REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 35608/022

DELETE WHICHEVER IS NOT APPLICABLE

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

2024/07/24 [redacted]

In the matter between:

MEC FOR THE DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT, MPUMALANGA — **APPLICANT**

And

I4 POWER TECHNOLOGY (PTY) LTD — **RESPONDENT**

JUDGMENT

MOTHA, J:

Introduction

[1] This is an application for a stay of arbitration proceedings, currently before the retired judge du Plessis (the arbitrator), pending the outcome of an action instituted by the applicant under case number: 35608/2022 (the action proceedings). Having ruled that the arbitration be heard before him over a four-week period, from 11 April 2023 to 5 May 2023, the arbitrator expressed the view that it was not for him to consider whether to suspend the hearing of the arbitration but this court. Hence, this application.

The parties

[2] The applicant is the Member of the Executive Council for the Department of Public Works, Roads and Transport, Mpumalanga Province.

[3] The respondent is I4 Power Technology (Pty) Limited, a company with limited liability, registered and incorporated in accordance with the laws of the Republic of South Africa.

The factual background

[4] During 2014, the applicant issued a public invitation for bid for the provision of energy efficient and related revenue management in the immovable properties of Mpumalanga Provincial facilities under bid number PWRT/2131/15/MP. On 23 March 2015, the respondent submitted its written bid document (tender). Following an evaluation process based on the strength of the information as set out in the tender, the applicant awarded the tender to the respondent. Subsequently, a written service level agreement was entered into between the parties on 10 May 2016, which was followed by the implementation of the agreement in August 2016.

[5] The contract between the parties made a provision for a certain formula to be used to calculate energy savings. The respondent's remuneration would

be a percentage of the value of the savings achieved. In general terms, the contract provided that the respondent would install and bear the costs of the installation of energy saving devices. It would then receive 50% of all savings resulting from the energy saving.

[6] In October 2018, the respondent sought an order against the plaintiff in the Mpumalanga High Court for the sum of R8,4 million for electrical retrofitting in order to save electricity in some 72 government buildings, in terms of the contract. Being of the view the respondent was overcharging, the applicant appointed a consulting electrical engineer, Mr. Willie Heesen, to provide it with expert advice.

[7] Mr. Heesen advised the applicant that according to his calculations the respondent had already been overpaid to the tune of R12.7 million in respect of one building only, namely the Riverside Government Complex. During August 2019, the applicant's management decided to cancel the agreement due to the failure by the parties to have timelessly reached an agreement about the baseline to be used to calculate the compensation due to the defendant for savings.

[8] The respondent took the view that the cancellation constituted a repudiation, and notified the applicant that it chose to accept the repudiation. On 26 September 2019, the respondent launched a second application, in Mpumalanga High Court, for the payment of R 27 420 430, 83 - representing payment of invoices allegedly due - and R 65 513 339,00 - representing the defendant's alleged capital input- based on the alleged cancellation resulting from the alleged repudiation.

[9] In an effort to resolve the dispute, the parties held a round table meeting and entered into an arbitration agreement, on 5 February 2020. The respondent withdrew its two applications and filed its statement of claim for an amount of more than R570 million, and stated that its claim is, in fact, four times as much,

namely R2 billion. The parties appointed the retired High Court judge BR du Plessis as the arbitrator.

[10] At the request of the parties, the arbitrator separated the issue of the alleged repudiation (i.e. the lawfulness of the applicant's cancellation of the contract based on the perceived issue about the baseline which had not been agreed upon) from the balance of the disputes, as the arbitration ran from 13 to 19 January 2021. On 5 February 2021, the arbitrator ruled that the applicant breached the contract by repudiating the agreement, entitling the respondent to accept the repudiation and claim damages from the applicant.

[11] Dissatisfied with the ruling, the applicant appealed to the appeal tribunal which was constituted by retired justices FR Malan, FDJ Brand and BR Southwood. It lost. There were two main classes of claims, namely for work already done and damages.

[12] Following various skirmishes involving, one, the respondent's attempt to separate the issue of its claim for payment of R39 million for alleged unpaid invoices for upfront adjudication and the balance for a hearing in February 2022, two, the challenge to the qualifications of Mr. Heese, which necessitated the appointment of Prof Jan -Harm Pretorius and Dr Pierre van Rhyn and, three, Rule 7 attack against the applicant's attorneys, the applicant appointed Mr. Hannes van Rooyen, a forensic investigator, who proved evidence of fraud and misrepresentation in the i4 PT tender documents. On 4 July 2022, the applicant issued summons to set aside the tender contract in the High Court, in Pretoria.

