

**THE REPUBLIC OF UGANDA**

IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS  
APPEALS TRIBUNAL AT KAMPALA  
APPLICATION NO.11 OF 2018  
(*Arising out of a re-trial Order for Application Nos. 12 & 13 of 2017 in High Court Misc.  
Cause No. 257 & 258 of 2017*)

YANJIAN UGANDA COMPANY LTD

=====APPLICANT

VS.

1. PUBLIC PROCUREMENT AND DISPOSAL  
OF PUBLIC ASSETS AUTHORITY
2. MBARARA UNIVERSITY OF SCIENCE &  
TECHNOLOGY
3. STEAM INVESTMENTS (U) LTD
4. KHALSA DEVELOPMENT (U) LTD

} RESPONDENTS

**DECISION OF THE TRIBUNAL**

**1.0 BRIEF FACTS**

- On 9<sup>th</sup> February, 2017 the 2<sup>nd</sup> Respondent (Entity) published bid notices in the New Vision Newspaper inviting potential bidders to submit bids in respect of the construction of a student's hostel at Kihumuro and construction of computer science building.
- 1.1 Bids were evaluated and on 27<sup>th</sup> March, 2017 the Notices of Best Evaluated Bidder (NBEB) were displayed and the successful bidders were M/s Khalsa Developments Uganda Ltd(4<sup>th</sup> Respondent) in respect of the construction of student's hostel at Kihumuro and Ms Steam Investments Ltd (3<sup>rd</sup> Respondent), in respect of the construction of computer science building.
  - 1.2 On 7<sup>th</sup> April 2017, the Applicant being dissatisfied with the outcome of the award results for both procurements in respect to the construction of a student's hostel and construction of computer science building applied for administrative review to the Accounting Officer of the 2<sup>nd</sup> Respondent.
  - 1.3 On 13<sup>th</sup> April, 2017 the Accounting Officer of the 2<sup>nd</sup> Respondent issued decisions upholding the Applicant's complaints in both procurement processes and ordered for the re-evaluation of all bids.
  - 1.4 On the 22<sup>nd</sup> May, 2017 the second display of the Notices of Best Evaluated Bidder were displayed and the Applicant was determined the BEB in both procurement processes for the construction of student's hostel at Kihumuro and construction of computer science building.

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- 1.5 On 31<sup>st</sup> May 2017, 4<sup>th</sup> Respondent being dissatisfied with the BEB award in respect to the procurement process for the construction of student's hostel at Kihumuro made a complaint to the Accounting Officer of the 2<sup>nd</sup> Respondent and the same was dismissed on 14<sup>th</sup> June 2017.
- 1.6 On 31<sup>st</sup> May 2017, 3<sup>rd</sup> Respondent being dissatisfied with the BEB award in respect to the procurement process for the construction of computer science building made a complaint to the Accounting Officer of the 2<sup>nd</sup> Respondent and the same was dismissed on 14<sup>th</sup> June 2017.
- 1.7 On 19<sup>th</sup> June 2017, 4<sup>th</sup> Respondent being dissatisfied with the decision of the Accounting Officer of the 2<sup>nd</sup> Respondent issued on 14<sup>th</sup> June 2017 made a complaint to the 1<sup>st</sup> Respondent and the Authority issued its decision on 18<sup>th</sup> July 2017 upholding the complaint.
- 1.8 On 19<sup>th</sup> June 2017, 3<sup>rd</sup> Respondent being dissatisfied with the decision of the Accounting Officer of the 2<sup>nd</sup> Respondent issued on 14<sup>th</sup> June 2017 made a complaint to the 1<sup>st</sup> Respondent and the Authority issued its decision on 18<sup>th</sup> July 2017 upholding the complaint.
- 1.8 The Applicant being dissatisfied with both decisions of the Authority in respect to the procurement of construction of students' hostel at Kihumuro and construction of computer science building filed separate applications No. 12 & 13 of 2017 respectively before the Tribunal on 21<sup>st</sup> July 2017 challenging its decision.

