REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
(4)

28/01/2026 [redacted]
DATE SIGNATURE

CASE NO: 2023-018685

In the matter between:

CEREBRUS HOLDINGS (PTY) LTD	First Applicant
TOEKOMSTE SKYN (PTY) LTD	Second Applicant
DVD QUALITY MINING (PTY) LTD	Third Applicant

and

TRANSNET SOC LTD	First Respondent
SITATUNGA MANGANESE (PTY) LTD	Second Respondent
TAWANA HOTAZEL MINING (PTY) LTD	Third Respondent
WEPEX TRADING (PTY) LTD	Fourth Respondent
LIMABRITE (PTY) LTD	Fifth Respondent
MOKALA MANGANESE (PTY) LTD	Sixth Respondent

ASSMANG (PTY) LTD	Seventh Respondent
HOTAZEL MANGANESE MINES (PTY) LTD	Eighth Respondent
UNITED MANGANESE OF KALAHARI (PTY) LTD	Ninth Respondent
TSHIPI' E NTLE MINING (PTY) LTD	Tenth Respondent
KUDUMANE MANGANESE (PTY) LTD	Eleventh Respondent
KALAGADI MANGANESE (PTY) LTD	Twelfth Respondent
SEBILO RESOURCES (PTY) LTD	Thirteenth Respondent
PMG MINING (PTY) LTD	Fourteenth Respondent
LIDINO TRADING (PTY) LTD	Fifteenth Respondent
EMANG MMOGO MANGANESE (PTY) LTD	Sixteenth Respondent

Neutral Citation: **Delivered:** By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

SENYATSI J:

Introduction

[1] During December 2025, I handed down this judgment. On reflection, I picked up two typographical errors, namely, firstly not stating the seventh respondents in the list of the those entitled to costs in my order and secondly not including Advocates R. Tshetlo and S. Mohammed as the juniors with Advocate R. Bhana SC. This revised judgment corrects those typographical errors.

[2] Before the Court are three matters to be determined together:

(a) The applicants' review application brought under Part B of the amended notice of motion (delivered 28 May 2025);

(b) The tenth respondent's purported counter-application; and

(c) The seventh respondent's (Assmang (Pty) Ltd's) application for condonation for the late filing of its heads of argument and practice note.

[3] In the main, this is an application brought by three applicants, Cerebrus Holdings (Pty) Ltd, Toekomste Skyn (Pty) Ltd and DVD Quality Mining (Pty) Ltd (collectively "the applicants") for the review and setting aside of certain decisions made by the first respondent, Transnet SOC Ltd ("Transnet"). The decisions pertain to Transnet's process of allocating railway capacity for the transport of manganese for export, specifically under its Manganese Export Capacity Allocation programme, cycle 3 ("MECA III").

[4] The application is opposed by Transnet and a number of other respondents, including several mining entities who are either existing or emerging manganese miners. The eighth respondent ("Hotazel") and the tenth respondent ("Tshipi") have filed extensive heads of argument in opposition, with Tshipi having launched a conditional counter-application.

[5] The respondents raise several preliminary objections: the absence of a Rule 53 record for the challenged 14 Mtpa "existing miners" allocation; the applicants' expansion of their case without supplementing their founding papers; locus standi; delay; and the incompetence of the counter-application. These objections are well-documented in the papers.

Background

[6] Transnet, a state-owned entity, manages and allocates finite railway capacity on its network for the transport of manganese from mines to ports. Historically, this capacity has been allocated in multi-year cycles. The previous cycle, MECA II, concluded on 31 March 2023.

[7] In preparation for MECA III, Transnet undertook a complex exercise to balance the needs of various stakeholders. This included:

(a) Existing miners: Entities with a long-standing contractual relationship with Transnet, a proven track record of utilizing allocated capacity, and a history of reliable payment.

(b) Emerging miners: New entrants to the market seeking access to railway capacity to export their product.

[8] Transnet's total available capacity for manganese export is approximately 16 million tons per annum ("Mtpa"). A central policy decision was made to increase the share of capacity allocated to emerging miners. To achieve this, Transnet decided to reduce the allocations of five major existing miners by an aggregate of 15% (2.4 Mtpa) and to make 2 Mtpa of capacity available exclusively to emerging miners through a competitive tender process. The remaining 14 Mtpa was to be allocated to existing miners based on direct negotiations, considering their historical performance and operational needs.

[9] This gave rise to what the parties have termed two distinct decisions:

The Provisioning Decision

(a) Transnet's decision to make only 2 Mtpa of capacity available to the market via a public tender process, reserving the bulk of capacity for existing miners.

