

SOUTH AFRICA / JUDGMENT

New Dawn Technologies (Pty) Ltd v Minister of Home Affairs and Another (26441/2010) [2012] ZAGPPHC 350 (4 December 2012)

[2012] ZAGPPHC 350**COURT**

North Gauteng High Court, Pretoria

BEFORE

Tuchten

CASE / FILE NUMBER

26441/2010

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Source record**NOT REPORTABLE****IN THE NORTH GAUTENG HIGH COURT,
PRETORIA REPUBLIC OF SOUTH AFRICA****CASE NO: 26441/2010****DATE:04/12/2012****In**

the matter between:

NEW
DAWN TECHNOLOGIES (PTY)
LIMITED.....Plaintiff
and
MINISTER
OF HOME
AFFAIRS.....First
Defendant
STATE
INFORMATION TECHNOLOGY AGENCY
(PTY)
LIMITED.....Second
Defendant

JUDGMENT

Tuchten J:

1. This is an exception taken by the defendants to both the main and the alternative claims pleaded by the plaintiff. According to the particulars of claim, the plaintiff responded to an invitation to tender to supply the Department of Home Affairs (“the DHA”) with an electronic document management system. As required under the invitation to tender, the plaintiff included in its bid response a form issued by the second defendant (“SITA”) on which the plaintiff supplied certain relevant information. This bid response as distributed to would be tenderers contained a great deal of information about the scope of the service required and contractual terms which were to be included in any eventual contract arising from the bid invitation. The plaintiff alleges that the bid response, together with the relevant bid invitation, contained the provisions of its contract with the DHA.
2. The bid response form contained sections called respectively “General Conditions of Contract/Proposal” and “Special Tender Conditions” which called for a response from a tenderer in relation to specific propositions by ticking one of two boxes provided for that purpose in the form, indicating whether the tenderer accepted or did not accept the proposition and, in one instance, whether the tenderer complied/agreed or did not comply. The plaintiff ticked all the accept boxes in the sections and the comply box. In other sections, the tenderer was required to indicate whether it did or did not comply with certain stated criteria and to substantiate its answer. The plaintiff stated that it did comply and provided substantiation. In a section headed Pricing, the tenderer had to insert its tendered prices, which the plaintiff did. The result was that each such proposition became a term of the offer constituted by the bid response as a whole.
3. SITA is a private company established under and incorporated pursuant to s 2 of the State Information Technology Agency Act, 88 of 1998 (“the Act”). The duties and powers of SITA are set out in s 7 of the Act. These include procuring, either as agent or principal, information systems and data-processing and associated services for state departments such as the DHA. The purpose of the tender was to procure such a system and data processing service.
4. The plaintiff instituted action against the defendants, alleging that its tender was accepted in about June 2006, upon which a contract came into existence between the plaintiff and the DHA and it started rendering services to the DHA pursuant to this contract.
5. Paragraphs 7.1 and 7.3 of the plaintiff’s particulars read:

On a proper interpretation of the bid response submitted by the plaintiff and accepted by SITA and the DHA and the award of the

tender to the plaintiff, the DHA had a right either to negotiate a final written contract with the plaintiff, incorporating the whole of the plaintiff's bid response, or hold the plaintiff contractually bound to the terms of its bid response.

The DHA by January 2007 exercised an election not to negotiate a final written contract with the plaintiff, but to hold the plaintiff

contractually bound to its bid response and to require of the plaintiff to proceed with the implementation of the awarded tender.

The DHA thereby waived its right to negotiate a final written contract.

6. The particulars of claim proceed to allege that from 28 February 2007 to June 2009, the DHA repudiated the contract between the parties by refusing to accept any performance by the plaintiff in terms of the contract and that the plaintiff thereafter continuously tendered to perform. On the strength of these allegations, the plaintiff claims payment of what it describes as its loss of profits, which it calculates as being the agreed contract price less its expenses saved by not performing under the contract.
7. There are certain provisions in the plaintiff's bid response which the plaintiff alleges give the DHA a right to require the plaintiff to negotiate with it towards the conclusion of what is termed a "final written agreement." In the alternative to its claim for an enforceable right to perform and get paid in terms of the contract, the plaintiff claims that the DHA was obliged by the terms of the bid response to negotiate with it in good faith and that if it had done so, a final written contract on substantially the same terms as those contained in the bid response would have been concluded. The plaintiff's claim under the alternative claim quantifies identically to its main claim.
8. The exception to the main claim focusses on those provisions of the bid response which provide for negotiations and the conclusion of a formal agreement or formal agreements after acceptance of the tender. I shall deal with them in the order they appear in the document.
9. Clause 2:

Based on the quality of the proposal submitted, SITA intends to select a preferred vendor with a view to concluding a service agreement (SLA) where applicable with such successful vendor.

