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

[REPORTABLE]

Case No: **19749/2022**

In the matter between:

SIEMENS ENERGY (PTY) LTD	First Applicant
THABO ABBIOT MOLEKOA	Second Applicant
IPELENG ODETTE SELELE	Third Applicant
TIMOTHY RICK O'SHEA	Fourth Applicant

and

CITY OF CAPE TOWN	First Respondent
LUNGELO MBANDAZAYO N.O.	Second Respondent
THE MINISTER OF FINANCE	Third Respondent

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is an opposed application brought in terms of Rule 53 of the Uniform Rules of Court, in terms of which the Applicants seek to review and set aside:

(a) the decision of the First Respondent that the Applicants committed an abuse of the City of Cape Town's Supply Chain Management System;

(b) the decision of the First Respondent to restrict the Applicants for a period of twelve months and to list them on the City's Register of Tender and Contract Defaulters for a period of twelve months which restriction period was wholly suspended for a period of twelve months.[1]

[2] The Applicants have abandoned prayers 1 and 2 of the notice of motion which sought to challenge the lawfulness of the City of Cape Town Supply Chain Management Policy. [2]

Factual Background

[3] This Review is predicated on two declarations of interest forms, ("the declaration of interest forms"), regarding persons in the service of the state. It is common cause that First Applicant ("Siemens Energy") submitted two declarations of interest forms on which it was declared that none of its directors had a spousal relationship with a person in service of the state, which was not correct.

[4] The first declaration of interest form was submitted as a returnable schedule that formed part of a tender offer made by Siemens Energy for design, manufacture,

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[1] Notice of motion, prayers 3 and 4, pages 2 – 3.

[2] Notice of motion, prayers 1 and 2, pages 1 – 2 '*an order declaring clause 58 of the First Defendant's, City of Cape Town ("the City") Supply Chain Management Policy ("SCM system"), inconsistent with Regulation 14 of the Preferential Procurement Regulations, 2017; Section 112 of the Municipal Finance Management Act, 2003 ("MFMA"); and Regulation 38 of the Municipal Supply Chain Regulations, 2005; and unconstitutional and invalid. Furthermore, to the extent that the City's SCM Policy provides that an innocent and immaterial representation amounts to an abuse of the SCM system, the Applicant sought an order declaring clauses 1.1 and 57 of the SCM Policy respectively, inconsistent with the Constitution; the Preferential Procurement Regulations, 2017; the Municipal Finance Management Act, 2003 and the Municipal Supply Chain Management Regulations; and unconstitutional and invalid*'.

supply, delivery to site, off-loading, installation, testing, commissioning and maintenance of 145 KV switchgear and associated equipment at the Morgen Gronde Switching Station on 25 June 2021 ("the June 2021 declaration"). The second declaration of interest form was submitted on the City's services portal as an annual update required of Siemens Energy as a supplier to the City of Cape Town ("the City"), on 11 October 2021 ("the October 2021 declaration").

[5] The declaration of interest forms did not declare that the wife of the Second Applicant ("Mr Molekoa"), is employed at the Council for Scientific and Industrial Research ("CSIR") and that the husband of the Third Applicant ("Mrs Selele), is an eye surgeon who provides professional services to the Helen Joseph Hospital.

[6] The reasons proffered by the Applicants as to why the spousal relationships of the directors were not declared have been summarised as follows[3]:

(a) During May 2021, Mr Molekoa was requested to confirm if he had a relationship with a person in the service of the state for a tender offer that Siemens Energy submitted to eThekwini Municipality. Mr Molekoa understood the requirement to declare a relationship to a person in the service of the state, and inadvertently interpreted the meaning of "state", to be specific to the context in which the declaration of interest was made. Mr Molekoa averred that he inadvertently interpreted the question to relate to a person in the employment of local government, and not to state entities in the broad sense.

(b) Siemens Energy employees did not request Mrs Selele to make a declaration of interest as they were of the mistaken *bona fide* belief that she was not required to do so as a non-executive director of Siemens Energy.

[3] Founding Affidavit, para 14, page 11; Annexures "FA2 to FA4".

[7] The Applicants contended that the declarations were completed by Siemens Energy employees based on the information that was used to complete the declaration of interest form submitted as part of Siemens Energy's tender offer to eThekwini Municipality in May 2021. In further augmentation, the Applicants contended that the employees neglected to request that the directors make an updated declaration in June and October 2021 respectively, and assumed that the information previously provided was correct and would not have changed.

[8] As a consequence, the City initiated steps in terms of its Supply Chain Management Policy ("SCM policy") against Siemens Energy and its directors on the basis that they abused the City's Supply Chain Management System ("SCM system") by misrepresenting information submitted to the City for the purposes of procuring a contract with the City.[4]

[9] On 6 July 2022, the City found that Siemens Energy and its directors committed an abuse in terms of the SCM system, by misrepresenting information on the declarations. On 11 October 2022, the City restricted the listed Siemens Energy and its directors on the City's Register of Tender and Contract Defaulters ("the City's Register") for a period of twelve months which restriction was wholly suspended.

The impugned decisions

[10] This application concerns two decisions, made by the City namely:

(a) On 6 July 2022, the City found that Siemens Energy and its directors had committed an abuse in terms of the City's SCM system, by misrepresenting

[4] Founding Affidavit, para 55 pages 26 - 27; Annexure FA34, page 174.

information on two declaration forms dated 25 June 2021 and 11 October 2021 respectively;

(b) On 11 October 2022, the City restricted Siemens and its directors from doing business with the City and listed them on the City's Register of Tender and Contract Defaulters for a period of twelve months, which restriction period was wholly suspended for a period of twelve months.

Grounds of Review

[11] The Applicants seek to set aside the impugned decisions under the Promotion of Administrative Justice Act, 2000 ("PAJA") and the principle of legality on the basis that it is unlawful, irrational and unreasonable;[5] more particularly that:

(a) a mandatory or material condition in the empowering provision was not complied with (Section 6(2)(b) of PAJA and the principle of legality);

(b) the decision was materially influenced by errors of law (section 6(2)(d) of PAJA and the principle of legality);

(c) the decision was taken for a reason not authorised by the empowering provision (section 6(2)(e)(i) of PAJA and the principle of legality);

(d) the decision was taken because of a material error of fact and because irrelevant considerations were taken into account or relevant considerations were not considered (section 6(2)(e)(iii) of PAJA and the principle of legality);

(e) the decision was taken arbitrarily or capriciously (section 6(2)(e)(vi) of PAJA and the principle of legality);

(f) the decision contravenes the law and is not authorised by the empowering provision (section 6(2)(f)(i) of PAJA and the principle of legality);

[5] Founding Affidavit, para 8, pages 4 – 5.

(g) the decision was not rationally connected to the purpose of the empowering provision, the information before the administrator or the reasons given by the administrator (section 6(2)(f)(ii)(bb), (cc) and (dd) of PAJA and the principle of legality);

(h) the decision is unreasonable (section 6(2)(h) of PAJA); and

(i) the decision is unconstitutional or otherwise unlawful (section 6(2)(i) of PAJA and the principle of legality).[6]

Issues for determination

[12] There are two preliminary issues to be decided[7]:

(a) Whether the review on the merits is ripe for hearing and

(b) Whether the review on sanction is moot.

[13] The identified issues for determination are:

(c) Whether the City's decision that the Applicants committed an abuse of the City's SCM system should be reviewed and set aside on any one of the grounds of review identified by the Applicants in the Founding Affidavit.

(d) Whether the City's decision to restrict the Applicants for a period of twelve months and to list them on the City's Register of Tender and Contract Defaulters for a period of twelve months, which restriction period is wholly suspended for a period of twelve months should be reviewed and set aside on any of the grounds of review identified by the Applicants.

[6] Founding Affidavit, para 151, pages 74 – 75.
[7] Joint Practice Note, para 4.2, page 4.

Legal framework

[14] Section 33 of the Constitution of South Africa[8] ("the Constitution") states that:

'Just administrative action

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and

(c) promote an efficient administration.'

[15] It is trite that the Promotion of Administrative Justice Act[9] ("PAJA") is the national legislation contemplated in section 33(3) of the Constitution, which the legislature was required to enact to give effect to the rights guaranteed in Section 33. The purpose of PAJA is:

> *'To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution'.*

[16] Section 217 of the Constitution states that:

'Procurement

217. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation,

[8] Act 108 of 1996.
[9] Act 3 of 2000.

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.'

Ripeness

[17] The ripeness of this Review on the merits has been identified as one of the preliminary issues to be decided. The Respondents submitted that the Applicants ought to have waited until the matter was ripe for the challenge. The principle of ripeness pre-dates our Constitutional democracy. In the matter of ***African Political Organisation and British Indian Association v Johannesburg Municipality*** [10], the Court declined to declare a regulation invalid for lack of an allegation that the Plaintiff had actually been affected by the regulation. This principle is part of the jurisprudence of the Constitutional era as was the case in the matter of ***Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd and Another*** [11] where the Supreme Court of Appeal, held that the absence of prejudice even in circumstances flowing from certain misdirections by an administrative body was unripe for review. In this regard, the SCA held:

'[32] The situation is clear: Normandien's rights have not been adversely affected by the process so far, and it can point to no prejudice on its part at this stage.

