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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 420/19, J 424/19,
J430/19, J431/19,
J432/19, J438/19,
J439/19, J440/19,
J443/19 and J444/19

In the matter between:

ANGLO GOLD ASHANTI LIMITED t/a

ANGLO GOLD ASHANTI (J420/19)

First Applicant

**LONMIN PLATINUM COMPRISING WESTERN
PLATINUM AND EASTERN PLATINUM LIMITED t/a**

LONMIN PLATINUM (J424/19)

Second Applicant

RUSTENBURG PLATINUM LIMITED t/a

RUSTENBURG PLATINUM (J430/19)

Third Applicant

HARMONY GOLD MINING COMPANY LIMITED t/a

HARMONY GOLD (J431/19)

Fourth Applicant

**VILLAGE MAIN REEF (PTY) LTD, TAU LEKOA
(PTY) LTD and KOPANONG (PTY) LTD t/a**

VILLAGE MAIN REEF (J432/19)

Fifth Applicant

NORTHAM PLATINUM LIMITED t/a

NORTHAM PLATINUM (J438/19)

Sixth Applicant

MARULA PLATINUM (PTY) LTD (J439/19)	Seventh Applicant
IMPALA PLATINUM LIMITED	
t/a IMPALA PLATINUM (J440/19)	Eighth Applicant
GLENCORE OPERATIONS SA (PTY) LTD (J443/19)	Ninth Applicant
BUSHVELD VAMETCO ALLOYS (PTY) LTD (J444/19)	Tenth Applicant
and	
ASSOCIATION FOR MINEWORKERS AND CONSTRUCTION UNION	First Respondent
EMPLOYEES LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION (J420/19)	Second Respondent
EMPLOYEES LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION (J424/19)	Third Respondent
INDIVIDUALS LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION (J430/19)	Fourth Respondent
THE PERSONS WHOSE NAMES APPEAR ON ANNEXURE "A1" TO THE NOTICE OF MOTION (J431/19)	Fifth Respondent
EMPLOYEES LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION (J432/19)	Sixth Respondent
EMPLOYEES LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION (J438/19)	Seventh Respondent
EMPLOYEES LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION (J439/19)	Eight Respondent
EMPLOYEES LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION (J440/19)	Ninth Respondent
MEMBERS OF AMCU EMPLOYED BY THE APPLICANT (J443/19)	Tenth Respondent

MEMBERS OF AMCU EMPLOYED BY**THE APPLICANT (J444/19)****Eleventh Respondent****Heard: 27 and 28 February 2019****Delivered: 15 March 2019**

JUDGMENT

PRINSLOO, JIntroduction

- [1] Sibanye Gold Limited trading as Sibanye Stillwater (Sibanye) operates a number of gold mines which are divided into three separate business units, viz Driefontein and Kloof in Gauteng and Beatrix in the Free State. Sibanye recognised NUM, Solidarity, UASA and AMCU (the recognised unions) for collective bargaining purposes.
- [2] Negotiations between the recognised unions, Sibanye and other companies in the gold mining industry in regards to wages and terms and conditions of employment for the period 1 July 2018 to 30 June 2021 commenced on 11 July 2018 at the Minerals Council South Africa (Minerals Council) (previously known as the Chamber of Mines). A collective agreement was eventually concluded on 14 November 2018 between the Minerals Council on behalf of Sibanye, NUM, UASA and Solidarity. AMCU was not party to the collective agreement and to date AMCU and Sibanye have not reached an agreement.
- [3] AMCU commenced with industrial action at Sibanye on 21 November 2018. The strike is still ongoing and has resulted in a number of urgent applications in this Court since its commencement.
- [4] On 20 February 2019, Anglo Gold Ashanti Ltd (Anglo Gold), Harmony Gold Mining Company (Harmony) and Village Main Reef (Village), Western and Eastern Platinum Ltd (Lonmin), Rustenburg Platinum Mine (Rustenburg), Northam Platinum Ltd (Northam), Marula Platinum Mine Ltd (Marula) and

Impala Platinum Mine (Impala), all received a notice of a secondary strike action from AMCU.

- [5] The strike notice indicates that the secondary strike will be in support of the protected strike action at Sibanye and relates to a dispute concerning wages and other conditions of employment. The secondary strike action was to commence on 28 February 2019 and continue for the full duration of the protected strike at Sibanye and until such time that the issue in dispute is resolved. It has since been clarified by AMCU that the duration of the secondary strike would only be for the period 28 February 2019 until 7 March 2019, thus a period of seven days.
- [6] On 21 February 2019, Glencore Operations South Africa (Pty) Ltd (Glencore) and Bushveld Vametco Alloys (Pty) Ltd (Bushveld) also received a notice of a secondary strike action from AMCU. The only difference is that this strike notice indicated that the secondary strike action will commence on 1 March 2019.
- [7] It was agreed between the parties that all the applications be consolidated and that there be one judgment in respect of all the applications. The Applicants will be referred to individually where necessary and collectively as the 'Applicants'.
- [8] The Applicants operate in the gold (Anglo Gold, Harmony and Village, platinum (Lonmin, Rustenburg, Northam, Marula and Impala), vanadium (Bushveld) and chrome (Glencore) mining industry and they approached this Court on an urgent basis to declare the secondary strike action unprotected on the basis that it does not comply with the requirements of a secondary strike, as envisaged in section 66(2)(c) of the Labour Relations Act¹ (LRA).

Legal principles

- [9] Section 23(1) and (2) of the Constitution² provide *inter alia*, that everyone has the right to fair labour practices and that every worker has the right to participate in the activities and programmes of a trade union and to strike. Section 23(5) of the Constitution provides for the enactment of national legislation to regulate collective bargaining. The LRA was promulgated pursuant thereto to provide

¹ Act 66 of 1995 (as amended).

² Constitution of the Republic of South Africa, 108 of 1996.

particularity and content to section 23 of the Constitution and to give effect to the rights afforded therein.

[10] AMCU submitted that the Constitution makes no distinction between a primary and secondary strike and that AMCU and its members rely on these rights as a fundamental tool to protect the right to engage in collective bargaining as well as the broader purpose and objectives of the LRA.

[11] It is so that the Constitution does not make a distinction between primary and secondary strikes, but the LRA, which gives content to the right to strike, makes a clear distinction between primary and secondary strikes. *In casu*, the Applicants' challenge is aimed at the secondary strike which AMCU has called.

[12] In *Clidet No 957 (Pty) Ltd v South African Municipal Workers Union and Another*³, the Court confirmed that the right to engage in secondary strike is not unfettered. The model adopted by the LRA recognises that it is legitimate for a union to place additional pressure on the primary employer to meet its demands by calling out its members employed by another employer, subject to the procedural requirements introduced by section 66(2)(a) and (b), and the reasonableness requirement introduced by section 66(2)(c).

[13] The requirements set out in section 66(2) of the LRA must be met for a secondary strike to be protected and before employees may engage in such strike action.

[14] Section 66(2) of the LRA provides that:

No person may take part in a secondary strike unless-

- (a) the strike that is to be supported complies with the provisions of sections 64 and 65;
- (b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and

³ [2011] 3 BLLR 225 (LC) at para 7.

(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer'.

[15] The requirements in section 66(2)(a) and (b) are procedural, while the requirement in subsection (c) is a substantive limitation on secondary strike action.

[16] *In casu*, and for purposes of this judgment I accept that the strike to be supported is protected and that AMCU has given the Applicants seven days' written notice of the proposed secondary strike action. There is thus compliance with the procedural requirements and this application turns on the third requirement of reasonableness.

[17] Section 66(c) of the LRA places emphasis on the effect that the secondary strike may have on the business of the primary employer and this is a factor that requires consideration in determining the reasonableness of the strike. This entails an enquiry into the nature and extent of the secondary strike, which involves an enquiry into its impact on the secondary employer. It also entails an enquiry into the possible direct or indirect effect that the secondary strike may have on the business of the primary employer. Ultimately, it is a proportionality assessment aimed at determining whether the harm caused by the secondary strike to the secondary employer is in proportion to the effect or impact or potential effect or impact on the business of the primary employer. If the harm caused to the secondary employer is in proportion to the effect of the secondary strike on the business of the primary employer, the secondary strike satisfies the requirements of section 66(2)(c) of the LRA and the strike will be protected and if it does not, the strike will be unprotected.

[18] Essentially, it is an enquiry into the extent of the pressure that is placed on the primary employer.⁴

[19] The relevant legal principles in regard to the reasonableness requirement were enunciated in *SALGA1* as follows:

'Whether or not a secondary strike is protected is determined by weighing up two factors - the reasonableness of the nature and extent of the secondary

⁴ See: *SALGA v SAMWU* (2007) 28 ILJ 2603 (LC) at para 16 (*SALGA1*).

strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, *inter alia*, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs) and secondly, the effect of the secondary strike on the business of the primary employer, which is in essence an enquiry into the extent of the pressure that is placed on the primary employer'.

[20] The Labour Appeal Court (LAC) in *SALGA v SAMWU*⁵ (*SALGA 2*) upheld *SALGA 1* and confirmed that section 66(2)(c) of the LRA imported a proportionality test and that the proportionality enquiry involved in section 66(2)(c) is about the weighing up of two factors: the reasonableness of the nature and extent of the secondary strike, thus the effect of the strike on a secondary employer and the effect of the nature and extent of the secondary strike on the business of the primary employer.

[21] In *SALGA2*⁶, the LAC confirmed that:

'Under the heading of proportionality, the court must weigh the effect of the secondary strike on the secondary employer and the effect of the nature and extent of the secondary strike on the business of the primary employer. The sub-section does not require actual harm to be suffered by the primary employer but that there must be the possibility that it may. The harm that the employer may suffer is not required to be direct. It may be harm that indirectly affects the business of the primary employer. It would, therefore, in every case require a factual inquiry to determine whether or not the possible effect the secondary strike will have on the business of the primary employer is reasonable. The harm that may be suffered by the secondary employer must be proportional to the possible effect the secondary strike may have on the business of the primary employer.' (Own emphasis)

[22] In my view this factual enquiry does not permit the grouping together of a collection of secondary employers in a specific industry and assessing what the combined effect of a broader industry the secondary strike would have on the primary employer. Such an approach will ignore a critical question namely; the effect the secondary strike may have on the business of the primary employer in relation to the secondary employer, which calls for a consideration of the facts

⁵ (2011) 32 *ILJ* 1886 (LAC) at para 9.

⁶ *Id* n 5 at para 10.

and an assessment of factors relevant to each secondary employer. To do differently would deprive each single secondary employer of the protection afforded to them by section 66(2)(c) of the LRA.

[23] In *Samancor Ltd and Another v National Union of Metalworkers of SA*⁷ (*Samancor*) the Court held that:

'If an interdict is sought, the onus rests on the secondary employer, even on the return day, to prove that the interdict should be granted. The employer must show that the conditions for embarking on a secondary strike have not been met. The employer would therefore also have to show that, as in this case, the secondary strike is unreasonable or not proportional.

The union would have to rebut any *prima facie* case that the employer make out and may have to justify its decision to have embarked on the secondary strike'.

[24] As already alluded to, the enquiry requires a consideration of, *inter alia*, the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs. These factors must be considered in respect of each secondary employer.

[25] I will set out the relevant facts presented by each of the Applicants, wherein they have addressed the aforesaid factors on an individual basis in support of their cases that the secondary strike is unreasonable and thus unprotected as it does not comply with the requirements of section 66(2)(c) of the LRA. AMCU filed a generic response that applies to all the Applicants and which will be dealt with in more detail *infra*. Insofar as there is a specific response relating to an individual Applicant only, it will be addressed separately.

[26] In respect of all the Applicants, AMCU submitted that they are members of the Minerals Council and can therefore persuade Sibanye as a co-member to acceded to its demands. It submitted further that the natural consequence of any protected strike action is that there will be an interruption in production and that the Applicants may make use of replacement labour.

AngloGold's Case (J420/19)

⁷ (1999) 20 ILJ 2941 (LC), [1999] 11 BLLR 1202 (LC) at paras 5 to 6.

