REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

20/9/16

CASE NO: 25737/2016

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

20:09:2016

SIGNATURE DATE

In the matter between:

DIMENSION DATA (PTY) LTD Applicant

And

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT First Respondent

DATACENTRIX (PTY) LTD Second Respondent

JUDGMENT

AC BASSON, J

[1] This is an application brought on an urgent basis by Dimension Data (Pty) Ltd ("Dimension Data") to interdict the implementation of a tender pending the outcome of an application to review the first respondent's (the Minister of Justice and Constitutional Development) decision to award the tender to the second respondent (Datacentrix (Pty) Ltd – "Datacentrix") and to start the process *de novo*.

[2] The bid at issue in this application was advertised on 13 June 2014 and invited tenders for a three year contract for "Court Recording Technology" ("CRT"). The successful bidder would be required to provide, supply, maintain and support digital recording solutions to court rooms countrywide at a costs of approximately R½ billion.

[3] The contract was awarded to Datacentrix on 29 January 2015. Dimension Data as the incumbent service provider administered the previous court recording system since its appointment in 2006. The previous court recording system is known as the "DCRS" system. Dimension Data's bid for the new recording system was unsuccessful. It is common cause that the DCRS system is out-dated.

[4] On 31 March 2016 (more than a year after the tender was awarded) Dimension Data launched a substantial application to review and set aside the award. In terms of prayer 2 of the Notice of Motion in the review application, Dimension Data seeks an order interdicting the first and second respondents from implementing the bid award pending the reconsideration of the award by the first respondent.

[5] On 30 May 2016 Dimension Data launched a further application to interdict the first respondent from implementing the bid awarded to Datacentrix this time pending the outcome of the review application. Dimension Date also seeks an order to maintain the *status quo ante* and to permit Dimension

Data to continue providing recording, maintenance and support services to the courts on a month-to-month basis on the terms and conditions set out in its contract of appointment (as extended from time to time). The relief sought in the Notice of Motion in this urgent application therefore seeks the restoration of the "*status quo ante*" which will have the effect of freezing the further rollout of the CRT system pending the final determination of the review.

[6] The present application was initially set down for hearing on 21 June 2016 but was allocated for hearing on 15 September 2016. Urgency, however, remains pertinent and both the first and second respondents have placed the urgency of the application in dispute.

[7] The present urgent application was therefore only launched some sixteen months after the decision to award the tender to Datacentrix was taken.

Urgency

[8] I have already referred to the fact that the CRT tender was awarded to Datacentrix on 29 January 2016.

[9] Dimension Data found out about the award on 3 February 2015 when it was sent a copy of the award letter in error. In this letter it is stated that the award of the tender is conditional on the "successful conclusion and signing of the SLA [Service Level Agreement] on or before 13 April 2016". The letter further states that the project implementation phase will commence on 14 April 2015 to 13 April 2016 and that the maintenance and support phase will begin from 14 April 2016 to 13 April 2021. These dates are important in that it indicates that as at 3 February 2015, Dimension Data was well aware of the fact that the implementation of the tender will commence during April 2015. Dimension Data was also aware of the fact that the signing of the SLA was imminent.

[10] Dimension Data wrote to the department on 4 February 2015 stating, *inter alia*, that the process was non-competitive because only one vendor was

considered technically qualified and that Datacentrix's bid price was higher than that of Dimension Data. In this letter the department was requested to review the adjudication process that was followed. It is further also stated that it is crucial that this be done prior to the award being finalised and contracts signed. Dimension Data also requested reasons from the department for the awarding of the bid to Datacentrix. The reasons were furnished to Dimension Data on 18 February 2015.

[11] It is important to point out that in this letter dated 4 February 2015, Dimension Data has already identified what is now a central point in the review application namely that the bid process was allegedly non-competitive because only one company was considered technically qualified. In this regard I am in agreement with the submission that nothing had prevented Dimension Data from approaching this court for an interdict on an urgent basis as early as February 2015 as the grounds for review had already been intimated by Dimension Data in this letter. A review application could also have been filed soon thereafter. In the review proceedings Dimension Data would then have been entitled to call for the record of the decision. However, no steps were taken to review the decision and no steps were taken to interdict the conclusion of the SLA agreement which was imminent. In respect of the SLA agreement, Dimension Data was well aware of the fact that the SLA was due to be signed on or before 13 April 2015.

