HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 26441/2010 & 12174/2008

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 26 NOVEMBER 2020

SIGNATURE

In the matter between:

NEW DAWN TECHNOLOGIES (PTY) LTD	First Plaintiff
VALOR IT CC	Second Plaintiff
and	
MINISTER OF HOME AFFAIRS	First Defendant
STATE INFORMATION TECHNOLOGY AGENCY	Second Defendant

J U D G M E N T

This matter has been heard in terms of the Directives of the Judge President of

this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

Law of contract-procurement by an organ of State-a binding contract can only come into being if an award of a tender to the successful bidder/s is made which complies with the statutory prescripts and the terms contained in the bid documents. Absent such a valid award, any purported acceptance of a tender or recommendations pertaining to a preferred bidder will not give rise to a binding agreement between the parties. SITA is not authorised to make awards of tenders, the accounting officer of the relevant government department is the person clothed with such authority.

DAVIS, J

[1] Introduction

1.1 New Dawn Technologies (Pty) Ltd ("New Dawn") and Valor IT CC ("Valor") have instituted actions for damages against the Minister of Home Affairs and the State Information Technology Agency ("SITA"), claiming that contracts had come into existence between New Dawn and Valor respectively on the one hand and the Department of Home Affairs ("DHA") on the other hand. These actions have been consolidated.

1.2 By agreement, the issues of the merits of the claims and the quantum of the alleged damages suffered by the plaintiffs have been separated in terms of Rule 33(4) of the Uniform Rules.

1.3 The consolidated actions, after various previous amendments, interlocutory issues, and trial dates eventually proceeded before this court over a period of three weeks.

[2] The common cause facts

Chronologically, the relevant common cause facts, largely emanating from the undermentioned documents, are the following:

2.1 During December 2005, SITA, at the instance of the DHA, issued and published a request for bids with Bid Number RFB 458.

2.2 The closing date for bids was 31 January 2006 and the proposed validity period was 90 days from 31 January 2006 (during the course of the various documents, evidence and argument, the words "bid", "proposal" and "tender", were used interchangeably).

2.3 The purpose of the RFB 458 was to invite potential suppliers to submit bids to render scanning, indexing, storing and retrieval of electronic images of documents under the control of the DHA and to provide for the control of business processes by means of an electronic workflow system. New infrastructure would also need to be supplied. The whole project was referred to as the Electronic Document Management System (EDMS).

2.4 SITA was mandated in accordance with section 7 of the State Information Technology Agency Act, 88 of 1998 (the SITA Act) to conduct the tender process.

2.5 Fifteen bids were received which were evaluated by a Technical Evaluation Committee (TEC) (also referred to in some documents as the Bid Evaluation Committee (BEC)) which made recommendations to a Recommendation Committee (RC) under chairmanship of a Mr Mamoojee.

2.6 On 22 March 2006 the BEC compiled a 16-page report. The contents thereof were included in a recommendation letter addressed to the Chairperson of the RC whereby the RC was requested to recommend to the

Director General (the DG) of the DHA to approve "a split award of the tender" for an amount of some R1, 5 billion to the following entities:

- New Dawn (scanning, indexing and storage)
- Graston (workflow)
- Ideco Group (infrastructure upgrade).

2.7 Due to various reasons pertaining to pricing and specification queries, the above recommendation was not supported, but, after some further clarification and the use of a quality assurance sub-committee, further recommendations were made to the RC which resulted in Mr Mamojee as chairperson of the RC recommending to the DG as accounting officer of the DHA that the scanning and indexing component be combined with the storage component and both be awarded to New Dawn. The recommendation was further that price negotiations be entered into, using the price quoted by another bidder for the storage component as a benchmark. A recommendation for the award of the infrastructure upgrade to the Ideco Group was also made, again with a recommendation of the use of another existing tender as a price benchmark. In respect of the workflow component, the recommendation was that all five vendors then still in the running, be requested to provide "best and final offers". Once these prices have been received, they should be evaluated and scored. Once this was done, the RC would then make a further recommendation to the accounting officer for the award of this component of the tender.

2.8 The recommendations, dated 11 June 2006, were made subject to:

"5.1 Confirmation by the auditors of the mathematical accuracy of the scores for the various components;

5.1 *Commercial due diligence being conducted on the recommended vendors in each category to ensure that the required services can be delivered to DHA;*

5.2 *Price negotiations being undertaken with the recommended vendors based on benchmarks being obtained from external sources for the different categories of services required;*

5.3 *Service Level Agreements (SLA) being entered into with the recommended vendors for each category of service;*

5.4 *Payment only be effected to the respective vendors upon the successful delivery of the goods/services in terms of the SLA;*

5.5 *Funds being available for the execution of the different phases within the next three years;*

5.6 *At least 30% of the contract value of the respective components be executed and delivered by SMME's and BEE's.*

2.9 On 19 June 2006, SITA's General Manager: Strategic Sourcing wrote to New Dawn and Valor, requesting them to submit their "best and final offers" in respect of the workflow component of the EDMS by 30 June 2006.

2.10 The very next day, 20 June 2006 SITA's sourcing Specialist: Strategic Sourcing, corrects the above request, requiring responses thereto by 23 June 2006. Valor immediately responded, maintaining its price at that of its initial tender in the amount of R118 million.

2.11 On 21 June 2006 (there is a contention as to this date, which contention I shall deal with later, the DHA contending that the date of the letter was actually 21 August 2006), the DG of DHA writes a letter to SITA's Head of Procurement Services, the late Mr Fantas Mobu. As the contents of this letter featured largely in the case, its contents are quoted in full:

> *"The Department has received your letter dated11 June 2006 in the abovementioned tender and accepts your recommendation. The Department approves the award of the Scanning, Indexing and Quality to New Dawn Technologies at a cost of ... 12.11 cents per page including VAT. Volumes to be scanned and the roll-out plan will be discussed and agreed upon during finalization of the contract. The storage component should also be awarded to New Dawn Technologies as recommended by the Recommendation Committee subject to price negotiation and the roll-out plan. The infrastructure upgrade as per your recommendation should be awarded to IDECO at a cost of R47 340 445,20. The Department is still awaiting the final recommendation for workflow and hopes for a speedy response in this regard".*

2.12 On 22 June 2006, Mr Mobu signs a letter dated 21 June 2006, directed to the Deputy Director General (DDG) of the DHA wherein he states that, after the evaluation conducted by the BEC and adjudication by the RC, it is recommended that the tender be awarded *"to various companies as mentioned in the attached document"*. He went on to state *"Once the award is approved by the Accounting Authority, he or she must notify SITA and the successful bidder in writing of the award of the bid. Upon receipt of this notification, SITA will make arrangement for the publication of the award in both the Government Tender Bulletin and SITA website.*

Procurement Services would like to communicate the resolution from the RC as per the attached documents" (it was never established exactly which document was attached but, it appears to have been one corresponding with the recommendation made by Mr Mamojee).

