



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 12174/2008 & 26441/2010

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 27 JANUARY 2021

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 (Leave to Appeal)

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.

DAVIS, J

[1] Introduction

- 1.1 The applicants (New Dawn and Valor IT) in the applications for leave to appeal were the plaintiffs in two consolidated actions against the Department of Home Affairs (DHA) and the State Information Technology Agency (SITA), who are the current respondents.
- 1.2 Both New Dawn and Valor IT had been unsuccessful in their claims that agreements had come into being between them and the DHA regarding certain portions of an Electronic Document Management System (EDMS) in respect of which a request for bids (RFB 458) had been made in 2005 with closing date 31 January 2006. The tender in respect of the EDMS was for a 3 year project, which period has long ago expired without the EDMS ever being implemented.
- 1.3 On 26 November 2020, this court found that no award which complies with the statutory prescripts and the terms contained in the bid documents had been made to either of the applicants. Accordingly, no binding agreement came into being between the parties. New Dawn and Valor It now seek leave to appeal these findings.

[2] The statutory prescripts and the lack of compliance therewith

- 2.1 Regulation 14 of the “SITA Regulations” headed “AWARD OF BIDS”, deals with this aspect (the full reference of the Regulations, appear from the initial judgment).

- 2.2 Regulation 14.1 reads as follows: *“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”*. There is no dispute that this is one of the relevant legislative prescripts.
- 2.3 The Recommendation Committee referred to is that of SITA and the accounting authority is the Director General (DG) of the DHA. This much is clear from the papers and from the binding authority in SAAB Grintek Defence (Pty) Ltd v South African Police Service 2016 JDR 1316 (SCA), specifically at paragraphs [10] and [11] as referred to in the initial judgment.
- 2.4 On 11 June 2006 the Recommendation Committee of SITA recommended to the DG of the DHA that the scanning, indexing and storage components of the EDMS project be awarded to New Dawn, on certain conditions. On 26 June 2006 the DG accepted these recommendations in the following terms, without making reference to the Recommendation Committee’s conditions:

“The Department has received your letter dated 11 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 Department is still awaiting the final recommendation for workflow and hopes for a speedy response in this regard”.

- 2.5 One of the Recommendation Committee’s conditions was that *“Funds be available for the execution of the different phases within the next three years”*.
- 2.6 On 4 July 2016 the Recommendation Committee recommended to the DG of the DHA that the workflow component of the project be awarded to Valor IT. There is no response from the DG on record regarding this recommendation, nor evidence of a decision taken at the time in respect of it.
- 2.7 On 25 August 2006 Ms Sekhu, a veteran employee of the DHA, drafted and presented a memorandum to the DG of the DHA. The purpose of the memorandum, as expressly stated therein, was to recommend that the DG signs “letters of award” to New Dawn and Valor IT.
- 2.8 Based on reservations expressed by the DHA’s Chief Financial Officer regarding the financial implications and availability of funds, the “letters of award” were, on all available evidence, never signed nor sent.
- 2.9 Regulation 14.6 of the SITA Regulations prescribe that *“the accounting authority of the department ... must in writing notify the Agency and the successful bidder or bidders of the award of the bid”*. (my underlining)
- 2.10 In the initial judgment, it was found, based on the letter of 21 June 2006, that Regulation 14.1 has been complied with by the DG as accounting authority in respect of New Dawn. Based on the facts set out in paragraph

2.8 above, it was found that the requirements of Regulation 14.6 had not been complied with.

- 2.11 Regarding Valor IT, it has been found that neither Regulation 14.1 nor Regulation 14.6 have been complied with in relation to the portion of the project for which it was recommended by the Recommendation Committee.
- 2.12 Furthermore, the RFB documents, constituting the terms on which the plaintiffs had responded to the request for bids (RFB), prescribed that *“every acceptance of a bid shall be posted to the supplier concerned by registered or certified mail ...”* and *“mere offer and acceptance shall not constitute a formal a contract of any nature ...”*.
- 2.13 Based on the above, this court also found (in paragraph 6.10 of the initial judgment) that the agreed formalities of the bids or bid documents regarding acceptance or the making of an award, had not been complied with. This pertains to both New Dawn and Valor IT.
- 2.14 Based on all of the aforesaid and the fact that the underlying facts were undisputed, this court came to the conclusions mentioned in paragraph 6.13 of the initial judgment, namely:
- *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.*

2.15 Against this background, it must now be considered whether the applicants have crossed the jurisdictional hurdle of section 17(1) of the Superior Courts Act 10 of 2013 and whether an appeal would have a reasonable prospect of success.

[3] Reasonable prospect of success on appeal?

3.1 On behalf of New Dawn it was submitted that this court has misdirected itself by “conflating” the two “*related but separate juridical acts regarding*

the decision to award, which is made in terms of SITA Regulation 14(1) and also compliance with the requirement to notify the successful bidder, which is made on terms of SITA Regulation 14(6)".

- 3.2 From what has been stated in paragraph 2 above, it is clear that the mere decision by the DG, whether in his mind (only), in his office or even expressed, by itself does not constitute the actual making of an award until concretised in an "award letter". Regulation 14(6) is couched in peremptory terms and a similar requirement has furthermore been agreed to by the parties. The issue is not one of alleged "conflation", the issue is that both requirements have to be fulfilled for an award to have been validly made.
- 3.3 I find no reasonable prospect of success that another court would on appeal find that the mere decision of an accounting officer to accept the recommendation of a Recommendation Committee would in itself constitute a binding contract (as the applicants allege) without there being compliance with the statutory prescripts or the terms of acceptance. I furthermore find it inconceivable that, despite objections by a Chief Financial Officer, raised in accordance with his obligations and the conditions imposed by the Recommendation Committee, a court would find that a valid award had been made by the mere acceptance of the recommendation of the identification of a successful bidder, without going through the processes prescribed in procurement legislation. Such a finding would in any event be contrary to the supply chain management circulars issued by National Treasury in terms of Section 76(4)(c) of the PFMA (as referred to in paragraph 3.5 of the initial judgment) and I foresee no reasonable prospect that any of this would happen on appeal.

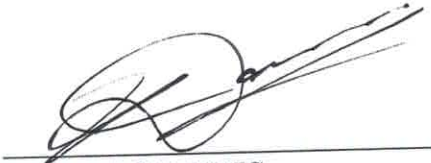
- 3.4 Valor IT's position is even more tenuous: it does not even have the benefit of a "decision" or proof of acceptance of the Recommendation Committee's recommendation in its favour, let alone any compliance with the prescripts referred to above.
- 3.5 The numerous peripheral issues relating to budgets, portfolio committee meetings and presentations and subsequent events do not detract from the abovementioned issues which were central to the applicants' claims. Once there has been a failure to make a valid award, all the other issues become irrelevant.

[4] Conclusion

I find that there is no reasonable prospect of success on appeal in relation to the findings made on both the applicants' claims.

[5] Order

The applications for leave to appeal are refused with costs, including the costs of multiple counsel as well as senior counsel, where so employed.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 21 January 2021

Judgment delivered: 27 January 2021

APPEARANCES:

For the First Applicant:

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