IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 36978/2022

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

E.M. KUBUSHI **DATE: 24 AUGUST 2022**

In the matter between:

MANTLADI TECHNOLOGIES (PTY)LTD	APPLICANT
and	
THE NATIONAL TREASURY	FIRST RESPONDENT
THE DEPARTMENT OF HEALTH	SECOND RESPONDENT
MINISTER OF FINANCE	THIRD RESPONDENT
THE COMPETITION COMMISION OF SOUTH AFRICA	FOURTH RESPONDENT
NUANGLE SOLUTIONS (PTY) LTD	FIFTH RESPONDENT
MOTHUDI SERVICES (PTY)LTD	SIXTH RESPONDENT
LOGAN MEDICAL & SURGICAL (PTY)LTD	SEVENTH RESPONDENT
ENDOMED MEDICAL & SURGICAL SUPPLIES CC	EIGHTH RESPONDENT

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 24 August 2022.

INTRODUCTION

[1] The application relates to a transversal tender, that was advertised, as a term contract, for the supply and delivery of bandages for three (3) years, by the National Treasury, the First Respondent herein ("the impugned tender"). The impugned tender deals with the supply and delivery of advanced wound care products. These products consist of bandages that are used in managing cases of non-healing wounds as well as chronic wounds associated with, amongst others, diabetes.

[2] Transversal contracts are contracts that are centrally facilitated by the National Treasury on behalf of the State. The National Treasury typically issues transversal contracts when there is more than one state department that requires the supply of certain services. For purposes of this application, the supply of the advanced wound care products was not only required by the relevant provincial Departments of Health, they were also needed by the Department of Correctional Services and the Department of Defence. The National Treasury facilitated the tender process on behalf of these departments.

[3] The Applicant, Mantladi Technologies (Pty) Ltd, brought this application on an urgent basis seeking an interim order to restrain and interdict the First Respondent and the Third Respondent (the Minister of Finance) from continuing with the implementation of the impugned tender. Initially, the relief the Applicant sought was couched in general terms – seeking to review and set aside the whole tender. But, after having considered the answering affidavit, the Applicant now seeks an order to restrain and interdict the impugned tender only in respect of the line items in the tender for which it tendered for and was unsuccessful. At the time of hearing this matter the impugned tender had been running for at least a month.

[4] The application is opposed by the First Respondent and the Third Respondent, only. For ease of reference the First Respondent and the Third

Respondent shall be referred to in this judgment collectively as the Respondents, and individually as the First Respondent and the Third Respondent, respectively.

[5] The Second to Eighth Respondents are cited due to their respective interests they have in the outcome of this application, no specific relief is sought against them. The Fifth to the Eighth Respondents are the successful bidders.

[6] Except for the Competition Commission of South Africa, the Fourth Respondent herein, the other Respondents are not taking part in these proceedings.

[7] The Fourth Respondent has filed a notice to abide, as well as an affidavit for the purpose of assisting the Court by providing an explanation of the Commission's investigation and its findings of irregularity of the impugned tender following the Applicant's complaint.

URGENCY

[8] The Respondents are opposing the urgency of the application. The Supreme Court of Appeal in *Millenium Waste Management*,[1] at para 34 of the judgment remarked that -

> "[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." (my emphasis).

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[1] Millenium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA) para 34.

[9] Therefore, relying on this judgment, it is this Court's view that this matter is inherently urgent.

FACTUAL MATRIX

[10] The First Respondent advertised the impugned tender on 27 July 2021 and the closing date for the tender was 26 August 2021. The Special Conditions of Contract ("SCC"), which is a supplementary to the General Conditions of Contract was also published. The special conditions of contract are there to supplement the general conditions of the contract.

[11] On the closing date, the First Respondent received ninety-three (93) bids and the Applicant was one of the 93 bidders. The tender itself consisted of 479 line items, which includes, *inter alia*, different categories of wound dressings; foam dressings; burn dressings; bandages; and skin closure strips. The Applicant tendered for only 9 line items. It was a specific requirement of the tender that all bidders should submit samples of the relevant product where applicable, and in one of the 9 line items the Applicant did not provide a sample. The tender was awarded by the First Respondent on 29 April 2022. The Applicant was not successful in its bid and the tender was awarded to other bidders, including the Fifth to Eighth Respondents ("the successful bidders").