- [27] AngloGold finalised a large scale restructuring exercise at the end of 2018, which was done primarily to downsize its business to ensure long term sustainability. The Mponeng Mine is AngloGold's only remaining underground business unit and its profitability remains marginal. The said mine has an eight-year lifespan of mining, with a challenging cost profile, and further capital to extend the life of the mine is uncertain and depends on a number of factors, such as financial factors and investor confidence.
- [28] The total workforce at the Mponeng Mine is 4 760 employees, of which 3 191 (67%) are AMCU members. The secondary strike notice indicated a full work stoppage by all AMCU members.
- [29] Anglo Gold's case is that if AMCU members were to embark on a secondary strike action, it would severely disrupt its operations in that the Mponeng mine would be unable to run production for the entire duration of the secondary strike. AngloGold will suffer production losses of 34 kg of gold per day, or put differently, will suffer a daily production loss of R 20 400 000, which cannot be recovered. The secondary strike action will prejudice the financial viability of the Mponeng mine and the employment security of all its employees. The effect of the secondary strike will be devastating.
- [30] Apart from production losses, AngloGold will have to incur costs arising from its obligation to continue essential services which include ventilation and refrigeration for the duration of the strike. AngloGold is a deep level gold mine and any work stoppages without the necessary planned stoppage procedures being followed may compromise safety.
- [31] In respect of a possible direct or indirect effect that the secondary strike may have on the business of the primary employer, AngloGold's argument is that it does not have any commercial relationship or interaction with Sibanye. The only link between Sibanye and Anglo Gold is that they bargain collectively at a centralised forum, represented by the Minerals Council. However, each mining company concludes its own individual wage agreement governing wages and other conditions of employment for its own business. A wage agreement was concluded between the Minerals Council acting on behalf of AngloGold on the one hand and AMCU, NUM, UASA and Solidarity on the other, for the period 2018 – 2021.

- [32] Based on the fact that each mining house concludes its own wage agreement, the secondary strike will have no impact whatsoever on the collective bargaining process between Sibanye and AMCU, it would not persuade Sibanye to negotiate a better wage deal and it would have no commercial impact on Sibanye, just as the primary strike has had no impact on AngloGold's operations in terms of attendance, production or from a market share price perspective.
- [33] Since the primary strike is going into its fourth month, it is unlikely that a secondary strike of seven days will have any impact on the primary strike at this stage. As Sibanye and AngloGold are competitive gold producers, a secondary strike resulting in AngloGold being unable to produce, would rather give Sibanye a competitive advantage.
- [34] In respect of the harm caused by the secondary strike to the secondary employer, AngloGold's case is that it stands to suffer considerable losses, whereas the secondary strike will have no effect on Sibanye, instead it may increase levels of violence as tensions may run high from secondary strikers who would not be paid in accordance with the 'no work no pay' principle, in support of a cause in which they have no interest. Furthermore, all the other recognised trade unions do not support the secondary strike. AngloGold would have to continue to remunerate its remaining workforce for the duration of the secondary strike, in an instance where production is lost.
- [35] In answer to AngloGold's case, AMCU submitted that AngloGold could appoint replacement labour, that it is a significant player in the mining industry and also that a strike of seven days at AngloGold cannot give Sibanye, who is facing a prolonged strike, any competitive advantage.
- [36] AngloGold made it clear that the appointment of replacement labour always brings with it significant risk to increased intimidation and violence. Furthermore, it is impossible to appoint a person and have them pass through the induction, medical assessment and training process, associated with such appointment, within seven days, as it takes over a week or more to take a person through the induction process alone. Most of AMCU's members fall within job categories where they are predominantly involved in the production and operation of equipment used in that process, which requires a significant level of skill and experience and which cannot be obtained in a short period of time.

- [37] AngloGold disputed that it is a significant player in the gold mining industry as it has only one operating shaft in South Africa. AngloGold has a total of 6 662 employees and by comparison, Sibanye employs in excess of 52 700 employees and Harmony employs 31 500 employees.
- [38] In conclusion, AngloGold's case is that the secondary strike will have the effect of stopping its operations and will have no effect on Sibanye's operations. Sibanye has continued to operate despite an almost four- month long strike.

Lonmin's Case (J424 /2019)

- [39] Lonmin's case is that it operates in a different sector of the mining industry as it operates in the platinum sector whereas Sibanye operates in the gold mining sector. Lonmin does not have any commercial relationship with Sibanye and there is no other co-operative arrangement or relationship agreement or nexus between them.
- [40] Lonmin and Sibanye are independent of each other and Lonmin has no influence over Sibanye and cannot exert any pressure on it.
- [41] In March 2018, an application was made for a merger approval with Sibanye as the primary acquiring firm and Lonmin as the primary target firm. Approval was conditionally granted but was, pursuant to an appeal, subsequently suspended. There is currently no merger between the parties as the appeal has suspended the entire transaction.
- [42] Lonmin submitted that as it has no influence over Sibanye and cannot exert any pressure on it, therefore, a secondary strike cannot have any impact on the business of Sibanye. Lonmin bargains at workshop level whereas Sibanye bargains collectively with other gold producers at the Minerals Council.
- [43] The secondary strike would be disproportional as the primary strike involves approximately 12 000 employees (just short of 33%) of Sibanye's workforce. A strike at Lonmin would involve 18 792 AMCU members, out of a total workforce of 22 510 (83%) and would thus affect the entire workforce and would bring the entire Marikana operation to a standstill. It would also have an impact on independent contractors and their employees as well as the surrounding communities, who are shareholders in Lonmin.

- [44] Furthermore, Lonmin is nearing the end of a three-year collective agreement with AMCU and the parties would enter into new wage negotiations in May 2019 in respect of the collective agreement that expires on 30 June 2019. A secondary strike would operate disproportionately unfairly against Lonmin in circumstances where it will soon enter into its own negotiations where the prospect of industrial action is a reality.
- [45] Lonmin will lose significant production on a daily basis, which losses will not be recovered. Lonmin's financial position is vulnerable, its liquidity is weak and will worsen where the fixed costs do not stop when production stops. Lonmin's operations are not diversified and when production stops, Lonmin's revenue stops and its liquidity will worsen as it remains vulnerable to uncontrollable events.
- [46] The reality is that for whatever period the strike lasts, the effect of the strike is actually longer as when the strike ends, it takes time to fully ramp up production again.
- [47] Lonmin is a competitor of a subsidiary of Sibanye and a secondary strike may benefit Sibanye instead of having a negative impact on its business.
- [48] Lonmin also submitted that the strike at Sibanye is violent and it would be grossly unfair to expose its employees to such a risk where it has no control or influence over the primary strike. Lonmin has in the past experienced a violent strike by AMCU, which necessitated an urgent application to this Court to interdict such violence. The violence associated with the Sibanye strike, coupled with Lonmin's own experience, is indicative of the risk Lonmin faces in the event of a secondary strike, with no method of stopping it, for example by acceding to a demand. AMCU is in no position to guarantee that the strike would not become violent.
- [49] Lonmin has the right to operate its business without an unprotected and unreasonable secondary strike, more so in circumstances where the said strike action has no prospect of influencing the business of Sibanye. The secondary strike will have a profound effect on Lonmin and its workforce, it will cripple production, raise the spectre of violence and potentially influence the upcoming wage negotiations.

- [50] In answer to Lonmin's averments, AMCU submitted that Lonmin could appoint replacement labour during the secondary strike to mitigate its losses, that it is a significant player in the mining industry and that, damage to the business of Lonmin cannot benefit a subsidiary of Sibanye as the strike at Sibanye is ongoing.
- [51] Lonmin made it clear that in the past instances of industrial action, it was unable to use replacement labour and that it had to bring numerous urgent applications to this Court seeking protection to prevent non-striking employees from being *inter alia*, interfered with and intimidated when seeking to tender their services. The reality is that AMCU will not allow replacement labour at Lonmin during the secondary strike. Furthermore, the period to introduce a new recruit to the production environment is three months. It involves a process of induction, medical assessment and a training process. Lonmin does not have the time or capacity to replace 82% of its workforce, amounting to more than 18 000 individuals. The skills required are extensive and varied and are not always available on short notice.
- [52] Lonmin reiterated that a strike at its mine will not affect Sibanye's growth outlook and increase socio-economic pressure on Sibanye to settle the dispute with AMCU. Sibanye has plans in place to keep its liquidity in check, regardless of the primary strike.
- [53] Lonmin further reiterated that it plays no role in the collective bargaining forum at the Minerals Council, unlike coal and gold producers.
- [54] In conclusion, Lonmin's case is that the secondary strike will have no effect on Sibanye, but the effect on Lonmin is that it would bring its entire production to a standstill and the only impact on Sibanye would be to destroy or severely disadvantage a competitor in the platinum sector, to Sibanye's benefit.

Rustenburg's Case (J430/19)

- [55] Rustenburg's case is that it has no factual nexus with Sibanye, but that it maintains a commercial relationship with Sibanye Rustenburg Platinum Mines, with whom it has entered into a sale and purchase agreement in terms of which it sold its Rustenburg operations to Sibanye Rustenburg Platinum Mines. The said parties also concluded a 'concentrate agreement' and a 'use and access'

agreement and as the ultimate parent company, Sibanye guaranteed the obligations of Sibanye Rustenburg Platinum Mines under the said agreements and no direct nexus will arise between Rustenburg and Sibanye until such a time as Sibanye Rustenburg Platinum Mines defaults under the aforesaid commercial agreements.

- [56] Rustenburg's operations are broadly divided between mining activities and processing of Anglo American Platinum Limited's activities. Given the substantial level of AMCU's representivity at Rustenburg's mining operations, the absence of AMCU employees will likely result in production coming to a standstill. It may be necessary to implement a controlled shut down of Rustenburg's processing operations, which would mean that the processing operations would also come to a standstill. This would impact on numerous third parties as Rustenburg has third-party purchase of concentrate arrangements with various mining companies, which in turn would have commercial implications. There is also an anticipated revenue loss of R 210 million per day as a result of the secondary strike as well as other financial, structural and safety consequences.
- [57] Rustenburg will need to maintain its daily fixed costs of R 71 million during the strike action. Rustenburg can ill-afford any disruptive effect on its productivity, efficiency and revenue, which will have an effect on the viability of the business and job security of Rustenburg's employees.
- [58] It submitted that in addition to the commercial consequences of the secondary strike, such a strike can result in an uncontrolled shut down of the processing operation which could have catastrophic financial, structural and safety consequences. It will be necessary to implement a controlled shut down to avoid the catastrophic consequences, in which event Rustenburg will lose significant production daily. This loss will not be limited to the duration of the strike, because there will have to be a controlled ramp-up time to get the entire process functioning and stable again, which process will take one month to finalize.
- [59] Rustenburg submitted that drawing from past experiences of intimidation and violence during strikes, it has an apprehension that non-striking employees will be prevented or dissuaded from tendering their services. The primary strike displayed incidents of violence, intimidation and other unlawful acts, which

shows that it has gone beyond the realm of orderly collective bargaining and peaceful picketing. This is an issue of concern to Rustenburg, given the history of violent strikes in the platinum sector since Marikana in 2012.

- [60] Rustenburg submitted that the secondary strike will occur in the already plagued mining industry and that it should not be viewed in isolation, but in light of AMCU's stated intention to bring the industry to a halt, which is an ill-conceived show of power with no regard for the industry as a whole. In the current difficult economic times, Rustenburg can ill-afford any disruptive effect on its productivity, efficiency and revenue.
- [61] Rustenburg submitted that it is in no position to exert any influence over the decision making of Sibanye's shareholders, the board or executive management. Rustenburg does not participate in wage negotiations in the gold industry and is therefore in no position to prevail over negotiations between Sibanye and AMCU and cannot exert any pressure on Sibanye and therefore, a secondary strike cannot have an impact on the business of Sibanye.
- [62] The secondary strike would be disproportional as it will have no direct effect on the business of Sibanye, and any indirect effect is likely to be insignificant and delayed. As Rustenburg is in no position to influence the resolution of the dispute underlying the primary strike, the secondary strike will serve no real purpose.
- [63] In answer to Rustenburg's case, AMCU submitted that Rustenburg has a commercial relationship with Sibanye Rustenburg Platinum Mines by virtue of which it could engage with the management of Sibanye Rustenburg Platinum Mines and Sibanye, to influence Sibanye's decision to accede to AMCU's demands. Furthermore, Rustenburg could appoint replacement labour during the secondary strike to mitigate its losses, that it is a significant player in the mining industry and that the harm that may be suffered by Rustenburg for a period of seven days, is proportional to the possible effect that the strike may have on Sibanye's business.
- [64] This is so because there is no factual basis for the losses Rustenburg claims will take place, AMCU has very limited membership at Rustenburg and its operations will not be brought to a complete standstill should its members

embark on a secondary strike. Rustenburg will still be in a position to make revenue on a daily basis.

