REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 137492/25

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

02 June 2026 .....

DATE SIGNATURE

In the matter between:

FETAKGOMO TUBATSE LOCAL MUNICIPALITY **APPLICANT**

And

KIPP CONSULTING ENGINEERS (PTY) LTD **FIRST RESPONDENT**

ARBITRATOR C P WESLEY SC NO **SECOND RESPONDENT**

ARBITRATION FOUNDATION OF SOUTHERN AFRICA **THIRD RESPONDENT**

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 02 June 2026*

JUDGMENT

MOGALE, AJ

Introduction

[1] This is an opposed application in which the applicant seeks an order to review and set aside, amongst others, the arbitration awards dated 8 May 2025 and 27 May 2025.

[2] The application is submitted pursuant to section 33(1)(b) of the Arbitration Act 42 of 1965 ('the Act'). The applicant challenges the arbitrator's procedure and conduct, including the exclusion of the applicant from further participation in the arbitration proceedings, which the applicant deems a gross irregularity.

*Parti*es

[3] The applicant is Fetakgomo Tubatse Local Municipality, a municipality established in terms of Section 12 of the Local Government: Municipal Structures Act 117 of 1998, with its principal place of business at [...] K[...] Street, Burgersfort, Limpopo (‘the Municipality’).

[4] The first respondent is Kipp Consulting Engineers (Pty) Ltd, a private company duly registered in terms of the Companies Act 71 of 2008 of the Republic of South Africa, with its principal place of business at [...] S[...] Street, Polokwane, Limpopo Province (‘Kipp’).

[5] The second respondent is Charles Wesley SC NO, a Senior Advocate who practises from the Club Group of Advocates, which forms part of the Pretoria Society of Advocates (‘the arbitrator’).

[6] The third respondent is the Arbitration Foundation of Southern Africa (‘AFSA’), a private dispute resolution authority which manages and administers the

confidential resolution of both local and international disputes. No relief is sought against AFSA.

Background

[7] During or about 11 June 2018, following a tender procurement process, Kipp was a successful tenderer and was appointed by the Municipality as a consulting engineer for the Mashung village road upgrade project.

[8] The necessary Service Level Agreement ('SLA') was finalised between the Municipality and Kipp, effective from 4 June 2018, and was slated to remain in effect until the primary construction was completed. An additional 12-month period was designated to follow the project's culmination. Kipp was authorised to receive R 1 344 213.86 for professional services to be rendered, with these fees corresponding to the contract's total value. Throughout the project, the payable fees increased to R 5 309 693.89.

[9] During or about 4 June 2018, and once again pursuant to a tender process, Kipp was appointed by the Municipality to render engineering services in respect of the Makgakala village road project, and Kipp was entitled to fees in the amount of R 2 169 268.75, which amount was increased to R 5 483 640.47.

[10] On 13 March 2023, due to disputes and a breakdown in the parties' relationship, the Municipality terminated Kipp's contract for both the Mashung and Makgakala road projects.

[11] On or about 28 March 2023, Kipp approached the Polokwane Division of the High Court on an urgent basis seeking the suspension of the terminations pending dispute resolution through mediation, and the court granted the order without costs.

[12] Between 14 April and 3 July 2023, the parties engaged in mediation before a mediator, Adv Rapatsa, who produced a report on the dispute. Pursuant to the conclusion of the mediation process, the parties concluded two addendum Service Level Agreements in respect of both the Mashung and Makgakala projects.

[13] On or about 10 May 2024, the Municipality issued a notice of breach to Kipp for substandard workmanship resulting from Kipp's designs. Subsequently, on or about 20 June 2024, the Municipality officially terminated Kipp's services.

[14] On or about 24 June 2024, Kipp referred a dispute to AFSA for arbitration, and Wesley SC (the third respondent) was appointed as an arbitrator, with the arbitration proceedings commencing on 17 March 2025. The parties agreed to the separation of issues, including the heads of damages and professional fees.

[15] During the arbitration proceedings, Kipp filed a notice to amend its statement of claim. The proposed amendment introduced two new claims, one for each project, in respect of payment of the balance of the fees for professional services rendered by Kipp to the Municipality.

[16] The arbitrator directed that the Municipality submit its objection, *if it so desired, within a reasonable period*; however, the Municipality failed to comply. Consequently, on 11 April 2025, the arbitrator issued an email directive requiring Kipp to submit its amended statement by 14 April 2025. Furthermore, the Municipality was instructed to submit its statement of defence regarding the amended portion within 10 days. Kipp was also directed to submit its reply to the Municipality's statement of defence within 10 days of receipt of said statement.

