



**THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between

Case No: 24100/15

**CAPE BOOK & COLLEGE SUPPLIES CC t/a  
UNIVERSITY BOOKSHOP**

**APPLICANT**

and

**NORTHLINK TVET COLLEGE  
VAN SCHAIK BOOK STORE (PTY) LTD  
NU-HORIZON BOOKS  
CAXTON BOOKS LTD  
ALICANIE TRADING CC**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT  
FOURTH RESPONDENT  
FIFTH RESPONDENT**

**Coram: ROGERS J**

**Heard: 24 DECEMBER 2015**

**Delivered: 24 DECEMBER 2015**

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**JUDGMENT**

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## **ROGERS J:**

### Introduction

[1] This is an urgent application to preview and set aside the award of a tender by the first respondent ('the College') to the second respondent ('Van Schaik'). The other tenderers were the applicant ('CBC'), the third respondent ('Nu-Horizon'), the fourth respondent ('Caxton') and the fifth respondent ('Alicanie'). CBC seeks a substituted decision in its favour, alternatively remittal on the basis that Van Schaik and Nu-Horizon be excluded from consideration.. Given the urgency and time of year I propose to state the reasons for my decision relatively briefly.

[2] The tender is for textbooks. The College issued the tender on 16 October 2015. The tender invitation listed the textbooks and the required quantities per book. The tender's closing date was 16 November 2015. There was a compulsory pre-tender meeting which took place on 27 October 2015. On 30 October 2015 the College notified bidders that a particular textbook (Drawing Sets) had now been excluded from the tender and that certain other textbooks had been added for the College's Belhar campus ('the additional Belhar books').

[3] It is common cause that Van Schaik initially failed to include the additional Belhar books in its tender. Several days after the tender closed (precisely when does not appear) it submitted a quotation for the additional Belhar books.

[4] On 20 November 2015 the College notified the bidders that five tenders were being processed. The aggregate prices tendered by the five bidders were stated. Van Schaik's bid (R5 231 400) was the lowest. CBC's bid was R6 124 895. In terms of the tender invitation the bids were to be adjudicated in accordance with the 90/10 preference points system contemplated in the Preferential Procurement Policy Framework Act 5 of 2000

[5] On 23 or 25 November 2015 the College's Bid Adjudication Committee ('BAC') resolved to award the tender to Van Schaik. The BAC's minutes indicate that

the Bid Evaluation Committee ('BEC') had shortlisted Van Schaik, Nu-Horizon and CBC. It appears that the members of the BAC were Deon van Rooyen ('Van Rooyen'), the Acting Deputy Principal: Finance, and Leon Beech ('Beech'), the College's Principal and Accounting Officer. (The minutes of the BEC have not been furnished to CBC or placed before the court.)

[6] On 27 November 2015 the College notified bidders that the tender had been awarded to Van Schaik. CBC was suspicious at Van Schaik's low price and made enquiries, inter alia with a view to establishing whether Van Schaik's quote had included the additional Belhar books.

[7] On 2 December 2015 the College's Procurement Officer, Andre Steenkamp ('Steenkamp'), informed CBC's Mr Moses ('Moses') that Van Schaik and Nu-Horizon had omitted the Belhar books but that this would not have mattered because if Van Schaik had bid for all the books it would still have scored the most points.

[8] On 3 December 2015 CBC noted an internal appeal.

[9] On 7 December 2015 Moses consulted with attorneys. During the course of this consultation he received a telephone call from Van Rooyen stating that he had had authority to allow Van Schaik to submit a quotation for the additional Belhar books after 16 November 2015. He nevertheless offered Moses an opportunity for CBC to be considered for the additional Belhar books. Moses confirmed this discussion in an email to Van Rooyen. The latter's reply reads in relevant part:

'Please be advised that due to other complaints received re the exclusion of drawing sets and then the inclusion of Belhar Campus Text Books during the tender process we considered best practice regarding the exclusion of the Drawing Sets and Belhar Campus Text Books and evaluated on that basis the final Tender Award.'