[12] On 25 February 2015 the attorneys on behalf of Dimension Data requested further information from the department. In this letter it is expressly stated that Dimension Data's attorneys held specific instructions to apply to the court for an interdict to prevent the department from contracting with Datacentrix and to prevent the department from implementing the tender pending the review of the decision to award the tender to Datacentrix. Despite this threat nothing happened.

[13] On 19 March 2015 Dimension Data requested documentation in terms of the Promotion of Access to Information Act.[1] The said documents were furnished to Dimension Data's attorneys on 11 May 2015. These documents included the supply management policy, the individual scores for Dimension Data by the bid evaluation committee, comparative statements for technical functionality in respect of Dimension Data, the final internal audit report and the bid document. Even if Dimension Data is correct in its view that it could not have launched these proceedings in February 2015, I am in agreement with the submission that as of March 2015, Dimension Data had sufficient information to launch this application. However, despite having received these documentation and despite the fact that Dimension Data was fully aware of the fact that the implementation of the contract would commence in April 2015, nothing happened.

[14] In mid-July 2015 negotiations with Dimension Data commenced in respect of the role that Dimension Data would play in the handing over of the system to Datacentrix. It appears from the papers that Dimension Data in fact actively participated in the implementation of the new contract by, amongst others, facilitating the handing over process which included the decommissioning and removal of the old system. In terms of the agreement concluded with Dimension Data ("the DCRS Transition and Support Agreement") Dimension Data agreed to ensure that the DRCS systems are operationally supported and fully maintained until the DCRS systems are switched off and removed. Dimension Data therefore agreed to offer its services of mainlining the DCRS system on a sliding scale, diminishing with time until it is totally phased out at the end of September 2016. Dimension Data also concluded an agreement in terms of which it would assist in ensuring that the latest data is backed up on an external hard drive. For these services Dimension Data would be paid somewhere in the region of R21 million.

[15] However, despite the fact that Dimension Data actively participated since 2015 in the phasing out of the DCRS system no further steps were taken

[1] Act 2 of 2000.

either to interdict the implementation of the contract or to review the decision to award of the bid and despite threats to do so made as far back as February 2015.

[16] A year later on 17 February 2016, Dimension Data, in a letter through their attorneys, demanded a written undertaking that there will be no implementation of the contract and demanded that such an undertaking be given by 23 February 2016 failing which an application for an interdict will be instituted as a matter of urgency. In this letter their attorneys again listed several alleged irregularities in the bid process which, according to Dimension Data, was neither transparent, unbiased nor fair. In this letter the attorneys once again threatened to enforce their rights and to review and set aside the bid awarded to Datacentrix. A threat was also made that, should the department not undertake to immediately desist in implementing the disputed bid, Dimension Data would have no alternative but to approach the court by way of urgency to preclude it from implementing the bid. In the last paragraph of this letter it is also stated that the department would be furnished "with a copy of the interdict application and in due course the application to set aside the bid award".

[17] Yet, once again, despite these threats nothing happened until some five weeks later when on 31 March 2016 the review application was launced. Evidently Dimension Data had been advised that no case for urgency or for interim relief (pending the outcome of the review application) could be made in the circumstances.

[18] Dimension Data then appears to have changed its mind and the urgent application that was first threatened with in the letter dated 25 February 2015 and repeated in the letter of 17 February 2016 was finally launched on 30 May 2016 – some three months after the latest threat to launch an urgent application and some sixteen months after the award of the bid.

[19] Dimension Data submitted that nothing happened in so far as the implementation of the CRT system was concerned in 2015 and that it was

only at the end of January 2015 that the respondents began rolling out the CRT system. It was then only that the attorneys on behalf of Dimension Data on 17 February 2016 requested the respondents to provide an undertaking that they would desist in implementing the disputed bid. It was only when such an undertaking was not forthcoming that Dimension Data launched its review on 31 March 2016.

[20] In essence it was therefore submitted on behalf of Dimension Data that they only had to act once it became clear that the respondents were intend on "accelerating the roll-out, intend that in excess of 1000 recorders be installed by the end of May 2016 and the balance by mid-September 2016".

[21] I have several difficulties with this submission: Dimension Data was aware of the fact that the tender was awarded as far back as 29 January 2015. At that time Dimension Data was aware that the conclusion of a SLA was imminent. It was also aware of the fact that further contracts will in all probability be concluded in furtherance of the implementation of the tender. In the letters of February 2015 Dimension Data already identified some of the alleged irregularities in the awarding of the tender. Various documents were furnished to Dimension Data and in May 2015 it was furnished with further documents consequent to a PAJA application. Even if there may be some merit in the submission that Dimension Data could not have brought the urgent application in February 2015, no persuasive reason exist as to why the urgent application could not have been launched somewhere in May or June 2015.

