

# RealTime Transcriptions

TRANSCRIPTION OF THE

## COMMISSION OF INQUIRY

### MARIKANA

#### BEFORE TRIBUNAL

THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON  
MR TOKOTA SC  
MS HEMRAJ SC

#### HELD ON

DAY 81      26 APRIL 2013      PAGES 8558 TO 8622

#### HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 26 APRIL 2013]  
 2 [09:39] CHAIRPERSON: The Commission resumes.  
 3 We're very pleased to see that Adv Mpofu is back with us,  
 4 welcome back. We were very distressed to hear of the  
 5 incident in which you were involved. We hope that you're  
 6 on the road to a complete recovery. I take it you're not  
 7 quite there yet but anyway, we're pleased to see you here  
 8 today. At this stage we're going to revert to the  
 9 application for a removal of the Commission to Centurion,  
 10 which was argued previously but thereafter opposing  
 11 affidavits were filed and I see the counsel who is here to  
 12 oppose the move is with us also. So would you like to – I  
 13 understand that replying affidavits have been filed, which  
 14 we've been given, and I take it you will address us. I  
 15 don't know whether the evidence leaders want to say  
 16 something as well. Mr Chaskalson will also address us and  
 17 thereafter you will have an opportunity to address us also.  
 18 Yes, Mr Mpofu?  
 19 MR MPOFU: Thank you very much,  
 20 Chairperson. Chairperson, if I may, before dealing with  
 21 the application, just address your earlier remarks and just  
 22 express my gratitude and thanks to you personally and the  
 23 other Commissioners, firstly, for the messages and also to  
 24 the colleagues, all the colleagues here, evidence leaders  
 25 and the LRC. They were the first flowers that arrived in

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1 hospital, came from the evidence leaders and the LRC but  
 2 other colleagues also sent messages directly and indirectly  
 3 and really, quite an outpouring of support for the near-  
 4 tragedy that happened but thank you very much, Chairperson,  
 5 I really appreciate it and you giving me the opportunity  
 6 maybe to use this platform to thank others who might not  
 7 also be here who expressed their support and prayers, as it  
 8 were. Thank you, Chair.  
 9 Now – and also before, Chair, the issue as you  
 10 correctly pointed out, I'm not yet fully recovered. I've  
 11 been advised to take it easy, which is a difficult thing  
 12 for me and the reality is that in the past seven days I've  
 13 spent five of those days in the ICU in hospital, so I'm  
 14 still a little bit weak but I thought because of the  
 15 importance of this matter, we should dispose of this  
 16 particular matter. The issue of the cross-examination is a  
 17 different issue, which I will discuss with Mr Semanya and  
 18 others.  
 19 CHAIRPERSON: What I can say is, as you  
 20 know, we have now got Major-General Annandale in the  
 21 witness box and I don't propose interposing the National  
 22 Commissioner in the middle of his evidence. I think he  
 23 must go through to the end of his evidence and at the end  
 24 of his evidence we will then see whether you're fit enough  
 25 to resume your cross-examination of the National

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1 Commissioner, otherwise we'll take the next witness.  
 2 MR MPOFU: Yes. No, I certainly -  
 3 CHAIRPERSON: It's important that you  
 4 make a full recovery.  
 5 MR MPOFU: Thank you.  
 6 CHAIRPERSON: I'm quite sure that the  
 7 National Commissioner won't mind having a chance to do some  
 8 of her work in her office rather than sitting here for days  
 9 being – not that you necessarily will be busy for days, but  
 10 she'd prefer to be working in her office rather than  
 11 sitting here.  
 12 MR MPOFU: Thank you, Chairperson, I was  
 13 more thinking of next week, so that's even a better  
 14 dispensation, then I can rest a bit. Thank you,  
 15 Chairperson.  
 16 CHAIRPERSON: I think it's fair to say  
 17 that, as was the case last time, the proceedings will be  
 18 transcribed and in due course I will see the Minister who  
 19 will have all the documents before him, as well as the  
 20 transcription of what is being said today and we will then  
 21 decide whether to grant the application or refuse it.  
 22 MR MPOFU: Yes. Thank you, Chairperson.  
 23 Coming back to the business of the day then, it's an  
 24 application for the relocation of the seat of the  
 25 Commission. As you've correctly pointed out, Chairperson,

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1 this matter was argued on the 26th of February, so I will  
 2 resist the temptation to re-argue or regurgitate the matter  
 3 that is already before the Commission and I won't argue it  
 4 as if it's a greenfield application, as it were, firstly  
 5 because those matters are on the record but secondly, also  
 6 because the matter that is on the record has not been  
 7 disputed in the answering affidavit or insofar as it has  
 8 been dealt with, it has only been tangential. So we took  
 9 the approach that the record as it stands represents what  
 10 one might call the founding papers and we'll discuss the  
 11 matter then on that basis. We'll therefore take that the  
 12 factual matter that has not been disputed is common cause  
 13 and proceed on that basis.  
 14 However, Chairperson, there are matters of  
 15 emphasis and cross-reference which will be made to, in some  
 16 of the earlier submissions made and of course there are  
 17 also new facts. Insofar as there are new facts, those new  
 18 facts have been dealt with in the replying affidavit as  
 19 well as, thankfully, the affidavit filed on behalf of the  
 20 evidence leaders and as well as SERI. So those are the  
 21 only new facts that we might dwell a little bit on. Sorry,  
 22 Chairperson, I've forgotten how this works now.  
 23 CHAIRPERSON: I'm sure your attorney can  
 24 assist.  
 25 MR MPOFU: Thank you. Chairperson, I