[65] Rustenburg made it clear that the placement of temporary employees at its mining and processing operations cannot happen immediately as temporary labour is not always available given the complex nature of its operations and where such labour is available, the induction and training process of such employees will take longer than the duration of the strike.

[66] Rustenburg pointed out that AMCU was selective in referring to its membership at Rustenburg's operations and ignored its membership at Dishaba Mine (79,7%), Tumela Mine (78,7%), Amandelbult Mine (47,2%), Mototolo Concentrator Plant (41,3%), Mortimer Smelter (47%) and Base Metals Refiner (54,2%). In addition, Rustenburg's processing operations are complex and requires fewer, specially qualified employees and the absence of one highly-skilled or qualified employee from the process chain, negatively impacts on the sustainability of the entire process. The absence of AMCU members has the potential to bring production to a standstill as critical areas of the plant may not have employees to oversee their operations. Furthermore, past experiences of intimidation and violence during strikes have prevented or dissuaded non-striking employees from tendering their services, which results in even fewer employees tendering their services and increasing the possibility of operations coming to a standstill.

Harmony's Case (J431/2019)

[67] Harmony employs approximately 31 327 employees at 11 gold mining operations in the Free State, Gauteng and North West. AMCU represents 7 549 (24%) of employees within Harmony's workplace. NUM is the majority trade union and its members, members of other trade unions and non-unionised employees account for 23 823 of the workforce, who would not support a secondary strike action called by AMCU.

[68] On 3 October 2018, a collective agreement was concluded at the Minerals Council between Harmony, NUM, UASA and Solidarity, settling all wage disputes and other conditions of employment for the period 2018 to 2021. This

agreement was extended in terms of section 23(1)(d) of the LRA to AMCU members at Harmony and they are bound by the said wage agreement.

[69] Harmony's case is that the secondary strike called by AMCU will be unreasonable and will have no direct or indirect effect on the business of Sibanye. There is no nexus between Harmony and Sibanye who are in fact, competitors, competing for capital investment in the market. Harmony does not exert any influence over the decision making of Sibanye, nor does it have any common major shareholders with Sibanye and there are no shared services or interdependence whatsoever between it and Sibanye's mining operations.

[70] A secondary strike at Harmony's operations would cause significant harm to its operations and its employees, with the likelihood of violence spreading, but would not have any direct or indirect effect on the business of Sibanye. There is ongoing union rivalry between AMCU and NUM and the secondary strike will inevitably lead to clashes between AMCU members who are on strike and other union members who want to tender their services during the strike. The disruption of Harmony's operations in support of a strike at an unrelated primary employer, will result in a negative counter-reaction. The climate remains volatile and there is a real likelihood that violence will erupt.

[71] Harmony is a gold mining company which operates under financial strain in a depressed economy and the secondary strike would lead to significant loss of production and financial damages which it would not be able to recover. Disrupted operations will affect the production bonuses of non-striking employees and will result in major daily financial losses for Harmony.

[72] A secondary strike will have a devastating impact on Harmony as well as the majority of its employees who are not participating in the strike. Past experience has shown that even a minority of employees can bring a mining operation to an almost complete standstill. Harmony operates with mixed teams comprising different trade unions and should a number of employees from a production team be absent due to participation in the secondary strike, the whole team cannot work as it is not practically possible or safe to operate with incomplete teams. It is also not possible or feasible to, on short notice, reconstitute team composition where skills, training and other legal issues are peremptory requirements. AMCU members occupy key positions within the production

teams and despite the fact that AMCU is the minority trade union, their concentrated representation in certain key positions could result in a total cessation of production at the affected operations.

- [73] In answer to Harmony's case, AMCU submitted that non-striking employees have protection against unlawful conduct and that AMCU and its members intend to embark on a peaceful stay away. Harmony responded by submitting that inter-union rivalry is prevalent in the mining sector and there have been several instances in the past where so-called 'peaceful stay aways' have resulted in intimidation and violence, as had been experienced by Harmony in the recent past. Harmony submitted that a bus transporting its employees had been stoned on several occasions as a result of the primary strike.
- [74] AMCU further submitted that Harmony may employ replacement labour to mitigate its losses and that it is a significant player in the mining industry. A strike at Harmony will affect Sibanye's growth outlook in real terms and increase the socio-economic pressure on Sibanye to settle the dispute with AMCU.
- [75] Harmony made it clear that it would not be able to employ replacement labour during the secondary strike as it cannot, on short notice or during a seven-day period, recruit, train and reconstitute production teams to maintain normal production. The recruitment of thousands of employees is logistically complex and impossible to effect within the seven days of the secondary strike. Furthermore, in view of the fact that AMCU called for a secondary strike within the gold, platinum and coal sectors, there will be a severe shortage of available replacement labour.

Village Main Reef's Case (J432/19)

- [76] Village includes reference to Tau Lekoa and Kopanong, private companies conducting gold mining operations. Village employs over 6 300 employees at its various operations and it received a notice of the secondary strike action in respect of AMCU members employed by Village at Tau Lekoa and Kopanong. The majority trade union at all Village's operations is NUM. AMCU has 18% membership at Tau Lekoa and 33% membership at Kopanong.
- [77] Village submitted that AMCU made the same wage demands to it as are being made to Sibanye. However, on 4 October 2018, a collective agreement was

concluded at the Minerals Council between Village, NUM, UASA and Solidarity, settling all wage disputes and other conditions of employment for the period 2018 to 2021. This agreement was extended in terms of section 23(1)(d) of the LRA to AMCU members at Village and as such, AMCU and its members are bound by the said collective agreement.

- [78] Village stated that there is no nexus between it and Sibanye which could be used to exert pressure or in any way influence Sibanye to submit to AMCU's demands. There is no geographical link between the operations of Village and Sibanye and they do not share any commodities, assets, resources or shareholders. Village is wholly owned by a private Chinese company.
- [79] The only link between Sibanye and Village is the fact that they both operate in the gold mining industry. Village's case is that both are indeed competitors.
- [80] Village further submitted that the secondary strike will have no effect on the primary strike, but the effect of the secondary strike on it and its employees would be catastrophic as it would lead to employee unrest and violence and it would have a negative effect on the financial position and continued viability of the mines. It would also impact on production bonuses of employees.
- [81] Village anticipates not only that violence will be perpetrated by AMCU members, but also that there would be a significant resistance to the secondary strike from the majority of other employees who are not AMCU members. Although AMCU represents only 18% and 33% of the employees at Tau Lekoa and Kopanong, each stope team consists of 12 to 20 employees who fulfil different roles and the team is dependent on each member and a skills gap would render the team useless in respect of production and unsafe in respect of health and safety considerations. In short, the mines will not be able to operate in the event of a strike.
- [82] Village notes that AMCU plans a stay away, however, it submitted that there is a real likelihood of violence and in view of AMCU members' conduct at Sibanye, there is no guarantee that non-AMCU employees will not be attacked and intimidated on their way to work.
- [83] The employees' remuneration is made up of a 30% production bonus, which is paid monthly. In the event that non-striking employees are prevented from

working as a result of the secondary strike, they will not qualify for production bonuses and they will forfeit 30% of their monthly remuneration. This will result in unrest and the existing union rivalry between AMCU and NUM will likely result in exacerbated violence.

- [84] Village is under financial strain and loss of production will result in loss of revenue of approximately R 55 000 000 per week, which is significant and the shareholders may not be able to fund this. A secondary strike will be catastrophic as it will not only result in loss of revenue, but would also deter any potential investor from injecting the necessary capital into the mines and if capital is not invested in the infrastructure, the closure of the mines is imminent and would result in the retrenchment of more than 6 000 employees in a current difficult economic climate.
- [85] The nature and extent of disruption of the secondary strike will be disproportionate to the potential effect it may have on the primary strike and it will in fact not achieve any productive ends in relation to the dispute with Sibanye, but will instead, end in violence and job losses.
- [86] In answer to Village's case, AMCU denied that Tau Lekoa and Kopanong Mines will be brought to a complete standstill if 18 % and 33% of the workforce at the said mines embark on strike action. Village can make contingency plans, such as the use of replacement labour, in respect of the small percentage of employees. It is also disputed that production could not continue, albeit at a reduced rate and the reasonableness of the estimate of the anticipated loss of revenue is questioned.
- [87] Village indicated that AMCU represents 1 518 of a total workforce of 6 382, which is a substantial number of employees. It would not be possible to arrange replacement labour for all the positions due to the volumes and because the replacement employees would first need to be trained and inducted and that could take several months. Furthermore, the crew members are skilled and experienced labourers, which skills are not readily available and Village cannot on short notice or during the seven-day secondary strike period, recruit, train and reconstitute the crews in order to maintain normal production.

- [88] Northam's case is that it has no factual nexus with Sibanye which could be utilised to exert pressure on Sibanye and there is no geographical link between them, they do not share any shareholders, assets, commodities or resources.
- [89] The only factor that links Northam and Sibanye, is that they are both concerned with mining in South Africa.
- [90] Northam submitted that the nature and effect of the secondary strike will be catastrophic to it and its employees as there is a real likelihood of violence to be perpetrated by AMCU members and a significant resistance to the secondary strike from other employees who are members of NUM, UASA or are non-unionised. The primary strike has been characterised by extreme and continuous violence.
- [91] Northam submitted further that AMCU represents 55% of the workforce at the Booyseindal Operation and in the event of a strike by AMCU, it would not be able to operate as there will be a significant skills gap which would render the team useless in respect of production and unsafe in respect of the relevant health and safety considerations. It is impractical and almost impossible to utilise replacement labour as Northam has to undergo an extensive recruitment process (which includes *inter alia*, medical and other testing and induction processes) for approximately 1 113 possible employees, and the process to recruit and employ the replacement labour will take more than seven days.
- [92] Furthermore, the cumulative effect of a seven-day strike action will be significant and will affect Northam's expansion opportunities, will result in a loss of production of more than 11 600 platinum and associated metals tonnes per day and will result in an approximate R 12 124 540,00 loss of revenue daily.
- [93] The secondary strike would be disproportional as it will have no direct effect on the business of Sibanye, and instead will have a disruptive effect on the expansion opportunities Northam has embarked upon. Northam will lose production and significant amounts in revenue and the secondary strike will most likely deter any potential investor from investing in its expansion programme, which may result in retrenchments.
- [94] AMCU's answer to Northam's case is to deny Northam's claims of the possible losses it will suffer and to deny that potential investor revenue will be lost by a

seven-day strike. AMCU stated that Northam may employ replacement labour during the strike to mitigate its losses, that Northam is a significant player in the mining industry and that as a member of the Minerals Council, it is in a position to persuade Sibanye to accede to AMCU's demands.

- [95] Northam reiterated that it will be impossible to use replacement labour as it will have to source 1 113 possible employees, who will have to be trained and undergo several testing processes, which would take approximately 35 days.

Marula's Case (J439/19)

- [96] Marula conducts underground platinum mining operations in Limpopo. Marula's case is that it has no factual nexus with Sibanye which could be utilised to exert pressure on it, they are independent and unrelated mining operations, they do not share any shareholders, assets or commodities and they are geographically distant from each other. Marula and Sibanye may have the same institutional shareholders such as PIC, Investec, Alan Gray and Sanlam, but that is not sufficient to establish a nexus between the entities.

- [97] Marula is a platinum mining operation while Sibanye is a gold mining operation. The only factor that links Northam and Sibanye, is that they are both concerned with mining in South Africa.

- [98] Marula submitted that the nature and effect of the secondary strike will be catastrophic to it and its employees and to the continued viability of its operations. There is a real likelihood of violence and employee unrest. Union rivalry is prevalent in the mining industry and in view of AMCU's conduct during the Sibanye strike, there is a real likelihood that it would influence the manner in which AMCU members will conduct themselves during the secondary strike. Furthermore, there is a real likelihood that non-AMCU employees would react negatively to AMCU members impacting on their ability to do their jobs, the potential to lose their bonuses, salaries and even their jobs and this may cause violence to erupt.