[10] On 10 December 2015 the Bid Dispute Committee, the body considering CBC's appeal, decided that previous decisions should be upheld. The minutes record that Van Schaik was the cheapest, with Beech recommending that 'we should focus on the original tender document'.

[11] I think it can be taken for present purposes that what was awarded to Van Schaik was a contract to supply the textbooks listed in the initial invitation document, ie to the exclusion of the additional Belhar books. CBC said that there were indications that the BAC may have been under the misapprehension that all the tenderers had bid for all the books. However it is not possible on the papers to make such a finding. The scoresheet which the College has furnished<sup>1</sup> is alleged by it to have formed the basis of the adjudication. This scoresheet was in two parts: (i) The first part dealt with the original list of books, deducting where appropriate the prices tendered by bidders for the additional Belhar books and deducting (in Van Schaik's case) the amount erroneously included in respect of Drawing Sets. (ii) The second part dealt with the additional Belhar books, in respect of which only Caxton, CBC and Alicanie qualified.

[12] The present review application was issued and served on 11 December 2015 for hearing on 24 December 2015. The notice of motion set out the applicant's intended timetable. The main ground of review was that bidders had been required to tender for the supply of all the textbooks, including the additional Belhar books. Because Van Schaik had omitted the additional Belhar books from its original tender, it should have been disqualified.

[13] On 22 December 2015 the College filed a provisional answering affidavit by Beech with a confirmatory affidavit by one Christian Fouché ('Fouché'), Van Schaik's Direct Sales Manager. On 23 December 2015 CBC filed a supplementary founding affidavit, having recently received various documents comprising the College's record. The College also filed a replying affidavit.

[14] Earlier today (24 December 2015) I heard argument, with Mr Freund SC leading Mr Simonsz for CBC, Mr Blommaert for the College and Mr Tsegarie for Van Schaik.

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<sup>1</sup> Record 375.

### Urgency

[15] I am satisfied that the matter is urgent. The textbooks need to be supplied before the College's academic year starts on 18 January 2016. CBC has not dragged its heels, as will be apparent from the brief chronology above.

[16] While a hearing on Christmas Eve is not ideal, the setting down of the application for 24 December 2015 rather than an earlier date had the advantage that the respondents were given as much time as possible to file answering papers.

[17] Mr Tsegarie, who only received instructions yesterday afternoon (from Werksmans), said that Van Schaik wished to oppose the application. The only papers with which he had been briefed were the supplementary founding papers. He referred me to a letter dated 23 December 2015 from his attorneys to CBC's attorney recording that although Van Schaik had previously indicated that it did not intend opposing the application its position had now changed in the light of the supplementary founding papers.

[18] The supplementary founding affidavits allege inter alia that Van Schaik's tender was defective not only because it omitted the additional Belhar books but also because it omitted various books specified on the original list. I have no doubt that it would be unfair to adjudicate the application on the basis of the grounds of review alleged in the supplementary founding papers without affording the College and Van Schaik an opportunity to respond to those grounds. The postponement necessary for this purpose would mean that a decision on review could not practically be taken in time to allow the books to be supplied for the opening of the academic year. This would in turn remove the immediate urgency because CBC on review would probably then be confined to seeking compensation in terms of s 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[19] However I am of the view that the application can be decided in CBC's favour on the grounds advanced in the original founding papers.

[20] Caxton and Alicanie, who received the application on 11 December 2015, have informed CBC's attorney, Mr Tappenden, that they do not intend to participate in or oppose the application.

[21] Mr Tappenden contacted Nu-Horizon on 23 December 2015 to ascertain its attitude. He was referred to a Mr Jerome Watson ('Watson') who stated that he had received the application by email on 11 December 2015 and had replied on the same day to say that Nu-Horizon wished to oppose, requesting that the application be sent to Nu-Horizon's attorney Mr G Mostert of Mostert & Partners. Mr Tappenden told him that he had received no such email. He asked Watson on what basis Nu-Horizon wished to oppose but received no specific response. Watson stated that Mostert & Partners had now closed for the holidays. Mr Tappenden nevertheless emailed the application to Mr Mostert.