The Allocation Decision

(b) The subsequent decision, pursuant to the published Invitation and Process Documents, on how to allocate the 2 Mtpa amongst the qualifying emerging miners who applied.

[10] The applicants, who are emerging miners (save for Cerebrus, a consulting entity), participated in the tender process for the 2 Mtpa. The third applicant ("DVD") was successful and received an allocation of 310,000 tonnes per annum. The second applicant ("Toekomste") was disqualified after a site inspection found no evidence of active mining operations. The first applicant ("Cerebrus"), a consulting company, did not qualify as a miner.

[11] Aggrieved by this outcome and the underlying structure of the MECA III process, the applicants launched this review. They seek to set aside not only the Allocation Decision but also the Provisioning Decision, arguing that the entire 16 Mtpa should have been put out to open tender, pitting emerging miners against existing miners in a single process.

[12] I will deal with the condonation application, the counter-application and the main review.

The condonation application

[13] It is critical at this stage to deal with the condonation application which is not controversial. Assmang applies for condonation for the late filing of its heads of argument and practice note. It brought its application by notice dated 15 September 2025. The condonation application is unopposed. It explains the extent of the delay, provides a supporting affidavit, and demonstrates no prejudice to any party if condonation is granted. Nothing in the papers suggests dilatoriness or bad faith.

[14] Under Uniform Rule 27(1), if parties do not agree, the court may, on application with notice and good cause, extend or shorten any time period set by the rules or by a court order for actions in proceedings.[1] There is no deadline for seeking condonation, and the court has discretion to grant or deny condonation for late compliance with procedural requirements.

[15] The applicant must provide a full explanation for the delay and show a *bona fide* attempt to comply with the procedural rules. The test in considering the condonation application is that the court has a broad discretion to grant condonation for non-compliance with procedural rules, provided there is good cause.[2] The defendant must provide a full explanation for the delay and show a *bona fide* attempt to comply with the procedural rules.

[16] The discretion, while extensive, must be exercised judicially, considering the fairness to both parties and in accordance with established legal principles.[3] Factors relevant to granting condonation include the degree of non-

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[1] Gool v Policansky 1939 CPD 386 at 390
[2] Botha t/a Tax Consulting SA v Renwick (2019/35217) [2021] ZAGPJHC 37 (13 April 2021) at paras 16 to 27, Du Plooy v Anwes Motors (Edms)Bpk 1983 (4) SA SA 212 (O) at 216H-217D
[3] Du Plooy v Anwes Motors supra at footnote 2 at 217B

compliance, the explanation provided (which must cover the entire period of the delay and must be a full, detailed and accurate account of the causes of the delay),[4] the applicant's prospects of success in the matter, and the potential prejudice to the opposing party, including its interest in finality.

[17] The explanation is adequate, the delay not excessive, and the interests of justice strongly favour granting condonation so that the Court may have the benefit of all submissions. Condonation is accordingly granted.

<u>The Tenth Respondent's Counter-Application</u>

<u>Procedural incompetence</u>

[18] The tenth respondent (Tshipi) purports within its answering affidavit rather than by notice of motion to seek substantive review relief, including the review of what it terms the "Impugned Decision" and the imposition of prescriptive guidelines on Transnet. The ninth respondent correctly objects to this approach.

[19] This is so because Rule 6(1) states the procedure to be followed when bringing the application and says:

> " Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief."

The rule is written in peremptory terms and must be complied with. Failure to comply with its terms is fatal to the so-called counter-application.

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[4] Van Wyk v Unitas Hospital and Others 2008 (4) BCLR 442 (CC); 2008 (2) SA 472 (CC) at para 22 & Unitrans Fuel & Chemical (Pty) Ltd v Dove-Co Carriers CC [2010] JOL 25743 (GSJ) at para 7.

[20] The Full Court in this division in *Minerals Council of South Africa v Minister of Mineral Resources and Energy*[5] held that:

> "It is not open to a co-respondent to claim relief unless it enters the litigation as an applicant and seeks that relief on notice of motion."

[21] The decision affecting Tshipi's allocation is not the "Impugned Decision" before this court. Tshipi's allocation was determined in direct negotiations with Transnet as an existing miner, separate from the 2 Mtpa tender process for emerging miners which is the subject of this review. This Court cannot, in this application, review a decision that is not properly pleaded or before it.

