



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

“REPORTABLE”

Case No: 10383/18

In the matter between:

LEAD AND SOLDERS CC

First Applicant

THE JANODIEN FAMILY TRUST

Second Applicant

ABDUL AZIZ JANODIEN

Third Applicant

and

THE CITY OF CAPE TOWN

First Respondent

LUNGELO MBANDAZAYO N.O.

Second Respondent

JUDGMENT DELIVERED ON 14 NOVEMBER 2018

Vos, AJ

Introduction

[1] In February 2017 the first applicant (“Lead and Solder”), and the second applicant (“the Family Trust”) submitted quotations to the City of Cape Town

("the City") for the supply of solder, and lead solder tin alloy. At the time, the third applicant ("Mr Abdul Janodien") was the sole member of Lead and Solder, and the Family Trust.

- [2] The City believed that the applicants colluded about their quotations and charged Lead and Solder, and the Family Trust with breaching the City's policy which is styled "Combating Abuse of Supply Chain Management System" (the "Abuse Policy"). In order to deal with the allegations, it appointed the second respondent ("Mr Mbandazayo") as the presiding officer of the hearing.
- [3] On 3 April 2018 Mr Mbandazayo handed down rulings whereby he found that the applicants had contravened the Abuse Policy. On 17 May 2018 sanction rulings were handed down, and in terms thereof, the applicants were restricted from doing business with the City.
- [4] Aggrieved by these rulings, the applicants now apply for the following relief:

"[1] That the following conduct and/or decision(s) be reviewed and set aside:

[1.1] The first and/or second respondents' ruling, dated 3 April 2018, in terms of the "City's Abuse of Supply Chain Management System Policy (dated 30 March 2009 and amended by Council on 22 June 2011) ("the SCM Policy") in relation first and/or the third applicant.

[1.2] The first and/or second respondents' ruling, dated 3 April 2018, in terms of the SCM Policy in relation second and/or the third applicant.

[1.3] The first and/or second respondents' sanction ruling, dated 17 May 2018, in terms of the SCM Policy in relation second and/or the third applicant.

[1.4] The first and/or second respondents' sanction ruling, dated 17 May 2018, in terms of the SCM

Policy in relation second and/or the third applicant.”

- [5] In order to arrive at a decision whether the applicants are entitled to the relief that they seek, a convenient starting point is the evaluation of the applicable legislative framework, insofar as it applies to public procurement.

The legislative framework

- [6] The regulation of public procurement is founded in section 217 of the Constitution, which prescribes that it must occur in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

- [7] Section 217 reads as follows:

“217 Procurement

- (1) *When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*
- (2) *Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-*
 - (a) *categories of preference in the allocation of contracts; and*
 - (b) *the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
- (3) *National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”*

- [8] The Local Government: Municipal Finance Management Act, No. 56 of 2003 (“the MFM Act”) regulates the supply chain management of municipalities. The objects of the MFM Act are set out in section 2, as follows:

“2 Object of Act

The object of this Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for-

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;*
- (b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;*
- (c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;*
- (d) borrowing;*
- (e) the handling of financial problems in municipalities;*
- (f) supply chain management; and*
- (g) other financial matters.”*

- [9] Section 111 of the MFM Act provides as follows:

“111 Supply Chain Management Policy

Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this part”.

- [10] In terms of section 168 of the MFM Act, Municipal Supply Chain Management Regulations were promulgated on 30 May 2005 under General Notice 868 in GG 27636. I shall refer to those regulations as “the Municipal Supply Chain Management Regulations”.
- [11] The Municipal Supply Chain Management Regulations provide in detail for the establishment and implementation of the Supply Chain Management Policies, as well as for the relevant framework of the policies.
- [12] Regulation 38 of the Municipal Supply Chain Management Regulations, reads as follows:

“38 Combating of abuse of supply chain, management

(1) A supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer –

(a) to take all reasonable steps to prevent such abuse;

(b) to investigate any allegations against an official or other role player of fraud, corruption, favouritism, unfair or irregular practices or failure to comply with the supply chain management policy, and when justified –

(i) take appropriate steps against such official or other role player; or

(ii) report any alleged criminal conduct to the South African Police Service;

(c) to check the National Treasury’s database prior to awarding any contract to ensure that no recommended bidder, or any of its directors, is listed as a person prohibited from doing business with the public sector;

(d) to reject any bid from a bidder-

- (i) *if any municipal rates and taxes or municipal service charges owed by that bidder or any of its directors to the municipality or municipal entity, or to any other municipality or municipal entity, are in arrears for more than three months;*
 - (ii) *or who during the last five years has failed to perform satisfactorily on a previous contract with the municipality or municipal entity or any other organ of state after written notice was given to that bidder that performance was unsatisfactory;*
- (e) *to reject a recommendation for the award of a contract if the recommended bidder, or any of its directors, has committed a corrupt or fraudulent act in competing for the particular contract;*
- (f) *to cancel a contract awarded to a person if –*
 - (i) *the person committed any corrupt or fraudulent act during the bidding process or the execution of the contract;*
 - (ii) *or an official or other role player committed any corrupt or fraudulent act during the bidding process or the execution of the contract that benefited that person; and*
- (g) *to reject the bid of any bidder if that bidder or any of its directors –*
 - (i) *has abused the supply chain management system of the municipality or municipal entity or has committed any improper conduct in relation to such system;*
 - (ii) *has been convicted for fraud or corruption during the past five years;*
 - (iii) *has wilfully neglected, reneged on or failed to comply with any government,*

municipal or other public sector contract during the past five years;

(iv) or has been listed in the Register for Tender Defaulters In terms section 29 of the Prevention and Combating of Corrupt Activities Act (No 12 of 2004).