[17] The arbitrator also determined that, in accordance with Article 9, read in conjunction with Article 9.1 of the AFSA Rules for Expedited Arbitration, the Municipality was duly notified in writing that failure to submit its amended statement of defence to the claimant's amended statement of claim by 12:00 on 14 May 2025 would result in the automatic forfeiture of its right to continue participating in the arbitration proceedings, and the Municipality would be excluded from further participation.

[18] Kipp complied with the arbitrator's directive, but the Municipality failed to comply. Following the failure, the arbitrator issued a ruling on 8 May 2025, thereby automatically excluding the Municipality from further participation in the arbitration proceedings.

[19] On 27 May 2025, the arbitrator further excluded the Municipality by stating as follows:

> *"Arbitrator: Mr Maude, I am in a terribly difficult position. I have made my ruling. I cannot ignore the ruling; then I would be acting unlawfully. The ruling was that, unless the amended statement of defence was filed within a week after I made the ruling and give you an extra week.*
>
> *Mr Maude : Ja*
>
> *Arbitrator: You forfeit the right to participate, and it is in terms of the rules that the parties agreed to. So I am applying the parties' rules here. And the ruling says specifically, automatically, there is no further step to be taken by me. Your client has effectively excluded himself by not complying with the ruling. And as I said, I cannot ignore the ruling. The only way that I can permit you to participate in the arbitration is if there is a court order telling me to do so. I can, after hearing the parties on an application to that effect, maybe change my mind. Or you can get your colleague's agreement to allow you to carry on participating. But absent any of those, I cannot permit you to participate. It would be unlawful.*
>
> *"In accordance with Article 9 read with 9.1 of the AFSA Rules for Expedited Arbitration, the Municipality was given notice that unless it delivers its amended statement of defence to the amended portion of Kipp's claim by 12:00 on 14 May 2025, it would automatically forfeit the right to continue to participate in the arbitration and would be excluded from further proceedings."*[1]

Relief sought

[20] Based on the arbitration ruling, the Municipality approached this court for the following relief:

> [19.1] The second respondent's rulings of 8 May 2025 and 27 May 2025 are hereby reviewed and set aside.

[1] Caselines 003-248 & 249 (Annexure AA37, Transcript).

[19.2] The final award delivered by the second respondent on 4 July 2025 under case number AFSA PTA 03072024 in respect of the remaining separated issues is hereby reviewed and set aside.

[19.3] The decision of the second respondent to exclude the applicant from further participation in the arbitration proceedings, in respect of the remaining separated issues, under case number AFSA 03072024, is hereby reviewed and set aside.

[19.4] The decision of the second respondent to rule that the applicant's counterclaim formed part of the proceedings in instances where the first respondent was a claimant, and the separation of issues was agreed upon by the parties, is hereby reviewed and set aside.

[19.5] The determination of the remaining separated issues is remitted to the third respondent within 30 days from the granting of this order, for it to appoint another arbitrator other than the second respondent, who is a Senior Counsel of no less than five years practising as such.

[19.6] The first respondent's application to have the award under review, certified as an order of court in terms of Section 31 of the Arbitration Act, which was issued at the Polokwane division of the High Court under case number 2025-108674, is hereby stayed pending the determination and finalization of these review proceedings and the remittal referenced in prayers 5 and 6 above.

[19.7] The first respondent's counter-application in these proceedings is hereby dismissed.

[19.8] The first respondent is ordered to pay the costs of this application and the costs of the counter application, such costs to include the costs consequent upon the employment of Senior Counsel on Scale C and Scale B in respect of the Junior Counsel.

Oral submissions by the applicant

[21] On behalf of the applicant, Advocate Rip SC argued that the arbitration proceedings commenced on 17 March 2025 and that the parties agreed to the separation of issues, including heads of damages and professional fees.

[22] Subsequently, during the proceedings, Kipp submitted a notice to amend its statement of claim. The applicant argued that the proposed amendment introduced two new claims, which prompted the arbitrator to instruct the Municipality to submit its objections within a reasonable timeframe if it wished to do so. Nevertheless, the Municipality did not file any objection to the proposed amendment introduced by Kipp.

[23] It was argued that established jurisprudence holds that if a proposed amendment faces no opposition, the party seeking it may proceed to amend its pleadings within the stipulated timeframes. However, the arbitrator persisted in issuing directives with specified timeframes regarding the manner and timing by which the parties were to submit their statements.

[24] The applicant contended that the arbitrator lacks the authority to direct parties to submit their pleadings. Moreover, if a party neither opposes nor takes part in amending pleadings, they should not be automatically excluded from the proceedings.

