REPORTABLE

CASE NO: SA 52/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

UNITED AFRICA GROUP (PTY) LTD	**Appellant**
and	
CHAIRPERSON OF THE TENDER BOARD OF NAMIBIA	**First Respondent**
MINISTER OF LABOUR AND SOCIAL WELFARE	**Second Respondent**
JOHN AND PENNY GROUP OF COMPANIES (PTY) LTD	**Third Respondent**
PATRIOTIC PAYMASTER SERVICES (PTY) LTD	**Fourth Respondent**
KUJO INVESTMENT (PTY) LTD	**Fifth Respondent**
ANTHER INVESTMENT CC	**Sixth Respondent**
EPUPA INVESTMENT TECHNOLOGY (PTY) LTD	**Seven Respondent**

Coram:	MARITZ JA, MAINGA JA and MTAMBANENGWE AJA
Heard:	**6 March 2013**
Delivered:	**11 November 2014**

APPEAL JUDGMENT

MTAMBANENGWE AJA (MARITZ JA and MAINGA JA concurring):

[1] The appeal in this matter is against the judgment of the High Court (per Unengu AJ) dismissing with costs the appellant's review application. The appellant, United Africa Group (Pty) Ltd (United Africa), sought to review and set aside an award by the Tender Board of Namibia (the Board) of Tender A6-1/2010: 'Cash Payment of Basic State Grants, Allowances to Beneficiaries' to the seventh respondent, Epupa Investment Technology (Pty) Ltd (Epupa) on 19 November 2010.

[2] It was contemplated that the monthly aggregate of the basic State grants and allowances to be handed to the successful tenderer for distribution would amount to N$55 million. For that reason, the conditions subject to which tenders were invited required assurances about the financial viability of prospective tenderers. Clause 28 of the 'Terms and Conditions of Tender Contract or Order' provides as follows:

> '28. Financial Viability
>
> A letter of good standing from the Bank indicating financial viability of the Contractor to deliver services as well as a written guarantee, the value of which shall be 10% of the monthly aggregate (N$55 000 000,00) of Basic State grant and allowances handed into the contractors custody, from the financial institution will be required.'

Pursuant to clause 28, United Africa and Epupa both sought and obtained letters from First National Bank (FNB) dated 16 September 2010 regarding their financial standing, which they submitted as part of their respective tenders. The letter submitted by United Africa reads:

‘Letter of Intent to Issue Guarantee 25911898

Contractor United Africa Group (Pty) Ltd, Reg. No. 870192
Contracting Authority: Ministry of Finance
Tender No. A6-1/2010

We have been informed by our customer, United Africa Group (Pty) Ltd, that they are tendering to secure the contract for the rendering of service to the Government to effect payments of basic state grants, allowances to beneficiaries for the period 1 December 2010 to 30 November 2015 and that a Performance Guarantee for the amount of N$5 500 000.00 (Five Million Five Hundred Thousand Namibian Dollars) representing 10% of the amount of N$55 000 000.00 (Fifty Five Million Namibia Dollars), will be required, if the Tender is awarded to, United Africa Group (Pty) Ltd.

We, First National Bank of Namibia Limited, Windhoek Corporate Branch . . . hereby confirm without further obligation or liability on our part, that we intend issuing the required Performance Guarantee should the abovementioned tender be awarded to United Africa Group (Pty) Ltd.

This is a Letter of Intent only, and may not be used for any purposes other than for information purposes. This Letter of Intent will become null and void Ninety (90) days after the closing date of the Tender (21 September 2010) or upon award of the abovementioned contract to United Africa Group (Pty) Ltd., or to any other person or company.’ (My emphasis.)