- [99] Marula employs approximately 3 197 employees and of these employees, 2 793 are AMCU members, thus representing 87,3% of the workforce. The withholding of labour by AMCU members will result in severe disruptions of the mining operations. There is a real risk of a permanent operational shut down and of

large scale retrenchments should Marula suffer severe financial losses as a result of the secondary strike. It is impractical and almost impossible to utilise replacement labour as Marula has to undergo an extensive recruitment process (which includes *inter alia*, medical and other testing and induction processes) for approximately 2 793 possible employees, and the process to recruit and employ the replacement labour will take more than seven days.

- [100] Marula is a platinum mining company which operates in a depressed economy and the secondary strike will lead to a significant loss of production and financial damages, which it will not be able to recover. Marula is situated in a part of South Africa where unemployment is rife and the secondary strike will paralyse the mine and will affect the six surrounding communities who depend on Marula for survival through employment. The strike will result in a daily loss of revenue of R 11,2 million, which will cripple Marula and result in job losses.
- [101] The secondary strike would be disproportional as it will have no productive effect on the primary strike but will significantly impede Marula's ability to continue its normal business operations, with significant financial losses and a real threat to the viability of the business and the job security of Marula's employees. Marula does not exert any influence over the decision making of Sibanye's shareholders and its executive management.
- [102] AMCU submitted in answer that Marula and Sibanye have the same shareholders and that the shareholders appoint the Board. AMCU disputed the losses Marula claims that it would suffer in the event of a secondary strike. It stated that Marula could employ replacement labour and that a strike at Marula would affect Sibanye's economic growth outlook in real terms and would increase the socio-economic pressure on Sibanye to settle the dispute with AMCU.
- [103] Marula reiterated that it would be impossible to make use of replacement labour. It sets out its shareholding, from which it is evident that it and Sibanye do not have the same shareholders who appoint the Board. Marula submitted that AMCU's understanding is flawed as Marula and Sibanye only have common institutional shareholders such as PIC and Allan Gray.

Impala's Case (J440/19)

- [104] Impala is a 96% owned subsidiary of Implats Platinum Limited and its mining operations, comprising a multi shaft mining complex and concentrating and smelting plants, are situated in Rustenburg.
- [105] Impala employs approximately 26 992 employees and of these employees, 19 944 are AMCU members, thus representing 74% of the workforce. The withholding of labour by AMCU members will result in severe disruptions of the mining operations as thousands of employees will stay away from work. If all AMCU members embark on a strike action, Impala's operations will not be able to run. It is impossible to utilise replacement labour as Marula has to undergo an extensive recruitment process (which includes *inter alia*, medical and other testing and induction processes) for approximately 19 974 possible employees, and the process to recruit and employ the replacement labour will take much more than seven days.
- [106] Impala's case is that it has no factual nexus with Sibanye which could be utilised to exert pressure on Sibanye as they are operating in separate industries, there is no geographical link between them, and they do not share any shareholders, assets, contractors or commodities.
- [107] The only factor that links Impala and Sibanye, is that they both operate in the broader mining industry in South Africa and this is insufficient to sustain an argument that Impala could exert pressure on Sibanye to resolve the dispute with AMCU. Impala is a platinum producer whereas Sibanye is a gold mining company.
- [108] Impala submitted that the nature and effect of the secondary strike will be catastrophic to it, to its operations and its employees. There is a real likelihood of employee unrest and violence. In 2014, Impala had to close its entire operation and had to place non-striking employees on forced leave due to the violence associated with AMCU's wage strike. The strike at Sibanye is violent and there is a real likelihood of violence spreading to Impala's operations. Impala also anticipates the possibility of resistance to the secondary strike.
- [109] The secondary strike will be devastating to Impala's operations since 74% of the workforce comprises of AMCU members and if they embark on strike action,

Impala would not be able to operate for the duration of the strike. This will result in daily loss of revenue of R 73 million and over the period of the secondary strike, the loss will rise to R 512 million. The losses will be severe and irrecoverable.

[110] Impala would not be able to hire replacement labour.

[111] The secondary strike would be disproportional as to the potential effect it may have on the primary strike. The secondary strike will not achieve any productive ends in relation to the Sibanye dispute, but will have a severe effect on Impala in that it may end in violence and job losses for its employees. Impala is the largest single platinum producer and previous strikes had significant impact on communities around the mine and the economy of Rustenburg.

[112] In answer to Impala's case, AMCU denied that Impala would suffer losses it alleges that it would suffer. It submitted that Impala could employ replacement labour to mitigate its losses, that Impala is a significant player in the mining industry and a member of the Minerals Council, which enables it to persuade Sibanye to accede to its demands.

[113] Impala made it clear that it will be impossible to use replacement labour as it will have to source 19 974 possible employees in respect of whom various processes have to be followed, which processes would take about 35 days to complete.

Glencore's Case (J443/19)

[114] Glencore operates a number of mines and smelters that produces and markets chrome ore, ferrochrome, manganese ore and vanadium. This application is limited to Glencore's alloys division, which includes the following operations: Eastern Chrome Mines, Western Chrome Mines and Rhovan Vanadium.

[115] AMCU has issued a strike notice for a secondary strike to take place at the Xstrata Eastern Chrome Operations, which strike will entail a full work stoppage by all 895 AMCU members, as well as a notice of a secondary strike at Glencore operations by 1 877 AMCU members.

[116] Glencore submitted that Sibanye operates a number of gold mines and is the largest individual producer of gold in South Africa and one of the ten largest gold

producers globally. There is no link between the operations of Sibanye and Glencore. The secondary strike by AMCU members, employed by Glencore, will have no direct or indirect effect on the Sibanye strike. The primary strike has had no effect on the operations of Glencore, just as the secondary strike will have no effect on Sibanye.

[117] Glencore's case is that there is no nexus between its business and the business of Sibanye, there is no link between ownership and they operate in distinctly separate sectors of the mining industry namely alloys and gold.

[118] The strike will involve 1 877 of Glencore's employees and will result in a total work stoppage by the employees for a period of seven days. This will cause excessive harm for Glencore and will have no effect on Sibanye's business and will have no impact on the primary strike. Glencore will suffer substantial financial and production losses because of the cessation of its operations. A substantial number of the AMCU members perform core functions that are critical to Glencore's operations and a total work stoppage by such employees will have a detrimental impact on Glencore's business. The estimated loss Glencore stands to suffer as a result of the secondary strike at Eastern and Western Chrome Mines is R 148 623 246,00 and at Rhovan Vanadium, R 78 571 231,00, which amounts are no doubt significant.

[119] The primary strike has been mired with violence and other acts of misconduct by AMCU members that has resulted in the loss of life and destruction of property. This Court has already issued an interdict against AMCU members in the primary strike, interdicting their acts of violence misconduct. The interdict has not assisted much, which is a clear indication that AMCU is unable to control its members and there can be little doubt that similar conduct may be perpetrated by AMCU members in the secondary strike.

[120] The secondary strike will not have any impact whatsoever on the collective bargaining process between Sibanye and AMCU, as the primary strike is going into its fourth month and it is unlikely that a secondary strike of seven days will have any impact on the primary strike at this stage.

[121] The secondary strike would be disproportionate as it will have no productive effect on the primary strike but will significantly impede Glencore's business

operations, with significant losses and a dramatic impact on production. It can take several days or even weeks to return to full production after the strike and the disruption of production has a knock-on effect on support services, production targets and ultimately the profitability of Glencore. The secondary strike will have no direct or indirect effect on the primary strike and will not exert pressure on Sibanye to accede to AMCU's demands.

[122] In answer to Glencore's case, AMCU stated that its members employed at Glencore are affected by the same socio-economic conditions that their co-members face at Sibanye. Mineworkers do not view themselves in isolated pockets, but stand as one and related to each other's challenges. AMCU members at Glencore want to assert their freedom of association and solidarity with their co-members and they want to show sympathy to their co-members, all working in the same industry.

[123] AMCU submitted that Glencore cannot claim that its production will cease with a seven-day strike or that its capital investment will be affected by it. AMCU's case is that the harm to be suffered is not disproportionate as the duration of the strike is finite, Glencore will be able to maintain production as it has stockpiles and can recover any losses in future periods by overtime work and by employing replacement labour. AMCU disputed the possibility that Glencore's operations will close down as a result of the secondary strike.

[124] In reply, Glencore stated that AMCU members in its employ perform core functions that are critical to Glencore's operations and where the employees performing the critical functions are on strike, Glencore cannot operate the plant with the remaining workforce.

[125] Glencore cannot exert any influence over Sibanye taking into consideration that they operate in different sectors and Glencore does not bargain collectively with Sibanye as it conducts its own collective bargaining. Notwithstanding the fact that Glencore is a member of the Minerals Council, it has no presence in the sectors that Sibanye operates in. Glencore's workforce is significantly smaller than that of Sibanye and it has no ability to influence Sibanye.

[126] Glencore denies that it has a stockpile because of the way it operates – the product that gets mines, gets processed. It further disputed the submission that

it could implement overtime to recover losses as it has already implemented overtime for its normal operations and it runs the risk of contravening the Basic Conditions of Employment Act⁸ (BCEA) if it has to implement additional overtime.

Bushveld's Case (J 444/2019)

[127] Bushveld is an integrated mining and processing plant, situated in Brits, and it operates an open pit mine supplying vanadium ore to its vanadium processing plant, which is located on the same property.

[128] Bushveld's case is that there is no nexus between its business and the business of Sibanye, there is no link between ownership, Bushveld does not rely on any of the assets of Sibanye, Sibanye does not provide any services to Bushveld, the business of Sibanye has no direct or indirect effect on the functions of Bushveld and they operate in distinctly separate sectors of the mining industry namely; vanadium and gold.

[129] The primary strike has had no effect on Bushveld's operations and Sibanye has no financial or other interest in the business of Bushveld. The secondary strike will not in any direct or indirect manner, pressure Sibanye into acceding to the demands made by AMCU.

[130] Bushveld has a total workforce of 460 employees, of which 283 (61%) are AMCU members who will be involved in the secondary strike action leading to a total stoppage of work for a period of seven days. This will cause excessive harm for Bushveld and will have no effect on Sibanye's business and will have no impact on the primary strike. If AMCU members were to strike, it will severely disrupt Bushveld's operations as AMCU members constitute the majority of the workforce and they occupy positions critical to its operations and the plant cannot operate without these employees. Bushveld will not be able to run production for the entire duration of the strike. Bushveld will suffer daily production loss and a financial loss of R 11 million. These losses will not be recovered.

⁸ Act 75 of 1997.

- [131] Furthermore, Bushveld will have to remunerate its non-striking workforce for the duration of the strike in circumstances where there is no production.
- [132] The primary strike has been mired with violence and other acts of misconduct by AMCU members that has resulted in the loss of life and destruction of property. This Court has already issued an interdict against AMCU members in the primary strike interdicting their violent conduct and other acts of misconduct, which has not assisted much and there can be little doubt that similar conduct may be perpetrated by AMCU members in the secondary strike.
- [133] The secondary strike will not have any impact whatsoever on the collective bargaining process between Sibanye and AMCU, as the primary strike is going into its fourth month and it is unlikely that a secondary strike of seven days will have any impact on the primary strike at this stage.
- [134] The secondary strike would be disproportionate as it will have no productive effect on the primary strike but will significantly impede Bushveld's business operations, with significant losses and a dramatic impact on production. It can take a considerable time to return to full production after the strike and the disruption of production has a knock-on effect on support services, production targets and ultimately the profitability of Bushveld. The secondary strike will have no direct or indirect effect on the primary strike and will not exert pressure on Sibanye to accede to AMCU's demands.
- [135] In answer to Bushveld's case, AMCU submitted that its members employed at Bushveld are affected by the same socio-economic conditions that their co-members are faced with at Sibanye. Mineworkers do not view themselves in isolated pockets, but stand as one and relate to each other's challenges. AMCU members at Bushveld want to assert their freedom of association and solidarity with their co-members and they want to show sympathy with their fellow oppressed members, all working in the same industry.
- [136] AMCU submitted that Bushveld cannot claim that its production will cease with a seven-day strike. AMCU's case is that Bushveld will be able to maintain production as it has stockpiles and can recover any losses in future periods by overtime work and by employing replacement labour. Bushveld will also have at least half of its workforce available.