[22] In my view Nu-Horizon was not entitled to sit back and do nothing after the alleged email to CBC's attorney. The notice of motion clearly stated that the application was to be heard on 24 December 2015. The court cannot be rendered impotent because Nu-Horizon's attorneys have closed for the holidays.

#### Dispute of fact?

[23] Mr Blommaert submitted that there was a genuine dispute of fact on the question whether the additional Belhar books were incorporated into the original tender, to be dealt with as an indivisible part thereof, or were to be dealt with as a separate tender. In para 18 of the founding affidavit Moses stated that he had been informed by his colleague Bronwyn Moses, who attended the compulsory pre-tender meeting held on 27 October 2015, that nothing had been said about possible changes to the tender specifications. Beech said the following in this regard in para 9 of his affidavit:

'I am informed and verily believe that the [version of the] meeting referred to in paragraph 18 of the Applicant's Founding Affidavit is incorrect. I am informed that the bidders at that meeting were informed that extra books might become necessary, which will be dealt with separately. I annex hereto a list of the people who were present at the meeting, marked

“LB4”. Due to the closure of the College I have not been able to contact these people in order to ascertain exactly what was said.’

[24] Moses in his replying affidavit denied this version.

[25] Mr Blommaert acknowledged that Beech’s ‘evidence’ regarding the meeting of 27 October 2015 was hearsay because Beech had not been present at the meeting. He pointed out, however, that Moses’ evidence about the meeting was also hearsay and that CBC had not filed a confirmatory affidavit by the colleague Bronwyn Moses. However, it is not CBC but the College which relies on the meeting of 27 October 2015 as being relevant to the status of the additional Belhar books. It was thus for the College to put up admissible evidence as to what was said.

[26] Given the urgent nature of the proceedings, hearsay evidence might in appropriate circumstances be acted upon. However, the College has had the papers since 11 December 2015. The attendance list for the meeting of 27 October 2015, attached to Beech’s affidavit, indicates that the College was represented by six officials, one of whom was Van Rooyen. As recently as 21 December 2015 Van Rooyen was in email and telephonic contact with Beech and with Van Schaik’s Fouché regarding the ordering of the textbooks. He is not incommunicado. It must have been possible for CBC to file a confirmatory affidavit from him or one of the other officials who attended the meeting.

[27] The only confirmatory affidavit filed on behalf of the College was from Fouché. The attendance register shows that he was at the meeting of 27 October 2015 and he says so himself in his affidavit. He does not confirm Beech’s version of the meeting (whether he was asked to do so I do not know). After stating that he attended the meeting, he says that ‘due to an administrative oversight’ Van Schaik did not timeously submit ‘the Belhar portion of the tender’ (meaning, as I understand, the additional Belhar books) but that Van Shaik did subsequently put in a tender for the Belhar portion of the tender, using the same mark-up as for the ‘Northink College portion of the tender’ (I take this latter phrase to mean the list of books forming part of the original tender invitation).

[28] As Mr Freund observed in argument, Beech's version, even as hearsay, is not a clear assertion that bidders were informed that the additional Belhar books would be separately adjudicated. Beech states that because of the year-end closure he has not been able to contact the relevant people 'in order to ascertain exactly what was said'.

[29] Apart from the absence of clear and admissible evidence as to what was said at the meeting, the College subsequently stated its position to bidders in writing, by way of its email of 30 October 2015. The writer was Steenkamp, another person who attended the meeting of 27 October 2015 on behalf of the College. The subject of the email was stated to be 'Northlink 2016 Student Textbook list'. Steenkamp said, with reference to the meeting of 27 October 2015, that he was attaching a spreadsheet and that a CD (ie containing the same information) would be available on 2 November 2015. He proceeded (emphasis in the original):

**'Please Note:**

- I refer to the tender document on the Textbook list, under Bellville Campus, FUNDAMENTALS Level 3 and on the CORE Level 2. Please disregard the Drawing sets. **This item is not part of the Tender document and process.**
- On the attached excel zip file and CD we have included the following on Belhar folder: **Additional NATED Textbook** list that will form part of the Tender list and process.'