The letter submitted by Epupa was issued on the following terms:

‘**Letter of Intent to Issue a Guarantee**

Tender no. A6-1/2010
Rendering of services to government to effect cash payment of basic state grants, allowances to beneficiaries for the period 1 December 2010 to 20 November 2015

> We, First National Bank of Namibia Limited, . . . undertake herewith on behalf of Epupa Investment Technology (Pty) Ltd Reg no. 2004/493, to supply the Ministry of Finance with a Performance Guarantee of N$5,500,000-00 being 10% of the contract amount for the above-mentioned project, if the tender is awarded to the Contractor.
>
> - This is a Letter of Intent only, and may not be used for any purposes other than for information purposes.
> - This undertaking is subject to Epupa Investment Technology (Pty) Ltd meeting the Bank's Credit Criteria.
> - This undertaking is neither negotiable nor transferable.
> - This undertaking shall remain in full force and effect until 17 December 2010, or notice is received that the Tender was not awarded to Epupa Investment Technology (Pty) Ltd, whichever event occurs first, after which date this undertaking shall expire
> - This Letter of Intent will become null and void upon issuance of the abovementioned guarantee.' (My emphasis.)

[3] Antecedent to the award of the said tender, the Tender Committee (the Committee) of the third respondent, the Ministry of Labour and Social Welfare, undertook certain preliminary steps that culminated in the Committee identifying United Africa and Epupa as the only two of the six companies that had submitted bids, which had met all the conditions and specifications set out in the tender documents and whose prices were adjudged to be fair and reasonable. Of the two, the prices tendered by Epupa for the services to be rendered were the lower.

[4] After the two companies had thus been identified, both were invited to make presentations to the Committee about their operational plans to execute the requested services in the event that the tender would be awarded to them. This

was in accordance with clause 13 of the 'Additional Instructions to Tenderers,' which reads as follows:

> '13. Only Tenderers that have met all the conditions and specifications of the Tender will be invited to a briefing meeting within fourteen days after the closing date of tender at which an opportunity will be given to them to present their operational plan, the type of equipment anticipated to be used and to raise any questions or seek clarification on the bid documents.'

Both companies made their respective presentations on 11 October 2011. At the conclusion thereof, each was told that the letters of good standing 'had to be followed up by an unconditional letter from the bank confirming that the letter of intent would, in the event of the tender being awarded, be converted into a guarantee'.

[5] After the presentations, the Committee on 12 October 2010 recommended to the Board that it should consider Epupa as its first choice and United Africa as its second in the award of the tender. The relevant minutes of the Committee reflect that both companies met the tender conditions and specifications, and that the prices quoted by the two companies were fair and reasonable.

[6] The final recommendation of the Committee to the Board, which was subsequently made, reversed the initial order of preference. This followed upon a request made by the Committee that the two tenderers should provide confirmation by the bank that the bank would issue performance guarantees. FNB reportedly furnished such a confirmation in respect of United Africa whereas it

declined to issue a similar confirmation in respect of Epupa. The bank's reasons for refusing to issue such a confirmation in respect of Epupa are not stated.

The confirmation letter by FNB to the Tender Board in respect of United Africa dated 11 October 2010 reads as follows:

> '**Letter of Intent to Issue Guarantee**
> **Contractor United Group (Pty) Ltd, Reg. No. 87/0192**
> **Contracting Authority: Ministry of Finance**
> **Tender No. A6-1/2010**
>
> With reference to our Letter of Intent issued 16 September 2010 in terms of the above tender application.
>
> Please be informed that on awarding the contract to United Africa Group (Pty) Ltd, we will issue the required guarantee within 24 hours in substitution of the letter of intent referred above. The wording of such a guarantee must be acceptable to the bank.
>
> Kindly provide us with the wording of the guarantee to enable us to prepare the guarantee in the meantime.**'**

[7] On 29 October 2010, the Board nevertheless decided to award the tender to Epupa. The minutes of the Board's meeting on that day read as follows:

> 'Recommendation: That approval be granted for the tender to be awarded to Messrs United Africa Group. The offer is the second lowest and to specifications. The price is fair and reasonable.
>
> Discussion:

1. The Board wanted to know why the lowest qualifying tenderer Messrs Epupa Investment was not recommended. It was explained that the bank could not confirm a bank guarantee to the company after the letter of intent was provided. Close scrutiny of the tender documents and submission revealed that both companies (United Africa Group and Epupa Investment) are to specification and are in possession of a letter of intent from First National Bank.

2. The Board noted that the letter of intent by the financial institution is sufficient proof that the bank will provide the guarantee once the tender is awarded to Messrs Epupa Investment. It was explained that the Ministry contacted the bank regarding a confirmation of the guarantee of Messrs Epupa Investment and did not obtain it. Some members expressed the fear that Messrs Epupa Investment might fail to obtain a bank guarantee after the award. It was argued that this fact is not stated anywhere in the documents and the recommendation is not in the best interest of equal wealth distribution.

