



**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: 24/08/2026



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 – L E A V E T O A P P E A L

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 24 August 2026.

BEZUIDENHOUT AJ:

Introduction

- [1] On 23 October 2025 I handed down judgment in the main application, in which the applicant, Guardrisk Insurance Company Limited ("Guardrisk"), sought payment from the first respondent, Basil Read Holdings Limited ("BR Holdings"), in its capacity as indemnifier and as surety and co-principal debtor in terms of a reciprocal indemnity and suretyship ("the indemnity") executed at Boksburg on 4 December 2015.¹ I granted an order against the first respondent for payment of the sum of R27,600,000.00 together with interest thereon from 16 April 2020, payment of the sum of R3,450,000.00 together with interest thereon from 8 November 2019, and costs of the application on the attorney and client scale, including the costs of counsel where so employed, on Scale B.
- [2] The first respondent now applies for leave to appeal against the whole of that judgment and order. Leave is sought to the Supreme Court of Appeal, alternatively to the Full Court of this Division. The application is opposed.
- [3] For ease of reference I retain in this judgment the designations employed in the main judgment. Guardrisk is accordingly referred to as the applicant,

¹ Annexure "FA2", 02-15 to 02-24. The instrument is headed "Reciprocal Indemnity and Suretyship". It is described in the founding affidavit as a "Reciprocal Deed of Indemnity and Suretyship" and in the answering affidavit as "the Counter-Indemnity".

BR Holdings as the first respondent, and Basil Read Limited (in business rescue) as the second respondent. No relief was sought against the second respondent in the main application and it takes no part in these proceedings.

- [4] Heads of argument, a practice note, a chronology and a list of authorities were delivered on behalf of the applicant, being the respondent in the application for leave to appeal. No heads of argument were delivered on behalf of the first respondent. I have considered the grounds of appeal as they are formulated in the notice dated 14 November 2025, together with the argument advanced at the hearing, and I deal with each of those grounds below.

The test to be applied

- [5] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [6] The use of the word "*would*" has been held to have raised the threshold for the granting of leave above that which obtained under the repealed Supreme Court Act 59 of 1959. That much was said in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen and others*² at para 6, and the sentiment has been echoed by the Supreme Court of Appeal in *S v Notshokovu*³ at para 2.

² 2014 JDR 2325 (LCC)

³ 2016 JDR 1647 (SCA)

- [7] In *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another*⁴ at paras 16 to 17 the court put the matter as follows:

"Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard. An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal. "

- [8] In *Ramakatsa and others v African National Congress and another* [2021] ZASCA 31 at para 10 Dlodlo JA explained that the test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. The prospects must not be remote; there must exist a reasonable chance of succeeding, and a sound, rational basis for the conclusion that such prospects exist must be shown.
- [9] As to the second leg, a compelling reason contemplated by section 17(1)(a)(ii) will ordinarily be present where the appeal raises a substantial question of law, or a discrete legal issue of public importance that will affect matters in the future, or where there are conflicting judgments on the

⁴ 2016 JDR 2214 (SCA)

question under consideration: *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*⁵.

The grounds of appeal

[10] The grounds upon which leave is sought are, in summary, the following:

- 10.1 that I erred in failing to find that the payments made by the applicant pursuant to the memorandum of agreement concluded between the South African National Roads Agency SOC Limited ("*SANRAL*"), Raubex Construction (Pty) Ltd ("*Raubex*"), the applicant and the second respondent ("*the MOA*") did not fall within the ambit of the performance guarantee issued to secure the second respondent's obligations under the construction contract for the N1-29 Musina Ring-Road project, and that on that premise the indemnity was not triggered;
- 10.2 that I erred in failing to find that the first respondent was not a party to the MOA and undertook no obligation to indemnify the second respondent in respect of any liability arising under that agreement;
- 10.3 that I erred in failing to find that the indemnity could be invoked only if the applicant had been called upon to perform under the performance guarantee itself, which it was not, the applicant having elected to make payment under the MOA; and
- 10.4 that I erred in failing to find that the first respondent's obligation to indemnify the applicant could arise only in respect of a claim falling

⁵ 2020 (5) SA 35 (SCA) at para 2

within the terms of the performance guarantee, and that because the payments made did not fall within that purview the applicant had no entitlement to recover under the indemnity.

[11] Those grounds are, in substance, indistinguishable from the defences raised in the answering affidavit and argued before me in the main application. They are summarised at paragraph 4 of the main judgment and were dealt with at paragraphs 15 to 22 thereof. No new issue of fact or of law is raised, and no misdirection is identified beyond the assertion that I ought to have decided the same points differently.