[12] The tender process consisted of five phases. The Bid Evaluation Committee ("BEC") met on 8 November 2021 and 10 February 2022 to evaluate the bids that had been submitted by various bidders including the Applicant. It is common cause that the Applicant submitted a bid that went successfully through the first three phases, but in the fourth phase the Applicant was disqualified. The BEC recommended 46 bidders for qualification to the next phase of the tender and the Applicant was not part of the recommended bidders. A list of all those who were disqualified together with the reasons for their disqualification was also drawn up. The Applicant alleges that its name does not appear on this list.

[13] On 18 May 2022 the Applicant addressed an electronic mail to the First Respondent in which the Applicant highlighted that it had been made aware that the tender had been awarded to the successful tenderers at the end of April 2022, but that the Applicant had not yet received a formal notice that it had not been successful. In the said email the Applicant requested full details as to why the Applicant, with a 100% locally manufactured product, was passed over and not successful in its bid.

[14] On 19 May 2022 the Applicant received an electronic mail from the First Respondent with an attachment to it, dated 17 May 2022. The attachment was written correspondence advising that the Applicant was not successful in its submitted tender. In response to the electronic mail dated 18 May 2022 from the Applicant, the First Respondent directed an email to the Applicant on 1 June 2022, in which the reason for passing the Applicant over during the bid process was highlighted. The reason for the non-award was recorded as "sample not recommended. Submitted woven dressing instead of non-woven." "Non designation"

THE INCLUSION OF THE FOURTH RESPONDENT IN THESE PROCEEDINGS

[15] The Fourth Respondent was drawn into this application as a result of the history that preceded the impugned tender. The history is said to be common cause between the parties, and relates to the inclusion in the past of certain patents in the standard requirement or specifications of these tenders. It is averred that there was a move away from generic specification terms to the inclusion, for example, of the term Drawtex. The difficulty, as alluded to by the Applicant, is that Drawtex is a patent and if you are not a license holder of the patent you cannot submit a product because it won't be a Drawtex product. This prohibits many entities to submit tenders and to can qualify for the awarding of these tenders. The Applicant alleges that the First Respondent invited the tender without the generic wording. Conversely, the Respondents

contends that nowhere in the impugned tender is there any mention of patented products such as Drawtex.

[16] Complaints were laid with the Fourth Respondent pertaining to a previous tender of this nature, which complaints, according to the First Respondent and the Fourth Respondent, were resolved after a meeting of the two and an undertaking by the First Respondent to issue a Request for Information ("RFI") to the market to identify who the market participants are, and their product specifications. This would help them to tailor generic tender specifications that do not exclude any player active in the wound bandages market.

[17] When the impugned tender was advertised without the generic wording, as it is alleged by the Applicant, the Applicant laid a fresh complaint with the Fourth Respondent. When the Applicant did not get any satisfaction from the Fourth Respondent, it approached this Court for relief and joined the Fourth Respondent as a party to the proceedings. Pursuant to its investigation regarding the Applicant's complaint, the Fourth Respondent submits in its explanatory affidavit that its preliminary review is that the pricing of the impugned tender is anti-competitive and that the impugned tender has been illegally awarded and ought to be set aside and re-advertised.

THE GROUNDS OF REVIEW

[18] The essence of the Applicant's submission is that, amongst others, the decision by the First Respondent is not rationally connected to the information that was before the First Respondent at the time of considering the Applicant's bid, and the reason given for the decision to not award the tender to the Applicant. According to the Applicant, the First Respondent considered irrelevant considerations and/or failed to consider relevant considerations when considering its bid.

[19] Additionally, it is submitted that the First Respondent's process in respect of this tender, as well, as its decision to award the tender to the Fifth to

Eighth Respondents falls short of the requirements set out in section 217 of the Constitution.

[20] Furthermore, the Applicant raises the following four grounds of review, namely, that

20.1 Save for the product submitted by the Fifth Respondent, the products submitted by the Sixth to Eighth Respondents were not locally manufactured and not compliant with the prescribed specification.

20.2 The pricing submitted by the Sixth to Eighth Respondents is indicative thereof that the product they submitted for purposes of the tender cannot be an "absorbent capillary action" product but must be a passive wound care product.

20.3 Should it be established that the Sixth to Eighth Respondents submitted an "absorbent capillary action" product, then in that event, the respective Respondents fall foul of clause 5.2.2.3 of the SCC.

20.4 The non-woven product submitted by the Applicant was incorrectly classified as a woven product.

[21] It is trite that before a Court may grant an interim interdict, it must be satisfied that the Applicant for an interdict has good prospects of success in the main review. The review must be based on strong grounds which are likely to succeed. This requires the Court adjudicating the interdict application, to peek into the grounds of review raised in the main review application, and assess the strength of such grounds of review. It is only if a Court is convinced that the review is likely to succeed that it may appropriately grant the interdict.[2]

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[2] Economic Freedom Fighters v Gordhan and Others 2020 (6) SA 325 (CC) para 42.