1 want to start by dealing with – before dealing with the  
 2 merits, just emphasising one or two issues that were raised  
 3 in February. One is that the foundations of this  
 4 application are not so much in the physical movement of the  
 5 Commission per se but can be traced back to what my learned  
 6 colleague Mr Ntsebeza, who unfortunately could not be here  
 7 but with whom I've discussed the matter, refers to as  
 8 equality of arms and that stems from the fact that the  
 9 parties, the applicant parties generally speaking are  
 10 burdened with huge economic consequences and resource  
 11 shortages related to the Commission, which are well known  
 12 and have already been well articulated, but I just wanted  
 13 to clarify this. What we are really saying is that if the  
 14 daily costs of representing the people that we represent  
 15 are X, because the Commission is here they become X plus Y.  
 16 The X you cannot change because it will be there, whether  
 17 you are in Pretoria or here, and it is really the Y, the  
 18 additional costs that are caused by the mere fact of being  
 19 in a particular location as opposed to another, that is the  
 20 subject matter of this application.

21 And I will deal with this later when I talk about  
 22 access to justice, which is really the real nub of the  
 23 issue but the other issue that I wanted to re-emphasise  
 24 from the last time is the fact that we made it clear even  
 25 then that this application, as it were, was being brought

1 reluctantly because obviously the choice of venue of  
 2 Rustenburg was meant mainly to advantage the people that we  
 3 represent. There is no doubt about that, but because of  
 4 this historical issue, issues around funding, they have now  
 5 been placed in a situation which I earlier described as  
 6 Hobson's choice, where the choices are quite stark. Do you  
 7 stay near the locality and risk the consequence of losing  
 8 legal representation earlier than you otherwise would have,  
 9 or do you travel a longer and thereby manage to gain the  
 10 legal representation, such legal representation as you are  
 11 able to muster, given all the constraints that we know  
 12 about.

13 And the clear choice that they have made, Chair,  
 14 given those two evils, is exactly to choose the lesser of  
 15 the two evils, which is to rather sacrifice some of their  
 16 own time to try and meet us halfway so that we can  
 17 represent them for as long as it is humanly possible under  
 18 the currently difficult circumstances.

19 Then Chairperson, I'd like to deal – I'll deal  
 20 with the other issues, some of them referring back as I've  
 21 said but, with your permission, if I may start with dealing  
 22 with what we have termed in our affidavit, points in  
 23 limine, the preliminary points.

24 Now the first issue, Chairperson, is whether  
 25 indeed there is opposition to the application and I preface

1 that by saying I know that this is not a court of law, one  
 2 doesn't have to be formalistic and we need to examine the  
 3 issues, the roots of the issues, but even with all that  
 4 latitude, Chair, there must be a semblance of order, as it  
 5 were.

6 What we have here is a situation where the so-  
 7 called respondents have not demonstrated a sufficient  
 8 interest in the matter before us. The first respondent is  
 9 cited as the administrator of the Bapo Ba Mogale  
 10 traditional community and we'll treat that respondent  
 11 differently.

12 The other respondents can be treated similarly.  
 13 They are the Bojanala Platinum District Municipality,  
 14 Rustenburg Local Municipality, Madibeng Local Municipality,  
 15 Moses Kotane Local Municipality. Our general submission is  
 16 that all these are non-parties, to start with but with  
 17 respect to the second to the fifth, their interest is not  
 18 even defined. All we know just from their names is that  
 19 these are local authorities but what they have to do with  
 20 the issue before the Commission and the Minister is not,  
 21 (a) defined in their affidavits or even sufficiently  
 22 justified. In one of the instances the affidavit is signed  
 23 by the municipal manager. You would expect a person like  
 24 that to then attach a council resolution that entitles him  
 25 or her to represent that particular council and the basis,

1 but that has not been done.

2 As far as the administrator of Bapo Ba Mogale  
 3 traditional community is concerned, it is stated in the  
 4 affidavit that that person has limited statutory powers to  
 5 represent the premier when the premier is unable to do so  
 6 and once again it is not defined in what capacity he is  
 7 acting, where he obtained his mandate and to crown it all,  
 8 Chairperson, you have received a letter that suggests that  
 9 – I think the words that were used, that he was acting on a  
 10 frolic of his own. So even that party which has some  
 11 relationship with an admitted party here, seems to be  
 12 wrongly – either wrongly cited or certainly hasn't shown  
 13 sufficient interest. And even if one can find some kind of  
 14 interest, it certainly is not one that can even begin to be  
 15 weighed as against the primary parties in the Commission.

16 So when we say they don't have locus standi we  
 17 mean it in the sense that conceptually one has to look at  
 18 this opposition as almost a fresh application because there  
 19 was an application and they've now launched opposition  
 20 almost as if now nothing has happened, as it were, without  
 21 even dealing with the merits of what was raised earlier.

