy Independent Power Producer Procurement Programme ("REI PPPP"). This was part of a competitor tender process which was initiated by the Independent Power Procurement Programme Office ("the IPP Office"). The objective was to make provision for private sector investment in the grid-connected renewable energy generation.

- [4] The Consortium was required to incorporate a special purpose vehicle ("the SPV"), namely Sannaspos Solar PV (Proprietary) Limited, which was to carry out the Consortium's obligations.
- [5] To confirm the appointment as a preferred bidder, the Consortium was required to lodge a Preferred Bidder Guarantee in an amount of R200,000.00 per megawatt of the contracted capacity in relation to each project in favour of the Minister as set out in the Request for Proposal ("the RFP")¹. Such Preferred Bidder Guarantee was issued by ABSA in the sum of R15 million in favour of the Department on the 25th of November 2021.
- [6] The Preferred Bidder Guarantee (Guarantee) stipulated that it would remain valid and effective from the date of issue, being 25 November 2021 until the expiry of the bid validity period (as it may be extended in terms of the RFP).

¹ The Request for Qualification and Proposal for new generation capacity under the REIPP procurement programme was issued for the fifth Bid Submission stage.

- [7] This entailed that the Preferred Bidder Guarantee remains valid and extant for the duration of the bid validity period and lapses at the expiry of such period. It was further stipulated that the meaning of the term “Bid Validity Period” in the Preferred Bidder Guarantee should be determined with reference to the meaning of “Bid Validity Period” in the RFP.
- [8] By virtue of the Guarantee, ABSA irrevocably and unconditionally undertook to pay the Department the guarantee on demand, on the basis that the Preferred Bidder was notified by the Department that its Preferred Bidder status has been revoked. The calling up of the said guarantee was however subject to the interpretation afforded to the term of the “bid validity period”.
- [9] Upon the lodgment Guarantee, the Consortium was required to finalise regulatory requirements and sign certain contracts that were incorporated in the RFP in order to achieve Commercial Close and terminate the “Bid Validity Period”.
- [10] The contracts included the Template Private Purchase Agreement with Eskom, the Template Implementation agreement with the Department (Appendix M to the RFP) which in effect guarantees Eskom's payments and provides direct contractual obligations and undertakings between the Department and the Preferred Bidder.

THE PREFERRED BIDDER GUARANTEE

[11] The wording in the Preferred Bider Guarantee is relevant to the dispute between the parties and reads:

“Whereas the Department of Mineral Resources and Energy of the Government of the Republic of South Africa (“the Department”) has issued a Request for Qualifications and Proposals for New Generation Capacity under the REIPP Procurement Programme, Tender No: DMRE/001/2021/22 (as amended) (“RFP”) in respect of the finance, construction, operation, and maintenance of renewable energy generation facilities adopting any of onshore wind or solar photovoltaic technologies for the purpose of entering into, inter alia, an Implementation Agreement with the Department and a Power Purchase Agreement with a buyer.

AND WHEREAS pursuant to the RFP, the Department has selected Engie Sannaspos Solar SPV (“Preferred Bidder”) as the Preferred Bidder in the Fifth Bid Submission Phase of the REIPP Procurement Programme;

AND WHEREAS the Department requires the Bidder to provide an on demand guarantee in favour of the Department in the amount of R15,000, 000.00 (Fifteen Million Rand Only) (“Guarantee Amount”) to secure certain undertakings or obligations of the Bidder as Preferred Bidder under the RFP in terms of clause 26.2 (Preferred Bidder Guarantee) of Part A (General Requirements, Rules and Provisions) of the RFP;

AND WHEREAS we, Absa Bank Limited, Registration Number 1986/004794/06 (“Bank”) have agreed to issue this guarantee to secure

such undertakings and obligations of the Preferred Bidder (“Preferred Bidder Guarantee”).

