

SOUTH AFRICA / JUDGMENT

Fidelity Services (Pty) Ltd v Mogale City Local Municipality and Others (32719/15) [2016] ZAGPJHC 397 (27 May 2016) [2016] ZAGPJHC 397

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Du Toit

CASE / FILE NUMBER

32719/15

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 32719/15

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED.

27/5/2018

In the matter between:

FIDELITY SERVICES (PTY) LTD Applicant

and

MOGALE CITY LOCAL MUNICIPALITY First Respondent

SIDAS SECURITY GUARDS (PTY) LTD Second Respondent

DAN MATSHITISHO Third Respondent

RENELL LIEBENBERG Fourth Respondent

DIRECTOR GENERAL OF THE NATIONAL

TREASURY Fifth Respondent

J U D G M E N T

S DU TOIT, AJ:

- [1] In this matter two main questions arise. The first is whether the contract under which a particular security service was employed by a municipality was lawful. The second is, if that employment was unlawful, what remedy the Court can provide to the aggrieved applicant, also a provider of security services. In particular the matter concerns the meaning and application of a municipal supply chain management policy.
- [2] The facts in the matter have a long history. The applicant (“Fidelity”) is a private security company. The first respondent (“Mogale City”) is a municipality under the Local Government Municipal Structures Act 117 of 1998. The second respondent (“Sidas”) is also a private security company. The third respondent (“Matshitisho”) is the municipal manager of Mogale City. The fourth respondent (“Liebenberg”) is the manager, supply chain management of Mogale City. The fifth respondent, the Director General of the National Treasury, took no part in these proceedings.
- [3] Fidelity seeks the following relief in terms of its amended notice of motion:

“2. Reviewing and setting aside the decision of the first respondent to participate in the contract concluded between the City of Tshwane and second respondent for the provision of security services.

2A Reviewing and setting aside the contract between the first and second respondents for security services.

3. The first respondent is directed immediately to conclude a contract with the applicant on the same terms and conditions as contained in the request for proposals in respect of tender number SS(T&S)10/2015, in order for the applicant to commence providing security services within 48 hours of the order of the above Honourable Court.

3A In the alternative to prayer 3 above, pending the lawful conclusion of a new contract pursuant to a competitive bidding process, the first respondent is directed to reinstate its month to month contract with the applicant on the same terms.

4. The first respondent, together with the third and fourth respondents in their personal capacities, and any other respondent that opposes the application, are ordered to pay the costs of this application on the attorney and client scale, jointly and severally, the one paying, the other to be absolved.”

HISTORY

- [4] The long history to which I refer is relevant to the relief sought. It started in 2012 when on 19 March of that year, and following a competitive bidding process, Mogale City awarded a three-year contract for the provision of security services to Mafoko Security Services (Pty) Ltd (“Mafoko”). The contract was intended to run from 1 April 2012. The amount involved was between R68 million and R80 million.

- [5] Fidelity and a company called Red Ant (Pty) Ltd (“Red Ant”) had both submitted tenders for this contract. Although they scored the highest in the bid evaluation process, both of these companies were disqualified from consideration, for various reasons. Fidelity was disqualified because one of its directors had been included in the National Treasury’s list of disqualified suppliers. (This inclusion was later set aside on 10 May 2012.) Red Ant was disqualified because it had, so it is alleged, attempted to bribe certain officials of Mogale City.
- [6] Red Ant then launched an application in May 2012 to review and set aside the decision to award the contract to Mafoko. Fidelity supported that application. However, in December 2012 Red Ant withdrew its review application.
- [7] On 13 December 2012, Fidelity filed an application to review and set aside the award of the tender to Mafoko. In judgment by Meyer J, (Case No 16813/2012) he granted an order reviewing and setting aside the award of the tender to Mafoko and declaring the contract entered into pursuant to that tender to be void ab initio. He further ordered Mogale City to “re-evaluate the bids submitted for tender No SS (T&S)10/2012 and to re-award the contract within four weeks of the date of” that order. One of the grounds for this order was the fact that Mafoko’s bid should have been eliminated at an early stage because of the low score it had achieved.
- [8] Mogale City appealed against this order. The Supreme Court of Appeal heard the appeal on 7 November 2014. In its judgment (reported as *Mogale City v Fidelity Security Services (Pty) Ltd and Others* 2015 (5) SA 590 (SCA) I note the tender number I quote differs slightly from that referred to in that judgment. Nothing turns on this). Wallis JA made certain remarks concerning the conduct of Mogale City in the administration of the tender then in issue.