3. The Board was not convinced [of the Committee's] motivation [in not recommending] the lowest qualifying tenderer, Messrs Epupa Investment, and went against the Ministry's recommendation.

Resolved: Approved to Messrs Epupa Investment.'

[8] United Africa challenged the award of the tender by the Board to Epupa on a number of grounds:

(a) Epupa should have been disqualified in the first place because the letter of good standing supplied on its behalf by FNB was fatally flawed;

(b) Epupa had not provided a performance guarantee when the Board awarded the tender to it on 29 October;

(c) Epupa did not provide a letter of confirmation from FNB that the bank would issue a performance guarantee as requested at the end of its presentation of its operational plans;

(d) When the Board considered the two tenders it erred because it did not appreciate the difference between the two letters of good standing, i.e. that on behalf of United Africa and that on behalf of Epupa; and

(e) The Board also erred in that it took as decisive a factor that it was legally impermissible to take into account.

I proceed to deal with these issues.

[9] The argument about the letters of good standing, advanced almost *ad nauseum*, particularly in the appellant's replying affidavit, is premised on the assertion that FNB's letter on behalf of Epupa is conditional and therefore does not qualify as a letter of good standing required in terms of clause 28 of the 'Terms and Conditions of Tender Contract or Order'. By contrast, the letter presented on behalf of United Africa is not conditional. First, I would observe that it needs no research to understand that a condition need not necessarily be expressed in words. However, an examination of the two letters shows that FNB stated expressly the condition on which the bank was prepared to issue the required performance guarantees. It stated –

(a) in respect of United Africa:

> 'We . . . hereby confirm, without further obligation or liability on our part, that we intend issuing the required Performance Guarantee should the abovementioned tender be awarded to United Africa Group (Pty) Ltd'.

(b) in respect of Epupa:

> 'We . . . undertake herewith on behalf of Epupa Investment Technology (Pty) Ltd Reg. No. 2004/493, to supply the Ministry of Finance with a Performance Guarantee of N$5 000 000,00 being 10% of the contract amount for the above-mentioned project, if the tender is awarded to the contractor.' (My emphasis.)

The only difference between the two letters is that the bank added the following condition to the second letter:

> 'This undertaking is subject to Epupa Investment Technology (Pty) Ltd meeting the Bank's Credit Criteria.'

The addition of that condition does not, in my opinion, make any difference, as it is a condition normally implied in any such transactions by a bank.

In any case, Mr Frank, appearing on behalf of United Africa, conceded in answer to a question from the Bench that the letter from FNB on behalf of United Africa was also conditional. In the result I find that this argument cannot be sustained. It was left to the Board to determine on a reasonable and rational basis whether the express or implied conditions subject to which the letters were issued were acceptable, given the underlying purpose for the requirement.

[10] As regards the argument that Epupa had not provided the performance guarantee required in terms of clause 28 of the conditions of tender when, on 29 October 2010, it was awarded the tender by the Board, I fail to see any rational basis for such an argument. The clause stipulates that 'a written guarantee . . . from a financial institution will be required'. It does not say when it will be required. In my view, it was therefore left to the Board to determine the date on which it should be provided. It is true that Epupa did furnish that guarantee on 16 November 2010, i.e. some days after the award. It did so on request and the guarantee was issued by Bank Windhoek on 1 November 2010. When United Africa complained about the award of the tender to Epupa and threatened to approach the High Court to have the award set aside, the Board sought advice on this issue from the Attorney General. I shall refer to the advice consequently given by the Attorney General here below.

[11] For present purposes, it is only pertinent to consider the following: when clause 28 of the tender conditions required that a written guarantee be furnished by a financial institution, 'the value of which shall be 10% of the monthly aggregate (N$55 000 000,00) of basic state grant and allowance handed into the contractors custody,' when must the written guarantee be given? Is United Africa correct to argue that Epupa should not have been awarded the tender because its performance guarantee was given by Bank Windhoek only after the tender was awarded?