NOW THEREFORE:

- 1. the Bank, duly represented by Karabo Bogatsu and Gilda Antonio in their capacities as BGI Case Managers being duly authorized to sign this Preferred Bidder Guarantee, hereby irrevocably and unconditionally guarantees and as a primary obligation undertakes to pay the Department without objection or argument amounts not exceeding in aggregate the Guarantee Amount, such payment(s) to be made by the Bank upon first written demand by the Department being received at the Bank’s counter, situated at Absa Towers North, 1[...] C[...] Street, Johannesburg, 2001, attention Karabo Bogatsu/Boipelo Moche, declaring that the Preferred Bidder has:*
 - 1.1 breached any law relating to the REIPP Procurement Programme or been disqualified from any part of the REIPP Procurement Programme as a result of its actions or omissions;*
 - 1.2 failed to comply timeously with any conditions contained in the letter or appointment as a Preferred Bidder;*
 - 1.3 failed to comply timeously with a request for information and/or documentation by the Department as contemplated in the RFP;*

- 1.4 failed to pay the budget quotation fee within the time period specified by the Department in the RFP or in the letter of appointment as Preferred Bidder;
- 1.5 failed to sign the PPA, Implementation Agreement, Direct Agreement, Independent Engineer Agreement and the Connection Agreements within the time period specified in clause 8.4 (Timetable of the Fifth Bid Submission phase of the REIPP Procurement Programme) of Part A (General Requirements, Rules and Provisions) of the RFP in respect of the relevant Bid Submission phase, as such time period may be extended by the Department on written notice to the Preferred Bidder;
- 1.6 having signed the PPA, Implementation Agreement, Direct Agreement, Independent Engineer Agreement and the connection Agreements, failed to pay the Development Fee in accordance with clause 2.1 of the Implementation Agreement or failed to comply with the requirements of any information or documentation request, or of any protocol issued by the Department including in relation to the submission to the Department of the computer model which is to be attached to the Implementation Agreement as Schedule 5 (Financial Model) following Financial Close;
- 1.7 failed to extend the term of the Preferred Bidder Guarantee as required by the RFP; or

- 1.8 *been notified by the Department that its status as preferred Bidder has been revoked for any reason.*
2. *More than 1 (one) demand may be made under this Preferred Bidder Guarantee, provided that the aggregate amount payable shall not exceed the Guarantee Amount.*
3. *...*
4. *This **Preferred Bidder Guarantee shall be valid and effective from the date of its issue until the earlier of (a) the expiry of the Bid Validity Period (as it may be extended in terms of the RFP):** and (b) the later of the date of payment of the Development Fee in accordance with clause 2.1 of the Implementation Agreement, and the date on which the preferred Bidder complies with the requirements of any protocol issued by the Department in relation to the submission to the department of the computer model which is to be attached to the Implementation Agreement as Schedule 5 (Financial Model), following Financial Close, provided that once Financial Close has been reached on the Preferred Bidder's Project, item (a) no longer applies and this Preferred Bidder Guarantee shall remain valid until the later of the events described in item (b) hereof.*

5. *The Preferred Bidder Guarantee shall remain valid during the period described above notwithstanding the Bidder's insolvency, winding-up, liquidation, business rescue, dissolution or deregistration, whether provisionally or finally.*
6. *Notwithstanding the above provisions, this Preferred Bidder Guarantee shall terminate and be returned to the Bank within fifteen (15) Business Days of payment of an amount or amounts which, in aggregate, equal the Guarantee Amount, or of expiry of the Preferred Bidder Guarantee as set out above.*
7. *This Preferred Bidder Guarantee shall be governed by the laws of the Republic of South Africa, and the parties hereto consent and submit for the benefit of the Department to the non-exclusive jurisdiction of the North Gauteng High Court of South Africa."*

[12] In terms of Clause 19.5.1 of the RFP, the arrangement was that the Preferred Bidder accepts the terms and conditions once:

- 12.1. the bidder fee is paid into the bank account designated by the Department as provided with the Guarantee;
- 12.2. the preferred bidder accepts the terms and conditions of the appointment as bidder, and;
- 12.3. the Preferred Bidder Guarantee is issued.

[13] Clause 26.2.4 of the RFP further stipulated that the Guarantee was “valid and effective” for a period from the date of issue of the Guarantee until the earlier of (a) the expiry of the Bid Validity Period (as extended from time to time); and (b) the later of the date on which the Bidder complies with certain requirements.

[14] The wording in Clause 4 of the Guarantee is premised upon the wording in Clause 26.2.2.4 namely that the Guarantee shall be:

“valid and effective from the date of its issue until the earlier of (a) the expiry of the Bid Validity Period (as it may be extended in terms of the RFP)”.

This entailed that the Guarantee would lapse when the “bid validity period expires”.

