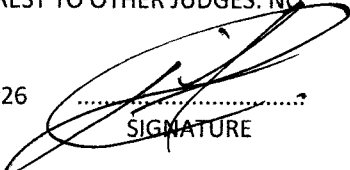




**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION: PRETORIA)**

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

**Case number: 020740/2023**

In the matter between:

**ELASAH RISK CONSULTANTS (PTY) LTD** First Applicant

**FUSION GUARANTEES (PTY) LTD** Second Applicant

and

**NATIONAL CREDIT REGULATOR** First Respondent

**THE FINANCIAL SECTOR CONDUCT AUTHORITY** Second Respondent

**PRUDENTIAL AUTHORITY** Third Respondent

*IN RE:*

**THE FINANCIAL SECTOR CONDUCT AUTHORITY** Applicant

and

**ELASAH RISK CONSULTANTS (PTY) LTD** First Respondent

**FUSION GUARANTEES** Second Respondent

THE NATIONAL CREDIT REGULATOR

Third Respondent

THE PRUDENTIAL AUTHORITY

Fourth Respondent

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**JUDGMENT**

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**MINNAAR AJ**

**Introduction:**

[1] The first applicant (“Elasah”) is seeking declaratory relief in the following terms:

- a. The Insurance Act 18 of 2017 (“the Insurance Act”) does not apply to a guarantee with the features set out below.
- b. An issuer of such a guarantee is not obliged to be licensed as an insurer under section 5(1) of the Insurance Act.
- c. The issuing of such a guarantee does not amount to conducting insurance business under the Insurance Act.

The features of the said guarantees being:

- (a) The overlap of three agreements:
  - (i) One, between a principal and a contractor;
  - (ii) Two, between the contractor and a guarantor;
  - (iii) Three, between the guarantor and the principal.
- (b) The absence of one or more of the essentials of a contract of indemnity insurance between the principal and the contractor,

the contractor and the guarantor and the guarantor and the principal.

The essentials of the type of insurance being:

- (i) The requirement of a premium;
- (ii) The spreading of risk;
- (iii) The indemnification of the principal for loss or damage;
- (iv) A policy of insurance.

(c) The presence of the essentials of a money loan or credit agreement as understood under the National Credit Act 34 of 2005 ("the NCA").

d. Costs in the event of opposition ("the Elasah application").

[2] On 29 October 2024, the second applicant ("Fusion") was granted leave to intervene in Elasah's application. Fusion seeks an order in terms of the declarators being sought by Elasah.

[3] The first respondent, the National Credit Regulator ("the NCR"), delivered an answering affidavit but did not submit heads of argument or appear at the hearing of the application. The NCR's affidavit was submitted not to oppose the application but to assist this court in interpreting the NCA's provisions.

[4] The application is opposed by the second and third respondents. The second respondent is the Financial Sector Conduct Authority ("FSCA"). The third respondent is the Prudential Authority ("Prudential").

[5] At the hearing of the application, Fusion presented a draft order, in terms of which it sought a declarator that:

- a. Fusion's current guarantees exemplified by annexures FA22, CA2, RA1, RA2 and RA3:
  - i. Are not guarantees as defined by Schedule 2, Table 2, Class 13 of the Insurance Act; and
  - ii. Are not non-life policies as defined in section 1 of the Insurance Act; and
  - iii. Do not constitute insurance business as defined in section 1 of the Insurance Act.

[6] Apart from presenting the draft order to the court, Fusion took no formal steps to alter or amend its stance that it aligned itself with the declarators sought by Elasih. The approach adopted by Fusion to seek relief in terms of the draft order was heavily criticised by counsel for both the FSCA and Prudential, on the basis that the contents of the draft order bear no relation to the relief that Fusion prayed for and constitute an illicit attempt by Fusion to obtain relief to which it is not entitled. It was only in reply that Fusion's counsel sought an amendment from the bar on the basis that both the FSCA and Prudential knew what Fusion's approach was and that what was set out in the proposed draft order should not come as a surprise to them. Fusion's attempt to introduce the draft order without a proper amendment to what it prayed for is flawed, and as such, the draft order is rejected.

- [7] The FSCA lodged a counter application, seeking the following relief:
- a. Declaring that the guarantees currently being issued by Fusion, and identified in its founding affidavit (“the Fusion Guarantees’), constitute non-life insurance as defined in section 1 of the Insurance Act.
  - b. Declaring that the issuing by Fusion of the Fusion Guarantees constitutes the conduct of insurance business as defined in section 1 of the Insurance Act.
  - c. Declaring that by issuing the Fusion Guarantees without a license to conduct insurance business, Fusion is acting in breach of section 5(1) of the Insurance Act.
  - d. Interdicting Fusion from issuing the Fusion Guarantees.
  - e. Declaring that the construction guarantees identified by Elasah in its founding affidavit (“the Elasah Guarantees”) constitute non-life insurance policies as defined in section 1 of the Insurance Act and that the issue of such guarantees constitutes the conduct of insurance business as defined in section 1 of the Insurance Act.
  - f. Declaring that the issue of the construction guarantees in the absence of a licence issued in terms of the Insurance Act to conduct insurance business constitutes a breach of section 5(1) of the Insurance Act and is, in consequence, unlawful.
  - g. Costs of suit and the costs of counsel on Scale C.

[8] The counter application is opposed by Elasah and Fusion. Prudential delivered a notice to abide by the court's decision in the counter application.

[9] The spectrum of the applications relates to the interpretation of the Insurance Act, Elasah's *locus standi*, the binding nature of the judgments in *Becker and Another v Registrar of Financial Service Providers and Others* (61274/2015) [2017] ZAGPPHC 926 (30 November 2017) (per Rip AJ) ("*Becker*") and *Fern Finance and Another v Financial Services Tribunal and Others* 2022 (JDR) 3092 (GP) (as per Potterill J) ("*Fern Finance*") on the Insurance Act and the applicability of the provisions of the Insurance Act on the Fusion guarantees and the construction guarantees relied on by Elasah.

**The Insurance Act:**

[10] The Insurance Act commenced on 1 July 2018. The purpose of the Insurance Act is to provide for a legal framework for the prudential regulation and supervision of insurance business in the Republic that is consistent with the Constitution of the Republic of South Africa, 1996, and promotes the maintenance of a fair, safe and stable insurance market; to introduce a legal framework for microinsurance to promote financial inclusion; to replace certain parts of the Long-term Insurance Act, 1998 ("*the LTIA*"), and the Short-term Insurance Act, 1998 ("*the STIA*"); and to provide for matters connected therewith.

[11] Section 3 of the Insurance Act provides that the objective of the Insurance Act is to, in a manner consistent with the Constitution of the Republic of South Africa, 1996, promote the maintenance of a fair, safe and stable insurance market for the benefit and protection of policyholders, by establishing a legal framework for the prudential regulation and supervision of insurers and insurance groups that-

- (a) facilitates the monitoring and the preservation of the safety and soundness of insurers;
- (b) enhances the protection of policyholders and potential policyholders;
- (c) increases access to insurance for all South Africans;
- (d) promotes broad-based transformation of the insurance sector; and
- (e) contributes to the stability of the financial system in general.

