



Republic of South Africa

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

Case number: 11031/2016

Before: The Hon. Mr Justice Binns-Ward
Hearing: 8 August 2017
Judgment: 22 August 2017

In the matter between:

SINGATHA AFRIKA MANAGEMENT SERVICES (PTY) LTD First Applicant

UNATHI NTSIKANA HOYANA Second Applicant

and

THE CITY OF CAPE TOWN First Respondent

LUNGELU MBANDAZAYO Second Respondent

JUDGMENT

[1] The applicants have applied in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') for the review and setting aside of the decision, dated 4 September 2015, by the second respondent, in an investigation conducted in terms of the City of Cape Town's Policy for 'Combatting Abuse of Supply Chain Management System', that they had '*committed an abuse of the City of Cape Town's Supply Chain Management System, and/or fraudulent, and/or improper conduct by failing to provide a valid TCC [tax clearance certificate] to the City as envisaged by*

the Abuse Policy and Regulation 38’ of the Municipal Supply Chain Management Regulations.¹ The applicants are Singatha Afrika Management Services (Pty) Ltd (‘the first applicant’ – the company’s name is sometimes spelt as ‘Singata’ in the papers) and the managing director of that company, Mr Unathi Hoyana (‘the second applicant’). Mr Hoyana is referred to in the impugned decision as ‘the affected person’. The City has been cited as the first respondent. The impugned decision was made by the second respondent in his capacity as the presiding officer appointed by the City’s municipal manager in terms of the City’s aforementioned Policy ‘to preside and adjudicate on allegations of abuse of the Supply Chain Management System’ against the applicants.²

[2] The first applicant was registered on the City’s vendor database as a supplier. Suppliers are required to be registered on the database in order to do business with the City. Notwithstanding its listing on the data base over a period of some years, the first applicant had in fact never actually conducted business with the City. It had, however, reportedly regularly done business with other state institutions. The City’s Supply Chain Management Policy required its municipal manager to ensure that the database was regularly updated. Amongst the requirements for listing, prospective suppliers were required to produce a valid tax clearance certificate.

[3] It is common ground that in early 2015 the first applicant provided the City with a tax clearance certificate that was not registered by the South African Revenue Service as having been issued by the Service. This was discovered when the City requested SARS to authenticate the certificate provided to it by the first applicant. The circumstances in which the City requested the authentication are not clear on the papers. It is not evident whether the request was made in the context of standard procedure or because of a suspicion on the part of the City’s officials that something was untoward. Certainly, by appearance the certificate provided by the first applicant was not noticeably distinguishable from a valid certificate.

[4] Upon the discovery of the apparent invalidity of the tax clearance certificate that had been provided to it by the first applicant, the City gave notice to the first

¹ Published under GN 868 in Government Gazette No. 27636, dated 30 May 2005.

² See paragraph 7 of the Policy quoted in paragraph [7] below. The Policy is also accessible on the City of Cape Town website.

applicant, by letter dated 26 May 2015, that the facts at its disposal indicated that the first applicant had *‘committed fraud and/or abuse and/or improper conduct as contemplated in Regulation 38 in that Singatha intentionally submitted false information and/or made a misrepresentation on the information submitted to the City in order to procure contract(s) with the City’*. (Underlining supplied for emphasis.)

[5] The City’s letter also drew attention to clause 3.4 of the City’s abovementioned Policy, pointing out that it stated that:

Any listing in terms of paragraph 2.3 shall, at the discretion of the City Manager, also be applicable to any other enterprise or other partner, manager director, or other person who wholly or partly exercises or exercised or may exercise control over the enterprise of the first mentioned person, and with which enterprise or person the first mentioned person is, or was, in the opinion of the City Manager, actively associated.