22 Then Chairperson, we then deal with, the second  
 23 preliminary point we raise is the point of acquiescence  
 24 which is related to the third point, which is the lateness  
 25 of the so-called opposition. And another quick throwback,

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1 Chairperson, you will remember that on the 26th of February  
 2 I said the reason that there was such a delay in bringing  
 3 the application, everyone knew that it was coming and there  
 4 was a delay, was exactly because we wanted to wait until  
 5 such time that all the parties had bought into the issue,  
 6 into the idea and they had raised whatever concerns and by  
 7 the time we brought the application, as we said, those  
 8 concerns had been addressed more or less, save for the  
 9 issue of transportation. So it had to be safely assumed  
 10 that every party here knew about the application and if  
 11 they didn't for some reason, then the Chairperson certainly  
 12 made it very clear at the beginning of the application that  
 13 he would grant any party an opportunity to raise their  
 14 voice, which was done and everybody did raise their voice  
 15 and this was on the 26th of February, Chairperson.  
 16 Now, let's jump more than a month later. On the  
 17 28th of March, just the day before Good Friday, the  
 18 Chairperson once again in open session indicated that on  
 19 the 2nd we would start a bit late because the Chairperson,  
 20 in terms of regulations, was going to meet with the  
 21 Minister and nobody said, oh, but wait a minute  
 22 Chairperson, there's some opposition which is being mounted  
 23 or even contemplated.  
 24 [09:59] And then the third issue, Chair, is that which  
 25 has been alluded to in the affidavit, is that I had a

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1 discussion with senior counsel representing the Bapo party.  
 2 I think, I can't place the date but it must have been  
 3 before the 26th. It was when we were still canvassing the  
 4 views of the parties, where he had just been engaged and he  
 5 wanted me to update him and he said he didn't know about  
 6 this application and I – at tea time we discussed it.  
 7 Coming back, he gave me his word that they would not object  
 8 to the application, all he needed was clarification and  
 9 therefore once that was discussed between counsel, at least  
 10 we were entitled to assume that no such opposition would be  
 11 forthcoming. And I took the liberty, because the senior  
 12 counsel has not been attending since then, to phone him  
 13 before finalising, settling the replying affidavit, just as  
 14 matter of professionalism and collegiality to make sure  
 15 that we are on the same wavelength about that discussion  
 16 and it was so confirmed, Chairperson.  
 17 So on those three grounds alone one could say  
 18 that this party is, quite frankly, not entitled to –  
 19 without even giving an explanation – to simply mount  
 20 opposition without saying, okay, maybe we took this stance  
 21 but then we changed. And Chairperson, without getting  
 22 technical, I'll just read one sentence which explains the  
 23 principle of acquiescence from Christie where at page 45 it  
 24 says, "If delay in enforcing a right conferred by the terms  
 25 of a contract has induced a reasonable belief that there is

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1 an agreement not to enforce the right, then the enforcement  
 2 has been waived by quasi mutual assent."  
 3 Now, if you add that – assume there was no act of  
 4 acquiescence or waiver or anything like that – the mere  
 5 lateness of the opposition without an explanation or the  
 6 customary asking for condonation or even a basic  
 7 explanation, it just adds more fuel to that particular  
 8 fire, Chairperson.  
 9 Then the last point in, preliminary point, deals  
 10 with what we have called the misapplication or, more  
 11 appropriately, misapprehension of the applicable legal  
 12 instruments and regulatory instruments, Chair. The  
 13 application is premised on the law of jurisdiction which  
 14 has no place in these kinds of proceedings and I'll explain  
 15 that very briefly, Chairperson. You'll see in the  
 16 replying, in the answering affidavit, Chairperson, that  
 17 there's reference to the fact that the so-called cause of  
 18 action arose in the North-West. Now, that language alone  
 19 betrays a misapprehension of what we are dealing with here  
 20 because there's no action, let alone a cause of any action  
 21 to talk about in the present situation. All that has  
 22 happened is that the President of the country has  
 23 instituted a commission in terms of the Commissions Act and  
 24 that Act, it's an old Act of 1947 and hence the reference  
 25 to the Union as opposed to the Republic but it can be read

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1 in, but section 2 of the Commissions Act 8 of 1947 provides  
 2 that, "A commission may sit at any place in the Union" –  
 3 read Republic – "for the purpose of hearing evidence or  
 4 addressing or deliberating." So that's as far as the issue  
 5 of jurisdiction goes. The legislature has seen it fit that  
 6 whether something had happened in Cape Town, a commission  
 7 could sit in Durban, to stretch the meaning as it were.  
 8 And then if that was not clear, and I would  
 9 submit that it is very clear, paragraph 4A of the terms of  
 10 reference for this Commission has been amended to read as  
 11 follows, "The seat of the Commission shall be the Civic  
 12 Centre in Rustenburg but the Chairperson of the Commission  
 13 may, with the concurrence of the Minister and on reasonable  
 14 grounds shown, determine any other place as the seat of the  
 15 Commission."  
 16 In other words, Chairperson, what I'm saying is  
 17 that the very foundational basis of this application is  
 18 misconceived and therefore what we're saying is that just  
 19 on the basis of those preliminary points, the opposition  
 20 should not be entertain and the application should be,  
 21 well, either granted or refused but dealt with on the basis  
 22 that it was originally unopposed and it still is. But  
 23 then, Chairperson, we have acknowledged that, as I've said  
 24 earlier, this is a matter where the Chairperson may wish  
 25 for good reasons to overlook those deficiencies as it were,

1 in the so-called opposition and may wish to entertain the  
2 merits but – and we are quite happy to do that because the  
3 merits themselves are even more deficient than the points  
4 in limine.