2.13 On 23 June 2006, New Dawn responds with its best price for the workflow component at R94 962 160.00.

2.14 Also on 23 June 2006, the Acting DG responds to Mr Mamojee as follows: "*I acknowledge receipt of your letter of 11 June 2006 regarding the above matter. The Department will consider your advice and a response will follow in due course*". The Acting DG was the DDG: Information Services (DDG: IS) of the DHA.

2.15 On 4 July 2006 the then Acting RC Chairman, Mr Bogoshi, recommends to the DG/Accounting Officer of the DHA that the workflow portion of the EDMS be approved to Valor for R118 million. One of the illogical reasons given was that Valor's score was higher than "the previously recommended vendor" and that Valor did not change its price. (There was no reference to New Dawn or its (lower) price in this recommendation).

2.16 On 7 August 2006 and on 21 August 2006, Mr Mobu reported to the DG of DHA that the RC has noted the DDG's report (it was not established what this was) but that the RC's recommendation still stands that the workflow component be awarded to Valor at R118 million. This time the reason was given that "*the top two vendors are not considered because their prices were not firm and fixed*". Again, the DG is instructed that, "*once the award is approved by the Accounting Authority, he or she must notify SITA and the successful bidder in writing of the award of the bid. Upon receipt of this notification, SITA will make arrangements for*

publication of the award in both the Government Tender Bulletin and SITA website".

2.17 On 25 August 2006 Ms Sekhu, an employee of DHA, drafted and presented a memorandum to the DG of the DHA. The purpose of the memorandum was to recommend that the DG signs "letters of award" to New Dawn and Valor. In respect of the previous letter already signed by the DG, the memorandum states that "*SITA however indicated that the letter signed by the DG was for their information and the award of the tender should be done by the Accounting Officer of DHA on the basis of their recommendation. It is on that basis that letters have been drafted to inform New Dawn Technologies and Ideco Group that they have been awarded Scanning, Storage and Infrastructure upgrade categories of Tender 458 respectively*".

2.18 The DDG-IS supported Ms Sekhu's recommendation, but the Chief Financial Officer, (CFO), Mr Nkambule, did not. He added certain reservations and conditions as follows:

> "*Financial implications and availability of funds must be stated in the submission. Paragraph 2 of the letter has been omitted in the letter to New Dawn and this is the important paragraph to include, given uncertainly of funding. 28/08/2006*"
>
> and
>
> "*Letter subsequently changed to include the paragraph. 30/8/2006*"
>
> and

"As confirmed telephonically with DDG:IS funds are available to coverer R47 340 445,20 amount awarded to IDECO and R37 million is available to cover the award to New Dawn Technologies. The Department will not commit itself above available funds when the contract is entered into. 01/09/2006"

2.19 On the same date as the CFO's last entry, 1 September 2006, the DG's secretariat's stamp is affixed to the memo with the words "*back to unit for corrections*". The routing forms of the memorandum contains the inscriptions "*see my notes before forwarding to the DG 28/8/2006*" and "*DDG: IS please correct letter to New Dawn. Thanks. 4/9/06*".

2.20 The draft letters which featured in this memorandum both before and after the recommended correction thereof, were neither discovered nor produced by any party and no –one knows their exact contents. It is, however, common cause that no such letter has ever been received either by New Dawn or by Valor. It is highly doubtful whether the letters were even signed at all and there is no evidence to this effect.

2.21 On 25 January 2007, New Dawn's Financial Director, Mr Mahlangu wrote a letter to Ms Sekhu, referring to a telephonic discussion between her and a Mr Maesela of New Dawn. The letter confirms that New Dawn is "*in position to deliver the required infrastructure solution for the EDMS tender number RFB 458 on 28 February 2007*". New Dawn further stated in the letter that it had also confirmed this with their suppliers.

2.22 On 11 May 2007 the "multi-award" of Tender 458 to New Dawn in respect of scanning, indexing and storage, to IDECO in respect of infrastructure upgrade and to Valor in respect of the workflow component is published in the Government Tender Bulletin. A similar publication appeared on the

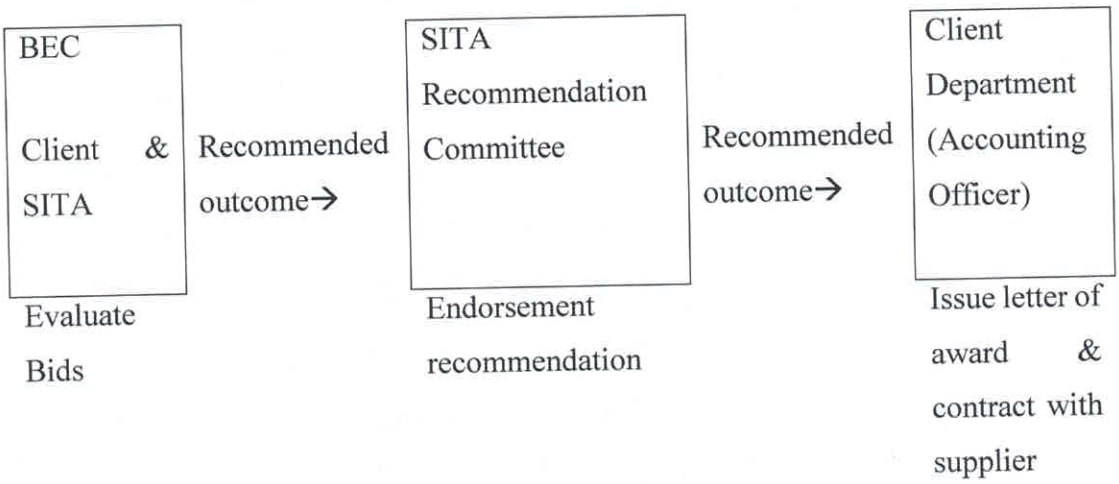
SITA website but the date of that publication could not be established with certainty (New Dawn contends it was 30 June 2006 and Valor contends it was10 May 2007. The DHA had no knowledge of the publication and did not authorize it).