## **2.0 DISPOSAL OF APPLICATIONS 12 & 13 OF 2017.**

- 2.1 When Applications No. 12 & 13 came up for disposal, the Tribunal on its own motion and with consent of the parties consolidated Applications No. 12 & 13..
- 2.2 MA 12 & 13 were heard. In disposing of the Applications No. 12 & 13 of 2017, the Tribunal ordered;
- a) The Preliminary objection be overruled.
  - b) Applications No. 12 & 13 are allowed and the decisions of the Authority in both complaints are hereby set aside.
  - c) The Tribunal in substitution for the decision so set aside affirms the decision of the Accounting Officer of the 2<sup>nd</sup> Respondent.
  - d) No orders to costs.

## **3.0 BACK GROUND OF THE RETRIAL**

- 3.1 4<sup>th</sup> Respondent participated in the impugned procurement process and being dissatisfied with the decision of the PPDA Appeals Tribunal delivered on 4<sup>th</sup> August 2017, it challenged by a way of judicial review the decision of the Tribunal vide High Court Miscellaneous Cause No. 257 of 2017 on the ground that they were not accorded the right to fair hearing.

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- 3.2 3<sup>rd</sup> Respondent participated in the impugned procurement process and being dissatisfied with the decision of the PPDA Appeals Tribunal delivered on 4<sup>th</sup> August 2017, it challenged by a way of judicial review the decision of the Tribunal vide High Court Miscellaneous Cause No. 258 of 2017 on the ground that they were not accorded the right to fair hearing.
- 3.3 On 5<sup>th</sup> March 2018, High Court delivered its decision of MC 257 of 2017 and ordered that this matter is referred back to the Public Procurement and Disposal of Public Assets Appeals Tribunal for a retrial with the applicant as a party.
- 3.4 On 30<sup>th</sup> April 2018, High Court delivered its decision of MC 258 of 2017 and ordered this case is remitted back to Appeals Tribunal with an order to remake the decision according to the law.
- 3.5 Accordingly, on 6<sup>th</sup> June 2018 the Tribunal issued summons to all the Respondents where in it included 4<sup>th</sup> Respondent and 3<sup>rd</sup> Respondent as parties to the application and attached copies of the application dated 20<sup>th</sup> July 2017 filed by the Applicant and renamed the new application as Application No. 11 of 2018 wherein the parties are Yanjian Uganda Company Ltd versus PPDA, Mbarara University of Science & Technology, 4<sup>th</sup> Respondent and 3<sup>rd</sup> Respondent.
- 3.6 The Tribunal also issued out hearing notices to the parties and the hearing for the retrial of Application No. 11 of 2018 was fixed for 14<sup>th</sup> June 2018. During the hearing, 4<sup>th</sup> Respondent was not served with the application therefore the proceeding was adjourned to a date upon notice to the parties.
- 3.7 On 21<sup>st</sup> June 2018, a fresh summons was issued to the parties in Application No. 11 of 2018 to file written responses and written submissions.
- 3.8 On 9<sup>th</sup> July 2018, the Tribunal issued hearing notices to the parties in Application No. 11 of 2018 wherein the matter was fixed for hearing on 12<sup>th</sup> July 2018.
- 4.0 SUBMISSION BY THE PARTIES**
- 4.1 On 12<sup>th</sup> July 2018, all the parties in Application No. 11 of 2018 appeared for the hearing. During the hearing Counsel for the 1<sup>st</sup> Respondent raised preliminary objection that the application before the Tribunal is not an application for administrative review and that the Applicant is no longer a bidder participating in the procurement process. That this Tribunal is exclusively mandated to hear and entertain administrative review applications in accordance with *Section 91I of the PPDA Act, 2003*.
- 4.2 Counsel for the 1<sup>st</sup> Respondent argued that the current application on re-trial is not catered for under the provisions of the said Section and therefore it does not amount to an application for administrative review that can be entertained by this Tribunal.
- 4.3 Counsel for the 1<sup>st</sup> Respondent further contended that the Applicant is no longer a bidder participating in the procurement process for the captioned procurement and therefore it has no locus to institute or maintain an application for administrative review.