- [9] He said at [21]:

“The tender process in this case was so defective and involved so many flaws that it seems extraordinary to think that a public authority could engage in such a farcical endeavour.”

He then mentioned a number of features of that process which are not necessary to repeat here and concluded with this remark:

“This litany of errors is such that it is appropriate to remind the municipality that it runs the risk, if there is a recurrence of such conduct, either at the re-evaluation stage or when dealing with other tenders, that a court may be minded to take the decision out of its hands and, rather than refer it back, order that tender to be awarded to the bidder to whom, in the court’s view, it should have been awarded had a proper process been followed. That may also result in identifiable officials responsible for that situation being ordered to pay the costs personally ...” (citations omitted.)

- [10] Having been ordered to re-evaluate the matter, Mogale City then did so. It then decided to award the tender to Red Ant. Fidelity felt aggrieved by this decision, having regard to the reason for Red Ant’s previous disqualification. It then approached the High Court for an order reviewing and setting aside the award of the contract to Red Ant. The matter then

came before Vermeulen AJ on 12 December 2014. He had certain critical comments to make about the conduct of Matshitisho in the preceding court cases. He considered the award of the contract to Red Ant as “highly irregular” and set it aside. He ordered Mogale City to appoint Fidelity to provide security services.

- [11] Pursuant to the order of Vermeulen AJ, Mogale City and Fidelity entered into a service level agreement for the provision of security services. This agreement was to run from 19 December 2014 to 31 March 2015.
- [12] Fidelity contends there was a “tacit agreement” between Fidelity and Mogale City that it would continue to render services, on the same terms and on a month to month basis until a new service level agreement was concluded. Whether that in fact was the case or not does not seem to be pertinent here. What is common cause is that the contract was extended on a monthly basis after 31 March 2015.
- [13] Mogale City on 16 January 2015 initiated a new bid, No SS (T&S) 10/2015 for the supply of security services for a three-year period commencing on 1 September
2015. Fidelity in fact submitted a bid in relation to this tender. It received no response, and continued to provide services on a monthly basis.
- [14] On 2 July 2015, Mogale City sent a letter to Fidelity recording concerns about certain incidents that had taken place and alleging non-compliance by Fidelity with its obligations under the existing agreement. Fidelity denied that it had breached the agreement and pointed to the fact that it had received high scores reflecting the adequacy and merit of its services. Fidelity pointed out that its employees had taken all reasonable steps.
- [15] Notwithstanding this, Mogale City gave notice to Fidelity terminating the monthly contract with effect from 31 August 2015. Mogale City also later informed Fidelity that it had not appointed any service providers in terms of tender SS (T&S) 10/2015. It said it was still considering its options. Later however Fidelity came to understand that Sidas had been awarded a tender for the provision of security services.
- [16] As will be indicated below, this impression was in fact incorrect. It nevertheless formed the basis for the current application in which Fidelity asked that this (purported) tender be set aside.
- [17] When Fidelity subsequently became aware that in fact no tender had been awarded to Sidas, but that Sidas had provided services under a different arrangement, Fidelity amended the substantive part of its notice of motion to reflect what is set out in [3] above. This amendment was granted without opposition.
- [18] What in fact had happened emerges from the answering affidavit by Matshitisho, as supplemented by a supplementary answering affidavit.