[10] 1906 TS 962.
[11] 2019 (6) SA 400 (SCA).

[33] As a general rule, a challenge to the validity of an exercise of public power that is not final in effect is premature. An application to review the action will not be ripe, and cannot succeed on that account. Hoexter explains the concept thus:[12]

> *'The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts' time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.'*

There is a close connection between prejudice and ripeness. Baxter states that 'the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not.[13]

[34] Normandien has approached the court before any decision, according to it, has even been taken, and before it had suffered any prejudice on account of the actions complained of. It launched a pre-emptive strike against Rhino. It may perhaps have been best advised to 'husband its powder'[14] *in anticipation of the battle that may (or may not) lie ahead.*

[35] In the result, the relief granted in the court below ought not to have been granted because of the absence of prejudice to Normandien and because the matter was not ripe for adjudication.'

[18] Counsel on behalf of the Respondents conceded that this case is distinguishable from the matter in *casu* as the City has concluded its process and has made a final decision. It was however highlighted that the Applicants have failed to demonstrate that any consequences of that decision have materialised and submitted that a court will not grant orders based on hypothetical scenarios. The Applicants however contended that the City's reliance on the principle of ripeness is misplaced

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[12] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 585.
[13] Baxter (note 14) at 720.
[14] *Simelane & others NNO v Seven-Eleven Corporation (SA) (Pty) Ltd & another* [2002] ZASCA 141; 2003 (3) SA 64 (SCA) para 17.

as the City, has failed to show that no prejudice either has been or will be caused to the Applicants as a result of its irregular decision.

[19] It is apposite to mention there is a close connection between prejudice and ripeness as illuminated in ***Rhino Oil*** *(supra)* where it was held:

> *'There is a close connection between prejudice and ripeness. Baxter states that "the appropriate criterion by which ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not"'.*

[20] The consideration of ripeness is clearly interwoven with the grounds of review insofar as it relates to the impugned decisions and will be further dealt with later in this judgment.

Mootness

[21] The Respondents contended that the issue of the sanction is indisputably moot as the challenge "no longer presents an existing or live controversy". The date of the implementation of the suspended sanction was 11 October 2022. The period of suspension having expired on 10 October 2023.

[22] The doctrine of mootness has been explained by the Constitutional Court in ***Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others*** [15] as follows:

> *'Mootness is when a matter "no longer presents an existing or live controversy".*[16] *The doctrine is based on the notion that judicial resources ought to be utilised efficiently and*

[15] (CCT195/19) [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (24 March 2020), at para 47.
[16] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21.

should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical".[17]

[23] It is trite that a High Court does not have any discretion relating to mootness which has been aptly demystified in ***Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others*** [18]

'The situation before Fabricius J was not comparable to the position where this court or the Constitutional Court decides to hear a case notwithstanding that it has become moot. When a court of appeal addresses issues that were properly determined by a first instance court, and determines them afresh because they raise issues of public importance, it is always mindful that otherwise under our system of precedent the judgment at first instance will affect the conduct of officials and influence other courts when confronting similar issues. A feature of all the cases referred to in the footnotes to para 22 above is that the appeal court either overruled the judgment in the court below or substantially modified it. The appeal court's jurisdiction was exercised because 'a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required'.[19] *The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination.*[20](my emphasis)

[24] Similar to the aspect of ripeness, this issue cannot be determined in a vacuum as there are aspects that are interlaced with considerations of mootness. It is my view, that a determination on any of these issues at this stage will be premature

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[17] *J T Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15. See also Loots "Standing, Ripeness and Mootness" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2014) at 7-19 and Du Plessis et al *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 39.

[18] (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016), at para 25.

[19] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5.

[20] See also *VINPRO NPC v President of the Republic of South Africa and Others* [2021] ZAWCHC 261 para 42; *South African Breweries Proprietary Limited and Others v President of the Republic of South Africa and Another* [2022] 3 All SA (WCC) at para 36.

as it behoves this court to deal with the grounds of review pertaining to the impugned decisions. I will deal further with this issue later in the judgment.

The First impugned decision

[25] The first issue for determination is whether the City's decision that the Applicants committed an abuse of the City's SCM system should be reviewed and set aside on any one of the grounds of review identified by the Applicants. As a fundamental starting point, it is not in dispute that Siemens Energy did not pursue its challenges regarding the validity of the City's SCM policy and as such, it must be accepted that the SCM policy is constitutional and lawful.

[26] In this regard, clause 57 of the SCM policy which deals with *"Combating Abuse of the Supply Chain Management System"* states that:

> *'57. The City Manager provides measures for the combating of the abuse of the supply chain management system and is able to:*
>
> *57.1 take all reasonable steps to prevent such abuse;*
>
> *57.2 investigate any allegations against an official, or other role player, of abuse and when justified, to:*
>
> *57.2.1 take appropriate steps against such official or other role-player; or*
>
> *57.2.2 report any alleged criminal conduct to the South African Police Service to any other recognised authority;*
>
> *57.3 check the National Treasury Database of Restricted Suppliers and Register to Tender Defaulters 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.*

...'

[27] Sections 57 and 58 of the City's SCM policy are the empowering provisions that authorise the City Manager to take measures for combating "abuse" of the SCM system; to take all reasonable steps to prevent such abuse, and to take appropriate steps against an official or other role player who has committed such abuse. In other words, these provisions cloaked the Second Respondent ("Mr Mbandazayo") with the power to investigate any alleged abuse of the SCM system and to take reasonable steps to prevent abuse when there are adequate grounds to do so.

[28] In this regard, the following ruling was made by Mr Mbandazayo:

'22. *...after considering the City's evidence, as well as responses received to the City's allegations, I find it to be proven on a balance of probabilities that Siemens Energy and the affected persons committed abuse in terms of the SCM System, by misrepresenting information on the Declaration Forms dated 25 June 2021 and 11 October 2021.*

23. *In addition to the aforementioned, I find that Mr Gobetz's reliance on the fact that Mr Molekoa's and Mrs Selele's failure to declare can be attributed to a bona fides misunderstanding/error, and not an intentional misrepresentation is not a justifiable excuse.*[21]

Abuse in terms of the SCM Policy

[29] The Applicants contended that the City's decision is contrary to SCM policy. The Applicants submitted that they did not abuse the SCM system and that the City's restriction was unlawful, unreasonable and irrational. The Applicants

[21] Annexure "FA 38, page 300.

asserted that the non-disclosures were not intentional and material, and do not constitute an abuse of the SCM system. The explanations proffered included:

(a) That Mr Mbandazayo interpreted the question to relate to only a person in the employ of the City and

(b) That its employees:

(i) mistakenly thought that the disclosure requirement did not apply to the Third Applicant who is a non-executive director and

(ii) neglected to require the directors to make updated declarations in June and October 2021.

[30] The Applicants submitted that the matter of ***Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others*** *(Millennium Waste)* [22] sets the basis for this matter. The Respondents however, challenged the relevance and/or applicability of the ***Millennium Waste*** case on the basis that it is distinguishable and deals with non-compliance in a technical respect.

[22] (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) (29 November 2007), at para 14 *'...the terms of the tender documents relating to administrative compliance were couched in peremptory language which expressly stated that non-compliance would result in disqualification. Proper signing of the tender documents is one of the terms which if not complied with, it was argued, led to disqualification. It was not procedurally unfair for the tender committee to disqualify the tender on the basis of the appellant's failure to sign, continued the argument, because it was forewarned that such a failure would lead to disqualification. Relying on the definition of 'acceptable tender' in the Preferential Procurement Policy Framework Act 5 of 2000 (the Preferential Procurement Act), counsel concluded by submitting that the appellant's tender did not constitute an acceptable tender due to the failure to sign...'*

[31] As the central issue in this matter turns on the meaning of "abuse" in the City's SCM policy it would therefore be prudent to deal with the proper interpretation of the relevant clauses in the SCM policy. The SCM Policy defines "abuse" as follows:

'1.1 "Abuse" in terms of the City's Supply Chain Management System means conduct by an official or person that is tantamount to:

1.1.1 fraud;

1.1.2 corruption;

1.1.3 favouritism;

1.1.4 unfair, irregular and unlawful practices;

1.1.5 misrepresentation on information submitted for the purposes of procuring a contract with the City; misrepresentation regarding the supplier's B-BEE status level of contributor; expertise and capacity to perform in terms of a contract procured via the supply chain management system;

1.1.6 breach of a contract procured via the supply chain management system;

1.1.7 failure to comply with the supply chain management system; or

1.1.8 and any other conduct referred to under the heading of "Combatting Abuse of the Supply Chain Management System".[23](my emphasis)

Misrepresentation "on information"

[32] The Applicants contended that although the information submitted contained misrepresentation, it did not commit "abuse" and as such denies that it is guilty of "abuse" of the City's SCM policy. The Applicants asserted that the City is mistaken if regard is had to a proper interpretation of clauses 1.1.5 and 57 of the SCM policy. According to the Applicants, the City conflated the test for non-compliance with the SCM policy with the determination of whether the conduct complained of falls within the meaning of abuse relevant in the circumstances.

