



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE

DATE: 17 September 2026

Case No. 2024-054193

In the matter between:

VIRTUAL GAS NETWORK (PTY) LTD

Applicant

and

**GAUTENG DEPARTMENT OF
INFRASTRUCTURE DEVELOPMENT**

Respondent

JUDGMENT

WILSON J:

- 1 The applicant, Virtual Gas Network (Pty) Ltd (VGN), applies for an award of over R200 million in damages flowing from what it says was the unlawful repudiation of its contract with the respondent, the Gauteng Department of Infrastructure Development (GDID). The dispute centres upon the supply of piped natural gas to ten public hospitals in Gauteng, the conversion of some of those hospitals' coal-powered furnaces to gas-powered furnaces, and the

installation of infrastructure, known as “daughter stations” at each of the hospitals so as to enable the gas piped to the hospitals to be stored and then pumped into the furnaces.

- 2 On 22 September 2015, GDID contracted with VGN for installation of daughter stations at, and the supply of natural gas to, four Gauteng hospitals for a period of three years. The gas was supplied and priced on the basis that GDID would pay for a minimum amount of gas to be made available to each of the hospitals, even if the hospitals did not use it. This was referred to in the contract as the “take or pay” principle. The clearest delineation of that principle emerges in paragraph 10.4 of the September 2015 agreement, which states that GDID “shall be obliged to, in each contract year, purchase, take or pay for” an “adjusted annual contract quantity”. That quantity is reached by taking the “annual contract quantity” and varying it by a method set out in the agreement which is not important for present purposes. The annual contract quantity was just under 410 000 gigajoules of gas.
- 3 However, it turned out that the four hospitals covered by the September 2015 contract did not use anything close to the volume of gas VGN tendered to supply, and GDID promised to pay for.
- 4 On 29 November 2016, therefore, the parties entered into an addendum, which extended the term of the initial contract, and expanded its scope. The idea appears to have been to enhance the capacity of Gauteng’s health infrastructure to the point at which it would be able to use the gas it had agreed to pay for. The addendum provided for the supply of natural gas to an additional six hospitals, together with the provision of infrastructure (in the form

of gas furnaces and daughter stations) to those hospitals to allow them to use the gas supplied. The period of the September 2015 agreement was extended by two years in relation to the four hospitals to which it applied. In relation to the other six hospitals, the duration of the contract for the supply of natural gas was specified as five years from the date on which certificates of completion of the enhanced infrastructure necessary to be installed at those hospitals were signed (see clause 4.1 of the addendum). VGN obtained a loan of R39 million from the Industrial Development Corporation to fund the construction of the additional infrastructure. Where I refer to the “the agreement” or “the contract” elsewhere in this judgment, I mean the September 2015 agreement and the addendum, read together.

- 5 Throughout this period, GDID regularly defaulted on its payment obligations. VGN obtained arbitral awards enforcing these obligations. The amounts due under the awards have now been paid, but the second award is of significance because it defined what VGN refers to as GDID’s “primary obligation” under both the original and the amended contract: that obligation, VGN says, is to pay, annually, for the use of just under 410 000 gigajoules of gas throughout the duration of the contract – whether or not that gas is actually used at any of the hospitals.
- 6 On 19 January 2023, GDID gave notice that it regarded the agreement as having expired in relation to six of the ten hospitals, and having either “not expired” or “not commenced” in relation to the other four. Though what exactly was meant by “expired”, “not expired” and “not commenced” is not clear on

the face of the 19 January 2023 notice, the final paragraph of the notice was unambiguous, in that it purported to terminate the whole agreement.

- 7 VGN did not accept that GDID was entitled to terminate the agreement. It regarded the agreement as not having run its course until five years after the additional infrastructure to be installed at the six hospitals covered by the addendum had been completed. VGN saw the 19 January 2023 termination as an unlawful repudiation. It accepted that repudiation and now claims contractual damages in the form of unpaid rental for daughter stations installed at certain of the hospitals, lost past and future profits resulting from GDID's failure to honour the contract, and interest on those amounts. VGN also seeks to recoup the value of interest payments it had to make on its IDC loan that would not have been due had GDID timeously satisfied an arbitral award VGN obtained for the payment of amounts due for gas supplied under the agreement.

Was the contract repudiated or terminated?

- 8 Much of the argument before me concerned the dispute about the impact the addendum had on the duration of the agreement. Clause 4.1 of the addendum states as follows –

“The period for the initial agreement is extended by a further 2 (two) years['] period and the additional sites will run for a period of 5 (five) years commencing from signing of the completion certificates”.