The letter had in an earlier passage quoted paragraphs 2.2 and 2.3 of the Policy as follows:

2.2 *The City Manager shall take all reasonable steps to prevent abuse of the Supply Chain Management System ...*

2.3 *The steps referred to in Clause 2.2 above which the City Manager may take include registering the affected person in the City’s Register of Tender and Contract Defaulters ...*

2.3.2 *Rejection of the tender of an affected person if that person or any of its representatives:*

2.3.2.2 *has abused the Supply Chain Management System or has committed any improper conduct in relation to the Supply Chain Management System ...*

It furthermore pointed out that *‘Improper Conduct’* was defined in paragraph 1 of the Policy to mean:

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

The notice letter proceeded:

Unathi Ntsikana Hoyana ("Hoyana") is the sole director of and exercise (sic) control over Singatha and/or is actively associated with Singatha. Should Singatha be restricted the restriction will also be applicable to Hoyana in terms of clause 3.4 of the Abuse Policy. A notice to this effect will be addressed to the director.

[6] The City's notice letter advised that the recipient was entitled to make written representations on the allegations. It went on to explain the procedure that would apply going forward as follows:

16. *A presiding officer will adjudicate on (sic) the allegations made based on this notice and the written submissions received (if any). In the event that Singatha is found by the presiding officer to have committed any of the acts referred to above, this may result in any quotes/tenders submitted by Singatha being rejected for the maximum period of five (5) years and accordingly being listed on the City's Register of Tender and Contract Defaulters (being a list of persons prohibited from being awarded any contract by the City). The City is furthermore required to inform National Treasury (MFMA Circular No. 46 and No. 56³) of any such restriction.*
17. *Please refer to the Abuse Policy⁴ with regard to Singatha's rights and obligations during this process. [Footnote 4 was a web address at which the Abuse Policy could be accessed.]*
18. *Please note that Singatha has the right to obtain legal representation.*

[7] The City's notice to the applicants falls to be read with the Policy, and in particular for present purposes with paragraphs 7-11 thereof, which provide as follows:

7. **ADMINISTRATION OF HEARINGS**
 - 7.1 *The City Manager shall appoint an independent and impartial person, who may be an official of the City of Cape Town, to preside and adjudicate on allegations of abuse of the Supply Chain Management System against an affected person.*
 - 7.2 *The Presiding Officer will adjudicate on the matter based on the written notice and written response and will inform all relevant parties accordingly should the matter, or part thereof be referred for an oral hearing.*
8. **RIGHT TO BE HEARD**

An affected person shall, in accordance with, and subject to, the procedures in terms of this policy, be granted the right to be heard upon receiving notice as contemplated in terms of Clause 6 and prior to the City Manager taking any of the steps listed in paragraph 2.2 and 2.3 of this Policy.
9. **ORAL HEARINGS**
 - 9.1 *An affected person does not have an automatic right to an oral hearing but may submit an application to the Presiding Officer to have the matter set down for an oral*

hearing in instances where the Presiding Officer decided to entertain the matter without oral evidence being heard, or not to refer the matter for an oral hearing.

9.2 *The Presiding Officer may grant such an opportunity in its discretion where the affected person has provided sufficient grounds to the Presiding Officer to refer the matter for an oral hearing.*

9.3 *The Presiding Officer shall take any relevant factor into account when deciding whether or not to grant an application referred to in paragraph 9.2 by an affected person.*

9.4 *The Presiding Officer must ensure that notice of an oral hearing shall be served by a duly authorised person on all relevant parties within 7 (seven) days of receipt of the representations referred to in paragraph from 5.2.3 above, and must*

9.4.1 Set the date of the oral hearing

9.4.2 Inform the affected person of their right to legal representation

9.4.3 Include any other information which the presiding officer may deem relevant or necessary to be included in the notice.

9.5 *The City shall be appropriately represented at these hearings by a natural person to lead the evidence against the affected person.*

10. *PROCEDURE AT ORAL HEARING*

10.1 *The procedure to be followed at an oral hearing shall be determined by the Presiding officer.*

10.2 *Witnesses shall testify under oath.*

10.3 *Affected person(s) or their representatives shall have the right to present their case and to cross-examine any witnesses who testify at the hearing.*

10.4 *Witnesses called by the affected person(s) shall be subjected to cross-examination by any party who may have an interest at the hearing.*

11. *RIGHT TO LEGAL REPRESENTATION*

The onus is on the City to prove any allegations of abuse of the Supply Chain Management System which proof shall be on a balance of probabilities.

An affidavit deposed to by an official from the Revenue Service, Mr Andries Carstens, was enclosed with the City's notice to the applicants. The affidavit confirmed that the tax certificate submitted by Singatha was not reflected on the Revenue Service's records as having been issued by SARS.