[15] The RFP anticipated that the preferred bidders should achieve Commercial Close within four months of appointment as preferred bidders. However, this was not the case in respect all the preferred bidders, which included the Consortium. The Department effected amendments to the Template Implementation Agreement which resulted in the Signed Implementation agreement.

[16] The Consortium in fact signed the Implementation Agreement on 8 December 2022 and was required to meet the suspensive conditions and achieve Commercial Close by 7 April 2023.

[17] As it failed to do so the Department again extended the period by which the Consortium was required to meet the suspensive conditions and achieve

Commercial Close which was 30 November 2023. Since the Consortium could not achieve commercial close by this date and the execution of the Implementation Agreement therefore lapsed. Notably the 30 November 2023 was the last extended date.

[18] The Consortium holds the view that the Preferred Bidder Guarantee lapsed and requested the Department to return the guarantee. The Department held a different view, namely that the Preferred Bidder Guarantee had not lapsed.

[19] The Department nevertheless persisted in calling up the Guarantee and eventually caused a handwritten demand to be delivered to ABSA, calling up the guarantee. Due to the Department's stance, the applicants instituted these proceedings in the month of October 2024.

ANALYSIS

[20] It is evident from the contentions raised by the parties that they bear different interpretations as to when the Guarantee lapsed. The relevant documents include the RFP, the Preferred Bidder Guarantee and the Signed Implementation Agreement. The correct approach to interpretation has been enunciated and confirmed by our higher courts.

[21] More recently in the **Fidelity Security** matter² the Constitutional Court affirmed the approach set out in **Endumeni**³. At paragraph 34, the court outlined the following:

- “(a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.
- (b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualized; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.
- (c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification “reasonably possible” is a

² Minister of Police v Fidelity Security and Others 2023 (3) SA BCLR (CC)

³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph 18

In the matter of **Endumeni**, at paragraph [18], the court stated:

“[18] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation...”

reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

(d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.”

[22] Interpretation should therefore be afforded in the context of the language, context and purpose for which the documents came to light. In summary:

- 22.1 the ordinary words of grammar, the context in which the provisions appears, the apparent purpose to which it is directed and the material known to those contracting must be considered;
- 22.2 furthermore the process should be objective and a sensible meaning is to be preferred rather than that is unbusinesslike or insensible or undermines the current purpose of the document;
- 22.3 a court should also not substitute meanings and interpretation to what it regards as reasonable, sensible or businesslike with the words actually used. ***Endumeni*** extrapolated that:

“... In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”;

22.4 contracts are to be interpreted to ascertain the intention of the parties and what the parties attended to achieve.⁴

[23] In general, a “Bid Validity Period” is the period within which the bidder agrees to keep the offer legally binding. The purpose of subscribing to a “Bid Validity Period” is to enable bidders to commit to not withdraw from the bid for a specified period. The period of the bid validity must therefore be clearly stated in the bidding documents.

[24] It is necessary to appreciate the context and purpose of the respective bidding documents. The RFP constituted a formal invitation to the bidders to submit their bid responses for the supply of energy to the buyer. The RFP had set out the rules of participation in the REIPP Procurement Programme and provided further information so as to enable the bidders to prepare comprehensive and competitive bid responses in respect of their projects in terms of the procurement programme.

[25] On the other hand, it enabled the Department to assess the bid responses in a manner where the bidders would be assessed with regard to specific outlined criteria. More importantly it enabled the Department to select preferred bidders and facilitate commercial close.

[26] Notably the RFP does not constitute an offer to enter into a contractual relationship with any bidder but serves to solicit bid responses to enable the department to select the preferred bidders⁵.

⁴ Novartis SA Ltd v Maphili Trading (Pty) Ltd 2016 (1) SA 518 (SCA) at para 27 to 28

