

SOUTH AFRICA / JUDGMENT

Helios Security and Risk Management CC and Another v College of Cape Town and Others (22265/2023) [2024] ZAWCHC 319 (18 October 2024)

[2024] ZAWCHC 319

COURT

Western Cape High Court, Cape Town

BEFORE

Vivier, P AJ

CASE / FILE NUMBER

22265/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 22265/2023

In

the matter between:

HELIOS
SECURITY AND RISK MANAGEMENT CC
First
Applicant
SECHABA
PROTECTION SERVICES
WESTERN
CAPE (PTY) LTD
Second
Applicant
and
COLLEGE
OF CAPE TOWN
First
Respondent
MTHIDHLA
GROUP VIP AND SECURITY (PTY) LTD
Second
Respondent

SNIPER
SECURITY SOLUTIONS
Third
Respondent
TSHEDZA
PROTECTIVE SERVICES CC
Fourth
Respondent
MAFUKO
SECURITY SERVICES CC
Fifth
Respondent
MADUNA
PROTECTION SERVICES
Sixth
Respondent
DEPARTMENT
OF HIGHER EDUCATION
AND
TRAINING
Seventh
Respondent
Bench: Vivier, P AJ
Heard: 28 August 2024
Delivered: 18 October
2024
This judgment was handed
down electronically by circulation to the parties' representatives
via email and release to SAFLII. The
date and time for hand-down is
deemed to be 10h00 on Friday, 18 October 2024.

JUDGMENT

VIVIER, AJ:

Introduction

- [1] The First Applicant, Helios Security and Risk Management CC (“Helios”), and the Second Applicant, Sechaba Protection Services Western Cape (Pty) Ltd (“Sechaba”), render security services to state institutions and private clients. Where applicable I shall hereinafter refer to Helios and Sechaba jointly as the Applicants.
- [2] The First Respondent is the College of Cape Town (“the College”). It was established as a public college, as described in sections 1 and 53 of the Continuing Education and Training Act, No. 16 of 2006 (“CETA”). The College’s main office is situate at Salt River, Cape Town, and it has several campuses within the Western Cape Peninsula.

- [3] The College is a semi-autonomous entity established by CETA. It is listed in Schedule 2 of CETA as one of the “[e]xisting public further education and training institutions, structures and bodies”. The College is a juristic entity and derives its powers from the provisions of CETA.
- [4] Helios previously provided security services to the College at eight college sites (seven campuses and the central offices). This occurred in terms of a contract that had been entered into between Helios and the College, for the rendering of such services during the period of 1 November 2020 to 31 October 2023.
- [5] With a view thereto that the duration of this contract would come to an end on 31 October 2023, the College issued an invitation to bidders, to tender for the provision of security services at the college sites, for a further period of 36 months. The closing date of the tender was 25 August 2023.
- [6] In response to this invitation, 17 bidders, inter alia Helios, Sechaba, the Second Respondent, Mthidlha Group VIP and Security (Pty) Ltd (“Mthidlha”), and the Third Respondent, Sniper Security Solutions (“Sniper”), submitted bids.
- [7] On 16 October 2023 the College Principal (as the accounting officer of the College) considered the recommendations of its Bid Evaluation Committee (“the BEC”) and Bid Adjudication Committee (“the BAC”), whereafter he awarded the bid jointly to Mthidlha and Sniper. These entities were described in the tender documents as the “Mthidlha-Sniper Security JV”. I shall for convenience refer to these successful bidders jointly as “Mthidlha-Sniper”.
- [8] This is an application for the review and setting aside of (a) the decisions and recommendations made by the BEC in respect of the tender on 30 October 2023, as well as (b) the decision of the College Principal to award the tender to Mthidlha-Sniper, on the grounds for review that I shall expand upon below.
- [9] At the hearing of the application, Ms N Nyathi appeared for the Applicants, and Mr L Matiso for the College.
- [10] This application has an extra-ordinary procedural history. It was launched by the Applicants on 7 December
2023. On 18 December 2023, the College delivered a notice of intention to oppose the application (“the notice of opposition”).
- [11] However, after the College had made the record of proceedings available in compliance with rule 53(1) of the Uniform Rules of Court, and Helios, on 9 April 2024, had filed a supplementary founding affidavit and amended the relief sought in the notice of motion, the College –
- [11.1] on 13 May 2024 filed a counter-application, seeking a self-review of

