

REPUBLIC OF SOUTH AFRICA



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

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

CASE NUMBER: 2025-064595

 16 May 2025
SIGNATURE DATE

In the matter between:

CONCOR CONSTRUCTION (PTY) LTD

Applicant

and

**OLD MUTUAL ALTERNATIVE RISK TRANSFER
INSURE LTD**

First Respondent

LOMBARD INSURANCE COMPANY LIMITED

Second Respondent

**OPTIPOWER A TRADING DIVISION OF MURRAY AND
ROBERTS LIMITED**

Third Respondent

PETER VAN DEN STEEN N.O.

Fourth Respondent

JOSHUA BRUCE CUNLIFFE N.O.

Fifth Respondent

DENIS MACHEYA CHIFUNYISE N.O.

Sixth Respondent

WOLF WINDFARM (RF) (PTY) LTD

Seventh Respondent

Heard: 14 May 2025

Delivered: 16 May 2025

J U D G M E N T

YACOOB, J:

- [1] The applicant, Concor Construction (Pty) Ltd (“Concor”), and the third respondent, Optipower (“Optipower”) are members of a consortium (“the Consortium”) contracted to provide services on a windfarm project for the seventh respondent, Wolf Wind Farm (RF) (Pty) Ltd (“the Employer”). Optipower is a trading division of Murray and Roberts Limited, which is now in business rescue. In terms of the written Consortium Agreement, Concor bears 28,94% of the benefits and liabilities of the project, while Optipower bears 71.06%, although these proportions are subject to change.

- [2] The fourth to sixth respondents are the three business rescue practitioners of Murray and Roberts, and therefore of Optipower. The second respondent, Lombard Insurance Company Limited (“Lombard”), provided a performance guarantee to the Employer for the full value of the project. The first respondent, Old Mutual Alternative Risk Transfer Insure Limited (“OMART”), provided a guarantee to Lombard for Concor’s proportion of liability in the project. Due to issues arising in the project apparently resulting from Optipower being placed in business rescue, the Employer has made demand of Lombard for payment, and Lombard consequently made demand of OMART for the portion guaranteed by OMART.

- [3] Concor has approached this court on an urgent basis to interdict OMART from paying Lombard, and Lombard from making demand on OMART in terms of the guarantee provided by OMART for Concor’s liability in the project (the OMART guarantee) pending the determination of part B of this application, in which it seeks a final determination that it and OMART are not liable in terms of the OMART guarantee.

- [4] Concor contends that the relief it seeks is urgent, because if the interdict is not granted, payment will be made where there is no liability. It contends that the demand is fraudulent, or at least made in the knowledge that there is no liability, because the proportions of liability in terms of the Consortium agreement have been changed. It contends that, should OMART pay Lombard pursuant to the demand, this will result in Concor bearing liability that ought to be borne by Optipower, despite the fact that the liability arises from Optipower’s breach to the

Employer. Concor does not set out in any particularity, or at all, how the payment by OMART in terms of the OMART guarantee, to which Concor is not a party, results in undue prejudice to Concor, which cannot be remedied in due course.

- [5] Concor contends that the Consortium agreement provides that Optipower indemnifies Concor against 100% of liabilities, and that for this reason, the OMART guarantee does not have any liability to guarantee.
- [6] However, the Consortium agreement specifically provides that if a member of the consortium bears more than its agreed share of the liability, that member is indemnified by the other member. In other words, Concor is indemnified by Optipower for any liability it becomes responsible for beyond its agreed share.
- [7] It must be remembered that the Consortium agreement only binds the two members of the consortium, and governs benefits and liabilities *inter partes*. The Consortium agreement does not affect the Employer, or either Lombard or OMART. None of the other parties to this litigation have any rights under the Consortium agreement, in the same way that Concor has no rights under the OMART guarantee.
- [8] It was argued on Concor's behalf that permitting OMART to pay out under the guarantee would be akin to a situation in which an agent obtained insurance cover for 100 vehicles, and then claimed for the loss of one of those vehicles, when in fact at the date of obtaining the cover, none of those vehicles exist. This analogy must be dealt with, because in this scenario, the person obtaining cover for the nonexistent vehicles is the person who must bear the consequences of their action. That is very different, factually, to the situation in this case.
- [9] Optipower entered business rescue on 22 November 2024. This was a default of the Consortium agreement, and resulted in Concor becoming the only decision making member of the consortium. To put it in the terms of the Consortium agreement, Concor was the only member of the consortium to have representatives on the Executive Committee of the consortium.
- [10] On 29 January 2025, the Executive Committee, as it was, at least on the face of it, empowered by the Consortium to do, determined that Concor was indemnified

by Optipower for the purposes of this case at lease, for all liabilities. It informed OMART of the fact.