5 One of the – apart from this issue of the cause  
6 of action and so on, one issue that I would like us to  
7 dispose of which has been dealt with in the replying, in  
8 the answering affidavit, is the fact that the application  
9 for relocation is seen as something to do with the lawyers  
10 or benefit to the lawyers who represent the victims, as it  
11 were, or the applicants and even the more startling notion  
12 that such a relocation would amount to a denial of access  
13 to justice to the respondents.

14 Well, starting with the issue of the lawyers, I  
15 thought we had disposed of this earlier but for what it's  
16 worth, let me just say this, Chairperson. This has nothing  
17 to do with the lawyers per se. The lawyers are mere  
18 conduits through which the litigants or rather the parties  
19 themselves, the victims in this case, exercise their own  
20 constitutional right to access to justice as enshrined in  
21 section 34 of the Constitution. Clearly the right to  
22 access to justice enshrined in that section incorporates  
23 the right to legal representation and it is legal  
24 representation per se, not necessarily legal representation  
25 by this or that legal representative. And the irony of

1 and I heard the Chairperson's remarks in that regard and  
2 there might well be even more than one extension, even if  
3 the regime that was proposed by Mr Burger and others is put  
4 in place. All it can do is to change the future, it won't  
5 change the past. The fact of the matter is that we are  
6 here now, eight months later.

7 So if we are going to be here for another eight  
8 months, one can safely say that it will be well nigh  
9 impossible for the legal representation to be continued.  
10 And in our case, Chairperson, one must remember that we  
11 started, at least our party, we started getting involved in  
12 this matter literally three or four days after the  
13 massacre. We've been seized with this since August of last  
14 year, long before the Commission was even put in place. By  
15 the time we all started here on the 1st of October we had  
16 been a good two months into doing this work, including the  
17 criminal cases and other related work. And it is a matter  
18 of also – well, I might place it on the record, we already  
19 had, I think I indicated on a previous occasion,  
20 instructions to make an application to court in respect of  
21 the refusal by the government to fund the victims but we  
22 have prevailed on the applicants to hold back that  
23 application on the basis that hopefully sanity will prevail  
24 or some other solution will be found and it is in that  
25 spirit that this application, among other things, the

1 this, Chair, is that, far from it being beneficial to the  
2 lawyers, what would be beneficial to the lawyers I suppose  
3 would have been simply to say, look, we've gone this far,  
4 we are now withdrawing from the matter, go back to our  
5 offices and do paying work and that would be – so it's the  
6 non-relocation that would be beneficial to the lawyers.  
7 The overburdening of the lawyers and, by extension, the  
8 parties themselves simply means that that result would be  
9 brought much earlier than it otherwise would have and  
10 therefore their own, as I say – I want to emphasise, their  
11 own access to justice would thereby be hampered. So the  
12 argument about lawyers is, quite frankly, illogical and  
13 preposterous, to say the least.

14 Now, fortunately with the benefit of technology  
15 one has been able to follow some of the proceedings here  
16 and yesterday I was watching the debate about the possible  
17 future extensions of the Commission and that, Chairperson,  
18 is something worth repeating. You remember, Chairperson,  
19 that on the 26th of February at least there was still room  
20 for speculation that, limited as it was, that there might  
21 be a small chance of finishing within the allocated time,  
22 namely the 31st of May. Sitting where we are now, the case  
23 is even much stronger because I don't think anybody in the  
24 room can even begin to believe that we will finish on that  
25 day. It's quite clear that there will be another extension

1 suggestions that we've made earlier about simultaneous  
2 interpretation and so on are meant to try and mitigate as  
3 much of the damage as possible but should all those fail,  
4 we will have no option but to raise this issue formally in  
5 a court of law. And the basis of that will be on the  
6 equality provision of the Constitution, Chair, which  
7 outlaws unfair discrimination, directly or indirectly,  
8 against any party on arbitrary grounds.

9 And finally, Chairperson, I'd like to just deal  
10 with some of what I've called the new material. I'm sure  
11 the parties that have submitted submissions will speak to  
12 them but I think it – once again as with the issue of the  
13 date and the potential for finalisation, the case right  
14 now, as it were, for relocation has even been more  
15 strengthened by what has been submitted, particularly by  
16 the evidence leaders.

17 And that, in a nutshell, without traversing the  
18 affidavit - the replying affidavit suggests that the state  
19 alone is losing an additional half a million or more in  
20 relation to, just as I've said, the aspect of the location.

21 CHAIRPERSON: This is the Y amount you  
22 referred to. You said that –

23 MR MPOFU: Yes.

24 CHAIRPERSON: - there are certain costs  
25 which will be there, wherever the Commission sits.

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1 MR MPOFU: Yes.

2 CHAIRPERSON: That's X. The additional

3 costs if it is here rather than in Pretoria, that's what

4 you called Y.

5 MR MPOFU: Thank you.

6 CHAIRPERSON: You say Y, as far as the

7 state is concerned, is half a million rand a month.

8 MR MPOFU: Minimum, yes. Thank you,

9 Chair. And I have no doubt, just reading through the

10 affidavit, that those are not all the points. There are

11 some costs that are patent that have not been included

12 there but even on the rough costs that they've put, the Y

13 effect, as it were, amounts to that much, more than half a

14 million per month. And if Mr Burger's predictions are

15 anything to go by, that means that there'd be a total of

16 about R10 million which would be lost from the taxpayers'

17 purse simply because we are here and not there, as it were.