- (a) the determination of the tender specifications, as well as (b) the decision to award the tender to Mthidlhla-Sniper; and

[11.2] on 21 May 2024 filed a notice in terms of which it withdrew its opposition to the review application.

- [12] In addition to this relief, the College also sought the following relief in prayers 4 and 6 of the notice of motion filed in the counter-application:

[12.1] “[T]hat the terms of the contract concerning payment for services rendered by the third and fourth respondents shall remain intact and subject to the said terms and rights that the third and fourth respondents and the applicant have as against each other in contract, the third and fourth respondents are to be paid for services already rendered.” (Emphasis added.)

The references to the Third and Fourth Respondents in this prayer were to Mthidlhla and Sniper respectively, as they were cited in the counter-application.

[12.2] “Directing that the costs of this application be paid by any party that oppose this application, jointly and severally, the one paying the others to be absolved.”

- [13] The parties are in agreement that the decision of the College Principal to award the tender to Mthidlhla-Sniper, should be reviewed and set aside. The Applicants recorded this agreement as follows in paragraph 4 of the practice note filed by them:

“The parties are ad idem that the administrative decision in question should be reviewed and set aside.”

- [14] In paragraph 5 of this practice note, the Applicants confirmed that the relief sought by the College, as referred to in paragraph [12] above, are the only issues for determination.

- [15] In paragraph 1 of the practice note filed by the College, it confirmed the aforesaid as follows:

“The First respondent makes common cause with the description of proceedings as set out in the applicants’ practice note.”

- [16] In the founding affidavit filed by the College in the counter-application, it failed to disclose any basis for the relief sought in respect of the contract between it and Mthidlhla-Sniper, as referred to in paragraph [12.1] above. When this aspect was raised by the Applicants in their answering affidavit filed in the counter-application, the College explained, in its replying affidavit, that such relief is merely “consequential relief to cater for the period of the (new) procurement process”. This was presumably a reference to the new procurement process that would have to be implemented in the event of the decision to award the tender to Mthidlhla-Sniper, being reviewed and set aside.

The main grounds for review set out in the main founding affidavit

- [17] Helios alleged that, on 23 August 2023, it submitted its bid in compliance with the tender invitation. It thereafter received no further communication from the College with regard to its bid.

[18] On 20 October 2023 Helios received “an electronic communication”[1] from the College, requesting it to attend a meeting scheduled for 23 October 2023, at the central office of the College. No explanation

was given with regard to the purpose of this meeting.

[19] Mr Reza de Bruyns, the managing director of Helios, attended the meeting. It was chaired by the College Principal, and several other persons were in attendance. Mr De Bruyns incorrectly assumed that they were campus managers. To his surprise, the College Principal however announced that they were the representatives of the “new security service provider”, and that the primary purpose of the meeting was to discuss the handover of the security services.

[20] An agenda for the meeting was then handed out, and the following was, inter alia, listed as the items on the agenda – (a) “Attendance Register and Apologies”; (b) “Purpose of the Meeting”; (c) “Security Services (Current Contract and New Contract)”; (d) “Handover Process and Communication Protocols” and (e) “Handover and Close Out Report”.

[21] On 23 October 2023 Helios sent a letter to the College, and requested it to provide Helios with the reasons why its bid had been unsuccessful. On 24 October 2023, the College responded to this letter, by e-mail. In this e-mail the College advised Helios that its request had been sent to the College’s attorneys “for processing”, and that the attorneys would “instruct a response” for the College. No further correspondence was received by Helios, from either the College or its attorneys, with regard to this request.