[12] Firstly, when we look at all the letters written by FNB to the Board on this aspect of the matter, we see that FNB clearly understood and appreciated that the

written guarantee had to be given after the award of the tender on behalf of the successful tenderer. I have underlined the words ‘if the tender is awarded to United Africa Group (Pty) Ltd’, ‘should the abovementioned tender be awarded to United Africa Group (Pty) Ltd,’ ‘upon award of the abovementioned contract to United Africa Group (Pty) Ltd,’ ‘if the tender is awarded to the contractors’ and ‘on awarding the contract to United Africa Group (Pty) Ltd’ in the letter quoted above, to demonstrate the understanding and appreciation of the bank of this fact. Secondly, both in the ‘Terms and Conditions of Tender Contract or Order’ and in the ‘General Conditions of Tender, Contract or Order,’ ‘contractor’ is defined as:

> ‘Any person or persons or anybody of persons corporate or not incorporated whose tender has been accepted by the state’.

This definition, when read together with the Special Conditions of the tender quoted hereunder, puts beyond any shadow of doubt that it was contemplated that, only on acceptance of its tender, would a tenderer be expected or called upon by the Board to furnish the performance guarantee. Accordingly, the answer to the second question posed above is that Epupa could not be disqualified on the basis contended for by the appellant.

[13] The eventual recommendation of the Committee to the Board, that is, that the tender be awarded to United Africa, was based on the fact that Epupa did not get from FNB the confirmation letter requested by the Committee at the end of Epupa’s and United Africa’s presentation of their respective operational plans. Epupa obtained a letter to the same effect on 19 October 2010 from the

Development Bank of Namibia and submitted it to the Committee on the same date. This letter, delivered to the Committee on the same day as it made its final recommendation to the Board, was not tabled before the Board. The Board, however, did not follow the Committee's recommendation. The discussions of the Board leading to its decision to award the tender to Epupa are reflected in the Board's minutes already referred to in para [7] of this judgment. The confirmation letter in favour of United Africa has also been referred to, in para [6] of this judgment. As I said earlier, when United Africa complained to the Board and threatened to take the matter to the High Court, the Board sought the advice of the Attorney-General. The advice given is reflected in the minutes of the Board's meeting on 5 November 2010. A section of the minutes relating to the discussion of Tender A1/6-1/2010 reads as follows:

'**MINUTES 42/2010 HELD 5 NOVEMBER 2010**

3.1.3 TENDER A1/6-1/2010 MINISTRY OF LABOUR AND SOCIAL WELFARE: RENDERING OF SERVICE TO GOVERNMENT TO EFFECT CASH PAYMENTS OF BASIC STATE GRANTS AND ALLOWANCES TO BENEFICIARIES

The Board was informed that soon after the award of this tender on Friday 29 October 2010, the two tenderers involved knew the outcome of the meeting. Consequently a letter from Messrs. United Africa's lawyers was received in which allegations are made that the awarded company Messrs Epupa Investec did not comply with specifications as they did not submit a written guarantee. The Board was also informed that because of that, a letter was written to the Attorney General seeking legal opinion.

The Board wanted to know why the notification was delayed and it was explained that it was a measure instituted by the Secretariat after the issue

> of the railway tender, to have minutes of the previous meeting approved before successful tenderers are notified. Due to the urgency of the matter Mr Sacky Shangala was requested to brief the Board on the way forward. He informed the Board that a written guarantee was not part of the specifications and that this condition was communicated to both tenderers afterwards. He also noted that strictly speaking the tenderer of Messrs United Africa also did not provide a guarantee as stipulated by a letter of intent which does not constitute a guarantee.
>
> Both tenderers supplied a letter of intent from the same financial institution. The legal opinion is thus: both companies did not comply and the Board could therefore condone any of the two tenderers and award. The Board decided to uphold its award to Messrs Epupa Investec and to condone the non-compliance as advised by the Attorney-General.'

[14] I agree with the Attorney-General's advice when he said:

> '. . . a written guarantee was not part of the specifications and that this condition was communicated to both tenderers afterwards'.

The condition does not appear in any of the tender documents referred to above nor can it be said to arise from the wording of clause 28 of the 'Terms and Conditions of Tender, Contract or Order'.