2.23 On 19 October 2007, attorneys for Valor wrote to the office of the DG of the DHA, claiming that a tender had been awarded to their client by SITA "on behalf of" the DHA and alleging that the commencement of the implementation of the tender should have taken place in July 2007. Based on this, a response regarding implementation was demanded within 7 days, failing which Valor would assume that the DHA has repudiated the contract.

2.24 Within the aforementioned seven days, the Executive Assistant, Support Services to the DG, responded that that the matter was receiving attention and that the attorneys would be informed of the outcome.

2.25 On 6 March 2008 Valor instituted action under Case No 12174/2008 against the Minister of Home Affairs and SITA.

2.26 During June 2008, both SITA and DHA made presentations to the Parliamentary Portfolio Committee for Home Affairs about various issues, including a delayed "who I am" project. Reference was indirectly made to the EDMS Project. The EDMS was not listed under services then "currently" offered by SITA, who explained its involvement in tender processes by way of a flowchart as follows:



In its presentation, SITA listed the EDMS project as "Completed tender for Government" and the listed Valor, New Dawn and the Ideco Group together with the amounts of their tenders. As an aside, the minutes of the Portfolio Committee meeting noted that "*unfortunately DHA was not one of the better paying clients and there was considerable amount of money owing on the accounts*". Regarding the flowchart explanation, the minutes read: "*The letter of award and the negotiation of the contract would then fall to the Director General of DHA. This was a standard process in place for many years". Regarding the issue of disclosure of the SITA Recommendation Committee recommendation, the minutes recorded the response as follows: The letter of recommendation is not made public: it was signed by the Chairperson of the Recommendation Committee and went to the DG of the Department. It would usually be made public when the letter of award was issued. Ideally no publication should take place until the contract has been signed as if anything would go wrong in that process, the Department would usually revert to the second preferred supplier. Letters would be sent to all other suppliers when the contract was concluded*".

2.27 On 4 December 2009 the CEO of New Dawn, Mr Mahlangu, wrote to the DG of DHA, stating the following: "*In January 2006 the DHA together*

with SITA issued a tender that was subsequently successfully awarded to NDT on the 11th of June 2006. Six months later, in January 2007, DHA official s contacted NDT, officially requesting that the first batch of specified equipments be delivered to DHA as a project kick-off. NDT wrote a letter dated 25 January 2007 ... confirming delivery of the requested equipment for the 28th February 2007 ... I have engaged all the officials of DHA who are responsible for this project and to date nothing has been done ... Finally, I would like to request a meeting with you for the purpose of discussing this matter further...". This correspondence was directed to a Mr Makoa during December 2009 after which the matter ended up on the desk of the DHA CFO (then Mr Apleni) who reported as follows on 8 February 202: "*I have perused all the documents you have provided (including the list of completed tenders for Government from the SITA website) and conducted preliminary investigations on the matter. At the present moment no information I could lay my hands on indicates or would suggest that there is any contractual relationship between the Department and New Dawn Technologies (Pty) Ltd to provide services to the Department*".

2.28 On 10 May 2010 New Dawn instituted action under case no 26441/2010 against the Minister of Home Affairs and SITA.

2.29 It is common cause that the goods and services contemplated in the tender was never rendered to the DHA, neither before nor after the expiry of the period for the project.

[3] <u>The legislative framework</u>

Supply chain Management (SCM) by organs of state is governed by an array of legislative provisions, the most relevant of which are the following:

3.1 The Constitutional imperative governing procurement of goods and services by organs of state is contained in section 217 of the Constitution which provides that such procurement must be in accordance with a system that is fair, equitable, transparent and cost-effective.

3.2 The national legislation contemplated in section 217(3) of the Constitution, is the Preferential Procurement Policy Framework Act, No 5 of 2000 (the PPPFA). This provides for the establishment of a procurement policy in compliance with section 217(2) of the Constitution and for the implementation of a preference points system where, for contracts with a Rand value above a prescribed amount, a maximum of 10 points may be allocated for specific goals as contemplated in section 2(d) of the PPPFA, which include the contracting with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability, generally referred to as the B-BBEE component, and 90 points for price.

3.3 In addition, in instances such as the present, where SITA assists a state department to acquire information technology, the SITA Act applies. In terms of section 7(4) and 7(7) of the SITA Act, where SITA is itself unable to provide such technology or service to a government department, SITA shall assist in such acquisition in terms of business and service level agreements concluded with state departments, for which it is paid a fee, as contemplated in sections 16(1) and 20 of that Act.

3.4 Both parties also relied on the provisions of the "SITA Regulations" promulgated in terms of the SITA Act published in GN R904 in Government Gazetten28021 of 15 September 2005. Regulation 14 thereof, in particular, finds application:

"14 AWARD OF BIDS

14.1 Upon receipt of the recommendation ... from the Recommendation Committee, the relevant accounting authority must make the final decision on the award of the bid to one or more bidders, as the case may be.

...

14.3 An accounting authority may before notifying the successful bidder or bidders of the award of the bid, cancel the bid if –

(a) due to changed circumstances, the need for the information technology goods or services in question no longer exists;

(b) the total envisaged expenditure exceeds the available funding stipulated in the business case for the bid and the additional funding cannot be obtained; ...

14.6 The accounting authority of the department ... must in writing notify the Agency and the successful bidder or bidders of the award of the bid.

14.7 Upon such notification, the Agency must arrange for the publication of the award of the bid in the Government Tender Bulletin and on the website of the Agency".

3.5 On 27 October 2004 the Chief Director: Norms and Standards of the National Treasury issued instructions contained in a circular entitled "Implementation of Supply Chain Management" "with a view to assist institutions with the implementation of the "SCM process". In terms of section 76(4)(c) of the Public Finance Management Act, No 1 of 1999 (the PFMA), these instructions bind all "institutions" to which the PFMA applies. In terms of section 3(1)(a) of the PFMA, this includes government departments. These instructions provide in paragraph 6.1.1. thereof that "*Successful bidders should be notified by registered or certified mail of the acceptance of their bids*".