[19] After stating that no tender was awarded to Sidas, he points out that Mogale City procured the services of Sidas “in terms of regulation 32 of the Municipal Supply Chain Management Regulations published under General Notice Number. 868/2005 and under a contract which [Sidas] has with another organ of State namely, the City of Tshwane Metropolitan Municipality”. He elaborates on the contended legal bases for this procedure, to which I will refer to in more detail below.

The tender SS (T&S) 10/2015, referred to above, he said, had not been disposed of before the expiry date and therefore had lapsed.

[20] Matshitisho also pointed out that Mogale City had re-advertised a tender under No SS (T&S) 11/2016 and that this tender was still pending.

[21] This information elicited a response from Fidelity in its supplementary founding affidavit filed pursuant to Rule 53(4). It had ascertained from the record of the decision that Mogale City had relied on regulation 32 of the Supply Chain Management Regulations promulgated in terms of the Local Government: Municipal Finance Management Act 56 of 2003. It however contended that Mogale City had failed to meet all the requirements of regulation 32, as well as the requirements set out in clause 32 of its own Supply Chain Management Policy.

[22] Matshitisho’s supplementary affidavit reveals that Mogale City had requested the City of Tshwane Metropolitan Municipality to consent to its participation in the City of Tshwane’s contract with Sidas. This was pursuant to regulation 32 (to which I refer below). On 24 August 2015 the city manager of the City of Tshwane consented to Mogale City’s participation in its contract with Sidas.

[23] On the same day, Mogale City appointed Sidas as its security service provider for a period of six months, commencing on 1 September

2015. This appointment is reflected in Matshitisho’s letter of 24 August 2015, of which I quote two paragraphs:

“You are hereby appointed in terms of Section 32 of the Supply Chain Management Policy of Mogale City Local Municipality for the rendering of security services, as approved by municipal manager on the 24 August 2015.

Your appointment will be based on the contract no. CB63/2013 awarded to you by City Tshwane Metro. A service Level Agreement will be drafted by our Legal Section based on the City of Tshwane tender, but we will also include all the terms and conditions required by Mogale City local municipality. Once satisfied, both parties will sign the Service Level Agreement.

Your contract will be over within a period of six (6) months with effect from 1 September 2015 to February 2016.

Your contact person with regard to this bid will be ...”

(My underlining)

[24] On 26 February 2016, Matshitisho wrote a further letter to Sidas concerning the following:

“Bid: SEC32 (CONTRACT NO: CB 63/2013): Rendering of security guarding services. Approval was granted to extend the contract for a period of one month, with effect from 1 March 2016 to 31 March 2016.

The Service Level Agreement between yourselves and Mogale City will be amended accordingly.”

[25] A similar letter was written on 31 March 2016 extending the contract with Sidas to 31 May 2016. These letters are supported by a copy of what is described as a letter addressed to Matshitisho seeking his permission “to extend the contract for appointment of Sidas”.

[26] What all this makes clear is that Mogale City entered into its own contract with Sidas. The documents I have quoted allow of no other interpretation. It did not, as it contended, “piggyback” on the City of Tshwane contract, but concluded a direct contract under the guise of procurement under regulation 32.

[27] It is this “contract” between Mogale City and Sidas which Fidelity seeks to review and set aside. It of course also seeks to set aside Mogale City’s purported decision to participate in the contract between City of Tshwane and Sidas.

THE CONSTITUTION AND THE ACT

[28] In evaluating the legality of any procurement process and contract the starting point must be with Grundnorm of our law, namely the Constitution. Section 217(1) thereof states:

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost- effective.”

This forms the basis for adjudging the legality of the process adopted by Mogale City in this matter. I need only add that sec 217(2) dealing with preferences is not relevant to the present matter.

[29] The Local Government: Municipal Finance Management Act 56 of 2003 (“the Act”) has as its object in sec 2 the securing of sound and sustainable management, which includes norms for supply chain management.

In chapter 11 the Act deals with the question of the procurement of goods and services. Section 110(1)(a) provides that the chapter applies to “the procurement by a municipality or municipal entity of goods and services”. (The other subsections of this section are not relevant to the current discussion.)