(2) The accounting officer must inform the National Treasury and relevant provincial treasury in writing of any actions taken in terms of sub-regulation (l)(b)(ii), (e) or (f)".

[13] In accordance with the obligations imposed upon the City in terms of section 111 and 112 of the MFM Act, as supplemented by the Municipal Supply Chain Management Regulations, the City adopted a Supply Chain Management Policy¹.

[14] Paragraph 53 of the Supply Chain Management Policy deals with the combatting of abuse of the Supply Chain Management Policy:

"Combating Abuse of the Supply Chain Management Policy

53. The City Manager must provide measures for the combating of abuse of the supply chain management system and is able to:

53.1 take all reasonable steps to prevent such abuse;

53.2 investigate any allegations against an official, or other role player, of fraud, corruption, favouritism, unfair or irregular practices, or failure to comply with the supply chain management system and when justified, to:

53.2.1 take appropriate steps against such official or other role player; or

53.2.2 report any alleged criminal conduct to the South African Police Service;

¹ The policy number is 12446. It was approved by the Council on 27 March 2008 and amended on 31 July 2013.

53.3 *check the National's Treasury's Database of Restricted Suppliers prior to awarding any contract to ensure that no recommended bidder, or any of its directors, members or partners, is listed as a person prohibited from doing business with the public sector;*

53.4 *reject any bid from a bidder:*

53.4.1 *if any municipal rates and taxes or municipal service charges owed by the bidder, or any of its directors, to the City or any of the City's municipal entities, or any other municipality or municipal entity, are in arrears for more than three months; or*

53.4.2 *who during the last five years has failed to perform satisfactorily on a previous contract with the City or its municipal entities or any other organ of state after written notice was given to that bidder that performance was unsatisfactory;*

53.5 *reject a recommendation for the award of a contract if the recommended bidder, or any of its directors, members or partners, has committed a corrupt or fraudulent act in competing for the particular contract;*

53.6 *cancel a contract awarded to a person if:*

53.6.1 *the person committed a corrupt or fraudulent act during the bidding process or the execution of the contract; or*

53.6.2 *an official or other role player committed any corrupt or fraudulent act during the bidding or in the execution of the contract that benefited that person.*

53.7 *reject the bid of any bidder or any of its directors, members or partners who:*

53.7.1 *abused the supply chain management system of the City or its municipal*

entities, or has committed any improper conduct in relation to this system;

53.7.2 has been convicted of fraud or corruption during the past five years;

53.7.3 wilfully neglected, reneged on or failed to comply with any government, municipal or other public sector contract during the past five years; or

53.7.4 has been listed on the National Treasury's Register for Tender Defaulters in terms of the Prevention and Combating of Corrupt Activities Act, 12 of 2004."

[15] On 30 March 2009 the City adopted the abovementioned Abuse Policy. It will be recalled that its full name is "*Combating Abuse of Supply Chain Management System*"².

[16] Section 1 of the Abuse Policy deals with definitions. Certain of the definitions are important for purposes of this application:

"Abuse of the Supply Chain Management System" is defined as:

"acts and/or omissions, or the underlying acts and/or omissions from an affected person that forms the basis of the intended steps to be taken by the City Manager as contemplated in paragraph 2", and include "fronting", "collusive tenders", "influencing the tender process" and "improper conduct".

"Affected person" means:

"a natural person or corporate entity whose rights may be materially and / or adversely affected if the City Manager takes any of the steps contemplated in this policy in order to combat abuse of the Supply Chain Management Process."

² Amendments were approved on 22 June 2011

“Collusive tenders” means:

“where tenderers conclude an arrangement between themselves to obtain the highest possible points in evaluation and / or the award of a tender whereby competitive bids are eliminated.”

“Influencing the tender process” means:

“directly, indirectly, or tacitly influencing or interfering with the work of relevant City Officials involved in the tender process in order to inter alia:

- (a) influence the process and / or outcome of the tender;*
- (b) incite breach of confidentiality and / or the offering of bribes;*
- (c) cause over or under invoicing;*
- (d) influence the choice of procurement method or technical standard;*
- (e) influence any City Official in any way which may secure an unfair advantage during or at any stage of the procurement process.”*

“Improper conduct” is defined as meaning:

“conduct that (is) tantamount to: - fraud; corruption; favouritism; unfair; irregular and unlawful practices; misrepresentation on information submitted in tender documents for the purposes of procuring a contract with the City; misrepresentation regarding the contractor’s expertise and capacity to perform in terms of the contract procured via the Supply Chain Management System; breach of a contract procured via the Supply Chain Management System; and failure to comply with the Supply Chain Management System.”

[17] Paragraph 2.1 of the Abuse Policy records that:

“the terms of reference of this Policy ensure compliance with regulation 38 of the Municipal Supply Chain Management

Regulations published under GEN N 868 in GG 27636 of 30 May 2005.”