[23] Supply Chain Management Policy, Annexure "LM 1", page 456.

[33] The interpretation of the wording of the definition of "abuse" read with clause 1.1.5 of the SCM policy, namely *"misrepresentation on information submitted for the purposes of procuring a contract with the city"* becomes relevant. The law on statutory interpretation is trite. The oft-cited excerpts taken from ***Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)***[24] offer guidance as to how to approach the interpretation of the words used in a document.[25]

> *'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'*

[34] The Supreme Court of Appeal ("SCA") in ***Capitec Bank Holdings v Coral Lagoon Investments 194 (Pty) Ltd***[26] explains that *'[i]t is the language used, understood in the context in which it is used, and having regard to the purpose of the*

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[24] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.
[25] *Capitec Bank Holdings v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA), *(Capitec)* para 25.
[26] *Capitec* at para 25.

provision that constitutes the unitary exercise of interpretation'. The SCA cautions that:

'[25] ...the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself...

[50] Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.'[27]

[35] The Constitutional Court in ***University of Johannesburg v Auckland Park Theological Seminary and Another***[28] referring to ***Endumeni*** *(supra),* endorses the settled approach to interpretation:

'This approach to interpretation requires that "from the outset one considers the context and the language together, with neither predominating over the other". In Chisuse, although speaking in the context of statutory interpretation, this Court held that this "now

[27] *Endumeni* para 18; *Capitec* para's 25 and 50.
[28] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) *(University of Johannesburg)* at para 65.

settled" approach to interpretation, is a "unitary" exercise.[29] *This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.'*

[36] It is the Respondents contention that Siemens Energy is attempting to twist the definition by suggesting that for an abuse to have taken place, it is the misrepresentation and not the information that must have been submitted for the purpose of contracting with the City. On this interpretation, Siemens Energy is in effect contending that the words "on information" be omitted in order from the clause in the SCM policy to read as "misrepresentation submitted for the purpose of procuring a contract with the City".

[37] The word "misrepresentation" is unqualified in the definition. In its plain meaning the definition covers both intentional and negligent misrepresentation. Caution must be heeded not to change a definition by reading in a meaning when interpreting a definition. To this end, it is suggested by Siemens Energy that the definition requires an element of intention, because the misrepresentation must have been for a specific purpose of procuring a contract with the City.[30]

[38] On a plain reading, it is clear that clause 1.1.5 refers to information that is submitted for the purposes of procuring a contract with the City. Consequently, it is the misrepresentation in that information, that will amount to "abuse". In applying the holistic interpretation approach where "text", "context" and "purpose" are relevant

[29] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 52.
[30] First and Second Respondents' Heads of Argument, para 49, page 16.

considerations, it behoves this court to deal with Siemens Energy's arguments in this regard.

[39] The Applicants challenged the City's policy decision to impose strict liability for non-compliance with SCM Policy contending that same is meritless and contrived in an attempt to justify its unlawful and unreasonable decision. Moreover, it argued that the City's contention is not consistent with a proper interpretation of the SCM Policy and the decision itself.[31]

Intention

[40] Siemens Energy submitted that the conduct contemplated under clause 1.1.5 of the City's SCM policy is the submission of false information with the intention to obtain a contract with the City, emphasising that it is the intentional submission of false information.[32] In augmentation of this submission, the Applicants argued that its interpretation is consistent with:

> *'29.1. The ordinary grammatical meaning of "misrepresentation" and "purpose", and the meaning of abuse, namely to "use to bad effect or for a bad purpose; misuse".*
>
> *29.2. The goal of the regulation of procurement to prevent corruption and irregular procurement.*
>
> *29.3. The purpose of the SCM Policy to provide measures for combating fraud, corruption, favouritism, and unfair and irregular practices in supply chain management.*
>
> *29.4. The scheme of the provision as a whole and the other forms of conduct tantamount to abuse under clause 1.1, including fraud, corruption, and irregular and unlawful practices.*
>
> *29.5. The steps that can be taken against a person who is found to have committed an abuse including to report alleged criminal conduct to the*

[31] Applicants' Heads of Argument, para 10.3 page 5.
[32] Applicants' Heads of Argument, para 28, page 12.

South African Police Service, restrict an entity from participating in government procurement procedures, and cancel a contract and enforce all contractual remedies.

29.6. *The City's interpretation of clause 1.1.5 apparent from its memorandum dated 9 November 2021 (from the director of supply chain management to the chief forensics officer) that requested a "further investigation to determine if the respective suppliers intentionally submitted a false [declaration of interest form]."*

29.7. *The City's ex post facto amendment to its SCM Policy in January 2023 to include a false declaration of interest as conduct that is tantamount to abuse under clause 1.1.5.*[33]

[41] The Applicants argued that the non-disclosures were not intentional and material and do not amount to an abuse as contemplated under clause 1.1.5[34]. The Applicants asserted that the City's policy in relation to non-disclosure amounting to an abuse of the SCM system, ignores the language and context in which the language appears and is insensible. They further contended that it is in conflict with the City's interpretation of clause 1.1.5 and its acceptance of Siemens Energy's non-disclosure of the spousal relationships in the Muizenberg and Newlands contract.[35] The Applicants submitted that the City was incorrect to disregard the fact that Siemens Energy had made full disclosure of the spouses' employment with the state in a November 2020 declaration of interest form submitted to the City.[36] This, it was argued, was material evidence that goes to the Applicants' state of mind (intention).

[42] It is uncontroverted that the City has the power to legislate in respect of its procurement system. This was done through the enactment of its SCM policy and

[33] Applicants' Heads of Argument, para 29, pages 12 – 13.
[34] '…1.5.1 misrepresentation of information submitted for the purposes of procuring a contract with the City…'
[35] Applicants' Heads of Argument, para 31, page 14.
[36] Annexures FA 37, para 21.5 at page 240; para 26.6 at page 243; Annexure FA 38, para 9 at page 297.

elected to use the word "misrepresentation" in the unqualified form. The SCM policy is therefore the memorial of what the City intended it to be at the time. This court is not called upon to pronounce on the validity thereof. The settled approach to interpretation is to be applied as set out earlier in this judgment.

[43] The starting point is therefore to apply ***Endumeni***, where the SCA explicated that the proper approach to statutory interpretation is the objective process of attributing meaning to words used in legislation, which encompasses considerations regarding the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed.

[44] The established guidelines endorsed in ***University of Johannesburg*** that interpretation is to be approached holistically which includes considering the text, context and purpose. Furthermore, the matter of ***Cool Ideas 1186 CC v Hubbard and Another*** [37] also offers useful guidance as to the approach to statutory interpretation where the Constitutional Court held:

> *'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely*
>
> *(a) that statutory provisions should always be interpreted purposively;*
> *(b) the relevant statutory provision must be properly contextualised; and*
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'*

[37] 2014 (4) SA 474 (CC) at para 28.

[45] In considering the "text", the definition of abuse is clearly defined in the SCM policy namely, "misrepresentation on information submitted for the purposes of procuring a contract". To reiterate, "misrepresentation" is not qualified and embraces the meaning of misrepresentation in the broad sense to include, any misrepresentation, whether intentional or negligent as long as it does not result in any absurdity when applying the settled approach to interpretation.[38]

[46] The "context" of the definition is a statutory enactment which seeks to further accountability; promote openness; prevent corruption and nepotism in public procurement. The Respondents contended that this purpose is best served by an interpretation which brings all misrepresentations within the purview of the term "abuse" to ensure that bidders make only factually correct representations to the City.[39] The Applicants' interpretation, lends itself for allowances to be made for certain misrepresentations which may undermine the City's objective of avoiding corruption and nepotism.

[47] In relation to "context"; here too, regard is to be had to the statutory enactment which seeks to prevent corruption and nepotism. There can be no disputing that this is best served by an interpretation which requires accurate information to be provided so as to avoid the potential consequences of corruption, nepotism and/or favouritism.

[38] *Cool Ideas (supra)* para 28 *'The words must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.'*
[39] Respondents' Heads of Argument, para 57, page 18.

[48] The "purpose" of the provision is to ensure that bidders provide accurate information to the City. This serves as a safeguard to detect and prevent corruption or nepotism. The Respondents argue that if a bidder is able to escape the consequences of non-compliance on the basis that its employee or, as in this case, the director was negligent; this will make effective enforcement of the procurement requirements very difficult. They go on to highlight the difficulty to prove deliberate non-compliance in the face of an assertion that there was "only" negligence.[40] The "purpose" of the provision, is to ensure that accurate information is provided to enable the City to be confident that it has only factually correct information before it when considering bids.