[22] On 26 October 2023 Helios sent a further letter to the College. In this letter Helios pointed out and emphasised the lack of response to its previous request for information, and recorded the following in paragraphs 8 and 9 thereof:

“8. It is of importance to note that the successful company namely, Mthidlhla, was established two years ago and has little experience in the security services industry. We also note that Mthidlhla & Sniper are both Gauteng based security service providers with little presence in the Western Cape Province.

9. In contrast to the above, Helios Security has been providing security services in the Western Cape Province for approximately 16 years and has a wealth of experience in providing such services to tertiary institutions.”

[23] Helios concluded the letter with a request that the appointment of the successful bidders should be held in abeyance, until Helios had been provided with the requested information. Helios also requested an opportunity to file an appeal, if necessary.

[24] Helios received no response from the College to its letter of 26 October 2023. It then resolved to launch an application for the review of the decision to award the tender to Mthidlhla-Sniper.

- [25] Sechaba submitted its tender on 25 August 2023. It likewise received no further response from the College. It was only on 24 October 2023, after Sechaba had communicated with Helios with regard to the matter, that it obtained knowledge thereof that the tender had been awarded to Mthidhla-Sniper. It addressed similar correspondence to the College, requesting reasons as to why its bid had been unsuccessful.
- [26] On 25 October 2023 the College's attorneys sent a letter to Sechaba in reply to its request for information. In this letter the College's attorneys acknowledged that Sechaba was well within its rights to have requested information with regard to the reason(s) why its bid had been unsuccessful. It advised Sechaba that such reasons would be requested from the College and "be provided in terms of the College's Supply Chain Policy, and relevant/applicable legislation".
- [27] Notwithstanding this acknowledgment by the College's attorneys of Sechaba's entitlement to the relevant reasons as requested, and the undertaking to provide such reasons, the College failed to do so.
- [28] Neither Helios nor Sechaba received any further response from the College with regard to the reasons why their bids were unsuccessful.
- [29] Section 45(1) of CETA imposed the following obligation on the College to furnish the requested information to Helios and Sechaba –
- "[A] college must make information available for inspection by any person in so far as such information is required for the exercise and protection of the rights of such person".*
- [30] Paragraph 2 of the tender invitation stipulated that the tender process was subject to the Preferential Procurement Policy Framework Act, No. 5 of 2000, and the Preferential Procurement Regulations
2017. The Applicants contended that the College, by initiating and concluding a tender process, was required to give effect to section 217(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), which provides as follows:
- "217. Procurement– (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in the national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."*
- [31] The Supply Chain Management Policy ("the SCM Policy") of the College provides[2] that its accounting officer is required to comply with the prescripts of the Preferential Procurement Policy Framework Act.
- The handling of bids submitted in response to the public invitation
 - The evaluation of bids

- The adjudication of bids
- The awarding of contracts
- The notification to bidders
- The signing of contracts

(Emphasis added.)

[33] In terms of clauses 4.30 and 4.31 of the SCM Policy,[4] the College must –

[33.1] inform all unsuccessful bidders in writing about the outcome of the bid; and

[33.2] when requested in writing by unsuccessful bidders, provide them with the reasons why his/her own bid was not successful.

[34] The College failed to comply with these peremptory provisions of the SCM Policy, in respect of its decision to award the bid to Mthidhla-Sniper. The Applicants contend that the bidding process was therefore not conducted in a manner that encourages ethical conduct, open and effective competition, fairness and equal treatment.

[35] The Applicants further contend that the College, by failing to comply with the Applicants' requests for reasons, also failed to comply with the provisions of section 3(2) and section 6(2) (b) and

(c) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA").