- [27] In terms of the Signed Implementation Agreement the parties agreed that the seller would undertake the projects in compliance with the terms and conditions set out in such agreement as well as the PPA (Power Purchase Agreement)
- [28] It was further agreed that the written Signed Implementation Agreement constituted their agreement in its entirety.
- [29] The Consortium took no issue with the proposition that the Preferred Bidder Guarantee should be interpreted with reference to the term “Bid Validity Period” as set out in the RFP. However, it is the interpretation of the term in context that is placed in dispute.
- [30] The “Bid Validity Period” is defined in the RFP as ... *“one year following the date of the bid submission, which period is automatically extended upon a bidder’s appointment by the Department as a Preferred Bidder until Commercial Close”*.
- 30.1 *“Commercial Close” is defined in the RFP “as the effective date as defined in the Implementation Agreement”;*
- 30.2 *“Implementation Agreement” is defined in the RFP as “Implementation Agreement to be entered into between the seller and the Department, a template of which is provided in Appendix “M” (Implementation Agreement) in Volume 2 (Legal Requirements of this RFP)”.*
- [31] The Consortium’s initial argument was that the effective date must be determined in terms of the Template Implementation Agreement which is the date on which

⁵ Clause 3 of the RFP

the agreement was signed between the parties⁶, 8 December 2022. This contention, in my view, has no merit as the RFP made provision for the parties to enter into a Signed Implementation Agreement⁷.

SIGNED IMPLEMENTATION AGREEMENT

[32] The Consortium's alternative argument was that if the term "Bid Validity Period" is to be considered in terms of the Signed Implementation Agreement, then the suspensive conditions outlined in Clause 3 of the agreement have cut off dates.

[33] Its understanding was that the suspensive conditions had to be met by the end of the Commercial Close period, originally set at 120 days from the "Signature Date" but then extended to 30 November 2023, the "Bid Validity Period" therefore expired on 30 November 2023. If the suspensive conditions are fulfilled before or by 30 November 2023, then the Bid Validity Period expires.

[34] Accordingly, if the suspensive conditions were not fulfilled on or before the date of the Commercial Close period, that is 30 November 2023, the agreement lapses and the Department would have no claim against the applicant arising from the non-fulfillment of the suspensive conditions. Accordingly, the Preferred Bidder

⁶ *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) at paragraph 66. The principle enunciated in the ***University of Johannesburg*** matter has relevance:

"A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract."

⁷ Clause 2.1.83 of the RFP

Guarantee also lapsed. The Department in these circumstances cannot call up the guarantee.

- [35] The Department submitted that it had amended the “bid validity period” in terms of Briefing Note 1. The definitions of the significant terms in the Signed Agreement clearly differed from the Template Implementation Agreement.

It was in dispute that the relevant terms were amended and/or inserted, namely:

- 35.1 *“Commercial Close” was now defined as “the date on which the last of the suspensive conditions referred to in Clause 3.1 of this Agreement is fulfilled being on or before the expiry of the “Commercial Close” period;*
- 35.2 *the Commercial Close Period (not defined in the RFP) a definition was defined as “the period of one hundred and twenty (120) days from “Signature Date” as may be amended in accordance with the provisions of the Implementation Agreement from time to time”;*
- 35.3 *“Signature Date” was defined as “the date this Agreement has been duly executed by each of the parties;*
- 35.4 *“Effective Date” was defined as “the date on which the suspensive condition set out in Clause 3 ... are fulfilled as demonstrated by the notice from the Department to the buyer and the seller pursuant to clause 3.3.3 below”.*

- [36] Clause 3 was further inserted in the Signed Implementation Agreement and read:
- “SUSPENSIVE CONDITIONS, ADJUSTMENT TERMS OF ENERGY RATES AND TERM***

3.1 **Suspensive conditions**

3.1.1 Save for the provisions of this clause 3 (Suspensive Conditions, Adjustments of Energy Rates and Term), clause 1 (Definitions and Interpretation), clause 9 (Notices), clause 15 (Assignment), clause 19 (Dispute Resolution), clause 20 (Liability), clause 0 (Confidentiality), clause 0 (Governing Law and Jurisdiction), clause 23 (Notices), clause 24 (Warranties) and clause 25 (Miscellaneous), which shall be of immediate force and effect, this Agreement is subject to the fulfilment of the following suspensive conditions, on or before the expiry of the Commercial Close Period:

3.1.1.1 the Seller obtaining and/or confirming receipt of all Consents required for the commencement with the Construction of the Project including the required environmental authorization(s) in terms of the Environmental Laws;

3.1.1.2 the execution of the Direct Agreement, the Independent Engineer Agreement and any other Project Documents by all parties thereto; and

3.1.1.3 the issue of the Notice of Amendments to the PPA charge Rates by the Department pursuant to clause 3.2.3.1

....”

