

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-071369

|             |                                                                                   |
|-------------|-----------------------------------------------------------------------------------|
| (1)         | REPORTABLE: NO                                                                    |
| (2)         | OF INTEREST TO OTHER JUDGES: NO                                                   |
| (3)         | REVISED: NO                                                                       |
| 19 May 2025 |  |
| DATE        | SIGNATURE                                                                         |

In the matter between:

**DAVIS & DEALE IRRIGATION (PTY) LTD**

First Applicant

**XYLEM WATER SOLUTIONS SOUTH AFRICA (PTY) LTD**

Second Applicant

**SENSUS SOUTH AFRICA (PTY) LTD**

Third Applicant

and

**THE CITY OF EKURHULENI METROPOLITAN**

First Respondent

**MALAKA SUPPLIES CC**

Second Respondent

**PPD ENGINEERING & HARDWARE SUPPLIERS CC**

Third Respondent

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**JUDGMENT**

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## **N S KRÜGER AJ:**

### *Summary*

*Interim interdict on motion sought pending review application-Organ of State-statutory duties- National Treasury and others v Opposition to Urban Tolling Alliance and others 2012 (6) SA 223 (CC)- only in exceptional cases and when a strong case for that relief has been made out- malice required- fraud alleged- inferences required to be drawn- causation- imminent irreparable harm- balance of convenience*

### *Introduction*

- [1] For the sake of convenience I refer herein to the first applicant as D&D, the first respondent as CEM, the second respondent as Malaka and the third respondent as PPD.
- [2] On 2 September 2022 CEM called online for bids on tender for the supply, delivery and off-loading of various sizes of water meters and related material on an 'as-and-when' required basis. D&D is one of several parties which bid for appointment as the service provider to supply, deliver and/or offload water meters and related material in competition with Malaka.
- [3] Following upon the tendering process, CEM entered into a Service Level Agreement with Malaka on 19 April 2023 for the supply, delivery and off-loading of various sizes water meters on an 'as and when required' basis. It continues until 30 June 2025 ("*the contract*").
- [4] D&D was displaced as the incumbent contracting party, from 2017 until 2022, to whom a contract had previously been awarded for the supply of water meters and water meter boxes
- [5] The applicants issued an application on or about 20 July 2023 consisting of Part A interdicting Ekurhuleni Metropolitan from ordering, installing and/or purchasing any above ground water meter boxes from Malaka and the third respondent pending the outcome Part B. In the latter part, the applicants seek an order setting aside CEM's decision and award of a contract for the supply, installation and/or purchasing of above ground water meter boxes to Malaka

and PPD. An amended notice of motion was filed on 4 October 2023. It differs from the initial notice of motion in that Part B now provides for the review and setting aside of the contract.

- [6] The second and third applicants were cited only because they were considered to have a real and substantial interest in the matter. Neither seeks relief against the respondents. There was no appearance for PPD from whom, according to the D&D, Malaka sourced meter boxes towards the execution of its obligations to CEM.

*The parties' submissions and arguments in summary*

- [7] D&D alleges CEM acted unlawfully in awarding the tender and concluding the contract with Malaka. In doing so, CEM had infringed upon D&D's constitutional rights as well as its rights provided for in the *Preferential Procurement Policy Framework Act*<sup>1</sup> (PPPFA). The water meters and boxes manufactured by PDD did not meet the technical specifications published in the bid documents whilst those manufactured by D&D did. According to D&D, CEM conceded that Malaka's water meters and boxes did not meet the required technical specifications. They are also inferior to the water meter boxes previously supplied by D&D. CEM ought to have rejected Malaka's bid on that basis, and no contract ought to have been concluded with it. CEM had given Malaka preferential treatment and continues doing so in that it allowed for the improvement of the water meter boxes offered to comply with the specifications ordered.
- [8] At the hearing, counsel for D&D introduced a further ground which was not relied upon before. It was alleged an interim order should be granted due a fraud. In a nutshell it was submitted that an analysis of several documents is indicative of a fraud having been perpetrated as a consequence of which the tender was awarded to Malaka and the contract entered into.
- [9] In essence CEM's case is that the tender process was done in a manner that was just, equitable, transparent, competitive as well as cost effective as