The main grounds for review set out in the supplementary founding affidavit

[36] The Bid Specification Committee ("the BSC") comprised of the following persons: (a) Tilly Reddy as chairperson;

(b) Nathaniel Masiza; (c) Ryan March and (d) Brenda Maasdorp.

[37] The BEC comprised of the following persons: (a) Sindiso Msipha as chairperson; (b) Daria Duncan and (c) Alfred Ramahlaphe.

[38] The BAC comprised of the following persons: (a) Deon van Rooyen as chairperson; (b) Achmat Gafieldien as deputy chairperson; (c) Basil Naicker; (d) Fred Koopman and (e) Melody Marescia.

[39] On 21 July 2023 the BSC held a meeting in order to, inter alia, agree on and adopt the tender specifications. However, Tilly Reddy did not attend this meeting and Ryan March acted as chairperson (a position not held by him, but by Tilly Reddy). A further irregularity was that Basil Naicker attended and participated in the meeting. He was not appointed as a member of the BSC, but of the BAC (a committee which served an entirely different function). In terms of clause 4.11 of the SCM Policy, the BSC has the function of "compiling the specifications for all procurement goods and services before the invitation process". On the other hand, clause 4.13 of the SCM Policy stipulates that the BAC is responsible for making a

final award or recommendation to the College Principal.

- [40] The BSC adopted the tender specifications on 21 July 2023, and on 31 July 2023 the College Principal approved the recommended specifications.
- [41] On 15 August 2023 the College called on interested bidders to attend a tender briefing session. The Applicants attended this meeting. The briefing session was conducted by the College Principal. The main focus of the meeting was the section of the tender documentation which contained the tender specifications. A question-and-answer session was held thereafter, on the basis of the tender specifications, which was dealt with by the College Principal.
- [42] The Applicants alleged that they submitted their bids in accordance with the requirements of the tender documentation, particularly the tender specifications.
- [43] On 3 October 2023 the BEC held a meeting in order to evaluate the submitted bids, in accordance with the tender specifications. The BEC discussed the bids, in particular those who had complied with the tender specifications, and those who purportedly did not comply. Out of 17 bidders, only 2 were recommended, namely Gap Management and Mthidlha-Sniper.
- [44] The bids of 15 bidders were not recommended, for the same reasons, namely their failure to provide the following documents: (a) UIF certificates; (b) provident fund compliance; (c) public liability insurance cover; (d) vehicle documents; and
- (e) proof of firearm licences.
- [45] However, none of these documents were required to be submitted in terms of the tender documentation and, particularly, the tender specifications.
- [46] The BEC therefore evaluated and disqualified 15 bidders, including the Applicants, on the basis of inaccurate criteria and on the basis of documents that were not required to be submitted in terms of the tender specifications.
- [47] The BEC therefore failed to evaluate the bids in accordance with the provisions of clause 4.12 of the SCM Policy, which provides as follows:

“A bid evaluation committee must

a Evaluate bids in accordance with:

- (i) the specifications for a specific procurement; and
- (ii) ...

b Evaluate each bidder’s ability to execute the contract”. (Emphasis added.)

[48] On 12 October 2023 the BAC held a meeting in order to consider the report and recommendations of the BEC, and to make a final award or recommendation to the College Principal.

[49] Two members of the BAC, Mr Gafieldien and Mr Naicker, did not attend the meeting. It was proceeded with in their absence, with no apologies recorded for the absence, and no official replacements appointed for them.

[50] Moreover, Mr Van Rooyen who acted as chairperson, was a member of the College Council. He was not entitled to attend this meeting by virtue of the prohibition contained in clause 4.13 of the SCM Policy, which provides as follows:

“No members of the college council may be part of the BAC.”

[51] During this meeting the comments and decisions of the BEC were discussed and reviewed. The BAC recorded its concern that the BEC had evaluated the submitted bids on the basis of documents which had not been required in terms of the tender specifications, as follows:

“The BEC minutes did not give full clarity on the reasons for implementing the requirements of a Provident Fund and therefore eliminating certain suppliers. The Chair discussed this with the Chair of the BEC.