[37] Furthermore Clause 3.3 clearly stipulated that if there was non-fulfilment of the suspensive conditions within a prescribed time period, the implementation

agreement shall no longer be of any force or effect between the parties and neither party shall have claim against the other arising from the non-fulfilment of the suspensive conditions referred to in clause 3.1. Clause 3.3 reads:

“3.3 *Suspensive Condition Fulfilment*

3.3.1 If this Agreement does not become unconditional on or before the expiry of the Commercial Close Period then:

3.3.1.1 this agreement shall no longer be of any force or effect between the Parties; and

3.3.1.2 save as aforesaid, neither Party shall have any claim against the other arising from the non-fulfilment of the suspensive conditions referred to in clause 3.1.

....

3.3.3 Upon fulfilment of the suspensive conditions listed in clause 2.1, the Department shall notify the Buyer and the Seller by completing and submitting the notice as attached in Schedule 11 (Form of IA Effective Date Notification).”

[38] Notably the parties are *ad idem* regarding their interpretation insofar as the lapsing of the Signed Implementation Agreement was concerned particularly with reference to Clause 3.

[39] The Department's understanding of the amendments effected as per the signed Implementation Agreement was that:

- 39.1 the Preferred Bidders were required to fulfil the suspensive condition within 120 days from the date of signature of the Implementation Agreement;
- 39.2 the entirety of the Implementation Agreement would become fully in force and effect if the suspensive conditions in clause 3 were fulfilled by the Preferred Bidder within 120 days, that is in the Commercial Close Period;
- 39.3 in the event that the suspensive conditions are not fulfilled within the 120 days the Implementation Agreement would be of no force and effect. The agreement therefore lapses;
- 39.4 the Commercial Close would be achieved on the date on which the last of the suspensive conditions in 3.1 were fulfilled. That date could either be before the 120th day or on the 120th day.

[40] The parties however differ as to when the Preferred Bidder Guarantee lapsed. The Department argued that although the Signed Implementation Agreement lapsed on 30 November 2023, the provisions of the RFP regulating the relationship between the parties remain in extant. The “Bid Validity Period” only expires on reaching “commercial close” and not the failure to reach “commercial close”. This entails that the Guarantee remains valid until the suspensive conditions are fulfilled. This is when “commercial close” is achieved.

[41] It was explained that when the Signed Implementation Agreement lapsed, the *status quo* between the parties is revived, namely that provision of the RFP regulating the relationship between the parties finds application. The Department advised that it could amend, vary or modify the RFP. In this regard the Bid Validity

Period was then amended to the date when the suspensive conditions become fulfilled.

[42] To motivate this reasoning the Department referred to Clause 30 of the RFP which deals with the topic “Bid Validity and Extension of Bid Validity Period”. The term Bid Validity Period is defined in the RFP as *“the period identified as the Bid Validity Period in Clause 30”*.

Clause 30 which stipulates:

“30.1 all Bid Responses constitute an irrevocable binding offer by the Bidder to the Department;

30.2 Bid Responses must remain valid and binding for 365 (three hundred and sixty five) calendar days from the relevant bid submission date (Bid Validity Period);

30.3 on appointment as a Preferred Bidder, the Bid Validity Period will be deemed to have automatically been extended until Commercial Close and all bid responses must remain valid and binding for such period.”⁸

[43] In my view the correct approach when interpreting Clause 30 is that it must be read together with the definitions of the relevant terms referred to in the RFP. The Department's interpretation that Commercial Close is achieved when the suspensive conditions are fulfilled is contrary to understanding the RFP in context.

[44] The term “commercial clause” clearly makes reference to a cut off date:

⁸ My underlining

- 44.1 Clause 30.3 states that “the Bid Validity Period will be deemed to have automatically been extended until Commercial Close”;
- 44.2 the term “Commercial Close” is defined as “*the Effective Date as defined in the Implementation Agreement*”;
- 44.3 the term “Commercial Close” as defined in the Signed Implementation Agreement refers to a specific date. It reads:
“Means the date on which the last of the suspensive conditions referred to in clause 3.1 (suspensive conditions, adjustment or energy rates on or before the expiry of the Commercial Close Period (reference is again made to a stipulated time period in which the suspensive obligation had to be made))”;
- 44.4 if one then notes the definition of “Commercial Close Period”, it reads “*a period of one hundred and twenty days (120 days) from signature date, as may be amended in accordance with the Implementation Agreement.*”;
- 44.5 it is not in dispute that the extended date was 30 November 2023 in terms of the Signed Implementation Agreement and has the cut off date;
- 44.6 furthermore as per the Signed implementation Agreement the term “Effective Date” makes reference to Clause 3.3.3 which is the time bound. Clause 3.1 also refers to a cut off period that is “on or before the expiry of the commercial close period”;
- 44.7 at all relevant times and on the respondents’ version, the Signed Implementation Agreement was the effective agreement between the parties;