- [137] AMCU stated that the secondary strike may discourage investments within the mining industry and therefore in Sibanye, which will have an adverse effect on the economic growth in the mining industry and Sibanye, which is a legitimate purpose of any protected strike. Strikes are intended to cause economic harm to employers with the hope that the employers will choose to rather accept the demand than face the harm.
- [138] In reply, Bushveld stated that AMCU members are employed in critical positions that are predominantly involved in the operation of the equipment used in the mining and processing of vanadium. The equipment requires a significant level of skill and experience to operate properly and safely, which skills cannot be obtained within a short period of time. Bushveld cannot operate if 61% of its workforce is absent and if it were to do so, it would be in breach of its health and safety obligations.
- [139] It is impossible to appoint replacement labour as it would increase the risk of intimidation and violence and the replacement labourers would be exposed to risks to their health and safety. Even if that was not the case, it is impossible to recruit a person and have him / her go through induction, medical assessment and training and be ready to operate machinery within seven days. It takes more than two weeks to take a person through the induction process.
- [140] Bushveld denies that it has a stockpile because of the product that it mines and processes. It further disputed that it could implement overtime to recover losses as its employees work 12 hour shifts and there is no capacity to work overtime and it runs the risk of contravening the BCEA if it has to implement overtime.
- [141] Bushveld denies that it can exert any influence over Sibanye taking into consideration that they operate in different sectors and Bushveld does not bargain collectively with Sibanye as it conducts its own collective bargaining. Notwithstanding the fact that Bushveld is a member of the Minerals Council, it is not a significant player in the mining industry and with a total workforce of 460 employees, it is significantly smaller than Sibanye which employs in excess of 52 700 employees. Bushveld reiterated that it has no ability to influence Sibanye.

AMCU's Case

- [142] I have already alluded to the fact that AMCU filed an answering affidavit wherein it dealt with the relevant prescripts, the reasons why the secondary strike is protected and specific issues raised in the Applicants' respective founding affidavits. Those issues were recorded *supra* in respect of each Applicant.
- [143] In respect of all the Applicants, AMCU submitted that the natural consequence of any protected strike action is that there will be an interruption in production and that the Applicants may make use of replacement labour. The issue of replacement labour has been set out in detail *supra* and the interruption of services as a consequence of a protected strike action will be addressed *infra*.
- [144] AMCU's case is that all the requirements of section 66(2) of the LRA have been satisfied and more specifically that the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer, Sibanye.
- [145] AMCU disputed the Applicants' contentions that the nature and extent of the secondary strike is unreasonable and that the impact thereof on the Applicants will be 'devastating' or catastrophic, that the secondary strike will have no direct or indirect effect on the business of Sibanye and that the alleged substantial harm caused to the Applicants' operations will not be proportional to the alleged 'non-existent' impact that it might have on the business of Sibanye.
- [146] AMCU made submissions on all the aspects or factors to be considered (which I will deal with *infra*) and AMCU's answer to the applications is largely based on and its position is informed by a report compiled by Dr Dick Forslund (the Forslund report). The second leg of AMCU's case is based on the Applicants' ability to influence the collective bargaining through the Minerals Council. Central to AMCU's case is the fact that the Applicants are members of the Minerals Council and can therefore persuade Sibanye as a co-member to accede to AMCU's demands.
- [147] It appears that AMCU's position is that the proportionality analysis is to be undertaken collectively vis-à-vis all of the employers who are subject to a secondary strike at once, as opposed to an individual analysis to be undertaken vis-à-vis each employer which is subject to the secondary strike.

[148] I have already held that the enquiry into the reasonableness of the secondary strike does not permit the grouping together of a collection of secondary employers in a specific industry and assessing what the combined effect of a broader industry secondary strike would have on the primary employer. The aforesaid assessment is to be undertaken in respect of the proportional harm done to each of the Applicants and must be assessed individually.

The Forslund Report

[149] In support of its contention that the secondary strike is reasonable, AMCU relied on the expert report of Dr Forslund. The general submissions made therein applies to all the Applicants.

[150] It is evident from the introduction of the Forslund report that the report was drafted after Dr Forslund was asked to give his view on the effect of a secondary strike at members of the Minerals Council on the business of Sibanye, whether a seven-day secondary strike would have any direct or indirect effect on Sibanye's business and whether the secondary strike would be reasonable.

[151] AMCU submitted that Dr Forslund is a senior economist at the Alternative Information and Development Centre and that he is duly qualified to express the opinions set out in his report. Dr Forslund has a BSc with economics and a PhD in business administration.

[152] The Applicants have taken issue with Dr Forslund's report and in support of the criticism levelled against it, the Applicants rely on the views expressed by Dr Michael Lamont. Dr Lamont is a senior lecturer in the Department of Commerce at the University of Stellenbosch and he holds a Doctorate in economics.

[153] In paragraph 32 of his report, Dr Forslund held that: "*If Sibanye's shares hadn't been traded on a modern stock market, if there was no short term and globalised finance and if credit ratings agencies like Moody's couldn't declare worse terms for Sibanye's debt service without the right to appeal, and if it wasn't for Sibanye being heavily indebted – Moody's is for example discussing a R6bn credit facility that is "almost fully utilised and matures in November 2019" – the effects of a 7 day secondary strike at mining companies with which Sibanye isn't trading would be unlikely to affect its finances.*" Dr Forslund however found that all these conditions are present.

- [154] Dr Forslund also found that it is possible, if not certain that the secondary strike will have a negative effect on Sibanye's share price. If Sibanye's share price is affected, its business will be affected too because its financial position as well as the general perception of this position is affected.
- [155] The Forslund report is criticised for a number of reasons. Firstly, according to Dr Lamont, the comments contained in paragraph 32 of the said report, indicate a complete lack of understanding of the role of financial markets and their infrastructure. Dr Lamont indicated that the market price in information and the risk associated with the secondary strike is a fact that is already known to the market. Dr Lamont further explained that it is not only foreign investors that drive economic growth, but also demand.
- [156] If Lonmin's production would come to a standstill due to the secondary strike, it will have the effect of disadvantaging Sibanye's competitor in the platinum sector, thereby reducing the overall production, and increasing the cost of platinum to Sibanye's benefit. The cost of palladium has increased by between 20 and 30%, which has enormously benefitted Sibanye. The impact of a week-long retardation of Lonmin's business, will not have the effect desired by AMCU in the face of such a commodity boom.
- [157] Dr Lamont indicated that the mining index number has increased from approximately 28 000 in November 2018 to 36 800 currently, which shows the number of shares and the value of the equities in the mining sector. These numbers indicate that the primary strike is not damaging Sibanye's gold business and the secondary strike has no potential to do so.
- [158] The criticism is that Dr Forslund ignored highly significant issues such as the performance of Sibanye's shares and the massive price increase in certain metals mined by Sibanye.
- [159] The second main criticism is aimed at Dr Forslund's reference to Sibanye's share price, referring to a 5-day graph. Dr Forslund stated that Sibanye's share price has been improving the whole year, despite the AMCU strike that started on 21 November 2018. On the morning of 20 February 2019 the share price fell until 22 February 2019 and Dr Forslund included a graph for the period 18 -22 February 2019.

- [160] The criticism is that referral to a 5-day graph is at best incomplete and at worst, misleading. It is impossible to predict what factors may influence the share price of a particular entity and those factors can range from macro-geopolitical issues to the appointment of a new chief executive.
- [161] The Applicants referred to a Sibanye share price graph over the past 6 and 12 months, from which it is evident that Sibanye's share price has increased markedly over the duration of the strike.
- [162] The Applicants also referred to a statement by Mr Froneman, Sibanye's Chief Executive Officer (CEO) wherein he reacted to Dr Forslund's report. Mr Froneman responded specifically to Dr Forslund's statement that the prospect of the secondary strike has negatively impacted on Sibanye's share price and that should the secondary strike actually transpire, Sibanye's share price will again be negatively affected. Mr Froneman stated that this is beyond speculation on Dr Forslund's behalf. Dr Forslund has taken a five-day graph, which is wholly inadequate to see even the trend of a share price. A longer period graph reveals that the share price is near its highest point and has increased incrementally during the course of the strike. The cause of a minor downturn cannot be speculated on, more so where the share price has increased again since the Forslund report was compiled. To opine that the share price reacts on a mirror basis to strike activity is naïve and one dimensional, as equity markets are notoriously unable to be predicted with any certainty or even hope of correctness.
- [163] Mr Froneman made it clear that Sibanye is a top performing company on the JSE, including during the period of the strike and there is no reason to suggest that a seven-day strike would impact on this trend. He added that the share price is not indicative of the impact of a secondary strike on the business of Sibanye. Investors buy and sell shares for a multitude of short, medium and long term reasons and there has been no run on Sibanye's shares. On the contrary, the shares have done very well during the strike and the reality is that the secondary strikes can only have less impact than the primary strike and it is equally feasible that the share price will continue to increase.
- [164] In my view there are a number of difficulties with the Forslund report.

[165] The duty of an expert witness is to the Court. This was confirmed in *Schneider NO and Others v Aspeling and Another*⁹ where the Court held that:

'In *Zeffertt and Paizes*, *The South African Law of Evidence* (Second Edition), at 330 the learned authors, citing an English judgment of *National Justice Compania Navierasa v Prudential Assurance Co Limited* 1993(2) Lloyd's Reports 68 at 81, set out the duties of an expert witness thus:

- "1. Expert evidence presented to the Court should be, and should be seen, to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;
2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate;
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion;
4. An expert witness should make it clear when a particular question or issue falls outside his expertise;
5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."

[166] The Court concluded that:

'In short, an expert comes to Court to give the Court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the Court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her

⁹ 2010 (5) SA 203 (WCC) at 211 – 212.

expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific, knowledge which that expert claims to possesses.'

[167] The first difficulty with the Forslund report is that, Dr Forslund indicated that he was asked to give his view on the effect of a secondary strike at members of the Minerals Council on the business of Sibanye, whether a seven-day secondary strike would have any direct or indirect effect on Sibanye's business and whether the secondary strike would be reasonable. I have already alluded to the fact that the assessment of the reasonableness of a secondary strike entails an assessment of the effect of the strike on the secondary employer.

[168] In my view the report prepared by Dr Forslund is manifestly one-sided. Although he purports to express an opinion on the reasonableness of the secondary strike, he had no regard to the nature of the strike and its effect on the secondary employers.

[169] The only finding made in this regard is that *"it seems that the secondary strike escalation, which will have short term economic and financial effects on other mining companies, but massive symbolic indirect effect as well as direct economic and financial effects on Sibanye's business, is a way to reach a deal that satisfies AMCU's members after a long strike and ends it."* Dr Forslund placed emphasis on *"the symbolic escalation of the long strike to a number of mining companies during seven days, which will suffer short term damages to production because of the failure to settle the strike at Sibanye, will point to Sibanye as a high risk destination for investments."*

[170] Dr Forslund referred to the effects of the secondary strike, yet he failed to describe what those effects are and more particularly, what the nexus is between the secondary strike and the impact on Sibanye's business. It seems like the only effect may be a symbolic one.

[171] As an expert, Dr Forslund is expected to assist this Court independently by way of an objective and unbiased opinion in relation to matters within his expertise. Dr Forslund is not expected to assume the role of an advocate for one of the parties. *In casu*, however, the expert evidence presented by Dr Forslund cannot be accepted as an independent product of an expert uninfluenced as to form or content by the exigencies of litigation. Dr Forslund's report is one-sided and

promotes AMCU's case and all the information available to Dr Forslund, had been turned in the direction of a finding that suited AMCU.

[172] Secondly, an expert is expected to provide the Court with an objective and unbiased opinion, based on his or her expertise. In his report Dr Forslund expressed an opinion on Sibanye's share price, which opinion was attacked and criticized by the Applicants.

[173] Dr Forslund has not provided any evidence, information or any record of his expertise in respect of share price movements or his ability to predict share price movements. The attacks on Dr Forslund's share-price findings, have been dealt with *supra* and need not be repeated.

[174] The evidence placed before me shows that the Sibanye shares have done well throughout the duration of the strike and continued to do so even after Dr Forslund prepared his report. There is nothing before me to show that Dr Forslund has the expertise or proven track record to express an opinion on share price movements. Share prices are complex and are determined by a host of factors, which Dr Forslund did not mention in his report and in all probability failed to consider as it falls beyond his area of expertise.

