



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: 4200/2023

Reportable	Yes/No
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In the matter between:

GOLDEN SECURITY SERVICES CC

Applicant

and

KING HINTSA TVET COLLEGE

1st Respondent

THE PRINCIPAL, KING HINTSA TVET COLLEGE
Respondent

2nd

THE CHAIRPERSON, BID ADJUDICATION
COMMITTEE, KING HINTSA TVET COLLEGE

3rd Respondent

THE CHAIRPERSON OF BID EVALUATION
COMMITTEE, KING HINTSA TVET COLLEGE

4th Respondent

FALCOLUX CC TRADING AS
FALCOLUX SECURITY SOLUTIONS

5th Respondent

JUDGMENT

Cengani- Mbakaza AJ:

Introduction

[1] This application was initially brought in two parts. In Part A, the applicants sought an order interdicting the first to fourth respondents from implementing or giving effect to the award (the tender/bid). Before Part A could be heard, the court directed the parties to fast track the review (Part B). As a result, the applicant withdrew Part A in adherence with court's directives and the matter was set down in relation to Part B.

The parties

[2] The applicant (Golden Security Services) is a close corporation registered in terms of the laws of the Republic of South Africa with its principal place of business in East London.

[3] The first respondent (the College) is a public college for further education and training. It is established by the Minister of Education in terms of s 3 of Further Education and Training Colleges Act.¹

[4] The second respondent is the principal at Hintsá TVET College, the Chief Executive and Accounting Officer of the first respondent.

¹ Act 16 of 2006.

[5] The third respondent is the chairperson of the Bid Adjudication Committee, established in terms of the Treasury Regulations and the Approved Supply Chain Management Policy of the first respondent.

[6] The fourth respondent is the Chairperson of the Bid Evaluation Committee, established in terms of Regulation 16A6 of the Treasury Regulations and approved Supply Management Policy of the first respondent.

[7] The fifth respondent is Falcolux CC trading under the name and style of Falcolux Security Solutions. It is a legal entity registered in terms of the laws of the Republic of South Africa.

The relief sought

[8] Golden Security Services alleges that the fifth respondent was awarded the tender unlawfully and unconstitutionally, and this forms part of this application.

[9] In a nutshell, Golden Security Services seeks an order in the following terms:

1. That, the first and second respondent's decision to award the tender under the bid number: KHC/BID 01/2023 which relates to the provision of security services at Hintsa TVET College for a period of 36 months to the fifth respondents be declared unconstitutional; invalid; be reviewed and set aside.
2. That, the decision by the third respondent to reverse fourth respondent's recommendation, declaring Golden Security Services the successful tenderer, and replacing it with the fifth respondent is being challenged as constitutionally invalid. Golden Security Services seeks to have this decision reviewed and set aside.
3. The agreement concluded between the first respondent and fifth respondent be set aside with immediate effect.

4. The decision to appoint the fifth respondent as a successful tenderer for the tender be substituted with the decision appointing Golden Security Services as a successful tenderer.

The salient facts

[10] In 2023, the College advertised a tender for security services for a period of 36 months. Golden Security Services and seventeen other companies submitted tender bids. In terms of the tender, only tenderers that submitted qualifications or mandatory specifications would be considered acceptable. Among the specifications was a letter of good standing in accordance with the Compensation for Occupational Injuries and Diseases Act² (COIDA).

[11] The tender evaluation was to be done in stages, including an assessment of responsiveness. Considering the fact that the Private Security Industry Act 56 of 2001 (PSIA) regulates the industry, one condition of the tender was that bidders assessed for mandatory specifications would not charge less than the amount gazetted by PSIA.

[12] In accordance with PSIA regulations, the College made a determination based on the minimum acceptable amount of R30, 372,489. During assessment, some tenderers were disqualified, with Golden Security Services being recommended by the Bid Evaluation Committee (BEC) after meeting the threshold.

[13] Despite the BEC's recommendation, the Bid Adjudication Committee (BAC) reversed it and awarded the tender to the fifth respondent. According to the BEC minutes, the fifth respondent's disqualification stemmed from being no-responsive for failing to submit COIDA proof of good standing.

² Act 130 of 1993.

[14] In the papers filed, the College conceded that the BAC's decision be reviewed and set aside. Based on those concessions, on 11 September 2024, the College as well as the second to fourth respondents unconditionally offered a substitution order in favour of Golden Security Services, with a contract in accordance with the terms of the tender.

Offer by the first to fourth respondents

[15] To put matters into perspective, the offer made pursuant to Rule 34 of the Uniform Rules of Court is as follows:

‘BE PLEASED TO TAKE NOTE THAT First to Fourth Respondents (“the respondents”) herewith unconditionally make the following offer to the Applicant:

1. The First and Second Respondent's decision to award the tender under bid number: KHC/BID 01/2023: provision of security services at King Hintsa TVET College for a period of 36 months (“the Tender”) to the Fifth Respondent be declared invalid and be reviewed and set aside.
2. The decision of the Third Respondent to reverse the recommendation of the Fourth Respondent that the Applicant is a successful tenderer and replacing the Applicant with the Fifth Respondent be declared invalid and be reviewed and set aside.
3. The service level agreement concluded on 7 July 2023 between the First Respondent and the Fifth Respondent be set aside.
4. The decision to appoint the Fifth Respondent as a successful tenderer for the tender be substituted with the decision to appoint the Applicant as the successful tenderer.
5. The appointment of the Applicant as the successful tenderer shall be on the same terms and conditions for which the Applicant had tendered.
6. The Applicant's substitution shall come into effect on 1 December 2024 and will remain in place until May 2026 following the conclusion of a service agreement between the Applicant and the First Respondent by 31 October 2024...’