[22] Dimension Data and the department had concluded a contract in terms of which Dimension Data undertook to phase out the DCRS system out of all the courts on a sliding scale until it was totally phased out at the end of September 2016. Dimension Data has sought out this arrangement and has done so as far back as July 2015. The fact that Dimension Data has sought out this agreement as far back as July 2015 is, in my view, further indicative of the fact that it was well aware of the fact that the contract with Datacentrix

was already in place and that it was being implemented during the course of 2015.

[23] Dimension Data also contended that it was not aware that the SLA agreement between Datacentrix and the department had been concluded and that it believed that no steps were taken to implement the contract in 2015 and that steps were only taken towards the implementation of the contract at the end of January 2016 when an order was placed for equipment. This is factually incorrect. The SLA was signed on 27 May 2015. Furthermore, according to the tender document the rollout was to be implemented in three phases: Phase I was the most intense and involved the design and configuration of the system. By the end of August 2015 the architecture of the system had been designed and signed off by the department. The testing phase was completed at the end of November 2015 and court staff were trained on the new system. In the replying affidavit Dimension Data in fact admitts that it was aware of the fact that the system was tested in November 2015. Furthermore, Dimension Data was, as already pointed out, involved in the transition phase and in fact participated in a number of meetings in 2015 dealing with the data migration required for the project. During October 2015 Datacentrix had also discussed a data migration strategy plan with Dimension Data. There can therefore in my view be no doubt that Dimension Data was aware of the progress that had been made on the project during 2015.

[24] In respect of the testing of the system during 2015, Dimension Data submitted that although it was aware of the testing, it was unaware of the results thereof. There is no merit in this submission and it is, in my view, irrelevant what the results of these tests were. The fact remains that Dimension Data was clearly aware of the fact that the department had commenced with the roll-out of the contract.

[25] It was contended on behalf of Dimension Data that it is in the public interest that this application be dealt with on an urgent basis and that an interdict be granted. It was also submitted that it is in the public interest for this court to

interfere with the award on an urgent basis to prevent further infringement of the procurement framework and the perpetuation of unlawfulness especially in light of the fact that there are strong indications that the tender process was, according to Dimension Data, infected with illegality, impropriety and corruption.

[26] I have no quarrel with the submission that it is in the public interest to interdict perceived invalid administrative acts. The dispute in this particular matter is, however, not about the entitlement of Dimension Data to approach this court for an interdict. The dispute is whether Dimension Data is entitled to approach this court on an urgent basis after it had waited an extraordinary long time before it finally launched an application to review and even longer before it brought an application to interdict the implementation of the award pending the outcome of the review.

[27] Our courts have recognised the importance of acting expeditiously in bringing a legal challenge against the award of a tender in view of the fact that a decision to accept a tender is generally immediately followed by the conclusion of a contract (usually a SLA) and further contracts aimed at executing the contract. Our courts have also recognised that, by not acting expeditiously in challenging a decision, it will almost invariably become more difficult at a later stage to obtain relief simply because of the risk that, by the time the court is approached with a legal challenge, the contract may have already reached an advance stage of implementation or execution.

[28] Where a litigant decides to approach the court with an application for an interdict to prevent the conclusion of a SLA and to interdict the implementation of the tender pending the outcome of a review, the need to approach the court expeditiously becomes, in my view, even more pressing.

[29] In this regard the court in *Millennium Waste Management v Chairperson Tender Board* (in context of a review application) confirmed the need to challenge perceived invalid administration acts expeditiously:[2]

> "[23] The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates*,[3] is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.
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> [34] In conclusion there is one further matter that needs to be mentioned. It appears that in some cases applicants for review approach the high court promptly for relief but their cases are not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights become drastically reduced. It may help if the high court, to the extent possible, gives priority to these matters."

[30] In *Steenkamp N.O. v Provincial Tender Board of The Eastern Cape*[4] the court frowned upon review proceedings that were only instituted a year after

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[2] [2007] SCA 165 (RSA).
[3] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para [46].
[4] 2007 (3) SA 121 (CC).

the tender was awarded, although the court pointed out that a mere delay does not deprive a litigant of a remedy:

> "[51] In the present matter the review proceedings to set aside the tender were initiated very late. It took the dissatisfied tenderer a year to approach court. The question must arise whether a review mounted so late should be looked at favourably by our courts. Be that as it may, in the ordinary course tenderers who dispute the correctness of an award would challenge its correctness relatively quickly so that the question of out-of-pocket expenses would be unlikely to arise. Even where there is a delay and a court nonetheless set aside a tender award, I do not accept that ordinarily a prudent and diligent successful tenderer whose award is reversed later is without remedy. He or she too may not leap without looking.