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- 4.4 Counsel for the 1<sup>st</sup> Respondent asserted that this application is untenable and it should be struck out on the basis of the preliminary objections.
- 4.5 Counsel for the 2<sup>nd</sup> Respondent also raised preliminary objections that *Regulation 8 (1) of the PPDA (Tribunal) (Procedure) Regulations, 2016* provides that where the application is for review of a decision of the Authority under *Section 91I (1) or (3) of the Act*, the application shall be filed within ten days after an applicant is served with the decision of the Authority. He submitted that the applicant initiated the process of the retrial on 20<sup>th</sup> June 2018 and yet on 5<sup>th</sup> March 2018, High Court delivered its decision in MC 257 of 2017 and ordered that this matter is referred back to the Public Procurement and Disposal of Public Assets Appeals Tribunal for a retrial with the applicant as a party. That on 30<sup>th</sup> April 2018, High Court delivered its decision in MC 258 of 2017 and ordered this case is remitted back to Appeals Tribunal with an order to render a fresh decision according to the law. He argued that the retrial process of application No. 11 of 2018 began when the 10 days statutory period within which the applicant was to file an application had expired.
- 4.6 Counsel for the 2<sup>nd</sup> Respondent raised preliminary objection that the application is overtaken by events. Counsel for the 2<sup>nd</sup> Respondent submitted that the Entity received letters from the 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent in respect of the impugned procurement process and following threats from the 3<sup>rd</sup> and 4<sup>th</sup> Respondents the Entity accordingly sought for advice from the Solicitor General. That in the letter dated 7<sup>th</sup> June 2018, the Solicitor General advised that in the absence of any court order prohibiting it, and in the absence of any proceedings before the Tribunal, the 2<sup>nd</sup> Respondent is at liberty to proceed and sign the contract with 4<sup>th</sup> Respondent in compliance with the decision of PPDA.
- 4.7 Counsel for the 2<sup>nd</sup> Respondent submitted that on 7<sup>th</sup> June 2018, the Solicitor General advised that in the absence of any court order prohibiting it, and in the absence of any proceedings before the Tribunal, the 2<sup>nd</sup> Respondent is at liberty to proceed and sign the contract with 3<sup>rd</sup> Respondent in compliance with the decision of PPDA. It also further advised the 2<sup>nd</sup> Respondent to proceed to recover the money already advanced to Yanjian Uganda Company Limited.
- 4.8 Counsel for the 2<sup>nd</sup> Respondent argued that the Solicitor General in the absence of the Attorney General is the chief legal advisor to the Government and therefore in accordance with *Article 119 of Uganda's Constitution*, his advice was binding. Counsel submitted that acting on the advice of the Solicitor General, the Entity signed contracts with 4<sup>th</sup> Respondent and 3<sup>rd</sup> Respondent. Therefore, the application is overtaken by events. Counsel for the 2<sup>nd</sup> Respondent further submitted that the Entity is bound by the decision of the Solicitor General.
- 4.9 Counsel for the 2<sup>nd</sup> Respondent also submitted that the Entity signed contracts with 4<sup>th</sup> Respondent and 3<sup>rd</sup> Respondent and the review process could not be restored under *Regulation 2 of the PPDA (Administrative Review) Regulations 2014* which states that these Regulations shall not apply where a procuring and disposing entity has entered into a contract, for procurement or disposal, with a bidder.