[4] <u>The terms of RFB458 applicable to the dispute</u>

4.1 The Request for Bids contained General Conditions of Contract (GCC), both included in the body of the document and as an annexure thereto which "*will form part of all bid documents and may not be amended*" as well as Special Conditions of Contract (SCC) which will supplement the GCC and which, in case of conflict between the two, will prevail.

4.2 The GCC terms most relevant to the disputes in this matter contained in the aforementioned annexure, are the following:

"*1. Definitions ...*

1.2. "Contract" means the written agreement entered into between the purchaser and the supplier, as recorded in the contract form signed by the parties ...

3. General

3.1 Unless otherwise indicated in the bidding documents, the purchaser shall not be liable for any expenses incurred in the preparation and submission of a bid ...

21. Delays in the supplier's performance

21.1 Delivery of the goods and performance of service shall be made by the supplier in accordance with the time schedule prescribed by the purchaser in the contract ...

22. Penalties

22.1 ... if the supplier fails to deliver any or all of the goods or to perform the services within the period(s) specified in the contract, the purchaser shall, subject to its other remedies under the contract, deduct from the contract price, a ... penalty ...

31. Notices

31.1 Every written acceptance of a bid shall be posted to the supplier concerned by registered or certified mail and any other notice to him shall be posted by ordinary mail ... and such posting shall be deemed to be proper service of such notice.

31.2. The time mentioned in the contract documents for performing any act after such aforesaid notice has been given shall be reached from the date of posting of such notice".

4.3 The RFB document itself, under the heading "Invitation to Bid", contains further general and special terms, the most relevant of which one the following:

"*3 Definitions ...*

SITA is mandated in accordance with section 7(g) of the Act to render ILT services to government departments and to act as the procurement agency of the Government ...

3.6. "Successful vendor" means the organization or person with whom the order is placed on who is contracted to execute the work as detailed in the proposal ...

3.9 "Client" means all Government departments ...

5.9 Formal Contract

This RFB, all the appended documentation and the proposal in response thereto read together, forms the basis for a formal contract to be negotiated and finalized between SITA and/ or its clients and the enterprise(s) to whim SITA awards the proposal in whole or in part.

Mere offer and acceptance shall not constitute a formal contract of any nature for any purpose between SITA and any vendor ...

9. General conditions of contract/proposal

9.2 The preparation of response will be made without obligation to acquire any of the items includes in the vendors proposal or to select any proposal ...

SPECIAL TENDER CONDITIONS...

9.28 The Department of Home Affairs specifically reserves the right to negotiate a final contract with the successful Tenderer. the contract will only be concluded on the signing of the contract and the agreement on service levels by both parties.

9.29 The Tenderer's response to this Tender or parts of the response will be included as a whole or by reference in the final contract.

9.30 The total number of records to be digitized by the successful tenderer is estimated at 500 million cases of which a minimum of 13, 5 million cases must be scanned within the first six months of the project as a priority. Failure to meet or comply with this requirement shall result in the contract with the successful tenderer being terminated or penalties being applied (Mandatory Requirement).

9.31. The successful tenderer must be on site 7 working days after the date on which the tender is awarded.

9.35 ... Background Information: Management overview ...

3. Through this IEDMS tender, the Department of Home Affairs would like to:

(a) *Expand the current EDMS (workflow, Storage ... and retrieval) to all functions and all offices of the Department as well as*

(b) *Digitise all the mentioned paper records ...*

5. *Bidders can tender for the solution as stipulated above in paragraph 3(a) or 3(b) or both.*

Annexure A1. Functional Questionnaire ...

2.2.2.1 *Transportation of documents. The successful tender will be required to transport paper documents form the Department of Home Affairs officers, namely: Waltloo, New Cooperation, Heyvries and Rosslyn (a maximum of 30 (thirty) km radius between all the buildings).*

3.2 *Volumes of paper documents*

Population register 2.025 million Priority 1 Waltloo

Refugee 50 thousand Priority 1 Waltloo

Identification 1,75 million Priority 2 New Cooperation

Deputation 100 thousand Priority 2 Waltloo

Population Register 17 million Priority 3 Waltloo & Rosslyn ...

4. *Requirements*

The Department of Home Affairs requires the services of the successful tender for:

4.1 The establishment of a project office in accordance with international project management standards

4.2 The execution of a system requirements analysis resulting in the expansion of the existing Financial Specification ...

7 Off-site service requirements

The successful tenderer shall be responsible for setting up a fully functional scanning infrastructure at the storage facility of the department of Home Affairs in Rosslyn and other sets designated by the Department as scanning bureaus ..."

[5] Plaintiffs' claims

It is against the abovementioned factual backdrop, within the legal framework set out above and, having regard to the terms of the request for bids that one must consider the plaintiffs' claims. They are as follows:

5.1 The first plaintiff, after having made reference to the recommendations made by SITA "to the Accounting Officer", pleaded that "*on or about 21 June and 1 September 2006 the Director General of the Department of Home Affairs ... approved and accepted the award of the scanning component and the storage component of the tender to the plaintiff on the terms as had been recommended by SITA in the letter of 11 June 2006 ...*". The particulars of claim further refers to DHA's "*right to either negotiate*

a final written contract with the plaintiff ... or to hold the plaintiff contractually bound to the terms of its bid response". On these premises, the first plaintiff pleaded that "*a contract came into existence between the (first) plaintiff and the DHA ...*". If further pleaded that in January 2007 the DHA exercised an election not to negotiate a "*final written contract*". By not taking up the first plaintiffs tender to deliver equipment by 28 February 2007, the DHA, according to the first plaintiff, repudiated the contract, entitling the first plaintiff to damages in the form of a loss of profit of some R 545 million and R 41 million in respect of the two components respectively.

5.2 The second plaintiff's particulars of claim discloses its claim to be the following: "*by Government Tender Bulletin dated 11 May 2007 the Defendant announced the plaintiff as the successful bidder for the workflow portion of the tender ... the date of the implementation of the tender was fixed as 1 July 2007 for the three years ending 30 June 2010. Acting pursuant to the acceptance of its proposal by the Defendant, the Plaintiff commenced with the implementation of the project ...*". After dealing with the correspondence referred to in paragraphs 2.23.and 2.24 above, the particulars claim that "*the defendant has, without providing any explanation or reason refused and/or failed to conclude the service level agreement or a formal contract with the plaintiff and to implement the tender awarded to the plaintiff*". As an alternative, the second defendant pleaded that the DHA has frustrated the fulfillment of a condition of the tender to conclude a service level agreement or "the formal contact". Again, a repudiation on the part of the DHA is alleged and damages is claimed in the amount of some R28 million.