- 9 VGN says that the clause means what it says: the period of the agreement in respect of the four hospitals named in the September 2015 agreement was extended to five years, and the period of the agreement applicable to the six

hospitals named in the addendum was to run until five years after GDID certified that the infrastructure had been installed at the last of the six hospitals named in the addendum. Throughout this time, VGN contends, GDID assumed the “primary obligation” to purchase, annually, just under 410 000 gigajoules of gas (adjusted where necessary in line with the provisions of the September 2015 agreement).

- 10 GDID contends that the agreement subsisted for a maximum of five years from the date on which the addendum was entered into – that is, no later than 30 November 2021. The termination of the agreement on 19 January 2023 was accordingly no more than the affirmation of a state of affairs that came into being when the agreement expired by effluxion of time.
- 11 In my view, GDID’s interpretation of the effect of the addendum is untenable. It is in the first place inconsistent with the plain text of clause 4.1. But it also makes no sense in the context of the agreement as a whole, evaluated in its surrounding circumstances. In order to accept GDID’s interpretation, I would have to accept that the duration of the extended agreement was a fixed five-year period, and that it started to run on the day the addendum was signed.
- 12 But that makes no business sense. The sensible interpretation is that the duration of the extended agreement was triggered on the day the addendum was signed, but that this duration was an indefinite but ascertainable period. That period is equal to the length of time between the signature of the addendum and the certification of the completed infrastructure work on the last of the hospitals named in the addendum, plus five years. The underlying scheme of the agreement was clearly that VGN would place each of the ten

named hospitals in the position to use gas-fired furnaces for a period of five years, and that it would supply gas to GDID for use at the hospitals until five years after the last of the hospitals was placed in such a position.

- 13 GDID advanced no coherent argument to the contrary. I reject its contention that the agreement expired five years from the date on which the addendum was signed. It in fact seems to me that GDID's reference, in its notice of termination, to obligations under the agreement in respect of some of the hospitals having "not commenced" is a tacit acceptance that the agreement had a much longer shelf life than a fixed five year period. There is no indication in the text of the agreement, in its avowed or imputed purpose, or in the circumstances surrounding its conclusion, that GDID's rights and obligations in relation to each of the six hospitals named in the addendum were severable from one another, with the effect that GDID could resile from the agreement after work on one hospital had been completed but before work on another had started. The better view is that GDID's obligations under the agreement were indivisible – at least in relation to the six hospitals named in the addendum. As a consequence, the duration of the agreement continued until five years after the last of the work had been done and certified on the last of the hospitals.

- 14 It follows that GDID was not entitled to terminate the contract when it did, and that its notice of termination was, in fact, a repudiation of the agreement.

Was the decision to enter into the addendum unlawful?

- 15 In a counter-application, GDID contends that, if the duration of the agreement is as VGN alleges, then GDID's decision to enter into the agreement was

unlawful. It asks for an order reviewing and setting aside that decision. GDID also seeks certain other relief in the counter-application, including an order varying one of the arbitration awards, and an order declaring VGN to have been overpaid by GDID in the sum of almost R79 million. Mr. Khoza, who appeared with Mr. Chavalala for GDID, confirmed that GDID no longer persists with the application to vary the arbitration awards. Although GDID continues to press for the overpayment relief, I need not rule on that part of the counter-application, in light of the view I have taken on the determination of the quantum of VGN's claim.

- 16 The review was advanced on two bases. The first was that the addendum was unlawfully entered into because it expanded the scope of work awarded to VGN beyond the terms of the original request for proposals. The second was that the addendum had the effect of increasing the value of VGN's contract beyond the margin approved in a National Treasury Instruction said to be binding upon GDID. I address each point in turn.

The scope of the request for proposals

- 17 GDID has not been consistent in its submissions on this score. At paragraphs 8.1. 8.1.1 and 8.1.18 of its answering affidavit, GDID alleges that the initial request for proposals (RPF07/07/2014) invited bids in respect of the work covered in the addendum, and that this work was in fact awarded to VGN. However, the documents annexed to the answering affidavit do not support the inference that the scope of the work for which VGN originally tendered and for which it was appointed included the work identified in the addendum. The request for proposals itself is not annexed to the answering affidavit. The

documents that are annexed appear to confirm that the scope of work for which VGN initially tendered, and for which it was appointed, was limited to four hospitals, none of which is referred to in the addendum.