[8] The applicants responded to the City notice in a letter from their then attorneys, dated 10 June 2015, which went as follows:

'Dear Sirs,

WRITTEN SUBMISSIONS FOR SINGATHA AFRIKA MANAGEMENT SERVICES (PTY) LTD

We act for Singatha Afrika Management Services (Pty) Ltd.

We are writing to you in response to your letter dated 26 May 2015 addressed to our client. In that letter you indicated that our client was entitled to make written representations to you in response to the allegations made against it.

We enclose two affidavits which have been deposed to by our client's managing director as well as a representative of our client's auditor. The contents of the affidavits are self-explanatory, and clearly record the process which our client followed in obtaining a tax clearance certificate.

In amplification of those affidavits, our instructions are as follows:

- 1. our client [the writer was clearly referring to Mr Hoyana in this paragraph, not Singatha Afrika Management Services (Pty) Ltd] is a self made businessman, and is not an accounting or tax expert;*
- 2. our client specifically employs the services of accountants and auditors to assist it with all of its financial and tax obligations;*
- 3. in January 2015, our client requested its auditors, being Ramathe Desai, Bhagat & Jeena, to obtain new tax clearance certificates for it;*
- 4. whilst its previous tax clearance certificate was only to expire on 27 March 2015, it required new certificates for tendering purposes;*
- 5. its auditors made a tax clearance application to SARS on 7 January 2015;*
- 6. several days later, our client's auditors sent a representative to the offices of SARS where the certificates were handed to them, over the counter, by a SARS official and during SARS trading hours;*
- 7. the tax clearance certificate was delivered by our client's auditors to our client who then began to use them;*
- 8. attached to this letter are copies of our client's 2013, 2014 and 2015 tax clearance certificates. They appear to all look the same, and our client's auditors have no reason to suspect they are not genuine.*
- 9. Had our client's auditors been of the view that the 2015 certificate was not genuine, it (sic) certainly would not have handed copies to our client. In turn, our client most certainly would not have tendered with a certificate it suspected was not genuine.*

Our client cannot speculate as to how it was give a tax clearance certificates (sic) in circumstances where SARS' online records suggest that no tax clearance certificate has been issued. Our client is not an expert in the field. It can only presume that there has been some internal blunder on the part of SARS, as most applications these days are made through SARS online e-filing system, whilst our client's application was delivered manually.

Our client is obviously now left in invidious position where it is being told that it does not have "valid or proper" tax clearance certificates. Subsequent to the City of Cape Town's correspondence to it, our client has checked the online SARS system and has noted that there are apparently some "issues" which have to be resolved before further tax clearance certificates can apparently be issued.

Again, our client is not sure how SARS issued it with tax clearance certificates in circumstances where there are now apparently ongoing issues which have to be resolved before certificates can be issued.

It has approached its auditors to address all of the issues, and they have indicated that they should all be resolved by the end of June. Once those issues have been resolved, and despite the fact that our client maintains that it already has a valid and properly issued tax clearance certificate, it will make a further application for a new certificate to be issued to it. It obviously needs to be issued with a certificate which is properly captured on the SARS online / e-filing system so this issue does not arise in the future.

In conclusion, our client humbly requests that no negative inference be drawn against it as a result of some internal blunder on the part of SARS. As can be seen from the attached affidavits, our client mandated its auditors to obtain tax clearance certificates, which they duly did. Neither our client nor the auditors have any reason to suspect that the certificates are not valid or properly issued, and cannot account for the fact that SARS has not captured the approval online.

Our client requests an opportunity to meet with you in order to discuss this issue and to determine how best to proceed. Our client is doing everything in its power to:

- 1. investigate the position with the relevant SARS official; and*
- 2. deal with the issues which have now arisen with SARS, in order to obtain new certificates.*

Please let u know whether you are willing to meet with our client in order to discuss this issue further. Our client would truly appreciate an opportunity of discussing and resolving this matter informally rather than having a presiding officer adjudicate over a highly technical issue which has arisen through no fault of our client.

[9] The affidavit made by Mr Hoyana that was annexed to the applicants' attorneys' letter read as follows:

1.