[30] Section 110(2) provides as follows:

“This Part, except where specifically provided otherwise, does not apply if a municipality or municipal entity contracts with another organ of state for –

- (a) the provision of goods or services to the municipality or municipal entity;
- (b) ...
- (c) the procurement of goods and services under a contract secured by that other organ of state, provided that the relevant supplier has agreed to such procurement.”

[31] Section 111 further provides that each municipality must have and implement a “supply chain management policy which gives effect to the provisions of this Part”. Section 112(1) goes on to provide that that supply chain management policy must be “fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management ...”. What further emerges from a reading of the Act is the clear aim of the legislator to ensure that a municipality gets the best value for its money.

[32] Section 115 makes the accounting officer of the municipality responsible for the implementation of its supply chain management policy. It is of some note that sec 173 of the Act renders an accounting officer guilty of an offence if he or she should deliberately or in a grossly negligent way fail to take reasonable steps to implement the municipality’s supply chain management policy.

THE REGULATIONS

[33] Section 168 of the Act provides that the Minister of Finance may make regulations or guidelines applicable to municipalities. Those regulations may have regard to inter alia financial management and internal control and any other matter that may facilitate the enforcement and administration of the Act.

[34] Pursuant to sec 168 the Minister promulgated municipal supply chain management regulations in Government Notice 868 in Government Gazette 27636 of 30 May 2005. Those regulations provide the framework for the supply chain management policies of a municipality.

Regulation 2 obliges a municipality to have and implement a supply chain management policy which, in summary, gives effect to the

Constitution and the Act. That regulation in other respects also broadens the duties of a municipality under a supply chain

management policy. Regulation 11 deals with the system of acquisition management. It provides that a supply chain management

policy must provide for an effective system of acquisition management in order to ensure that goods and services are procured by the municipality in accordance with authorised processes only. Under regulation 12(1) a supply chain management policy must provide for the procurement of goods and services by way of a competitive

bidding process where the procurement relates to a transaction value above R200 000, 00. On the information available to me on the papers the Sidas contract exceeded that value. Regulation 19 provides that the supply chain management policy must (my emphasis) specify that goods or services above a transaction value of R200 000,00. may be procured only through a competitive bidding process. The regulations then go on to detail how these competitive bids must be dealt with.

[35] Regulation 32 deals with the procurement of goods and services under contract secured by other organs of state. I quote:

“(1) A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if

–

- (a) the contract has been secured by that organ of state by means of a competitive bidding process applicable to that organ of state;
- (b) the municipality or entity has no reason to believe that such contract was not validly procured;
- (c) there are demonstrable discounts or benefits for the municipality or entity to do so; and
- (d) that other organ of state and the provider have consented to such procurement in writing.”

[36] I mention in passing that regulation 36 provides that a supply chain management policy may allow for deviations. It provides that such a policy may allow the accounting officer to dispense with the official procurement processes and to procure the goods and services through any convenient process but only in certain specified circumstances. I quote regulation 36(1)(a)(v):

“(v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes;”

The relevance of this will emerge when I deal with the arguments by counsel.

Deviations are also allowed in other instances, notably in relation to emergency situations.

[37] Mogale City itself adopted a supply chain management policy in 2005, which has been amended from time to time. It largely mirrors the regulations. Clause 32(1) of that policy echoes the provisions of regulation 32 I have quoted above. Clause 32 however adds the following provisions:

“(3) The accounting officer should satisfy himself that the applicable procurement processes were followed by obtaining any other information, including but not limited to, the following documents from the other organ of state.