- [18] In terms of paragraph 2.2 of the Abuse Policy, the City Manager has the duty to *“take all reasonable steps to prevent abuse of the Supply Chain Management System and to investigate any allegations of improper conduct against the concerned official, councillor, or other role player...”*.
- [19] Paragraph 5.1 of the Abuse Policy provides that, once the City has obtained *prima facie* evidence which it deems to be sufficient to initiate proceedings to take steps against the affected persons contemplated in paragraph 2.2 and 2.3, the City must give the affected person adequate written notice of the manner in which it is alleged that the affected person abused the Supply Chain Management System.
- [20] The written notice must outline the grounds on which it is alleged that the affected person abused the Supply Chain Management System, it must refer to the applicable provisions of the Abuse Policy, and it must stipulate that the affected person must make *“written representations”* in response to the allegations.
- [21] In terms of paragraph 7.1 of the Abuse Policy:
- “The City Manager shall appoint an independent and impartial person, who may be an official of the City of Cape Town, to preside and adjudicate on allegations of abuse of the Supply Chain Management System against an affected person.”*
- [22] In terms of Paragraph 11 of the Abuse Policy, the onus of proof is on the City to prove any allegations of abuse of the Supply Chain Management System *“on a balance of probabilities”*.
- [23] Paragraph 7.2 of the Abuse Policy provides as follows:

“The Presiding Officer will adjudicate on the matter based on the written notice and written response and will inform all relevant parties accordingly should the matter, or part thereof be referred for an Oral Hearing”

[24] Paragraph 9 of the Abuse Policy makes provision for oral hearings:

“9.1 An affected person does not have an automatic right to an oral hearing but may submit an application to the Presiding Officer to have the matter set down for an oral hearing in instances where the Presiding Officer decided to entertain the matter without oral evidence being heard, or not to refer the matter for an oral hearing.”

[25] Paragraph 10 of the Abuse Policy deals with the procedure to be followed at oral hearings. In particular, it is regulated that witnesses shall testify under oath and affected persons have the right to cross-examine any witness who testified at such hearing.

The relevant facts

[26] Both Lead and Solder and the Family Trust are in the business of recycling and manufacturing of non-ferrous metals. Lead and solder are key components of their business.

[27] Mr Abdul Janodien deposed to the founding affidavit on behalf of the applicants. He explains that he is in the business of recycling and manufacturing of non-ferrous metal products. In 1984, and at the age of 20, he started working in the industry as a labourer, and in 1992 he formed Lead and Solder. Lead and Solder and the Family Trust employ a total number of 63 employees, most of whom are sole breadwinners of their respective families.

- [28] He further explains that although the Family Trust was established in 2001, it was generally non-trading and was dormant. It only recently decided to start trading. Mr Abdul Janodien further explains that the annual turnover of Lead and Solder is approximately R 32 000 000.00 and the annual turnover of the Family Trust is in the region of R 9 500 000.00. The majority of the business of Mr Abdul Janodien *“is done with the State and State owned enterprises, from which the first and second applicants tender for work”*.
- [29] Mr Abdul Janodien is a trustee of the Family Trust and he is also the only member of Lead and Solder. Two employees feature prominently in this matter. The one is Ms Ruth Njonga (*“Ms Njonga”*) who works for Lead and Solder in a managerial capacity. The other is Mr Lenon Guzha (*“Mr Guzha”*) who also works in a managerial position for the Family Trust.
- [30] The Government has a Central Supplier Database where the information of registered suppliers, is contained. According to that, the Family Trust is registered as a supplier with reference MAAAO174999. The name is given as *“The Janodien Family Trust”*, and it appears that the date of the creation of the information is 26 May 2016. The address of the Family Trust is given as Unit 8, Saxon Park, Glucose Road, Bellville South. The information was *“created by ‘Lenon@janodienfmtrust.co.za’*. The income tax reference number of the Family Trust is furnished as 0574267241 and it appears that the information on the Central Supplier Database was edited on 5 September 2016.
- [31] On 29 November 2016 Mr Guzha signed a document of the City styled *“Supplier Registration Detail”*, on behalf of the Family Trust. In that document the sales person and the accounting clerk is reflected as *“Lenon”*. At the foot of the document, it was signed by Mr Guzha. It therefore follows that at 29 November 2016, Mr Guzha represented to the City that insofar as the Family Trust was concerned, Mr Guzha was the duly authorised sales person and accounting clerk of the Family Trust.

- [32] In 2016 the City issued a “*Request for Quotation (Goods)*” under reference number RO21700308 for the supply of “*electrical accessories.*” The closing time of the tender was 13:00 on 9 February 2017.
- [33] On 7 February 2017 Mr Guzha signed a “*Form of Offer*” on behalf of the Family Trust, whereby it offered to supply the required solder material to the City.
- [34] On the same day, 7 February 2017 Ms Njonga also signed a “*Form of Offer*” on behalf of Lead and Solder, whereby Lead and Solder offered to supply the same soldering material to the City.
- [35] The City did not accept the quotation of Lead and Solder or the Family Trust.
- [36] On 16 May 2017 a meeting was held at the request of the City. It was attended by Mr Abdul Janodien, Ms Njonga and Mr Guzha.
- [37] At the meeting Mr Abdul Janodien *inter alia* advised the City officials that he did not personally oversee the quotation submitted by Lead and Solder, and the Family Trust, and there was no agreement to collude. The quotations were submitted independently.