[12] Section 5(1) of the Insurance Act provides that no person may conduct insurance business in the Republic unless that person is licensed under this Act.

[13] Section 1 of the Insurance Act contains the following relevant definitions:

- a. 'insurance business' means life insurance business or non-life insurance business conducted or regarded as being conducted in the Republic, and includes reinsurance business.

- b. 'insurance policy' means a life insurance policy or a non-life insurance policy.
- c. 'insurer' means a person licensed to conduct insurance business under this Act, and includes, unless specifically otherwise provided for in this Act, Lloyd's, a Lloyd's underwriter and a reinsurer.
- d. 'non-life insurance business' means any activity conducted with the purpose of entering into or meeting insurance obligations under a non-life insurance policy.
- e. 'non-life insurance policy' means any arrangement under which a person, in return for provision being made for the rendering of a premium to that person, undertakes to meet insurance obligations that fully or partially indemnifies loss on the happening of an unplanned or uncertain event, other than-
  - (a) a life event; or
  - (b) a death event or disability event not resulting from an accident,and includes a renewal or variation of that arrangement;
- f. 'insurance obligations' means all obligations (other than the obligations of the policyholder), whether those obligations constitute an obligation to pay one or more sums of money, render services or meet any other obligations, under or arising from insurance policies, and, in respect of life insurance policies, includes any guarantees and discretionary participation features.

g. 'premium' means any direct or indirect, or partially or fully subsidised, consideration given or to be given in return for an undertaking to meet insurance obligations.

[14] Section 1 of the Insurance Act does not contain a definition of a 'guarantee'.

[15] Schedule 2 of the Insurance Act deals with classes and subclasses. Table 2 of Schedule 2 deals with classes and sub-classes of insurance business.

[16] In terms of Item 13 of Table 2, the description of the "Guarantee" class reads as follows:

"Covers loss resulting from-

- insolvency;
- **the direct and indirect failure of a person to discharge an obligation;**
- suretyship offered as part of normal business activities, other than a guarantee issued by a Bank registered under the Banks Act, 1990." (my emphasis)

[17] Neither the cover of a loss resulting from insolvency nor suretyship applies to the guarantees applicable in this case. The only loss that might find application in this case is the loss resulting from the direct or indirect failure of a person to discharge an obligation.

**Elasah's locus standi:**

[18] Elasah is a financial services provider (FSP) that specialises in intermediary and advisory services related to demand guarantees, the subject of the present application. According to Elasah, its principal function is to arrange guarantees (referred to as "construction guarantees", "performance guarantees" or "on-demand guarantees") for potential contractors in the construction industry, mostly but not exclusively, in the municipal sector. Elasah, as an FSP, markets and sells guarantors' products.

[19] The tripartite relationship in guarantees comprises the employer, the contractor, and the guarantor. Elasah is not a 'guarantor' because it does not issue guarantees; it merely arranges them. Elasah's is a consultancy business that advises on and arranges guarantees on behalf of its clients, namely the contractors in the tripartite relationship.

[20] According to Elasah, the "formal view" is that the FSCA and Prudential adopted the view that all guarantors have to be registered as insurers under the Insurance Act. Elasah refers to this approach as the 'formal view'. Elasah brought the application to challenge the formal view and to obtain clarity on whether the demand guarantees are subject to the Insurance Act and whether the guarantors must be registered as insurers under it.

[21] Elasa's case is that it has a direct legal interest in determining whether a guarantor must be an insurance company or may be a regulated credit provider. The overriding reason for this approach is to enable Elasa to provide clients with legally sound and valid advice.

[22] Both the FSCA and Prudential challenged Elasa's *locus standi* to have lodged this application. According to the FSCA and Prudential, Elasa does not have an adequate interest in the subject matter of the litigation, that being a direct interest in the relief sought. It is their contention that Elasa's interest in the issue is remote, abstract, academic and hypothetical. According to Prudential, the real thrust of Elasa's application is to protect its indirect financial interest within the construction guarantee business. It is the case of both the FSCA and Prudential that Elasa's interest is not a legal interest for the purposes of satisfying the requirement of *locus standi*.

[23] For a party to be clothed with *locus standi*, it is required that a person who has approached the court seeking relief from it have an interest in the sense of being personally adversely affected by the wrong alleged.<sup>1</sup>

[24] In *Firm-O-Seal CC v Wynand Prinsloo & Van Eeden Inc and Another* 2024 (6) SA 52 (SCA) at para 6, it was recently confirmed that *locus standi in iudicio* is an access mechanism controlled by the court

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<sup>1</sup> *Natal Fresh Produce Growers Association and Others v Agroserve Pty Ltd and Others* 1990 (4) SA 749 N at 758G – 759E

itself.<sup>2</sup> The Supreme Court of Appeal reiterated that generally, the requirements for *locus standi* are these:

- a. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought;
- b. The interest must not be too remote;
- c. The interest must be actual, not abstract or academic; and
- d. It must be a current interest and not a hypothetical one.<sup>3</sup>

[25] Standing is thus not just a procedural question; it is also a question of substance, concerning the sufficiency of a litigant's interest in the proceedings.<sup>4</sup> The sufficiency of the interest depends on the particular facts in any given situation.<sup>5</sup> The real enquiry is whether the events constitute a wrong against the litigant.<sup>6</sup>

[26] In *Lebashe Financial Services (Pty) Ltd v Prudential Authority & Others* 2023 (2) SA 130 (SCA) at paras 23 – 26, the Supreme Court of Appeal said the following on *locus standi*:

“[23] As I have said, *Lebashe* had been granted leave to intervene in the liquidation applications by agreement and obtained leave from the High Court to appeal to this court. That, however, did not relieve *Lebashe* of

<sup>2</sup> *Watt v Sea Plant Products Bpk and Others* [1998] 4 All SA 109 (C) at 113H.

<sup>3</sup> *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) ([2018] ZASCA 124) para 7.

<sup>4</sup> *Wessels en Andere v Sinodale Kerkkantoer Kommissie van die Nederduitse Gereformeerde Kerk, OVS* 1978 (3) SA 716 (A) at 725H; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388B – E.

<sup>5</sup> *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) ([1991] ZASCA 152) at 534D; *Gross and Others v Pentz* 1996 (4) SA 617 (A) ([1996] 4 All SA 63) at 632B – D.

<sup>6</sup> *Muller v De Wet NO and Others* 2001 (2) SA 489 (W) ([2000] 3 All SA 620).