I am an adult male businessman and the managing director of Singatha Afrika Management Services (Pty) Ltd ("Singatha").

2.

The facts contained herein are both true and correct.

3.

I confirm that Singatha's auditors are Ramatha Desai, Bhagat & Jeena ("RDBJ"). I have been working with RDBJ, and in particular Mr Jithen Jeena, for many years.

4.

At the beginning of January I contacted Mr Jeena and asked him to assist in obtaining a tax clearance certificate for Singatha for 2015. I indicated that:

- 4.1 I needed additional certificates for tendering purposes; and*
- 4.2 The current certificate was about to expire.*

5.

He said that he would assist in obtaining the certificate.

6.

The new certificates were delivered to my office.

7.

I was incredibly alarmed to receive correspondence from the City of Cape Town suggesting that the certificate had been obtained fraudulently.

[10] The affidavit by the first applicant's auditor, one Jiten Jeena, that was annexed to the applicants' attorneys' aforementioned letter stated:

1.

I am an adult male chartered accountant, and am practising as such from Ramatha Desai, Bhagat & Jeena ("RJB").

2.

The facts contained herein are both true and correct.

3.

RDBJ are the auditors of Singatha Afrika Management Services (Pty) Ltd ("Singatha").

4.

Unathi Hoyana and Singatha have been clients of mine / RDBJ for over ten years.

5.

At the beginning of January 2015 I received a call from Unathi requesting that we obtain a tax clearance certificate for Singatha. He indicated that:

5.1 *his current tax clearance certificate was about to expire; and*

5.2 *he needed a new tax clearance certificate for tendering purposes.*

6.

I had one a representative of RDBJ go to SARS and deliver a tax clearance application form on or about 7 January 2015. A copy of the application papers are attached as "JJ1".

7.

I obtained the certificates several days later and arranged to get them to Unathi.

[11] The City does not appear to have replied to the applicants' attorneys' letter of 10 June 2015. Indeed, there is no indication in the evidence of any communication between the City and the applicants after the despatch of the attorneys' letter and the receipt by the applicants of the ruling by the second respondent that there had been an infringement by them of the City's supply chain management policy.

[12] The presiding officer's ruling commenced by noting that the submission of 'an invalid TCC, not issued by SARS, constitutes an abuse of the City's Supply Chain Management System and/or fraudulent conduct, and/or improper conduct, which is

sanctionable in terms of Regulation 38 ...'. The ruling then proceeded to rehearse the history described earlier in this judgment. The rehearsal included a summary of the content of the affidavits by the official from SARS (Mr Andries Carstens) who stated that the tax clearance certificate presented by the first applicant had not been issued by the Revenue Service, on the one hand, and by the second applicant and a partner at the first applicant's auditors setting out how the certificate had been obtained in an apparently regular manner, on the other. The ruling then set out various pertinent provisions from the City's Supply Chain Management Supply Policy, the Abuse Policy and regulation 38. The presiding officer's finding was set out at paragraphs 17-23 of the ruling document as follows:

FINDING

17. *Mr Andries Carstens' affidavit verified under oath that the TCC submitted by Singatha to the City was not issued by SARS. This constitutes proof on a balance of probabilities that Singatha committed an abuse of the City's SCM System which amounts to improper conduct and it is therefore reasonable for the City to rely on the contents thereof.*
18. *The submission of an invalid TCC, not issued by SARS is a serious matter, and constitutes an abuse of the City's SCM System. Singatha cannot rely on the averment that they are not experts in the field and they should have verified that the TCC was in fact issued by SARS, prior to submission to the City.*
19. *Singatha failed to furnish the City with evidence that the TCC was in fact issued by SARS. Singatha avers that subsequent to the City's notice, they checked the SARS online system and noticed that there are issues which have to be resolved before further TCC's can be issued.*
20. *The City would be failing in its duty to prevent abuse of its SCM System if a supplier that submitted such an invalid TCC was permitted to do business with the City without any consequences. This would place the City at serious risk of exposure to fraud.*
21. *It should be noted that when it is confirmed by SARS in an affidavit that it did not issue a TCC, it is accepted that the TCC is invalid as the affidavit provided constitutes prima facie proof that the TCC is invalid.*
22. *The remainder of Singatha's response is devoted to factors in mitigation of any sanction that may be imposed which will be considered at the appropriate time.*
23. *I therefore find it to be proven on a balance of probabilities that Singatha and the affected person has (sic) committed an abuse of the City of Cape Town's Supply Chain Management System and/or fraudulent and/or improper conduct by failing to provide a valid TCC to the City as envisaged by the Abuse Policy and Regulation 38.*