Written notice: The City’s allegation of improper conduct

- [38] The City was not satisfied with the explanation given, and on 6 November 2017 it addressed written notices in terms of paragraph 5 of the Abuse Policy to Lead and Solder, the Family Trust and Mr Abdul Janodien.
- [39] In respect of the Family Trust, it was alleged in the written notice that:

- “5.1 According to the Schedule 1: Details of Supplier Declaration a certain Mr Abdul Aziz Janodien is the Family Trust’s authorised representative (see a copy of the said Schedule 1 declaration in respect of the Family Trust’s quotation for RFQ 308 attached hereto marked annexure “A”.*
- 5.2 According to the Schedule 1: Details of Supplier declaration, the Family Trust’s physical address is [...].*
- 5.3 The Schedule 2: Form of Offer declaration was signed by a Mr Lenon T Guzha, purportedly as the duly authorised representative of the Family Trust, however the authorised representative stated in that Schedule is Mr Abdul Aziz Janodien in his capacity as Trustee of the Family Trust (see a copy of the said Schedule 2 declaration in respect of the Family Trust’s quotation for RFQ 308 attached hereto marked annexure “B”).*
- 5.4 The Schedule 3: Price Schedule indicates that the Family Trust only submitted prices for the first two items on the schedule [see a copy of the said Schedule 3 in respect of the Family Trust’s quotation for RFQ 308 attached hereto marked annexure “C”).*
- 5.5 The Schedule 4: Preference Schedule. Schedule 6: Conflict of Interest Declaration and Schedule 7: Declaration of Supplier’s Past Supply Chain Management Practices declaration were also signed by Mr Lenon T Guzha purportedly as the representative of the Family Trust. However he is not the authorised representative stated in the Schedule 1: Details of Supplier and Schedule 2: Form of Offer (see copies of the said Schedule 4 declaration, Schedule 6 declaration and Schedule 7 declaration in respect of the Family Trust’s quotation for RFQ 308 attached hereto marked annexure “D” “E” and “F” respectively.)*
- 5.6 the Schedule 8: Certificate of Independent Quotation Determination declaration (“the Schedule 8 declaration”) was signed by Mr Lenon T Guzha (see a copy of the Schedule 8 declaration annexed hereto marked annexure “G”).”*

[40] In paragraph 10 of the written notice, the following was stated:

“10. As a result of the above, it is alleged that Mr Lenon T Guzha and the Family Trust have contravened the Schedule 8 declaration in that:

10.1 Mr Lenon T Guzha was not the authorised representative of the Family Trust and therefore did not have the authority to sign the Family Trust’s quotation in respect of RFQ 308 thus contravening clause 3 and 4 of the Schedule 8 declaration.

10.2 The suppliers render the same services and are therefore considered to be competitors in terms of clause 5 contravening sub-clause 5(b) and (c) of the Schedule 8 declaration;

10.3 As Mr Abdul Aziz Janodien is the only active member of Lead and Solder and is a trustee and authorised representative of the Family Trust, he forms part of the directing minds of each of the suppliers. The suppliers could therefore not have arrived at their quotations independently without Mr Guzha and Ms Njonga communicating with Mr Abdul Aziz Janodien thus contravening clauses 6 and 9 of the Schedule 8 declaration; and

10.4 The suppliers both submitted prices for only the first two items in the Schedule 3: Price Schedules for their respective bids regarding RFQ 308 and the prices offered by the suppliers are nearly identical, which indicates that the suppliers contravened clauses 6 and 9 of the Schedule 8 declaration. The physical addresses for the suppliers are also identical in their bids in respect of RFQ 308, which indicates that they contravened clauses 6 and 9 of the Schedule 8 declaration.”³

[41] And in paragraph 12 the City alleged that:

³ Clause 6 of the Schedule 8 declaration reads as follows: “The supplier has arrived at this quotation independently from and without consultation, communication, agreement or arrangement with any competitor”.

Clause 9 of the Schedule 8 declaration reads as follows: “9. The terms of this quotation have not been, and will not be, disclosed by the supplier, directly or indirectly, to any competitor, prior to the date and time of the official quotation opening or of the awarding of the contract”.

“12. It is therefore alleged that the Family Trust committed improper conduct and / or abuse of the Supply Chain Management System as contemplated in Regulation 38”.

[42] In respect of Lead and Solder and Mr Abdul Janodien, the City made similar allegations in a written notice. All the relevant documents upon which the City relied in support of its allegations, were attached to the written notices.

Response to the charges

[43] On 16 November 2017 Mr M.S. Nacerodien, an attorney, addressed a letter to the City in which he dealt with the charges.

[44] The relevant part of the letter reads as follows:

“There was improper conduct on the part of Mr L.J Guzha as regards the Family Trust, as he submitted a tender on behalf of the Family Trust in respect of Quotation No: R021700308 for the supply of electrical accessories to the City of Cape Town without prior authorisation. His improper conduct cannot and should not be attributed to any improper conduct or abuse by the Family Trust of the City’s said system for the following reasons and due to the following circumstances:

- 1. Mr Aziz Janodien has for over 25 years conducted business under the name and style of Lead and Solder Sales CC (“the CC”) of which he was the managing member and lately the sole member.*
- 2. The CC has a scrap tender with the City valued at approximately R5 million per annum, which it has won for the past 20 years. This has enabled the CC to provide employment for 40 employees. The current tender runs until 2020.*
- 3. Because of the loyalty, honesty and commitment of many of the CC’s staff, Mr Janodien recently embarked on a program of training and promoting its employees, especially those who have been employed for 20 years or more, with the stated intention of making them*

stakeholders in the CC once they fully understand and can run various aspects of the business competently.