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<sup>1</sup> 5 of 2000

required by law. It has a statutory duty to manage water resources to ensure sustainable and effective water use. This requires, amongst others, the ability to meter and tariff water use. The effect of interim order sought will restrain CEM from exercising its statutory duties. It was argued on behalf of CEM that no evidence was presented that D&D was unfairly treated or that its rights were impugned upon. Nor is there evidence that Malaka's product fails to meet the specifications of the revised bid documents. In any event, the contract is weeks away from its termination date. It was submitted that D&D failed to establish a *prima facie* right as it did not show good prospects of success in the review prayed for in Part B of the application, or that it would suffer imminent irreparable harm should the interim interdict not be granted.

[10] Counsel for CEM submitted that even if it is found there exists good prospects of success in the review, the award of the tender and conclusion of the contract might not be awarded to D&D. The fact of the termination of the contract in the very near future is pertinent in this regard. There is no evidence that in the time left there is any requirement for further meters to be installed. Some two years had lapsed since the conclusion of the contract during which time Malaka performed its obligations. A number of constitutional rights, values and obligations which is established will be negated should an interim order be granted at this late stage. D&D had failed to establish that for the past several years it had suffered any harm, or that it will continue suffering harm in the little time of the contract left that could not be compensated by a monetary award and/or damages should the review be successful. In having allowed so much time to pass since the conclusion of the contract, any prejudice D&D may suffer is outweighed by the prejudice CEM and the community it is constitutionally obliged to serve will suffer should the interim interdict be allowed.

[11] In a nutshell, Malaka's case is that the contract was awarded lawfully in accordance with the provisions of section 217 of the Constitution<sup>2</sup> as well as the relevant provisions of the PPPFA.<sup>3</sup> In awarding the contract, CEM's assessment of the bids was not only informed by the specification of the water meter boxes, but also by the lowest price which was offered in Malaka's bid.

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<sup>2</sup> 108 of 1996

<sup>3</sup> Section 2(1)(a), (c), (d), €, (f) and (g)

Any opportunity provided to Malaka to improve its water meter boxes was not unlawful as it would be in compliance with the provisions of the PPPFA.

### *Consideration*

- [12] The requisites for granting of an interim interdict as set out in *Setlegelo v Setlegelo*<sup>4</sup> more than a century ago in *Webster v Mitchell*<sup>5</sup> is well settled. It has been confirmed, amongst many others, by the Constitutional Court in *National Treasury and others v Opposition to Urban Tolling Alliance and others*<sup>6</sup> as well as the Supreme Court of Appeal.<sup>7</sup> An applicant is required to establish: (a) a *prima facie* right, albeit open to some doubt; (b) a well-grounded reasonable apprehension of irreparable and imminent harm occurring if an interim interdict is not granted and final relief is ultimately granted; (c) the balance of convenience should favour the applicant; and (d) the absence of any other satisfactory remedy. For an interim interdict to be granted all these requisites must be shown to be present on a balance of probabilities. They are not judged in isolation and are interactive as part of the wide discretionary nature of an interim interdict.<sup>8</sup>
- [13] In *National Treasury* it was held that the test must be applied cognisant of the normative scheme and democratic principles which underlies constitutional principles. When considering whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purpose of the Constitution. In reference to the full court decision in *Gool v Minister of Justice and Another*<sup>9</sup> the principle that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out.<sup>10</sup> For an applicant to succeed in a matter where the order sought will restrain the exercise of statutory powers it will not

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<sup>4</sup> 1914 AD 221 at 227

<sup>5</sup> 1948 (1) SA 1186 (W)

<sup>6</sup> 2012 (6) SA 223 (CC) at [41]

<sup>7</sup> *KSL v AL* 2024 (6) SA 410 (SCA) at [16]; *National Commissioner of Police and another v Gun Owners of South Africa (Gun Free South Africa as amicus curiae)* [2020] 4 All SA 1 (SCA) at [36]