[49] The City took a policy decision to enforce strict liability for non-compliance with the SCM policy. In this regard, negligent non-compliance by a bidder will amount to a breach, and as such a failure to disclose information which ought to have been disclosed amounts to a breach and an abuse of the SCM system. I agree with the Respondents that such application of the interpretation, that negligent misrepresentation does not constitute abuse; will defeat or undermine the purpose of the provision.

[50] In my view, Siemens' interpretation cannot be sustained as it does not accord with the plain meaning which is that an abuse occurs when there is a misrepresentation on information that is submitted for the purpose of procuring a contract with the City, which does not require that the misrepresentation needs to be intentional.

[40] Respondents' Heads of Argument, para 58, pages 18 – 19.

[51] It does, however, behove this court to consider whether the false or inaccurate information should be material. The Applicants contended that in order to constitute an abuse, false information must be submitted either for the purposes of procuring a contract with the City or regarding the supplier's B-BEE status level of contributor, expertise and capacity to perform in terms of a contract procured bit the SCM system. Simplistically put, the contention is that false information must be material either to the conclusion of a contract with the City or the supplier's B-BEE status or ability to perform under the contract.[41]

[52] The Respondents pointed out that on Siemens Energy's interpretation, a bidder has the right to make any number of misrepresentations, even deliberate misrepresentations, without any consequence at all, unless the City can prove that the misrepresentations were material. It would therefore be inconceivable for any municipality to adopt an SCM policy in which misrepresentations that were not material would not constitute an abuse.[42]

[53] I interpose to deal with whether the award of the Muizenberg and Newlands contract to Siemens Energy by the City, seemingly with full knowledge of the spouses' employment influence the consideration of materiality. In this regard, to reiterate, the "text" clearly refers to "misrepresentation" in unqualified terms. The words "material", "intentional" and /or "negligent cannot be inserted which does not appear in the text. Consequently, Siemens Energy's interpretation of the definition as requiring intentional misrepresentation falls to be rejected.

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[41] Applicants' Heads of Argument, para 35, page 15.
[42] Respondents' Heads of Argument, para 63, page 20.

[54] It is my view that the award of the Muizenberg and Newlands contracts is demonstrative that Siemens Energy has not been prejudiced. The aspect of prejudice will be dealt with more fully later in this judgment.

[55] To hold that material misrepresentation, similar to negligent misrepresentation, does not constitute abuse will in my view, undermine the purpose of the provision and make proving deliberate non-compliance onerous. This interpretation cannot be regarded as sensible and businesslike, especially when the statutory enactments seek to prevent corruption and nepotism. Therefore, to apply the interpretation advanced by Siemens Energy, in my view, would not be "sensible" or "businesslike" on the facts and context of this matter. Similarly, for the same reasons, Siemens Energy's contention that misrepresentation must be "material" in order for it to constitute abuse could not survive the accepted test on interpretation.

Error of law

[56] To cement this conclusion, it is incumbent for this court to deal with the Applicants' contention within the context of the principles of legality and PAJA for the sake of completeness. It was argued that the City's decision to restrict the Applicants was based on a material error of law in that the City Manager failed to exercise his discretion, which decision is unjustified, irrational and unreasonable.[43]

[57] This because, the Applicants contended that the City was incorrect when it said that its decision that clause 1.1.5 does not make a distinction between a fraudulent, negligent or innocent misrepresentation and its decision was materially

[43] Applicants' Heads of Argument, para 10.4 – 10.5, page 6.

influenced by an error of law as was the case in ***Long Beach Home Owners Association v Department of Agriculture, Forestry and Fisheries and Another***[44].

[58] Inasmuch as the Applicant acknowledges that the City was correct to find that there is a duty on suppliers to declare whether a conflict of interest exists in relation to the process of evaluating and adjudicating of tenders, it contended that the City erred by not having regard to the following:

(a) Siemens Energy was not successful in its tender offer in which the June 2021 declaration was submitted for reasons unrelated to the non-disclosure;

(b) The October 2021 declaration did not relate to a tender at all and

(c) The spouses' employment at the CSIR and the Gauteng Department of Health did not create any conflict in the evaluation and adjudication of a tender with the City.

[59] The Applicants contended that the City failed to take these relevant considerations into account. To this end, the Applicants averred that the decision by the City was materially influenced by an error of law because the City did not allege or find that Siemens Energy and its directors intentionally submitted false information to the City.

[60] In addition, the Applicants submitted that the City has failed to have regard to the fact that the declaration of the spouses' employment in the service of the state in unrelated public entities in a different province is not essential to whether the City would contract with Siemens Energy. The Second Applicant's wife is

[44] 2018 (2) SA 42 (SCA) at para 7 and 16; see also *The Business Zone 1010 CC v Engen Petroleum Limited* 2017 JDR 0259 (CC).

employed as a Research Group Leader at CSIR and the Third Respondent's husband is a self-employed eye surgeon who does sessions in Ophthalmology for a State Hospital, Helen Joseph.[45] In amplification, the Applicants contended that:[46]

(a) A close relationship with persons in the service of the state is neither an automatic bar nor a disqualification to the submission of a bid and the award of a contract under the Municipal Supply Chain Management Regulations.

(b) The award of the Muizenberg and Newlands contract to Siemens Energy by the City with full knowledge of the spouses' employment.[47]

(c) The authority relied on by the City in support of its decision regarding material non-disclosures, as fully detailed in the founding affidavit.[48]

[61] Furthermore, the Applicants contended that the non-disclosures did not induce the City to enter into a contract with Siemens Energy and that no contract was concluded between the parties. It was argued that the City's reliance on the principle that a "misrepresentation occurs when a false or incorrect statement is made by a contractor or agent to the contracting party, which consequently induces the latter party to conclude a contract", cannot be sustained.[49]

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[45] Clause 1.49 of the SCM policy states that *'[i]n the service of the state means:*

1.49.1 *a member of any municipal council, any provincial legislature or the National Assembly or the National Council of Provinces;*

1.49.2 *an official of any municipality or municipal entity;*

1.49.3 *an employee of any national or provincial department, national or provincial public entity or constitutional institution within the meaning of the Public Finance Management Act, 1999 (Act 1 of 1999) ...'*

[46] Applicants' Heads of Argument, para 37, pages 15 – 16; Founding Affidavit para 45.7, page 22.

[47] Founding Affidavit, para 118.2, page 62.

[48] Founding Affidavit, para 119 -120, pages 62 – 64; Annexure FA38, para 15, page 298.

[49] Annexure FA 38, para 14, page 298.

[62] Additionally, the Applicants contended that the City was incorrect to find that the Applicants "had a duty to disclose the information that was in their sole knowledge when submitting the declaration form to the City, and that their failure to do so amounts to misrepresentation".[50] In this regard, it was argued that the City's findings were incorrect in both fact and law for the following reasons:

(a) The City was made aware of the spouses' employment in November 2020 and again in October 2021. These previous declarations, according to the Applicants, demonstrate that full disclosure had previously been made to the City and evidences the Applicants' states of mind.[51]

(b) The City previously accepted the Applicants' explanation regarding the non-disclosure of the spouses' employment in relation to the Muizenberg and Newlands contract, which according to the Applicant, demonstrates the irrationality and unreasonableness of the City's approach in this matter.[52]

(c) The Applicants were not the only source of the information and there was no involuntary reliance by the City on the Applicants for the information. In this regard, the City had secured the information in November 2020 and January 2022 and was able to do so at any point in time through a procurement enquiry request with the consumer profile bureau.[53]

(d) The authority relied on by the City in support of its finding when a duty to disclose exists is distinguishable and irrelevant.[54]

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[50] Founding Affidavit, para 124, page 65; Annexure FA 38, para 17, page 299.
[51] Founding Affidavit, para 126.1 – 126.2, page 66; Founding Affidavit para 49, page 225; Annexure FA31 - FA33, pages 167 - 173.
[52] Founding Affidavit, para 126.3 – 126.4, page 66.
[53] Founding Affidavit, para 125, page 65; Annexure 41, page 392; Annexure FA 34, pages 189 – 190.
[54] Founding Affidavit, para 127, page 66.

[63] The Applicants furthermore contended that the City's factual errors are reviewable because they concern a material fact where the facts are uncontentious and objectively verifiable.[55] They aver that the errors are material because they are the direct cause for the finding that the Applicants conduct amounts to a misrepresentation.[56]

[64] This argument flows into the challenges regarding the sanction. Here too, the submissions in certain respects are interwoven as the Applicants remain steadfast that they did not abuse the SCM system and averred that the decision to restrict the Applicants is unjustified, unlawful, unreasonable, inappropriate, unfair and irrational.