4. *To this end, when the Family Trust was formed, certain of the CC's employees were assigned as employees of the Family Trust.*
5. *It was decided by Mr Janodien to separate the scope of business of the two entities, so that the CC would confine its business to manufacturing only and the Family Trust to attend to procurement and marketing of the CC's and other related products.*
6. *In order to ensure the smooth separation of the scope of each entity, Mr L T Guzha who was the sales representative and accounting clerk of the Family Trust was advised by Mr Janodien that he would be acting as the duly authorised representative of the Family Trust in future in respect of procuring and marketing the CC's products.*
7. *Mr L T Guzha was in fact instructed by Mr Janodien that before doing any procurement, he should liaise with Mr Janodien who would guide and assist him until such time as he could do so on his own but otherwise as regards sales, he would not be micro managed by Mr Janodien.*
8. *Ms Njonga got the tender off the Council's daily tender bulleting and tendered for this said tender which is only worth R 12 000.00 with a gross profit of R 1 500.00.*
9. *Unbeknown to Mr Janodien and Ms Njonga, Mr Guzha, on behalf of the Family Trust, independently went ahead to tender for the same contract. This was his first attempt at tendering.*
10. *The Family Trust was accepted by the City as a supplier and although all the necessary amendments regarding authorisation to act on behalf of the Family Trust had not been done, Mr Guzha submitted a tender without the knowledge or authorisation of Mr Janodien.*
11. *Mr Janodien only heard of the Family Trust tender when concerns were raised by the City of Cape Town.*
12. *Client discussed this matter with Mr Guzha when client heard about it, and he can only ascribe Mr Guzha's*

conduct as being over eager and an attempt to impress him that he (Guzha) is capable of completing a tender unassisted.

13. *Client also interrogated Ms Njonga and she confirmed that she was unaware that he Trust had also submitted a tender for the same service as had been done by the CC.*
14. *The CC is the sole producer and supplier in the Western Cape in respect of the solder required for this tender.*
15. *The CC has an average gross annual turnover of almost R3 0mil and Mr Janodien certainly would not want to jeopardise the good reputation he has built up with the City over more than 20 years by colluding with the Family Trust for a gross profit gain of only R 1 500.00, particularly as the CC in any event would be supplying the solder required for the contract.*
16. *It is Mr Janodien's intention to train up his existing staff and to assign responsibilities to them by mentoring them and so promote those who are competent and capable of heading managerial responsibilities to become members of the CC and eventually take over the business.*
17. *The intention as regards the Family Trust was to promote persons who were labourers, sweepers and general workers and who worked for the CC for a long time, to become trainee sales personnel, and to build a management team from this pool, so that the sales and procurement business of the Family Trust could be run independently by these employees as soon as reasonably possible.*
18. *Mr Guzha was identified by Mr Janodien as having the potential to develop into a procurement and sales manager and an authorised representative of the Family Trust.*
19. *Unfortunately, his over eagerness in regard to this tender has placed the whole program of our client to empower and upskill his workers, in danger.*
20. *In fact, if Mr Janodien is registered as an affected person in the City's register, then, not only will this have*

a catastrophic effect on our client's empowerment program but it will have devastating consequences on his employees, of whom he would have to lay off at least 50%.

21. *Our client's good intentions of promoting and empowering his employees and building the businesses for their benefit so that they could expand the business, thereby creating employment and benefitting the local economy in these trying times, will come to naught if the City construes the mistake made by Mr Guzha as an act of improper conduct by the CC or the Family Trust.*
22. *As far as the writer is concerned, he is an independent trustee of the Family Trust and not involved in any way in the managerial decisions taken on a day to day basis by those running the business. He was not aware nor had any hand in the tender submitted by Mr Guzha on behalf of the Family Trust to the City. His duties as a trustee of the Family Trust do not include any involvement in the running of any business owned by the Family Trust.*
23. *It is submitted that no improper conduct can be attributed to the writer as he is in no way financially involved with the Family Trust, and receives no benefit from the Family Trust or its business except in regard to services rendered in his professional capacity as an attorney.*
24. *It is submitted that it is clear from the very nature of the tender that collusion or tender rigging by the Family Trust was never intended but occurred as a result of an honest mistake of the scope of the exercise of his duties by an inexperienced trainee in his first attempt at submitting a tender.*
25. *Mr Guzha now clearly understands the limits of the scope of his duties which will endure until such times as Mr Janodien is satisfied regarding his capabilities, when he will be notified that the oversight duties of Mr Janodien will cease."*

[45] On 22 January 2018 Mr M.S Nacerodien, addressed another letter to the City in which further written representations were made. In that letter it was again pertinently stated:

“3. Our clients deny any collusion or knowledge of any alleged collusion between the Trust and Lead and Solder CC”.

The Rulings

[46] On 3 April 2018, and without an oral hearing being held, Mr Mbandazayo ruled against the Family Trust and Mr Abdul Janodien. He inter alia found as follows:

“22. After taking into account the circumstantial evidence submitted, I therefore find on a balance of probabilities that the Trust committed improper conduct in that they breached clauses 6 and 9 of the Schedule 8 Declaration by disclosing the terms and conditions of their offer to Lead and Solder and consulting, communicating and entering into agreements and arrangements in respect thereof.”

