

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 2023-089324

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 19 May 2026 E van der Schyff

In the matter between:

COLLINS SEBOLA FINANCIAL SERVICES (PTY) LTD

APPLICANT

and

SOUTH AFRICAN FORESTRY COMPANY SOC LIMITED

FIRST RESPONDENT

TEHEPO MONAHENG

SECOND RESPONDENT

**CHAIRPERSON OF THE BID EVALUATION
COMMITTEE IN RESPECT OF BID RFB 039/2022**

THIRD RESPONDENT

**CHAIRPERSON OF THE ADJUDICATION
COMMITTEE IN RESPECT OF BID RF 039/2022**

FOURTH RESPONDENT

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. In the event that there is a discrepancy between the date the judgment is signed and the date it is uploaded to CaseLines, the date the judgment is uploaded to CaseLines is deemed to be the date that the judgment is handed down.

JUDGMENT

VAN DER SCHYFF J

Introduction

[1] The applicant approached the court for declaratory relief in terms of section 21 (1)(c) of the Superior Courts Act 10 of 2013 and ancillary interdictory relief.

[2] As initially conceptualised, the applicants sought an order

- (a) Declaring the respondents' decision to cancel Bid RFB 039/2022 unlawful and invalid;
- (b) Interdicting and restraining the respondents from cancelling BID RFB 039/2022;
- (c) Interdicting the first respondent from re-advertising Bid RF 039/2022;
- (d) Directing the first respondent to proceed with the appointment of the applicant as the successful bidder of Bid RF 039/2022;

[3] The applicant subsequently amended its notice of motion, abandoning the relief aimed at compelling its appointment as the successful bidder.

[4] Although the parties initially raised objections regarding the late filing of affidavits, counsel agreed to waive these points. Consequently, this court is required to determine the application solely on its merits.

[5] The first respondent is a state-owned company incorporated under South African law and listed as a Schedule 2 Major Public Entity under the Public Finance Management Act 1 of 1999 ("PFMA"). As a public entity that performs public functions and exercises public power in terms of legislation, it constitutes an "organ of state" as contemplated in section 239 of the Constitution. Its procurement processes are therefore governed by the PFMA, the applicable Treasury Regulations, and the constitutional procurement framework in section 217 of the Constitution, which requires procurement systems to be fair, equitable, transparent, competitive, and cost-effective.

Common cause factual matrix

[6] On 13 December 2022, the first respondent, a state-owned forestry company, published Bid RFB 039/2022 (the tender), inviting proposals to provide integrated,

technology-enabled security services at its various sites for a period of five years. The closing date for the submission was 15 February 2023, and the tender validity period 90 days from that closing date. The applicant submitted its bid response timeously.

[7] Following the submission stage, the bid evaluation process proceeded through several structured phases. The applicant was invited to deliver a formal presentation scheduled on 22 March 2023. This invitation was extended only to bidders who had achieved the requisite threshold scores in the preceding evaluation phases. The applicant duly delivered the presentation and was awarded 100 points for this stage.

[8] On 28 March 2023, the evaluators conducted a site inspection at the applicant's premises in Makhado, Limpopo, in accordance with Phase 2 of the bid requirements. The applicant passed 8 of the 9 assessed requirements and was awarded 100 points for the site inspection. The competing bidder scored 88 points in that same phase.

[9] On 21 April 2023, the respondent requested price clarification from the bidders. Subsequently, on 24 May 2023, it requested the applicant's consent to extend the tender validity period to 30 June 2023. The applicant consented to this extension on 30 May 2023.

[10] In respect of the price evaluation, the applicant's bid price was R163,982,275.00 (VAT inclusive), while the competing bidder's price was R183,646,718.80. A budget of approximately R147,368,586.00 (VAT exclusive) had been set aside for the project. In terms of Annexure CS5, the applicant was designated as the 'highest scoring bidder' and the "recommended bidder".

[11] The Bid Evaluation Committee (BEC), however, recommended to the Bid Adjudication Committee (BAC) that the tender be cancelled and re-advertised. At its meeting on 15 June 2023, the BAC considered the BEC's recommendation and resolved to cancel and re-advertise the tender.