The second impugned decision

[65] The Applicants averred that the City's decision amounts to a material error of law as the City is mistaken in its approach that the purpose of the sanction process is "to only consider mitigating factors in order to determine an appropriate period of restriction" as set out in the sanction ruling:

> 7. *Due to the Ruling being finalised on the merits and my role as Presiding Officer being functus officio, the purpose at this stage of the process is to only consider mitigating factors in order to determine an appropriate period of restriction. I am therefore unable to make a finding on the additional written submissions raised by Mr Hoosen, relating to averments and allegations that should have been raised in their written submissions in response to the City's Notice.*[57] (my emphasis)

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[55] *Polokwane Local Municipality v Granor Passi (Pty) Ltd and Another* [2019] 2 All SA 307 (SCA), para 14 *'...The scope of such review was explained in Dumani, which held that factual error by a decision maker vested with the power to determine the facts would only constitute reviewable error if the error were one in regard to a material fact, where the facts were uncontentious and objectively verifiable....'*
[56] Applicants' Heads of Argument, para 41, page 18.
[57] Annexure FA40, para 7, page 389.

[66] It is however imperative to consider the context within which the Mr Mbandazayo, mentioned that the purpose of the process was to only consider mitigating factors in order to determine an appropriate period of restriction. This was because there was seemingly an attempt to introduce additional submissions relating to averments and allegations that should have been raised in response to the City's notice. At the time of considering an appropriate sanction, the horse had, proverbially speaking, already bolted as a ruling was already made in this regard as a finding was made on 6 July 2022 that Siemens Energy abused the City's SCM system in terms of Regulation 38, promulgated under the SCM Regulations read with the City's SCM policy.[58]

[67] The only consideration at that stage, namely the sanction process, related to mitigating factors. I am therefore of the view that Mr Mbandazayo's decision in this regard, does not amount to a material error in law, as the Applicants were permitted and afforded an opportunity to make submissions pertaining to the City's notice and the sanction. What requires determination is whether Mr Mbandazayo was correct in indicating that the purpose of the process was to only consider mitigating factors in order to determine an appropriate period of restriction. This, because the Applicants argued that it is not correct that a restriction automatically follows a finding of an abuse of the SCM system if regard is had to the wording of SCM policy read with Regulation 38 of the Municipal Supply Chain Management Regulations.[59] It was submitted that the City Manager failed to appreciate that the SCM Policy required him to exercise a discretion whether or not to take appropriate steps or impose a

[58] Annexure "FA40", para 1, page 386.
[59] Founding Affidavit, para 141, pages 69 – 70.

restriction. As previously stated, clause 57 and 58 deals with combating abuse of the SCM System.

[68] The authority to initiate restriction proceedings emanates from Regulation 38 of the Municipal Supply Chain Management Regulations, which is mirrored in the City's SCM Policy. The steps which the City Manager may take include:

'58.1 reject any bid from a bidder:

58.1.1 if any municipal rates and taxes or 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 municipal entity, are in arrears for more than three months; or

58.1.2 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;

58.2 reject a recommendation for the award of a contract if:

58.2.1 the recommended bidder, or any of its directors has committed any abuse of the supply chain management system in competing for the particular contract.

58.3 cancel a contract (and enforce all contractual remedies) awarded to a person...'[60]

[69] The Respondents contended that there are three fundamental problems with Siemens Energy's attack on the sanction namely:

(a) Firstly, the issue of the sanction is moot;

[60] Annexure "LM1", page 477.

(b) Secondly, if there was a material error of law in the determination of the sanction, the appropriate remedy would be to set aside the sanction and refer the matter back to the City, which will be pointless under the present circumstances;

(c) Thirdly, Siemens Energy does not take the correct approach to errors of law. In augmentation, they aver that an appeal and review should not be conflated. What is to be demonstrated is that there was an error of law which would have a material bearing on the outcome of the decision. Reference was made to the matter of ***City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*** [61] where the Constitutional Court held:

> *'However, a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of the Promotion of Administrative Justice Act permits administrative action to be reviewed and set aside only where it is "materially influenced by an error of law". An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision despite the error of law.'*

[70] To strengthen the force of the Respondents' argument, they contended that the City Manager imposed a wholly suspended sanction, which did not affect the ability of Siemens to contract with the City during the period of sanction. Furthermore, it was argued that Siemens has not attempted to explain what other sanction would have been imposed in the absence of the alleged error and has elected to re-argue the facts which were already put before the decision-maker.

[71] As previously stated, the Applicants contended that it is not correct that a restriction automatically follows a finding of an abuse of the SCM system if regard is had to the wording of the SCM policy. The question to be answered therefore, is

[61] 2010 (6) SA 182 (CC) at para 91.

whether the City Manager failed to appreciate that the SCM Policy required him to exercise a discretion whether or not to take appropriate steps or impose a restriction. In this regard, it is evident from the ruling that Mr Mbandazayo had regard to the various legislative and policy framework in reaching his decision.[62] In reference to the City's Notice, the Applicants were made aware that the City intended, to restrict Siemens Energy and the affected persons for a period of up to five (5) years and list them on the City's Register of Tender and Contract Defaulters for a period of up to five (5) years in terms of clause 58 of the SCM policy.[63]

[72] It is evident that the consideration outlined was not rubber-stamped, without consideration. The ultimate sanction was a departure from the aforegoing contemplation, as the Applicants were afforded the opportunity to make submissions. Mr Mbandazayo emphatically indicated that he considered the factors set out in his written ruling, and having applied his mind to the matter at hand, was of the view that a suspended sentence would be an appropriate sanction.[64] Consequently, I am satisfied that Mr Mbandazayo was alive to the fact that the SCM policy required him to exercise a discretion on whether or not to take appropriate steps and/or impose a restriction.

[73] The Applicants challenged Mr Mbandazayo where he stated that he had previously ruled that any sanction imposed on Siemens Energy will equally apply to its directors. The Applicants contended that no such ruling was made and argued that the City is also mistaken in its interpretation and application of clause 60 of the SCM Policy. They averred that it is not clear or apparent from the ruling or sanction that the

[62] Ruling, para 6, page 296.
[63] Ruling, para 24, pages 329 - 330.
[64] Ruling – Sanction, para 10, page 390.

Presiding Officer in fact exercised his discretion or applied his mind to this point, more especially as clause 60 does not provide that a listing automatically applies to a director of an entity.

[74] In this regard, clause 60 of the SCM Policy provides that any listing of a person in terms of clause 59 shall, at the discretion of the City Manager also be applicable to any director who wholly or partly exercises or exercised or may exercise control over.[65] In summary, the Applicants contend that it is irrational to say that because it is in the indictment it is in the ruling as the consequence thereof has a bearing on Mr O'Shea as well.

[75] It was highlighted that the City's notice of the initiation of steps against the Applicants preceded the City's ruling and is not the City's ruling. In this regard, the following was stated in the ruling:

> *'24. The City's Notice indicates that if it is proven that the SCM Policy and Regulation 38 have been contravened as alleged, the City intends to restrict Siemens Energy and the affected persons for a period of up to 5 (five) years and list them on the City's Register of Tender and Contract Defaulters (a list of persons prohibited from being awarded any contracts by the City) for a period of up to 5 (five) years in terms of clause 58 of the SCM Policy.'*[66]

[76] The Applicants contended that they were not provided with a fair and reasonable opportunity to make representations at that stage of the proceedings, and therefore the ruling is unlawful.

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[65] Founding Affidavit, para 143, page 66.
[66] Annexure FA38, para 24, page 300.

[77] It was highlighted that the City's notice was signed by Celsa Watt, a legal advisor at the City. It is the City Manager who is empowered to exercise the discretion to restrict the directors. Therefore, it was submitted, any attempt to do so by another person is *ultra vires* and unlawful. In this regard, it was argued the City does not contend that the City Manager purported to subdelegate his discretionary function under clause 60 of the SCM Policy to Ms Watt.

[78] The Applicants contend that the City Manager failed to apply his mind to the question of whether the restriction should also apply to the directors and also failed to apply his mind to the discretion conferred upon him by clause 60 of the SCM Policy and as such the decision to restrict the directors should be set aside on this basis alone. It was argued that a material condition in the empowering provision was not complied with when the City Manager failed to apply his mind and exercise his discretion.

[79] Furthermore, it was contended that to the extent that the City Manager's acceptance of the statement in the City's notice is based on his mistaken belief that a restriction automatically follows a finding of abuse of the SCM system and that clause 60 is automatically applicable in the absence of the exercise of the required discretion, constituted a material error of law.

[80] The First and Second Respondents' Answering Affidavit, attested to by Mr Mbandazayo, states that Siemens Energy is incorrect in that no finding was made in respect of its directors. The ruling plainly refers to "Siemens and the affected persons", the latter being the directors of Siemens:[67]

[67] Answering Affidavit, para 144.3 page 445; See also the Ruling, para 25, page 301.

'25. Siemens Energy and the affected persons are hereby granted the opportunity to make written submissions as to why the restriction period of up to 5 (five) years should not be imposed.'