[13] The respondent delivered its notice to defend on 22 July 2022. On 25 August 2022, the respondent launched Rule 30 application challenging the applicant's response to Rule 7, in the Mpumalanga High Court. In the meantime, the applicant launched an application to stay the pending arbitration, in Pretoria High Court. The respondent opposed it. Per letter, the applicant approached the DJP for an intervention regarding all these applications. At a meeting with the DJP in Pretoria, the respondent opposed the request for case management and expediting the matter on 10 November 2022.

[14] On 20 March 2023, the arbitrator postponed the arbitration *sine die* pending the outcome of this stay application. On 4 September 2023, the respondent filed its plea to the action.

Issues

[15] The gist of the applicant's case is that the respondent made fraudulent misrepresentations in its bid documents. Therefore, the contract must be reviewed and set aside in terms of s 172 of the Constitution. In the alternative, it relied on s 3(2) of the Arbitration Act in that there is good cause to approach this court. The purported fraudulent misrepresentations are contained in the particulars of claim.

Alleged misrepresentations

[16] In its tender bid document, the respondent made representation that it had in its employment various experts and specialist employees relevant to the energy saving services to be rendered, including the following persons:

Dr Pierre Van Rhyn,
Richard Gievers,
Cornielius Lourens,
Johan George Krige;
Nelius Louw.
Francs Coetzee
Johannes Otto Priem
Heinrich Fredrick Kopplinger

[17] None of these experts or specialist employees were employed by the respondent at the time of the tender nor were they informed of the intention to procure their services for the contract in question.

[18] Furthermore, the respondent represented that it had completed 20 projects which were specifically identified in the bid documents, such as Greater Tzaneen Municipality, where it completed audit of streetlights including all

reports and forecasting of saving. The work was allegedly valued at R5 000 000.00., Gamagara Municipality audited street lighting and the work allegedly valued at R5 000 000.00, Mercedes Benz SA lighting audit to calculate energy savings potential, audited high bray lights (400W HPS) for replacement with TST- Bays approximately 4000 fittings valued at allegedly R4 100 000.00 and Arwyp Clinic allegedly valued at R11 400,000 in 2012, to mention but a few. None of these 20 projects mentioned had been performed.

[19] Since none of the afore-mentioned persons were employees of the respondent, these representations were not only false but also fraudulent. In terms of Clause 8.1 of SBD 6.1 submitted as part of the tender, the respondent accepted that it would not make use of the services of subcontractors. Yet, the respondent did not possess the professed expertise as represented and could not itself perform in terms of the contract but had to utilize the services of subcontractors.

[20] Addressing Dr Pierre van Rhyn's role, the respondent alleged that he was under permanent contract period and responsible as project manager for 240 buildings and a senior engineer for 80 buildings in the project in question. On the contrary, Dr Pierre van Rhyn categorically denied being employed by the respondent. When approached by the applicant in 2021, he stated that he learnt of the tender project for the first time.

[21] He further refuted that there was any co-operation agreement between his company, ReticSA and the respondent. In 2013, he entered into a co-operation agreement on behalf of his ReticSA with a company known as Solutions in Buildings and Facilities (Pty) Ltd (i4 SBF) in respect of Eskom projects. Dr van Rhyn stated that he had never heard of the respondent (i14 PT) nor was he aware that his CV and those of the employees of ReticSA had been used in a tender document of the respondent for the Mpumalanga project some years earlier.

[22] Counsel took the court through the agreement which was clearly between ReticSA (Pty) Ltd and i14 Solution in Buildings and Facilities (Pty) Ltd and not the respondent.

[23] FR Gievers was said to be under permanent contract period responsible for 80 buildings as Senior engineer 1. Lourens was on a three (3) months contract period as Senior engineer 2. These were also incorrect.

[24] In its particulars of claim as well as in its submission, the applicant contented that the awarding of the tender to the respondent on false information fell foul of section 217 of the Constitution, which says:

> "(1) 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."