<sup>8</sup> *Cliff v Electronic Media Network (Pty) Ltd and another* [2016] 2 All SA 102 (GJ); *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T) at 54E

<sup>9</sup> 1955 (2) SA 682 (C) at 689B-C

<sup>10</sup> *National Treasury* at [44]

readily be granted in the absence of *mala fides* having been shown save in the clearest of cases.<sup>11</sup>

[14] Everyone has the right to sufficient water in terms of Chapter 2 of the *Constitution*<sup>12</sup> and the state is enjoined to take reasonable measures to achieve the realisation of this right.<sup>13</sup> Delivery of water and sanitation services is the responsibility of local government.<sup>14</sup> There is no doubt CEM has a statutory duty to meter and tariff use of water to enable Integrated Water Resource Management in ensuring sustainable and effective water use. In consequence, the plaintiff bears the onus to prove that the CEM had acted with malice in awarding the contract to Malaka.

[15] It is not surprising, in light of the above, for the applicant's counsel to have sought arguing that a fraud had been perpetrated in the awarding of the contract. It was not raised in the applicant's affidavits, nor was it relied upon in the applicant's heads of argument. Fraud, to which it was contended the CEM was a party, was first raised during argument before Court on the papers as it stood.

[16] The high water mark of the applicant's case as set expressly out in its affidavit is that bidders such as Malaka, in not ensuring its product is 100% compliant with the technical specification prior to lodging their bid, had acted dishonestly by misleading the CEM and other bidders. Applicant's counsel endeavoured to persuade me, on the papers as it stood, that a fraud had been perpetrated to which the CEM's representatives were a party.

[17] The theory advanced by the applicant at the hearing is that, on a balance of probability, the representation of Malaka that its PPD boxes met the specifications set in the tender documents was fraudulent and that CEM was party to such misrepresentation. D&D's counsel endeavoured to do so by extensive reference to a multitude of documents, the contents of which it was

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<sup>11</sup> *Public Protector v Speaker of the National Assembly and others* [2020] 4 All SA 776 (WCC) at [18]

<sup>12</sup> 108 of 1996, section 27(1)(b).

<sup>13</sup> Above, section 27(3)

<sup>14</sup> Section 1 of the *National Norms and Standard for Domestic water and Sanitation Services* (GN 982 in GG 41100 of 8 September 2017 published in terms of the *Water Services Act* 108 of 1998

submitted substantiate the argument that a fraud had been perpetrated in the awarding of the tender and conclusion of the contract as it was.

[18] It is not within the ambit of this judgment to consider all the elements to establish fraud in criminal or civil law and the minutiae of differences across various fields of law where fraud and its associated forms exist. Generally, it requires, whether in criminal<sup>15</sup> or civil law,<sup>16</sup> at least proof of the alleged perpetrator having acted unlawfully in making a false representation with the intention to deceive which causes actual prejudice or which, in criminal law and delict<sup>17</sup>, is potentially prejudicial to another. In the law of contract, the requirements are, amongst others, that the perpetrator must have made a false representation knowing it to be so with the intention of inducing a representee to act in accordance with the misrepresentation.<sup>18</sup>

[19] Loss of profit suffered by an unsuccessful tenderer as a result of dishonesty and fraud is claimable in delict, should all the other requirements of delict be met as confirmed by the Supreme Court of Appeal in *Transnet v Sechaba Photoscan*.<sup>19</sup> It was followed in *Esorfranki*.<sup>20</sup>

[20] The applicant's endeavour to establish a fraud to have been perpetrated requires the Court to draw a multitude of inferences to arrive at such a conclusion.

[21] Regarding criminal trials where inferential reasoning is required upon circumstantial evidence this well-known passage in *R v Blom*<sup>21</sup> deserves attention:

*"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:*

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<sup>15</sup> Burchell *Principles of Criminal Law* 742; *Snyman's Criminal Law* 461

<sup>16</sup> In contract or delict, for example.