[175] Thirdly, a perusal of the Forslund report shows that Dr Forslund went beyond expressing his expert views as an economist by expressing views on the law. For instance, Dr Forslund concluded that there is a clear basis for AMCU to contend that the secondary strike is protected solely on the basis that Sibanye and the secondary employers are members of the Minerals Council. Dr Forslund held that the Minerals Council is a "*formal forum where political pressure could be put on Sibanye by others in the industry, if they would think that Sibanye should move closer to the demands of AMCU to resolve the long conflict.*" This is based on Dr Forslund's reading and understanding of what is stated on the Mineral's Council website.

[176] Before this Court, are affidavits deposed to by the Applicants, who are members of the Minerals Council, as well as an affidavit by an official of the Council, wherein they explain the workings of the Council. This is evidence from the horse's mouth, as opposed to Dr Forslund's evidence which is no more than a

reading from the Council's website, without any understanding how the Council actually functions and what the member's participation is.

[177] In my view, Dr Forslund's evidence raises significant problems as to his independence, credibility and expertise and this Court cannot attach any weight to the opinions expressed by him.

The reasonableness requirement

[178] The reasonableness requirement involves a proportionality assessment: the harm caused by the secondary strike to the secondary employer must be in proportion to the harm potentially caused to the primary employer as a consequence of the secondary strike. In my view, this calls for an assessment of three key issues: the effect of the secondary strike on the secondary employer, the possible direct or indirect effect that the secondary strike may have on the business of the primary employer and the proportionality of the harm caused to the primary and secondary employers respectively.

[179] I will deal with each of the key issues in turn *infra*.

The effect of the secondary strike on the secondary employer

[180] The first enquiry is into the nature and extend of the secondary strike and its impact on the secondary employer and requires consideration of, *inter alia*, the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs¹⁰.

The duration, form and magnitude of the secondary strike

[181] The duration of the strike will be seven days in the form of a complete withholding of labour. This must be considered with the magnitude of the strike's impact on the secondary employer, which will include *inter alia*, a consideration of the number of employees involved, the losses the secondary employer will incur as a result of the strike and whether such losses will be recoverable.

[182] AMCU's case is that the strike is not of an indefinite duration and that it is less than the average duration of strikes in the sector and it is not longer than

¹⁰ As per *SALGA 1 Supra* n 4.

stoppages that may occur due to a section 54 notice as provided for in the Mine Health and Safety Act¹¹. The duration of the strike is not unreasonable, as a shorter duration will not have the desired impact because there would be no incentive on the secondary employers to influence the primary employer and a strike of a lesser duration will not be effective.

[183] The secondary strike will have short term economic and financial effects on the Applicants.

[184] AMCU placed reliance on what was said in *SALGA 1*¹² where it was held that the disruption of services and economic loss are not factors that rank highly when considering the legitimacy of industrial action and that those are rather inevitable consequences which underpin the purpose of strike action in a democratic society.

[185] AMCU further submitted that the Applicants can make use of replacement labour during the secondary strike.

[186] The position in respect of the individual Applicants is as follows:

AngloGold

[187] The total workforce at the Mponeng Mine is 4 760, of which 3 191 (67%) are AMCU members. If AMCU members were to embark on secondary strike action, the Mponeng mine would be unable to run production for the entire duration of the secondary strike. Anglo Gold will suffer production losses of 34 kg of gold per day, which equates to a daily loss of R 20 400 000. The production losses cannot be recovered. The secondary strike action will prejudice the financial viability of the Mponeng mine and the employment security of all its employees.

Lonmin

[188] The strike would involve 18 792 AMCU members, out of a total workforce of 22 510 (83%). It would affect the entire workforce and would bring the entire Marikana operation to a standstill. Lonmin will lose significant production on a daily basis, which losses will not be recovered. Lonmin's financial position is

¹¹ Act 26 of 1996.

¹² *Supra* n 4.

vulnerable and its liquidity is weak and will worsen where the fixed costs do not stop when production stops.

Rustenburg

[189] Given the substantial level of AMCU, representivity at Rustenburg's mining operations, the absence of the AMCU employees will likely result in the production and processing operations coming to a standstill. Rustenburg has an anticipated revenue loss of R 210 million per day, as well as other financial, structural and safety consequences. Rustenburg will need to maintain its daily fixed costs of R 71 million per day during the strike action. Rustenburg can ill-afford any disruptive effect on its productivity, efficiency and revenue, which will have an effect on the viability of the business and job security of Rustenburg's employees.

Harmony

[190] Harmony employs approximately 31 327 employees at 11 gold mining operation in the Free State, Gauteng and North West. AMCU represents 7 549 (24%) of employees within its workplace. A secondary strike at Harmony's operations would cause significant harm to it and its employees. Harmony operates under financial strain in a depressed economy and the secondary strike would lead to significant loss of production and financial damages which it would not be able to recover. Disrupted operations will affect the production bonuses of non-striking employees and will result in major daily financial losses for Harmony.

Village

[191] At Tau Lekoa, AMCU has 18% membership and 33% membership at Kopanong. Village is under financial strain and loss of production will result in loss of revenue of approximately R 55 000 000 per week, which is significant and the shareholders may not be able to fund this. A secondary strike will be catastrophic as it will not only result in loss of revenue, but would also deter any potential investor from injecting the necessary capital into the mines and if capital is not invested in the infrastructure, the closure of the mines is imminent and would result in the retrenchment of more than 6 000 employees in a currently difficult economic climate.

Northam

[192] AMCU represents 55% of the workforce and in the event of a strike by AMCU, Northam would not be able to operate as there will be a significant skills gap which would render the team useless in respect of production and unsafe in respect of the relevant health and safety considerations. The cumulative effect of a week-long strike action will be significant and will affect Northam's expansion opportunities, result in a loss of production of more than 11 600 platinum and associated metals tonnes per day, and will result in an approximate daily loss of revenue of R 12 124 540,00

Marula

[193] Marula employs approximately 3 197 employees and of these, 2 793 (87,3%) are AMCU members. The withholding of AMCU members' labour will result in severe disruptions of the mining operations, with a real risk of a permanent operational shut down and of large scale retrenchments. Marula is a platinum mining company which operates in a depressed economy and the secondary strike will lead to a significant loss of production and financial damages, which Marula will not be able to recover. The strike will result in a daily loss of revenue of R 11,2 million, which will cripple Marula and result in job losses.

Impala

[194] Impala employs approximately 26 992 employees and of these, 19 944 (74%) are AMCU members. If all AMCU members embark on strike action, Impala's operations will not be able to run. The strike will result in a daily loss of revenue of R 73 million and over the period of the secondary strike, the loss will rise to R 512 million. The losses will be severe and irrecoverable.

Glencore

[195] At Glencore, the strike will involve 1 877 of its employees and will result in a total work stoppage by the employees for a period of seven days. Glencore will suffer substantial financial and production losses because of the cessation of its operations. A substantial number of AMCU members perform core functions that are critical to Glencore's operations and a total work stoppage by such employees will have a detrimental impact on Glencore's business. The

estimated loss Glencore stands to suffer at Eastern and Western Chrome Mines is R 148 623 246,00 and at Rhovan Vanadium, R 78 571 231,00.

Bushveld

[196] Bushveld has a total workforce of 460 employees, of which 283 (61%) are AMCU members who will be involved in the secondary strike action and total stoppage of work for a period of seven days. This will cause excessive harm for Bushveld as it will severely disrupt its operations because AMCU members constitute the majority of the workforce and they occupy positions critical to the operations and the plant cannot operate without these employees. Bushveld will not be able to run production for the entire duration of the strike. It will suffer a daily production loss and a financial loss of R 11 million. These losses will not be recovered.

[197] The effect of the secondary strike on the Applicants is to be considered individually. However, the effect of the secondary strike is also to be considered holistically because on AMCU's own version, Sibanye's business is unlikely to be even indirectly affected by a seven-day secondary strike at one or two other mining companies. To be effective, the notice of the secondary strike had to be given to many mining companies where AMCU has members and it is the scope of the said strike that makes it possible to have a negative indirect or direct effect on Sibanye's business. Thus, if the secondary strike at only one or two secondary employers may have a possible direct or indirect effect on the business of Sibanye, the secondary strike would on AMCU's own version, not pass muster.

[198] In summary and after considering the facts relating to each individual Applicant the position is as follows: at the majority of the Applicants (AngloGold, Lonmin, Northam, Marula, Impala and Bushveld) AMCU has as members the majority of the workforce and at the others Applicants AMCU has significant representation. The Applicants' operations will be affected by a secondary strike in various degrees ranging from severe disruptions to complete standstill. The Applicants will all suffer significant production and financial losses, in excess of millions of Rands per day, at a time when they operate in a depressed market wherein many of them are vulnerable and already under financial strain. This includes wasted costs in respect of keeping the operations going, absent any production

or limited production, and paying non-striking employees their salaries when they may not be able to render any services.

[199] The Applicants made it clear that it will be impossible to utilise replacement labour as they will have to undergo extensive recruitment processes, which includes *inter alia*, medical and other testing and induction, for a substantial number of employees, and the process to recruit and employ the replacement labour will take much more than seven days. The Applicants also indicated that AMCU members occupy critical positions and perform core functions, which require special skills and experience, which are not readily available on short notice.

[200] The Applicants further indicated that even though the strike is only for seven days, the effect of the strike will last much longer as it will take days or weeks or even longer to restore the full operation after the strike has ended. Furthermore, the losses the Applicants stand to suffer are not recoverable.

[201] In the context of the operations of the Applicants and the fact that the secondary strike may have the effect of halting operations entirely for seven days, it cannot be said that a strike of seven days is short, considering the reasonableness of the impact of the strike on the secondary employer.

[202] Although it was held in *SALGA* ¹³ that the disruption of services and economic loss are not factors that rank highly when considering the legitimacy of industrial action and that those are rather inevitable consequences which underpin the purpose of strike action in a democratic society, I am of the view that the economic loss to be suffered by the secondary employers should be considered with due regard to the industry within which the strike is to happen and it is a factor that should be ranked highly when considering the proportionality of the impact of the secondary strike on the businesses of the secondary employers. The LRA clearly differentiated between a primary and secondary strike and different considerations are at play in a secondary strike. So too are the considerations that apply when considering 'legitimacy' and 'proportionality'.

¹³ *Supra* n 4.

The conduct of the employees

- [203] The Applicants all submitted that the secondary strike action should be interdicted as they fear an outbreak of violence. The Applicants' fears are based on the events that transpired during the primary strike at Sibanye and in some instances, their own experiences with AMCU strikes in the past.
- [204] It is common cause that the strike action at Sibanye commenced on 19 November 2018 and that Sibanye launched an urgent application on 21 November 2018 under case number J 4217/18 to interdict violence and strike related misconduct. On 12 December 2018, Sibanye approached the Labour Court seeking orders to find AMCU and various of its members and leaders guilty of contempt of Court for failing to comply with various aspects of the Court order issued under case number J 4217/18.
- [205] AMCU's answer to the Applicants' allegations in respect of violence is that there is no evidence to suggest that its members will misconduct themselves during the secondary strike. AMCU further submitted that it has called a stay away and does not intend to picket during the secondary strike. In respect of the primary strike, AMCU has taken certain steps to alleviate the possibility of violence *inter alia*, by informing its members that Sibanye has obtained an interdict in respect of any acts of violence, intimidation and harassment and by reading out and explaining the contents of the interdict to the members.
- [206] The mere fact that Sibanye had to approach the Labour Court on 12 December 2018, subsequent to the interdict that prohibited violence and unlawful conduct, with an application for contempt, is, *prima facie* at least, indicative of the fact that the Court interdict was not respected and complied with. AMCU's position to distance itself from unlawful conduct, is a noble position. However, the reality is that Sibanye and other Applicants in the past had to approach this Court for an interdict to prohibit violent conduct and other acts of misconduct that AMCU and its members are well aware that such, that does not belong in realms of peaceful industrial action and that cannot be tolerated or condoned. The reality is that the Sibanye strike has claimed the lives of seven individuals and resulted in material damage to property, which is a tragic state of affairs and which should be a matter of serious concern to AMCU.