[13] The applicants have sought to impugn the finding on various of the grounds provided for in terms of s 6(2) of PAJA. In view of the conclusion to which I have come it is necessary to mention only the following:

1. That the action was procedurally unfair.
2. That the action was taken because irrelevant considerations were taken into account and relevant considerations were not considered.
3. That the action was not rationally connected to the information before the administrator and the reasons given for it by the administrator.
4. That the power exercised by the presiding officer was so unreasonable that no reasonable decision maker would have exercised the power in that manner.

[14] The applicants made a number of allegations in support of their contention that the action was affected by procedural unfairness. Again, in view of the conclusion to which I have come, it is not necessary to treat of them all. The applicants complained that the presiding officer did not address their request for a meeting and implied that in the event of the matter proceeding formally, as it did, without their request for a meeting having been acceded to, the enquiry should have been referred to an oral hearing because their attorneys' letter of 10 June set forth sufficient grounds to indicate that an oral hearing was indicated.

[15] In my judgment the applicants' point in this respect is well made. It is appropriate to preface the discussion on the question of procedural fairness with the trite observation that any question concerning what would be fair in the circumstances has to be approached with appropriate flexibility, astute to the peculiar circumstances of the given case; cf. e.g *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC), at para. 56.

[16] The attorneys' letter (which was not addressed to a presiding officer, but had been placed before him by the City as the applicants' response to the notice given in terms of the Abuse Policy) clearly articulated a request that the matter be dealt with in discussion *before* a reference to a presiding officer in terms of the Abuse Policy. The City was within its rights to decline to entertain the request, but its failure to respond to the attorneys' letter meant that the applicants were not informed that the matter had been referred to a presiding officer and consequently not alerted to the need to request

that officer to give them an oral hearing. In my judgment, the omission in the peculiar circumstances to advise the applicants that their attorneys' request had been declined and that the matter had been referred to an identified presiding officer with whom they might communicate to exercise their right in terms of paragraph 9 of the Abuse Policy to submit an application for an oral hearing gave rise to material procedural prejudice.

[17] Furthermore, I consider that the City's Abuse Policy falls to be construed and applied with appropriate regard to its foundation in regulation 38 of the Supply Chain Management Regulations promulgated under the Local Government: Municipal Finance Management Act 56 of 2003. Paragraph 2 of the City's Abuse Policy, part of which has been quoted earlier in this judgment,³ mirrors the wording of regulation 38(1)(a). It is clear, however, from reg. 38(1)(b) that the character of the relevant duty placed on the municipal manager (qua accounting officer) in terms of the regulation is investigative. Regulation 38(1)(b) provides:

A supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer-

...

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

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

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

(Underlining supplied for emphasis.)

[18] The 'adjudicative' role given to a presiding officer in terms of the City's Abuse Policy has to be construed in a manner that gives effect to the obligation imposed on the City's municipal manager in terms of reg. 38. Thus understood, the presiding officer's role is effectively to act as the agent of the municipal manager in conducting the investigation mandated by the regulation. It follows that in order to properly discharge that function the presiding officer is required, if the material before him or her demands it in order for the investigation to be properly undertaken and determined, to proceed with an oral hearing *mero motu*, even in the absence of a request therefor in terms of paragraph 9 of the policy. It seems to me that paragraphs

³ At paragraph [5] above.

7.2 and 9.1 of the Abuse Policy in point of fact give express recognition to this incident of the presiding officer's functions.