<sup>17</sup> *Esorfranki (Pty) Ltd v Mopani District Municipality* at [88]

<sup>18</sup> See *Quartermark Investments (Pty) Ltd v Mkhwanazi and another* [2014] 1 All SA 22 at 23; (SCA); *Ruto Flour Mills (Pty) Ltd v Moriates* 1957 (3) SA 113 (T); *Hulett v Hulett* [1992] 2 All SA 308 (A) at 324

<sup>19</sup> 2005 (1) SA 299 (SCA) at [16]

<sup>20</sup> At [91]

<sup>21</sup> 1939 AD 388 at 202 - 203

*(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*

*(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”*

[22] As regards civil cases the Supreme Court of Appeal found as follows:

*“(T)he court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the two cardinal rules of logic referred to by Watermeyer JA in R v Blom is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most plausible or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If, on the other hand, an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof.”<sup>22</sup>*

[23] Having regard to the essential elements required to establish fraud, it is unsurprising that fraud is not easily inferred. The more so, I daresay, in the absence of viva voce evidence at trial tested through cross examination and where a Court is able to assess the demeanour of witnesses. Furthermore, the respondents did not have the opportunity of specifically addressing allegations of fraudulent conduct in their affidavits as it was not expressly at issue in D&D’s papers. It is trite in motion proceedings that a founding affidavit is pleadings as well as evidence in which the cause of action, as it were, should be properly pleaded.

[24] For fraud to be established, the elements required to be proven include culpable conduct of the perpetrator as well as causation. *Dolus* is an entirely subjective element which requires an investigation as to the mind-set of a perpetrator. To do so on paper only is fraught with danger, the more so in the circumstances prevailing in this matter. In my view *dolus* is not the most

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<sup>22</sup> *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1027E – 1028A



probable inference that might be drawn on the facts as it stands. Assuming there was a misrepresentation, it is equally likely that it may have been the result of sheer incompetence or negligence. It may also have been innocently made, or upon an incorrect interpretation of the tender and its requirements as well as the tendering process.

- [25] Even if it is assumed for the purposes of argument that a misrepresentation had been made with the intention to deceive, it is equally likely that the CEM's bid adjudication committee, which is the entity deciding to award a tender, was not part of any misrepresentation, if not the bid evaluation committee. Both factual and legal causation must be shown by D&D. Much has been written about the concept of causation. It is not as easily determined as one might think. It involves the concept of factual as well as legal causation. In *International Shipping Co (Pty) Ltd v Bentley*<sup>23</sup> it was framed as follows:

*"The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part..."*

- [26] The court approvingly quotes from *Law of Torts*<sup>24</sup> the following:

*"The second problem involves the question whether, or to what extent, the defendant*

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<sup>23</sup> 1990 (1) SA 680 (A) at 700ff. See *Heyns v Venter* 2004 (3) SA 200 (T) at [9] to [11]

<sup>24</sup> Fleming, 7<sup>th</sup> Edition at 173

*should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default."*

- [27] In essence the issue is the extent to which liability might be limited for conduct which factually resulted in the loss suffered particularly with regard to remoteness. A compromise is to place emphasis on whether a sufficiently close connection exists between the harmful conduct and its factual result having regard to the circumstances of the case, and policy considerations such as fairness, reasonableness and justice.<sup>25</sup> In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*<sup>26</sup> it was held that such a compromise is not a substantive test as what is fair, reasonable and just which may be too dependent on a judge's subjective idiosyncrasies and should be limited in its application.<sup>27</sup> The court held as follows:

*"...the existing criteria of foreseeability, directness, et cetera, should not be applied dogmatically, but in a flexible manner so as to avoid a result, which is so unfair or unjust that it is regarded as untenable. If the foreseeability test, for example, leads to a result which will be acceptable to most right-minded people, that is the end of the matter."*<sup>28</sup>