*the duty to satisfy this court that it has locus standi to obtain the relief that it seeks on appeal. That is so for two main reasons. The first is that the respective tests are not identical. Germane to the second, are the oft-repeated dicta that the scarce resources of this court should not be expended on deciding abstract or academic issues.*

*[24] As Harms JA said in Gross and Others v Pentz 1996 (4) SA 617 (A) ([1996] 4 All SA 63) at 632C:*

*'The question of locus standi is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as a litigating party.'*

*See also Sandton Civic Precinct (Pty) Ltd v City of Jhb and Another 2009 (1) SA 317 (SCA) ([2009] 1 All SA 291; [2008] ZASCA 104) para 19.*

*Although there are no hard-and-fast rules in this regard, the general rule is that a direct and existing interest in the relief is required. A direct interest is one that is not too far removed, and an existing interest is one that is not abstract, academic or hypothetical. See Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 388B – H; Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) ([1991] ZASCA 152) at 534A – E; and Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) ([2011] ZASCA 108) para 29.*

*[25] The winding-up orders in respect of the insurers do not, of course, operate against Lebashe. What then is Lebashe's interest in having the liquidation orders overturned? Lebashe is a creditor of BIG. I accept that it is also the majority shareholder of BIG, which holds the shares in the*

*insurers. These were the only factors referred to by counsel for Lebashe when this court raised this issue during argument. On this basis, however, Lebashe is only a creditor and shareholder of the holding company of the insurers. As such, there are no legal relationships between Lebashe and the insurers. Lebashe has no rights to a preferred legal process of dealing with the undisputed insolvency of the insurers, even though it may have an indirect financial or commercial interest therein. In my view, Lebashe's interest is too indirect and insufficient to clothe it with locus standi in the appeal.*

*[26] The High Court ought to have considered these matters in determining whether leave to appeal should be granted. And, quite frankly, that should have resulted in a refusal of leave to appeal. It follows that the appeal must fail for this reason alone. Ordinarily that would have been the end of the matter. However, the remaining issues have been fully argued, are novel and are likely to arise in the future. In the circumstances, I regard it in the interests of justice to determine the remaining issues.”*

[27] It is Elasaḥ’s case that they are entitled to the declaratory relief to get legal certainty to properly advise their clients. Elasaḥ is, in essence, a torchbearer to challenge, according to it, the official view held by the FSCA and Prudential, namely that all guarantors must be registered as insurers under the Insurance Act. In its replying affidavit, Elasaḥ states that it “... *has a legal interest in the classification of the relationship between the parties, which is dependent upon whether the guarantor*

*must be an insurance company (“official view”) or whether it may be a credit provider. As a FSP, Elasah markets and sells the products of product suppliers, i.e., the guarantors, and it makes a world of difference to Elasah whether the product supplier falls in one or the other category.”*

[28] Elasah is seeking declaratory relief in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013. This section grants the court the power in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[29] Declaratory orders are discretionary and flexible. In *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC) at para 107, the Constitutional Court stated:

*“It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.”*

[30] An application for a declaratory order is a two-stage approach.<sup>7</sup>

First, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. Second, if the court is satisfied that such an interest exists, it must be considered whether or not the order should be granted.

[31] In *Milani and Another v South African Medical and Dental Council*

1990 (1) SA 899 (T) on page 902, an 'interested person' was defined as a person who has a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court.

[32] Since Elasah is merely arranging guarantees, there is no requirement in law for Elasah to be registered under the Insurance Act to provide its consultancy services in the form of arranging construction guarantees. There can thus be no wrong against Elasah, and whether or not the Insurance Act apply is of no direct concern to Elasah.

[33] Elasah has failed to allege, or make out, a case that a right it is meant to enjoy is infringed by the law, or that the application is brought in terms of section 38 of the Constitution, which deals with the enforcement of rights.

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<sup>7</sup> *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at para 18; *Pasiya and Others v Lithemba Gold Mining (Pty) Ltd and Others* 2024 (4) SA 118 (SCA) at para 46 to 51

[34] Apart from seeking legal advice from this court, it is difficult to comprehend how Elasaah could have an adequate interest in the subject matter of the litigation. The mere fact that Elasaah brought the application does not, in itself, confer on Elasaah the requisite standing. Elasaah's interest in the issue before the court is remote, abstract, academic and hypothetical. Elasaah has no direct interest in the outcome of these proceedings. On the contrary, Elasaah's interest is an indirect financial one. Elasaah's interest is plainly not a legal interest for the purposes of satisfying the requirement of *locus standi*.

[35] It follows that Elasaah lacks the required *locus standi*, and, on this premise, Elasaah's application must fail.

[36] The lack of *locus standi* would have been the end of the matter. However, since Fusion joined the proceedings and the remaining issues have been fully argued, are novel, and are likely to arise in the future, it would be in the interests of justice to determine them.

**Res judicata:**

[37] Section 5(1) of the Insurance Act provides that no person may conduct insurance business in the Republic unless that person is licensed under this Act.

[38] In both *Becker* and *Fern Finance*, the Court dealt with the STIA, the predecessor of the Insurance Act.

[39] Before its repeal, section 7(1) of the STIA prohibited anyone from carrying on any short-term insurance business without being registered, or deemed to be registered, to do so.<sup>8</sup>

[40] The STIA defined short-term insurance business as *“the business of providing or undertaking to provide policy benefits under short-term policies”*. Section 1 of the STIA defined short-term policies to include guarantee policies. To issue guarantee policies, therefore, an entity had to be registered, or deemed registered, for that purpose.

[41] In *Becker*, a decision by the Appeal Board of the Financial Services Board (the predecessor of the FSCA) was taken on review. The court was called upon to determine whether guarantees were issued in contravention of section 7 of the STIA. Rip AJ held as follows at para 3.9:

*“It would appear to me that the submission on behalf of the Respondents that whether or not they could also constitute suretyships was not decisive of the matter is correct. The issue was whether or not they constituted guarantees as defined in terms of the STIA.”*

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<sup>8</sup> Section 7(1)(a) of the STIA: *“No person shall carry on any kind of short-term insurance business, unless that person is registered or deemed to be registered as a short-term insurer and is authorized to carry on the kind of short-term insurance business concerned under this Act.”*

[42] Rip AJ considered the nature of the guarantees issued by Fusion in *Becker* and found that the “guarantees” Fusion issued on behalf of its underwriter could plainly only fall within the ambit of the term policies as contemplated in the STIA definition of guarantee policy.<sup>9</sup> Rip AJ further found that Fusion’s guarantees were, in fact, “guarantee policies” contemplated by the STIA.<sup>10</sup>

[43] In *Fern Finance*, the issue before the court was whether Fern Finance's business was subject to regulation by the STIA or the NCA. In paragraph 7 of her judgment, Potterill J relied on the *ratio* in *Becker* as follows:

*“In Becker ... the court rejected the argument that an entity had to be registered in terms of the NCA or the STIA. If the services rendered fell under STIA, registration with the NCA did not exclude registration with STIA. I agree with this ratio.”<sup>11</sup>*

[44] Neither *Becker* nor *Fern Finance* were overturned on appeal, and as such, these decisions stand as authority.