[12] The cancellation notice was signed on 22 June 2023 but was only communicated to the applicant on 8 August 2023 — approximately six weeks after it was signed, after the tender validity period had already lapsed. The stated reason for cancellation, as reflected

in that notice, was stated as: *"non-responsive due to irregularities on the compliance of the published ToR (Terms of Reference)."*

[13] Following the cancellation of the tender, the applicant launched these proceedings.

The parties' respective contentions

The applicant's main contentions

[14] A principal basis upon which the applicant advances its case is the content of Annexure "CS5" to the founding affidavit. In this document, the applicant is designated as both the "Highest Scoring Bidder on the 50/10 Principle" and as the "Recommended Bidder". The applicant contends that, but for the cancellation of the tender process, it would in all probability have been appointed as the successful bidder. Consequently, the applicant disputes the existence of any lawful or valid basis for the cancellation.

[15] The legal grounds advanced by the applicant in support of its contention that the cancellation was unlawful and invalid comprise the following:

- (a) Non-compliance with the Preferential Procurement Regulations, 2017. The applicant claims to be the preferred bidder in terms of the Preferential Procurement Policy Framework Act 5 of 2000 read with the Regulations. It submits that regulation 20.1 (*sic.*) exhaustively enumerates the permissible grounds on which an Accounting Officer or Accounting Authority may cancel a tender prior to its award. These grounds are restricted to instances where (i) there is no longer a need for the goods or services requested; (ii) funds are no longer available to cover the envisaged expenditure; (iii) no acceptable tenders are received; or (iv) due to material irregularities in the tender process. The applicant contends that none of these jurisdictional facts existed at the time of the purported cancellation, and brands the reason provided as ambiguous and frivolous.
- (b) Contravention of section 217 of the Constitution – the applicant argues that the stated reason for the cancellation was opaque and ambiguous, thereby

failing to satisfy the constitutional standard of transparency in public procurement.

- (c) Contravention of section 51 of the Public Finance Management Act 1 of 1999 – The applicant contends that cancelling the tender, only to re-advertise a substantially identical scope of work, occasions fruitless and wasteful expenditure of public funds;

[16] The applicant submits that it has established an entitlement to final interdictory relief in the following respects:

- (a) A clear right: Having been identified as the highest-scoring, recommended bidder, it possesses a clear right to have the tender lawfully concluded and awarded;
- (b) Injury, or threat of harm: the applicant expended time and resources to secure the tender, only for the first respondent to cancel the process at a stage when it was legally obliged to award it to the applicant;
- (c) The absence of any satisfactory remedy.

The first respondent's main contentions

[17] The first respondent relies on the minutes of the BEC meetings held on 28 February 2023 and 2 March 2023, which record the primary reasons underlying the BEC's recommendation to cancel and re-advertise the tender.

[18] The first respondent contends that material irregularities in both the procurement process and the Terms of Reference (ToR) were discovered, rendering it not only entitled but legally obliged to cancel the process. These irregularities arose from the defective formulation of the bid specifications, which omitted site-specific operational requirements—such as the precise number of guards, deployment vehicles, or drones required per site. These material omissions in the ToR and scope of work were identified during the document review and site inspection phases.

[19] The first respondent highlights the following specific irregularities and shortcomings that were identified:

- (a) Inaccurate Pricing: Due to the deficiencies in the ToR, the bidders' pricing structures did not reflect the true operational costs associated with the services required.
- (b) Indeterminate Resource Allocation: Bidders were unable to demonstrate the exact volume of resources to be deployed at the first respondent's various sites, owing to the absence of clear operational parameters in the specifications.
- (c) Inconsistent Costing Models: Because the specifications left resource determination to the discretion of individual bidders, the competing proposals were based on varied risk assumptions. This fragmentation created severe inconsistencies in costing and service delivery models.

[20] The first respondent argues that the vague ToR precluded the BEC from conducting an objective, competitive comparison of the financial proposals during the evaluation stage. Consequently, the first respondent lacked the necessary assurance that the process was cost-effective, competitive, or yielded value for money, thereby necessitating the formulation of new tender specifications.