18 I queried this contradiction at the hearing of this matter convened on 15 May 2026. Mr. Louw, who appeared for VGN, contended that the situation was in fact as was described in paragraph 8 of GDID's answering affidavit: viz. that the request for proposals covered all the work for which VGN was ultimately contracted. This drew no response from Mr. Khoza.

19 Another hearing was held on 17 August 2026 to canvass further argument on GDID's review application, and to argue an application for leave to amend GDID's notice of motion. During that hearing, Mr. Khoza asserted that the request for proposals did not encompass the work covered in the addendum, and that the addendum unlawfully widened the scope of the work for that reason. However, despite being given a post-hearing opportunity to say where the request for proposals appears on the papers, or to apply for leave to introduce it, counsel for GDID did neither. Their case was in fact that the request for proposals appeared at annexure "D2" to the answering affidavit. But that was plainly erroneous. Annexure "D2" is in fact VGN's response to GDID's invitation to bid. It does not define the scope of the work for which VGN was invited to bid.

20 For his part, Mr. Louw argued in his post-hearing submissions that GDID must stand or fall by the version set out at paragraphs 8.1. 8.1.1 and 8.1.18 of its answering affidavit: viz. that the request for proposals did include the six hospitals identified in the addendum. Given the stance GDID has taken in this

case, I must agree. Notwithstanding the apparent tension between the version put in GDID's answering affidavit, and the annexures upon which it relies, GDID must be held to the version set out in the answering affidavit. On that version, the hospitals named in the addendum were within the scope of the work defined in the request for proposals.

- 21 The argument that the addendum exceeded the scope of that work must accordingly be rejected.

The treasury instruction

- 22 The treasury instruction was introduced to supplement GDID's review after the hearing of 15 May 2026. Understandably, VGN objected to its late introduction and to GDID's reliance upon it. On balance, given that GDID's case is fundamentally one of legality, it is in the interests of justice that I consider the instruction, since to do otherwise would risk adjudicating the case on the basis of a legal misconception.

- 23 In any event, I do not think the treasury instruction assists GDID's case. This is so for two reasons. The first is that, even assuming that the treasury instruction forbade GDID from entering into the addendum, the instruction itself cannot have the status of law. It is plainly an internal administrative document produced by a treasury official with no law-making powers. It was not published in the government gazette, and accordingly lacks the publicity necessary to ground a review application. In my view, legality review can only be sustained on the basis of publicly accessible legal rules which have been promulgated in accordance with a specific empowering provision. The treasury instruction lacks either of these attributes, and is, accordingly, not

“law” in the sense that can sustain a legality review of the kind GDID seeks to pursue.

24 To hold otherwise would risk blurring the distinction between law on the one hand, and policy or internal administrative practice on the other. Mr. Khoza argued that GDID is bound by the treasury instruction because section 76 of the Public Finance Management Act 1 of 1999 says so. That is true, but it does not follow that GDID is entitled to self-review its decision to enter into a contract in breach of one of those instructions. Self-review is a form of legality review. Legality review requires the reviewing party to show that the act being reviewed breaches a law. For the reasons I have already given, the treasury instruction is not “law” in this sense. It certainly binds GDID in its dealings with the treasury, but it does not entitle GDID to impugn its own conduct toward third parties, who cannot be expected to be aware of the instruction in advance, precisely because the instruction lacks the publicity that a promulgated law would have.

25 In any event, I do not think that it has been established that the decision to enter into the addendum was taken in breach of the treasury instruction. The treasury instruction forbids more than a 15% variation in the value of a government contract. For the reasons I turn to below, it has not been established that the addendum had this effect.

26 Accordingly, the counter-review must be dismissed. I have reached this conclusion without considering whether GDID’s self-review was unreasonably delayed, and whether it would have been appropriate to overlook any such delay in this case. Given the transparent lack of merit in the review, I would

have been hard-pressed to overlook the substantial delay in this case, but, because everything turned on GDID's prospects of success, it was in the interests of justice that I consider the review on its merits.