10. Clause 5.9

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 finalised between SITA and/or its clients and the enterprise(s) to whom SITA awards the proposal in whole or in part.

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

11. Clause 9.28

The [DHA] 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.

12. Clause 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.

13. The crisp point made on behalf of the DHA is that the accepted tender creates no contract between the parties and that despite the form of the bid invitation such a contract was only to arise on the conclusion, after negotiation, of a final written contract.

14. It was submitted that I should view the material in the particulars of claim against the background of the Act and the Regulations made pursuant to the Act. These measures broadly set out the procedures by which procurement by SITA and those departments and public bodies contemplated by the Act are to procure the networks, systems and services provided for in the Act. It was not however suggested that an agreement concluded otherwise than strictly in accordance with the Act or the Regulations would be invalid merely for that reason. The submission was essentially that I should employ the statutory measures as an aid to interpretation. The thrust of the argument is that regulation 9(5) requires that SITA must, whenever it contracts for the procurement of certain "mandatory services" and after complying with certain formalities, conclude the "necessary contracts" with the successful bidder or bidders.

15. It is not the plaintiff's case that it has contracted with SITA for the services. The plaintiff's case is that it contracted with the DHA. There is nothing in the particulars of claim to suggest that the nature of the performance required of the plaintiff constituted mandatory services.

So, in my view, on the material before me, reg 9 does not assist the DHA.

16. On the other hand, reg 12, which relates to optional services, provides for the conclusion of a contract by the department concerned. No specific form for such a contract is prescribed. And then, reg 14(3) provides that "an accounting authority,"

defined to mean in relation to a

department the relevant person or body having financial accountability in accordance with the relevant legislation, may, "before notifying the successful bidder or bidders of the award of the bid", cancel the bid under certain circumstances. This suggests that the bid may not be cancelled after the successful bidders have been notified. Reg 14(6) imposes a duty on an accounting authority to notify SITA as well as the successful bidders of the award of the bid. Reg 14 tends to indicate that the award of a bid, without more, has contractual significance.

17. In summary, therefore, I think that I have insufficient information on the strength of which to place the material put up by the plaintiff within the scheme of the Act and the Regulations. The measures therefore do not, at this stage, afford any aid to

interpreting the material which the plaintiff has pleaded contains the terms of its contract with the DHA.

18. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4. SA593 SCA paras 18-19, the modern approach to interpretation of written contracts and statutes was explained. I shall confine my remarks to contracts because a contract is what is in issue in this case.
19. A contract is Interpreted by attributing meaning to the words used in the contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.
20. The scope of the tender was to provide the DHA with digitised records. The bid response provided in clause 9.30 for the plaintiff

to accept, which it did, that an estimated 500 million cases would have to be digitised, a minimum of 13,3 million of which must be scanned within the first six months of the project as priority. Failure to meet or comply with this requirement shall result in the contract with the successful tenderer being terminated or penalties being applied.

21. In addition, the “successful Tenderer” is required under clause 2.2.2.1 of annexure A to the bid response (a document headed “Functional Questionnaire) to transport paper documents from one DHA site to another. For the scanning itself, the successful tenderer was required under clause 2.1 of the same Questionnaire to ... supply a fully functional scanning bureau for the completion of this project to cover the ... expansion of the current EDMS (scanning, workflow, storage and retrieval) for all functions of the [DHA] and transportation, preparation, scanning, indexing and quality assurance of a backlog [my emphasis] of paper documents in the [DHA],
22. In resisting the exception, counsel for the plaintiff drew my attention to certain provisions in the General Conditions of

Contract/Proposal section in the bid response. I deal with them below.

23. Clause 9.5

SITA reserves the right to; cancel/reject any proposal...

24. Clause 9.14

Should the parties at any time before and or after the award of the proposal and prior to, and or after conclusion of the contract fail to agree on any significant product change in technical specification, change in services etc. SITA shall be entitled within 14 (fourteen) days of such failure to agree, to recall the letter of award and cancel the proposal..., in which event all fees on which the parties failed to agree increases or decreases shall, for the duration of such notice period, remain fixed on those fee/price applicable prior to the negotiations.