The point in issue

[16] The issue for determination by this court hinges on paragraphs 6 of the offer (the impugned paragraph). The question is whether the respondents' unconditional offer, specifically the impugned paragraph, equates to 'just and equitable' remedy under s 172 (1) (b) of the Constitution³ read with s 8(1)(c)(ii)(aa) of the Promotion of Administration of Justice Act 3 of 2000 (PAJA).

The legal framework

[17] Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It is well-established that administrative remedies are inherent to the constitutional text and must be interpreted within its framework.

[18] Section 172(1)(a) entails that a court must declare that 'any law or conduct that is inconsistent with the Constitution is invalid'. In terms of s 172(1)(b) the court may make an order that is 'just and equitable'. The Constitutional Court (CC) in *Electoral Commission v Mhlophe*⁴ held:

'[132] Section 172(1)(b) clothed our country with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently resolvable situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b)...'

[19] In accordance with the principle of subsidiarity, the provisions of PAJA aim to realise the rights envisaged under s 33(1) and (2) of the Constitution. Pursuant to s 6 (1) of the PAJA, any person whose rights have been materially

³ Constitution of the Republic of South Africa, 1996 (the Constitution).

⁴ 2016 (5) SA 1 (CC); [2016] ZACC 15 at para 132.

and adversely affected by an administrative decision is entitled to seek for judicial review of that administrative action.

[20] Section 8(1)(c)(ii)(aa) of PAJA empowers the court or tribunal, in proceedings for judicial review, to grant any order that is just and equitable. This includes, in exceptional circumstances, an order substituting or varying the administrative action or correcting a defect resulting from it.

[21] The legal position is that the court cannot usurp the functions of the administrator unless compelling reasons necessitate that intervention. Therefore, for substitution to be granted under s 8 (1)(c)(ii)(aa) of PAJA, the applicant must demonstrate compelling facts amounting to exceptional circumstances.

[22] In *Trencon Construction (Pty)Limited v Industrial Development Corporation of South Africa Limited and Another*⁵, the CC held that the following factors should be considered to determine whether the exceptional circumstances exist for a court to order a substitution. While these principles are acknowledged, each case is ultimately decided on its own unique circumstances.

‘(a) Whether the court is in a good position as an administrator to make a decision;

(b) Whether there has been undue delay; and

(c) Whether there is evidence of bias or incompetence on the part of the administrator.’⁶

The parties’ submissions

[23] All the parties acknowledge that the tender was for a 36-month term. Counsel for Golden Security Services argues that paragraphs 5 and 6 of the offer do not synchronise. In paragraph 5, the College acknowledges that the

⁵ 2015 (5) SA 245 (CC).

⁶ *Supra* at para 47.

appointment of Golden Security Services as a successful tenderer shall be on the same terms and conditions for which the applicant had tendered.

[24] Paragraph 6 of the offer entails that the substitution must come into effect from 01 December 2024 and remain in force until May 2026. According to Golden Security Services, this period amounts to 18 months, as opposed to the 36 months envisaged under the terms and conditions of the tender.

[25] In contrast, the fifth respondents' counsel argue that the tender was duly implemented by the fifth respondent from July 2023 until June 2024, at which point the College cancelled the contract pending review.

[26] Following the cancellation, and in order to maintain security operations at the institution, the matter came to court which granted an order on 24 October 2024. The effect of that order was that Golden Security Services would be appointed to render the same services on a month-to-month basis, pending the final determination of the review.

[27] The College and the fifth respondents' counsel argue that the contract will expire soon, and Golden Security Services is already providing the same service on a month-to-month basis. Therefore, a fresh 36-month contract from the date of judgment would not correct an irregularity but rather create an entirely new contract, extending beyond the scope of the original tender and beyond the financial period approved under the Public Finance Management Act 1 of 1999.

[28] Such an order, so the argument goes, would offend the principles of legality under s 217 (1) of the Constitution. The respondents therefore argue that the substitution should be confined strictly to the remainder of the original contract period in order to preserve legality, fiscal discipline and the integrity of the competitive-bidding system.

The analysis

[29] In this case, it is evident from the joint practice notes, the terms of the offer including the arguments raised that the parties agree that the administrative action is invalid. The established legal principle is that when the consequences of an invalid administrative act can no longer be prevented, they must be corrected.

[30] Furthermore, it is undisputed that Golden Security Services has demonstrated exceptional circumstances warranting a substitution order. It is noted that the College filed no answering affidavit to oppose this application. Therefore, the exceptional circumstances are inferred from the following facts which are common cause: the fifth respondent did not meet the mandatory terms and conditions of the bid despite being appointed as a successful tenderer.