Submissions

[25] Counsel for the applicant relied on *Independent Development Trust (IDT) v Bakhi Design Studio CC and Others*[1] in which the court referred with approval to *Aiport Company South Afric SOC Limited v ISO Leisure OR Tambo (Pty)Ltd and Another, 2011(4) SA 642(GSJ) at para [72],* where it said:

> "*In Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industrial Ltd and Another* Botha J said:
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> "As far as the reasoning in the last-mentioned case is concerned, it appears to me, with respect, that it is unrealistic and inconvenient to expect a party who contends that impending arbitration proceedings will be invalid, to take part in such proceedings under protest, or otherwise to await the conclusion and then, if the result is against him, to oppose

[1] Case no033351 12/5/2023 PHC

the award being made an order of court. Every consideration of convenience and justice, it seems to me, points to the desirability of allowing a party to seek an order preventing the allegedly futile proceedings before they are commenced. Moreover, as a matter of law, the probability of harm or injury seems to me to be present in the form of wasted and, to some extent at least, irrecoverable, costs incurred in relation to the abortive proceedings if they are alternately established to have been such. In my view, therefore, the applicant is entitled to an order in terms of its main prayer."

[26] He submitted that the applicant has established a *prima facie* case for the setting aside of the contract in respect of the merits of the action. The submission is that the arbitrator does not have the jurisdiction to adjudicate a dispute about the constitutional validity of the tender. Alternatively, they rely on good cause envisaged in s 3(2) of the Arbitration Act, as already stated.

[27] In his opening remarks, the respondent's counsel referred to the matter of *S v Mhlungu*[2] where the court said:

"I would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed"[3]

[28] relying on the matter of *Zantsi v Council of State, Ciskei and Others,* [4] the respondent's counsel referred to the following excerpt:

"it is already settled jurisprudence of this court that a court should not ordinarily decide a constitutional issue unless it is necessary to do so"[5]

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[2] 1995(3)SA 867
[3] Supra para 59
[4] 1995(4)SA615(CC)
[5] Supra para 2 to3

[29] He submitted that the applicant's approach to this matter was a true definition of *Stalingrad approach* as stated in the matter of *Moyo v Minister of Justice*[6] where the court said:

> "The term Stalingrad defense has become a term of art in the armoury of criminal defense lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place. I need hardly add that this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers."[7]

[30] Respondent's counsel further submitted that only in the heads of argument does the applicant seek to impugn the arbitration process in terms of s 3(2) of the Arbitration Act without making a case in the founding affidavit. This is another example of Stalingrad approach, he argued. Section 3(2) deals with a final relief which is not asked for in its papers. The contents of s 3(2) read as follows:

> "(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-
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> (a) set aside the arbitration agreement; or
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> (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
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> (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

[31] Indeed, from the reading of the section it is impossible to see how it applies to the current matter. Moreover, this section was not relied upon in the

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[6] 2018(2) SACR 313 (SCA)
[7] Supra para [169]

notice of motion nor in the affidavits of the applicant. This attack must fail if one has regard to the matter of *Molusi and Others v Voges N.O. and Others*[8] where the court said:

> "[27] It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in Sunker: "if an issue is not cognizable or derivable from these sources, there is little or no scope of for reliance on it. It is a fundamental rule of fair civil proceedings that parties... should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he whom asserts... must formulate his case sufficiently clearly so it is to indicate what he is relying on"

[32] The respondent submitted that the applicant conflated two different acts. Firstly, it is the act of awarding the tender pursuant to a tender process. Secondly, it is the act of the conclusion of the service level agreement after the tender process had been concluded. Referring to *Oudekraal Estate (Pty) Ltd v City of Cape Town Others*[9], the respondent quoted the following

> "... If the validity of consequent no more than initial acts is dependent on the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by competent quote"[10]

[33] To underscore the distinction between the two processes, the respondent's counsel referred to the matter of *Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others,*[11] at para 18, where the court said:

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[8] 2016(3)SA370(CC)
[9] 2004(6)SA 222(SCA)
[10] Supra para 31
[11] 2021 (2) SA 1013

"The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law... When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of the commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. S 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers not with the public administration acting as a contracting party from a position no different from what it would have been in, had it been a private individual or institution."