The BAC requested that in order for the members to agree to the rejection of Supplierd (sic) on the basis of provident funds, the BEC is requested to update their minutes as the Tender Documents was not clear on this process.

The Members then proceeded with the rest of the Suppliers and confirmed the findings of the BEC.” (Emphasis added.)

[52] As is evident from these minutes, the BAC both acknowledged and expressed its concern that the BEC had evaluated the submitted bids on the basis of documents that had not been required in terms of the tender specifications.

[53] The BAC proceeded to discuss the recommended bidders, GAP Management and Mthidlha-Sniper. The following was recorded in the minutes, in this regard:

“The BAC reviewed the two Suppliers and concluded as follows:

- 1) GAP Management is more than 50km in radius as required by the bidding document. BAC rejects GAP’s application.
- 2) Mthidlha-Snippet (sic) is lacking proof of financial stability of the Company. The Financials submitted was not properly concluded and indicated no financial support. The Joint Venture on the suppliers did not submit the JV’s financials and therefore the BAC is unable to recommend the Supplier.

BAC members could therefore not conclude a recommendation.” (Emphasis added.)

[54] The BAC therefore decided not to recommend any bidders, and recorded its decision as follows:

“The Bid Adjudication Committee do not recommend any Supplier but recommends that the matter be referred to the Office of the Principal for consideration and next steps. If necessary the 17 Suppliers who tendered should be called to another Briefing Session to explain the requirements of the Provident fund as well as Proper Financial Statements.

It is best due to time and appointments to urgently clear with the Principal Office and extend the services of the current service provider on Security for another month.” (Emphasis added.)

[55] On 16 October 2023 the College Principal received the recommendations of the BEC and BAC, and considered the evaluation forms which had been completed by the BEC and BAC in respect of all the received bids.

[56] On the last page of the bid evaluation form in respect of Mthidlha-Sniper, the College Principal recorded the following statements and decision made by him in respect of this bid:

“The issue of feasibility of finances raised by the BAC is outside of the requirement of the tender and can therefore not be considered. The office of the Accounting Officer notes that the two Committees agree in everything and therefore submitted to him to make a determination. The office of the Principal therefore award this contract to the JV.” (Emphasis added.)

[57] The College Principal’s summation in the first two sentences of the quotation in the previous paragraph, is manifestly incorrect. Clause 16 of the Special Conditions of Contract[5] required an investigation by the College of the bidder’s financial position to execute the contract, and to reject any bid

received from a bidder who does not have the capacity to execute the contract. Clause 16 provides as follows:

“16. Vendor assessment (capability and financial ability)

16.1 The College of Cape Town will have the right to confirm the ability of bidders to execute this contract successfully. This includes an investigation by the College of Cape Town or its appointee of the following: a) the bidder’s financial position to execute the contracts,

b) previous contracts executed and current contract, c) delivery periods, Quality and Quantity of Products.

16.2 ...

16.3 ...

16.4 Should the contractor not cooperate in any of these matters and/or do not have the capability to execute the contract his/her offer will be regarded as not acceptable.” (Emphasis added.)

- [58] It therefore follows that a bidder's financial ability to execute a tender contract, was a materially relevant consideration. The College Principal failed to consider this requirement, nor did he consider the fact that the unsuccessful bidders had been unduly disqualified on the basis of the failure to submit documents, which the tender document did not call for.
- [59] The College Principal did not take into account the recommendations by the BAC which called for a further briefing session to be held with the bidders who had been disqualified. The College Principal did not follow these recommendations, and failed to provide a justifiable reason for effectively rejecting the BAC's recommendations in this regard.
- [60] In awarding the bid to Mthidhla-Sniper, a bidder who had not been recommended by the BAC (on the basis that a requirement of the tender specifications had not been met), the College Principal gave Mthidhla-Sniper an unfair advantage, to the detriment of all the other bidders.