- [28] The Court in that matter applied both the direct consequences approach and the foreseeability approach to the facts and found that in either case the harm was not too remote and imposing liability on the wrongdoer was not in any way untenable. In doing so, considerations of fairness and equity *"...were not used as a means to determine whether liability should be imposed, but rather to*

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<sup>25</sup> *S v Mokgethi* 1990 (1) SA 32 (A) at 40Iff

<sup>26</sup> [2009] (1) All SA 525 (SCA) at [31]

<sup>27</sup> Above at [33]

<sup>28</sup> Above at [34]

*assess whether the application of the tests produced an acceptable result.*"<sup>29</sup>

Various factors may be taken into account such as directness, reasonable foreseeability; fairness, justice, reasonability, legal policy and the absence or presence of a *novus actus interveniens*.<sup>30</sup>

[29] With the above in mind, I cannot agree the evidence before me in the prevailing circumstances enable the drawing of inferences to the extent it may be held probable that any misrepresentation are causally linked to the consequences as D&D's counsel contends.

[30] In the result I decline to draw the inferences required for D&D's contention to be justified. I am not satisfied fraud has been adequately established. It seems to me for much the same reasons *mala fide* conduct has not been shown to exist in the awarding of the contract to Malaka. In the result, the application for an interim interdict must fail.

[31] Even if I am wrong, it is my view that the application for an interim interdict must fail in that D&D has not met the threshold of establishing at least some of the requirements needed.

[32] From *Sechaba* and *Esorfranki* it is clear that a claim in delict is available to an unsuccessful bidder for loss of profit. In *Sechaba* the plaintiff (respondent on appeal) *a quo* had claimed damages for loss of prospective profits suffered upon the award of a purchase contract to another following a fraudulent tender process. The defendant *a quo* (appellant) had conceded damages had been suffered and that it was liable for it. The only question remaining was the quantum of damages. In the course of its judgment the Court found the idea that loss of profit was not recoverable in delict was unfounded. The award of delictual damages seeks to compensate the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained but for the delict.<sup>31</sup> The appeal was dismissed.

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<sup>29</sup> Van der Walt & Midgley *Principles of Delict* Fourth Edition par 181 and the judgments there cited as well as their valued interpretation

<sup>30</sup> *Standard Chartered Bank of Canada v Nedperm Bank Ltd* [1994] 2 All SA 524 (A) at 537

<sup>31</sup> *Sechaba* at [15] and [16] The Court observed there is no practical value in the distinction between positive and negative interesse in the calculation of damages.

- [33] In *Esorfranki* the plaintiff, an unsuccessful tenderer for the construction of a water pipeline for the Mopanu District Municipality, alleged the contract was awarded to another as a result of wrongful and intentional conduct amounting to dishonesty and fraud. In consequence it alleged it had suffered a loss of profit as a result and claimed damages in delict from the municipality and the successful tenderer. The trial court *a quo* found in favour of the defendant. On appeal the Supreme Court of Appeal confirmed *Sechaba*.<sup>32</sup> It found the decision maker had acted deliberately and dishonestly, with bias in favour of the successful bidder and that it had acted in bad faith with an ulterior motive as well as fraudulently. However, the appeal was dismissed because the majority found the appellant had failed to establish causation in linking the harm suffered by the appellant to the municipality's wrongful and unlawful conduct.<sup>33</sup>
- [34] In its heads of argument, the applicant submitted that a suitable alternative remedy in claiming damages was not feasible because of the practicalities of such a claim. The reasons advanced were that harm suffered by D&D is ongoing and accumulating over time. It has a duty to mitigate its losses. Practically it cannot compute the quantum of its damages on a sliding scale over an indefinite period. Nothing further of any consequence was raised during argument before Court in this regard.
- [35] I disagree with D&D's submissions regarding the availability of an alternative suitable remedy. In my view the applicant has a suitable alternative remedy at its disposal, namely a claim for loss of profit in delict. I can find no adequate reason as to why D&D would be unable to establish its quantum of damages adequately for the purposes of issuing summons, followed by possible confirmation and perhaps amendment upon discovery and the like. Mitigation of damages is for a defendant to rise. It bears the onus of proving that a plaintiff ought to have prevented an accumulation of loss, which our courts are circumspect in upholding. The duty to mitigate goes no further than to require an injured party to act reasonably regard being had to the prevailing

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<sup>32</sup> *Esorfranki* at [91]

<sup>33</sup> *Esorfranki* at [102]ff. See the judgment of Mbatha JA at [142] regarding different grounds for the failure to establish causation.

circumstances.<sup>34</sup> In my view, in the circumstances of this case, reliance on a duty to mitigate damages is more apparent than real in justifying the absence of a suitable alternative remedy.