[21] The first respondent further contends that the published bid documents expressly reserved its right to accept or reject any tender. Accordingly, no bidder could acquire a vested right to be awarded the contract merely by participating in the procurement process

[22] Regarding the evaluation metrics, the first respondent clarifies that the allocation of 100 points to the applicant during the site inspection phase did not create an entitlement to appointment. In any event, the first respondent disputes that the applicant satisfied all technical requirements, alleging that it failed the license plate and facial recognition criteria.

[23] Finally, the first respondent submits that because the tender validity period has expired, it can no longer be interdicted from cancelling the tender, as the procurement process under Bid RFB 039/2022 has run its course and ceased to exist.

Discussion

[24] In motion proceedings, a party's failure to answer a specific material averment made by its opponent with sufficient particularity often decisively shapes the outcome. Where an applicant is confronted with serious allegations in an answering affidavit, it cannot refute them by a sweeping statement in its replying affidavit stating that *"any issue raised in the answering affidavit but which is not specifically responded to herein should be deemed to have been denied."* Such an approach disregards the well-established principle that a deponent in motion proceedings must actively engage with disputed averments, failing which he does not create a genuine dispute of fact.¹

[25] In the present matter, the applicant failed to reply to two critical averments raised by the first respondent:

- (a) The first respondent stated in its answering affidavit that the fact that the tender was tainted by irregularities is, among others, evinced by the fact that the applicant has attached to its founding affidavit extracts from what appears to be the first respondent's internal documents that are private and confidential and which the first respondent has not yet published. The first respondent explicitly stated that this was a clear indication that the applicant colluded with internal officials to secure procurement documents prior to the conclusion of the tender process. The applicant failed to answer this averment or explain its possession of these internal documents.
- (b) The first respondent detailed the express reservation of rights clause contained in the published bid documents, which reads:

'The procurement of accommodation, goods or services will be at SAFCOL's sole and absolute discretion and SAFCOL reserves the right, including without limitation, not to accept any proposal/bid and to cancel the RFP and this TOR, without awarding any contract; unilaterally to amend/supplement/split the specifications on the basis of which the RFP and this TOR is made.'

The applicant failed to address this averment in its replying affidavit.

¹ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para 13.

[26] The applicant seeks declaratory relief in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013. Under this section, a High Court may, in its discretion and at the instance of an interested person, enquire into and determine any existing, future or contingent right, or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[27] A compelling factor militating against exercising my discretion in favour of the applicant is its introduction of confidential internal extracts to build its case, paired with a complete failure to explain how it obtained them. The applicant's silence is telling in the face of the first respondent's explicit allegation that this information was irregularly acquired. Even in the absence of a definitive finding of collusion, the possession of confidential internal documents during an active procurement process, left entirely unexplained by the applicant, on face value, constitutes a serious procedural irregularity. The clean hands principle dictates that this court will be slow to grant extraordinary equitable relief, such as a declarator, to a litigant whose reliance on compromised internal processes remains completely unaccounted for.

[28] In *Cordiant Trading CC v Daimler Chrysler Financial Services*² the Supreme Court of Appeal ("the SCA") outlined the framework governing the competence of a court to grant a declaration of rights. That authority remains binding, notwithstanding that it interpreted section 19(1)(a)(iii) of the now-repealed Supreme Court Act 59 of 1959.

[29] As emphasised by the SCA, the relevant provision requires the court to utilise a two-stage approach when exercising its statutory discretion. A court is not bound to grant a declarator; it must first consider and decide whether the jurisdictional threshold is met and then determine whether to refuse or grant the order.³

[30] The first stage requires the court to be satisfied that the applicant has an interest in an existing, future, or contingent right or obligation. If such an interest is established, the court proceeds to the second stage to evaluate whether the order should be granted. In

² 2005 (6) SA 205 (SCA).