[81] Whilst it is so that the ruling refers to "affected persons", this according to the Respondents, imputes a reference to the directors of Siemens Energy. The question to be answered is whether Mr Mbandazayo was correct in stating that he had previously ruled that any sanction imposed on Siemens Energy will equally apply to its directors. In the City's notice dated 10 May 2022, Siemens Energy was advised as follows:

'The City Manager or his nominee will adjudicate on the allegations made in terms of this notice and written submissions received (if any). In the event that Siemens Energy and the above-mentioned directors are found to have contravened any of the above-mentioned provisions, Siemens Energy and the above-mentioned directors may be listed on the City's Register of Tender and Contract Defaulters (a list of persons prohibited from being awarded any contracts by the City) for a period of up to five (5) years. In the case of such listing, Siemens Energy and the above-mentioned directors shall be prohibited from being awarded any contract by the City for that period...'[68]

[82] It is noteworthy that there is specific mention made to consequences in respect of the directors of Siemens Energy. It can therefore be accepted that reference to "affected persons" implies and/or includes the directors of Siemens Energy. This reference, however, is contained in the notice, which is not a ruling. However, as correctly pointed out, the ruling provided Siemens Energy and its directors an opportunity to make written submissions as to why the restriction period should not be imposed.[69]

[68] Annexure "FA34", para 30, page 181.
[69] Ruling, para 25, page 301.

[83] It was further contended that the decision to restrict all the directors is unreasonable and irrational and demonstrates the failure of the City Manager to properly exercise his discretion under clauses 57 and 60 of the SCM Policy in that the City Manager failed to have regard to:[70]

(a) The Second Respondent's interpretation of the declaration from being specific to local government and not to the state in the broader context is reasonable and was previously accepted by the City i.e. the Muizenberg Contract.

(b) The failure to disclose Mrs Selele's husband's employment was a *bona fide* oversight by a junior employee of Siemens Energy who failed to approach Mrs Selele to make a declaration of interest. As a non-executive director, Mrs Selele was not involved in the day-to-day management of the business (contrary to the City's "ruling") and was not in a position to monitor the employee or to prevent the unintended oversight from taking place.

(c) The Fourth Applicant, Mr O'Shea, at all instances correctly disclosed that he does not have a spouse, child or parent in the service of the state.

[84] Of seminal importance is the finding by the Presiding Officer that it was proven on a balance of probabilities that Siemens Energy and the affected persons, meaning its directors, committed abuse in terms of the SCM system, by misrepresenting information on the declaration forms.[71] Whilst Mr Mbandazayo may not have used the exact wording, there can be no mistaking that the ruling included the directors of Siemens Energy and as previously stated, the directors were invited to make submissions prior to the imposition of the sanction.

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[70] Applicants' Heads of Argument, para 52, page 25.
[71] Ruling, para 21, page 300.

[85] In my view, the interpretation by the Applicants in this regard, fails to consider the settled approach on interpretation, which not only applies to the interpretation of the challenged provisions but also the Ruling of the Presiding Officer. Therefore, a holistic approach is imperative, taking into account the text, context and purpose. Consequently, I am satisfied that the Mr Mbandazayo's ruling also applies to the directors of Siemens Energy.

[86] As to whether Mr Mbandazayo had in fact exercised his discretion or applied his mind in this regard, in view of the contention that clause 60 does not provide that a listing automatically applies to a director of an entity, it is my view that this challenge ought to be viewed in the context of the matter which directly affected the directors of Siemens by virtue of the non-disclosure. There can therefore be no separation as the issues are unmistakably interwoven from a logical perspective.

[87] It is most unfortunate that Mr O'Shea is affected by the outcome, however, the consequences cannot be limited to just those directors implicated in the non-disclosures. Directors are equally responsible for the decisions of a company and whilst on the face of it, it may appear to be unfair or irrational for Mr O'Shea, he cannot escape an inevitable consequence of the finding and subsequent sanction of the City.

[88] I am therefore satisfied that the Applicants were provided with a fair and reasonable opportunity to make submissions prior to the imposition of the sanction, which is evident from the wording of the ruling for the reasons already stated earlier in this judgment. I am not persuaded that the ruling under these circumstances was unlawful as contended by the Applicants.

[89] Insofar as it is alleged that the City's notice was signed by Celsa Watt, a legal advisor, it is my view that nothing turns on this. The notice is exactly what it purports to be. It was correctly pointed out that the City Manager is imbued with the power to exercise a discretion to restrict directors. The notice does not impose any restrictions and in my view cannot be regarded as any authority to do so. Therefore, no sub-delegation was required, for a notice to be sent to Siemens Energy and its directors of the City's intention to take action. The Applicants' arguments in this regard would ultimately mean that the City Manager would have to sign every notice in circumstances where action is being contemplated.

[90] Therefore, for the reasons already stated earlier, I am not in agreement with the Applicants' contention that the City Manager failed to apply his mind to the question of whether the restriction should also apply to the directors. I am also not persuaded that the City Manager failed to apply his mind to the discretion conferred upon him by clause 60 of the SCM policy. I am satisfied that the City Manager has complied with the empowering provision in that he has applied his mind and exercised his discretion. I cannot find, based on the papers before me, that the actions of the City and or the Second Respondent, constituted a material error of law. The City's contention that the decision to restrict the directors should be set aside on these bases therefore falls to be dismissed.

[91] By virtue of the settled approach which has been embraced in this Division, the relief sought in para 4 of the Applicants' notice of motion falls to be dismissed.[72] It is important to note that the Applicants in their Heads of Argument

[72] Notice of motion, page 3 *'4. The decision of the first respondent to restrict the applicants for a period of twelve months and to list them on the City's Register of Tender and Contract Defaulters for a period of twelve months, which restriction period is wholly suspended for a period of twelve months, is reviewed and set aside.'*

relied on the contention that the City Manager failed to apply his mind to the question of whether the sanction should also apply to the directors and failed to exercise the discretion conferred upon him by clause 60 of the SCM policy. This cause of action was not pleaded in the founding papers. Although references were made to the facts in this regard, this was not relied upon when the deponent set out what Siemens Energy's case is with regard to the sanction imposed upon the directors.

[92] The following was stated in the Founding Affidavit:

> *'140. Mr Mbandazayo is also incorrect that he previously ruled that any sanction imposed on Siemens Energy will equally apply to its directors. No such finding was made in the ruling. Clause 60 of the SCM policy provides that any listing of a person in terms of clause 59 shall, at the discretion of the City Manager, also be applicable to any director who wholly or partly exercises or exercised or may exercise control over. It is not clear or apparent from the ruling or the sanction that Mr Mbandazayo in fact exercised his discretion or applied his mind to this point at all. Clause 60 does not provide that a listing automatically applies to a director of an entity...*
>
> *147. It is also apparent that Mr Mbandazayo did not have any regard to the impact on the directors and to the mitigating factors in support of not imposing a unilateral restriction on all directors. Mr Mbandazayo failed to consider:*
>
> *...'*[73]

[93] The matter of ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs***[74] provides guidance on the court's approach in review matters namely *'that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.'*

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[73] Founding Affidavit, para 143, pages, 70, paras 147 – 150, pages 72 – 74.
[74] 2004 (4) SA 390 (CC), at para 27.

[94] It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. It is thus expected of an Applicant to disclose facts that would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet in the Founding Affidavit.[75] This legal principle has been enunciated in ***Director of Hospital Services v Mistry***[76] where the Appellate Division held:

> *"When...proceedings were launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and has been said in many other cases:*
>
> > *'...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'*
>
> *Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit (per Van Winsen J in SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board 1953(3) SA 256 (C) at 260)"*

[95] It is therefore settled law that the issues and averments in support of the parties' cases should appear clearly from the Founding Affidavit. The Founding Affidavit is to contain sufficient facts upon which a court may find in the Applicant's favour. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof. Therefore, it is impermissible to raise issues during argument, which has not been pleaded.

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[75] See also *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T); *Juta & Co Ltd v De Koker* 1994 (3) SA 499 (T) at 508 B-D.
[76] 1979 (1) SA 626 (AD) at 635H-636B.

Effect of the sanction

[96] The City restricted the Applicants from doing business with the City and listed them on the City's Register for a period of twelve months. The restriction period was wholly suspended for a period of twelve months on condition that the Applicants do not commit similar violations during the period of suspension, failing which the restriction period will automatically become effective from the date of such finding.

[97] It was argued that by imposing a restriction, the City failed to exercise its discretion in a reasonable and rational manner. It is however noteworthy that the Applicants accepted that there is a public benefit to the restriction of entities that have committed corrupt or fraudulent acts in public procurement.[77] However, the Applicants contended that the restriction is unjustified, unreasonable and irrational because the City failed to have regard to the following factors:[78]

(a) The non-disclosure was not intentional and material. It was based on a reasonable *bona fide* error and misunderstanding. It was submitted that the non-disclosure was not the form of intentional, dishonest and *mala fide* conduct that is the target of a restriction.

(b) The explanation provided for the non-disclosure was reasonable and has previously been accepted by the City in the Muizenberg and Newlands contract.

(c) Siemens Energy was a newly established entity at the time of the non-disclosures and was still in the process of establishing its internal systems and controls when the declarations were made.

[77] Applicants' Heads of Argument, para 50, page 23.
[78] Applicants' Heads of Argument, para 51, pages 24 – 25.

(d) Siemens Energy has taken full remedial action to ensure that the non-disclosure will not be repeated.