[15] The special conditions of tender required all tenderers to undertake in the form of a letter to the Board that -

> '1. If the tender is accepted either wholly or in part, I/we undertake to enter into a contract, embodying all the terms and conditions of the tender and acceptance, and further to provide security to be in the form of a guarantee

by a bank or approval guarantee corporation or the deposit of cash or government securities on approved municipal stock in negotiable form.

2. The tenderer agrees that if:

i) …
ii) …
iii) when called upon to do so, he fails to give the Government satisfactory security for the due fulfilment of the contract, or
iv) when called upon to fulfil the contract he fails to do so,

the Government may, in addition to any other remedies it may have, agree to the withdrawal of his tender or cancel the contract that may have been entered into between himself and the Government and he will then pay to the Government any additional expense incurred by the Government having either to accept any less favourable tender or if fresh tenders have to be called, the additional expenditure incurred by the invitation of fresh tenders and by the subsequent acceptance of any less favourable tender.

3. The Government shall have the right to recover such additional expenditure by setting off any money which may be due or become due to the tenderer under his or any other tender or contract or against any guarantee or deposit that may have been furnished by or on behalf of the tenderer for the due fulfilment of this or any other contract and, pending the ascertainment of the amount for such additional expenditure to retain such moneys, guarantee or deposit as security for any loss the Government may sustain by reason of the tenderer's default'.

As they were obliged to do, all the tenderers signed this undertaking. This special condition means, in my opinion, that any tenderer whose tender was accepted could provide the performance guarantee required in terms of clause 28 by a deposit of cash or a deposit of Government securities or approved municipal stock in negotiable form.

[16] Other criticism of the Tender Board's decision

In para 35.5 of appellant's founding affidavit the deponent states that it appears from the minutes of the Board on 19 October 2010:

> 'That the primary motive of the decision – a missing bank guarantee notwithstanding – was the best interest of equal wealth distribution'.

It says in para 31 thereof:

> 'I have been advised and respectfully submit:
>
> 31.1 The requirement for a guarantee could not be dispensed with by the Board. The Board thus acted outside the scope of their powers and did not understand the legal basis of the exercise of their discretion.
>
> 31.2 The Board took irrelevant matters into consideration while ignoring relevant considerations.
>
> 31.3 Whereas the price of tenders is relevant, the "best interest of equal wealth distribution" has no foundation in fact or law and is irrelevant to the discretion that had to be exercised.
>
> 31.4 The reference to "the best interest of equal wealth distribution" is indicative of improper purpose or ulterior motive.
>
> 31.5 The Board had no apprehension for the relevant decisional referents.
>
> 31.6 That the decision is distorted by an error as to the Board's statutory powers in condoning Epupa's non-compliance.

31.7 Dispensing with the requirement relating to the unconditional written guarantee the Board contravened sec. 15(2)(*a*) and 15(3)(*a*) of the Tender Board of Namibia Act, No. 16 of 1996'.

In his written heads of argument, Mr Frank expanded on these submissions on behalf of the appellant when he turned to the merits, particularly when he submitted in para 39:

> 'Furthermore, to award the tender to the seventh respondent and not the applicant because to have awarded it to the applicant would not be in the "best interest of equal wealth distribution" also shows a failure on the side of the Board to appreciate the extent of its discretion as the criteria used by the Board is not sanctioned by the Tender Act or any other law and was therefore not a legally permissible factor when taking their decision'.

I confine my comments on this aspect of Mr Frank's criticism because I have already dealt with and dismissed his submissions regarding the letters of intent and the guarantee etc. I found these arguments unsustainable.

Before addressing the merits, Mr Frank refers to various sections of the Tender Board of Namibia Act 16 of 1996 (the Act) including ss 15(5) and (6), which provide:

> '(5) In comparing tenders the Board shall give effect to the price preference policy of the Government to redress social, economic and educational imbalances in a democratic society and to encourage industrial and commercial interests in Namibia.
>
> (6) If the Board does not accept the lowest tender or tenders from among all the tenders submitted to it, the reasons for not accepting the lowest tender or tenders shall be kept on record by the Board.'

The effect of ss 15(5) and (6) is that in general the lowest tender must be accepted unless there are reasons to the contrary. Such reasons may include the price preference policy of the Government to redress social, economic and educational imbalances and to encourage industrial and commercial interests in Namibia.