[30] In my view this notification is perfectly clear: the exclusion in the first bullet point and the inclusion in the second bullet point brought about adjustments in what was and remained a single and indivisible tender process. Whatever was said at the meeting of 27 October 2015, the written communication superseded it.

[31] I thus do not think there is a genuine dispute of fact on this question: the additional Belhar books formed part of a single tender governed by all the conditions set out in the invitation document of 16 October 2015.



### The relevant rules applicable to the tender

[32] It is not disputed that the College is a public body exercising public powers. The tender process was thus subject to a public law principles, in particular those relating to just administrative action, and the tender decision constitutes 'administrative action' which is subject to review in terms of PAJA (see *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others* 2008 (2) SA 481 (SCA) para 21). Immaterial irregularities do not necessarily vitiate a tender award. However, proper compliance with the procurement process is necessary for legality and the strict rules of compliance have recently been emphasised: see *Westinghouse Electric Belgium Société Anonym v Eskom Holdings (Soc) Ltd & Another* [2015] ZASCA 208 paras 36-43 where Lewis JA cited from some of the leading recent authorities and concluded (para 43):

'The tender invitation, which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these provisions...'

[33] The invitation document stated that the 90/10 preference points system in terms of the Preferential Procurement Policy Framework Act was applicable. In terms of s 2(1) of that Act it is only 'acceptable tenders' that are taken into account. An 'acceptable tender' is defined in s 1 as meaning 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'.

[34] The invitation document in the present case specified the closing date as being 16 November 2015 at 11h00. The invitation stated that late tenders, and tenders submitted via email or telegram, would not be accepted. The invitation stated, further, that tenders had to be completed in full. In terms of clause 3 of Section A a bidder's proposal was required to address all the items listed in the proposal specification. Failure to comply would lead to a bid being disqualified. From these provisions and clause 16 of Section A it is clear that what was to be evaluated was each bidder's tender as a whole for all the listed books and that the successful bidder would be awarded the contract for the supply and delivery of all the books.

[35] The original list, contained in annexure J to the invitation document, was as I have said amended by way of the email of 30 October 2015. The decision to amend the list has not been attacked by any of the bidders as being unfair and susceptible to review. They still had slightly more than two weeks to exclude Drawing Sets from, and integrate the additional Belhar books into, their quotations. CBC, Caxton and Alicanie duly included the additional Belhar books in their bids. According to a letter dated 23 December 2015 from the College's attorneys to CBC's attorneys (not attached to an affidavit but handed up at the hearing), Nu-Horizon included the additional Belhar books in its bid but only tendered for half the requested quantities. Van Schaik altogether omitted the Belhar books. As noted, Fouché in his affidavit attributed this to an 'administrative oversight'. He did not suggest that Van Schaik did not have enough time to incorporate the adjustments into its bid.

[36] The additional Belhar books were not a trivial or immaterial part of the tender. Based on the tenders furnished by CBC, Caxton and Alicanie, they represented between 13,5% and 14,8% of the total value of the tender. Van Schaik's failure to cover these books in its bid was thus a material defect. The invitation document was quite explicit that late bids would not be accepted. Any fair process of procurement must have a guillotine of this nature.

[37] In the circumstances, Van Schaik should have been disqualified from consideration, given its failure timeously to submit a bid for all the listed books.

[38] Nu-Horizon should also have been disqualified, since according to the College's attorney's letter of 23 December 2015 its bid only included half of the requested quantities of the additional Belhar books. The scoresheet furnished by the College indicates that Nu-Horizon's total bid was R5 562 686, of which R431 745 related to the additional Belhar books. CBC's total bid was R6 124 895, of which R826 871 related to the additional Belhar books. The bids submitted by Caxton and Alicanie in respect of the additional Belhar books were higher than CBC's bid for those books. This is consistent with Nu-Horizon having bid for only half the additional Belhar quantities. (I may add that if one were to double the amount allowed by Nu-Horizon for the additional Belhar books, its total bid would have been R5 994 431 as against CBC's R6 124 895. Given CBC's superior BEE points (10/10

as against Nu-Horizon's 8/10), CBC's final score would have been marginally higher than Nu-Horizon's.<sup>2</sup> But this is by the way if Nu-Horizon should in any event have been excluded.)