- 4.10 Counsel for the 2<sup>nd</sup> Respondent also raised preliminary objection that the matter before the Tribunal is erroneously filed before it as a consolidated application without the consent of the parties to the proceedings. He submitted that the procurement process where 4<sup>th</sup> Respondent and 3<sup>rd</sup> Respondent participated were different, adverts for the two bids were carried out on different dates and the parties are also different. He submitted for these applications to be consolidated all the parties to the proceedings had to participate.
- 4.11 Counsel for the 2<sup>nd</sup> Respondent prayed that the preliminary objections be upheld and the application be dismissed.
- 4.12 Counsel for the 3<sup>rd</sup> Respondent also raised preliminary objections that the Tribunal lost jurisdiction to retry this matter. He submitted that Application No. 11 of 2018 is non-existent because application to retry Application No. 12 and 13 of 2017 were quashed by the decision of the High Court. Counsel further submitted that the 3<sup>rd</sup> Respondent was not a party to applications No. 12 and 13 of 2017. The parties to those applications were Yanjian Uganda Company Ltd as the Applicant, while PPDA and Mbarara University of Science & Technology were the Respondents. That the applicant was supposed to file a new application before this honourable Tribunal in accordance with *Section 91I of the PPDA Act, 2003* and *Regulation 6(1) (2) & (3) of the PPDA (Tribunal) (Procedure) Regulations, 2016* which provides for the contents of application before the Tribunal. Counsel for the 3<sup>rd</sup> Respondent argued that the 3<sup>rd</sup> Respondent was not a party to applications No. 12 & 13 and there is no way how the 3<sup>rd</sup> Respondent can be properly before this Tribunal basing on impugned application.
- 4.13 Counsel for the 3<sup>rd</sup> Respondent also raised preliminary objection that this application is out of time and it was overtaken by events.
- 4.14 That on 30<sup>th</sup> April 2018, High Court in Misc. Application No. 258 of 2017 quashed applications No. 12 and 13 of 2017 where it held that in that regard having made the above determinations, the impugned decision of the PPDA Appeals Tribunal is hereby quashed and in light of all the above decision, this case is remitted back to appeals tribunal with an order to make the decision according to the law.
- 4.15 He submitted that the applicant was supposed to file an application for retrial within 10 days in accordance with *Section 91L (a) and (b) of the Act*. There was no application filed by the applicant save for a letter dated 8<sup>th</sup> May 2018 filed and served on the Respondents after the expiration of 10 days period. The retrial meant, as was ordered by the Judge, a new application, where the 3<sup>rd</sup> Respondent is a party, and that application had to be filed in accordance with the law.
- 4.16 Counsel for the 3<sup>rd</sup> Respondent submitted that the 2<sup>nd</sup> Respondent acting on the advice of Solicitor General, the principal legal adviser of Government, signed a contract with the 3<sup>rd</sup> Respondent and an advance payment has been made and the 3<sup>rd</sup> Respondent has already commenced the construction. Therefore, the application has been rendered nugatory and any attempt by this honourable tribunal to hold

otherwise may tantamount to frustration of government projects which is not in public interest.

- 4.17 Counsel prayed for the preliminary objections to be upheld and the application be struck out.
- 4.18 Counsel for the 4<sup>th</sup> Respondent raised preliminary objection that the proceedings are already in contravention of *Section 91I (7) of the PPDA Act, 2003*. That these proceedings were commenced on or about the 6<sup>th</sup> June 2018 and yet the law provides that the Tribunal is supposed to issue its decision within a period of ten working days after the date of receiving an application for review. In this case, the Tribunal should have delivered its decision on or before the 20<sup>th</sup> June 2018. Acting outside these timelines means the Tribunal is acting without jurisdiction.
- 4.19 Counsel for the 4<sup>th</sup> Respondent raised preliminary objection that these applications have been overtaken by events as the 4<sup>th</sup> Respondent and the 2<sup>nd</sup> Respondent have already executed contract documents in respect of construction of a student Hostel at Kihumuro Phase 1 and the 4<sup>th</sup> Respondent has commenced works on the project.
- 4.20 Counsel for the 4<sup>th</sup> Respondent raised preliminary objection that these applications are time barred. The High Court on 5<sup>th</sup> March 2018 in its decision quashed all the proceedings and decision of the PPDA Appeals Tribunal and ordered that a retrial be done after adding the 4<sup>th</sup> Respondent as a party. These proceedings were only commenced on or about 6<sup>th</sup> June 2018 well outside the periods provided for under the PPDA Act, 2003. Under *Section 91L of the PPDA Act, 2003* the applicant ought to have commenced the retrial process with the Tribunal within 10 days from the date of the decision of the High Court in Miscellaneous Application No. 257 of 2017. The application with the 4<sup>th</sup> Respondent as party should have been filed by the 15<sup>th</sup> March 2018. Failure to this within the said time frame rendered the current applications time barred.
- 4.21 The 4<sup>th</sup> Respondent further contended that there is no application before the Tribunal to which the 4<sup>th</sup> Respondent is properly a party that this Tribunal should retry. The applications do not comply with provisions of *Regulation 6 of the PPDA (Tribunal) (Procedure) Regulations, 2016* the 4<sup>th</sup> Respondent has not been made a party to the applications. Ideally, an amended application should have been filed that adds the 4<sup>th</sup> Respondent as a party.
- 4.22 The 4<sup>th</sup> Respondent prayed that based on the above preliminary objections that this application be dismissed with costs.