[45] In light of the aforesaid analysis I find that the Signed Implementation Agreement lapsed when the “Bid Validity Period” expired. Furthermore, the lapsing of the Signed Implementation Agreement entails the lapsing of the Preferred Bidder Guarantee.

[46] It would clearly be contrary to the customary understanding of the performance guarantee if the Department is able to call on the Preferred Bidder Guarantee when the agreement lapsed. The very logic of performance guarantees would be defeated if the Department can call up the guarantee when there are no performance obligations on the part of the applicant. There is no risk left to be secured if the underlying project obligations have lapsed entirely. It could therefore never have been intended between the parties that Preferred Bidder Guarantee was not time bound.

[47] Furthermore, the Department’s argument that the briefing notes amended the definition of “Commercial Close” in the RFP, unassailable. The Department submitted that an amendment was effected to change the determination of the Bid Validity Period to the date on which the suspensive conditions become fulfilled as per the Signed Implementation Agreement.

[48] The Consortium correctly illustrated that this argument is unmeritorious in that:

48.1 the Department could not amend the RFP in the manner they alleged;

48.2 the Briefing Notes issued by the Department did not amend the RFP in the way the Department contended;

48.3 the term “Bid Validity Period”, as mirrored in the Preferred Guarantee envisaged a cut off period.

[49] The Consortium identified the relevant provisions in the RFP, which prohibited the Department from amending same namely:

49.1 Clause 4.6 does not make provision for the RFP to be amended and reads:

“Volume 2 (Legal Requirements) contains copies of the legal agreements that will (subject to any subsequent amendments issued by the Department) be required to be entered not by the Project Company of a Preferred Bidder and the counter-parties, if applicable, namely, an Implementation Agreement, a PPA, a Direct Agreement, a Transmission Agreement or a Distribution Agreement, an Independent Engineer Agreement and a Connection Direct Agreement.”;

49.2 Clause 36.1.18 further prohibits the Department from amending the RFP once the Consortium was appointed as a Preferred Bidder and reads:

“36.1.18 The Department deserves the right to amend the RFP, the Implementation Agreement, the PPA, the Direct Agreement, the Independent Engineer Agreement and Connection Agreements at any time prior to the execution of those agreements, and the Department shall not be liable to any

Bidder or Preferred Bidder for any consequences, claims or costs arising from any of these actions.”;

49.3 Clause 25.6 of the Signed Implementation Agreement provided that the Agreement contains a whole agreement between the parties and supercedes any prior written or oral agreement between them. Clause 25.6 stipulated:

“25.6.1 This agreement contains the whole agreement between the parties in respect of the subject matter hereof and supersedes any prior written or oral agreement between them;

25.6.2 Each party acknowledges and agrees that it is not entering into this agreement in reliance on and shall have no rights of action against the other party in respect of any assurance, promise, undertaking, representation or warranty made by the other party at any time prior to the “Signature Date” unless it is expressly set out in this agreement.”;

49.4 In addition, Clause 25.2 allows for amendments or variation provided same are in writing and agreed to by both parties. It reads:

“This agreement may not be released, discharged, supplemented, interpreted, amended, varied or modified in any manner except by an instrument in writing signed by a duly authorized officer or representative of each of the parties of this agreement.”

[50] On my interpretation, particularly having regard to the language, context and purpose together with the intention of the parties, the only plausible conclusion I arrive at is that the guarantee lapsed when the agreement lapsed. In particular:

50.1 The objective of a Performance Guarantee, was for ABSA to provide the beneficiary, the Department, with protection against counter party risk, that is the risk of performance failure by the applicants of obligations they were required to fulfil.