The grounds of review set out in the counter-application

- [61] The College alleges that after the filing of the Applicants' amended notice of motion and supplementary affidavit, the officials of the College "took advice" (presumably from the College's legal advisors) and there was consensus "that the tender process had been tainted by bona fide irregularities that rendered the entire procurement process unlawful". The College was therefore advised to institute a counter-application for a self-review of its decision to award the tender to Mthidhla-Sniper.
- [62] The College relied, in the first instance, on the judgment of Minister of Finance v Afribusines NPC 35,[6] in which the Constitutional Court held that the Preferential Procurement Regulations,[7] promulgated by the Minister of Finance, were inconsistent with the Preferential Procurement Policy Framework Act, and therefore invalid. The College alleged that it was unaware of this judgment at the time that it formulated the tender specifications. The tender process was therefore rendered unlawful, because the empowering provision (the aforesaid Regulations) was invalid.
- [63] The College further alleged that the requirements of the "tender data" was vague and caused confusion, in that it was not clear what documents would be required in order to comply with the following operational requirement:
- "The Service Provider is solely responsible for the safety and well-being of its employees when working at CCT."*
- [64] The tender data therefore did not set out the "evaluation criteria for administrative phase", nor did it "explicitly set out the administrative requirement and sanction for non-compliance". The provisions of section 3(2)(b) of PAJA had therefore not been complied with.

[65] The College alleged that the bidders were entitled to know how their bids would be evaluated in each evaluation phase, which was not the case given the vagueness of the requirement. This vagueness “strikes at the core of the tenderer’s right to procedural fairness”.

Discussion

[66] The College did not file an answering affidavit and raised no defence to the grounds upon which the Applicants sought the review and setting aside of the impugned decisions.

[67] Instead, on 13 May 2024 the College filed its counter-application.

[68] On 21 May 2024 the College filed a notice entitled “Notice of Withdrawal”, in which it notified the Applicants as follows:

“BE PLEASED TO TAKE NOTICE THAT THE FIRST RESPONDENT hereby withdraws their (sic) notice of intention to oppose.”

I have already alluded to this notice in paragraph [11.1] above.

[69] In the founding affidavit filed in the counter-application, the College proffered the following explanation as to why it deemed it necessary to launch a counter-application, notwithstanding its decision to withdraw its opposition to the main application:

“The College does not concede any of the review grounds advanced by the applicants’ in the main application but rather, institutes this self-review application in discharge of its higher duty as a public institution to act lawfully and correct any unlawful acts as soon as it becomes aware of such.”

[70] In my view, this explanation is unsatisfactory and difficult to reconcile with the College’s decision not to file an answering affidavit in the main application, but, instead, to withdraw its opposition thereto. There was no need to institute a counter-application for essentially the same relief sought by the Applicants, albeit on different grounds, in respect of the decision to award the tender to Mthidhla-Sniper.

[71] In view of these decisions by the College, the grounds for review upon which the Applicants rely, became unopposed. The College could therefore not have laboured under any misapprehension with regard to the outcome of the main application. The position taken by the College in its founding affidavit in the counter-application, that it does not concede any of the review grounds, does not detract from this conclusion.

[72] The College did not proffer any explanation in its founding affidavit as to why it had filed the “Notice of Withdrawal. In argument, Mr Matiso sought to explain this on the following basis – the notice of opposition was irregular. It had been filed prematurely and out of sequence, because it would only have been necessary to file such notice after the rule 53 record had been made available. Mr Matiso was, however, unable to explain why the College had decided to withdraw its opposition to the main application at such a late stage, if the purpose thereof was merely to rectify its own mistake (of having filed the notice of opposition

prematurely).