[31] Although I am in agreement with the sentiments expressed by the court in *Steenkamp*, the particular circumstances of this case cannot be overlooked: In this case Dimension Data was aware of the awarding of the tender and in fact actively participated in the implementation of the tender by rendering assistance to the respondents to migrate the old system to the new system. It can also not be said that Dimension Data did not have sufficient information to approach the court at an earlier stage especially in light of the letter dated 25 February 2015 in which the grounds for the perceived invalid procedure were identified. Dimension Data has also been alive to the fact that by September 2016 the old system would be switched off and removed and replaced by the CRT system. In these circumstances there clearly rests a duty upon a litigant to act expeditiously in approaching the court, especially for urgent interim relief to prevent the first respondent from implementing the bid awarded to Datacentrix.

[32] It also cannot be overlooked that in this particular case the CRT system has for all practical purposes been installed. This much is clear from the following: As at 13 June 2016 the progress of the project is as follows: (i) 908 courtrooms have been installed with the new CRT system; (ii) 840

courtrooms have been signed-off and a new CRT system is utilised by the courts; (iii) Dimension Data has removed a total of 455 of DCRS equipment in the courts. It is also not in dispute that by the end of September 2016 – a mere two weeks away – the installation of the new CRT system will be completed. As already pointed out, Dimension Data has been aware of this time table yet did nothing to approach this court on an expedited basis. In this regard I am in particular agreement with the following statements made in *Tshenolo Resources (Pty) Ltd v MEC: Northern Cape Provincial Government*[5] where the court pointed out that although parties have remedies available to challenge the non-observance of a process awarding a tender, such remedies should be utilised before significant progress has been made on the execution of the contract:

> "[5] Two interlocutory matters were raised for prior adjudication. The first of which was lack of urgency. It is common cause between the parties that no competitive bidding process was followed prior to the award of the road upgrading contract to Nucon Roads by the MEC. Urgent review and interlocutory remedies are available to challengers to the outcome and process of a state tender. See Steenkamp NO v Provincial Tender Board Eastern Cape, 2007(3) SA 121 (CC) at 142H-143A (para 51). It is therefore not only prudent but also necessary for challengers of non-observance of the constitutionally ordained processes, the state organ and the defenders of the award to adjudicate their dispute before the Court before any significant progress on the contract has been made. In Darson Construction (Pty) Ltd v City of Cape Town and Another 2007(4) SA 488(C) the Court stated at 506E-H:
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> > *'On the facts of this matter, applicant could, indeed, have sought an interdict immediately after the award of the contract to second respondent on 17 December 2004. It is true that applicant was invited to appeal, but, objectively seen, the appeal was the*

[5] [2015] NCHC 27.

incorrect remedy. In any event, when applicant became aware that second respondent was on site and had begun work in terms of the contract, it could immediately have approached the Court to interdict second respondent pending the outcome of its appeal. By that time it was clear that first respondent was going ahead and allowing second respondent to execute the contract despite applicant's appeal. An application for an interdict would, in all probability, have brought to the fore that the decision of 17 December 2004 was invalid and would have prevented the loss which applicant seeks to recover had applicant, in addition, been able to show its entitlement to the contract. An examination of the correspondence sent by or on behalf of applicant from 10 February until the launch of the application demonstrates that applicant knew that it had the right to approach the court for relief. It regularly threatened to do so but failed to follow up on its threats.'"

[33] In light of the above, I am of the view that the matter is not urgent and is accordingly struck from the roll with costs.

[34] In the event the following order is made:

> The matter is not urgent and is struck from the roll with costs such costs to include the costs of two counsel in respect of both the first and second respondents.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	Adv. P Stais (SC) Adv. GD Wickins
Instructed by	:	Eversheds Attorneys
For the First Respondent	:	Adv. KD Moroka (SC) Adv. MM Mojapelo
Instructed by	:	The state attorney
For the Second Respondent	:	Adv. FA Snyckers (SC) Adv. IB Currie
Instructed by	:	Tugendhaft Wapnick Banchetti and partners