### Appropriate relief

[39] It will be apparent from what I have said that I consider that the review should succeed on its merits. CBC claims a substituted decision in its favour, alternatively a remittal for urgent reconsideration of the submitted tenders on the basis that Van Schaik and Nu-Horizon be disqualified for non-compliance.

[40] A court is only entitled to make a substituted decision in exceptional circumstances (s 8(1)(c)(ii)(aa) of PAJA). The two key considerations in this regard (though other factors may also come into play) are whether the court is in as good a position as the administrator to make the decision and whether the appropriate decision is a foregone conclusion (*Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & Another* 2015 (5) SA 245 (CC) para 47). The College has provided the scoresheet for its adjudication of the tender. There is no suggestion that the College has any grounds for awarding the tender other than to the bidder who scored the highest points. The tender was awarded to Van Schaik on this basis. (Clause 16.3 of Section A of the invitation stated that in terms of the 90/10 point system under the Preferential Procurement Policy Framework Act 'only the bidder scoring the highest total number of points may be selected'. Clause 4, on the other hand, stated that the College did 'not bind itself to accept any or the lowest tender'. On the facts of this case, I do not need to decide which of these apparently contradictory clauses should take precedence.)

[41] If, as I hold, Van Schaik and Nu-Horizon should have been disqualified for their failure to include the additional (or the full quantity of the additional) Belhar books, the remaining three compliant bids would be Caxton (R6 113 677), CBC

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<sup>2</sup> This is on the basis of excluding Van Schaik, which failed to bid at all for the additional Belhar books, and thus treating Nu-Horizon as the lowest bidder with a reconstructed price of R5 994 431. With this as the benchmark price, Nu-Horizon would score a total of 98 points (90 price points plus 8 BEE points). Caxton would score 97,2 (88,2 price points plus 9 BEE points) while CBC would score 98,2 (88,2 price points + 10 BEE points). (See the scoresheet record 375.)

(R6 124 895) and Alicanie (R6 669 160). Although Caxton's price is marginally cheaper than CBC's, CBC is entitled to 10 BEE points whereas Caxton only has 9. CBC's total score would thus be 99,8 whereas Caxton's would be 99. Alicanie's price is significantly higher and its BEE points 9.<sup>3</sup>

[42] I thus think this is a case where the outcome is a foregone conclusion. There are other considerations in favour of making a substituted decision. The textbooks are required urgently. In the light of what Beech has said about the year-end closure and non-availability of personnel, it seems most unlikely that the College's BEC and BAC would be able to finalise a reconsideration of the tender before the books are needed at the beginning of the 2016 academic year.

[43] For similar reasons, it would not seem to be a practical option for the College to cancel the existing tender and request new tenders. The only option, if the existing tender were cancelled, would be for the College to order the books without a competitive tender as a deviation in terms of clause 4.25.6 of the recommended supply chain management policy for institutions such as the College. Indeed, Beech states in his affidavit that it was on this basis that on 21 December 2015 he authorized Van Rooyen to advise Van Schaik to proceed with ordering the books from the publishers. This was done in the face of an application for review scheduled to be heard on 24 December 2015. There is no justification for a deviation from a competitive tender procedure, given that there were three compliant bids and that the tender process is of recent provenance.

[44] The papers do not disclose how much Van Schaik tendered (late) for the additional Belhar books. If one adds, to Van Schaik's originally tendered price, the amount of R826 871 that CBC tendered for the additional Belhar books, and if one subtracts the amount of R203 064 which Van Schaik erroneously included in its bid for the Drawing Sets, its adjusted price would be R5 855 207 as against CBC's R6 124 895, a difference of R269 688. Because CBC is entitled to 10 BEE points as against Van Schaik's 8, the adjusted final scores would be 98 (Van Schaik) and 96

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<sup>3</sup> The calculations, which I have checked, are set out in para 50 of the founding affidavit.