Furthermore, Regulation 7 of the Act provides:

> '(i) In comparing tenders the Board shall give effect to the policy of Government referred to in section 15(5) of the Act'.

In Epupa's answering affidavit, the deponent thereof Ms Loini Nyanyukweni Kalomo, Epupa's managing director, explained 'equal wealth distribution' as follows:

> 'The fact that the Tender Board mentioned equal wealth distribution does not make its decision reviewable. As far as I am concerned it has a sound foundation in fact because it is common knowledge that applicant is an extremely wealthy company with equally wealthy shareholders. It has a variety of lucrative contracts all over Namibia including a bunkering agreement with De Beers Marine Namibia worth millions. Seventh respondent on the other hand is a small wholly owned Namibian company with nine previously disadvantaged shareholders (six of which are women) of modest means'. (My emphasis.)

The additional instructions to tenderers provide in ss 8 and 9:

> '8. The Tender Board reserves the right to accept any or none of the bids. The lowest or sole tender will not necessarily be accepted. The tender price linked to the quality of service will however play a decisive role.
>
> 9. The Tender is subject to the Tender Board Regulations as published in the Official Gazette of Namibia Notice 237 of 12th September 1996 (Act 16 of 1996) and subsequent amendments.'

[17] When the Board made its decision on 29 October 2010, its members would have obviously been aware of these provisions in the Act, the Regulations and the various tender documents. Furthermore, if the minutes of the Board's discussions are read in their entirety, they show that the Board was quite concerned about the Committee's motivation in not recommending Epupa notwithstanding its tender being the lowest. Pricing is not a matter the Board took lightly; it is mentioned twice in the minutes in this relation to this issue.

[18] *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (CkH) emphasises the importance of pricing factors in tender board matters at 351G:

> 'The task of the tender board has always been and will always be primarily to ensure that government gets the best service and value for that for which it pays. If that were not the prime purpose of the tender board and policy considerations were to override those considerations, the very purpose of the tender board is defeated and no tender board needs to exist. It would then be quite simple for government simply, on a basis of policy determination, to enter into contracts for whatever it required without intervention of a tender board. If the tender board loses sight of its prime purpose as stated hereinbefore it becomes a threat to government and serves little purpose'.

and at page 360A:

> 'Tender boards, more than any other government tribunals, have a particular responsibility in this regard. The values of annual contracts nationally probably run into billions of rands. If tender boards do not recognise that their primary task is the procurement of the services of tenderers at the least possible cost to the State,

> mindful of the need to honour the demands of the “RDP”, the ability of the government to balance its budget is greatly undermined’.

[19] For the appellant to try to turn into a principle an ineptly worded phrase that appears in the context (in para 2 alone) of an argument presented by ‘some members’ at the meeting, is completely unwarranted, especially as it is clear from para 3 of the minutes that the principal consideration that informed the decision of the Board was the more favourable pricing of the services by Epupa. The use of the phrase in the course of an argument at the Board’s meeting can clearly be seen as a mere clumsy articulation of pricing preferences stated not only in the tender documents but also in the governing Act and Regulations. In my opinion, it was not necessary to refer to the preferences to justify the acceptance of Epupa’s tender because it was the lower of the two. It is the latter consideration that swayed the decision of the Board. The appellant’s reliance on an ineptly worded argument presented by ‘some members’ at the meeting for its submission that the Board had acted with ulterior purposes when it awarded the tender to Epupa is wholly unpersuasive and must be dismissed without further ado.

[20] Before concluding, I must express the court’s appreciation of the appellant’s counsel’s industry in putting before the court many authorities and the principles derived from them. I intend no disparagement of counsel’s efforts by saying that I have looked at all the cases referred to but, other than those bearing on the authorities already cited, I find none of the principles addressed therein applicable to the facts and circumstances of this matter.

[21] In the result, the appeal should be dismissed with costs including the costs of one instructing counsel and one instructed counsel. I so order.

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MTAMBANENGWE AJA

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MARITZ JA

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MAINGA JA

APPEARANCES

APPELLANT	T J Frank SC (with G Dicks) Instructed by Theunissen, Louw & Partners
SEVENTH RESPONDENT	G B Coleman Instructed by AngulaColeman Legal Practitioners