[19] The explanation put up on the applicants' behalf in their attorneys' letter supported by the accompanying affidavits was such that it could not be rejected without further investigation and in the absence of oral evidence. It is well-established in judicial practice that material disputes of fact are rarely amenable to determination on paper. It is only in cases in which the decision that has to be made is essentially provisional or interim in effect⁴ that a court will make any determinations of such disputes on the probabilities as they appear to it on the papers, and without hearing oral evidence. The approach is founded on principles of mixed procedural and substantive legal character, in which fairness - as a manifestation of natural justice - figures prominently. I can think of no reason to distinguish the approach from that required of a presiding officer in the discharge of the adjudicative function under the City's Abuse Policy.

[20] The presiding officer would have been entitled to infer as a matter of probability that the tax clearance certificate submitted by Singatha had been falsified and presented fraudulently if the information provided in the affidavit of a SARS official that the certificate had not been issued by the Revenue Service had not been responded to. As the presiding officer indeed noted in his finding, the content of Mr Carstens' affidavit constituted prima facie evidence. Prima facie evidence becomes sufficient evidence if nothing is offered to counter its effect. The potentially conclusive effect of prima facie evidence is defused when the evidence is answered. If an answer is provided, the adjudicator must be in a position to rationally prefer the one version to the other in order to determine the matter. When it is not possible to prefer one version to the other, the decision must go against the party that carried the onus, in this case the City.

[21] The nature of the allegation put to the applicants (which has been quoted in paragraph [4] above) implied conduct involving fraudulent or at least negligent misrepresentation on their part. The response provided by the applicants presented a version that was inconsistent with any fraudulent intent or even culpability on their

⁴ Such as in applications for interim relief or in respect of applications for provisional sequestration or liquidation.

part. In the context of all the information before the presiding officer when he made his decision, the affidavit of the SARS official amounted to no more, in substance, than proof that a record of the clearance certificate in contention was not reflected on the Revenue Service's system. There does not appear to have been any evidence before the presiding officer concerning the procedures entailed in the issuance of tax clearance certificates or as to how, when issued, they come to be captured on the Revenue Service's records. The applicants' response to the City's notice was to advise that the certificate had been obtained in a routine manner and in circumstances in which neither they, nor Singatha's auditors, had had any reason to suspect that there was anything irregular about it. The response suggested that the staff of SARS in Durban had issued the certificate 'over the counter', but that its issuance had not been captured on SARS's computerised system.

[22] Moreover, on the version put up by the applicants they would have had no motive to provide a false certificate to the City. They had not done any business with the City in the past despite Singatha having maintained its name on the suppliers' database for some years, and the submission of the certificate was a matter of compliance with a routine requirement and unrelated to any particular intended bid for a contract with the City.

[23] In the circumstances, if the only evidence against the applicants was - as would appear to have been the case - the affidavit by the SARS official, the presiding officer should have appreciated that it was insufficient, without more, to reject the applicant's version of the facts as actually or even just probably untrue. If, on the other hand, there was evidence against the applicants concerning the issuance of the certificate beyond that contained in the SARS official's affidavit, its nature is not apparent on the record; and it was not disclosed to the applicants with an opportunity for them to respond, as basic considerations of fairness would have required.

[24] It is true that the applicants' response to the notice in terms of the Abuse Policy indicated that there were unresolved issues concerning Singatha's tax affairs at the time the tax clearance certificate was issued. The nature of these issues, whether the applicants or their auditors were aware of them, and whether it would not have been practically possible for a SARS employee to have issued a clearance certificate in the face of them was not explored. The tenor of the applicants' response suggested

that it had been unaware of the issues and that the issuance of a certificate that was not captured on the system was an ‘internal blunder’ on the part of SARS. The presiding officer was in no position, without further investigation, to reject the applicants’ version of the facts, or the submissions advanced on the strength of it. In my judgment, his determination of the enquiry adversely to the applicants without such further investigation was both procedurally and substantively irregular. In consequence, his decision was also one to which a reasonable decision maker could not have come in the circumstances.

[25] These conclusions would be sufficient on the merits of the case to impel granting the review sought by the applicants, but it is appropriate to address a further aspect of the finding. It relates to the applicants’ contention that the decision was not rationally connected to the information before the presiding officer and the reasons given for it by him.