- [207] It may be so that there is no evidence that AMCU members will misconduct themselves during the secondary strike, however in view of past conduct at some of the Applicants premises, AMCU members' conduct in the Sibanye strike and AMCU's apparent inability to control its members during strike action and to enforce the position that unlawful conduct is not to be tolerated, it cannot be said that the Applicants' fears are completely unfounded.
- [208] The Applicants are sceptical as to whether AMCU is in a position to guarantee that the secondary strike will be a peaceful one, notwithstanding AMCU's averments to that effect in its papers before me. In my view and based on the past conduct of AMCU members, the Applicants' scepticism is understandable.
- [209] AMCU's position is that the allegations of violence should not be a reason for the secondary strike action to be interdicted as there is no evidence that AMCU members will misconduct themselves during the secondary strike, there is no evidence that they will act in the same manner as the Sibanye strikers or that the secondary strike will not be a peaceful one. AMCU and the secondary strikers distance themselves from any unlawful conduct and have no intention to conduct themselves unlawfully. It is according to AMCU, impossible for the Court to assess upfront what may happen in the future.
- [210] It is indeed true that this Court cannot assess upfront what may happen in the future. At the same time this Court cannot ignore what had happened in the past and what is happening at Sibanye where AMCU members participated in industrial action. It is indeed a sad reality that there has been a track record of violence and intimidation when industrial action takes place and AMCU is in no position to dispute the allegations made by the Applicants in respect of their own past experiences and in respect of the horrendous violence displayed during the ongoing Sibanye strike. These allegations are not taken out of thin air and are not made without any justification.
- [211] There were numerous urgent applications brought to this Court to interdict violence and other related conduct displayed by striking AMCU members, a fact I cannot ignore in assessing the probabilities of violence in the secondary strike. I further cannot ignore the fact that AMCU, on its own version, never opposes applications wherein an interdict is sought to prohibit violence and unlawful conduct during its strikes.

- [212] It is a sad reality for AMCU that its members' conduct during strike action caused numerous urgent applications and interdicts issued by this Court. The conduct of AMCU's members certainly tainted its reputation as a trade union that supports peaceful industrial action. In my view, AMCU's position that it distances itself from unlawful conduct, offers nothing but cold comfort as that position is not visible in AMCU strikes. In fact, the contrary is true as employers have to approach this Court to interdict violence etcetera, which AMCU on its own version never opposes, and that in the face of a union that openly distances itself from such conduct and purports to support peaceful strike action.
- [213] The violence displayed during AMCU strikes is a reality and it raises certain questions *inter alia*, whether AMCU's members are aware that AMCU does not condone violence and other unlawful conduct during strikes, whether AMCU is able to control its members to behave according to acceptable standards when embarking on strike action and whether AMCU is serious in building a reputation as a trade union that supports and conducts peaceful industrial action.
- [214] Even though AMCU contemplates a stay away, sight should not be lost of the fact that its members and other non-striking employees live in the same mining communities or mine hostels and that in the past instances, violence and intimidation happened in those communities and hostels. Violence and other unlawful actions are not limited to the workplace or the specific premises of an employer and it would be naïve to accept that a stay away would eliminate all and any possibility of violence or intimidation.
- [215] Considering all the relevant factors, I am satisfied that *in casu*, the secondary strike will indeed have a significant impact on the business and operations of the secondary employers and that such strike action will cause harm to the Applicants.
- [216] This must be in proportion to the harm potentially caused to the primary employer as a consequence of the secondary strike.

The effect of the secondary strike on the primary employer

- [217] The second enquiry turns on the possible direct or indirect effect that the secondary strike may have on the business of the primary employer, which is in

essence an enquiry into the extent of the pressure that is placed on the primary employer.

[218] It is trite that a nexus between the primary and secondary employer is neither a formal requirement nor determinative.

[219] In *SALGA 1*, it was held as that:¹⁴

'To the extent that SALGA's submission contemplates a requirement that there be a particular linkage between the primary and secondary employers (the 'ally' or 'associated employer' doctrine adopted in some jurisdictions), it ignores the emphasis placed by section 66 on the effect the secondary strike has on the business of the primary employer. This is not to say that some relationship or nexus between the primary and secondary employer is not a requirement, indeed it is difficult to conceive how a secondary strike could have a direct or indirect effect on the primary employer's business without some relationship of sorts between the two employers. But it is not as SALGA's averment implies; a determinative factor whenever the nature of that relationship is one of dependency. The approach adopted by section 66(2) is to require the harm caused to the secondary employer to be proportional to its impact or likely impact on the business of the primary employer.' (Own underlining)

[220] In *Clidet No 957 (Pty) Ltd v South African Municipal Workers Union and Another*¹⁵ it was held that:

'In the present instance, the two businesses represented by the primary and secondary employer are both service providers to an enterprise managed ultimately by a third party. MTC [the primary employer] manages the bus stations; the applicant [the secondary employer] operates the busses, ultimately for the benefit of the City. In one sense, the two entities share a connection – the stations exist to serve the busses, and the busses could not operate effectively without the stations. But that is not the test. The legitimacy (or otherwise) of the secondary strike must be determined by determining the nature and extent of the proposed secondary strike, and weighing that against the harm that will be caused to the business of the primary employer. This

¹⁴ *Supra* n 5 at para 12.

¹⁵ [2011] 3 BLLR 225 (LC); (2011) 32 ILJ 1070 (LC) at para 8.

approach is obviously better suited to employers that stand in a relationship of customer and supplier, or who enjoy a connection by way of a common shareholding or some other nexus that bears on the capacity of the secondary employer to place pressure on the primary employer to resolve its dispute with the union. Where both employers, as they are in the present instance, simply provide services for the benefit of a common client, it is difficult to appreciate how, ordinarily, the one is in a position to influence the other.' (Own emphasis)

- [221] Although a nexus between the primary and secondary employer is neither a formal requirement nor determinative, it is difficult to conceive how a secondary strike will have a possible direct or indirect effect on the business of the primary employer in the absence of any nexus between the primary and secondary employers. This is more so where it is in essence an enquiry into the extent of the pressure that is placed or could be placed on the primary employer.
- [222] The Applicants all disputed that there is any nexus between them and Sibanye. The reasons for their denial are *inter alia*, that they do not operate in the same industry, they do not share any commodities, assets, resources or shareholders and they do not have any commercial relationship. In fact, Sibanye and some of the Applicants are competitors. The only possible link is that they are members of the Minerals Council.
- [223] This is indeed AMCU's case. The secondary strike will take place in the mining industry and at employers who are members of the Minerals Council. AMCU's intention is to place Sibanye under socio-economic pressure and to strengthen its collective bargaining position, with the hope that Sibanye's fellow members will place the necessary pressure on it to move closer to AMCU's demands.
- [224] AMCU submitted that there is a strong possibility that the Minerals Council will ensure that a resolution is facilitated between it and Sibanye. AMCU evidently placed reliance on the Applicants' ability to influence the collective bargaining through the Minerals Council and has issued secondary strike notices to 15 members of the Minerals Council.
- [225] AMCU raised the Minerals Council issue in its answering affidavit and in reply, the Applicants responded thereto and attached an affidavit deposed to by Mr Motlhamme, the head of employee relations of the Minerals Council, in support thereof. Mr Boda submitted that this Court should not have regard to the affidavit

of Mr Motlhamme and the averments made in reply in respect of the functioning of the Minerals Council, as this should have been dealt with in the founding affidavit.

[226] I cannot agree with Mr Boda. The Applicants' averments regarding the Minerals Council are raised in response to allegations in AMCU's answering affidavit and relate to issues raised in the answering affidavit. To strike out or ignore those responses, will defeat the purpose of a replying affidavit.

The Minerals Council

[227] The Minerals Council is a registered employers' organisation. It is a voluntary association of members and not a statutory bargaining council. It represents some sectors in collective bargaining with organised labour and also acts as a principal advocate for mining in South Africa to government, communicating major policies endorsed by its members.

[228] The Constitution of the Minerals Council is the founding document that regulates the Council's role, objectives and functions. The said Constitution provides that the Minerals Council is empowered to represent its members and to act on their behalf or as their agent in matters affecting their common interest.

[229] Item 3(b) of the Minerals Council's Constitution provides that the objects and powers of the Council shall be:

'to regulate relations between its members and their employees; to represent its members and act on their behalf in matters connected with the regulation of such relations; to negotiate and conclude, on behalf of its members, agreements with any or all of their employees, or with any association, associations, trade union or trade unions representing any or all of such employees, relating to wages or other conditions of employment, to represent its members and act on their behalf in industrial disputes in which they or any of them are concerned and in all matters arising under or in connection with industrial legislation affecting them;

[230] The Minerals Council has 78 members across base minerals, coal, platinum, gold, mining contractors, diamonds, associations and mining corporates. It represents four members in the gold sector (Sibanye, Anglo Gold, Village and Harmony) and six members in the coal sector in collective bargaining with

organised labour. There are several gold companies who are members of the Minerals Council and who have elected not to be represented by the Council in collective bargaining.

- [231] The platinum producers Impala, Marula, Rustenburg, Lonmin and Northam are also members of the Minerals Council but the Council represents no members in the platinum industry in collective bargaining processes. In the platinum industry, each platinum producer negotiates on an individual basis at plant level. They do not negotiate centrally and the Council plays no part in the bargaining process and has no mandate to do so.
- [232] The origins of collective bargaining in the mining industry goes back as far as 1915 when the then Chamber of Mines was assigned the role of negotiating on behalf of members with employee organisations. Today, and in the gold and coal sectors, the Minerals Council operates by virtue of mandates provided to it, from time to time, by the members in the said sectors. This structure provides a platform where each employer constructs and presents its own unique mandated position, based on its own strategy and circumstances. Each member in respect of whom the Minerals Council bargains, gives their own mandate, informed by its own affordability parameters, capital expenditure plans, ability to raise capital and specific economic and business strategies. The Minerals Council acts as the bargaining agent in the negotiations and presents each company's mandate to the unions and each mining company puts together their own negotiating team. The members conclude their own separate agreements with the relevant trade unions.
- [233] Each member in respect of whom the Minerals Council bargains, gives their own mandate and the Council cannot dictate or influence the terms of such mandate to a member and has never been able to do so. In the same breath, the members of the Council cannot dictate, influence or change the mandates of the other members.
- [234] The fact that a mining company is a member of the Minerals Council, does not bind such a member to participate in the centralised collective bargaining under the auspices of the Council as participation is entirely voluntary. In fact, only a small number of the members actually rely on the Minerals Council in the collective bargaining process.

- [235] The Mineral Council's primary function is to lobby and advocate on behalf of its members in respect of policy matters, which are separate from collective bargaining.
- [236] Mr Motlhamme explained that seen in this context, AMCU is a relatively new player in this collective bargaining process as it first participated in centralised wage negotiations during 2013 and has since then, sought to impose its own interpretation of the collective bargaining process under the Minerals Council. AMCU has resisted the independent and flexible nature of the collective bargaining process.
- [237] In respect of the 2018 wage negotiations, Mr Motlhamme explained that at the commencement of each wage review period, the members indicate whether they would participate in central negotiations and only Anglo Gold, Village, Harmony and Sibanye participated in central negotiations. At the start of the negotiations, the unions submitted their individual demands in respect of each of the companies. The demands differed from one union to the other as well as from company to company. AMCU's demands were similar across all four gold mining companies.
- [238] Upon receipt of the demands, the Minerals Council met with each union and company and once an agreement was reached that they would participate in central bargaining, the Council convened plenary sessions between the members and organised labour. The members participated in the plenary sessions and held individual caucus sessions with the recognised trade unions.
- [239] Ultimately this resulted in individual agreements at each company. At Harmony and Village, the agreements were extended to AMCU and its members, at AngloGold all the unions signed the wage agreement and at Sibanye, an agreement was reached with NUM, UASA and Solidarity but not with AMCU.
- [240] Upon accepting membership of the Minerals Council and as a condition of membership, members become subject to the Membership Compact (the Compact) which is a mandatory code of ethical business conduct to which all members of the Minerals Council subscribe.
- [241] The Compact provides that members of the Minerals Council recognise that the Council operates on the basis of mandates and that while it is the case that

positions adopted by individual companies must be aligned to their overarching strategic objectives and that they may differ from company to company, the positions adopted by the Council will apply to all its members. In this regard the members of the Minerals Council agree that they will *inter alia*, at all times engage honestly and in good faith, that they would strive to reach agreed positions that will improve the sustainability of the mining industry and accept that mandated positions can only be changed after any contrary views have been debated by the Council of the Minerals Council and agreed upon.