[47] In respect of Lead and Solder, a similar finding was made:

“18. After taking into account the circumstantial evidence submitted, I therefore find on a balance of probabilities that Lead and Solder committed improper conduct in that they breached clauses 6 and 9 of the Schedule 8 Declaration by disclosing the terms and conditions of their offer to the Trust and consulting, communicating and entering into agreements and arrangements in respect thereof.”

The grounds of review

[48] The applicants rely on the following grounds of review:

[48.1] The City Manager did not investigate the matter;

[48.2] The City Manager failed to appreciate that he had a discretion to implement the Abuse Policy;

[48.3] Mr Mbandazayo did not have all relevant facts before him;

[48.4] The respondents did not discharge their onus, and the rulings were so unreasonable that no reasonable person could have exercised the power.

[49] I turn to consider the various grounds of review.

The failure of the City Manager to investigate

[50] Although the applicants contend that there was no investigation, Mr Basil Chinasamy deposed to an affidavit in which he stated that Mr Dias, the legal advisor for the City, conducted certain preliminary fact-finding investigations.

[51] Given the nature and contents of the written notices that were furnished to the applicants, I am satisfied that there must have been an investigation that preceded the formulation of the charges. It is inconceivable that the written notices could have been produced, in the absence of any investigation.

[52] After considering all the relevant evidence produced, I am satisfied that there was an investigation, and that this ground of review must fail.

A failure to appreciate the discretion to implement the Abuse Policy

[53] Given the present scourge of corruption complaints in this country insofar as doing business with the State and municipalities is concerned, the City does not only have a discretion to implement the Abuse Policy, but also a duty when there is *prima facie* evidence of wrongdoing.

- [54] In this matter, and on the basis of the evidence produced, it is clear that the City understood that it had a discretion, and acted in terms thereof. There is no merit in this ground of review.

Mr Mbandazayo did not have all relevant facts before him

- [55] This submission on behalf of the applicants, loses sight of the fact that the applicants had the right to place any written representations and evidence before Mr Mbandazayo. They employed the services of an attorney to assist them, and it was their duty to place all the relevant facts, which they thought are relevant, before Mr Mbandazayo.

- [56] This ground of review must fail.

The respondents did not discharge their onus, and the rulings were so unreasonable that no reasonable person could have exercised the power

- [57] The City bore the onus to prove all the issues that were placed in dispute, and it had to prove it on a balance of probabilities. One of the key issues that falls for determination, is: what fact(s) did the City have to prove?

- [58] As a point of departure, regard should first be had to the nature of the City's "*written notice*" and the "*written representations*" filed by the applicants. Those documents would inform the Presiding Officer of the issues in dispute.

- [59] In my view the "*written notice*" of the City, and the "*written representations*" by the applicants, resemble pleadings. Although they are not affidavits, a fair amount of evidence was included in the "*written notice*" and the response thereto. So, to a certain extent, the information that was placed before the presiding officer, also had features of an affidavit.

[60] In Transnet v Rubenstein⁴ the Court stated that in motion proceedings, the affidavits constitute not only the evidence, but also the pleadings.

[61] The proceedings before Mr Mbandazayo, are obviously not legal proceedings in the same sense as in a court of law. But they can be described as quasi-judicial proceedings.

[62] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*⁵ the Constitutional Court held:

“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings.”

[63] In legal proceedings, pleadings are of critical importance for a number of reasons, some of which are as follows:

- (a) it determines where the onus lies;
- (b) it determines which facts a plaintiff or defendant have to prove.

[64] In *Mobil Oil Southern Africa (Pty) Ltd v Mechin*⁶ the Court held:

“Generally speaking the onus of proof is fixed by the pleadings and it is necessary therefore to analyse the allegations in the pleadings as amplified by the further particulars, the latter forming part of the pleadings.”

[65] And further⁷:

⁴ 2006 (1) 591 (SCA) at paragraph 28

⁵ 1999 (4) SA 147 (CC)

⁶ 1965 (2) SA 706 (A) at 410

⁷ At p711

“The general principle governing the determination of the incidence of the onus is the one stated in the Corpus Iuris:

“semper necessitas probandi incumbit illi qui agit (D. 22.3.21.). In other words he who seeks a remedy must prove the grounds therefor.”

[66] In *Kriegler v Minitzer and Another*⁸ it was held that a party who makes positive allegations must prove same.

[67] In *Imprefed (Pty) Ltd v National Transport Commission*⁹ the following passage, as it appeared in *Durbach v Fairway Hotel Limited*¹⁰ was approved:

“The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.”

[68] In the light of the above general principles applicable to pleadings, I turn to consider the facts that the City had to prove, as it appeared from *“the pleadings”* before Mr Mbandazayo.

[69] In the applicants’ written representations of 16 November 2017, it was specifically *“pleaded”* that the Family Trust, independently of Lead and Solder, submitted its tender to the City.¹¹ It was also specifically pleaded that Mr Abdul Janodien had no knowledge that the Family Trust submitted its tender to the City. He only heard that the Family Trust had submitted a tender after *“concerns were raised by the City of Cape Town”*¹². The applicants further specifically pleaded that Ms Njonga *“was unaware that the Trust had also submitted a tender for the same service that had been done*

⁸ 1949 (4) SA 821 (AD) at p828

⁹ 1993 (3) SA 94 (A) at 107

¹⁰ 1949 (3) SA 1081 (SA) at 1082

¹¹ Record 200 paragraph 9

¹² Record 200 paragraph 11

by the CC".¹³ In the representations of 22 January 2018 any collusion between the Family Trust and Lead and Solder was specifically denied¹⁴.

