IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG HIGH COURT, PRETORIA)

14/03/2014

Case Number: 74192/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED. ✓

14/3/14
DATE

SIGNATURE

In the matter between:

AFRISAKE NPC	FIRST APPLICANT
AFRIFORUM NPC	SECOND APPLICANT
CORNELIUS JANSEN VAN RENSBURG	THIRD APPLICANT

And

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	FIRST RESPONDENT
THE MUNICIPAL MANAGER OF THE CITY OF TSHWANE	SECOND RESPONDENT
THE EXECUTIVE DIRECTOR: SUPPLY CHAIN MANAGEMENT OF THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	THIRD RESPONDENT

THE CHAIRPERSON OF THE BID ADJUDICATION
COMMITTEE OF THE CITY OF THSWANE — FOURTH RESPONDENT

THE CHAIRPERSON OF THE BID EVALUATION
COMMITTEE OF THE CITY OF THSWANE — FIFTH RESPONDENT

THE CHAIRPERSON OF THE BID SPECIFICATION
COMMITTEE OF THE CITY OF THSWANE — SIXTH RESPONDENT

THE CHAIRPERSON OF THE EXECUTIVE ACQUISITION
COMMITTEE OF THE CITY OF THSWANE — SEVENTH RESPONDENT

THE SPEAKER OF THE CITY COUNCIL OF TSHWANE
OF THE CITY OF THSWANE — EIGHTH RESPONDENT

THE EXECUTIVE MAYOR
OF THE CITY OF THSWANE — NINTH RESPONDENT

PEU CAPITAL PARTNERS (PTY) LTD — TENTH RESPONDENT

TSHWANE UTILITY MANAGEMENT
SERVICES (PTY) LTD — ELEVENTH RESPONDENT

JUDGMENT

Fabricius J,

1.

In this urgent application which was allocated to me after an arrangement with the learned Deputy Judge President, the Applicants seek an interim interdict against the first, the second, ninth, tenth and eleventh Respondents that they:

1.1

"Discontinue the installation of equipment in respect of the smart metering project of first Respondent, and;

1.2

Discontinue in general the execution of the services agreement entered into between the City of Tshwane and the tenth Respondent following upon the authorisation to enter into such services agreement dated 30 May 2013, pending adjudication of the B – Part of the notice of motion."

1.3

The Applicants further seek an order that the mentioned Respondents are interdicted from effecting expenditure of whatever nature in respect of the smart metering

project of the first Respondent pending adjudication of the said B – Part of the Notice of Motion. They also seek an order that costs be reserved in these proceedings pending the envisaged review. The crux of the Part B application, the intended review proceedings, is that an order is sought that "the decisions of the first Respondent to enter into the agreement which is dated 2 October 2012 and the agreement that was entered into following upon the authorisation at a meeting of the City Council of the City of Tshwane Metropolitan Municipality on 30 May 2013 and are annexed to the founding papers (*sic*) are declared to be illegal and invalid and are reviewed and set aside." The further order that would be sought on review would be that the mentioned agreements are declared to be illegal and invalid and in consequence null and void and of no force and effect.

2.

There was only a tentative debate about urgency in the proceedings before me, but having regard to the nature of the application, and the interests of the consumers in these proceedings, I am of the view that the application is indeed urgent. It is

obviously in the interest of all the parties that this application and the intended review be heard and decided upon as soon as possible. Although each Judge must decide the question of urgency on the merits of the case before her or him, it is important to keep in mind what was said in this context in ***Millennium Waste Management vs Chairperson, Tender Board 2008 (2) SA 481 SCA at 493 par. 34***:

"... it appears that in some cases Applicants for review approach the High Court promptly for relief but the cases are not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting-aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights becomes drastically reduced. It may help if the High Court, to the extent possible, gives priority to these matters."

3.

The notice of motion is dated 5 December 2013 and voluminous documentation was introduced thereafter, and accordingly no one could reasonably complain that this Court has not dealt with this application as expeditiously as possible.

4.

It is common cause that not all relevant documents are before me at this stage, and it is also reasonable to assume therefore that further supplementary affidavits and heads of argument will be filed in due course for purposes of the review application. I have little doubt that once the full record of all relevant documents has been compiled, and all further affidavits have been completed, that the learned Deputy Judge President will again accommodate the parties by allocating a preferential date for the actual review.

5.