(e) The Applicants did not receive any direct or indirect benefit as a result of the non-disclosure and have never previously been accused of or found to have committed any abuse of the SCM system.

(f) Siemens Energy, its directors and employees cooperated fully with the City's investigation and made full disclosure of all information.

(g) The City has not suffered any prejudice and/or financial damage as a result of the non-disclosure.

[98] In addition, it was contended that the City failed to consider the detrimental consequences that a restriction would have on the personal and professional lives of the directors against the fact that:[79]

(a) The directors did not contravene any law or regulations;

(b) The non-disclosures were not intentional, dishonest, do not amount to severe misconduct and are not material;

(c) There was no benefit to the directors from the non-disclosure;

(d) A lack of honesty and integrity is not alleged and has not been established in any respect;

(e) There is no need to protect any state entity from the directors;

(f) The directors gave full cooperation to the City and provided all information requested by the City, demonstrating a willingness to comply with the legal and regulatory requirements; and

[79] Applicants' Heads of Argument, para 53, page 26.

(g) The directors have never been investigated by an organ of state or restricted by any state entity.

[99] It was further contended that the unreasonableness of the City's decision to restrict the Applicants is further demonstrated by the absence of any reasons for the decision and the onerous impact of the restriction on the Applicants as the means employed are excessive and disproportionate. It was further asserted that the suspension of the restriction does not render the exercise of the City's discretion reasonable and rational. To be rational and reasonable, the decision must be based on accurate findings of fact and a correct application of the law, which the Applicants contend, is not the case in *casu*.

[100] The Constitutional Court in ***Bato Star*** (supra) [80] is instructive guidance on what will constitute a reasonable decision:

> *'...In determining the proper meaning of section 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 section 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 section 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.*
>
> *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*

[80] At paras 44 -45.

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. 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 taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.' (my emphasis)

[101] It is common cause that the sanction was handed down on 11 October 2022 and expired on 11 October 2023. It was contended that a finding of abuse of the City's SCM system is final and lives on forever. Siemens Energy, would still be required to disclose the decision of abuse for the SCM system and the restriction to various other clients and counterparts such as, Chevron, British Petroleum, Eni, Eskom and Armscor.

[102] The Respondents contended that the sanction has not acted, and does not act, as a bar to Siemens Energy submitting tenders to the City and being considered by the City of the award of any current or future tenders. It was argued that there are no adverse consequences flowing from the impugned decision as between the City and the Applicants.

Pre-emptive relief

[103] The Respondents submitted that Siemens Energy seeks pre-emptive relief against the City in circumstances where:

(a) As between the City and the Applicants, there are no practical consequences of the City's decision; and

(b) The Applicants have presented no case of actual harm or inevitable harm.

[104] In augmentation of this contention, reference was made to the matter of ***Savoi v NDPP*** [81] where the Constitutional Court warned against these types of challenges as follows:

> *'...Courts generally treat abstract challenges with disfavour. And rightly so...Abstract challenges ask courts to peer into the future, and in doing so stretch the limits of judicial competence. For that reason, the Applicants in this case bear a heavy burden...'*

[105] The Respondents argued that there is no reason why "the limits of judicial competence should be stretched" in *casu*. The entities to which Siemens Energy all require certain disclosures by a bidder, including disclosures of previous alleged misconduct by the bidder. [82] In some instances, the facts in the disclosure will warrant excluding the bidder and in others is will not do so.[83]

[106] By way of example, it was contended that if the hypothetical entity does not have regard to the facts of a case in deciding whether to exclude Siemens this act will be unreasonable because a decision which ignores the correct facts will run the risk of being disproportionate. Ultimately, Siemens and its directors would have recourse against that entity. This, because the entity will be obliged to have regard to the nature of Siemens Energy's breach of the City's SCM policy. Furthermore, the entity would also have to have regard to the facts that when the City determined the sanction, it chose to impose a sanction which had no direct adverse consequences.

[107] In other words, if a third party, whether inside or outside the borders of South Africa, acts unreasonably or disproportionately on the basis of the disclosure

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[81] 2014 (5) SA 317 (CC) at para 13.
[82] Applicants' Reply to First Respondent's Rule 35 (12) Notice, pages 981, 995, 1004 – 1005, 1040 and 1063. See also Applicants' Heads of Argument, para 56, pages 27 – 28.
[83] Respondents' Heads of Argument, paras 66 – 68.

which is made to it, then it is that conduct which is unlawful and falls to be challenged at that stage and on those particular facts, not the City's lawful implementation of a lawful policy.

[108] The Applicants seek to challenge the decision of the City in terms of its SCM policy in order to prevent the hypothetical concerns raised by the Applicants. The challenge appears to be abstract as none of these concerns have manifested as at the time this application was launched and/or argued.

[109] In light of the conclusion to which I have come, that the City did not act unlawfully by taking steps against Siemens and its directors, I am of the view that Siemens Energy has not discharged the "heavy burden" as was referred to in *Savoi (supra),* in order to mount its abstract challenge.

Actual or inevitable harm

[110] The Applicants contended that the City is mistaken that the Applicants are required to produce evidence of actual harm. It therefore follows, that the court is to have regard to whether prejudices have already resulted or are inevitable, which it was argued is not the same as "potential prejudice".

[111] The finding that the Applicants abused the City's SCM policy is final and exists in perpetuity. The Applicants submitted that the prejudice is manifest and includes[84]:

(a) An adverse finding of abuse of the City's SCM system which amounts to a determination of culpability;

[84] Applicants' Heads of Argument, para 71, page 33.

(b) An indeterminate burden on Siemens Energy to disclose the adverse finding in all procurement processes and in the directors' personal and professional capacities; and

(c) The impact of the disclosure of the adverse finding of abuse on all procurement processes and on the directors' personal and professional endeavours.

[112] It was reiterated that the Applicants are obliged to disclose the decision of the City to its clients and counterparts. In further amplification, it was contended that the finding of abuse does not differentiate the Applicants from dishonest and corrupt persons or entities and has an immediate adverse effect on the Applicants' good name and reputation, as well as the directors' right to human dignity.

[113] The Respondent contended that the initiation of these proceedings by the Applicants is not aimed at ameliorating any actual adverse consequences of the sanction between the City and the Applicants. It was argued that the purpose of this litigation is for pre-emptive relief which is based on speculation as to the consequences that may or may not arise in relation to other entities to which Siemens Energy may submit tenders. The arguments centre around perceived consequences to Siemens Energy, its directors or the Siemens Energy AG which is a German company not incorporated in South Africa and is not a litigant in these proceedings.

[114] The Respondents argued that Siemens Energy's approach is fundamentally flawed for the following reasons:

(a) The City's decision does not affect the ability of Siemens Energy to bid for and obtain contracts from the City. The City's decision does not adversely affect any

current or future rights of Siemens Energy as between the City and Siemens Energy.

(b) The envisaged potential future harm as it relates to other entities elsewhere in South Africa or the work, ought to be raised when such challenge materialises.

(c) That if Siemens (or Siemens Energy AG) at some stage in future suffer prejudice, it will not arise from the City's lawful implementation of its duly adopted SCM policy, but from action which other entities have taken in implementing their own policies. It is that action which should be challenged and not the City's lawful implementation of its duly adopted and lawful SCM policy.

(d) The City's decision has no binding on Siemens Energy AG, a German-based company, that is not a party to these proceedings. The Applicants seeks pre-emptive relief in relation to alleged harm to an entity that is not before the Court.

[115] As previously stated, there is a close connection between ripeness and prejudice. Although the Applicants contended that the City's reliance on the principle of ripeness is misplaced as the City, has failed to show that no prejudice either has been or will be caused to the Applicants as a result of its irregular decision, it is clear that the prejudices envisaged are based on eventualities that may or may not materialise.

[116] On the application before this court, I am not persuaded that the Applicants have shown actual or inevitable prejudice. The lawfulness of the City's decision therefore, in my view, does not have the consequence that the City's decision has caused cognisable actual or inevitable prejudice. The award of the

Muizenberg and contracts also anchors this point on the basis that Siemens Energy has not demonstrated any prejudice, as earlier mentioned

[117] Thus, in my view, potential prejudice would not be sufficient to overcome the hurdle of ripeness if regard is had to ***Esau v Minister of COGTA*** [85] where it was held:

> *'...first, that in order for an exercise of public power to be ripe for review, it should ordinarily be final in effect; and secondly, that the decision must have some adverse effect for the person who wishes to review it, because otherwise its setting aside would be an academic exercise which courts generally eschew.'*

[118] I am not persuaded that the Applicants have demonstrated that any consequences of the impugned decision have materialised. It is trite that a court will not grant orders based on hypothetical scenarios.

Declaratory Relief

[119] The Review Application was issued on 22 November 2022. Prayers 1 and 2 of the notice of motion seek an order declaring clauses 1.1, 57 and 58 of the SCM policy to be inconsistent with Regulation 14 of the Preferential Procurement Regulations, section 112 of the Municipal Finance Management Act, and regulation 38 of the Municipal Supply Chain Management Regulations and unconstitutional and invalid.