³ *Id.* at paras 17 and 18.

exercising this secondary discretion, the court may decline to grant relief if the question raised is hypothetical, abstract, or academic.⁴

[31] The objective factual reality is twofold: First, the first respondent explicitly reserved the right to cancel the tender when it invited bids. No vested rights accrued to the applicant merely by advancing through the successive phases of the evaluation process. Because the tender was cancelled prior to adjudication, no tenderer acquired rights in or arising from it. At most, the applicant possessed a mere *spes* or expectation of being recommended for appointment.⁵ The cancellation of the tender may have affected the applicant's expectations, but not any rights.⁶

[32] Second, the extended tender validity period expired subsequent to the cancellation resolution. The procurement process has run its course and cannot be resuscitated *ex post facto*.⁷

[33] The applicant refers in its founding affidavit to "clause 20" of the 2017 Preferential Procurement Regulations. I had regard to the Preferential Procurement Regulations, 2017, and the clause dealing with the cancellation of tenders is regulation 13. The applicant's ascription of regulation 20 corresponds to the content of regulation 13.

[34] The applicant's reliance on the Preferential Procurement Regulations, 2017, to argue that the regulations establish a closed list of permissible cancellation grounds is misplaced. In *City of Tshwane Metropolitan Municipality v Nambiti Technologies (Pty) Ltd*,⁸ the SCA considered the argument that the procurement regulations rigidly constrain an organ of state's discretion to cancel an unawarded tender. The SCA confirmed that the regulatory framework is couched in permissive, rather than mandatory, terms.

⁴ *SA Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* 1977 (3) SA 642 (A) at 658H.

⁵ *Maano Water (Pty) Ltd v Eskom Holdings SOC Limited* (383/24) [2025] ZASCA 87 (12 June 2025) at para 13.

⁶ See *Mano*, *supra*, at para 14.

⁷ *City of Tshwane v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) at para 33.

⁸ *Nambiti*, *supra*, at paras 29 and 30.

[35] Even if the applicant's closed-list reading of regulation 13 is accepted for argument's sake, the ground of "a material irregularity in the tender process" is directly relevant to this case. The first respondent's case throughout is that deficiencies in the ToR rendered the process materially irregular: bidders could not price on a common basis, the BEC could not objectively compare proposals, and, therefore, the process could not meet the constitutionally mandated requirement of cost-effectiveness.

[36] As counsel for the first respondent elaborated, it was only after the conclusion of the initial evaluation phases, the presentations, and the site inspections—specifically when the comparative pricing structures were placed side by side—that the fundamental operational deficiencies in the published ToR became glaringly apparent. The proverbial "penny dropped" at this late juncture.

[37] The rules of bidding were accepted by all participants. Circumstances such as these provide the commercial basis for reserving the power not to make an award at all. The first respondent advanced cogent, rational grounds for its decision to cancel the procurement process, specifically citing the structural deficiencies in the ToR which prevented an objective price evaluation. Absent a formal review application challenging the rationality or lawfulness of that decision,⁹ the first respondent's operational justification for the cancellation stands unassailable.

[38] *Maano Water (Pty) Ltd v Eskom Holdings SOC Limited*¹⁰ deals with the reviewability of a tender cancellation by a state-owned enterprise. The SCA confirmed that the decision to cancel falls within the realm of executive action,¹¹ and without a successful challenge to the lawfulness of the cancellation, the cancellation of the tender effectively terminated "any claim by Maano to a right to continue to negotiate."¹² For the decision to cancel to be set aside, it must be found unlawful and reviewable.¹³ A case for review must, however, be properly developed in the founding affidavit. The grounds of review must be clearly stated,

⁹ *Maano*, supra at para 13.

¹⁰ (383/24) [2025] ZASCA 87 (12 June 2025).

¹¹ *Mano*, supra, at para 13.

¹² *Mano*, supra, at para [9].

¹³ *Id.*

and, more importantly, the court must be apprised of the full record before it can make a determination regarding lawfulness and reviewability.

[39] The applicant has explicitly disavowed any reliance on a judicial review, electing instead to confine its case strictly to a stand-alone declaratory order under section 21(1)(c) of the Superior Courts Act and ancillary interdictory relief. It is an established principle of our law that a litigant is bound by its pleaded case. A court cannot step into the shoes of a review court—nor import review-style scrutiny—where no review has been sought. Consequently, this court is neither called upon, nor empowered, to engage in an exhaustive evaluation of the materiality of the shortcoming identified by the BEC or to determine whether the first respondent was the architect of its own confusion.