[31] The fifth respondent's price was less than the required minimum price by R254 889. The BEC had excluded the fifth respondent for failure to submit proof that it was in good standing with COIDA. Golden Security Services, on the other hand, met the required threshold of the bid specifications.

[32] Therefore, the decision to appoint the fifth respondent as a successful tenderer was unlawful, unconstitutional, grossly irregular and irrational. Considering these circumstances, the elements of bias are evident. Consequently, the respondents' concession regarding the substitution order is justified.

'Just and equitable order'

[33] In *Mvumvu and Others v Minister of Transport and Another*⁷, the CC reiterates that unless the interests of justice and good governance dictate otherwise, the applicant is entitled to the remedy it seeks if successful. The

⁷ (CCT 67/10) [2011] ZACC 1; 2011 (2) SA 473 (CC)'2011 (5) BCLR 488 (CC) (17 January 2011) para 46.

court may decline to grant it only if there are compelling reasons to do so. The CC in *Mvumvu*⁸ added that the discretion conferred on the courts by s 172(1) of the Constitution must indeed be exercised judiciously.

[34] In *casu*, the fifth respondent's counsel referenced to *Department of Transport and Others v Tasima (Pty) Limited*⁹ (Tasima), stating that a contract that had expired due to effluxion of time cannot be kept alive by a court order. Although this principle is acknowledged, it needs to be emphasised that the facts of this case and those in *Tasima* are distinguishable.

[35] In this matter, the fifth respondent acknowledges that the impugned contract was cancelled pending the review. This indicates that there is no contract in existence in terms of the bid. The month-to-month contract that Golden Security Services entered into after the first to fourth respondents decided to cancel the impugned contract with the fifth respondent does not form part of the procurement process as envisaged in terms of s 217 of the Constitution, in that no bid was even advertised for the month-to-month contract.

[36] Gleaning from the papers filed, it is clear that the contract on a month-to-month basis was offered to ensure that security services in the College are rendered and to ameliorate prejudice on the part of Golden Security Services. In light of the aforesaid, there would be no plausible reason to adjust the terms and conditions of the bid security contract of a 36-month period.

[37] Moreover, considering paragraph 5 of the offer, it stands to reason that the respondents acknowledge that Golden Security Services is entitled to be

⁸ *Ibid.*

⁹ (CCT5/16) [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (9 November 2016) paras 3-4.

appointed as a successful tenderer with the same terms and conditions as the contractual terms in terms of the bid. There is no basis to conclude that this would constitute a fresh unjustified contract, as argued by the fifth respondent's counsel.

[38] Furthermore, the interests of justice dictate that the delays in the finalisation of this review, which was partly not opposed by the respondents justify the granting of the order as prayed for.

[39] The constitutional dictates of s 217 ought to have been considered in favour of the Golden Security Services from the outset. Essentially, had the College followed the fair, equitable, transparent, competitive and cost-effective principles as envisaged under the Constitution, this dispute could have been avoided.

[40] The initial decision not to award the bid to Golden Security Services, despite its compliance contravened the fairness and transparency required by s 217 of the Constitution, leading to the current protracted legal process. Considering the fact that Golden Security Services met all the requirements, a faithful application of s 217 of the Constitution would have seen it appointed without delay, ensuring an equitable outcome.

[41] In my view, leaving the terms and conditions of the bid contract in their original state is the most equitable solution to remedy the problem at hand.

Costs

[42] On the basis of its success, Golden Security Services is entitled to costs of this application. There is no reason to deviate from the general rule.

Order

[43] Resultantly, the following order is made:

1. The first and second respondent's decision to award the tender under bid number: KHC/BID 01/2023: (provision of security services at King Hintsa TVET College) to the fifth respondent for a 36 -month period is declared invalid, reviewed and consequently set aside.
2. The third respondent's decision to reverse the fourth respondent's decision that the applicant was a successful tenderer, and to replace the applicant with the fifth respondent, is declared invalid, reviewed and set aside.
3. The Service Level Agreement concluded between the first and fifth respondents is set aside.
4. The decision to appoint the fifth respondent as the successful tenderer is substituted with a decision to appoint the applicant as a successful tenderer.
5. The appointment of the applicant as the successful tenderer shall be on the same terms and conditions for which the applicant had tendered, specifically a 36-month contract.
6. The respondents shall pay costs of this application on Scale "A", in accordance with Rule 67A read with Rule 69 of the Uniform Rules of Court, jointly and severally the one paying the other to be absolved.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Adv Mathe-Ndlazi
Instructed by	:	Makhanya Attorneys East London C/o: Mgangatho Attorneys Makhanda
Counsel for the 1 st to 4 th Respondents:		Adv GJ Gajjar with Adv Madokwe
Instructed by	:	Joubert Galpin Searle Gqeberha C/o Huxtables Attorneys Makhanda
Counsel for the 5 th respondent	:	Adv Somandi
Instructed by	:	MN NTSHWAXA INC. Makhanda
Heard on	:	06 November 2025
Judgment Delivered on	:	26 February 2026