[70] In summary, therefore, the applicants averred that there was no communication between the Family Trust and Lead and Solder, prior to submitting their respective quotations to the City.

[71] In the light of the foregoing contentions by the applicants, it follows in my view that the City had to prove on a balance of probabilities that there was prior communication between Lead and Solder on the one hand, and the Family Trust on the other hand, about the two tenders, prior to the submission thereof to the City.

[72] It is common cause that no oral hearing was held, despite the fact that paragraphs 7.2 and 9 of the Abuse Policy specifically make provision for an "oral hearing". At such oral hearing, witnesses have to produce their evidence under oath and affected persons have a right to cross-examine any witness who testifies at that hearing.

[73] In this matter, it is clear that Mr Mbandazayo made a factual finding that Lead and Solder and the Family Trust did communicate with one another at the time of, or prior to submitting their tenders to the City. He could only have made that finding, on an evaluation of the documentary evidence before him. Could he reasonably have done that? I turn to deal with the relevant legal principles.

[74] Section 6 (2) (h) of the Promotion of Administrative Justice Act, No. 3 of 2000 provides as follows:

"6 (2) A court or tribunal has the power to judicially review an administrative action if-

¹³ Record 200 paragraph 13

¹⁴ Record 179 paragraph 3

(h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function;*"

[75] In *Bato Star Fishing v Minister of Environmental Affairs and Tourism and Others*¹⁵ the Court held as follows¹⁶:

"[44] *There was some debate in the supplementary heads filed by the parties as to the precise meaning of s 6(2)(h) of PAJA, which provides that, if a decision 'is so unreasonable that no reasonable person could have so exercised the power', it will be reviewable. This test draws directly on the language of the well-known decision of the English Court of Appeal in Associated Provincial Picture Houses Ltd v Wednesbury Corporation. The repetitiousness of the test there established has been found to be unfortunate and confusing. As Lord Cooke commented in R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd:*

'It seems to me unfortunate that Wednesbury and some Wednesbury phrases have become established incantations in the Courts of the United Kingdom and beyond. Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene MR ([1947] 2 All ER 680 at 683 and 685, [1948] 1 KB 223 at 230 and 234) twice uses the tautologous formula "so unreasonable that no reasonable authority could ever have come to it". Yet Judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory

¹⁵ 2004 (4) SA 490 (CC)

¹⁶ At paragraph [44]

circumlocutions. When, in Secretary of State for Education and Science v Tameside Metropolitan Borough [1976] 3 All ER 665, [1977] AC 1014 the precise meaning of "unreasonably" in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court, all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock ([1976] 3 All ER 665 at 697, [1977] AC 1014 at 1064) as "conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt". These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.'

In determining the proper meaning of s 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.

- [45] *What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not*

will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.”

- [76] In *Dumani v Nair and Another*¹⁷ the Court considered an appeal by a Magistrate who was convicted at a disciplinary hearing on 3 counts of sexual misconduct. Oral evidence was presented at the hearing, and the witnesses were cross examined. The magistrate took the matter on review, and the Supreme Court of Appeal stated¹⁸:

“The enquiry before this court is not whether the presiding officer was correct in his conclusion that Dumani was guilty on three of the charges. The main enquiry before this court is whether the presiding officer's decision is so unreasonable that no reasonable person could have reached it.”

- [77] In *Bato Star*¹⁹ the Constitutional Court warned as follows:

“Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions by administrative agencies fall within the bounds of reasonableness as required by the Constitution”.

- [78] To the extent that Mr Mbandazayo may have made an incorrect factual finding, I am bound by the following dictum in *Dumani*²⁰:

“In our law, where the power to make findings of fact is conferred on a particular functionary - an ‘administrator’ as defined in PAJA - the material - error – of - fact ground of

¹⁷ 2013 (2) SA 274 (SCA)

¹⁸ At Para [22]

¹⁹ At Para [45]

²⁰ At Para [32]

review does not entitle a review Court to reconsider the matter afresh”.

- [79] In the light of the foregoing principle laid down in *Dumani*, I am mindful that it is not my function to reconsider the matter afresh. However, if a fact is established in the sense that it is “*uncontentious and objectively verifiable*”, a Court may intervene²¹.
- [80] In *Chairman, State Tender Board v Digital Voice Processing Pty Ltd; Chairman, State Tender Board v Sneller Digital Pty Limited and Others*²² the State Tender Board decided to restrict Sneller Digital (Pty) Ltd and its directors from doing business within certain spheres of Government for a period of 10 years. It did so on the basis that it decided that the directors had been appointed after a tender had been submitted by the company, and that the company had accordingly made a fraudulent misrepresentation and had been guilty of “*fronting*”. On the objective facts, the directors had been appointed before the tender was submitted and the Supreme Court of Appeal concluded that, had the State Tender Board taken its decision based on the proper facts, it could not have concluded that the company and directors had made a fraudulent misrepresentation. The Supreme Court of Appeal further held that there was a material factual error, and that error, was the direct cause of a decision to blacklist the company and its directors.
- [81] In this matter, and applying the principles enunciated in the above authorities, this Court may intervene if there was a material error or fact finding by Mr Mbandazayo. I turn to deal with that inquiry.
- [82] On the papers before Mr Mbandazayo, there were two mutually destructive versions. The City averred that there was prior communication. The applicants denied it.