For present purposes the *locus standi* of the Applicants is not an issue before me. The issue before me was whether or not the Applicants had shown that the requirements for an interim interdict had been established. Before dealing with the parties' respective arguments in that context (and I intend doing that only fairly briefly, so as not to pre-empt any decision of the Court hearing the review) I must add that Counsel for Applicants Mr Q. Pelser SC and Counsel for the first to the

ninth Respondents were not even *ad idem* as to which legislation applied to the relevant decision of the City. Applicants' contention was that obviously ***s. 217 of the Constitution of the Republic of South Africa*** applied, with which Mr W. Mokhare SC agreed, but the last mentioned disagreed that any of the legislation applying to a Municipality in the context of procurement management having any bearing at all. Mr Mokhare SC however did concede that the ***Municipal Finance Management Act no. 56 of 2003*** applied, as did the ***Promotion of Administrative Justice Act 3 of 2000***. Mr J. P. Daniels SC on behalf of the tenth and eleventh Respondents in turn, was of the view that the ***Administrative Justice Act*** did not apply, and with reference to ***Mazibuku and Others vs City of Johannesburg and Others 2010 (4) SA 1 CC*** contended that where a decision is taken by a Municipal Council in pursuance of legislative and executive functions, such decision would not ordinarily be administrative in character. In my view that is an issue or a debate that the Court hearing the review application will have to decide once all relevant documentation is properly before it. At this stage the parties were only in agreement for obvious reasons that, whatever the City did, it had to act lawfully.

See: ***Fedsure Life Insurance Ltd and Others vs Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 CC at 394 par. 40.***

The principle of legality lies at the heart of our Constitution and there need be no debate about that at the very least.

6.

Background facts:

Mr Pelser SC dealt with the background facts and the relevant documentation that formed part of the record before me in very great detail pointing out, with reference to each stage of the proceedings, which legislative or regulatory provision the City did not apply. That is why he then submitted that the principle of legality was pivotal to this application. What had actually occurred was (in extreme brevity) the following: the City of Tshwane and the tenth Respondent ("PEU") entered into a Master Services Agreement ("MSA") on 6 June 2013. This agreement required PEU to install, maintain and operate a pre-paid smart metering system in order to provide the City with a method of collecting revenue for the supply of electricity. The

services are to be performed by the eleventh Respondent ("TUMS"), the cessionary and delegatee of PEU's obligations under MSA, in exchange for the payment of a services fee. Mr Daniels SC submitted that this decision to conclude the MSA was made by a resolution of the Municipal Council of the City in terms of ***s.33 of the Municipal Finance Management Act 56 of 2003.*** The cession was not before me, and, there is no contract between the City and the cessionary. As I have said, Mr Daniels SC submitted that this decision was a legislative, alternative executive decision of the Municipal Council, and was accordingly not subject to the provisions of the ***Promotion of Administrative Justice Act.*** Mr Mokhare SC in turn, submitted that the case dealt with an ill-founded attempt to "stop dead" a policy implementation of the Local Government, something a Court would do only in the most clear-cut cases.

7.

I will deal with the various arguments of the parties when I deal with the requirements for an interim interdict. At this stage I must however emphasize that

this case is not concerned with an attack on the "policy decision" of the City to introduce smart pre-paid electricity meters as a way of contributing to the City's Revenue Optimisation Program. The parties before me in fact have supported this decision, but the Applicants case was that in the absence of a proper, transparent, cost-effective, and fair process in the context of the provisions of s.217 of the Constitution, the "policy decision" was simply unlawful and the decision of the Constitutional Court in ***National Treasury and Others vs Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 at 231 par. 26*** therefore has to be distinguished on that basis. Mr Pelser SC argued with reference to the relevant facts and the legislation that he deemed applicable, that there could be no mention of any process, either prior to the relevant decision of the City, or thereafter, that was in any manner whatsoever competitive and cost-effective. The City did not even conduct a feasibility study for instance, and also no competitive process was conducted, all of which would be to the detriment of the consumers. It is of course true that any contract that flows from the constitutional and statutory procurement

framework is concluded not on the State's entity behalf (Local Authorities' behalf), but on the public's behalf.

See*: Allpay Consolidated vs Chief Executive Officer, SASSA 2014 (1) SA 604 CC at 626 par. 56.* The interest of those most closely associated with the benefits of the contract must be given due weight.

See: *Verstappen vs Port Edward Town Board and Others 1994 (3) SA 567 D and CLD at 576 H.*

I will return to this consideration when I deal with the requirements for an interim interdict. Before doing so I must however emphasize that the Applicants herein have made no allegation whatsoever that either the decision of the Council, or the process that was followed prior to such, or thereafter, was tainted with any *mala fides*, fraud or corruption. Had these allegations been made and substantiated I would have given the utmost weight to them, and would not have hesitated to have made an appropriate order.