THE ISSUE FOR DETERMINATION BY THIS COURT

[22] Two issues stand to be determined by this Court before it can grant the Applicant the relief it seeks in this application. The main issue is whether the Applicant has established the requirements for the granting of an interim interdict. Underlying that issue is whether the grounds of review raised by the Applicant have good prospects of success in the main review.

[23] The two issues shall be dealt with hereunder in turn. The issue of whether there are strong grounds of review shall be dealt with first.

DISCUSSION

Whether the grounds of review raised by the Applicant have good prospects of success in the main review.

[24] The Applicant submits that it has strong grounds of review, clear evidence of irregularity, and an independent state institution, the Competition Commission, submitting that this impugned tender is anti-competitive.

[25] In its oral argument, the Applicant concentrated its submissions more on the grounds of irrationality, the wrong classification of the product and that the First Respondent, when adjudication the Applicant's bid considered irrelevant considerations and/or failed to consider relevant considerations. These grounds of review are further honed by the below arguments of the Applicant.

[26] The reason for disqualifying the Applicant is stated as 'sample not recommended. Submitted a woven dressing.' The products that were required by the tender were 'non-woven'. The second reason for disqualification is that the Applicant did not provide samples. Bidders were expected to provide samples with their bids.

[27] According to the Applicant, it submitted the bid and made offers on 9 line items out of the 479 items that formed the subject of the impugned tender, and then attached a copy of the list and full description of the nine items. But, the reason provided by the First Respondent for the Applicant's disqualification is

a broad sweeping statement without any specifics as to the nine line items it tendered for.

[28] In relation to the whole dispute about whether the product was woven or non- woven, and whether or not the Applicant provided the correct product, the Applicant's submission is that there can be no dispute in this regard because Mr Molefe Fani ("Mr Fani"), the deponent to the answering affidavit, does not have personal knowledge. The contention being that although Mr Fani is a high ranking official within National Treasury, he was, however, not a member of the BEC, and, thus, did not participate directly in the BEC meetings. His evidence is founded on documents that fall under his control and supervision, but, no confirmatory affidavits are attached to the answering affidavit.

[29] According to the Applicant, the failure to file the confirmatory affidavits left only the evidence of Mr Fani, who although is in a supervisory capacity and has access to documents, but, he has no personal knowledge of what was debated about the reasoning and motivation of, specifically, the BEC at phase four of the tender disqualifying the Applicant. He can simply not rely on what he read in the documents or what he was told by undisclosed sources. That Mr Fani was not part of the BEC meeting is not in dispute, this is conceded in the answering affidavit, and the attendance list also bears testimony to that, so the Applicant argues.

[30] The Applicant's argument is that the hearsay evidence of Mr Fani is trumped by the evidence of Mr Jacobus Frederik Mouton ("Mr Mouton") which is contained in the confirmatory affidavit to the Applicant's replying affidavit. Mr Mouton is alleged to have personal knowledge and is an expert and patent holder of the products in question. Mr Mouton is said to have confirmed that the products that the Applicant tendered for were correct in that they were non-woven. Mr Mouton's evidence is alleged to be uncontested, the Respondents having not taken issue with the data contained in his confirmatory affidavit.

[31] In respect of whether a sample was provided or not, the Applicant contends that the Supply List attached to the replying affidavit demonstrates that except for one-line item, a sample was provided in respect of each line item that the Applicant tendered for. The Applicant concedes that in respect of that one-line item it did not supply the sample. The Applicant, further, submits that there being no evidence to the contrary that the Supply List was not submitted, the Supply List establishes without a shadow of doubt that the samples were provided, and that that reason for disqualification can simply not hold water.

[32] Additionally, the Applicant contends that it was disqualified whilst it submitted the same products as some of the successful bidders. The contention is that it is, therefore, irrational that the Fifth Respondent successfully tendered with the exact same items, being a non-woven XLTA product whereas the Applicant who submitted the same product was disqualified.

[33] The Applicant further relies on the Fourth Respondent's submission that the tender has been illegally awarded and ought to be set aside, and be re-advertised.