## 5.0 REPLY TO THE PRELIMINARY OBJECTIONS.

- 5.1 Counsel for the Applicant submitted that the Tribunal is clothed with jurisdiction. Counsel agreed that if there are no valid bids, the applicant cannot sustain an application, however the applicant is before the Tribunal by the orders of the High Court for a retrial of application No. 12 and 13 of 2017. The sequence of events is that the matter before the High Court was by way of a judicial review therefore the Tribunal has jurisdiction.

- 5.2 Counsel for the Applicant submitted that Regulation 2 of the PPDA (Administrative Review) *Regulations, 2014 SI No. 16 of 2014* can be negated if there is an illegality. He argued that the Authority in its decision dated 18<sup>th</sup> July 2017 could not appoint the 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent as the best evaluated bidder.
- 5.3 Counsel for the Applicant also submitted that the decision of the High Court did not nullify the contract between the Entity and the Applicant. The 2<sup>nd</sup> Respondent therefore erred in law when it sought for advice from the Solicitor General.
- 5.4 Counsel for the Applicant submitted that High Court did not order the Tribunal to retry the application within 10 days. The applicant wrote to the Tribunal and on 21<sup>st</sup> March 2018, the Registrar of the Tribunal replied and accordingly on 28<sup>th</sup> May 2018, the applicant furnished the Tribunal with certified copy of the proceedings. He also further submitted that the 2<sup>nd</sup> Respondent should have initiated the process of the retrial being the entity and they did nothing.
- 5.5 Counsel submitted that there was no valid bid at the time the contracts were signed by the 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent respectively. The bid expired on 16<sup>th</sup> August 2017 when the Applicant signed contracts with the Entity.
- 5.6 Counsel further submitted that the 2<sup>nd</sup> Respondent misdirected Solicitor General in advising it to sign contract with the 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent. He relied on paragraph 1 of the letter dated 7<sup>th</sup> June 2018 which stated that the ruling of the High Court in Miscellaneous Cause No. 257 of 2017 (Khalsa Development (U) Ltd Vs PPDA Mbarara University of Science & Technology and Yanjian Uganda Company Ltd which set aside the decision of the PPDA Appeals Tribunal, invalidated any and all the steps or actions that had been taken by Mbarara University of Science & Technology on the basis of that decision, including the signature of the contract (on which the court specifically pronounced itself). He submitted that in both High Court Misc. Causes No. 257 and 258 of 2017, the court did not nullify the contract the Entity signed with the applicant.
- 5.7 In respect to the consolidation of the applications before the Tribunal, Counsel for the Applicant submitted that the Judge ordered for retrial of application No. 12 & 13 of 2017 and the Tribunal issued summons consolidating the applications. That the Applicant cannot therefore be faulted for the consolidation of the applications.
- 5.8 Counsel for the applicant in respect to filing application out of time submitted that the it exercised her right well within the law. On 15<sup>th</sup> March 2018, it notified the Tribunal about the orders issued by the High Court in the Misc. Causes No. 257 & 258 of 2017 which the Registrar accordingly replied to on 21<sup>st</sup> March 2018.
- 5.9 Counsel for the Applicant submitted that the 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent were added to this Application by the Tribunal giving effect to application No. 11 of 2018. That the 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent have also responded to this Application therefore this application is properly before the Tribunal.

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5.10 Counsel for the applicant also argued that the decision of the Authority only rescinded the Accounting Officer's decision but did not substitute it with another one.

5.11 He prayed that the preliminary objections raised by the Respondents be overruled.

## **6.0 REJOINDER**

6.1 Counsel for the 1<sup>st</sup> Respondent submitted that the Applicant had conceded that there was no valid bid therefore it is not a bidder. That the retrial of this application is about the decision of the Authority since the applicant has conceded that it does not have valid bid it has no locus to bring, submit and appear before the Tribunal. The argument by the applicant is nugatory because it does not have locus before the Tribunal.