- (i) The bid advertisement.
 - (ii) Bid Evaluation report.
 - (iii) Bid Adjudication report and minutes.
 - (iv) Acceptance letter.
 - (v) Service Level Agreement.
- (4) Municipalities should consult with Gauteng Provincial Treasury on the intention to partake in a contract secured by an other organ of state.”
- [38] Against the background of the various legislative provisions I have referred to above Ms Steinberg SC, with her Mr Ferreira, submitted that a direct contract between Mogale City and Sidas was unlawful and thus invalid. That contract was not the consequence of a competitive bidding process. It had arisen from a direct negotiation between Mogale City and Sidas, as the letters I have quoted show. Regulation 32 of the supply chain management policy regulations (as repeated in Mogale City’s own supply chain management policy) does not permit such a direct contract. Sidas is not an organ of state. Mogale City can under regulation 32 procure goods and services from City of Tshwane, an organ of state. But Mogale City cannot conclude a separate contract (incorporating its own provisions, as shown above) with the private service provider under the aegis of regulation 32.
- [39] As an alternative, or perhaps in addition, Ms Steinberg pointed to the requirements of Mogale City’s supply chain management policy referred to above. That required that there be “demonstrable discounts or benefits” for Mogale City to procure security services under the contract between City of Tshwane and Sidas. She pointed out that Sidas’ rates exceed those of Fidelity, in some instances quite considerably. There were no discounts or benefits, nor in fact were any alleged. There was also no evidence that Mogale City had consulted with the Gauteng Provincial Treasury.
- [40] It is clear that a supply chain management policy binds a municipality. When it acts in conflict with such a policy, it acts unlawfully, and its unlawful acts can be reviewed and set aside. Cf. *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) and *Blue Nightingale Trading 397 (Pty) t/a Siyenza Group v Amathole District Municipality* (ECD1681/15).

- [41] In my view regulation 32 permits an arrangement between a municipality and another organ of state only. As I have found that Mogale City entered into a separate contract with Sidas, it is clear that the municipality was acting outside the permissible limits of regulation 32. That contract was therefore not lawful. Having found that, it is unnecessary to consider the second ground advanced, though there is considerable merit in that as well.
- [42] It is pointed out that Fidelity's contentions that the requirements of regulation 32 had not been observed were met by bare denials only. This, it was argued was not enough. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634I; *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at [13].
- [43] It is further argued for the applicant that the judgment of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) at [22] and following requires a court to review and set aside an unlawful procurement contract. This, it was argued, overtakes the approach of the Supreme Court of Appeal, as expressed for instance in the judgments of Chairperson, Standing Tender Committee and Others v *JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) and *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA). Those judgments tended to the view that where a contract, even if unlawfully procured, was virtually complete, it would be impracticable to set it aside. This, it was argued, was in conflict with *Allpay* because it elides the question of review with the question of remedy. The Constitutional Court did not hold that not every irregularity constitutes a ground for review. The question to be considered was whether the ground for review was material. It was material if it undermined the very purpose of the statutory provision. To my mind the purpose of the Act and the policies legislated under it, is to ensure cost-effective procurement. The very opposite seems to have occurred here.
- [44] Mr Skosana SC, with him Mr Mathebese, for respondents, argued that practical considerations dictated that a subsidiary contract, as he called it, could be entered into by Mogale City piggybacking as it were on the main contract entered into by the City of Tshwane with the service provider (Sidas). It was, in his submission, a practical necessity to allow Mogale City to adapt the main contract between City of Tshwane and Sidas to requirements specific to Mogale City. It was argued, in this vein, that the provision of security services in Mogale City would not necessarily be the same as the provision of security services in the City of Tshwane. From a practical point of view, there is some merit in this argument. It may be problematic to transplant the rendering of security services from one locality to another, without some adjustment for local features. It is also not clear, for instance, from regulation 32 exactly how the municipality deals with contractual relationships and liabilities arising out of a contract between another organ of state and a third (private) party.