The quantum of VGN's damage

27 It follows from all this that GDID repudiated the agreement, and that VGN is entitled to be compensated for such damage as it may prove in consequence of that repudiation. The quantum of damage VGN claims on the papers before me depends on my accepting that the "primary obligation" to take or pay for just under 410 000 gigajoules of gas annually survived the parties' agreement to the addendum. Whether that is so is conceptually and practically distinct from the question of the duration of the agreement as a whole. If the agreement was supposed to subsist until five years from the installation of new infrastructure at the last of the hospitals named in the addendum, then it is clear that VGN is owed something in respect of the period between GDID's repudiation of the agreement and the point at which the contract would otherwise have come to an end. However, it does not mean that VGN is entitled to the quantum it claims in this application, since that quantum is calculated on the assumption that the "primary obligation" to take or pay for just under 410 000 gigajoules of gas annually survived the addendum, and that this "primary obligation" was meant to apply throughout the duration of the agreement.

28 The problem for VGN is that clause 5.1 of the addendum says this –

"5.1. The Parties agree that the take or pay principle as agreed upon in the [September 2015] Agreement as well as any reference to "Minimum Order Quantities" shall no longer be applicable and that [GDID] shall be

charged monthly the product and or compressed natural gas [sic] delivered for that specific month and shall only pay for the compressed natural gas delivered for that month.”

- 29 On its face, clause 5.1 of the addendum suggests that neither the obligation to purchase the adjusted annual contract quantity nor the “take or pay principle” entrenched in the initial agreement applies any longer to the overall agreement between the parties. In its answering affidavit, GDID is emphatic that this is exactly what the clause means (see especially paragraphs 180, 185, 187 and 192 of the answering affidavit).
- 30 VGN contends otherwise. It says that the effect of the clause was that “it did away with the **monthly** take or pay principle. But it did not amend the total **annual** [compressed natural gas] GDID had to order” (see paragraph 47 of VGN’s founding affidavit. The emphasis is in the original). VGN also relies on several other provisions of the September 2015 agreement which indicate that GDID’s primary obligation under both the main agreement and the addendum was to “purchase, take or pay” a minimum amount annually (see paragraphs 74 to 80 of the founding affidavit). VGN furthermore points out that, unless GDID was obliged to “purchase, take or pay for” a minimum amount of gas annually, the agreement would lack business efficacy, since VGN was bound to pay its own suppliers on the same “take or pay” principle. VGN also relies upon an arbitral award it secured in which it was confirmed, so VGN contends, that GDID’s primary obligation was to “purchase, take or pay” just under 410 000 gigajoules of gas annually. VGN says that award renders the issue *res judicata*. These arguments make sense on their own terms, but they do not accord with the plain text of clause 5.1 of the addendum.

- 31 Perhaps because GDID changed its counsel shortly before the hearing, the fundamental difficulty that arises from clause 5.1 of the addendum was overlooked. Understandably, VGN's papers gloss over that difficulty by pointing to terms of the September 2015 agreement and the surrounding circumstances which suggest that the take or pay principle was fundamental to the contract, and to the arbitrator's award which appears to adopt the view that the take or pay principle survived the addendum.
- 32 Less intelligible is GDID's counsels' lack of emphasis on difficulties clause 5.1 causes for the calculation of VGN's damages. This is despite clear and emphatic reliance on the text clause 5.1 in GDID's answering affidavit, to which VGN offers no specific reply.
- 33 In my view, however, the meaning of clause 5.1 is central to determining the value of VGN's claim. Fundamental to VGN's case is that GDID's primary obligation was to purchase a minimum amount of compressed natural gas for the duration of the contract between the parties. Indeed, it seems to me that the agreement may lack much of its business efficacy unless that obligation survived the addendum. On the other hand, clause 5.1 of the addendum clearly states that the take or pay principle was to be abandoned, and that GDID would henceforth only pay monthly for the amounts of gas actually "delivered" in a specific month.
- 34 I do not accept that I am bound by the second arbitral award on this question. That award was made on an unopposed basis, and did no more than accept VGN's submissions as to the proper interpretation of clause 5.1 of the addendum. Those submissions have never squarely addressed the textual

problems raised by clause 5.1. They either skirt around or seek to avoid them by reference to other provisions of the agreement, or to the second arbitral award. In these circumstances, GDID is right to submit, in its answering affidavit, that it is entitled to challenge VGN's submissions in these proceedings. To hold otherwise would require me to conclude that GDID is issue estopped from re-opening any controversy about meaning of clause 5.1 of the addendum. Given the amounts of public money involved, VGN's failure to face up to the problems that the text of clause 5.1 causes, and the fact that GDID has never been heard on this issue, I think that result would be inequitable (see in this respect *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA), paragraph 26).