8.

The requirements for an interim interdict:

These requirements, which are often referred to as being "trite", conveniently appear in the ***Law of South Africa, Second Edition, Vol 11 at 411,*** the author being the respected former Judge of Appeal, L. T. C. Harms. They are also dealt with, and their history, in ***the Law and Practice of Interdicts, C. B. Prest SC, JUTA and Company 1996.*** As I have said, these requirements are often regarded as being "trite", but a careful reading of the Case Law will lead one to the conclusion that they are often misunderstood, and, as in the case before me, not applied to the facts correctly. I am not dealing with the requirements for a final interdict. One of the most important considerations is that an interim interdict must be concerned with the future only. It is not meant to affect decisions already made.

See: ***National Treasury vs Opposition to Urban Tolling Alliance supra par. 50***

I say that this is of the utmost importance because it is interrelated to the second requirement, and it is in this context in particular where the misapprehension occurs

as to what must actually be shown. The requisites for the right to claim an interim interdict are:

a) A *prima facie* right, though open to some doubt;

b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

c) That the balance of convenience favours the granting of an interim interdict; and

d) That the applicant has no other satisfactory remedy.

None of these requisites must be judged in isolation.

See: ***Olympic Passenger Service (Pty) Ltd vs Ramlagan 1957 (2) SA 382 D at 383.***

9.

These requisites have their origin, so it is often said, in ***Setlogelo vs Setlogelo 1914 AD 221 at 227.*** It is however clear from that judgment that the appeal before the Court concerned the granting of a final interdict, where the requirements are

different. It was in the context of whether or not an interim interdict could be obtained even though a clear right was not shown, that Innes JA dealt with the need to show irreparable harm as set out by ***Van der Linden, Institutes, (3, 1, 4, 7)***. Van der Linden mentioned this only in the case of where the right relied upon was not clear, but was only *prima facie* established, if open to some doubt. In that instance the question would be whether the continuance of the thing against which an interdict is sought, would cause irreparable injury to the applicant. The better course would be, so it was said, to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party. The whole topic was again debated by Clayden J in ***Webster vs Mitchell 1948 (1) SA 1186 W at 1189***. The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient, but the weighing-up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those

facts obtain final relief at the trial. The facts set up in contradiction by the respondent, should then be considered, and if they throw serious doubt on the applicant's case, the latter cannot succeed. In ***Webster vs Mitchell*** *supra* the test was actually whether the applicant could obtain final relief on those facts. The mentioned qualification was introduced by ***Gool vs Minister of Justice 1955 (2) SA 682 (C)*** at ***687 to 688.*** The Full Bench of the Cape Provincial Division agreed with the relevant analysis of the requirements in ***Webster vs Mitchell*** *supra,* subject to the qualification that the Court must decide, having applied the proper approach to the facts that I have mentioned, whether the applicant should (not could) obtain final relief at the trial on those facts. I may add at this stage, because I will return to that topic hereafter, that it was also held in that decision (at 689) that where an interdict was sought against the exercising of statutory powers, it will only be exercised in exceptional circumstances, and when a strong case is made out for relief. The mentioned qualification to the ***Setlogelo***-test, if I can call it that, as subsequently adapted by ***Webster vs Mitchell,*** was held to be "a handy and ready guide to the bench and practitioners alike in the grants of interdicts in busy magistrates' courts

and high courts." The qualification in ***Gool*** was given approval, and it was also said that the ***Setlogelo***-test had now to be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means in effect that when a Court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution. For instance, if the right asserted in the claim for an interim interdict is sourced from the Constitution it would be redundant to inquire whether that right exists. As another example, the principle of the separation of powers must be applied in appropriate circumstances.

See: ***National Treasury vs Opposition to Urban Tolling Alliance*** *supra* ***at 236 par. 44.***

10.

I have said that the mentioned requisites are not to be judged in isolation and that they interact. It is no doubt that for this reason Moseneke, DCJ in the ***National Treasury*** decision *supra* held at 237 par. 50 that "under the ***Setlogelo***-test the prima facie right a claimant must establish is not merely a right to approach a Court

and order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicant must demonstrate a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions does not require any preservation *pendente lite*." The second requisite of irreparable harm, must be looked at objectively, and the question is whether a reasonable person, confronted by the facts, would apprehend the probability of harm; actual harm need not be established upon a balance of probabilities. This requisite in turn is closely related to the question of the balance of convenience. This is the third requisite and it must be shown that the balance of convenience favours the grant of the order. In this context the Court must way the prejudice the applicant will suffer if the interim interdict is not granted, against the prejudice the respondent will suffer if it is.