[36] The test as to whether the apprehension of imminent irreparable harm is well-grounded is objective. In other words, if a reasonable person in the prevailing circumstances consider irreparable harm will follow should interim relief not be granted and the final relief prayed for be granted in due course.<sup>35</sup>

[37] I am not persuaded the applicant has shown on the papers that it had or is suffering irreparable and imminent harm in consequence of the continuing execution of the contract. Firstly, there is no evidence before Court that the applicant is suffering any harm at all. It is the applicant's case as recorded in its heads of argument that it is faced by threat of irreparable harm which is financial in nature. It is alleged it will suffer a significant loss of income. Secondly, there is no evidence that should the order be granted, the contract would revert to them. To the contrary, should the contract be set aside, the result would be that there is no service provider to step into Malaka's shoes and there would be nobody from which the order and/or purchase the supplies or to install same as was required as per the contract. For a new service provider to be appointed, the process by virtue of which a service provider might be contracted with would have to start afresh, save perhaps where an emergency requires the urgent appointment of someone to execute the duties envisaged. There is no evidence of any emergency or urgency in making an appointment in the immediate future.

[38] For that matter, there is no compelling evidence before me that on a balance of probabilities the contract would have been awarded to the applicant had the award not been made as it was. What is more, it is common cause between the parties that the contract was on an 'as and when required basis". There is no evidence before this Court as to when meters would be installed and in particular, if any were to be required and/or installed in the time remaining for

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<sup>34</sup> *De Pinto v Rensea Investments (Pty) Ltd* 1977 (2) SA 1000 (A) as amended in *De Pinto v Rensea Investments (Pty) Ltd* 1977 (4) SA 529 (A)

<sup>35</sup> *Weinert and another v Municipality of the City of Cape Town and others* [2023] 1 All SA 536 (WCC) at [12]

the duration of the contract. It follows that the applicant has failed to indicate irreparable harm and that it is imminent.

[39] I am of the view that the balance of convenience does not favour D&D. In *Public Protector v Speaker of the National Assembly and others* a full court held that where a Court is required to consider whether to grant an interim interdict, it must do so in a way that promotes the objects, spirit and purpose of the *Constitution*. Should an interdict now be granted, regard being had to the time left for the contract, it will serve little if any purpose.

### *Conclusion*

[40] By virtue of the view I take of the matter, I do not express any view in respect of any other issue pertaining to the requirements of an interim interdict. In particular I do not express any opinion as to the existence of a clear right.

[41] Having regard to what has been set out herein before and the conclusions I have come to, I make an order as set out below.

### **Order**

[42] Part A of the application as per the notice of motion for an interim interdict is dismissed:

[43] The first applicant shall pay the first and second respondents' costs of Part A of the application.



**N. S. KRÜGER**  
**NAME OF JUDGE**

**ACTING JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

***Electronically submitted***

Delivered: This judgment was prepared and authored by the Acting 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 of the judgment is deemed to be **19 May 2025**.

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|----------------------------|-------------------------------------------------------------|
| For the first applicant:   | Adv A Bishop instructed by Dewey Mclean Levy Inc            |
| For the first respondent:  | Adv K Potgieter instructed by Du Plessis, de Heus & Van Wyk |
| For the second respondent: | Adv T G Ngobeni instructed by Mabasa Attorneys              |
| Date of hearing:           | 13 March 2025                                               |
| Date of judgment:          | 19 May 2025                                                 |