[45] According to Elasah and Fusion, both *Becker* and *Fern Finance* relate to the STIA, which has been repealed and replaced by the Insurance Act. Fusion further contends that the erstwhile guarantees forming the subject matter in *Becker* were of a different nature from the

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<sup>9</sup> *Becker* at para 3.12.1

<sup>10</sup> *Becker* at para 3.12.3

<sup>11</sup> *Fern Finance* at para 7

current Fusion guarantees, and that they were interpreted through the lens of the STIA. As such, there is presently no precedent for the question that this court is asked to answer.

[46] Section 12(2) of the Interpretation Act 33 of 1957 provides:

*'(2) Where a law repeals any other law, then **unless the contrary intention appears**, the repeal shall not-*

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or*
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or*
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or*
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or*
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'* (my emphasis)

[47] Both the STIA (section 7(1)(a)) and the Insurance Act (section 5(1)) require that entities offering guarantee policies be registered. This requirement was therefore not repealed by the Insurance Act. The Insurance Act does not express a contrary intention to that found and decided in the STIA as to which entities offering guarantees must be registered.

[48] Prudential is correct in its approach: the Insurance Act did not repeal the requirement that entities offering guarantee policies be registered. Section 5(1) of the Insurance Act is clear on this requirement.

[49] No material difference can be found between guarantee policies under the STIA and non-life policies under the Insurance Act. The requirement in section 5(1) of the Insurance Act is the same as the one which existed under section 7(1)(a) of the STIA.

[50] I agree with Prudential's approach that, from both *Becker* and *Fern Finance*, it is clear that the issue of registration under either the NCA or the Insurance Act depends on the facts of each guarantee agreement, and that registration with one is not exclusive of the other.

[51] *Becker* and *Fern Finance* remain applicable, and I am bound by these decisions.

[52] The Insurance Act did not introduce a new legal concept in the form of non-life insurance business. Therefore, the jurisprudence developed and applied in relation to guarantee policies under the STIA continues to apply to non-life insurance policies under the Insurance Act.

**The Fusion application and the counter application:**

The Fusion application:

[53] The motivation behind Fusion's application to intervene in the Elasih application was premised on the risk that it might be found that Elasih lacked the requisite standing in law to seek the relief sought by Elasih. As already found by me, this risk has become a reality.

[54] According to Fusion, the question of whether the issuance of the type of guarantee and the agreements entered into between contractors and guarantors constitute insurance business as defined in the Insurance Act is of existential importance to Fusion.

[55] Fusion was the subject of various investigations under the STIA. One of the investigations culminated in the *Becker* decision, which found that the guarantees issued by Fusion on behalf of its underwriter fall squarely within the ambit of the term "policies" as contemplated by the STIA definition of "guarantee policy". I pause to state that Fusion was the second applicant in *Becker*, whilst the deponent to Fusion's

affidavits, Me Ilse Becker, was the first applicant. Neither Fusion nor Me Becker is thus a stranger to the issue to be determined by this court.

[56] Fusion states that its product is a secured loan transaction whereby a credit facility is granted to a contractor providing security in the form of, inter alia, indemnities, company-to-company sureties, director's personal sureties, cession of the contractor's debtor's book, the pledge and cession of cash collateral and/or any other securities requested or required by Fusion.

[57] Fusion is a registered credit provider that, according to it, complies with all its obligations under the NCA. Fusion explains that it provides credit to its clients (the contractors) after a rigorous credit check. Fusion further explains how credit costs are calculated and what they entail.

[58] For the services it provides, Fusion charges the contractor a fee for the credit it extends. These fees are stipulated in a pre-agreement statement and quotation for credit facilities and credit agreements, the credit agreement and the compliance report. According to Fusion, a credit provider's presentation of a guarantee confirms that an extensive analysis of the contractor's creditworthiness has been conducted and that the contractor is good for the amount of the applied-for guarantee and can pay. These fees are stipulated in the pre-agreement statement and quotation for credit facilities, the credit agreement, the quarterly

returns, and the annual compliance report. Fusion attached examples of a pre-agreement statement, quotation, and credit agreement ("FA23" and "FA24" to its founding affidavit).

[59] Fusion's case is that it does not indemnify a contractor. In the event that Fusion is called upon by an employer to make good on its guarantee, the contractor inures to back-to-back liability to pay Fusion the guarantee amount, together with interest and other agreed charges, as permitted by the NCA. This is the moment when the credit is actually provided, and interest begins to accrue. The facilities are utilised by the contractor to pay their contract works insurance premiums, appoint engineers, pay legal costs, or pay a demand call from an employer. If any amount is discharged from the facility and Fusion is called upon by an employer to make good on its guarantee, the contractor will have 90 days to repay Fusion, plus interest. If there is a failure to do so, Fusion can call on the securities provided under the facility agreement. Fusion contends that the facility thus operates like an overdraft facility or credit card facility. Once any amount is discharged from the facility, the credit is provided; the contractor is thus never indemnified.

[60] I interpose to remark that Fusion's comparison of its guarantees with an overdraft facility or a credit card is intriguing. Why then make any reference to a guarantee being issued and engage in years of litigation on the STIA, and now on the Insurance Act, where, as Fusion wants this court to believe, the whole transaction is as simple as merely providing

credit to a contractor, which credit is available as and when the credit is required by the contractor. The only logical conclusion is that the intricate environment applicable to these guarantees, the specific requirements laid down for guarantees, the complex tri-party relationship involved in the guarantee, and the strict necessity that the contractor should perform to the satisfaction of the employer imply and require more than just a credit facility. Fusion's comparison of the guarantees it provides to its clients as merely constituting a simple credit agreement or facility is therefore rejected.

[61] Once a facility limit is approved and granted, Fusion issues a guarantee to a nominated beneficiary or employer. The guarantee is an undertaking by Fusion to pay an agreed amount to an employer upon demand and the production of prescribed documentation. It is Fusion's case that the guarantees issued by it are based on the principle of independence and that its obligation to an employer is not based on proof of any loss or other prejudice or on any legal liability owing by the contractor to the employer, but based purely on compliance with the contractual requirement as set out in the guarantee. Annexure "FA22" is the only example of such a guarantee attached to Fusion's founding affidavit.

[62] It is prudent to note that "FA22" was issued on 29 May 2017. This guarantee was issued prior to the *Becker* decision, which was delivered on 30 November 2017. In *Becker*, it was pertinently held that the

guarantees issued by Fusion fall within the ambit of the term policies contemplated in the definition of a guarantee policy in the STIA. Despite this judgment, Fusion still elected to place reliance on 'FA22' to ask for an order that it be declared that the Fusion guarantees do not constitute insurance business as defined in Table 2(13) of Schedule 2 of the Insurance Act. "FA22" was further issued prior to the implementation of the Insurance Act.

