

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No 249754/2025

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
 _____ SIGNATURE	
2 JANUARY 2026 DATE	

In the matter between:

BOMBELA OPERATIN CO PTY LTD

Applicant

And

NEDBANK LIMITED

1ST Respondent

BOMBELA CONCESSION COMPANY (LTD) LTD

2nd Respondent

THE MEC FOR THE GAUTENG PROVINCIAL

3rd Respondent

GOVERNMENT, THE REBPUBLICNOF SOUTH AFRICA

Acting through the DEPARTMENT OF PUBLIC

TRANSPORT, ROADS AND WORKS

JUDGMENT

MAHOMED J

THE BACKGROUND

- [1] The first and third respondents in this matter abide by the court's decision.
- [2] The parties before me are responsible for the management and operation of the Gautrain, a rapid rail service, which services Johannesburg and surrounds including the international airport. They concluded a contract in terms of which the 2nd respondent, known as the concessionaire, may issue a notice of operator default on the applicant/ operator in the event of a clearly identified default and to allow the operator 30 days to address the default. The applicant is the operator; it is the sole operator for this critical service. A precondition to this relationship is that the applicant is to secure a performance guarantee.
- [3] The first respondent, (Nedbank) issued such guarantee in favour of the second respondent, the concessionaire in the amount of R205 934 250.39, to secure certain of the applicant's performance related obligations in terms of the operating contract. Nedbank would be obliged to pay over those monies to the concessionaire if the concessionaire is able to demonstrate that it qualifies for its entitlement. There are two contracts that are in focus in the matter, the operator performance contract and the bond guarantee contract.
- [4] A default notice was served on 19 November 2025 after the second respondent placed the applicant on terms to rectify the default, the applicant failed to do so in the time permitted, therefore the second respondent called up payment of the guarantee. The second respondent has been awaiting a handing over report, as the operator contract will end in March 2026 and the contract will again be put out to tender.

[5] Stanlianou SC appeared for the applicant and submitted the applicant seeks to interdict Nedbank from paying out the monies on three grounds, viz it claims the bond is not a standard bond but a conditional bond, furthermore, the preconditions to payment had not been met and therefore Nedbank is not obliged to pay the monies over and finally, that the second respondent acts fraudulently in that on the facts, it could not have believed that all of the conditions for payment had been met, notwithstanding it called up the bond. Counsel contended that on a reading of the clauses in the operating bond it is clear the bond is not a standard bond such as a letter of credit, he contended it is a conditional bond which requires Nedbank to make reasonable inquiries to determine if the second respondent/ concessionaire is entitled to payment.

[6] He relied on s 4.2.1 and 4.2.2 of the bond, he submitted Nedbank failed to do so and must be interdicted from paying out the monies to the second respondent. Counsel submitted that the default has been addressed, the report which the second respondent /concessionaire required is due only on 6 January 2026, having regard to the date of the notice, the report has been delivered to the 2nd respondent. The second respondent has downloaded the information.

[7] Cassim SC for the second respondent/concessionaire, submitted that the bond is unconditional, and referred the court to clause 4 of the bond document, Clause 4 provides:

“ 4. *PAYMENT*

4.1 *The guarantor irrevocably and unconditionally agrees, subject to the terms of this performance bond;*

4.1.1 .

4.1.2 ...

4.1.3 ...

to forthwith make payment of the amount specified in any demand to the account specified in clause 4.6 within 5 (five) business days of the date of receipt of any demand.

4.2 *Notwithstanding anything to the contrary contained in this performance bond, the concessionaire and the Operator agree that the Guarantor, in evaluating or making any payment pursuant to any demand made under this performance bond, shall.*

4.2.1 *not be entitled or obliged to make any enquiry in relation to, inter alia:-*

...

4.2.2 *be obliged to make reasonable enquiry only in relation to whether or not the demand is made in terms of the performance bond.*"

[8] Counsel contended that his client has a clear right, it is entitled to payment on demand, and Nedbank is obliged to pay over the guaranteed amount of R205 934 250.30. It was submitted that clause 4 of the bond is clear in its language and the wording expressly "disables" Nedbank from making any inquiries other than those set out in clause 2.2 of the bond. There is no duty on Nedbank to inquire further once it has noted a dispute notice, a certification from AFSA of non-referral, and that the time permitted to resolve the dispute has expired, the dispute remains unresolved, therefore the second respondent is entitled to demand payment.