See: ***Harms supra par. 406 and Prest supra at 73***, where the learned author said, in my view quite correctly, that a consideration of the balance of convenience is

often the decisive factor in an application for an interim interdict. He states that even where all the requirements for a temporary interdict appear to be present, it remains a discretionary remedy and the exercise of the discretion ordinarily turns on a balance of convenience. I agree with that approach and the view of Harms, JA in this context (at par. 406), as well as the *dictum* in ***Olympic Passenger Service (Pty) Ltd supra at 383***. The fourth requisite for the granting of an interim interdict is the absence of another adequate remedy. This element is also a factor in the exercise of the Court's general discretion to grant or refuse an interim interdict. Before turning to the relevant facts and submissions made by the parties, it is said (see ***Harms supra par. 408***) that the Court always has a wide discretion to refuse an interim interdict even if the requisites have been established. This means that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision, and not that the Court has a free and unfettered discretion. The discretion is a judicial one, which must be exercised according to law and upon established facts. I therefore do not agree with Mr Pelser SC that I have a so called "overriding" discretion.

See: ***Knox D'Arcy Ltd vs Jamieson 1996 (4) SA 348 (A) at 361 to 362***

and Hix Networking Technologies CC vs System Publishers (Pty) Ltd 1997 (1) SA 391 (A) at 401. The exercise of the discretion must therefore be related to the requisites for the interim order sought, and not to any unrelated features.

11.

Facts and submissions:

***Prima facie* right:**

In Applicants' founding affidavit they say that they intend dealing with the requisites for interim interdict under separate headings. It is then said that Applicants' have a *prima facie* case in that the agreements entered into by the City were illegal and invalid. They then give details of how and why the required procurement processes were not followed. It was stated to which extent other legislation relevant to the topic, was not complied with. They also rely on the failure to comply with provisions in the Municipal Finance Management Act relating to public private partnership provisions. The service contract was then analysed and details were given of which

documents had been requested, but not yet provided. At the end of that extensive exercise Applicants say in conclusion, and in the absence of any specific heading dealing with the first requisite, 'that they have made out a very strong case and that there have been serious irregularities in terms of various Statutes in the awarding of the contract in question to the tenth Respondent.' In addition to the *prima facie* case which they say they have presented, they point out that the financial consequences of the irregular contract are enormous, and will result in the consumers of electricity within the area of jurisdiction of the City paying huge amounts of money to private individuals, through the tenth Respondent, which expenditure could have been averted. According to Applicants it was therefore imperative that the City be interdicted to proceed with the project until such time as there has been a process of competitive bidding. With reference to the ***National Treasury*** decision *supra,* they say that they are aware thereof and that they will argue that the A-Part of the notice of motion presents an exceptional case. They further point out that the agreement with the tenth Respondent is a contract that is due to run for a minimum of 10 years from the effective date. It may be extended for a further period of three years. This

will impact also on the rights of, and obligations of, the next generation of consumers living in this City, so it was stated. On behalf of the first to ninth Respondents, it was said that one searches in vain in the founding affidavit, for any clear articulation of Applicants' *prima facie* rights. What one finds, it was submitted, was a "rag-bag of supposed grounds of review" which the Applicants say will be upheld in due course in the review proceedings. It was submitted that the supposed grounds were so convoluted and argumentative, that it was an impossible task for me to deduce from them whether they disclose a *prima facie* right or not. With such grounds, it was not possible to deal with them, without in effect arguing Part-B of the case itself. On behalf of the tenth and eleventh Respondents it was argued that Applicants have not established a *prima facie* case within the context of the *dictum* in the ***National Treasury*** decision ***par. 49,*** that I have referred to. Applicants are indeed able to have the relevant decision and the contract reviewed. They point out that Applicants themselves have said that the project is in the very early stages of the initial roll-out. An interim interdict would therefore stop the project even before it has begun properly. According to the tenth and eleventh Respondents this was

actually the essence of Applicants' case for interim relief: little has been done so far, and nothing further should be done in the interim or the project would become a *fait accompli* and, even if declared invalid, the situation would not be able to be remedied. It was submitted therefore by Mr Daniels SC that Applicants' entire case rested on two faulty premises. The first one was that the factual premise that the smart metering project has barely gotten off the ground was speculative, and based on hear-say and incomplete allegations. They were also inaccurate inasmuch as the project has already reached a stage where it could not be switched off or dismantled without having serious repercussions for the City's revenue collection and for its largest electricity consumers. The second faulty premise was that unless an interim interdict was granted, "nothing could be done". There was a fallacy in this argument as the reviewing Court could make such order that was just and equitable on the facts, taking into account all relevant rights, obligations and consequences. Granting relief now, would pre-empt consideration of all relevant facts and interests and accordingly, it was said, Applicants had failed to meet the most basic threshold for

an award of interim relief, namely a *prima facie* right and a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted.