- [45] However, I cannot agree with Mr Skosana's submission. In my view, regulation 32 simply does not provide for a so-called "subsidiary contract". Secondly, having regard to the overall purpose of the applicable legislation namely to ensure open, fair, cost-effective and competitive procurement practices, allowing the existence of a so-called "subsidiary contract" could undermine that purpose. Under the guise of providing for the specific circumstances of the second municipality much room could be created for introducing deviations and variations which may circumvent the requirements of the legislation to which I have referred.
- [46] If Mogale City's appointment of Sidas is unlawful, as I hold it is, what then is the remedy? Ms Steinberg says that I must appoint Fidelity to provide security services to Mogale City on the same terms as it had previously done. Mr Skosana counters this by saying that in view of the fact that the contract with Sidas expires within a few days it is simply not practicable now to set the contract aside. This argument is countered, on behalf of applicant, on the grounds that, having regard to the history of this matter, it is wholly uncertain when in fact Mogale City will engage in a competitive bidding process leading to the appointment of a provider of security services. The current tender, Ms Steinberg points out, has in fact lapsed. Its extension was invalid because that extension occurred only after the expiry date of the tender. See *Joubert Golpin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (EC). It was inevitable, she said, that if an award was made pursuant to the current tender there would be another review

application on the grounds that the tender had expired before it was extended.

- [47] The applicant relies on sec 172(1)(b) of the Constitution, as well as sec 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. The latter permits a court, in exceptional circumstances, to substitute its own decision for that of the administrator.

- [48] In my view there are a number of circumstances which would justify the exercise of the court's power to substitute its decision for that of Mogale City. They are:

48.1 The litany of failures dating back to 2012 on behalf of Mogale City to give effect to the requirements of the Constitution and the other applicable legislation.

48.2 The failure of Mogale City to bring the 2015 tender to a satisfactory conclusion before its expiry.

48.3 The obvious defect in the 2016 tender which will inevitably lead to further litigation and delay.

48.4 The circumvention of the provisions of the supply chain management system, under the guise of regulation 32, which should not be permitted to continue.

48.5 The savings which the appointment of Fidelity by this Court would bring about, where its tariffs are lower than those of Sidas.

48.6 The unsatisfactory conduct of Matshitisho as the municipal manager in relation to the procurement of security services.

48.7 The likelihood that some other dubious expedient may have to be resorted to by Mogale City, where the current tender process is so clearly open to attack.

48.8 The fact that Fidelity has previously performed security services for Mogale City and therefore is familiar with the scope and ambit of such services. This would imply an easy and smooth transfer to Fidelity.

[49] These points in my view justify the exercise of the court's powers under sec 8(1)(c)(ii)(aa) of the Promotion of Administrative of Justice Act. I would have preferred to embellish this judgment with the product of further research, but the urgency of the matter precludes this.

COSTS

[50] In view of Fidelity's success, it is entitled to costs, including costs consequent upon the employment of two counsel, but subject to the following. Firstly, it must pay the costs arising from its amendment, including the initial opposition thereto. Much of what was contended in the founding affidavit in fact became redundant when Fidelity ascertained that Sidas in fact had not been awarded a tender. Mogale City's complaint that Fidelity was changing its case was not, in my view, unreasonable. Secondly, as Fidelity's counsel rightly conceded, the founding affidavit was burdened with unnecessary material. Much of this was never referred to. I therefore propose to disallow the costs of a proportion of this.

[51] I make the following order:

51.1 The forms and service provided for in the Rules of Court are dispensed with and the matter is heard as an urgent application in terms of Rule 6(12).

51.2 The decision of the first respondent purportedly to participate in the contract concluded between the City of Tshwane and the second respondent for the provision of security services is reviewed and set aside.

51.3 The contract between the first and second respondents for the provision of security services is reviewed and set aside.

51.4 Pending the lawful conclusion of a new contract pursuant to a competitive bidding process, the first respondent is directed to reinstate the previous month-to-month contract with the applicant, on the same terms.

51.5 The first respondent is to pay the costs of the application, including the costs of two counsel. Such costs however must allow for only 300 pages in the founding affidavit including annexures

51.6 The applicant is to pay the costs of its amendment of the notice of motion, including the costs of the opposition thereto.

STEPHAN DU TOIT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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INSTRUCTED BY

MAKHUBELA ATTORNEYS

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