[26] An analysis of the presiding officer’s reasoning shows that his finding was premised on a view that the evidence contained in the SARS affidavit resulted in an onus being placed on the applicants to show that the tax clearance certificate had in fact been issued by SARS. The presiding officer’s view was fundamentally misdirected. There was no shifting onus. The onus of proof remained on the City. Furthermore, the issue was not whether the certificate had been validly issued. It was not disputed that it had not been captured on SARS’s system. The issue raised on the allegations the applicants were called upon by the City’s notice to answer was whether the applicants had fraudulently, or at least negligently, misrepresented the certificate to be a valid tax clearance certificate.

[27] The presiding officer’s finding suggests that he misconceived the nature of the allegations he was called upon to adjudicate, and also that he failed to take into account of the information provided by the applicants in making his decision. As already discussed, the information put up by the applicants precluded a finding that they had acted fraudulently or negligently. In order to give the prima facie import of the evidence in Mr Carstens’ affidavit a conclusive effect, the presiding officer had to be able to find and articulate a rational basis to reject the countervailing effect of the evidence in the applicants’ case. He did not even attempt to do so, and instead appears (in para. 20 of the ruling) to have approached the determination of the matter

on the assumption of some form of strict liability. It is also not apparent on the information before the presiding officer where he came by the notion that there had been a duty on the applicants in the circumstances to confirm with SARS that the tax certificate had been validly issued. Absent some special provision (to which, if it exists, no attention was drawn) the applicants would be entitled to rely on the presumption that all was in order on the basis of the doctrine expressed in the maxim *‘omnia praesumuntur rite esse acta donec probetur in contrarium’*.⁵

[28] The result of the presiding officer’s misdirections was that the decision was not rationally connected to the information before him and the reasons given for it.

[29] The applicants also complained, justifiably in my view, that it does not appear from the decision in what respect they were found guilty of abusing the City’s supply chain management policy. The framing of the determination incorporating a series of alternatives reflected in the employment of two sets of ‘and/or’ and a reference to ‘improper conduct’, which in its defined form,⁶ offers an even wider range of alternatives bears out their complaint. The apparent failure of the presiding officer or the municipal manager to refer the matter to the police, as required in terms of reg. 38(1)(b)(ii) of the Supply Chain Management Regulations, would appear to suggest that the finding was not intended to impute any criminal conduct to the applicants. But who knows? The manner in which the finding was worded fudged the precise character of the abuse that the applicants were found to have perpetrated.

[30] The applicants applied only for the review and setting aside of the presiding officer’s ruling. They did not seek any consequential relief. Granting an order in the bald terms sought by the applicants would not be appropriate. It is clear that an investigation into their conduct in relation to the submission of a tax clearance certificate that was not reflected on the official records was warranted. As indicated, the nature of the applicants’ response is such that a determination cannot properly be made without further investigation, and probably not without oral evidence. In the circumstances it would be appropriate, if the ruling were to be reviewed and set aside, to remit the matter for reconsideration by the presiding officer.

⁵ All things are presumed to have been done in due form, unless proof is offered to the contrary.

⁶ The definition is quoted in paragraph [5] above.

[31] The application for review was brought outside the time limit provided in terms of s 7(1) of PAJA. In their amended notice of motion, the applicants prayed for relief in terms of s 9 of the Act extending the period prescribed in terms of s 7 to the date of the institution of these proceedings. The first respondent did not contend that it had suffered any prejudice as a result of the delay and left the question of whether the applicants should be granted the indulgence in the hands of the court. In all the circumstances of the case I am persuaded that it is in the interests of justice that relief in terms of s 9 should be granted.

[32] The following order is made:

- (a) It is directed in terms of s 9 of the Promotion of Administrative Justice Act 3 of 2000 that the period of 180 days referred to in s 7 of the Act is extended to the date upon which the proceedings in case no. 11031/16 were instituted.
- (b) The ruling in terms of the City of Cape Town's Policy on 'Combating Abuse of Supply Chain Management System' made against the applicants by the second respondent, dated 4 September 2015, is reviewed and set aside.
- (c) The allegations of abuse of the City's Supply Chain Management System against the first and second applicants are remitted to the second respondent for reconsideration in the light of the court's judgment.
- (d) The first respondent is directed to pay the applicants' costs of suit.

A.G. BINNS-WARD
Judge of the High Court