50.2 The Signed Implementation Agreement as the effective agreement between the parties stipulated that if the suspensive conditions were not fulfilled on or before the expiry date of the Commercial Close Period of 30 November 2023, the said agreement would no longer have any force and effect. Consequently, the Department would have no claim against the Consortium arising from the non-fulfilment of the suspensive conditions. Accordingly, ABSA's guarantee can also not be called up.

50.3 The wording in the Preferred Bidder Guarantee in fact made provisions for bidders to comply within a time period hence the reference to the word "timeously".

[51] When interpreting the bid documents a unitary exercise is necessary where the court must consider the language used and ascertain what a reasonable person would have understood therefrom. The Supreme Court of Appeal in **ABSA Bank**

Matter⁹ acknowledged in the reasoning set out by the English courts in **Society of Lloyds v Robinson¹⁰** where it expressed:

“Loyalty to the text of a commercial contract instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought to generally favor a commercially reasonable construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and untrue emphasis on niceties of language”.

[52] The applicant sensibly pointed out that banks will not issue open-ended on-demand guarantees without timelines. They would never have consented to issue a guarantee where the expiry date is indefinite.

DECLARATORY RELIEF

[53] The Consortium sought declaratory relief to the effect that the Preferred Bidder Guarantee lapsed either on 8 December 2022 alternatively on 13 November 2023.

[54] It is settled law that for a party to succeed in obtaining declaratory relief certain requirements have to be met. The two-stage process outlined by the Supreme

⁹ ABSA Bank Limited v Rosenberg and Another [2024] ZASCA 58 (24 April 2024)

¹⁰ Society of Llyod’s v Robinson [1999] AER (comm) 545

Court of appeal in **Cordiant**¹¹ finds application. I have to be satisfied, firstly that the Consortium has an interest in the existing or continued right or obligation and secondly, I am required to exercise my judicial discretion.

[55] I am satisfied that the Consortium has an interest in the matter. In the event ABSA is called upon to make payment in terms of their Preferred Bidder Guarantee, the Consortium would be financially affected in terms of its obligations in terms of the counter guarantee concluded. The Consortium would be responsible to settle the guarantee if ABSA is compelled to pay it over to the Department.

[56] The Consortium motivated its reputation would also be compromised. An adverse finding will affect its future participation in procurement programmes with government.

FINAL INTERDICTIONARY RELIEF

[57] The Consortium has met the requirements for final interdictory relief namely:

57.1 it has a clear right;

57.2 harm or injury is reasonably apprehended;

57.3 there is no alternative recourse for the Consortium.

[58] The Consortium submitted that it has a public law and a contractual rights in terms of 26.3 of the RFP for the release and return by the Department of the

¹¹ Cordiant Trading CC v Daimler Chrysler Financial Services 2005 (5) SA 205 SCA

Preferred Bidder Guarantee. The issuing of the RFP by the Department constitutes a public decision, alternatively an administrative decision.

Clause 26.3 of the RFP provides:

“Unless the Department has notified the Bidder or Preferred Bidder in terms of Clause 26.4 that it intends calling on the Bid Guarantee or the Preferred Bidder Guarantee, the Department will return the Bid Guarantee or Preferred Bidder Guarantee as applicable within 15 business days of its expiry.”

[59] Hence if the relief sought is not granted, the Department can call on the ABSA guarantee. The Department contended that the dispute could have been ventilated in the review application, hence there is an alternative remedy. In response, the Consortium demonstrated that argument that an order of this court was necessary, without such order the Department could call up the guarantee. In addition, the Department refused to give an undertaking to wait for the final adjudication of the review application before calling on the Preferred Bidder Guarantee. As a result, the Consortium was left with no option.

[60] In the premises, the Consortium is successful in this application.

COSTS

[61] In exercising my discretion, I apply the general rule that costs should follow the result. The applicant as the successful party, is entitled to its costs. The first, third, seventh and eighth respondents are ordered to pay the costs consequent upon the appointment of two counsel jointly and severally on Scale C.

H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant:

Adv. P Rood SC

Adv. D Sive

Instructed by:

Fasken (Bell Dewar Incorporated)

Counsel for the 1st, 3rd, 4th, 7th and 8th respondent: Adv. N Maenetje SC

P Sokhela

Instructed by:

Ledwaba Mazwai Attorneys

Date heard:

04 September 2025

Date of Judgment:

21 November 2025