[63] One can only assume that Fusion realised this mistake and then attempted, in the replying affidavit, to introduce more up-to-date guarantees. These up-to-date guarantees are attached as "RA1", "RA2" and "RA3". These guarantees are dated 20 December 2024, 21 June 2024 and 30 September 2024, respectively. All these guarantees were issued after the intervention application was lodged in April 2024. It is trite that a party is not entitled to introduce new matter in a replying affidavit. As such, the guarantees attached to the replying affidavit are not properly before the Court and cannot be included in any relief sought by Fusion.

[64] Fusion expands on the possibility that, as part of its security obligations, a contractor may be required to deposit collateral for any payment due to the employer for the duration of the guarantee. This collateral is held in a separate account from Fusion's funds and is not treated as income; it is held in trust for the contractor. When the guarantee is cancelled in due course, which, according to Fusion,

happens in the vast majority of cases, the amount with interest is repaid to the contractor. Fusion emphasises that the collateral is held separately from its funds, unlike that held by Insurance Companies.

[65] This collateral business model was in place when the STIA was still applicable and prior to the *Becker* decision. Fusion states that, in 2010, it appointed Cornerstone Investments (Pty) Ltd (“Cornerstone”), a licensed FSP fund manager, to manage any funds paid to Fusion by a contractor as collateral under the credit agreement. Cornerstone charges fees for its management services, which are disclosed to the contractor in both the facility agreement and the credit agreement. If Fusion must make a payment to an employer, it withdraws the collateral for the contractor. It is stated that the collateral fund is not a fund from which demands are paid.

[66] Fusion explains that when a contractor enters into a written credit agreement with Fusion, the contractor nominates a beneficiary (the employer) and provides Fusion with its banking details. Should Fusion be required to make a payment to the employer, the contractor must repay Fusion this amount, together with interest and costs.

[67] On the guarantee, Fusion states that a contractor who has been awarded a tender by an employer will approach Fusion with its letter of appointment. The appointment letter indicates which standard agreement governs the relationship between the contractor and the

employer (generally the GCC 2010, GCC 2015, JBCC 2014, or the FIDIC 2018/2020 agreement). The guarantee must comply with the general conditions of the contract as set out in the specific agreement entered into by the contractor. According to Fusion, it will release the guarantee to the employer if the contractor has complied with all of Fusion's security requirements and has paid all amounts due under the credit agreement.

[68] Once a demand is made, Fusion has to validate the demand by having regard to the payment certificates to determine which amounts have been deducted by an employer, and which amounts are still due for payment by an employer. Fusion is entitled to dispute an employer's demand on the grounds of fraud or breach of contract, resulting in the contractor's inability to finalise the project.

[69] Fusion remains adamant that, upon scrutiny of the agreements attached to its founding affidavit, it is clear that the agreements concluded by Fusion are credit agreements.

[70] On the aspect of collateral, it is Fusion's case that a contractor has more protection under the NCA than under the Insurance Act, as the furnishing of collateral is tightly regulated by the NCA.

[71] On the "official view" that all guarantors have to be registered as insurers under the Insurance Act and its predecessor (the STIA), it is the

case of Fusion that the setting up of a guarantee is not the provision of insurance, either at common law or as defined in the STIA or the Insurance Act but that it is instead a form of money lending. According to Fusion, classifying guarantees and the underlying agreements between the guarantor and the contractor as contracts of insurance, rather than credit agreements, gives rise to anomalies. One such anomaly is that FSP's are compelled to misrepresent to their clients (the contractors) the nature of the guarantee transactions. The transactions have to be explained in insurance terms, whilst that is not the case. These misrepresentations directly breach the professional obligations of FSP's. According to Fusion, it is unethical, immoral, and illegal to say that a client is purchasing insurance policies while the contractor is entering into a secured loan transaction.

[72] Fusion contends that the guarantees are based on the principle of independence, which effectively means that the guarantor's obligation to the principal is not based on proof of any loss or other prejudice or on any legal liability owing to the contractor, but on compliance with the contractual compliance requirements, which are set out in the guarantee. The guarantor's obligation is independent of the rights and obligations between the contractor and the principal.

[73] According to Fusion, the only type of insurance that may be applicable in the circumstances of a guarantee is indemnity insurance.

Fusion's case is that guarantee facilities have none of the features of insurance:

- a. There is no sharing or spreading of risk in a guarantee situation. An insurer pays the insured from its own resources, built up by pooling premiums. In the case of a guarantee, there is only a passing-on liability, so the guarantor always remains financially neutral. Once the guarantor pays the principal, the contractor pays the guarantor.
- b. There is no indemnification. In an insurance situation, the insured must first suffer a loss for which the insurer is indemnified before the insurer is obliged to pay. The amount equals the loss suffered. In the case of a guarantee, the principal is entitled to demand payment without having suffered any loss. The payment must be made on demand, and the principle of independence precludes any investigation into liability or loss.
- c. There is no subrogation. In the case of insurance, the insurer steps into the shoes of the insured and may sue a third party that caused the insured's loss in the name of the insured. With a guarantee, the guarantor may recover payment from the contractor, not because the contractor caused the principal loss, but because of the agreement between the guarantor and the contractor.
- d. Insurance is generally not concerned with the financial ability or creditworthiness of a policyholder and/or its insured, nor how well a claim can be secured by a policyholder. Insurance coverage is

extended upon payment of the premium. The insured person must perform first by paying the premium. The insurer performs thereafter. No question of affordability, overindebtedness, or ability to pay arises in the insurance relationship. This is different in the case of a guarantee. The contractor submits a facility application to a guarantor for a guarantee. The guarantor performs extensive credit checks and financial analyses to determine whether the contractor will be able to pay the guarantor when the guarantor pays the principal. The guarantor always demands security. No premium is paid, no policy is entered into, and no subrogation arises. No risk is transferred to the insurer.

[74] Fusion is adamant that none of the essentials in the Insurance Act (as referenced by Fusion as a policy, a premium, and indemnification of loss) is found in a construction guarantee or a guarantee facility. It is Fusion's case that the references in the Insurance Act to guarantees are references to indemnity insurance and not to a construction guarantee.

[75] It is the FSCA's case that the relief sought in the Elasah application is academic and circular and that the Fusion relief is not competent.

[76] The genre of guarantees that Fusion seeks to exclude from the purview of the Insurance Act is called "construction guarantees". A construction guarantee refers to an undertaking by a guarantor (which is

almost invariably a registered insurer, and sometimes a registered bank) to pay a specified amount of money to an employer (e.g. a municipality seeking construction services) in the event of an unplanned or uncertain event or risk occurring, such as a contractor defaulting. Such payment is, however, made upon the employer's fulfilment of the requirements for the guarantor's demand set out in the guarantee.

[77] The party required by its construction contract or arrangement to obtain and pay for the construction guarantee is the contractor. Under the construction contract, the employer is the beneficiary of the construction guarantee. The aim of a construction guarantee is to enable the employer to expedite or complete the construction project, or to be compensated, should the contractor be unable or unwilling to perform. That breach by the contractor is the insured risk or interest covered by the guarantee. The loss that is being indemnified here is the loss of the employer that may result from such failure by a contractor.