[9] Mr Cassim referred the court to the judgment in the Group Five case, where Van der Linde J, stated that “the underlying dispute is required to be resolved in the manner provided for in the contract between the parties. The court furthermore stated that the determination of the dispute in the underlying contract may lead to a result that is wholly different from that of the unconditional bond,” however the bond is open to be called up, it is independent of the underlying contract. Mr Cassim argued that the applicant conflates the operations contract with the performance guarantee.

[10] It was submitted that the applicant on its version was unable to provide the information sought, he contended that on the facts in this matter the 5 days allowed to remedy the default was reasonable, his client has requested the information since September 2025, the applicant has known of the default and done nothing to remedy the default. The applicant’s allegations of fraud were rejected, and it was contended that only the clearest of cases must exist for the applicant to succeed with this allegation. The second respondent relied on the decision in the Eskom matter, where the court stated that the call demand is independent of the underlying contract. Mr Cassim proffered that his client would not have been wise to accept a guarantee for a relationship of this nature with the applicant, linked to the operator’s performance contract.

[11] Counsel for the applicant argues that this is a conditional bond and it incorporates the underlying contract. He referred the court to clause 4.2.2 of the performance guarantee and submitted that the provision in the clause requires Nedbank to make inquiries as to whether the preconditions to payment had been met. In comparison to the language in clause 2.2 of the same document, which requires Nedbank to conduct a tick box exercise. In

terms of clause 4.2.2 Nedbank was to “evaluate and make reasonable enquiry” before payment is made.

[12] Clause 4.2.2 provides:

“ be obliged to make reasonable enquiry only in relation to whether or not the demand is made in terms of the performance bond.”

The judgments of our courts have confirmed the approach is to consider the nature of the contract. It was contended that this duty to enquire establishes that the bond is a conditional one.

[13] Stanlianou SC argued that one must also have regard to what Nedbank must do as provided for in clause 2.2.2 of the performance bond guarantee, inter alia, that the operator has been provided with the notice of default, for a remedy of the default, that it has been remedied within the prescribed remedy period in the operating contract. Stanlianou argued if not much more was expected of Nedbank, clause 4.2 would be meaningless. He submitted that on a proper interpretation of the terms Nedbank is required to satisfy itself that the concessionaire has met the basic preconditions and is entitled to payment on the guarantee. Counsel contended that the period for remedy is 30 days as provided for in the operator contract and it was not disputed it expires only on 6 January 2025. Counsel proffered that the applicant has delivered the report and therefore purged the default, the concessionaire has downloaded the information.

[14] Mr Cassim reiterate that the bond guarantee makes no reference to the 30 days to resolve the dispute or the 20 days to file a remediation plan. He submitted that the 5 days permitted to resolve the dispute was reasonable if

one had regard for the request for the information having been sought as far back as October 2025.

[15] He argued that the applicant on its own version in correspondence dated 17 December 2025 stated that the dispute remains unresolved. Mr Cassim rejected the applicants claim that the second respondent knew it had not met the certifications to call the bond yet called on Nedbank for payment. He submitted the allegations of fraud lack a basis and stand to be rejected.

URGENCY

[16] Cassim SC argued that the urgency is self-created that the applicant knew on 19 November 2025 of the default, it could have brought this application much earlier. He further argued that the applicant's case is that it had 30 days as per contract, however the respondent affords him 5 days (arbitrarily), the applicant could on that very basis have approached this court much earlier, he contended the matter is not urgent. Counsel furthermore argued that the applicants have an alternate remedy and can obtain substantial redress at a hearing in due course, approaching the urgent court is an abuse of process. The operator performance contract provides for related disputes to be taken to arbitration.