²¹ *Dumani* at Para [29]

²² 2012 (2) SA 16 (SCA)

- [83] No oral evidence was produced to lay a foundation upon which Mr Mbandazayo could find that Lead and Solder, and the Family Trust communicated with one another prior to submitting their tenders.
- [84] Both Lead and Solder and the Family Trust positively asserted in their written representation that there was no such communication. Was Mr Mbandazayo entitled to merely reject the applicants' version as it appeared in the "pleadings"?
- [85] If the applicants' written response can be equated to affidavits, the reasonable presiding officer had to apply the *Plascon Evans* principle:²³

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858. (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly

²³ 1984 (3) SA 623 (A) at 634 - 635

untenable that the Court is justified in rejecting them merely on the papers”

[86] The foregoing therefore means that, as a general proposition, he had to accept the version of Lead and Solder, and the Trust, because they were in the position of “*respondents*”. Only if their version was far-fetched or clearly untenable, could it have been rejected on the papers. There was no finding that their version was far-fetched or clearly untenable.

[87] The finding was based on a conclusion that there was circumstantial evidence that pointed towards prior communication. Now, in my view, a reasonable presiding officer should not have made a factual finding based on circumstantial evidence by only considering the “*pleadings*”.

[88] My reasons are:

- (a) Firstly, there was a material dispute of fact which is evident from the “*pleadings*” (or “*affidavits*”).
- (b) Secondly, where a material fact is disputed in the pleadings, it is undesirable that a judicial officer, or quasi-judicial officer, should make a factual finding which is based on the pleadings and documents only.
- (c) Thirdly, the presiding officer should have referred the matter to an oral hearing to determine the central issue in dispute.

[89] Mr Mbandazayo found that there must have been prior communication, because Lead and Solder, and the Family Trust have the same address. I disagree. The fact that Lead and Solder and the Family Trust operate from the same premises, does not in itself prove that Ms Njonga and Mr Guzha communicated with one another prior to submitting the tenders. There is a

suspicion that they did communicate, but a suspicion should not be elevated to the status of a proven fact.

- [90] He also found against the applicants, because they tendered to supply the same material. The fact that both Lead and Solder and the Family Trust tendered to supply the same material, does not in itself prove that Ms Njonga and Mr Guzha communicated with one another prior to submitting the tenders. It is normal that competing bidders tender to supply the same goods, material or services. It is irrational to find that, because competing tenderers offered to supply the same goods, there must have been prior communication.

- [91] He also found that there must have been prior communication between Lead and Solder, and the Family Trust because the respective prices contained in their quotations, were close to one another. I disagree. The fact that two tenderers offer to supply material at prices which are close to one another, does not in itself prove that the two tenderers communicated with one another prior to submitting their tenders. In fact, it is not uncommon that competing tenders have prices which are very competitive and close to one another.

- [92] Mr Mbandazayo found as a fact, that there was prior communication between Lead and Solder and the Family Trust, about their tenders, but there was no evidence placed before him to justify such a finding.

- [93] In my view Mr Mbandazayo based his decision on “*facts*” that are absent. It is objectively verifiable that those “*facts*” are absent.

- [94] The reasonable Presiding Officer, upon evaluating the “*written notices*” and the “*written response*” thereto, should have realised that there was a material dispute of fact which was incapable of resolution on the papers. In those circumstances, he should have referred the matter to an oral hearing in terms of paragraph 7.1 and paragraph 9 of the Abuse Policy. The reasonable

Presiding Officer could not find for the City, based only on the pleadings, and support such finding by way of inferential reasoning.

[95] In the circumstances, and in the absence of an oral hearing, the City failed to discharge the onus of proof. The rulings of Mr Mbandazayo were so unreasonable, that no reasonable person could have reached it.

[96] The rulings can therefore not stand, and have to be set aside.

Closing remarks

[97] The allegations of abuse of the City's Supply Chain Management System, are serious and should be adjudicated upon in a proper manner. Since the rulings were made by Mr Mbandazayo, he has now become the City Manager.

[98] It would therefore be inappropriate if his rulings are set aside, to refer the matter back to him. It would be in the interests of justice that a different Presiding Officer be appointed to deal with the allegations.

Order

[99] In the result, the following order is made;

- (a) The rulings in terms of the City of Cape Town's policy on "*Combating Abuse of Supply Chain Management System*" made against the applicants by the second respondent, dated 3 April 2018 and 17 May 2018, are reviewed and set aside.
- (b) The allegations of abuse of the City's Supply Chain Management System against the applicants, are remitted to the first respondent to deal with it in terms of the policy on "*Combating Abuse of Supply*

Chain Management System", and to appoint an independent and impartial person as envisaged in paragraph 7 of the aforesaid policy.

- (c) The first respondent is directed to pay the applicants' costs of suit including the costs relating to the applicants' application dated 8 August 2018, and the costs incurred on 18 June 2018, 15 August 2018 and 18 September 2018.

W. VOS, AJ
ACTING JUDGE OF THE HIGH COURT