[12] That a party disagrees with the outcome, and repeats the argument which produced it, does not of itself disclose reasonable prospects of success. The question is not whether the argument was arguable, but whether another court, applying the same law to the same facts, would reasonably come to a different conclusion. I am not persuaded that it would, for the reasons that follow.

The scope of the indemnity

[13] The first, third and fourth grounds all rest on a single premise, namely that the first respondent's liability under the indemnity is engaged only by a payment made pursuant to a demand under the performance guarantee. That premise is not supported by the language of the instrument which the first respondent signed and the terms of which it admits.⁶

⁶ Answering affidavit, para 46, 02-84: "I admit that the applicant and the respondents concluded the Counter-Indemnity. The terms of the Counter-Indemnity are in annexure 'FA2' to the founding affidavit. I admit the terms as set out in annexure 'FA2'."

- [14] Clause 1 of the indemnity binds each principal which signs it, the first respondent among them, to keep the applicant indemnified and to hold it harmless from and against:⁷

"all and any claims, losses, payments, liabilities, costs or expenses of whatsoever nature which the Insurer may sustain or incur by reason or in consequence of having executed or hereafter executing any Guarantees as aforesaid on behalf of a Principal."

- [15] Clause 3.1 imposes a further indemnity, jointly and severally, in the same causal terms. The signatories thereby indemnify the applicant and hold it harmless from and against:⁸

"all and any claims, losses, demands, liabilities, costs and expenses of whatsoever nature, including legal costs as between attorney and client, which the Insurer may at any time sustain or incur by reason or in consequence of having furnished and/or provided a Guarantee on behalf of a Debtor together with interest thereon at the prime overdraft rate of Absa Bank Limited, plus 2%, from the time of payment by the Insurer to date of repayment by the Principal(s) and Surety(ies) to the Insurer."

- [16] It is clause 3.1 which founds both the rate at which, and the date from which, interest was awarded in the main application, and the award of costs as between attorney and client. Clause 3.2 goes further. The signatories undertake to pay the applicant on demand any sum which it *"may be called upon to pay under any Guarantee whether or not the Insurer shall, at such*

⁷ Clause 1 of annexure "FA2", 02-15.

⁸ Clause 3.1 of annexure "FA2", 02-16.

*date, have made such payment, and whether or not the Debtor ... admits the validity of such claim against the Insurer under such Guarantee”.*⁹

Liability under the indemnity is thus not made to depend upon the mechanics by which the applicant’s exposure is discharged, nor upon the debtor’s acceptance that the claim against the applicant is good.

[17] The operative words in each of these clauses are words of causation, not of mechanism. What must be established is that the loss was sustained or incurred “by reason or in consequence of” the execution of the guarantee. Neither clause says, and neither can be read to say, that the loss must have been incurred pursuant to a written demand under the guarantee. Had the parties intended so material a limitation upon an indemnity cast in the widest terms, they would have said so.

[18] On the common cause facts, the causal link is plain. Guarantee no CG/16/01736 was issued at Sandton on 8 January 2016, at the instance and request of the second respondent, in the sum of R55,549,870.48 including value added tax, for the due fulfilment of the second respondent’s obligations to SANRAL under contract NRA N.001-290-2005/1 for the construction of the Musina Ring-Road.¹⁰ The second respondent was placed under business rescue on or about 15 June 2018 and was unable to complete the outstanding work. That default triggered the applicant’s exposure under the guarantee and rendered a demand inevitable. The MOA was concluded, and the payments were made, precisely because that

⁹ Clause 3.2 of annexure “FA2”, 02-16.

¹⁰ Annexure “FA3”, 02-25 to 02-26.

exposure had arisen. But for the guarantee, no payment would have been made at all.

- [19] Clause 3.1.2 of the MOA records the position expressly, in terms that admit of no other construction:¹¹

"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;"

- [20] The complaint that the first respondent was not a party to the MOA is answered by the indemnity itself. Clause 5 provides that the applicant shall be entitled, without reference to a signatory and without in any way affecting the liability of a signatory, *"to consent to any arrangements between the Creditors and the Debtor and to make any arrangements or compound with the Creditors or the Debtor or to release the Debtor from any liability to it"*.¹² The arrangement of which the first respondent complains is precisely such an arrangement: one between the creditor, SANRAL, and the debtor, the second respondent, to which the applicant consented and in which it participated in order to limit its exposure. The first respondent agreed in terms that its liability would be unaffected by any such arrangement, and it therefore contracted for the very eventuality of which it now complains. Its non-participation in the MOA is of no consequence, because its obligations flow from the indemnity and not from

¹¹ Annexure "FA4", clause 3.1.2, 02-32.