[34] He further referred to the matter of *Steenkamp NO v Provincial Tender Board Eastern Cape* [12] particularly where the court said:

"[11] There is no need to restate the administrative law principles applicable to a public tender process save to repeat that any such process is governed by the Constitution (which includes the right to administrative justice) and legislation made under it and that, if the process of awarding a tender is sufficiently tainted, the transaction may be visited with invalidity on review.

[12] Everything, though, is not administrative law. Seen in isolation, the invitation to tender is no doubt an offer made by a state organ 'not acting from a position of superiority or authority by virtue of its being a public authority',...

The evaluation of the tender is, however, a process governed by administrative law. Once the tender is awarded, the relationship of the parties is that of ordinary contracting parties, although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship."

[12] 2006(3) SA 151 (SCA)

[35] Crucially, in response to the allegations of fraudulent misrepresentations, the respondent submitted that the deponent of the founding affidavit did not allege and prove any involvement in the tender evaluation process. Furthermore, it was submitted that the applicant had not even presented the reports generated in the tender process in order to demonstrate the award was made on the strength of the information in the tender documents. In its affidavit, the respondent pointed out the following:

> "55...it seems to have escaped both Dr van Rhyn and Mr van Rooyen that a total of 100 points were allocated for Functionality. Of this total, only 10 points were allocated for "Experience and educational background of personnel proposed to provide the service."
> A bidder required a minimum score of 75 points out of the total of 100 points, for Functionality. In this regard, the bid document recorded the following:
> "Cut-off points (threshold) for Functionality is 75 of 100 points. The bid will be disqualified if it fails to meet the minimum threshold for functionality."
> What this means is that a bidder could score zero for this category, but still score 90 points for Functionality: and
> As such, even if any of the complaints raised by the Department were valid (and I maintain that they have no merit), something more would have been required in order for the Department to conclude that any of the complaints induced it to conclude the agreement."[13]

[36] Finally, it was argued that there was no link between the alleged misrepresentation and the conclusion of the service level agreement. The respondent's counsel placed reliance on the matter of *Trust Bank of Africa v Frysch,* [14]at page 588, where the court said:

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[13] Answering affidavit paragraphs 55 to 56
[14] 1977(3) SA 562 (A)

"A party who seeks to establish the defence that the contract which he entered into is voidable on the ground of misrepresentation must prove (the onus being upon him) (i) that a representation was made by the other party in order to induce him to enter into the contract; (ii) that the representation was material; (iii) that was false in fact; and (iv) that he was induced to enter into the contract on the faith of the representation..."

Discussion

[37] From the case law, such as *Steenkamp*, it is trite that when dealing with the tender process s 217 of the Constitution is implicated. In *casu*, the distinction that the respondent seeks to highlight is that the attack is launched against the contract not the tender.

[38] In view of the pleaded case in the particulars of claim, I find this distinction to be unmeritorious. From the few opening stanzas of the particulars of claim, the applicant called into question the written bid documents, referred to as POC1. At paragraph 5, it is made clear that the tender was awarded on the strength of the information in POC1. Thereafter, the information contained in POC1, which is alleged to be false, is outlined in great details.

[39] If there was any doubt that the tender is in issue in this matter, the contents of paragraph 21, at the very least, establish a prima facie case. They read:

"In the result:

21.1. The award of the contract should be declared to have been unconstitutional and to be reviewed and set aside, in terms of section 172 of the Constitution.

21.2. The Honorable court should issue and order that it is just and equitable, including an order setting aside of the foresaid arbitration awards."

[40] Courts have insisted that organs of state cannot take a non possumus attitude in the face of irregularity in public administration. Top of mind is the recent matter of *City of Tshwane Metropolitan Municipality v Malvigenix NPC t/a Wecanwin and Others*.[15]At paragraph 23 the court said:

> "Third, the City has a misconceived notion of its duty and role as a sphere of local government. Despite being a constitutional structure, the City supinely assumes that the duty to correct its unlawful conduct lies with those adversely affected by that conduct, in this instance, the property owners. The Constitutional Court has, in at least three cases, addressed this misconception.
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> (a) In *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape*[11] (*Njongi*), the Constitutional Court stated:
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> '...Indeed, the Provincial Government should have taken proactive measures to fully reinstate every improperly cancelled social grant. This is a necessary consequence of the duty of every organ of State to "assist and protect the courts to ensure the ... dignity ... and effectiveness of the courts." It would also be mandated by the constitutional injunction that an order of court binds all organs of State to which it applies acceptable. The Provincial Government had every right to appeal the order in *Bushula*. Once it did not do so however, it had the duty in my view to ensure full redress for every person in the position of Mr Bushula...'
>
> (b) In *Khumalo and Another v MEC for Education, KwaZulu-Natal*,[12] the Constitutional Court held thus:
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> 'Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty

[15] 90/2023) [2024] ZASCA 76 (16 May 2024

on the functionary to investigate and, if need be, *to correct any unlawfulness through the appropriate avenues*. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a). Read in the light of the founding value of the rule of law in section 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.' (Emphasis added.)