18 Of course I'm tempted to say that money could be put into

19 better use, such as paying for the victims' legal

20 representatives –

21 [10:19] CHAIRPERSON: But you're resisting that

22 temptation, I'm sure.

23 MR MPOFU: But I will resist it, and

24 SERI, Chairperson, has also put some very concrete evidence

25 of the kind of financial burden. All I want to say about

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1 that is they are in a similar situation as us, but whatever

2 they say you can multiply by 3 when it comes to us because

3 we have less representation, no, definitely no sources of

4 funding at the moment, and clearly having to, representing

5 more than 300 people, being the 270 arrested and more than

6 50 or so that are injured. Now of course there's an

7 overlap because some of the people are both arrested and

8 injured, but the number is well over 300, Chairperson.

9 Chairperson, just one issue which I've been

10 reminded I did not mention was the fact that even if – I'm

11 sorry, I'm just going back quickly to one of the

12 preliminary points – even if one were to accept that the

13 first respondent has some kind of standing, that standing,

14 peripheral as it may be, clearly relates to phase 2, and

15 that has been amply demonstrated by the mere fact that the

16 party that is here has not participated in phase 1, for

17 good reason, except when they informed us that some of the

18 victims were there to infest their land, as it were, and

19 I'm sure whatever issues they intend to raise, which are

20 obviously legitimate in relation to phase 2, can be raised

21 with equal force whether we are here or in Pretoria.

22 Thank you, Chairperson, and I'm reminded in a

23 collision with Lonmin that the phase 2 is an affidavit. So

24 all the issues that we are talking about, the practical

25 issues of accommodation and all that –

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1 CHAIRPERSON: Most of phase 2 will be

2 dealt with on paper, as it were, by affidavit and documents

3 that had been made available, and the public is not aware

4 of it, a lot of work has already been done behind the

5 scenes as it were, on phase 2, and it should be much

6 shorter and should, as you say, be largely on paper with

7 perhaps a little bit of expert evidence or something of

8 that kind. That can, you point is that can as easily be

9 done there as here.

10 MR MPOFU: Yes, Chairperson, and secondly

11 that that phase, just from that definition, clearly does

12 not involve the issues we are dealing with here of

13 transport, sleeping over, and consultations with witnesses,

14 and leading evidence, cross-examination, and so on, which

15 is the stuff that consumes time, which really is the nub of

16 the issue.

17 Finally - some things never change, Chairperson,

18 sorry, so finally still comes more than once. The issue of

19 transportation needs to be mentioned as well, just as an

20 update really. We continue to engage with the parties that

21 we had mentioned. Nothing, we had said that we would do

22 this bilaterally, so I don't need to burden the record with

23 this matter, save to say that we continue to engage with

24 Lonmin, whom we sincerely still trust will at least provide

25 the bus that they are currently providing, just for a

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1 longer distance, but our view is that the primary

2 responsibility for that issue is on the State and we will

3 engage with the State as well to maybe provide a second

4 bus, but now we are more encouraged by the fact that the

5 State might be saving more than half a million, so surely

6 the issue of hiring a bus will be in comparatively speaking

7 and still, we'll still be making a huge saving. But those

8 are discussions which I'm mentioning, Chair, simply to say

9 that that condition is still there. I don't want to debate

10 those here. We are, and I think advisably, dealing with

11 them at a bilateral level with the concerned parties.

12 So all in all then, Chairperson, we would like to

13 move that the Chairperson uses his good offices in

14 consultation with the Minister to grant the order that we

15 have asked for, which we have articulated in the affidavit,

16 and specifically to reject the opposition to the

17 application as unfounded on any one of the grounds that

18 have been articulated.

19 CHAIRPERSON: To put it in a nutshell,

20 you contend that reasonable grounds for the removal have

21 been shown by you. Is that –

22 MR MPOFU: Ja.

23 CHAIRPERSON: That's what it amounts to.

24 MR MPOFU: Exactly, Chairperson, and

25 those reasonable grounds pertaining to what we call the key

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1 parties to the Commission, and even the silent party out  
 2 there, which is the public or the taxpayers, I mean at a  
 3 crude level, if there's going to be a saving to the  
 4 taxpayers then that alone is something to be welcomed, but  
 5 insofar as the taxpayer is also a member of the public and  
 6 has an interest in the outcome of the Commission, clearly  
 7 that outcome if anything will, the quality of that outcome  
 8 might well be enhanced by the relocation in a sense that  
 9 the representation, the quality of the representation will  
 10 be much better than it would have otherwise been. Thanks,  
 11 Chairperson.

12 CHAIRPERSON: Thank you, Mr Mpofu. Is  
 13 there anyone who wishes to address the, or me really, for  
 14 transmission to the Minister from the side of SERI?

15 MS MOTLOENYA: Yes, Chair. Thank you,  
 16 Chair and Commissioners. For purposes of the record, my  
 17 name is Adv Tholoana Motloenya, Motloenya spelt M-O-T-L-O-  
 18 E-N-Y-A, and I'm instructed by the Socio-Economic Rights  
 19 Institute, recited as the second applicant in this  
 20 application, Chair. Chair, I represent the families of the  
 21 deceased miners and Ms Lewis and myself are led by Adv  
 22 Ntsebeza.