5.3 Having regard to the heads of argument delivered on behalf of New Dawn, the DHA and SITA, the questions to be determined by this court are:

- Whether the letter of 21 June 2006 by the DG of DHA to SITA constituted an award of tender RFB458 to New Dawn?

- Whether, if the letter constituted an award, a contract then came into existence between DHA and New Dawn and, if so, on what terms?

- If such a contract had been established, whether the DHA had repudiated it?

- Whether the common law should be developed to oblige "parties who undertake to negotiate with each other to do so reasonably and in good faith".

5.4 On behalf of Valor, it was submitted that all five requirements for a contract coming into being, namely consensus, contractual capacity (SITA being DHA's agent), lawfulness, possibility of performance and compliance with formalities prescribed by law had been satisfied.

5.5 The plaintiffs both based their claims on the law of contract.

[6] Was there a valid award of a tender to the plaintiffs?

6.1 The DHA was SITA's client in terms of a service level agreement in existence between them. While SITA might have been the DHA's "agent" for purposes of advertising the request for bids and for conducting the bid evaluation process, culminating in recommendations made by the RC, the DHA, and not SITA, was the "accounting authority" referred to in regulation 14.1 the SITA Regulations. The "accounting authority" is

the entity who may exercise a decision to accept a recommendation to procure goods and services from a particular bidder as proposed supplier. It was put as follows in Tshwane City v Nambiti Technologies (Pty) Ltd 2016 (2) SA 494 (SCA), namely that the decision as to procurement of goods and services is one which lies within the heartland of the exercise of executive authority by that organ of state.

6.2 The plaintiffs tried to make something of the fact that clause 5.9 of the Request for Bids (quoted in paragraph 4.3 above) envisaged that SITA actually makes the awards, but conceded that such a system (where SITA made the awards for tenders not only when itself proves goods or services, but also when the goods or services are procured by government departments) pre-dates the SITA Regulations operative at the time of the bid process under consideration.

Clause 5.9 must therefore be purposely interpreted in context and in a manner which renders it legally compliant. See: Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA), Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) and, inter alia, Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd 2018 (4) SA 358 (SCA). Therefore, the words "*and/or its clients, as the case may be*" should be read into the clause after the word "SITA" where it appears for the second and third time in the said clause. The retention of references to SITA in the clause will then only apply when SITA itself acquires goods and services, but, when goods or services are to be procured by a government department, the inserted words will apply, in accordance with the already abovementioned legislative prescripts.

6.3 The plaintiffs, and in particular, the second plaintiff, made much of the fact that, on the pleadings, SITA's agency on behalf of the DHA had been admitted. But this admission must also be seen in context. The plaintiffs have both pleaded that SITA, acting on behalf of the DHA had issued "a public invitation to tender …" for the EDMS "system" under bid number RFB458. It was those allegations which have been admitted but nothing more. At no state was it the DHA's case that SITA had acted as its agent regarding the award of the tender, nor had it been admitted that it could do so.

6.4 Any doubt as to the extent of SITA's authority when managing a request for bids for the procurement of information technology has been laid to rest by the decision in SAAB Grintek Defence (Pty) Ltd v South African Police Service 2016 JDR 1316 (SCA) wherein the following has been found at [10] and [11], namely that nowhere in the SITA Act "*... is it provided that SITA is entitled to award tenders or conclude contracts on behalf of government departments ... . Instead, SITA acts in terms of business and service level agreements ... . All this is perfectly made clear in the regulations made in terms of the (SITA) Act ... . All doubt is dispelled by Reg 14.1 ... all this makes it clear that SITA's role is that of an expert agency facilitating the acquisition of technology services by governments, but it does not decide whether to acquire the technology, nor does it decide not to proceed with a tender process. That is the function of the relevant department*".

6.5 Having thus determined that the only relevant decision is that of the DG, as accounting officer of the accounting authority, being the DHA, it is to be decided whether he has actually made an award. Certainly, the letter by him to SITA referred to in paragraph 2.11 above indicates a decision

in favour of New Dawn, in respect of the portions of the project that the RC has recommended should be awarded to it, but is that enough?

6.6 Reg 14.6 stipulates that the "*successful bidder/s must in writing be notified of the award of the bid*". That, the DG has not done.

6.7 In fact, when letters contemplating such notification were prepared for the DG's signature, the CFO raised red flags. The red flag raised regarding the insufficiency of funds, corresponded with one of the conditions imposed by the RC on its recommendation to the DG in the first place. It is not clear why the DG wrote the letter in question to SITA in the first place and why that letter wasn't preceded by a memorandum with checks and balances built into it, such as the memo of 25 August 2006. Leading counsel for DHA, Adv Puckrin SC, conceded that the DG had not "covered himself in glory" by his conduct and by him ignoring the conditions imposed by the RC on its recommendation.

6.8 It is common cause that, after the memo of 25 August 2006 had been dealt with in the manner set out in paragraphs 2.17 to 2.19 above, the DG wrote no further letter concerning any acceptance of a bid or the award of any tender in respect of RFB458 to any bidder.

6.9 It must follow that no award as contended for by the plaintiffs had been made to either of them.

6.10 Apart from the fact that no award has been made by the DG, the plaintiffs contended that the acceptance of the RC's recommendation, amounted to a contract coming into being between them and the DHA. That is also why their cause of action is based on the law of contract. The position is succinctly summarised as follows in an article by Robert Sharrock in 2015

Annual Survey of SA Law at 497: "*It is trite that an offeror may indicate, expressly or impliedly, the mode of acceptance by which a vinculum iuris will be created (see, for example ... Lepogo Construction (Pty) Ltd v Govan Mbeki Municipality [2015] 1 All SA 153 (SCA) and Bosch Munitech (Pty) Ltd v Govan Mbeki Municipality [2015] 4 All SA 674 (GP)) ... . in both cases the municipality failed to follow the stipulated requirements for acceptance ... . non-compliance with the formalities imposed by the offeror means that no contractual vinculum iuris is established and the parties are not entitled to any contractual remedies*". In the present case, the plaintiffs' offers were made or their express acceptance at the time they submitted their bids that the formalities were, in terms of clause 31.1 of the GCC that "*every written acceptance of a bid shall be posted to the supplier concerned by registered or certified mail ...*". No written acceptances were posted to either of the plaintiffs at any stage, let alone by registered or certified mail. None of the agreed formalities had been complied with, hence, no contract came into existence. A similar finding was made in Bosh Munitech, even despite the actual implementation of the contract therein and the payment of the first set of payments for work done.