[34] As expected, all these grounds are denied by the Respondents. The Respondents contend in their answering affidavit that –

34.1 The Applicant was deemed non-compliant on all the line items it bid on and made offers on. The Applicant was deemed non-compliant mainly because it was found that it provided woven items whereas the bid specification required non-woven items. In addition to this, the Applicant was also disqualified because in terms of the bid specification, bidders were meant to provide samples with their bids so that the BEC could ascertain if the sample provided met the relevant technical requirements. For

some of the nine line items that the Applicant bid on, it failed to provide the samples for the BEC to assess.

34.2 The Applicant's contention that it was unfairly disqualified even though it submitted the same brand of product (XLTA) as some of the other successful bidders, is not valid. What the Applicant fails to explain to this Court is that although the product it submitted in its bid is the same brand as some of the products submitted by the other successful bidders, the actual product that the Applicant submitted in its bid was either the incorrect product from the same brand or company; or it was the correct product but the Applicant failed to provide a sample of the product. It was a specific requirement of the tender that all bidders should submit samples of the relevant products where applicable and the Applicant failed to do so.

[35] This being an interdictory application, it is not for this Court to decide this dispute at this stage of the proceedings, as to do so would be to usurp the powers of the Review Court. Ordinarily, the Court should avoid anticipating the outcome of the review, except perhaps where the review has no prospects of success whatsoever. This Court, as such, is only called upon to peek into the Applicant's grounds of review and to determine whether the Applicant has raised strong grounds of review which are likely to succeed in the main review.

[36] Therefore, relying on the judgment in *Economic Freedom Fighters* quoted above, this Court is convinced that the Applicant has raised strong grounds of review which are likely to succeed in the review application.

Whether the Applicant has established the requirements for the granting of an interim interdict.

[37] It is evident from the papers filed that the nature of the relief the Applicant is claiming for is that of an interim interdict. The test for the right to claim an interim interdict is trite. In order for the Applicant for interim interdict to succeed

it must establish: (a) a *prima facie* right; (b) a well-grounded apprehension of irreparable harm; (c) the balance of convenience favouring the granting of an interim interdict; and (d) that the applicant has no other satisfactory remedy.[3]

[38] The Respondents' submission is that the Applicant has not satisfied any of the requirements for an interim interdict. It is this Court's view, as it will appear more fully hereunder, that the Applicant has been able to establish only one of the aforestated requirements.

[39] The four requisites are dealt with *ad seriatim* hereunder.

Prima Facie Right

[40] This Court is satisfied that on the facts and evidence provided the Applicant has established a *prima facie* right. The Applicant was involved in the tender process at all material times, and this Court's finding that the Applicant has raised strong grounds of review that are likely to succeed in the main review, confirms that the Applicant has a *prima facie* right.[4] More so, the Constitution makes it plain that *"[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair"* and, in turn, PAJA[5] regulates the review of administrative action.[6]

A Well-Grounded Apprehension of Irreparable Harm

[41] The Applicant has to show a reasonable apprehension of irreparable harm if the interim relief is not granted. The test is whether the irreparable harm complained of can be revisited and turned around.

[42] The Constitutional Court in *Urban Tolling Alliances* at para 50 of that judgement held as follows:

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[3] National Treasury and Others v Opposition to Urban Tolling Allinces and Others 2012 (6) SA 223 (CC) at para 41.

[4] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) para 48.

[5] Promotion of Administrative Justice Act, 2000.

[6] Section 33 (1) and (3) of the Constitution read with PAJA.

> "50. Under the *Setlogelo* test, the *prima facie* right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*." (footnotes omitted)

[43] Therefore, in this matter, the Applicant must demonstrate that the *prima facie* right is threatened by an impending and imminent irreparable harm which cannot be revisited, if the interdict is not granted.

[44] The Applicant submits that the irreparable harm is clear, in that the harm to be prevented in the present circumstances, is the continued implementation of the tender, in the event that the Review Court finds it to have been unlawfully awarded, and the risk it places on the integrity of the review process. The submission is that if the interim interdict is not granted the line items will continue to be delivered to the detriment of the Applicant and that of the public, for it is in the public interest that the correct products as *per* the specification be provided.

[45] It is clear that what the Applicant is contending for in this application is the loss of profit that it would not realise if it is not granted the tender. In the event that the interdict is not granted, such loss would relate mainly to the profit the Applicant would have realised on the contract if it succeeds in the review application and is eventually awarded the tender.

[46] However, this is not irreparable harm for the profit may still be realised should the Applicant succeed in the review application and be awarded the tender.

[47] There is, thus, no threat of irreparable harm to the Applicant.