- [11] After this, the Lombard guarantee and the OMART guarantee were both about to expire and were both renewed. The OMART guarantee was renewed too, the new guarantee being issued on 20 March 2025. Concor alleges in its founding affidavit that its provision of the OMART guarantee to Lombard was in accordance with Concor's obligation in terms of clause 4.2 of the Consortium agreement.
- [12] Clause 4.2 of the Consortium agreement provides that the parties intend that any bond that is drawn down by a beneficiary of that bond is drawn down only in proportion to the percentage share of the consortium member who provided the bond, but that if the bond is drawn down disproportionate to the percentage shares, the parties indemnify each other against the excess liability. It does not require a party to provide a bond, but it does shed light on what the Consortium agreement provides regarding liabilities borne by the parties.
- [13] Clause 4.1 of the Consortium agreement provides, inter alia, that "Each Party shall provide guarantee facilities in accordance with their respective Percentage Share". Clause 4.3 provides that the draw down on any bond or guarantee be in accordance with the Percentage Share adjusted by any amount by which one Party indemnifies the other. Concor relies on this to contend that no draw down on the OMART bond is permissible. Clause 4.4 provides for a Party to remedy a breach of its obligations in terms of clauses 4.2 and 4.3, by providing a payment guarantee to the other party.
- [14] Although the Executive Committee determined in January 2025 that Optipower indemnified Concor for all amounts, it still provided a bond, on its own version in accordance with its obligations in terms of the Consortium agreement, on 20 March 2025, two months after it alleges that the Percentage Share liability of Concor no longer existed, for 29% of the Lombard guarantee. One wonders why, if it is the case that Optipower's liability was now 100%, and that that was binding on Lombard and OMART, Concor procured from OMART the 29% guarantee in favour of Lombard. In those circumstances, at least *prima facie*, there is no bad

faith on the part of either Lombard or OMART in drawing down and paying the 29%, whatever Concor had told them, which it alleges it did by February 2025, at least a month before the issue of this guarantee. Further, there is no allegation that OMART was told after the guarantee was issued that it was erroneous, or that Concor did anything to retract the guarantee. Certainly, if the allegation that the guarantee was provided in accordance with Concor's obligations in terms of the Consortium agreement, then it appears that at that date, which was after the decision was taken by the Executive Committee that Optipower indemnified Concor for 100% of the liability, that Concor nonetheless had to provide the guarantee for 29%.


[15] In these circumstances, it is difficult to see what prejudice results to Concor from the payment of the guarantee by Lombard, let alone that any prejudice cannot be remedied in due course. Taken together with the fact that Concor does not state in its founding affidavit what prejudice results to it from the payment by OMART to Lombard in terms of the guarantee, I cannot find that Concor has established that the application is urgent. And even if it was urgent, I cannot find that Concor has established a *prima facie* right that is at risk.

[16] To refer back to the analogy employed by counsel for Concor, the person who obtained the cover ostensibly aware that there was nothing to be covered is not, unlike in that analogy, the person who would bear the consequences of their own action. Concor is the person who knew the circumstances, and obtained the cover anyway. To say that the cover cannot be drawn down on in those circumstances raises a number of questions that no urgent court can deal with appropriately.

[17] There is no reason why costs should not follow the result. Lombard, the only respondent that participated in these urgent proceedings, made use of two counsel, and considering that Lombard was called upon to respond to a complex set of facts in a very short period of time, I consider that to be justified.

[18] In the result, I order:

The application is struck for want of urgency, with costs on scale C, including costs of two counsel.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 May 2025.

APPEARANCES

For the applicant:	LJ van Tonder SC
Instructed by:	Tiefenthaler Attorneys Inc
For the first respondent (abiding):	Moll Quibell Attorneys
For the second respondent:	L Morison SC with A Kruger
Instructed by:	Frese Gurovich Attorneys
For the third to sixth respondents:	Webber Wentzel Attorneys