[78] The crisp question before this court, as asked by Fusion, is whether construction guarantees are regulated by the NCA to the exclusion of the Insurance Act. The apposite question is whether the construction guarantee falls within the ambit of the Insurance Act. In *Becker*, it was made clear that the NCA does not exclude the Insurance Act. Fusion and Me Becker were aware of this position, and by bringing the Fusion application, they ignored the precedent set by this court.

[79] The question is therefore not whether an undertaking is a credit facility or a guarantee policy. Rather, the question under the current legislative regime is whether the construction guarantee in question qualifies as a non-life insurance policy, more specifically, a guarantee policy under Schedule 2, Table 2 of the Insurance Act. If the answer to this question is affirmative, it follows that the Fusion- and Elasih application must be dismissed and the counter application granted.

[80] I agree with the FSCA's contention that, although *Becker* was delivered in respect of the STIA and considered whether the guarantees issued by Fusion fell within the ambit of the STIA, the principles endorsed by the court apply equally to the Insurance Act. Stated differently, this principle is unaffected by differences between the Insurance Act and the STIA regarding guarantees. In any event, there is no substantial difference in relation to guarantees between the Insurance Act and the STIA that would render the jurisprudence established under the STIA inapplicable to the Insurance Act. A guarantee under the STIA included "*a contract in terms of which a person, other than a bank, in return for a premium, undertakes to provide policy benefits if an event, contemplated in the policy as a risk relating to the failure of a person to discharge an obligation, occurs*". The indemnification of loss has been specifically referred to in the Insurance Act, but that does not bolster or detract from the jurisprudence established by *Becker*.

[81] Fusion relies in part on the notion that the contractor is the guarantor's "counter-guarantor", in an attempt to locate construction guarantees outside the Insurance Act. According to Fusion, this feature means that there is no indemnification of loss. This conceptualisation is stated as follows in paragraph 20 of the founding affidavit:

*"Once the guarantor has paid the principal the amount claimed on demand, the guarantor is entitled to recoup payment from the contractor by virtue of the terms of the contract concluded between the guarantor and the contractor. Between the contractor and the guarantor, as shown above, various contractual stipulations are included to ensure that the guarantor is secured. ..."*

[82] There is no description of what is contained in the "terms of the contract", or the "various contractual stipulations", nor does Fusion state whether the contract between the contractor and the guarantor is a guarantee, suretyship or some other contract.

[83] The essence of Fusion's contention is that a counter-guarantee is not a feature of an insurance contract. According to the FSCA, that is of no consequence, and Fusion's argument is misconceived.

[84] The relationship between the contractor and the guarantor, and in terms of which the former agreed to indemnify the latter against any loss it may suffer if the guarantee is called up, is extraneous to the

question whether the contract between the guarantor and contractor, in terms of which the guarantor issues a guarantee in favour of the employer, constitutes a non-life insurance policy for the purposes of the Insurance Act.

[85] Fusion and Elasah further contend that construction guarantees do not fall within any of the requirements under the definition of guarantees under Schedule 2, Table 2 of the Insurance Act, being:

- a. Loss as a result of insolvency;
- b. Suretyship; or
- c. The direct or indirect failure of a person to discharge an obligation.

[86] Construction guarantees fall under the Insurance Act because they meet the requirements of non-life insurance policies and guarantees under Schedule 2, Table 2 of the Insurance Act. These policies come about in the following circumstances:

- a. When entering into a construction contract with the contractor, the employer requires the contractor to provide a construction guarantee. The purpose of this guarantee is to indemnify the employer against losses arising from a breach of the construction contract that might come about as a result of the contractor's default.
- b. In order to meet that obligation, the contractor concluded a contract with the guarantor in terms of which the guarantor undertakes to indemnify the employer against losses that might

come about as a result of the contractor's default. The guarantor undertakes this obligation in exchange for a premium, paid either by the contractor or a third party. It is not a requirement of the Insurance Act that the contractor pay the premium to the guarantor.

- c. The guarantor in return undertakes to pay the employer a specified or limited amount on the occurrence of a default by the contractor, In other words, the guarantor provides a guarantee to the employer in terms of which the guarantor undertakes to pay the employer up to a maximum guaranteed amount on the occurrence of the default by the contractor subject to terms relating to the demand for payment.

[87] It is important to note that the potential loss indemnified under the guarantee is not the contractor's, but the employer's. The construction contract between the contractor and the employer anticipates that the employer may suffer a loss as a result of the contractor's conduct giving rise to the risk insured against (default). An important feature of the definitions under the Insurance Act mentioned above is that the Act does not stipulate who must pay the premium or consideration, nor does it require that the person paying the premium be the one who faces the risk of loss and suffers the indemnified loss.

[88] A counter-guarantee is a collateral, independent arrangement between the guarantor and the contractor that permits the guarantor to

seek reimbursement from the contractor in the event that it (the guarantor) has to honour its insurance obligations (typically obligations to pay the employer) *vis-à-vis* the employer. Even if the counter-guarantee is required by the guarantor (insurer), the employer's loss and the obligations to indemnify the loss are unrelated to and unaffected by this extraneous collateral arrangement.

[89] The counter-guarantee argument raised by Fusion, and the position as discussed in the previous paragraphs, is by no means novel. The 2015 Appeal Board decision given by retired Supreme Court of Appeal Judge Howie, which was confirmed by *Becker*, specifically found at paragraph 30 that the existence of a counter-guarantee “*does not render the definition of guarantee policy inapplicable to the guarantees issued by Fusion ...*”

[90] The court held in *Becker*, as confirmed in *Fern*, that whether a contract to provide a construction guarantee falls under the STIA or the Insurance Act depends on the contract's features. One must therefore interrogate the agreement itself. It is irrelevant whether the arrangement is or may be something else (such as a suretyship or a credit agreement under the NCA). The question is whether it is insurance.

[91] In relation to the direct or indirect failure of a person to discharge an obligation, relying on what Fusion and Elasah call the “*principle of independence*”, they contend that the guarantee stands independent of

the relationship between the employer and the contractor. It is not a requirement that there be a failure by the contractor to discharge an obligation: *“The guarantor must respond and make payment not because of any loss suffered, not because of the failure to discharge an obligation, not because there is causation between the loss and failure to act positively, but only because the undertaking is to make payment on demand, usuaully if the prescribed documents are presented.”*

[92] According to Fusion and Elasah, this (new) feature takes construction guarantees outside the ambit of “guarantees” as defined in Schedule 2, Table 2 of the Insurance Act, i.e., covering loss resulting from the direct or indirect failure of a person to discharge an obligation.

[93] It is incorrect to say that the liability of a guarantor to an employer under a construction guarantee is wholly independent from the liability of the contractor under the construction contract. The guarantee is, after all, a guarantee for performance by the contractor under the construction contract. Payment under the guarantee will be made only if the employer produces the prescribed documents, which may include a payment certificate or a certificate of practical completion, evidencing the amount due by the contractor to the employer. The loss is this amount, resulting from the contractor’s failure.