[25] It was further contended that, given the existing separation of heads of damages and professional fees, the arbitrator ought to have distinguished the amended statement of claims and continued with the arbitration proceedings that were already initiated.

[26] Consequently, the arbitrator acted unfairly by not exercising the broadest discretion and powers granted by law to guarantee a fair, economical, and final resolution of all matters in dispute, in accordance with Article 6(5) of the Rules for Expedited Arbitration. The arbitrator erred in asserting that the Municipality's counterclaim was part of the initial proceedings. Additionally, the arbitrator erred in

excluding the Municipality from arguing its counterclaim or participating in any aspect of the residual claims within the dispute.

[27] The Court should ascertain what constitutes “a fair trial" in accordance with the Constitution and case law. It must also evaluate whether the arbitrator guaranteed that all parties received a fair trial and full participation in the proceedings.

[28] Following the arbitration ruling in favour of Kipp, the applicant filed an application with the Polokwane High Court to convert the award into a court order, and the proceedings remain pending. The Municipality opposed the application, citing the principle of *lis pendens*.

Oral submissions by the respondents

[29] On behalf of the first respondent, Advocate Solomon, SC, argued that the arbitration rules differ entirely from the Superior Court Rules. The parties, in their consolidated minutes, agreed that the arbitration proceedings would be conducted in accordance with the AFSA Expedited rules.[2]

[30] It was argued that the AFSA arbitration rules “*provide the arbitrator with the widest discretion and powers allowed by the law to ensure just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the matter of costs.”*

[31] The decision rendered by the arbitrator was a discretionary exercise, authorised by the law to uphold just proceedings. This court shall not interfere with that arbitrator's discretion.

[32] Section 14(1)(a)(ii) of the Arbitration Act provides that:

> “14 Powers of arbitration tribunal and manner of arriving at decisions where the arbitration tribunal consists of two or more arbitrators

[2] AFSA Rules for Expedited Arbitration (Caselines 021-01).

(1) An arbitration tribunal may-

(a) on the application of any party to a reference, unless the arbitration agreement otherwise provides-

(i) …

(ii) require the parties to the references to deliver pleadings or statements of claim and defence or require any party to give particulars of his claim or counterclaim, and allow any party to amend his pleadings or statements of claim or defence;"

[33] It was further contended that the arbitrator acted in accordance with the law and courteously requested that the applicant submit their notice of objection; however, the applicant failed to comply. The arbitrator's ruling on 8 May 2025 explicitly referenced Rule 9.1 of the Expedited Rules and stipulated that "should the applicant neglect to submit its amended statement of defence, it shall automatically forfeit its right to continue participating in the arbitration and shall be excluded from further proceedings". Consequently, the arbitrator's determinations were not irregular and are in harmony with the law.

[34] It was further argued that, under Section 33(1)(b) of the Arbitration Act, gross irregularity must relate to the conduct of the proceedings, not the final outcome. Therefore, if an arbitrator conducts the arbitration in a highly arbitrary, high-handed, or dishonest manner, that constitutes a gross irregularity. However, a genuine mistake regarding the merits, regardless of its severity, does not qualify. Additionally, not every irregularity in the conduct of the proceedings justifies review; only those of such gravity that they prevent the affected party from having their case fully and fairly decided will suffice.

[35] Kipp will experience prejudice if the proceedings are conducted *de novo*, given that the arbitration spanned several weeks and Kipp has endured prejudice for many years.

Issues to be decided

[36] The central question to be decided is whether the arbitrator's ruling to exclude the applicant from additional participation in the arbitration proceedings, due to non-compliance in submitting an amended statement of defence within the prescribed timeframe, constitutes a gross irregularity that deprived the applicant of a fair hearing. Furthermore, the Court must determine whether such a sanction is fair under the Constitution and case law, notwithstanding its permissibility under the relevant arbitration rules.

Applicable Law

[37] Section 34 of the Constitution provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[38] Section 33 of the Arbitration Act provides that:

> "(1) Where-
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained.
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[39] In *Ellis v Morgan*,[3] the court sets out what constitutes an "irregularity" in the context of reviewing a magistrate's proceedings as follows:

[3] 1909 TS 576 at 581.

> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial… which has prevented the aggrieved party from having his case fully and fairly determined.

[40] In *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*,[4] the court held that:

> "It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity."

Arbitration Rules and the Constitution

[41] It is common cause that the parties agreed to the AFSA Rules for Expedited Arbitration. Rule 6.5 grants the arbitrator the widest discretion and powers allowed by law to ensure a just, expeditious, economical, and final determination of all disputes.