[22] Lastly, on the merits, the doctrine of legitimate expectation does not assist Tshipi. Its previous allocation was governed by a commercial contract (MECA II). The renegotiation of terms for a new contractual period (MECA III) is a commercial engagement. As held in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA), when a public authority exercises a contractual right of renewal or negotiation on terms previously agreed with a substantial commercial entity, it is not exercising a public power that attracts public law duties of fairness beyond those in the contract. Tshipi had no legitimate expectation to a specific allocation in perpetuity

[23] Tshipi did not intervene as an applicant nor file a notice of motion. The counter-application is thus irregular and falls to be dismissed. I deal with the main application as set out below.

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[5] 2022 (1) SA 535 (GP) at para 63.

The Main Application

The Legal Framework and Standard of Review

[24] The foundational principle governing this review is the separation of powers, a cornerstone of our constitutional democracy. As recently reiterated by the Supreme Court of Appeal in *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others*[6] a court may not set aside executive decisions simply because it disagrees with them or believes a better process could have been devised. The Court said the following to formulate this principle:

> "That is not to say that the courts have untrammeled powers to interfere with the measures chosen by the executive to meet the challenge faced by the nation. Judicial power, like all public power, is subject to the rule of law.[7] Perhaps the most obvious constraint on the power of the courts is the doctrine of the separation of powers, a principle upon which our Constitution is based[8] and which allocates powers and responsibilities to the three arms of government – the legislature, the executive and the judiciary.[9] What the separation of powers means in a case such as this, is that a court may not set aside decisions taken and regulations made by the executive simply because it disagrees with the means chosen by the executive, or because it believes that the problems that the decisions or regulations seek to address can be better achieved by other means: the wisdom of the executive's exercises of power are not justiciable, only their legality. Somewhat cynically, Schreiner JA, in *Sinovich v Hercules Municipal Council*,[10] said that '[t]he law does

[6] 2021 (3) SA 593 (SCA) at para 6,
[7] *S v Mabena and Another* [2006] ZASCA 178; 2007 (1) SACR 482 (SCA) para 2.
[8] Constitutional Principle VI of Schedule 4 of the interim Constitution required the Constitutional Assembly, when drafting the final Constitution, to make provision for the separation of powers.
[9] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) paras 106-113; *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) SA 77 (CC) paras 24-25.
[10] *Sinovich v Hercules Municipal Council* 1946 AD 783 at 802-803.

not protect the subject against the merely foolish exercise of a discretion by an official, however much the subject suffers thereby".

[25] As the quoted passages from the case suggest, the wisdom of an executive exercise of power is not justiciable; only its legality is. The wisdom of an executive exercise of power is not justiciable; only its legality is.

[26] The Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer: South African Social Security Agency and Others (No 2)*[11] affirmed that the court's role in procurement reviews is not to ascertain whether the decision was correct, but whether the process followed was lawful, reasonable, and procedurally fair. The Court again, said the following on separation of powers:

> "There can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights.[12] Hence, the answer to the separation of powers argument lies in the express provisions of section 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency, in this case, an invalid award of the tender for five years."

[27] It is therefore trite that the court's role in procurement reviews is not to ascertain whether the decision was correct, but whether the process followed was lawful, reasonable, and procedurally fair.

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[11] 2014 (1) SA 604 (CC) at paras 42 and 45

[12] See *Mvumvu and Others v Minister for Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at paras 46 and 48 and *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[28] Section 217(1) of the Constitution requires organs of state to contract for goods and services in accordance with a system that is "fair, equitable, transparent, competitive and cost-effective." This provision is central to the applicants' challenge. However, its application is not boundless. As argued by Transnet and supported by authority, section 217(1) regulates the tender process *once it has commenced*. It does not dictate to an organ of state *what* it must contract for or *how much* of a finite resource it must offer to the market. The decision on what to put out to tender is a precursor to the section 217(1) process.

[29] A decision not to procure, or to limit what is procured, is typically an executive, polycentric decision located in the "heartland of the exercise of executive authority". In *City of Tshwane Metropolitan Municipality v Nambiti Technologies (Pty) Ltd* [13] the Court said:

> "…A decision as to the procurement of goods and services by an organ of State is one that lies within the heartland of the exercise of executive authority by that organ of State. We live in a country of finite resources at every level of government. Decisions by organs of State on how their limited resources will be spent inevitably involve painful compromises."[14]

[30] Such a decision, if reviewable at all, is subject only to the low-threshold rationality review under the principle of legality. The question is whether there is a rational connection between the decision and a legitimate governmental purpose.

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[13] 2016 (2) SA 494 (SCA) at para 43

[14] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) A 765 (CC).