[94] The so-called "*principle of independence*" is not a feature of the guarantee issued by Fusion. The example of a guarantee attached to Fusion's affidavit as "FA22" states the following in paragraph 5:

"5. ... *the Guarantor (Fusion) undertakes to pay the Employer the Guaranteed Sum or the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor ... calling up this Performance Guarantee, such demand stating that:*

*5.1 the contract has been terminated due to the Contractor's default, and the Performance Guarantee is called up in terms of 5, or ..."*

[95] The suggestion that an Elasah/Fusion guarantee will be paid on demand for no reason or on the occurrence of an event that was planned or certain when the construction guarantee was entered into is nowhere relied on in any of the affidavits delivered by Elasah and/or Fusion or any contract provided by them.

[96] In amplification, paragraph 2 of the performance guarantee, under the heading "Period of Liability," stipulates that the guarantee covers the entire project period. This is yet another indication that the guarantor's obligations to the employer are linked to the contractor's performance throughout the entire project period.

[97] Providers of non-life insurance in the form of construction guarantees are required by law to be licensed under the Insurance Act because those contracts constitute the provision of non-life insurance policies as defined in the Insurance Act. This is not merely the “official view” as referred to by Fusion, it is, in fact, the law.

[98] The correct question is whether particular construction guarantee constitutes guarantee policies in respect of the STIA and non-life policies under the Insurance Act. The deliberate setting up of a guarantee in the context of what is contained in the Elasah application and in relation to Fusion’s business does not exclude the application of the Insurance Act.

[99] There can be no accurate generic description of construction contracts. Contracts must be considered on their own terms. Some contracts require that the work be completed before payment is made; others provide for interim payments; and the variety of construction contract forms is wide. Before this court are the applications by Fusion and Elasah, which require consideration.

[100] The presence of a counter-guarantee by the contractor does not convert a guarantee policy into something else. In short, it does not remove the indemnification-of-loss element, as the loss indemnified remains the loss the employer paid before any bi-party counter-guarantee obligation comes into being.

[101] Construction guarantees in the context of the Elasah application and with regard to Fusion's business are insurance policies if they indemnify a loss which the employer might suffer because the contractor fails to perform in terms of the relevant construction contract. This is the "*unplanned or uncertain event*" in the definition of non-life insurance policy.

[102] It is not required that the terms "policies" and "premiums" be used. If the guarantee conforms to the definition of a non-life insurance policy, it will constitute such a policy irrespective of the terminology used in the documentation or how it may be called colloquially.

[103] Similarly, if a consideration conforms to the definition of "premium", being "*any direct or indirect, or partially or fully subsidised, consideration given or to be given in return for an undertaking to meet the insurance obligations*", then it is a premium, notwithstanding whether it is called a fee or by another name. Fusion is mistaken to say that these terms are unknown in the "guarantee industry". The guarantor in *Fusion*, being Fusion, which dealt with construction guarantees in the construction industry, specifically used the term "premium".<sup>12</sup>

[104] Fusion's attempt to place its current guarantees before this court to obtain validation of those guarantees and to escape the obligations imposed on it by the Insurance Act. As the purpose of the Insurance Act

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<sup>12</sup> *Fusion* at para 3.10

is the same as the purpose of the STIA, this attempt by Fusion must fail, and the Fusion application must be dismissed.

The counter application:

[105] In terms of the provisions of section 152 of the Financial Sector Regulation Act 9 of 2017, the FSCA lodged its counter-application to obtain a declarator that the Fusion guarantees constitute non-life insurance policies as defined in section 1 of the Insurance Act and that the issuing of the Fusion guarantees constitutes the conduct of insurance business as defined in section 1 of the Insurance Act.

[106] Section 152(1) of the Financial Sector Regulation Act 9 of 2017 permits the FSCA to institute proceedings in the high court for an order to ensure compliance with financial sector law. In terms of section 152(2), the court may grant such an order, even if there is another remedy available, if:

- a. It is apparent that the person against whom proceedings have been instituted is engaging in or proposes (intends) to engage in conduct that contravenes a financial sector law.
- b. The person against whom proceedings have been instituted has previously engaged in such conduct; or
- c. There is a risk of significant or irreparable harm, prejudice, or damage if the person engages in conduct that contravenes a financial sector law.

[107] It is the FSCA's case that Fusion is acting in contravention of section 5(1) of the Insurance Act by issuing Fusion guarantees without authorisation to do so. Similarly, it is contended that the construction guarantees identified by Elasah in its founding affidavit in the main proceedings constitute non-life insurance policies as defined in section 1 of the Insurance Act and that their issuing constitutes the conduct of insurance business as defined in section 1 of the Insurance Act. The FSCA's case is that the issuing of construction guarantees without authorisation to conduct insurance business constitutes a breach of section 5(1) of the Insurance Act and therefore unlawful.

[108] Apart from the declarators sought, the FSCA also seeks an order interdicting Fusion from issuing the Fusion guarantees.

[109] The question is whether the Fusion guarantees and the construction guarantees (as referred to by Elasah in its founding affidavit) satisfy the definition of guarantees in the Insurance Act. The answer to this question, as already discussed above, is that it indeed satisfies the definition of a guarantee.

[110] It is Fusion's case that the type of guarantees resorting under the Insurance Act are those that cover loss and are separate and distinct from the guarantees issued by Fusion. Fusion contends that the current Fusion guarantees constitute a product offering that does not seek to

cover loss, are not Class 13 guarantees, need not be issued by a licensed insurer, and may be issued by an entity such as Fusion.

[111] In the guarantees relied on by Fusion, all payments are subject to demand. Fusion's contractual obligation to pay is triggered by receipt of the demand and/or documents mentioned in the guarantee, without any loss requirement or assessment. According to Fusion, its guarantees do not give rise to insurance obligations covering loss caused by defined events; consequently, as scrutiny of Fusion's guarantee wordings shows, they neither cover nor inquire into loss. It is Fusion's case that the current Fusion guarantees are independent of the relationship between employer and contractor and are not concerned with the establishment of loss; its obligation arises from its contractual obligation to pay irrespective of whether loss has occurred.

[112] It is the submission of Fusion and Elasah that the contract between the contractor and the guarantor does not constitute a contract of insurance under the common law, and it does not meet the requirements of the Insurance Act. Rather, it satisfies all the essential elements of a common law loan agreement and complies with the NCA's provisions.

[113] On an analysis of the definition of a 'non-life insurance policy' in section 1 of the Insurance Act, a non-life insurance policy has the following attributes:

- a. The payment of, or arrangement to pay, a **premium**;
- b. An undertaking to meet an **insurance obligation**;
- c. The **indemnification of loss**; and
- d. The occurrence of an **uncertain risk**.

[114] A 'premium' is defined as consideration given, whether directly or indirectly, and whether partially or fully subsidised, **in return for an undertaking to meet insurance obligations**.