35 It is by now trite that the interpretation of contracts is a unitary exercise which takes in to account the words used in a written agreement, the underlying purpose of that agreement, and the circumstances surrounding the striking of the agreement. Courts will generally be keen to adopt interpretations of contracts which have sensible and businesslike results (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18).

36 It seems to me that the plain text of clause 5.1 of the agreement is apparently incongruous with the underlying purpose and business efficacy of the agreement. This is not a case where the purpose and effect of the clause can be inferred from the type of contract at issue or from some special feature of the text and its structure (*Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA) paragraphs 50 and 51). The

agreement at issue in this case is a bespoke arrangement, meant to achieve a unique purpose. The proper interpretation of clause 5.1 against the background of the agreement as a whole requires an unusually sensitive contextual treatment. At present, the indications of meaning provided by text of the agreement on the one hand, and by the purpose and surrounding circumstances of the agreement on the other, are evenly balanced. Its true meaning can only be determined by a fuller investigation of the circumstances surrounding the conclusion of the addendum – in other words, by oral evidence of those circumstances.

37 Mr. Louw submitted that if, for any reason, VGN's damages could not be determined on affidavit, the appropriate relief would be to declare that the agreement was repudiated and to refer the quantification of VGN's damages to trial. I accept that submission.

Remedy

38 It follows from all of this that –

38.1 The addendum entered into in November 2016 extended the duration of the contract to an indefinite but ascertainable date not later than five years after GDID certified that VGN had given the last of the hospitals named in the addendum the infrastructure necessary to use gas-fired furnaces with gas VGN supplied. GDID's termination of the agreement before that date was in fact a repudiation of GDID's obligations under it.

38.2 The decision to enter into the addendum was not unlawful on either of the bases GDID has identified. The addendum did not unlawfully exceed the scope of the work GDID invited VGN to tender for. The treasury instruction upon which GDID relies does not have the force of law, and accordingly cannot be relied upon in GDID's self-review. It is, in any event, impossible to determine whether the addendum varied the value of the contract in breach of the treasury instruction upon which GDID relies, because it is presently impossible to determine, without the benefit of oral evidence, whether GDID's obligation to purchase a minimum amount of gas from VGN survived the addendum. The review application must fail.

38.3 VGN is in principle entitled to such damages as it may prove flow from GDID's repudiation of the agreement. However, the quantum of those damages depends, in part, on whether GDID's obligation to purchase a minimum amount of gas from VGN survived the addendum. That question must be referred to trial, together with the balance of the issues relevant to the determination of the quantum of VGN's damages.

Costs

39 VGN has been successful on every issue finally determined in this judgment. Costs must follow that result.

Order

40 Accordingly –

- 40.1 The application for leave to amend the respondent's notice of counter-application is granted.
- 40.2 The parties' respective applications for leave to file further written submissions are granted.
- 40.3 Prayers 1, 2, 4 and 5 of the counter-application are dismissed.
- 40.4 Prayer 3 of the counter-application is postponed *sine die*, to be pursued together with the quantification of the applicant's contractual damages in terms of paragraphs 40.6 and 40.7 below.
- 40.5 It is declared that -
- 40.5.1 the respondent breached its contract with the applicant (comprising both the main agreement of 22 September 2015 and the addendum of 29 November 2016) by purporting to terminate the contract when the respondent had no right to do so, thereby repudiating the contract; and that
- 40.5.2 the applicant is entitled to such damages as it may prove flowing from this breach.
- 40.6 The question of the quantum of the applicant's damages is referred to trial. The applicant's notice of motion and founding affidavit will stand as its combined summons. The answering affidavit will stand as the respondent's plea. The replying affidavit will stand as the

applicant's replication. The annexures to each of these affidavits are to be regarded as discovered documents.

40.7 Each party is to make any further discovery in terms of rule 35 within 20 days of this order, whereafter the rules of court will apply.

40.8 The respondent is directed to pay the applicant's costs to date, including the costs of counsel, which may be taxed on scale "C".



S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 17 September 2026.

HEARD ON: 15 May and 17 August 2026

SUBMISSIONS: 28 and 31 August 2026

DECIDED ON: 17 September 2026

For the Applicant: PF Louw SC
Instructed by Martin Henning Attorneys

For the Respondent: M G Khoza SC
T Chavalala
(Primary heads of argument drawn by E Baloyi-Mere SC and K Mvubu)
Instructed by Seanego Attorneys Inc