[40] The applicant's focus on declaratory and interdictory relief, to the exclusion of a legality review, predetermined the scope of the proceedings.¹⁴

[41] Section 217 of the Constitution requires that organs of state contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. As established in *Nambiti, supra*, a compliant procurement system does not prohibit an organ of state from cancelling a tender before it is awarded. The applicant attempted to create atmosphere by alleging that the first respondent cancelled the process maliciously to avoid awarding it the contract, driven by animosity stemming from prior litigation. However, the applicant failed to adduce objective facts to demonstrate bias or improper motive. The first respondent denies any such animosity, and its explanation for the cancellation stands uncontradicted.

[42] The applicant's contention that the re-advertising of a substantially similar tender would constitute "fruitless and wasteful expenditure" contrary to section 51 of the PFMA, does not hold water. The first respondent's factual case is that the ToR was deficient and that proceeding to award under those deficient specifications would itself have led to delivery failures, disputes and cost overruns. This would in itself amount to fruitless and wasteful expenditure. Re-advertising costs in this context, cannot be defined as wasteful,

¹⁴ Follow *Maano, supra*, at para 10.

but rather the costs of correcting a process that would otherwise have produced worse outcomes for public funds.

[43] It follows that the jurisdictional requirements for declaratory relief have not been satisfied, and the request for declaratory relief must be refused.

[44] Regarding the ancillary interdictory relief, no legal basis exists for its consideration in the absence of the primary declaratory relief. If the interdictory relief had remained live, the applicant would not have been granted the relief sought. For the reasons set out above, the applicant has failed to establish a clear right, which is a fatal defect for a final interdict. Consequently, the application must fail.

Miscellaneous

[45] The applicant seeks an order directing the first respondent to pay the costs occasioned by an interlocutory application brought under Uniform Rule 35(12). The application was opposed, and heads of argument were filed. It was initially enrolled for hearing on 22 March 2024, on which date it was removed from the roll. The matter was subsequently re-enrolled and, according to the applicant, was ripe for hearing when the first respondent unilaterally withdrew it by notice. Crucially, the notice of withdrawal contained no tender for costs

[46] The issue of the costs of the Rule 35(12) application was not raised in the papers. In the heads of argument, counsel for the applicant states: "The applicant's attorneys protested [the absence of a provision for costs in the notice of withdrawal] and sought a tender for costs as provided for in the Rules, an indication was made the honourable court would be approached to deal with the issue of costs."

[47] Generally, a court cannot determine the question of costs following the withdrawal of an application in the absence of supplementary affidavits setting out the parties' respective positions. Such an inquiry involves more than a superficial assessment of who would have succeeded had the merits been argued. However, the facts of this interlocutory dispute are peculiar. The first respondent sought to compel the production of documents that ought ordinarily to have been in its own possession as part of the standard course of

the tender process. Invoking Rule 35(12) to demand such documents from the applicant was manifestly dilatory.

[48] In the interest of finalising this protracted litigation, and because the issue was raised in the applicant's heads of argument filed in 2025—thereby giving the first respondent ample notice and opportunity to oppose the relief—I deem it appropriate to determine the issue.

[49] A litigant who brings an opponent to court cannot escape liability for costs by simply withdrawing its application after heads of argument have been filed. Consequently, the first respondent must be ordered to pay the costs of the application to compel compliance with its Rule 35(12) notice.

Costs

[50] As regards the costs of the main application, no reason exists to deviate from the established principle that costs follow the result. I am, however, not persuaded that this matter was of sufficient complexity or magnitude to justify the employment of two counsel. Consequently, costs will be awarded on party-and-party scale on Scale C, limited to the costs of one counsel.

ORDER

In the result, the following order is granted:

- 1 The first respondent is to pay the costs occasioned by the interlocutory application to compel production of documents identified in the Rule 35(12) notice.
- 2 The main application is dismissed with costs on party-and-party scale, limited to the costs of one counsel on Scale C.


E VAN DER SCHYFF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the applicant:
Instructed by:

Adv. N Ralikhuvhana
Prince Mudau and Associates Inc.

For the first to fourth respondents:
With:

Adv. K Tsatsawane SC
Adv. T Mokhatla

Instructed by:

Lawtons Inc.

Date of the hearing:

12 May 2025

Date of judgment:

19 May 2026