Such cancellation means that SITA reserves the right to award the same proposal to next best vendors as it deems fit.

25.Clause 9.16

Any amendment or change of any nature to this RFB shall only be of force and effect if it is in writing, signed by SITA signatory and added to this RFB as an addendum.

26.Clause 9.17

Failure or neglect by either party to (at any time) enforce any of the provisions of this proposal shall not, in any manner, be construed to be a waiver of any of that party's right in that regard and in terms of this proposal. Such failure or neglect shall not, in any manner, affect the continued, unaltered validity of this proposal, or prejudice the right of that party to institute subsequent action.

27. Clause 9.18

Vendors who make use of sub-contractors The proposal will however be awarded to the vendor as a primary contractor who will be responsible for the management of the awarded proposal. No separate contract will be entered into between DHA and any such sub-contractors. Copies of the signed agreements between the relevant parties must be attached to the proposal responses.

28. Clause 9.26

If the successful vendor disregards contractual specifications, this action may result in the termination of the contract.

29. Counsel for the plaintiff also relied on clause 9.29 and submitted that, on a proper interpretation, this clause reserved to the DHA a right to negotiate a final contract with the successful tenderer. I agree with this submission. That is precisely what clause 9.29 says. In consequence, the DHA was entitled to elect not to negotiate a final contract which, according to the particulars of claim, it indeed elected not to do. That does not dispose of the enquiry. The question is whether the accepted bid offer acquired contractual force as between the parties.

30. The principles relating to the situation where there is an offer and acceptance but the parties envisage a further, formal contract have very recently been restated and applied by the SCA in *Command Protection Services (Gauteng) (Pty) Ltd v South African Post Office Limited* [2012] ZASCA 160 paras 12-13:

The dispute thus arising is not novel. It frequently happens, particularly in complicated transactions, that the parties reach agreement by tender (or offer) and acceptance while there are clearly some outstanding issues that require further negotiation and

agreement. Our case law recognises that in these situations there are two possibilities. 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 issues. In that event the law will recognise no contractual relationship, 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. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail (see eg *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A)

at 92A-E; *Namibian Minerals Corporation Ltd v Bengueia Concessions Ltd*

[1996] ZASCA 140; 1997 (2) SA 548 (A) at 567A-C).

Illustrations of cases that were held by this court to be manifestations of the first possibility are to be found in *Namibian Minerals Corporation* and in *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) while the facts in *Alsthom Equipment* and in *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) were held to demonstrate the second (see also *Lewis v Oneanate (Pty) Ltd* [1992] ZASCA 174; 1992 (4) SA 811 (A) at 820I-821E). The criterion as to whether the facts of a particular case indicate the one or the other was succinctly summarised thus by Corbett JA in *Alsthom Equipments* at 92E:

‘Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances.’

31. Because this is an exception, I must also have regard to the test to be applied at this stage to the interpretation of a contract. The first defendant, as excipient, must persuade the court that upon every interpretation which the particulars of claim (including any written material referred to in the pleading as containing contractual provisions) can reasonably bear, no cause of action is made out *Lewis v Oneanate (Pty) Ltd* and *Another* [1992] ZASCA 174; 1992 4 SA 811 AD 817G.

32. The Special Conditions of Contract/Proposal section includes a clause 9.31 to which I have not yet referred:

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

33. There is no provision in the bid response for the date by which the contemplated final contract must be negotiated. The scope of the work as described in the bid response is enormous. The successful tenderer has to commit to digitising a prioritised 13,5 million cases of paper documents, relating to births, marriages, deaths (all vital records for the smooth maintenance of civil society in our country) and amendments "within the first six months of the project as priority." in light of clause 9.31, the project commenced on the seventh working day after the date upon which the tender was awarded. The most reasonable interpretation of the bid response is that the DHA regarded the completion of the work which had been commissioned as urgent and that the duty imposed on the plaintiff to come onto site (and, by inevitable inference, to start working) preceded the attempt to negotiate a final contract. And if the plaintiff had to start working before any obligation to negotiate the final contract arose, the further inevitable inference is that it was bound by contract to do so.