- [73] This explanation proffered on behalf of the College, is unsatisfactory. There is no suggestion in the papers that the Applicants objected to the notice of opposition, because it had been filed prematurely. In any event, nothing was done to replace the irregular notice, if it was indeed the intention of the College to merely rectify this irregularity, and to persist in its opposition of the main application.
- [74] It became apparent during argument that the College's decision to withdraw the notice of opposition, occurred concurrently with the decision to launch the counter-application. The inference is inescapable that this was not a mere coincidence, notwithstanding the College's contention to the contrary. I therefore question the explanation proffered on behalf of the College, as to why it had withdrawn the notice of opposition.
- [75] Be that as it may, regardless of my view in this regard, the fact remains that the main application and the grounds upon which the Applicants seek the review and setting aside of the impugned decisions, are unopposed.
- [76] When I questioned Mr Matiso about the merits of the grounds for review, as set out in the Applicants' main founding affidavit, he did not contest that they were valid, but merely stated that he had no instructions to concede the merits thereof.
- [77] I am satisfied that the grounds for review, as set out in the Applicants' main and supplementary founding affidavits, are well-founded. The College Principal's decision to award the tender to Mthidlha-Sniper was not only procedurally unfair, but taken because (a) irrelevant considerations were taken into account and (b) relevant considerations were not considered. The grounds for review as described in section 6(2)(c) and (e)(iii) of PAJA are therefore satisfied.
- [78] The conclusion is inescapable that the College's main purpose for launching the counter-application, was to obtain the relief sought in prayer 4 of its notice of motion (as quoted in paragraph [12.1] above).
- [79] The College failed to disclose any basis for this relief in its founding affidavit. Mr Matiso contended that the College required such relief because it could not allow its campuses to be without any security services. He was unable to substantiate this contention, with reference to any evidence produced by the College.
- [80] In the College's replying affidavit it embarked upon a process of interpreting the relief sought in prayer 4 of its notice of motion, and contended that it "is no more than a (sic) consequential relief to cater for the period of the procurement process". It was submitted in the College's heads of argument that the Court is empowered by section 172(1)(b) of the Constitution to grant just and equitable relief, after having set aside a decision taken in the exercise of a public power.[8]

[81] It is trite that under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power to make “any order that is just and equitable”.^[9] However, this discretion cannot be exercised in the air. If the Court is to exercise its discretion to grant an equitable remedy under section 172(1)(b), there must be a basis to do so, and that basis must be gleaned from the facts placed before the Court, or objectively available facts.^[10] The College made no attempt to place relevant facts before the Court in support of the relief it seeks in this regard.

[82] A further difficulty is that Mr Matiso confirmed that the College persisted in seeking the relief as formulated in prayer 4 of its notice of motion. This relief is contradictory to the relief sought in prayer 3 of the notice of motion, namely –

“Reviewing and setting aside the contract concluded between the applicant and the third and fourth respondents’ (sic) pursuant to the award of the tender.”

[83] Moreover, the Court is left in the dark with regard to at least the following important aspects: (a) what are the terms of the existing contract “concerning payment for services rendered” that should “remain intact”; and (b) for what period should these provisions of the contract effectively remain extant?

[84] The “Service Level Agreement” entered into between the College, on the one hand, and Mthidlha and Sniper, on the other, for the provision of security services to the College, was attached to the College’s replying affidavit. Clause 2.1 thereof provides as follows:

“The price for the service shall be as set out in the Security Pricing Schedule (SPS) attached (Annexure ‘A’).”

[85] However, the document which was attached to the contract as annexure “A”, is not a “Security Pricing Schedule”. It appears to be a document that related to the scope of works, that formed part of the tender documentation. It does not deal with the prices for the rendering of security services. Mr Matiso conceded that this was not the correct attachment to the service level agreement.

[86] I therefore conclude that no basis exists for granting the relief sought in prayer 4 of the notice of motion in the counter-application, as an equitable remedy in terms of section 172(1)(b) of the Constitution. The College’s counter-application for such relief should therefore be dismissed.