Balance of Convenience

[48] It is trite that before granting an order for interim interdict a Court must be satisfied that the balance of convenience favours the granting of such interdict. The Court must first weigh the harm to be endured by an applicant if interim relief is not granted, as against the harm a respondent will bear if the interdict is granted. Thus, a Court must assess all relevant factors carefully in order to decide where the balance of convenience rests.[7]

[49] The Supreme Court of Appeal in *Millenium Waste Management* held as follows:

> "[23] The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates*, 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."(footnote omitted)

[50] As indicated, the loss for the Applicant in the event that the interdict is not granted would relate mainly to the profit it would have realised on the contract if it is eventually awarded the tender. Against that must be weighted the loss that the departments and the public at large might suffer if the interdict is granted.

[51] The Respondents have shown, correctly so, that if the relief is granted, the relevant departments that are participants in the transversal contract stand

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[7] National Treasury and Others v Opposition to Urban Tolling Alliances and Others 2012 (6) SA 223 (CC) at para 55.

to suffer irreparable harm as they will not be able to supply advanced wound care products to millions of patients who need the products around the country. The relief sought will be deleterious, not only to the relevant departments but also to millions of patients who need the advance wound care products. Granting the relief may also lead to the suffering of numerous patients for not receiving the necessary treatment, the loss of several lives and further, burdening the state healthcare system.

[52] From the point of view of the public, serious concerns might also arise if the interdict is granted and the impugned tender is terminated. The tender relates to the supply and delivery of advanced wound care products, that are not easily and readily attainable. It is said that these products include bandages that are used in managing non-healing wounds as well as chronic wounds. The availability of these products is vital to the lives of many patients who suffer from these specific wounds. It is, thus, clear that without the availability of these products many lives will be at risk, hence the supply thereof must be carried out without interruption. There is no evidence on record as to the limits the various departments might go to in trying to sustain the provision of such products if the tender is stopped now and with no knowledge of how long it will take for the review application to be finalised.

[53] The Applicant's argument that the interdict is sought against only 9 line items out of 479 line items is also not sustainable as the products in those line items must be available when required by the patients. Even the lack of products in one line item puts the lives of many patients who might require the product, at risk. It might not be known what number of patients might be affected, but one life is one life too many.

[54] Although not much was canvassed about the situation of the successful bidders, their interests must also be taken into account when the balance of convenience is assessed. As is stated in *Millenium Waste Management*,

> "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."

[55] As such, it is the view of this Court that the balance of convenience must, under such circumstances, tilt in favour of relevant state departments more importantly, members of the public that require advance wound care products that would be prejudiced, as against the loss of profit envisaged by the Applicant.

No Other Satisfactory Remedy

[56] The Applicant's argument in this regard is that it has already tried to get relief by approaching the Fourth Respondent but received no satisfaction, hence it approached this Court for relief. Furthermore, the mootness of a review process once the tender is fully implemented, satisfies this requirement. Not granting the interdict will annihilate any suitable remedy that the review Court may consider to be just and equitable, so the Applicant argues.

[57] The Applicant's suggestion that this matter will have become moot if an interdict is not granted is unsustainable. It is common cause that the impugned tender is envisioned to remain in place until 2025. Should the Applicant wish to do so, it may expedite the review application, with a view of finalising it well in advance of 2025. The Applicant has not explained why this option is unavailable to it in this matter. It is in fact, the Applicant's argument that the mere fact that the tender has been implemented does not mean that the Court cannot intervene, and that Courts have previously intervened where a tender had already been implemented. Therefore, the Applicant will still have a remedy in due course even if this interdict is not granted.

CONCLUSION

[58] The Constitutional Court in *Urban Tolling Aliances* cautioned that *'a court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review'*.[8] There can be no doubt that the impact of the temporary restraining order, in this matter, will be immediate, ongoing and substantial, stopping dead the supply of services once it is granted.

[59] The Court have cautioned against the granting of interim orders against state institutions except in very clear cases. This case is not one such case. Therefore, the Applicant's application for interim interdict falls to be dismissed.

COSTS

[60] As is trite, costs should, ordinarily, follow the successful litigant. The parties had applied for such costs to include costs of two counsel. I am satisfied that this application warranted the employment of two counsel and that such costs ought to be granted.

ORDER

[61] Consequently, the following order is made:

1. The application is dismissed.

2. The Applicant is ordered to pay the costs of the application, such costs to include the costs consequent upon the employment of two counsel.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

[8] Para 26

APPEARANCES:

APPLICANT'S COUNSEL:	ADV. JP VAN DEN BERG SC
	ADV. D HINRICHSEN
APPLICANT'S ATTORNEYS:	CAVANAGH & RICHARDS ATTORNEYS
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