23 Chairperson, SERI as the second applicant also  
 24 instructs AMCU and SERI, the families' team –

25 CHAIRPERSON: I think it's probably the

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1 other way around; AMCU instructs SERI.

2 MS MOTLOENYA: Sorry. Sorry, it's the  
 3 other way around, yes, Chairperson. I beg your pardon,  
 4 Chairperson. SERI, the AMCU team, and the families' team  
 5 support everything that, all the submissions that Mr Mpofu  
 6 has made, and support this application for the relocation  
 7 of the seat of the Commission.

8 Chair and Commissioners, Adv Ntsebeza has already  
 9 made oral submissions before this Commission on the 26th of  
 10 February and I do not intend to repeat those submissions  
 11 that have already been made.

12 CHAIRPERSON: They don't appear to have  
 13 been challenged by respondents in any way.

14 MS MOTLOENYA: Indeed.

15 CHAIRPERSON: They have made substantive  
 16 points of their own, which Mr Mpofu has endeavoured to deal  
 17 with, but they haven't, as I understand it, traversed the  
 18 case, the points that were advanced by Mr Ntsebeza on  
 19 behalf of SERI.

20 MS MOTLOENYA: Indeed, Chairperson. But  
 21 first then the application has been opposed and SERI has  
 22 filed a replying affidavit, Chairperson. I just wish to  
 23 draw the Chairperson's attention to paragraph 6 of that  
 24 affidavit specifically which starts on page 3 of the  
 25 affidavit.

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1 CHAIRPERSON: Yes, I have that.

2 MS MOTLOENYA: Yes, Chairperson,  
 3 paragraph 6 extends all the way to page 5 and that is where  
 4 SERI's financial, current financial position is set out in  
 5 the affidavit, Chairperson, and as things stand, SERI's  
 6 budgetary resources will be exhausted by the end of June  
 7 2013.

8 Chairperson, from those facts that have been set  
 9 out in paragraph 6 I wish to make the following  
 10 submissions, that if the Commission moves to Pretoria or  
 11 Centurion, this will save SERI an amount of about R200 000,  
 12 meaning that we can continue to participate at the  
 13 Commission for another month beyond May 2013 –

14 CHAIRPERSON: It seems from paragraph 6.6  
 15 that the amount is actually R239 423. Is that correct?

16 MS MOTLOENYA: I beg your pardon,  
 17 Chairperson?

18 CHAIRPERSON: It seems from paragraph 6.6  
 19 that the amount in question is about R239 423. How much is  
 20 it per month? I know it's difficult because presumably the  
 21 number of people here at any given time on the number of  
 22 days vary, but approximately how much per month?

23 MS MOTLOENYA: Chairperson, I'm advised  
 24 by my instructing attorney that just for accommodation it  
 25 is about R100 000, excluding transport and subsistence for

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1 us to be – I beg your pardon, Chairperson, I've just been  
 2 corrected by my instructing attorney who says that it is  
 3 R100 000 for the team to be in Rustenburg, which includes  
 4 transport and accommodation, but it excludes counsel fees.

5 CHAIRPERSON: In other words, this is the  
 6 Y factor that Mr Mpofu referred to. Counsel would  
 7 presumably be paid, whether they appear in Rustenburg or in  
 8 Pretoria, but the Y factor is the expenses that would not  
 9 be incurred if the move were to take place.

10 MS MOTLOENYA: Indeed, Chairperson –

11 CHAIRPERSON: And that you say is about  
 12 100 000 a month?

13 MS MOTLOENYA: Indeed, Chairperson.

14 CHAIRPERSON: Thank you.

15 MS MOTLOENYA: That is also the Y factor  
 16 of the equation. Chairperson, SERI is currently trying to  
 17 secure funding from other sources and they will be also  
 18 approaching the Legal Aid Board. However, the funders that  
 19 have already funded SERI cannot commit to continuing to  
 20 fund the legal representatives any longer, and at the same  
 21 time we are faced with a situation where none of the  
 22 parties know when the Commission will end. There is no  
 23 undertaking that can be given to the funders as to how long  
 24 we might need the funding for. Chairperson, I wish to  
 25 emphasise that the later the Commission moves to Pretoria,

1 the less money SERI has in the Y factor.  
 2 Chairperson, I lastly wish to submit that  
 3 relocating the Commission to Pretoria/Centurion will mean  
 4 that the AMCU and the families continue to be represented  
 5 at the Commission and continue to make a contribution into  
 6 assisting the Chairperson and the Commissioners to finding  
 7 the truth as to what happened at Marikana in August 2012,  
 8 and if the application is not successful then they face the  
 9 real likelihood that they will not be able to continue to  
 10 participate at the Commission beyond June 2013.

11 I wish to submit, Chairperson, finally, that in  
 12 light of the above facts that have been set out in the  
 13 affidavit which has been filed on behalf of SERI, that  
 14 there are reasonable grounds that have been shown for the  
 15 application to be successful. I have no further  
 16 submissions, thank you.

17 CHAIRPERSON: Thank you. Mr Chaskalson,  
 18 I understand you're going to speak on behalf of the  
 19 evidence leaders.