[42] However, the parties' autonomy to agree on procedural rules is not absolute. As the Constitutional Court held in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another,*[5] referring a dispute to private arbitration is a choice, and, provided it is made voluntarily, the court should respect it. The court further held that

> "… should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance."[6]

> "… as this court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions

[4] 2018 (5) SA 462 (SCA) at para 8.
[5] 2009 (4) SA 529 (CC) at para 219.
[6] Id at para 220.

around the world that arbitrations may be conducted according to procedures determined by the parties. As such, the proceedings may be adversarial or investigative, and may dispense with pleadings, with oral evidence, and even oral argument."[7]

[43] The same principle applies to arbitration rules incorporated by reference. Arbitration rules must be read and applied consistently with the Constitution. Section 39(2) of the Constitution requires that when any court interprets any legislation, or develops the common law, it must promote the spirit, purport and objects of the Bill of Rights. While the AFSA Rules are not legislation, they derive their force from the parties' agreement, which is subject to public policy, and public policy is now rooted in the Constitution.

[44] Article 9.1 of the AFSA Rules for Expedited Arbitration, insofar as it seeks to authorise an arbitrator to impose a permanent and comprehensive exclusion of a party from all facets of the arbitration proceedings, including the party's counterclaims, without the necessity to evaluate proportionality, the nature of the default, or consider less severe sanctions, is inconsistent with public policy as informed by the Constitution.

[45] The parties had an agreement to conduct piecemeal arbitration proceedings. The parties' agreement to conduct the arbitration on separate issues means the arbitrator conducts the arbitration subject to that agreement. An issue arising from a separate issue cannot bar a party from further participation in other separate issues. The misconception about the nature of the arbitration proceedings arises when the arbitrator fails to conduct the proceedings in accordance with the parties' agreement.

[46] Balancing party autonomy and constitutional fairness necessitates a contextual approach. Parties are at liberty to agree upon efficient and, at times, stringent procedural rules. They may agree to shorten timeframes, waive oral hearings, or impose penalties for non-compliance. Nonetheless, they are prohibited from agreeing to a procedure that deprives a party of any realistic opportunity to

[7] Id at para 223.

present its case or to respond to the opposing party's case. The right to a fair hearing under section 34 is non-waivable. An arbitration agreement that purports to authorise a permanent and total exclusion from proceedings without judicial oversight or a proportionality inquiry breaches this constitutional threshold. However, this does not imply that all exclusion orders are invalid. A carefully tailored exclusion confined to a specific claim, accompanied by warnings and proportionate to the default, may well be upheld. The defect herein lies in the *automatic* and *total* nature of the exclusion, rather than the exclusion itself.

[47] The Supreme Court of Appeal in *Telcordia Technologies Inc v Telkom SA Ltd*,[8] the court held that:

> "[T]he Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system that the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."

[48] It is trite that parties in arbitration proceedings are exercising their autonomy. The duty of this Court is to ensure that when parties are exercising their autonomy, they do so within the confines of the Constitution. The Court should not intrude on voluntary agreements lightly; however, there should be more compelling evidence and reasons for the Court to do so. *In casu*, the Court must exercise the same discretion in assessing the agreement between the parties and whether it was executed within the confines of the law.

Evaluation

[49] The arbitrator's ruling of 8 May 2025, and its confirmation on 27 May 2025, had the effect of excluding the Municipality not only from defending the amended

[8] 2007 (3) SA 266 (SCA) at para 47 (Quoting from *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at para 13).

portions of Kipp's claim, but from the entire arbitration, including the Municipality's own counterclaim. I find this to be a gross irregularity for several reasons.

[50] *Firstly*, the sanction was disproportionate. The Municipality's failure to file an amended statement of defence in response to an amendment of the statement of claim constituted a default. However, this default, although potentially blameworthy, did not warrant or justify exclusion from the proceedings in their entirety.

[51] I concur with counsel for the applicant that the arbitrator, instead of imposing a sanction of exclusion from the entire proceedings due to a procedural default, whether pursuant to Article 9 or any other relevant statute, should have carefully considered the following factors:

> (a) Was the nature and gravity of the default wilful, grossly negligent, or merely negligent?
> (b) Can the prejudice caused to the other party be cured by a punitive costs order?
> (c) The existence of less drastic sanctions, such as deeming the amended allegations admitted, striking out a defence only to the new claim, or granting a final postponement with a peremptory deadline.
> (d) Whether the defaulting party has a pending counterclaim or a separate issue that does not depend on the default, excluding the party from its own claim amounts to a denial of access to the courts.
> (e) The stage of the proceedings at which exclusion may be more justifiable is after repeated warnings and flagrant disregard, but not at first default.