Analysis

A. The Provisioning Decision

[31] The applicants' attack on the Provisioning Decision is, in essence, a request for this Court to dictate to Transnet how to manage its finite railway capacity. They argue that by reserving 14 Mtpa for existing miners without an open tender, Transnet violated section 217(1) and acted irrationally.

[32] I find no merit in this challenge for the reasons set out below.

Nature of the Decision

[33] The Provisioning Decision was made prior to the commencement of any tender process. The Invitation Document explicitly stated that 2 Mtpa was being made available for tender. The decision on how to apportion the total capacity between existing and new market entrants was a classic polycentric, executive decision. It involved balancing complex factors such as honouring existing commercial relationships, ensuring the financial stability and operational efficiency of the railway network (which relies on consistent, high-volume users), and fulfilling a policy imperative to empower emerging miners. This is precisely the type of balancing act entrusted by the Constitution to the executive, not the judiciary. Interfering with Transnet's decision in this regard will amount to judicial overreach which violates the rule of law on separation of po wers as provided for in the Constitution. The decision does not, in my view, violate the principle of legality and is therefore not reviewable.

Application of Section 217(1)

[34] The contention that section 217(1) governs the decision of what to tender is an overreach. The section governs how a tender process is run once a decision to procure has been made. To hold otherwise would mean any member of the public could challenge a State entity's decision not to sell a particular asset or service, leading to an absurdity and crippling State comm ercial operations. The authorities cited by Transnet, including *Nambiti*[15] an d *SAAB Grintek Defence (Pty) Ltd v South African Police Service*[16] are persuasive on this point.

Rationality

[35] Even if the Provisioning Decision were reviewable, it easily passes the rationality test. The reasons proffered by Transnet are cogent and logical as demonstrated below.

Continuity and Stability

[36] Existing miners have invested billions in infrastructure reliant on Transnet's services and have a proven record of payment and utilisation. Abruptly subjecting their allocations to a competitive tender against newcomers would create commercial uncertainty, potentially destabilising the rail network's revenue base and operational planning. In any event, there is not enough capacity on the rail network for the allocation of manganese except what Transnet in its wisdom, has decided to allocate and divide between existing a nd new manganese miners. To submit as Mr. Motau SC for the applicants, did that new miners are forced to use road transport which is expensive and

[15] See footnote 13 above.

[16] [2016] 3 All SA 669 (SCA) at para 24.

inefficient because of heavy congestion of trucks at Richards Bay Port does n ot make the Transnet decision, dare I say, reviewable.

Practical Empowerment

[37] A "flat-footed" tender for all 16 Mtpa would likely have seen emerging miners, with smaller operations and unproven track records, outmatched by established miners. By ring-fencing a portion of capacity (2 Mtpa) for emerging miners, Transnet created a realistic pathway for their entry and growth, consistent with broader economic empowerment goals.

Phased Approach

[38] The decision is part of a phased strategy to increase emerging miner allocation from 13% under MECA II to a target of 30%. This demonstrates a rational, incremental approach to transformation, mindful of both the need for change and the practicalities of network management.

[39] The applicants' complaint that a "better" process existed is irrelevant. The court's role is not to optimise policy but to assess its lawfulness and rationality. The Provisioning Decision was rational.

B. The Allocation Decision

[40] The applicants raise several grounds against the Allocation Decision, namely:

(a) the disqualification of Toekomste was based on a material error of fact and was unfair;

(b) the allocation of an equal 310,000 tonnes to each successful emerging miner was an irrational "blanket approach";

(c) the process was vague and procedurally unfair; and (iv) Transnet failed to provide adequate reasons.

I deal with each of the grounds as set out below.

Disqualification of Toekomste

[41] The record shows Transnet conducted a physical site inspection. Its officials, accompanied by Toekomste's own representatives including its Mine Manager, found no evidence of active mining: pits were marked "closed", there were no operational roads, and no trucking activity was observed.

[42] This factual finding formed a reasonable basis for disqualification. The applicants' attempt to introduce Department of Mineral Resources reports in the replying affidavit to prove historical mining is impermissible as it seeks to make a new case on reply. Furthermore, it does not displace the reasonableness of Transnet's decision made on the information before it at the time. There is no evidence of bad faith or a failure to apply its mind. The submissions made on behalf of the applicants by Mr. Motau SC, do not supp ort the contention that Transnet's decision was unreasonable.

The Blanket Allocation

[43] Transnet allocated 310,000 tons to each of the six qualifying emerging miners. The applicants argue this was irrational and that a differential allocation based on individual merit should have been made. This argument misunderstands the context. The 310,000 tons represented a sustainable

minimum threshold, a starting point designed to accommodate growth.