20 MR CHASKALSON SC: Yes, Mr Chairperson.  
 21 Mr Chairperson, in terms of section 4(a) your power  
 22 together with the Minister to move the seat of the  
 23 Commission is a power that must be exercised on reasonable  
 24 grounds shown, and we submit that there are very definitely  
 25 reasonable grounds for a move and these relate first of

1 all, and most importantly, to the issue of participation in  
 2 the proceedings by interested parties. Then there's the  
 3 issue of the saving of public expense, and finally there's  
 4 the issue of convenience to the parties.

5 If I can start briefly with participation in the  
 6 proceedings by interested parties, I do not want to repeat  
 7 the submissions made by my learned friends who have  
 8 preceded me today. The simple point is that the ongoing  
 9 additional cost – and I emphasise additional cost – of  
 10 holding the proceedings in Rustenburg threatens the  
 11 continued legal representation of the injured and arrested  
 12 persons and the families of the victims, and possibly also  
 13 AMCU.

14 For the purposes of phase 1 of the proceedings  
 15 these parties are amongst the most important parties who  
 16 are here, and the value and legitimacy of any findings made  
 17 in phase 1 of the Commission will be seriously compromised  
 18 if the proceedings in relation to phase 1 have to take  
 19 place without the full participation of the injured and  
 20 arrested persons, and the families of the victims, and  
 21 AMCU. Any findings and recommendations that this  
 22 Commission makes in phase 1 will carry much less weight if  
 23 the parties, whom I might say are among the most important  
 24 parties in relation to phase 1, are not properly  
 25 represented for the phase 1 proceedings.

1 The second ground relates to the saving of public  
 2 expense and here I refer to the additional – and again I  
 3 emphasise additional – accommodation, travelling, and  
 4 subsistence expenses incurred by the State because the  
 5 Department of Justice officials and various legal teams  
 6 paid from the public purse have to travel to Rustenburg for  
 7 the proceedings and have to be accommodated here while the  
 8 proceedings are in session.

9 We've addressed this issue in paragraphs 5 to 8  
 10 of the affidavit of Mr Mpepu, merely to go to the bottom  
 11 line.

12 [10:39] We estimate that a move to Gauteng would  
 13 ordinarily result in monthly savings of at least R300 000  
 14 in public expense, and in months where the Commission sits  
 15 without any breaks the saving may well exceed R500 000.

16 Finally in relation to cost there is a point made  
 17 in the answering affidavit that the local municipality has  
 18 very generously provided us with this venue free of charge.  
 19 That will not affect the saving that we speak of because  
 20 the same offer has been made by the Centurion, or by the  
 21 Tshwane Municipality in relation to facilities in  
 22 Centurion. So the net monthly saving to the public purse  
 23 of a move we estimate would be at least 300 000 in months  
 24 where the Commission does not sit every day, and in months  
 25 where the Commission does sit every day, as much as 500

1 000.

2 Then there's the issue of convenience. Most of  
 3 the parties are not based in the Rustenburg area. Almost  
 4 all of the legal teams are based in Gauteng, so there's a  
 5 substantial additional cost occasioned to parties by  
 6 holding proceedings in Rustenburg. Most of the  
 7 Commission's suppliers are based in Gauteng, so too are the  
 8 transcribers and the audio and video consultants engaged by  
 9 the Commission. Now the location of the Commission in  
 10 Rustenburg has caused some difficulties in this regard from  
 11 time to time in the past, and so we would expect that the  
 12 efficiency of the Commission will be enhanced if it is  
 13 based in Gauteng, closer to its suppliers, transcribers,  
 14 and audio and video consultants.

15 Now as Mr Mpofo has already indicated,  
 16 arrangements are being made to ensure that any local  
 17 residents who would want to attend proceedings in Gauteng,  
 18 will be able to do so. Transport, or arrangements are  
 19 being made to provide transport for this purpose.

20 Now if I read the answering affidavit of the  
 21 respondents, it seems that the principal case against a  
 22 move seems to be based on the interest of local communities  
 23 in Commission proceedings relating to the underlying causes  
 24 of the events of the violence in August last year, and  
 25 recommendations that the Commission will make that are



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1 designed to address these underlying causes. Now these are  
 2 issues which will be addressed in phase 2 of the  
 3 Commission, not phase 1. The Commission proceedings will  
 4 be confined to phase 1 for the foreseeable future, and the  
 5 Commission is unlikely to be able to reach phase 2 for many  
 6 months. Phase 2 of the Commission is also likely to be a  
 7 much shorter duration than phase 1 because, as has already  
 8 been pointed out this morning, for the most part it will be  
 9 dealt with on affidavits.

10 In that regard we point out that the cost and  
 11 convenience considerations against seating the Commission  
 12 in Rustenburg would not be that significant, will not be as  
 13 significant when it comes to phase 2, as they are for phase  
 14 1, and we would submit that the local access concerns  
 15 against a move to Gauteng really relates to phase 2.  
 16 They're not relevant to phase 1, and they would be better  
 17 revisited at the time when the commencement of phase 2 is  
 18 imminent. It may well be that a case could be made for the  
 19 return of the Commission to Rustenburg for phase 2, but  
 20 that's not an issue to be addressed now. For the  
 21 foreseeable future the Commission is dealing with phase 1  
 22 where costs consideration and participation concerns  
 23 militate strongly against remaining in Rustenburg, and  
 24 strongly in favour of moving to Gauteng.