(CBC).<sup>4</sup> The difference is not so substantial as to justify an abandonment of the tender process and its rules.

[45] I have indicated that on 21 December 2015 the College authorized Van Schaik to proceed with the ordering of the books. This was preceded by a letter from Van Schaik's attorneys to the College's attorneys on 18 December 2015 in which they indicated that, because of the pending review, Van Schaik could not proceed to order the books from publishers pursuant to the purchase order which the College had placed on Van Schaik. It was recorded that Van Schaik would not be liable for any resultant delay in the delivery of the books by 11 January 2016. On 21 December 2016 Van Rooyen, after conferring with Beech, authorized Van Schaik to proceed with processing the order.

[46] At my request Mr Tsegarie obtained instructions as to whether Van Schaik had acted on the foregoing authority. According to Mr Tsegarie's instructions, Van Schaik has ordered the books from the various publishers except for the additional Belhar books. Some publishers will deliver next week while others will deliver upon opening after the New Year.

[47] I also requested counsel to obtain instructions as to whether the bidders would obtain the various titles from the same publishers or from different suppliers. Counsel were agreed, as I understood them, that, whoever the successful bidder was, such bidder would order any particular title from the publisher of that book in South Africa. In other words, if the tender were awarded to CBC by way of a substituted decision, it would place an order for the same books on the same publishers as Van Schaik has recently done. Subject only to any marginal differences in the discounts available to CBC on the one hand and Van Schaik on the other, CBC ought – if all parties act in a commercially sensible manner – to be able to step into Van Schaik's shoes.

[48] I do not think in the circumstances that I should be deterred from granting the order I regard as appropriate by the fact that Van Schaik has apparently placed

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<sup>4</sup> This is on the basis that, on Van Schaik's reconstructed price, it would be lowest on price and would score 90 price points as against CBC's 86.

orders. Van Schaik and the College acted with their eyes open in the face of a review hearing scheduled for 24 December 2015.

[49] Mr Blommaert submitted that compensation in terms of s 8(1)(c)(ii)(aa) of PAJA would be an adequate remedy in the circumstances of the present case. For this reason, so he argued, I should allow the review to be heard, after the filing of further papers, on the court's semi-urgent roll. In response to a question from the court, he placed on record that the College would not contend, if the review succeeded in due course on its merits, that compensation was not a just and equitable remedy.

[50] Compensation as a remedy on review is an exceptional one. If it were not possible to make a final decision now, and if the review could only be decided at a time when a substituted decision or remittal was no longer practically feasible, the case might well be an exceptional one and compensation might indeed be an appropriate remedy. However, I do not think that I should have recourse to this alternative (entailing further papers in the review proceedings and a potentially contentious enquiry into quantum) when it is possible to decide the matter now and remedy it with a substituted decision.

[51] In all the circumstances, I regard a substituted decision as being, in the exceptional circumstances of this case, the just and equitable remedy.

### Conclusion

[52] As to costs, I do not think that Mr Tsegarie's belated appearance for Van Schaik has contributed significantly to the costs of the proceedings. The primary opposition has come from the College and it should bear the costs.

[53] Although the costs of two counsel was not, to the best of my recollection, mentioned in oral argument, the notice of motion and the concluding paragraph of the founding affidavit sought the costs of two counsel. Having regard to the amount involved, the nature of the issues, and the urgent circumstances under which CBC was constrained to litigate, I think the employment of two counsel was justified.

[54] I make the following order:

(a) The decision of the first respondent, taken on or about 27 November 2015, to award tender NLC/TX01/2015 for the supply and delivery of student textbooks ('the Tender') to the second respondent, is reviewed and set aside.

(b) It is declared that any contract concluded between the first and second respondents pursuant to the award of the Tender, including but not limited to any supply and delivery agreement, is unlawful, invalid and of no force and effect.

(c) There is substituted, for the decision mentioned in (a), a decision awarding the Tender to the applicant.

(d) The first respondent is directed to pay the applicant's costs of suit, including those attendant on the employment of two counsel.

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ROGERS J

## APPEARANCES

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