[44] The Process Document contemplated annual reviews and potential re-allocation based on actual performance. This approach was rational in the context of onboarding new, unproven entities. It ensured a fair entry point for all qualifying miners while allowing for future adjustments based on demonstrated capacity. The decision in *MEC for Environmental Affairs and Development Planning v Clairison*'s CC[17] cautions courts against interfering with the weight a functionary attaches to factors within its discretion. In this r egard, the Court said the following in that case:

> " It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker. As it was stated by *Baxter*:[18]
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> 'The court will merely require the decision-maker to take the relevant considerations *into account*; it will not prescribe the *weight* that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'"

[45] I am of the view therefore that Transnet's approach was not irrational.

Procedural Fairness and Vagueness

[46] The Process Document outlined the key criteria for evaluation: financial, operational, and technical capability. The applicants, including DVD which

[17] 2013 (6) SA 235 (SCA) at para 20.
[18] Lawrence Baxter *Administrative Law* 1ed (1984) at 505.

successfully navigated the process, were able to understand and comply with these requirements. The standard for clarity in such documents is "reasonable certainty," not "perfect lucidity"[19].

[47] The documents met this standard. The process afforded all applicants an equal opportunity to participate. There was no duty to engage in further consultations or *audi alteram partem* hearings beyond what the published process provided.

Reasons

[48] Transnet's reasons are contained in the evaluation records, site inspection reports, and the allocation table. These documents reveal that the decisions were based on the applicants' compliance (or non-compliance) with the published criteria. This is sufficient to meet the requirement for reasons.

D. The Appropriate Remedy

[49] In light of my finding that the review fails on its merits, the question of a just and equitable remedy under section 172(1)(b) of the Constitution does not arise. However, had I found any invalidity, I would have been persuaded by the arguments of Transnet and the eighth respondent regarding the catastrophic consequences of an immediate setting aside.

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[19] See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 87*

[50] The MECA III allocations have been in effect since 1 April 2023. Contracts have been concluded and significant commercial operations, investments, and employment dependencies have been structured around them. As emphasised in *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province*[20] , courts must weigh the interests of disappointed tenderers against the immense public and commercial disruption caused by unravelling such decisions. A suspension of any invalidity to allow for an orderly transition would have been the only just and equitable course.

Conclusion and Costs

[51] The applicants have invited this Court to overstep its constitutional role. They ask not for a review of legality, but for the Court to substitute Transnet's executive and commercial judgments with its own. This I cannot do. The decisions under review were rational, taken in good faith, and within the lawful ambit of Transnet's executive and commercial authority.

[52] The application for review therefore falls to be dismissed. The tenth respondent's conditional counter-application is similarly dismissed.

[53] The general rule is that costs follow the result. There is no reason to deviate from this rule. The applicants chose to litigate and have been unsuccessful. The first respondent and the other opposing respondents are entitled to their costs.

Order

[54] Accordingly, the following order is made:

[20] 2008 (2) SA 481 (SCA) para 23.

(a) The application for review is dismissed.

(b) The tenth respondent's conditional counter-application is dismissed.

(c) The applicants are ordered to pay the costs of the all the respondents that participated in these proceedings and opposed this application, jointly and severally, the one paying the others to be absolved, such costs to include the costs of two counsel where so employed.

[redacted]

ML SENYATSI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 15,16,17 October 2025

DATE JUDGMENT HANDED DOWN: 28 January 2026

APPEARANCES

Counsel for the Applicant:	Advocate Terry Motau SC
	Advocate Stuart Scott
	Advocate Refiloe Molefe
Instructed by:	Cuzen Randeree Dyasi Inc
Counsel for the First Respondent:	Advocate A Rafik Bhana SC
	Advocate R Tshetlo
	Advocate S Mohammed
Instructed by:	Lawtons Inc
Counsel for the third and thirteenth respondents:	Advocate O. Cook SC
Instructed by:	Beech Veltman Inc.
Counsel for the sixth respondent:	Advocate A.R.G. Mundell SC
Instructed by:	Webber Wentzel
Counsel for the seventh respondent:	Advocate TJ Bruinders SC
	Advocate Matthew Kruger
Instructed by:	Webber Wentzel
Counsel for the eighth respondent:	Advocate B. Roux SC

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Instructed by:	Pinsent Masons South Africa Inc
Counsel for the tenth respondent:	Advocate B. Leech SC Advocate A. Ngidi
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