[120] The Preferential Procurement Regulations 2017 were declared invalid; which declaration of invalidity was suspended for twelve months. At the time when

[85] 2021 (3) SA 593 (SCA), para 45.

the impugned decision was made and the Review Application was issued, the 2017 Regulations were still in force. On 4 November 2022, the Minister of Finance published the Preferential Procurement Regulations 2022, effective from 16 January 2023. On 22 May 2023, the draft Public Procurement Bill 2023 was published. The Bill was introduced in the National Assembly on 30 June 2023 and was passed by the National Assembly in December 2023. The aim of the Bill is to prescribe a single framework to regulate public procurement. The Bill recognises that the public procurement regime in South Africa is currently fragmented with several different laws that regulate procurement across public administration creating confusion as different procurement laws and procedures apply. The Bill, if passed, will repeal chapter 11 of the Municipal Finance Management Act, including Section 112 of the Act and applies to all municipalities.

[121] The Bill also deals with the very issues raised by the Applicants in this application, more particularly the procedures to be followed for the restriction of a person or entity and the process to review a decision to debar. For these reasons, the Applicants have not pursued the declaratory relief which will ultimately be regulated by the impending Bill before Parliament.

Discussion

[122] The City has made an *ex post facto* amendment, to its SCM policy. In this regard, the Applicants contended that it demonstrates that the City recognised if they wanted to impose strict liability they needed to amend. This therefore begs the question whether the City's *ex post facto* amendment to its SCM policy in January

2023, to include a false declaration of interest as conduct that is tantamount to abuse under clause 1.1.5 ultimately amounts to a recognition of the *lacuna* in the policy[86]?

[123] The origin of this litigation lies in the admitted failure of Siemens Energy to correctly answer the City's declaration of interest questionnaires. It is common cause that Siemens Energy made misrepresentations twice. The finding was that this amounted to an abuse as envisaged in the SCM policy before the amendment. The Applicants are confined to the four corners of its application. The reasons for subsequent changes to the SCM policy are not before this court.

[124] Of pivotal importance is that the validity of the SCM policy as it was applied at the time of the impugned decisions is not being challenged. The SCM policy does not make a distinction between the degrees of seriousness of the misrepresentation and essentially prohibited all misrepresentation irrespective of whether the abuse was intentional and/or material and/or negligent as previously stated. I have earlier indicated that Siemens interpretation of "abuse" cannot be sustained as it does not accord with the plain meaning which is that an abuse occurs when there is a misrepresentation on information that is submitted for the purpose of procuring a contract with the City, which does not require that the misrepresentation needs to be intentional.

[125] To reiterate, the definition is unqualified, therefore, on a plain reading of the SCM policy, Siemens Energy committed an abuse. It bears mentioning that the inaccurate disclosures were discovered during the course of conducting internal

[86] Replying Affidavit, para 44 – 45, page 572; Annexure RA3, pages 585 – 586.

checks in accordance with the City's SCM policy uncovered the non-compliance, which led to the City initiating steps in terms of its SCM policy.

[126] The City has adopted a policy to ensure the integrity of its procurement system, which is to further accountability, promote openness, prevent corruption and nepotism in public procurement. The declaration of interest questionnaire has become a standardised part of procurement with the State. It places the obligation on the bidder to disclose whether there is any close relationship or familial bonds with anyone employed by the State to ensure transparency and avoid nepotism or favouritism. The policy requires that tenderers themselves must make the necessary disclosures regarding any close relationships they have with persons in the employment of the State. In this regard, the declarations go to the heart of the key principles of procurement as set out in section 217 read with section 33 of the Constitution.

[127] The Applicants contended that the City essentially made a mountain out of a mole-hill, proverbially speaking, by elevating form over substance. I am not in agreement with the Applicants contention that the non-disclosures would have made no difference and amount to *de minimus*. The disciplinary process brought about the remedial action.

[128] To condone the inaccuracy of the information provided would not be in keeping with the underlying principles of the Constitutional mandate to organs of state and local spheres of government to observe *inter alia* fairness, transparency in the

procurement process and the assurance of an administrative process that is lawful, reasonable and procedurally fair.

[129] For reasons already stated earlier in this judgment, I am not persuaded that the decision by the Presiding Officer was taken for a reason not authorised by the empowering provision. Neither am I of the view that the decision was taken because of a material error of fact. The considerations mentioned in this application were before the Mr Mbandazayo at the time of considering the matter. The purpose of the empowering provision is manifest.

[130] It is trite that courts cannot unduly intrude on the original and deliberative law-making powers, which is the independent function and pre-eminent domain of the legislature. Furthermore, public confidence will be eroded if there is no certainty in law. This court is enjoined to ensure that the Rule of Law is upheld, which is entrenched in particular through the provisions of Section 1(c) read with Sections 217 and 33 of the Constitution. Whilst National legislation is in the process of addressing the policy framework, the *de facto* position at the time when the ruling and sanction were made in accordance with the SCM policy; which policy was not challenged. This SCM policy, in particular, has as its core objective to further accountability, promote openness, prevent corruption and nepotism in public procurement.

[131] The City was empowered to impose an appropriate sanction, which sanction was lawful and has had no consequence to Siemens Energy as it was at all times able to submit bids. It is my view that Mr Mbandazayo has exercised his

discretion rationally and in line with the purpose of the empowering provision, for the reasons encapsulated in his respective rulings. In the circumstances, for the reasons already provided, I am not persuaded that the City's decision was unlawful, irrational and unreasonable as envisaged in terms of PAJA and the principle of legality.

[132] At the time of the hearing of this application, the period of suspension had already expired. Siemens Energy provided no evidence of any impact which the sanction has actually had with any entity. It is manifest that alleged harms envisaged by the Applicants are all hypothetical as the papers do not bear out actual or inevitable harm. It is unrefuted that the City's decision does not adversely affect any current or future rights of Siemens Energy as between the City and Siemens Energy. The Applicants are in effect seeking a pre-emptive order which requires the Court to decide this matter on assumed or hypothetical facts which may or may not arise. In any event, to the extent that there may be any consequences those may be challenged as against the entity; and do not make the decision of the City unlawful.

Conclusion

[133] To summarise, I make the following findings that:

(a) The City's decision was not contrary to its SCM policy in that the misrepresentation, need not have been intentional and/or material to amount to an abuse as contemplated under clause 1.1.5.

(b) The finding that the non-disclosures are an abuse of the SCM system was not materially influenced by errors of law.

(j) The decision taken was authorised by the empowering provision.

(k) The decision was not taken as a consequence of a material error of fact.

(l) Relevant considerations were taken into account.

(m) The decision was not taken arbitrarily or capriciously.

(n) The decision does not contravene the law.

(o) The decision was rationally connected to the purpose of the empowering provision, the information before Mr Mbandazayo and the reasons given by Mr Mbandazayo.

(p) The decision is not unreasonable.

(q) The decision is constitutional and lawful.

(r) Mr Mbandazayo has complied with the mandatory or material condition in the empowering provision.

[134] In considering the unique facts and circumstances of this case, and in keeping with the underlying accepted legal principles as referred to earlier in this judgment, I do not deem it meet to interfere on review with the decision of a *quasi*-judicial tribunal where there has been no irregularity, and in circumstances where Applicants have suffered no prejudice, apart from hypothetical concerns raised. For the reasons already provided in this judgment, the Applicants' application to set aside the impugned decisions under the Promotion of Administrative Justice Act, 2000 and the principle of legality on the basis that it is unlawful, irrational and unreasonable falls to be dismissed.

[135] Even if I am wrong, as at the date of the hearing this matter, 19 months had already passed since the time of the imposition of the sanction. The sanction, therefore, on these facts, has no practical effect. The High Court is vested with the function to determine cases that are live. Consequently, I am not persuaded that there

exists a live issue for determination. In the circumstances, I am of the view that this matter also falls to be dismissed on the basis of mootness as well as ripeness.

Costs

[136] It is trite that Rule 67A of the Uniform Rules requires that party and party costs in the High Court be awarded on one of three scales. The scales set a maximum recoverable rate for work having regard to the importance, value and complexity of the matter. The amendment to the Rule applies prospectively.

[137] The parties were *ad idem* that Scale C would apply, with effect from the date of the amendment, being 12 April 2024. The parties were also in agreement that the costs of two counsel are justified. After carefully considering the complexity of the matter, its value and importance to the parties, in the exercise of my discretion, I am of the view that costs on Scale C are justified.

Order:

[138] In the result, the Court, after having heard counsel for the Applicants and Counsel for the Respondents, and having read the papers filed of record make the following orders:

1. The application is dismissed with costs, which costs are to include the costs of two counsel on the party and party scale, at Scale C from 12 April 2024, as contemplated under Uniform Rule 69, as amended.

ANDREWS, AJ
Acting Judge of the High Court, Western Cape Division

CASE NO: 19749/2022

APPEARANCES

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Attorney briefed:	Mr. S Sirkar

Date of Hearing: 15 May 2024
Date of Judgment: 25 July 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.