[242] AMCU's case is that from the broad terms of the Compact, the members of the Minerals Council have the right to attempt to change mandated positions after debate by the Council of the Minerals Council and therefore each one of the members of the Minerals Council has the ability to influence the mandated positions of the other. Furthermore, the members have a duty to act in good faith with each other and where there is a secondary strike at some members of the Minerals Council, in order to influence another member, such as Sibanye, there is an obligation in terms of the Compact to implement risk management strategies and to co-operate in good faith to alleviate the prospect of any harm the secondary strike may cause.

[243] AMCU submitted that the members of the Minerals Council, may influence the collective bargaining positions adopted by each other and therefore each member affected by the secondary strike may persuade Sibanye, as a co-member, to accede to AMCU's demands and thus resolve the primary and the secondary strikes.

[244] According to AMCU, the duty of good faith contained in the Compact and the duty to implement it, would require Sibanye at the instance of the Applicants, to discuss and debate its mandated position and there is a clear possibility that the secondary employers may influence the collective bargaining outcome at Sibanye.

[245] This is disputed by the Applicants who deny that they have any influence over Sibanye generally or as a result of membership of the Minerals Council. The Minerals Council, per Mr Motlhamme, explained that the Compact is an internal document which was developed and adopted by the Board of the Minerals Council to get members to act in unison for the purposes of ensuring that certain

values are observed by members. The Board is largely ceremonial in nature and has no executive or managerial powers over members of the Council.

[246] The Compact is not a document on which external third parties can rely and it is no more than values members of the Minerals Council ascribe to. The Compact is not aimed at governing collective bargaining at all and it has never been the intention thereof. The Minerals Council is in no position to intervene in continuing wage negotiations between AMCU and Sibanye. It only acts as an agent during the course of wage negotiations, based on a member's mandate and cannot influence its members during the course of wage negotiations.

[247] The Minerals Council explained that it is not a collective bargaining practice for members to exert pressure on other members and that its members cannot exert pressure on Sibanye to move closer to AMCU's wage demands. No member company can intervene in a dispute between another member and union and the Minerals Council's Constitution does not provide for such an intervention.

[248] It is evident that neither the Minerals Council's Constitution nor the Compact provide for any mechanism by which the Council or its members can intervene or censure a member for the position adopted by such member in the collective bargaining process.

[249] In my view the collective bargaining process at the Minerals Council is indeed a voluntary, flexible and informal process where each member provides its own mandate and concludes its own separate agreement. The Minerals Council does no more than to act as the bargaining agent in the negotiations and to present each company's mandate to the trade unions.

[250] The Minerals Council membership link between the Applicants and Sibanye is a tenuous one. I say so because I am not convinced that the Council can dictate or influence the terms of such mandate to each member. Also, the members of the Council cannot dictate, influence or change the mandates of the other members as they bargain voluntary and based on their own strategies and circumstances. The structure merely provides a platform where each employer constructs and presents its own unique mandated position and concludes its own, separate agreement, if it so wishes.

- [251] In view of the functioning and structure of the Minerals Council, I am not convinced that the Applicants are by virtue of their membership of the Council, able to place pressure on Sibanye to accede to AMCU's demands. The compact also does not go to this extent.
- [252] There is however another reason why it is doubtful that a secondary strike would have any possible direct or indirect effect on the business of Sibanye. Mr Froneman deposed to a statement after perusal of the affidavits filed in support of Lonmin's application to interdict the secondary strike.
- [253] In his statement, Mr Froneman addressed certain allegations and presumptions made by AMCU concerning Sibanye and he placed the following facts before this Court: the primary strike at Sibanye has been carefully and thoroughly analysed and is dealt with in the manner which is best for the future of Sibanye and its employees. Sibanye has long since made contingency plans to deal with the impact the strike may have, as it operates in the South African environment where strikes, including those lasting over long periods, are a reality and Sibanye will continue to operate in this environment.
- [254] Mr Froneman made it clear that a seven-day secondary strike will have no impact whatsoever on Sibanye, in circumstances where it has been able to weather a strike that is entering its fourth month.
- [255] Sibanye has reached a wage agreement with the other trade unions at its gold operations, which agreement is fair and final and will not be amended as a result of AMCU's demands and threats. The strike will not be settled on a basis that gives AMCU anything over and above what the members of the other unions had received.
- [256] Sibanye is a top performing company on the JSE, including the period of the duration of the strike and its share price is rising. It is unlikely that the strike at Sibanye will affect the share price negatively and a secondary strike at the Applicants' operations, will certainly not have that effect.
- [257] Mr Froneman made it clear that Sibanye will not be influenced by other members of the Minerals Council or the Council itself. He emphasized that the reason why the strike has not been resolved is because of AMCU's unreasonable demands and not because of the fact that insufficient pressure

has been put on Sibanye. A secondary strike will have no impact on this paradigm.

[258] There is no relationship between Sibanye and the Applicants and any deterioration in their businesses caused by a secondary strike, will have no impact on Sibanye's business and a secondary strike will have no impact on the primary strike or Sibanye's business.

[259] In *SALGA2*¹⁶ it was held that section 66 of the LRA does not require that the secondary employer should exert influence on the primary employer or that the secondary employer should have the capacity to exert influence on the primary employer in order to encourage it to compromise or capitulate to the demands of the workers. What is required is that the secondary strike should have a possible direct or indirect effect on the business of the primary employer and that the nature and extent of the secondary strike should be reasonable in relation to the possible direct or indirect effect on the business of the primary employer. It was further held that it is not a requirement that the secondary strike should cause the primary employer actual harm, but there must be a possibility that it may.

[260] A possibility of harm will suffice, but the more remote the possibility of harm to the primary employer, the less likely it will be that the proportionality assessment will result in the secondary strike being protected. The same goes for the secondary employer's capacity to exert influence on the primary employer – the less influence the secondary employer has, the less likely it is that the secondary strike would be protected.

[261] The secondary strike action must have some impact on the bargaining process between Sibanye and AMCU and to some sense, it has to affect the position of the primary employer.

[262] Considering the possible direct or indirect effect that the secondary strike may have on the business of Sibanye and the extent of the pressure that it would place on it, I am not convinced that the secondary strike will have any direct or indirect effect on Sibanye's business or that there is even a remote possibility that it would cause any harm or affect Sibanye's business. I am also not

¹⁶ *Supra* n 5.

convinced that the Applicants are at all able to put pressure on Sibanye or to exert any influence on it to accede to AMCU's demands. This is more so in circumstances where some of the Applicants operate as competitors of Sibanye and where some are significantly smaller than Sibanye, finding themselves in a 'David versus Goliath' situation. The multiplicity of the secondary strike action does not change this position.

The proportionality assessment

[263] In respect of the first enquiry, I have already alluded to the fact that the secondary strike will cause irrecoverable loss of production and income, will cause wasted costs in respect of keeping the operations going without any production, will impact on vulnerable financial positions, and may result in job losses.

[264] Regarding the second enquiry and in respect of the gold producing Applicants, given the fact they and Sibanye are competitors, makes it difficult to conceive how the deterioration of the competition's business would have any effect on Sibanye and its bargaining position. This is more so where Sibanye is the giant in the gold mining industry and the others, only smaller players.

[265] In *Transnet Transnet SOC Ltd v National Transport Movement and others (Transnet)*¹⁷ the Court held that:

'Dealing, firstly, with TFR, the applicant has shown that Transnet Freight Rail and the primary employers are in fact competitors. They both transport goods and it is a business strategy of Transnet Freight Rail that it should lure business away from the primary employers. As was observed by Bhoola J in *Coca Cola Fortune* ... in such a case, the possibility of the secondary strike having an effect on the primary strike is remote, or is not one that is contemplated by s 66(2)(c).'

[266] In assessing the proportionality of the secondary strike, I cannot ignore the industries within which the secondary strike is to take place as well as the effect it would have, not only on the industries, but also on the broader economy and

¹⁷ [2014] 1 BLLR 98 (LC) at paras 46-47.

longer term job security. I can also not ignore the fact that AMCU's president, Mr Mathunjwa held a press briefing where he said that with the secondary strike, AMCU will bring the mining sector to a standstill.

[267] In *Transnet*¹⁸ it was held that :

'The nature and extent of the envisaged [secondary] strike action is such that it will have a major effect on Transnet and on the economy of the country. It does not appear to be reasonable in relation to the slight possible effect it may have on the primary employers. It is disproportionate to the goal of the strike action, i.e. to force the primary employers to accept SATAWU's demands.'

[268] The same applies *in casu*.

[269] AMCU stated that the secondary strike may discourage investments within the mining industry and therefore in Sibanye, which will have an adverse effect on the economic growth in the mining industry and Sibanye, this being a legitimate purpose of any protected strike. Strikes are intended to cause economic harm to employers with the hope that the employers will choose to rather accede to the demand rather than face harm. This may be so, but *in casu*, the Applicants will suffer economic harm without the option of accepting the demand rather than face harm. *In casu*, the Applicants cannot influence Sibanye to accept AMCU's demand and they are in no position to accept a demand, rather than face economic harm. This is a factor that weighs heavily in favour of the Applicants, in circumstances where they are unable to change the destiny of the primary strike action.

[270] A secondary strike of the magnitude envisaged by AMCU, will have a major effect on the economy of the country. This factor certainly outweighs the negligible effect the secondary strike may have on Sibanye and therefore renders it unreasonable. Furthermore, the purpose of a secondary strike is to put pressure on the primary employer to accede to demands. The purpose and the aim cannot be to bring an entire industry to a standstill, without any consideration of the possible effect the secondary strike would or could have on the primary employer.

¹⁸ This is consistent with what was found in *Clidet* and *Coca Cola*.

[271] Considering this matter holistically, it is evident that AMCU is rather seeking to rely on the scope and scale of the call-out in the secondary strike, rather than the business effect it may have or the proportionality as contemplated by the LRA. Put differently, AMCU is relying on some sort of emotional factor or emotive impact that a multiplicity of strikes may have on a number of employers, rather than to rely on the effect the secondary strike may have on the business.

[272] I accept that a secondary strike may be called with the object of giving emotional support and applying socio-economic pressure, but that does not take away the fact that the secondary strike must possibly have some impact on the bargaining process, of which potential impact or effect is sufficient. The intention to put pressure and to inflict harm on the Applicants is permissible, however it remains subject to reasonableness and proportionality requirements, as envisaged in section 66(2)(c) of the LRA.

[273] As per *Samancor*¹⁹, the onus rests on the secondary employer to prove that the interdict should be granted and it has to show that, the secondary strike is unreasonable or not proportional. The union must rebut any *prima facie* case that the employer makes out and may have to justify its decision to have embarked on the secondary strike.

[274] In the circumstances where the Applicants stand to suffer considerable losses as a consequence of the secondary strike and where the secondary strike will have no effect on Sibanye, the secondary strike would be disproportionate to the goal of the strike and is thus unreasonable and unprotected.

[275] I am satisfied that the Applicants have made out a case that the secondary strike is unreasonable and AMCU has failed to rebut the Applicants' case and failed to show that there is justification for embarking on the planned secondary strike.

Costs

[276] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness²⁰.

¹⁹ *Supra* n 8.

²⁰ Section 62 of the LRA.

[277] I have considered the fact that the parties before me are in a continuous collective bargaining relationship and that it is imperative to maintain and protect such relationship. Furthermore, the issues before me were not clear cut and required a factual analysis and consideration of each of the parties' respective positions. In my view this is a case where a cost order may negatively affect the said relationship and the interests of justice and fairness will be best served by making no order as to costs.

[278] In the premises, I make the following order:

Order:

1. The secondary strike is declared unprotected.
2. There is no order as to costs.



for

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the First Applicant: Advocate A Myburgh SC with Advocate R Itzkin
Instructed by: Fasken Attorneys

For the Second Applicant: Advocate A N Snider
Instructed by: Cliffe Dekker Hofmeyr Attorneys

For the Third Applicant: Advocate P Maharaj-Pillay
Instructed by: Webber Wentzel Attorneys

For the Fourth and Fifth Applicants: Mr J Olivier of Webber Wentzel Attorneys

For the Sixth, Seventh and Eighth Applicants: Ms L Louw of Webber Wentzel Attorneys

For the Ninth and Tenth Applicants: Mr D Masher of ENS Attorneys

For the First Respondent: Advocate F Boda SC with Advocate S Collet
Instructed by: Larry Dave Attorneys