I agree that it is extremely difficult to establish what Applicants' right exactly is, except insofar in stating that it must obviously be, according to them, that a number of statutes that were applicable to the decision and the process, were not complied with. As I have said, that is not what a *prima facie* right is all about having regard to the authorities that I have mentioned. The *prima facie* right must be a right which, if not protected by an interdict now, would result in irreparable harm. In my view the Applicants have not shown this. On the one hand they say in the founding affidavit, after analysis of the agreement, that "the system did not go live on 1 October 2013 as envisaged by clause 2.1.41", and that "if anything the present status is that the roll-out is in the very, very early stages of initial roll-out", and that "to the extent that there may have been a number of meters installed, such meters certainly are not operational", and "one cannot buy pre-paid electricity on any website", and "that the large power users are loathed to switch to pre-paid electricity, simply by reason of the fact that they cannot trust the reliability of such new system and cannot risk their

enterprise" and "that the operation phase commencement date within the ambit of such phrase in clause 2.1.64 has not arrived". They then say that they had serious difficulty in obtaining information regarding the present state of affairs. They also accept that it will take time to get the process moving, as it was put, and that this was the very point of asking now that it be stalled sooner than later. They then say that they are not against the implementation of the pre-paid system *per se.* On the contrary, it is said in the founding affidavit, they are of the opinion that it may potentially serve to assist the city in recovering income. It was however the illegality that concerned them, and even then they say it is not necessary for the City of Thswane to discontinue the pre-paid system to the limited extent that it has been installed. If it is up and running, it may continue to run parallel to post-paid system until such time as this Court has pronounced on final relief. Ultimately it becomes clear that it was Applicants' case that "it is of utmost importance that interim relief should be granted in order to afford an opportunity to have the review application adjudicated before the project becomes a *fait accompli.*" Having regard to what was said in the ***National Treasury*** decision ***supra*** in the context of the requisites for an

interim interdict, it is clear that the Applicants have shot themselves in both feet, proverbially speaking. On their own version, the project is certainly not steaming ahead to the extent that they will be presented with a *fait accompli* at the review hearing. On their own version the opposite is in fact the case. That is their version and they must stand in for by it, and it certainly does not disclose that they will suffer irreparable harm. Similarly, on that very same basis, the balance of convenience cannot be in their favour. It is true that I cannot decide on these papers whether or not there is any merit in the allegation that the service fee paid by the City to PEU could be less or not. As I have said, the purpose of an interim interdict is not to address any harm suffered in the past. On the Applicants' own version I cannot find that they will suffer irreparable harm between now and the hearing of the actual review application. It is merely generalised speculative harm, if any. In reply, Mr Pelser SC even substantially watered down the prayers sought in the notice of motion, much to the chagrin of Counsel for the tenth to eleventh Respondents, who quite rightly suggested that I should ignore such tender. If it had been made at the proper stage, it would most likely have resulted in a different approach to the

litigation before me. It is in any event clear from the ***National Treasury*** decision *supra* that if the good citizens and customers of the City will pay more than they were lawfully obliged to do, that they will have a claim for the repayment of the money.

See: ***National Treasury supra at par. 54***

There is therefore in my view no sustainable allegation that irreparable harm has been caused to the Applicants or to the effected customers of the City, or to the general public. I have weighed up the consequences that follow if I grant the order as against the consequences that would follow if I refuse it. In my view the balance of convenience tilts against the Applicants herein on their own version. On behalf of the tenth and eleventh Respondents, I was referred to the relevant allegations in the answering affidavit. They say that the smart metering infrastructure consists of a "front-end" and "back-end". The "front-end" is the smart metering equipment and the "back-end" consists of the hardware and software capable of running this equipment. In particular, the "back-end" system consists of a meter data management system and a vending platform. The vending platform communicates with the meter data