6.11 In passing, I point out that the initial bid validity period had expired by the time the DG wrote the letter to SITA. At the conclusion of the hearing I therefore queried whether, as in Telkom SA LTD v Merid Trading (Pty) Ltd & Others [2012] ZAHCPHC (7 January 2011) and Joubert Galpin Searle v RAF 2014 (4) SA 148 (ECP), any subsequent award would in any event be invalid. None of the parties could answer the question and no evidence had been led in this regard. I allowed the parties the opportunity to address this issue in subsequent heads of argument, which they did. It turns out, from documents submitted with those heads, that

the bid validity period had, after acceptance of invitations to such extension, been extended from 30 April 2006 to 31 July 2006 and again form that date to 31 October 2006. As this point was one raised *meru motu* by the court and not the parties, I am prepared to accept the confirmation documents submitted in this regard, but in the end, nothing turns on this.

6.12 The plaintiffs sought to bolster their case by calling a number of witnesses. Once the common cause facts as evinced by the documents discovered by the parties had been established and fleshed out, the issue became largely a legal one and the witnesses' evidence thereon or their interpretation thereof became irrelevant and inadmissible. This led to numerous objections and vigorous debates but, undaunted, the plaintiffs pressed on. For the aforementioned reasons, I shall address the relevant portions of the evidence as succinctly as possible:

Mr Mahlangu: He is the founder and CEO of New Dawn. Until interrupted, his initial evidence comprised of reading reams of undisputed documents into the record. On the disputed aspects, he testified that the contract between New Dawn and the DHA came into being upon the DHA's acceptance of the RC's recommendation by the DG in his letter of 21 June 2006. Both Mr Mahlangu and New Dawn were, however, unaware of the acceptance and the letter itself. Mr Mahlangu relied on the publication of the award on SITA's website which he unsuccessfully tried to pin down to 30 June 2006. Upon becoming aware of the publication, he contracted SITA as, up to that point, New Dawn had not "interacted" with the DHA at all. SITA's officials apparently told him: "*look, we have done our job, the recommendation has been made to the DHA, the next steps will be handled by the DHA*". After contacting a number of "people" at the DHA, he got in contact with the DHA CFO,

Mr Nkambule who told him to wait as the DHA "*was still getting its house in order*" for the financial year. Mr Mahlangu was told that the CFO still had to "check", that he must give the DHA some time and that they "will get back" to him. Mr Mahlangu testified that he was aware of the seven day period to get on site after the award of the tender and the 13,5 million documents to be scanned in the first six months. The next interaction with the DHA was in January 2007 when Ms Sekhu telephoned New Dawn's proposed project manager, Mr Maesela. He understood the contents of the call (with which I shall deal with hereunder more fully) as constituting a demand to be on site on 28 February 2007. Mr Mahlangu arranged for equipment to be ordered on credit from a supplier to New Dawn, despite Mr Mahlangu having "stepped out" after the perceived award of the tender to allow his colleague (Mr Maesela) to deal with the project. Apart from a sole conversation with Mr Nkambula who told him that the DHA would have some odd R7 million available in the budget until financial year-end, he heard nothing further from the DHA until a denial of the existence of any contract made in January or February 2010 in response to his letter of 4 December 2009 referred to in paragraph 2.27 above. Mr Mahlangu also relied in his evidence on the Portfolio Committee presentations by SITA on 12 June 2008. Mr Mahlangu was extensively cross-examined as to when the actual publication by SITA on its website took place and when New Dawn became aware of it, whether the DG's letter to SITA was actually dated 11 June 2006 or 11 August 2006 and whether clause 9.28 of the bid proposal (to which Mr Mahlangu had consented by appending his signature to bid documents) envisaged that a written contract had to be concluded as a pre-condition to the relationships between the parties becoming binding. Mr Mahlangu also explained that New Dawn could not itself perform the work tendered for, but would rely on its consortium partners to do. Similarly, it would "source" the

equipment and storage facilities from a supplier. Apart from referring to New Dawn Being sued by the supplier from which it ordered equipment in February 2007, there was no evidence about the other consortium parties' involvement or concerns with the bid or the absence of the commencement of service delivery.

Mr Maesela: He was a manager at New Dawn at the relevant time, responsible for infrastructure, networking and storage. In January 2007 he got a call from Ms Sekhu from DHA. She wanted to know whether New Dawn could deliver equipment forming part of the storage component of the tender by end of February 2007. Mr Maesela informed Mr Mahlangu hereof, who then responded as set out in paragraph 2.21 above. Mr Maesela also contacted the DHA to obtain the technical information pertaining to the "infrastructure needs". After a single briefing meeting of a general nature, his involvement with DHA ceased. He testified that he understood that the storage components were to be installed before the end of the financial year, but was vague in the extreme as what this entailed or where it would be installed. He speculated at Waltloo.

Mr Hlahla. He was one of a series of "overlapping" witnesses relied on by both plaintiffs. He was the Deputy Director: Information Services (DDG: IS) of the DHA in 2005/2006. He explained the particulars of the EDMS and the DHA's need for such a project. Ms Sekhu was his assistant would have been the project manager for the EDMS. He was the one who sent a letter on 13 December 2005 authorising SITA to issue and publish the request for bids under number RFB 458. He did so as acting DG at the time. He was part of the evaluation process and was aware of the "old process" where recommendations were made to the SITA Tender

Board but confirmed that the process in question was one where the RC makes a recommendation to a department's DG, who has to take the ultimate decision. He was the drafter of the DG's letter of 21 June 2006 (which date he confirmed as the correct date). He saw this as the "beginning of the relationship between the DHA and its service providers". Although he drafted letters in the course of executing his duties, it was ultimately the decision of the DG who, if he agreed, signed the letter/s and communicated with outsiders. He otherwise confirmed the documentation as prescribed in paragraph 2 above. Mr Hlahla knew at the time that the CFO stated that there were insufficient funds for the "entire period" of the project but his view was that the budget items could be reprioritized. He denied that the DHA was "cash strapped" at the time. He was aware that no final price negotiations had taken place with New Dawn and that no contract had been negotiated by the time he left the DHA on 31 October 2006.