(c) In *Merafong City Local Municipality v Anglo Gold Ashanti Limited,* **[13]** the Constitutional Court held:

'. . . state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty "to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power". Public functionaries "must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it". Not to do so may spawn confusion and conflict, to the detriment of the administration and the public. A vivid instance is where the President himself has sought judicial correction for a process misstep in promulgating legislation.'"

[41] Throughout the particulars of claim the challenge is mounted against the fraudulent misrepresentation. As an aid to arrive at the decision on whether or not the arbitration proceedings should be stayed, the applicant's counsel submitted that the court should be guided by the elements of an interim interdict, whilst counsel for the respondent submitted that what is just and equitable should be the guide. I agree with the applicant, I am of the view that I cannot use the language of s 172 (1)(b) of the Constitution, namely just and equitable. To do that would be tantamount to usurping the role of the judge in the action proceedings. I see my role as circumscribed to deciding on the

presence of a *prima facie* case, or lack thereof. As with an interim interdict this court must decide whether the *status qou* should be preserved pending the final determination of the rights of the parties in the action proceedings.

[42] Upon a proper reading of the particulars of claim, I come to the conclusion that s 217 of the Constitution is pertinently raised in the particulars of claim and must be dealt with. The issues of alleged fraud and misrepresentation in the bid documents are too serious and the response to them leaves one with more questions than answers. Therefore, the applicant has established the existence of a *prima facie* case *albeit* open to some doubt. Moreover, if the applicant prevails in the action proceedings, the court will have to deal with the provisions of s172(1)(b) and that is beyond the jurisdiction of an arbitrator.

[43] Indeed, if the matter were to proceed before the arbitrator without the conclusion of the action proceedings, there is a well-grounded apprehension of irreparable harm that will be suffered by the applicant, not least the waste of public funds. It is noteworthy that the action proceedings have progressed past the close of pleadings and can be heard this year, or early next year at the latest. Having weighed the harm to be endured by the applicant if the stay is not granted, as against the harm the respondent will bear, I am convinced that the balance of convenience favours the applicant. In case of a victory by the applicant in the action proceedings, the need for the arbitration would dissipate without any waste of resources. However, if it wins after spending resources on the arbitration proceedings, worst still if it has already paid the respondent's estimated R2 billion, the harm is self-evident. On the contrary if the respondent's is victorious the arbitration can be proceeded with.

[44] Certainly, there is no suitable alternative remedy available to the applicant. In the result, I am of the view that the applicant has on *prima facie* basis established a case of fraudulent misrepresentation, which justifies a stay of the arbitration proceedings. As agreed by counsel for the applicant, the stay is solely for the hearing and conclusion of the action proceedings.

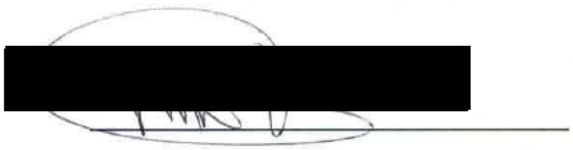
Costs

[45] The issue of costs is within the discretion of the court. In *casu*, I agree with counsel for the respondent that the proper manner to deal with the question of costs, under these circumstances, is to order that costs of this application shall be costs in the action proceedings. In the result, I make the following order.

Order

1. The arbitration proceedings are stayed pending the outcome of the action proceedings under case number: 35608/2022.

2. The costs of this application will be costs in the action proceedings.



M.P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 30 April 2024

Date of judgment: 24 July 2024

APPEARANCES:

COUNSEL FOR APPLICANT:	J. L. VAN DER MERWE SC, D. MILLS SC AND J. JANSEN VAN RENSBURG INSTRUCTED BY SOUTIE VAN RESBURG ATTORNEYS

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