management system via a communications platform connecting the "front-end" systems to the "back end" systems. The "back-end" system has been procured, installed and configured and is currently operational. The roll-out of the "front-end" system has commenced at the premises of some 300 of the City's large power users. The meters installed at large power users and the "back-end" system are fully operational and close to R300 million worth of electricity has already been bought by the City's customers using the system since October 2013. TUMS has almost completed the procurement process for the appointment supplies and installers of the "front-end" pre-paid meters and other equipment. In reaching this point, PEU and TUMS have spent R89.5 million and have committed further R107.6 million into service providers. In other words, the first phase of the roll-out of the project to large power users is complete and the "back-end" system is functional. The degree of completion that has been reached has the effect that the system, now functioning, cannot be switched off without deleterious consequences. The effect of my order would be that the eleventh Respondent would be unable to do further work on the project. It could not maintain the "back-end" system that it has already established

and installed without an income stream to pay for the running cost of doing so, and to service the debt already incurred in acquiring the system. The system would have to be shut down. The project is funded by private-sector risk capital on the strength of the anticipated revenue flows. Should those flows cease, the funding will be placed on hold or maybe cancelled. In the absence of funding to continue the roll-out or to maintain the existing infrastructure, the project's demise is a matter of certainty. On this basis, which the Applicants to a very large extent could not dispute in reply, the balance of convenience certainly does not favour them. On their own version, they have shown no irreparable harm to them and weighing up all the relevant considerations, it is my view that the Applicants have also not established the second and third requisites for an interim interdict. The facts in any event show that the Applicants do not require an interim interdict to preserve and prosecute their rights in the review proceedings. Interim harm has not been shown and harm in the past is irrelevant for present purposes. Therefore, as far as the second and third requirements are concerned, which are largely inter-related on the present facts, I exercise my discretion against the Applicants in any event. I must also point out that

the tenth and eleventh Respondents say that the Applicants have misconceived the costs to the consumers at large. They say that no additional cost is levied on the consumers as a result of the agreement. The services fee is based on a percentage of the rand value of the electricity tariff. The cost of electricity to the consumers is not impacted by the project: consumers will continue to pay only the tariffs set by the City and approved by the Regulatory Authority. The relevant project is an off-balance sheet transaction. It can therefore have no impact on the City's balance sheet by entailing additional costs to the City. The agreement provides that the City pays a fee for the services provided by TUMS calculated as a percentage of the electricity revenue collected. This fee is lower than the current costs that are being incurred by the City as a result of its current metering system such as interest, debt collection costs, meter reading costs, impairment costs etc. As I have said, I am not in a position on the documentation before me to arrive at the accurate calculation but this is in any event not necessary at this stage. I agree with Mr Daniels SC that the issues raised are of considerable complexity. Not all the relevant documentation

is before me at this stage. Whether or not certain legislation and regulations apply to the whole process or not will have to be fully ventilated in the review proceedings.

12.

I must add that in the context of the principle of separation of powers, Applicants have not made out a strong case at all. A Court is fortunately not a legislator and should be loath to interfere with legislative or executive decisions, unless clear illegality has been shown.

13.

It is my view therefore that the Applicants have failed to establish the necessary requisites for an interim interdict largely on their own version and certainly not on Respondents' version. Applicants have not sought a cost order against the Respondents at this stage of the proceedings. Respondents in turn say that they are entitled to a cost order albeit only on the basis of the fees related to the appearances in Court for two days, inasmuch as the affidavits will remain to be

considered by the Court hearing the review. Tenth and eleventh Respondents in turn say that they are not organs of State and ought to be entitled the cost if the application does not succeed. I have considered all the arguments, the facts and the submissions. In my view the Court hearing the review application will be in a better and proper position to decide the question of costs, be it in their totality or be it on the basis of whether or not the proceedings before me had been justifiably and reasonably been brought.

14.

The following order is therefore made:

1. **The application is dismissed;**

2. **Costs are reserved.**

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

Case no.: 74192/13

Counsel for the Applicants: Adv Q. Pelser SC

Adv A.T. Lamey

Instructed by: Hurter Spies Inc

Counsel for the 1st to 9th Respondents: Adv W. R. Mokhare SC

Adv L. Sisilana

Instructed by: Kunene Rampala Botha Inc

Counsel for the 10th and 11th Respondents: Adv J. P. Daniels SC

Adv I. B. Currie

Instructed by: Edward Nathan Sonnenbergs Inc

Heard on: 24/02/2014 to 25/02/2014

Date of Judgment: 14/03/2014 at 10:00