Mr Nkambule. He was the CFO of the DHA in 2005/2006. He also confirmed the correspondence listed in paragraph 2 above which he was aware of, in particularly his reaction and comment on Ms Sekhu's memo to the DG dated 25 August 2006. He explained that, although only R37 million was available for this project at the time of the memo (apart from a separate amount for Ideco's infrastructure part of the project), the digitizing project was to run over three years and annual and medium-term budgets are compiled with even mid-term reviews. The documents pertaining to the DHA budget votes for 2003 – 2007 were also introduced by this witness. Mr Nkambule's understanding of the project, as described by him in cross-examination, was that it could be "upscaled or downscaled" at any given time, depending on available funding. It could be implemented with only R37 million available at first and then adjusted

later, depending on the quantities determined in the service level agreement. When confronted with the fact that R37 million constituted only some 3% of the full tender price, he testified that year on year, the DHA presented its budget to Treasury but could not provide further detail. He was suspended in 2007 and dismissed in January 2009. His dismissal is still the subject of ongoing litigation between him and the DHA.

Mr Mamojee. He is a chartered accountant and tax practitioner with an impressive curriculum vitae in state procurement. Before his retirement in 2018 at the age of sixty, he was inter alia, employed at Liberty, Ernst & Young and the Department of Treasury. He held a number of positions over the years such as the Accountant General for the State, the Acting Head of the erstwhile State Tender Board and, more pertinently to this case, the chairman of the RC at the relevant time. In particular, he confirmed that the conditions imposed on the RC's recommendation, was his attempt at trying to "get the best value" for the DHA. What was surprising was his evidence that the due diligence investigation included as condition 5.2 (in par 2.8 above) was included to "avoid fronting and ensure capability". One would have expected, from a reading of the Treasury guidelines referred to earlier, that this would have been done during the functionality evaluation phase. Be that as it may, Mr Mamojee testified that he did not see the requirements for a written contract or an SLA to constitute conditions precedent to the coming into existence of contract. He otherwise confirmed the validity of the tender process up to the RC recommendation and the fact that SITA acted in terms of the SITA Act and its business agreement and SLA with the DHA as its client. After having performed its duties by making recommendations via the RC, it is up to the DHA's accounting officer to make the final determination. If

the accounting officer accepts the RC's recommendation, he communicates that to the bidders and to SITA.

Mr Molele. He started Valor in 2012. He was a garrulous witness, expanding on Valor's capabilities and its participation in the bidding process. He confirmed Valor not changing its initial price as contained in the letter of the Acting Chair of the RC dated 7 August 2006 referred to in par 2.16 above. He was unaware of the RC recommendations at the time and only found out about the documentation during the abandoned review application launched by the DHA under case number 9302/2015. Valor relied on the publication of the award by SITA on its website which Mr Molele testified, took place on 10 May 2007. This was, according to him, confirmed by the publication in the Government Tender Bulletin and a publication on the Treasury website, both on 11 May 2007. Regarding the issue of a written contract or an SLA, he testified that DHA was the party who "never" wanted to negotiate a contract and that an SLA can be concluded even some months after the commencement of the rendering of services. He alleges that the publication of the awards constituted a binding contract between the DHA and Valor and that, since 19 October 2007 he has, to date, not been made aware of any reason why the tender had not proceeded with, neither has he been told that the tender had been cancelled. He testified that the awards remained published on the SITA website during 2018 and 2019. He claims to have been the "culprit" (his words) who caused the Portfolio Committee presentation on 12 June 2008 as a result of letters and presentations made by him. Mr Molele repeatedly refused in cross-examination to answer whether Valor had ever received a written award from DHA despite the absence of such a fact being common cause. His "issue", as he put it, was that DHA had simply abdicated its responsibilities.

Ms Sekhu. She was the sole witness called by the DHA. She had joined the DHA in 2000, has a degree in education and qualifications in IT management. In 2005/2006 she was a Deputy Director IT in the DHA. She confirmed her authorship of the memo to the DG dated 25 August 2006. According to her, she was told at the time that at a meeting where she was not present, between the Minister, the DDG: IS and the DG, the lack of financial resources for the EDMS project was discussed. She did not have an independent recollection of the contents of her conversation within Mr Maesela in January 2007 but testified that at that time, the DHA was trying so "salvage" the project. She telephoned to enquire whether New Dawn would still be able to perform. At the time, the CFO was trying to direct funds (for the project). Neither her telephone conversation nor the confirmation of ability to perform by New Dawn dated 25 January 2007 could be seen as an order or an instruction. Orders or instructions to perform are done in writing though the DHA's procurement department and not by her. At the time, she was, as a project manager, not aware of any contract over R 500 000,00 proceeding without a SLA. SLA's are necessary to manage the roll-out of a contract and payments. She confirmed that since her time at the DHA there had been nine ministers and about twelve different DG's. She was cross-examined about her role in the TEC. The availability of finance was also canvassed with her but this fell beyond her purview. Her view was that the project was never cancelled, but merely "shelved". She was not aware of any award to New Dawn or Valor and only became aware of publication on SITA's website after litigation had commenced. In answer to questions on behalf of Valor, she further testified that, due to the effluxion of the initially envisaged three years for the project, if it is to proceed, a new tender would have to be advertised. In answer to further questions, she testified that at the time of her telephonic enquiry in January 2007, the DHA was

"in engagement" with Treasury, seeking permission to reprioritize funds within its budget, which permission had not "materialized" by 2006/2007. This was corroborated by a letter to which she was referred to by counsel for Valor, written by DHA to the DG of Treasury dated 13 September 2006. She was also referred to the DHA 2006/7 annual report which cryptically noted that "*Not achieved: IEDMS Tender not awarded. Delays in finalizing Business Intelligence and Data Wharehouse project due to IT infrastructure problems ... . Digitizing Phase I – not achieved-delay in awarding tender*".