[115] 'Insurance obligations' are defined as **all obligations** (other than the obligations of the policyholder), whether those obligations constitute an obligation to pay one or more sums of money, render services or **meet any other obligations**, under or arising from insurance policies, and, in respect of life insurance policies, include any guarantees and discretionary features.

[116] A 'policy holder' is defined as a person (or its successor in title) who enters into an agreement with an insurer, for the provision of a life insurance policy or a non-life insurance policy.

[117] The inquiry into whether the issue of the Fusion guarantees and the construction guarantees relied on by Elasah constitute insurance business as defined in the Insurance Act is a factual one. This is the case that the FSCA must meet to obtain the declarators in the counter application.

[118] In the paragraphs hereunder, I address the Fusion guarantees and the construction guarantees relied on by Elasah, and analyse them against the definition of a 'non-life insurance policy' in section 1 of the Insurance Act.

Payment of premiums:

[119] Fusion relies on charging a "contractor fee" for its services and remains adamant that it is not a premium. It is irrelevant whether Fusion labels this payment as a contractor fee for the alleged credit it extends.

[120] In terms of the definition of 'premium' in section 1 of the Insurance Act, it means any direct or indirect, or partially or fully subsidised, consideration given or to be given in return for an undertaking to meet insurance obligations.

[121] Fusion provided a full explanation of the elaborate process involved prior to issuing the Fusion guarantees. For me, it is clear from all the considerations given by Fusion prior to what it describes as a credit facility that the fee payable to Fusion satisfies the definition of a premium under the Insurance Act.

An undertaking to meet an insurance obligation:

[122] In its founding affidavit, Fusion describes its undertaking as an undertaking by Fusion to pay an agreed amount to an employer upon

demand and the production of prescribed documentation. This description is consistent with what is contained in paragraph 4 of the guarantee attached as "FA22".

[123] I agree with the FSCA that the requirement of "an undertaking to meet insurance obligations" is therefore satisfied, because it is an undertaking to pay the employer a sum of money in terms of an agreement which meets the requirement of the definition of a non-life policy, and more particularly a guarantee policy referred to in Table 2 to Schedule 2 to the Act.

The indemnification of loss:

[124] As an example, prayer 5 of "FA22" reads as follows:

*"5 ... the Guarantor (Fusion) undertakes to pay the Employer the Guaranteed Sum or the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor ... calling up this Performance Guarantee, such demand stating that:  
... 5. 1 the contract has been terminated due to the Contractor's default and that the Performance Guarantee is called up, or ...."*

[125] Fusion clearly undertakes to indemnify loss or liability where a contractor concludes a contract with Fusion, in terms of which Fusion undertakes to indemnify the employer (which is a third party) against specified losses that might come about as a result of the contractor's default.

The occurrence of an uncertain risk:

[126] Logically, the occurrence of an uncertain effect would, by all probabilities, be the default on the part of the contractor.

[127] "FA22" record this as the event of the contract being terminated due to the contractor's default ("failure to perform an obligation") or the grant of a provisional or final sequestration or liquidation order against the contractor ("insolvency").

[128] I am satisfied that Fusion's current guarantee business reveals that the guarantees issued by Fusion meet the criteria for non-life insurance business as defined by the Insurance Act. As such, Fusion must be registered as a licensed insurer under the Insurance Act, and it therefore operates in breach of section 5(1) of the Insurance Act.

[129] Elasah failed to provide any meaningful response to the FSCA's counter application, as Elasah's answering affidavit is virtually a verbatim repetition of what is contained in its founding affidavit. Elasah failed to provide any meaningful response to the FSCA's counter-application. I am, in any event, satisfied that the construction guarantees that Elasah refers to in its founding affidavit are non-life insurance policies. To highlight this conclusion, "JCR8" and "JCR11" attached to Elasah's founding affidavit make reference to the terms "premium" and "policy" and are signed by "underwriters". Elasah's allegation that there

is a counter-indemnity relationship between the guarantor and the contractor is misplaced and finds no application herein.

[130] On a reading of the papers, in conjunction with the provisions of section 152 of the Financial Sector Regulation Act 9 of 2017, I am satisfied that the FSCA has satisfied the requirement for a final interdict.

[131] As to costs, all parties employed two counsel. Such employment was justified in this application. I am further of the view that costs on Scale C would be appropriate.

Order:

Consequently, I make the following order on the **main application**:

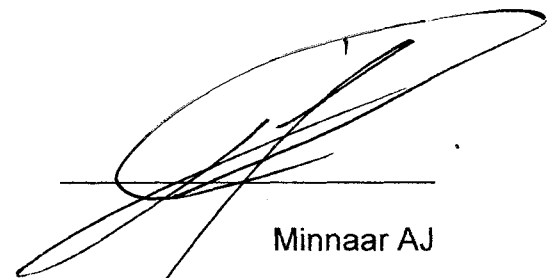
1. The application is dismissed.
2. The first and second applicants in the main application, jointly and severally, the one paying the other to be absolved, are to pay the costs of the main application, which costs are to include costs as occasioned by the employment of two counsel.

The following order is made in the **counter application**:

1. It is declared:
  - 1.1 The guarantees currently being issued by the second respondent and identified in its founding affidavit ("the Fusion Guarantees") constitute non-life insurance as defined in section 1 of the Insurance Act.
  - 1.2 The issuing by the second respondent of the Fusion Guarantees constitutes the conduct of insurance business as defined in

section 1 of the Insurance Act.

- 1.3 By issuing the Fusion Guarantees without a license to conduct insurance business, the second respondent is acting in breach of section 5(1) of the Insurance Act.
- 1.4 The construction guarantees identified by the first respondent in its founding affidavit (“the Elasah Guarantees”) constitute non-life insurance policies as defined in section 1 of the Insurance Act, and the issue of such guarantees constitutes the conduct of insurance business as defined in section 1 of the Insurance Act.
  - a. Issuing construction guarantees in the absence of a licence issued in terms of the Insurance Act to conduct insurance business constitutes a breach of section 5(1) of the Insurance Act and is, in consequence, unlawful.
2. The second respondent is interdicted from issuing the Fusion Guarantees.
3. The first and second respondents in the counter application, jointly and severally, the one paying the other to be absolved, are to pay the costs of the counter application, which costs are to include costs as occasioned by the employment of two counsel.



Minnaar AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard on : 22 October 2025  
For the first applicant : Adv P F Louw SC with Adv N Daniels  
Instructed by : L Cirone Attorneys at Law  
For the second applicant : Adv E van Vuuren SC with Adv N Daniels  
Instructed by : CHM Attorneys  
For the first respondent : No appearance  
For the second respondent: : Adv C Loxton SC with Adv N Muvangua  
Instructed by: : Norton Rose Fullbright South Africa Inc  
For the third respondent: : Adv V Maleka SC with Adv L Mtukushe  
Instructed by: : MacRoberts Attorneys Inc  
Date of judgment : 23 March 2026