¹² Clause 5 of annexure "FA2", 02-16 to 02-17.

the MOA. The MOA served as a loss-mitigation mechanism designed to preserve value and to reduce the applicant's exposure under the guarantee, and the operation of the indemnity was never dependent upon it.

[21] Clause 9 puts the matter beyond argument. The applicant is entitled to waive or abandon any right of contribution, to release or absolve any real or personal security, to grant extensions of time or any other indulgence, and to "*enter into compromises and/or to accept settlements*", and to do all of this "*without affecting the obligations of the Signatories hereunder*". The clause continues that, despite any such waiver or abandonment, the applicant remains entitled to require the signatories to repay or to pay to it "*any amount which the Insurer may be called upon to pay or any loss it may suffer or incur as aforesaid*".¹³ An indemnity in those terms cannot sensibly be read as forfeiting the indemnified party's recourse at the moment it compromises a claim instead of paying it in full.

[22] Far from having been prejudiced by the compromise, the first respondent was the principal beneficiary of it. A guarantee exposure of R55,549,870.48 was discharged for R31,050,000.00. The first respondent's argument, if accepted, would mean that a guarantor who acts prudently to reduce the loss forfeits its recourse, while one who awaits a formal demand and pays the full amount retains it. Commercial sense does not admit of such a result.

The authorities

[23] The proposition contended for by the first respondent has, moreover, already been considered and rejected by the Supreme Court of Appeal in

¹³ Clause 9 of annexure "FA2", 02-17 to 02-18.

*Bonifacio and another v Lombard Insurance Company Limited*¹⁴, upon which I relied in the main judgment. That court held, at paras 17, 19 and 24, that the guarantor's claim throughout remained based on the indemnity contract and not on the settlement agreement, and that the only impact of the settlement agreement was that the amount to be paid was reduced. I am bound by that decision. Nothing in the notice of application for leave to appeal seeks to distinguish it, and I am unable to discern any basis upon which it could be distinguished.

[24] The same conclusion follows from *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and others*¹⁵, in which it was held that the legal effect of a performance guarantee is to create an obligation to pay upon the happening of an event, independently of the underlying contract. The effect of the guarantee in this matter is no different.

[25] As to the cession of the second respondent's obligations to Raubex, in clause 6 the signatories renounced "*the legal exceptions or benefits of excussion, division, cession of action, non causa debiti and no value received*", declaring themselves fully acquainted with the meaning and effect of those exceptions.¹⁶ In clause 2 the first respondent bound itself as surety for and co-principal debtor jointly and severally in solidum with the second respondent for the due payment on demand of all amounts owing to the applicant under the indemnity.¹⁷ It is accordingly fully accountable for the

¹⁴ 2024 JDR 2278 (SCA)

¹⁵ 2010 (2) SA 86 (SCA)

¹⁶ Clause 6 of annexure "FA2", 02-17.

¹⁷ Clause 2 of annexure "FA2", 02-16.

losses sustained, irrespective of how the applicant chose to manage or structure its exposure. Clause 7 records, further, that the obligations and liability of the signatories continue as a continuing covering security until the debtor is entirely and finally released and discharged from all its obligations, contingent or otherwise, to the applicant.¹⁸ The cession did not extinguish liability for the second respondent's historic default; it reassigned the performance of future obligations to a third party, and the liability which had already accrued remained extant.

Some other compelling reason

[26] The first respondent asserts, without elaboration, that there is some other compelling reason why the appeal should be heard. None is identified. No conflicting judgments were placed before me, and the position in this Division and in the Supreme Court of Appeal is settled. The dispute turns upon the construction of particular contractual instruments concluded between these parties, applying established principles of interpretation, and raises no discrete question of law of importance to others. The magnitude of the amount involved, standing alone, is not a compelling reason within the meaning of section 17(1)(a)(ii).

Costs

[27] There is no reason why costs should not follow the result. Having regard to the complexity of the matter and the amounts at stake, and to the basis upon which costs were awarded in the main application, an award of costs

¹⁸ Clause 7 of annexure "FA2", 02-17.

including the costs of counsel where so employed, on Scale B, is appropriate.

Conclusion

[28] Taking a dispassionate view of the facts and the law, I am not persuaded that another court would reasonably come to a conclusion different to the one at which I arrived. The prospects of success are not merely remote; on the terms of the indemnity and on binding authority, they are absent. Nor is there any other compelling reason why the appeal should be heard. The application must accordingly fail.

ORDER

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

1. The application for leave to appeal is dismissed.
2. The first respondent is ordered to pay the costs of the application for leave to appeal, including the costs of counsel where so employed, on Scale B.



F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

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