6.2 He submitted that the contract the applicant entered into with the 2<sup>nd</sup> Respondent was quashed by the decision of the High Court in Miscellaneous Causes No. 257 & 258 of 2017 therefore there is no binding agreement between the parties.

6.3 He prayed that the application should therefore be struck out with no orders to costs.

6.4 Counsel for the 2<sup>nd</sup> Respondent reiterated his earlier submission and prayed that his preliminary objections be upheld.

6.5 Counsel for the 3<sup>rd</sup> Respondent submitted that the Judge in the High Court Misc. Cause No. 258 of 2017 had not yet made decision in respect to 3<sup>rd</sup> Respondent therefore the applicant could not have applied for retrial before the Tribunal when there was no decision.

6.6 Counsel for the 4<sup>th</sup> Respondent submitted that the letter the applicant wrote to the Tribunal for initiating the retrial process was not received by the 4<sup>th</sup> Respondent though it was copied to it. He also added that the letter itself is erroneous since it stated a wrong date when the decision of the High Court Misc. Cause No. 258 of 2017 was delivered.

6.7 He prayed that his preliminary objections be upheld and the application be struck out.

## **7.0 DISPOSAL OF THE APPLICATION.**

### **7.1 OBSERVATIONS**

The Tribunal observed that the applicant on the request by the Accounting Officer of the 2<sup>nd</sup> Respondent in its letter dated 27<sup>th</sup> July, 2017 extended the bid validity period for construction of student's hostel and construction of faculty of computer science building by three months. Thereafter there is no evidence on record to show that the Accounting Officer of the 2<sup>nd</sup> Respondent extended bid validity period for all the other bidders.



- 7.2 The Tribunal also observed that the effect of the High Court Ruling in MC 257 and 258 was nullification of the contract dated 16<sup>th</sup> August 2017 between the Applicant and the 2<sup>nd</sup> Respondent because the Tribunal's decision upholding the Accounting Officer's Decision to name the Applicant as Best Evaluated Bidder was quashed.
- 7.3 That the Solicitor General's opinion addressed to the 2<sup>nd</sup> Respondent on 7<sup>th</sup> June 2018 was misadvised because at the time of the issuance of that opinion the procurement process had been concluded and the 3<sup>rd</sup> and 4<sup>th</sup> Respondent's bids had expired. Therefore there were no bids.
- 7.4 The Entity illegally entered into contract with the 3<sup>rd</sup> and 4<sup>th</sup> Respondents after disposal of MC 257 and 258 of 2018 at the High Court purportedly on the advice of the Solicitor General because they were no longer bidders in this process after the Entity concluded the contract with the Applicant on 16<sup>th</sup> August 2017 (*See Reg 53 (6) SI 8/14 PPDA Regulations 2014*). This is the correct position at law not withstanding nullification of the Applicants contract by Implication in the decision of the High Court in MC 257 and 258. The nullification of the Applicant' contract does not revive any of the bids, including the 3<sup>rd</sup> and 4<sup>th</sup> Respondents bids.

#### 8.0 DECISION OF THE TRIBUNAL

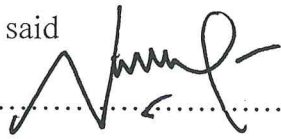
1. The preliminary objections are upheld.
2. The Applicant in the instant application ceased being a bidder and therefore lacks locus standi to file this application.
3. The application is incompetent and is accordingly struck out with no orders to costs.

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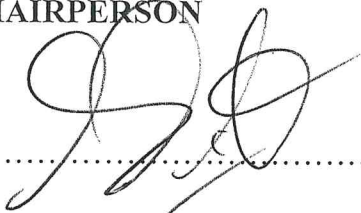
SIGNED and sealed this 13<sup>th</sup> day of July, 2018 by the said

MOSES JURUA ADRIKO

  
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CHAIRPERSON

ABRAHAM NKATA

  
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MEMBER

DAVID KABATERAINE

  
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MEMBER