6.13 It is clear from the above that:

- the letter by the DG to SITA dated 21 June 20006 did not comply with the formalities stipulated for the award of the tender in the bid documents or prescribed by the legislative framework, in particular SITA Reg 14.6;

- the aforesaid letter by the DG was not an award or "acceptance letter" directed to New Dawn and was not a letter as contemplated in paragraphs 2.12, 2.16 and 2.26 above;

- the proposed award letter to New Dawn was forestalled by the CFO's comments appended to Ms Sekhu's memo dated 25 August 2006;

- the publications on either SITA's website and in the Government Tender Bulletin or any other website, can be no more than an erroneous or premature compliance by SITA with its obligations contemplated in Reg. 14.7, but cannot, either in fact or in law, be elevated to a decision or an actual award itself;

- the DG never accepted the RC recommendation regarding Valor and no award letter was ever issued to it;

- there was therefore never any valid award made to either New Dawn or Valor.

- the extended bid validity periods (and the envisioned contract period) have by now expired and no valid award can be made.

6.14 Insofar as the issue of financial availability played a role, the tenders were not cancelled as a result thereof and the DHA never formally, either by way of correspondence or by way of their pleadings, relied on this issue. This issue was introduced into evidence by the plaintiffs and, although the annual budgets and reports of the DHA indicated that large sums of money were annually budgeted for, the allocation or reprioritizing of funds specifically for the full duration and extent of the EDMS project was by no means clear.

6.15 The plaintiffs and their respective CEO's made much of the requirement to be on site of the within seven days after the award of the tender and the requirement to scan 13, 5 million documents in the first six months. The perceived importance of both these issues are exaggerated, but even if it were not, neither indicate nor confirm that an award had been made or that a contract came into existence between the respective parties. Yes, the seven day period is admittedly short, but there was no evidence that it meant that full digitizing and storage operations must be in full swing within those seven days. The briefing, scoping, exact placement requirements could all take place once the suppliers were on site in seven days as well as the negotiation of an SLA or at least the commencement of such negotiations. The 13,5 million is also a red hearing when one

compares the scope of the project included in the plaintiffs' bid documents: 500 million documents had to be scanned in the three year period envisaged for the EDMS project. That equates to 13,88 million per month. Viewed in this light, the 13,5 million documents of over a period of six months are far less than the monthly volume tendered by the plaintiffs (in fact, if only 13,5 million documents are processed in the first six months, the monthly total for the remaining 30 months escalates to 16,21 million per month).

6.16 Having reached the conclusions set out in paragraph 6.13 above, it is not necessary to deal with the remaining issues identified in par 5.3 pertaining to the terms of the envisaged contract or the alleged repudiation thereof. It is also not necessary to deal with the alleged waiver by the DHA to insist on a written contract, as additionally argued on behalf of New Dawn. Insofar as the argument of Valor might still be alive pertaining to the five requirements for a contract to come into being, it is clear that there was no evidence of consensus on the part of the DG in respect of an award to Valor. The DG was the only one with contractual capacity as SITA had no such authority and the reliance on a contract coming into being contrary to the legal prescripts would be unlawful. It is clear that the formalities prescribed by the parties themselves and by law had not been complied with. The elements required for the coming into existence of a contract were therefore all absent.

6.17 Having reached these conclusions, I also need not make a determination as to whether the contents of the bids in the present instance, had there been a valid award, would fall in the first or the second of the two categories contemplated in Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd 2013 (2) SA

133 (SCA), a case which caused much debate during closing argument. The two categories have been described as follows: "*The first is that the agreement reached by the acceptance of the offer lacked animus contrahendi because it was conditional upon consensus being reached, after further negotiation, on the outstanding issue. In that event the law will recognize no contractual relationships, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation*". Having regard to the recommendation by the RC, the conditions imposed by the CFO and the clear wording of clause 5.9 of the bid conditions (with SITA being replaced by the DHA in the wording thereof) the indications are that the present matter would have fallen in the first of the two categories.

6.18 On the same topic of contractual negotiations, the last issue to be determined is whether the common law should be developed as claimed by the plaintiffs. On behalf of New Dawn, this issue was formulated as follows in written heads of argument: "*whether the DHA was contractually obliged to negotiate with New Dawn, with a view to the conclusion and signature of a final written contract; and whether the Honorable Court should develop the common law to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith*". Firstly, since there was no valid award, there was no binding contract, irrespective of whatever of the two categories referred to above may be applicable, therefore no obligation to negotiate arose or needs to be developed. All the cases referred to by the parties in this regard, such as Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corp 2012 (6) SA 96 (WCC) at para 28, Makete v Vodacom 2016 (4) SA 121 (CC) at para

102, including the obiter pronouncement by Moseneke, DCJ in Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) at para 23, were premised on a pre-existing contractual relationship between the parties, which I have found to be absent in this case.

6.19 Secondly, from the plaintiffs' argument and, in particular, the evidence of their respective CEO's, it appears that the actual complaint is not the absence of a negotiation of contractual terms. In fact, the plaintiffs claimed that no contracts or negotiated terms were necessary and that the request for bids and their responses thereto contained such sufficient detail and "roll-out" plans that it could be both implemented and enforced without ado. The plaintiffs' dissatisfaction is in actual fact about the absence of actual engagement with the recommendations of the RC, the conditions proposed by Mr Mamojee and the failure to issue awards. The DHA is accused of having left the plaintiffs out to dry by having, in effect, abandoned the tenders (and the EDMS project with it) and that it was not entitled to claim poverty or having merely "shelved" the project. These complaints however fall within the scope of administrative law. While the plaintiff may have or may have had cause to complain about the manner in which executive authority has been wielded (or not wielded), their current causes of action were based on contract.

6.20 For the above reasons, the plaintiffs' alternative claim, particularly pursued by New Dawn, cannot be entertained.

[7] Conclusion and costs

I find therefore that both plaintiffs' claims must be dismissed. I have considered the issue of the liability for costs and find no compelling reason why costs should not follow the event. This should include the costs

occasioned by a previous postponement. Due to the fact that the plaintiffs have made common cause with each other and even shared "overlapping" witnesses, they should be jointly and severally liable for costs.

[8] Orders:

1. In both cases 12174/2008 and 26441/2010 the claims of the respective plaintiffs are dismissed.

2. The respective plaintiffs are, jointly and severally liable for the costs of the defendants, including the costs of senior and junior counsel employed by them respectively. Insofar as the employment of second junior counsel is concerned, those costs are excluded and shall form part of the defendants' own costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 02 - 11 November 2020

Judgment delivered: 26 November 2020

APPEARANCES:

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