Costs

[87] The Applicants initiated these proceedings in order to obtain the review and setting aside of the decision to award the tender to Mthidlha-Sniper. The application was initially opposed by the College. As a consequence, the Applicants’ legal representatives was faced with the formidable task of perusing and considering a voluminous rule 53 record, comprising more than 20 lever-arch files, and the filing of a supplementary founding affidavit and an amended notice of motion.

- [88] It was only thereafter that the College withdrew its opposition to the application. Although the College took the position in its founding affidavit in the counter-application that it does not concede any of the grounds for review relied upon by the Applicants, it effectively never challenged the basis upon which the Applicants sought the setting aside and review of the impugned decisions.
- [89] In my view, there is no reason to depart from the general rule, namely that costs should follow the event in respect of the main application. This rule should only be departed from where there are good grounds for doing so.[11] None have been disclosed.
- [90] With regard to the counter-application, it is apparent from the College's founding affidavit that it based the self-review of its decision to award the tender to Mthidlhla-Sniper, on the provisions of PAJA.[12]
- [91] This cause of action was misconceived. The College exercised a public function when it procured security services and awarded the tender to Mthidlhla-Sniper. As such, it could not use PAJA to review its own decision. PAJA is not available to organs of state as a vehicle for self-review.[13]
- [92] It is unnecessary, however, to make a finding in this regard, given the fact that the parties are in agreement that the decision to award the tender to Mthidlhla-Sniper, should be reviewed and set aside.
- [93] In my view, the main purpose of the counter-application was to obtain the relief sought in prayer 4 of the notice of motion, namely that the terms of the College's existing contract with Mthidlhla-Sniper, with regard to the latter's remuneration for the provision of security services, should remain intact.
- [94] The College was unsuccessful in obtaining such relief, and should therefore pay the Applicants' costs.
- [95] In the result, I make the following order:
1. The decisions and recommendations made by the First Respondent's Bid Evaluation Committee on 3 October 2023 in respect of Tender No. CCT042023, are reviewed and set aside.
 2. The decision of the First Respondent's College Principal to award Tender No. CCT042023 to the Joint Venture between the Second Respondent and the Third Respondent, is reviewed and set aside.
 3. The First Respondent is directed to appoint the following committees –
 - (a) a bid specification committee;
 - (b) a bid evaluation committee; and
 - (c) a bid adjudication committee;

in accordance with its supply chain management policy, with a view to re-advertising, adjudicating and awarding Tender No. CCT042023.

4. The First Respondent is directed to re-advertise Tender No. CCT042023 in accordance with its supply chain management policy.
5. The application for the relief sought by the First Respondent in terms of prayer 4 of its notice of motion in the counter-application, is dismissed.
6. The First Respondent shall pay the Applicants' costs in respect of the main and counter-applications. Costs are granted on Scale A in terms of rule 67A(3)(a).

VIVIER, AJ

APPEARANCES For the Applicants : Adv N Nyathi Instructed by Mark Hess Attorneys Cape Town
For the Respondents : Adv L Matiso Instructed by Mukombo Attorneys Cape Town

- [1] Presumably by e-mail. The nature of this communication was not explained in the founding affidavit.
- [2] In clause 3.4.5 at page 17 thereof.
- [3] In clause 3.5 at page 17 thereof.
- [4] At page 45 thereof.
- [5] As set out at page 42 of the tender documentation.
- [6] 2022
- (4) SA 362 (CC).
- [7] Preferential Procurement Regulations, GN R32 GG 40553, 20 January 2017.
- [8] Par 16 of the heads of argument.
- [9] State Information Technology v Gigima Holdings 2018 (2) SA 23 (CC), par 53.
- [10] Gigima, supra, par 49.
- [11] Law of Costs, 3rd Edition, by A C Cilliers at page 2-16.
- [12] See paragraphs 29 and 35 of the College's founding affidavit.
- [13] Gigima, supra, par 36 and 37.

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