34. This conclusion is reinforced, in my view by the provisions of clauses 9.28, 9.5, 9.14, 9.16.9.17, 9.18, 9.26 and the provisions of the Functional Questionnaire to which I have referred. It is further reinforced by the conduct of the parties as alleged in paragraph 8 of

the particulars of claim, which I must accept at this stage as fact, that in January 2007, after the acceptance of the plaintiff's bid offer, a representative of the DHA required the plaintiff to make certain performance in accordance with the tender and that the plaintiff tendered to do so. In the result, in my view, the most reasonable interpretation of the material put up by the plaintiff

favours the interpretation for which the plaintiff contends, ie that the parties concluded a binding contract on the acceptance of the plaintiff's tender. The exception to the main claim must therefore fail. My conclusions are of course arrived at on the basis of what is before me on exception. The final decision on the interpretation of the material must be left to the trial court, before which additional material may possibly be placed.

35. The exception to the alternative claim is based on the proposition that a mere agreement to agree, or to negotiate towards an agreement, is not enforceable. That of course is the position where one of the parties has reserved to itself, to use the words of Schutz JA in

Premier Free State, and Others v Firechem Freestate (Pty) Ltd 2000 4 SA 413 SCA para 35.

... the absolute [my emphasis] discretion ... to agree or disagree.

36. But the plaintiff has pleaded that there rested on the first defendant an obligation to negotiate in good faith. The assertion

that the parties were obliged to negotiate in good faith has not been assailed on exception. In Southernport Developments (Pty) Ltd v Transnet Ltd 2005 2 SA 202 SCA para 17, the SCA held:

The express undertaking to negotiate in good faith in this case is not an isolated edifice. It is linked to a provision that the parties, in the event of them failing to reach agreement, will refer such dispute to an arbitrator, whose decision will be final and binding. The final and binding nature of the arbitrator's decision renders certain and enforceable, what would otherwise have been an unenforceable preliminary agreement.

37. In my view, the ratio in *Southernport* is that an otherwise unenforceable agreement to agree will become binding when the parties

agree on a mechanism to resolve their failure to agree. There is no such provision for a mechanism in the material put up by the

plaintiff in its particulars of claim. In the result, in my view, the present case has not because of the obligation to negotiate in good faith (an assertion I accept at this stage because it was not attacked on exception) been taken out of the cadre of cases

contemplated in *Premier, Free State, and Others v Firechem Freestate (Pty) Ltd*.

38. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 CC, the Constitutional Court dealt with a defence that the common law should be developed to enforce an agreement to agree the rental of business premises for a period after the expiry of a lease, if an option in that regard was exercised by the lessee. The

majority held that the defence should not be sustained on appeal to the highest court in the land on constitutional matters because the defence had not been taken in the courts below. However the majority concluded, firstly (para 72), that where there is a contractual

obligation to negotiate, it would hardly be imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching agreement and in good faith and, secondly (para 71), that in relation to this question, the case had not been "properly pleaded" and that the defence could therefore not be entertained.

39. In the present case, there is no reference in the particulars of claim to facts which might give rise to "a number of

interlinking constitutional values [which] would inform a development of the common law."

(*Everfresh* para 72). Indeed, there is no request at all to the court to develop the common law. In the result, in my view, the alternative claim falls to be determined in the light of the common law, at its present stage of development as reflected in *Southernport*, against

which, for reasons given, the alternative claim does not pass muster. In the result, the exception to the alternative claim must be upheld, with leave to the plaintiff to amend, if so advised.

40. As to costs, both parties have achieved a measure of success but the greater part of the argument related to the exception to the main claim. I think that the same can be said for the preparation by the legal representatives. I think that the fairest would be to award the plaintiff half of its taxed costs.

41. I make the following order:

1. The exception to the plaintiffs main claim, as set out in paragraphs 9 to 12 of the notice of exception dated 10 April 2012 is dismissed;
2. The exception to the plaintiff's alternative claim, as set out in paragraphs 13 to 14 of the notice of exception dated 10 April 2012 is upheld;
3. The plaintiff is granted leave to amend its particulars of claim in relation to its alternative claim by delivery of a notice of intention to amend in accordance with rule 28 within four weeks of the date of this order.
4. The first defendant is to pay one half of the plaintiff's taxed costs in relation to the exception proceedings as a whole.

NB Tuchten

Judge of the High Court 29 November 2012

NewDawnSITA26441.10

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