[17] Stanlianu contended his client provided the documents ahead of due date and it would have been premature for it to have launched a urgent application any earlier, moreover nothing was said on an intention to call on the bond. The urgency arose as Nedbank was obliged to pay within 5 days and has no grounds to do so. He submitted the matter is urgent and the applicant has made out a case for interim relief. This interdict is pending the outcome at arbitration.

[18] Addressing the merits, Cassim SC referred the court to the judgment by Van der Linde J1, who stated that a demand guarantee is “serving as unclouded immediate cash despite an underlying contract.” He argued the bond is separate from the operating contract. Nothing in the bond document obliges Nedbank to make any inquiries, as claimed by the applicant, clause 2 of the bond provides for an unconditional payment by Nedbank and this was signed by both Nedbank and the applicant in favour of the second respondent. Nedbank is only obliged to satisfy itself that clause 2 has been met. He argued that the second respondent has a clear right to the money and the applicant failed to remedy the default in the time permitted. Counsel submitted that our courts have consistently held that the second respondent has only to demonstrate it demanded payment. It was submitted that the applicant’s failure to refer its dispute to AFSA within the time permitted was unfortunate when it has known of its dispute since September 2025.

Judgment

[19] It was submitted that the applicant conveniently conflates the provisions of the bond with that of the operator performance contract. In *Lombard Insurance Co Ltd, v Landmark Holdings (Pty) Ltd and Others*², the court in a construction dispute stated: “*construction guarantee is self-contained and distinct. It is not to be interpreted in conjunction with the construction contract.*”

[20] I agree with Mr Cassim, and the guarantee is the concessionaire’s security, the language employed in clause 4.1 is clear on an unconditional obligation to pay. I am of the view the bond guarantee is independent of the underlying

¹ Group 5 2008/41068

² 2010 (2) SA 86 SCA

contract, that the second respondent has only to demonstrate that it has made a demand to be entitled to immediate payment. The applicant was dilatory and “missed the boat” when it failed to refer the dispute to AFSA, upon receipt of the default notice. The opportunity of a referral is another “safety feature” inserted to assist the operator in the face of an unconditional guarantee, where immediate payment is guaranteed. I agree with Cassim SC his client could not have intended to accept a guarantee which is linked to a complex operator performance contract. The five days permitted for remedy, viewed contextually was reasonable, the applicant has known that the information was sought over months, it knew the purpose and significance of the requested information and knew that the contracts are to expire within a few months.

[21] The applicant’s argument/ reasoning and linking of the two contracts, appears to denude a “guarantee” of its very essence and value in commercial contracts. In *Loomcraft Fabrics CC v Nedbank Limited and Another*³, was stated “*an interdict restraining a bank from paying in terms of a credit will accordingly not be granted at the instance of a buyer save in the most exceptional circumstances.*” It is noteworthy that the applicant is a “sole operator” and the precondition of a guarantee to secure the concessionaire’s interest is logical, for as long as the guarantee is given its full force and effect in commercial transactions.

[22] Therefore, I am of the view the application must fail.

COSTS

³ 1998 (1) SA 812 (a) headnote

[23] Costs must follow the cause, and I am satisfied the costs on scale C, including costs of two counsel is appropriate.

[24] I make the following order:

1. Part A and B of the application is dismissed with costs on scale C including the costs of two counsel.
2. The first respondent is to pay the second respondent the sum of R205 934 250.39 by 9 January 2026.

A handwritten signature in grey ink, appearing to be 'Mahomed J', is written over a black rectangular redaction box.

Mahomed J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing 24 December 2025

Date of Judgment 2 January 2026

Appearances:

For Applicant:

Stanlianou SC Instructed by

Pincent Masons SA Inc

Email: Jason.smit@pinsentmasons.com

Angela.lawrence@pincentmasons.com

Thehe.mokele@pincentmasons.com

For Second Respondent:

Cassim SC, with him

Advocate M Desai Instructed by LNP Beyond
Legal

Email: nikita.lalla@lnpbeyondlegal.com

Ricardo.pillay@lnpbeyondlegal.com

Danielle.giannico@lnpbeyondlegal.com

Msizi.zungu@lnpbeyondlegal.com