[52] I consider the arbitrator's failure to conduct a proportionality enquiry, by imposing a total permanent exclusion without taking these factors into account, to constitute an act of irregularity.

[53] *Secondly*, the arbitrator misunderstood the character of the inquiry. The parties had concurred to separate the issues. The Municipality's counterclaim had already been filed and was pending. The arbitrator regarded the procedural default

on a portion of Kipp's amended claim as nullifying the Municipality's right to engage in any aspect of the dispute, including its own claim. I consider this a fundamental misinterpretation of the arbitration agreement and the powers vested in the arbitrator.

[54] *Thirdly*, I believe that the arbitrator's reliance on Article 9.1 of the AFSA Rules and the broad discretion afforded to the arbitrator cannot supersede the constitutional right to a fair hearing. If Article 9.1 is interpreted as requiring permanent and total exclusion from proceedings regardless of context, then such an interpretation is contrary to public policy and unenforceable. A correctly construed reading of Article 9.1, which aligns with constitutional principles, would necessitate that the arbitrator exercise discretion, consider less severe sanctions, and ensure that any exclusion is proportionate and limited to the specific default involved.

[55] The first respondent argues that the parties agreed to these rules and must abide by them. That argument carries weight, but it is not conclusive. In *Lufuno Mphaphuli*,[9] the Constitutional Court made clear that party autonomy in arbitration is respected only insofar as it does not violate constitutional norms. A procedure that permanently silences a party, preventing it from pursuing its own claim or defending against others, without any judicial scrutiny, is precisely the kind of unacceptable excess that the Constitution prohibits.

[56] The first respondent also argues that the Municipality was properly notified but failed to act. This is correct. However, the key issue is not whether the Municipality defaulted, which it did. Instead, the question is whether the disciplinary action taken by the arbitrator was lawful and fair. The evidence presented to this court shows that it was not.

[57] The arbitrator's behaviour was more than just a mistake in exercising discretion; it was an irregularity because it changed the entire nature of the proceedings. The arbitrator misunderstood his role, thinking he lacked the authority to change his decision without court approval (para 18 above). He neglected the discretion specifically given by Rule 6.5.

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[9] Above n 5.

[58] Furthermore, the arbitrator applied the rule in an automatic and mechanical manner, without any inquiry into proportionality or the separate issues involved. I agree that a genuine error on the merits, even if serious, would not warrant review. However, in this case, the *method* of decision-making was fundamentally flawed; the arbitrator failed to undertake the inquiry implicitly mandated by the Constitution and the Arbitration Act. This constitutes the very definition of a gross irregularity.

Conclusion

[59] For these reasons, the Court finds that the arbitrator's rulings of 8 May 2025, 27 May 2025, and the final award of 4 July 2025 are tainted by gross irregularity. The applicant was denied a fair hearing in violation of section 34 of the Constitution.

[60] The matter must be remitted to AFSA for determination by a different arbitrator.

[61] It is upon this basis that the dispute between the parties is yet to be resolved, and the relief sought by the first respondent to make the arbitration award an order of the Court is dismissed because the matter is remitted back to arbitration.

Order

[62] The following order is made:

1. The second respondent's rulings of 8 May 2025 and 27 May 2025 are hereby reviewed and set aside.
2. The final award delivered by the second respondent on 4 July 2025 under case number AFSA PTA 03072024 is hereby reviewed and set aside.
3. The decision of the second respondent to exclude the applicant from further participation in the arbitration proceedings is hereby reviewed and set aside.

4. The determination of all remaining issues, including the applicant's counterclaim, is remitted to the third respondent (AFSA) within 30 days of this order, for the appointment of a new arbitrator who is a Senior Counsel of no less than five years' standing.

5. The first respondent's application to have the award certified as an order of court is hereby dismissed because of the new arbitration proceedings referred to in paragraph 58 above.

6. The first respondent's counter-application is dismissed.

7. The first respondent is ordered to pay the costs of this application and the counter-application, including the costs consequent upon the employment of senior counsel on Scale C and junior counsel on Scale B.

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K MOGALE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 22 April 2026
Date of judgment: 02 June 2026

Appearances:

Applicant's counsel:	Advocate Rip SC
Junior counsel:	Advocate W Maodi
Instructed by:	Mmakola Matsimela Attorneys
First Respondent's counsel:	Advocate Solomon SC
Instructed by:	Michael Ramphela's Attorneys