25 So we would support the application and we would

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1 associate ourselves with the applicant's request to the  
 2 Chairperson to approach the Minister with a view to moving  
 3 the seat of the Commission to Gauteng as soon as possible.

4 CHAIRPERSON: Thank you, Mr Chaskalson.  
 5 Ms Kgoroeadira -  
 6 MS KGOROeadIRA: Yes, Chair?  
 7 CHAIRPERSON: Do you have submissions  
 8 that you wish to present -  
 9 MS KGOROeadIRA: Yes.  
 10 CHAIRPERSON: - on behalf of your client?  
 11 MS KGOROeadIRA: Yes.  
 12 CHAIRPERSON: Please do so.  
 13 MS KGOROeadIRA: Thank you.  
 14 MR NTSONKOTA: Chair, just for record  
 15 purposes, my name is Thando Ntsonkota, spelt N-T-S-O-N-K-O-  
 16 T-A, on behalf of NUM, led by Mr Tip who unfortunately due  
 17 to prior commitments out of which he could not extricate  
 18 himself -  
 19 CHAIRPERSON: I'm sorry I didn't call on  
 20 you. I didn't realise you wanted to address me, but -  
 21 MR NTSONKOTA: I should have been -  
 22 CHAIRPERSON: - please forgive me for  
 23 that omission, and please before Adv Kgoroeadira addresses  
 24 us, addresses me and then the Minister through the  
 25 transcript, please make your submissions.

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1 MR NTSONKOTA: Thank you, Chair. Members  
 2 of the Commission, you will recall that on the 26th of  
 3 February when Mr Mpfu moved the application on invitation  
 4 from the Chair for the parties to indicate their attitude  
 5 towards the application, my leader Mr Tip took the  
 6 opportunity to address the Commission, and in his address  
 7 on behalf of NUM he indicated that NUM does support the  
 8 application, and he advanced reasons therefore. I do not  
 9 deem it fruitful to regurgitate what Mr Tip had to say, or  
 10 the reasons advanced in favour of the application - these  
 11 are already on record - save merely to reiterate that we  
 12 stand by our support of the application and the reasons  
 13 that we advanced in support thereof.

14 Yes, perhaps I should also just point out that  
 15 when one has regard to the opposing affidavit, the reasons  
 16 that we advanced for supporting the application have not in  
 17 any way been challenged, and I respectfully submit that  
 18 therefore they should stand.

19 Just lastly, Chair, I respectfully submit that a  
 20 case has been made out when one has regard to the reasons  
 21 that were advanced by NUM, and those advanced by those that  
 22 spoke before me, and I would request that the Commission in  
 23 its engagement with the relevant Ministry to submit on  
 24 behalf of the applicants that a proper case has been made  
 25 out for the relief sought, Chair. Thank you, Chair.

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1 CHAIRPERSON: Thank you. Do any of the  
 2 other parties wish to address me before I call upon Ms  
 3 Kgoroeadira to speak on behalf of her client? Sorry, Mr  
 4 Bizos also raised his hand. Is that right?  
 5 MR BIZOS SC: Very briefly -  
 6 CHAIRPERSON: Ms Chabedi, shall we give  
 7 Mr Bizos a chance first, and then you can speak?  
 8 MR BIZOS SC: Very briefly, we support  
 9 the application, particularly for the reasons advanced on  
 10 behalf of the evidence leaders. I want to submit and make  
 11 publically known that the absence of anyone of the  
 12 representatives here for financial reasons may be a, if not  
 13 disastrous, very important factor to be taken into  
 14 consideration. We believe that everyone of us here is  
 15 making a contribution and the absence of anyone will affect  
 16 the public perception that may be created if in fact  
 17 anybody has to leave for financial reasons. The travelling  
 18 costs and the accommodation costs for a team to be in  
 19 Rustenburg are, if possible, should be avoided, and the  
 20 time taken to come to Rustenburg and back to Gauteng is  
 21 considerable, almost five hours there and back, and if that  
 22 wasted time can be avoided the application should succeed  
 23 in our submission for practically everybody's benefit. We  
 24 want to thank the council of Rustenburg - we have been  
 25 treated well, but there are overwhelming factors in favour

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1 of the move to Gauteng.

2 CHAIRPERSON: Thank you, Mr Bizos.

3 MS CHABEDI: Thank you, Chair, fellow

4 Commissioners. Just for the record, my surname is Chabedi,

5 C-H-A-B-E-D-I, on behalf of the DMR. I'm led in this

6 matter by Mr Cassie Badenhorst and assisted by Lerato

7 Maite, both of whom are not present today. Chair, early in

8 February –

9 CHAIRPERSON: You're appearing for DMR,

10 aren't you? The Department of Mineral Resources.

11 MS CHABEDI: That's correct, Chairperson.

12 Chair, in February when the application was first argued,

13 the DMR placed on record that we will abide the outcome of

14 this application. I would like to place it on record that

15 we have since revised that position. The DMR now supports

16 the application on the basis as set out in the affidavit

17 filed on behalf of the evidence leaders, in particular

18 paragraph 6 which sets out the cost estimates, how the

19 expenses are expended by the team while in Rustenburg.

20 Chairperson, we submit that the cost estimates apply

21 equally to the DMR team, and as Mr Chaskalson has already

22 put to the Commission, that in phase 2, although there's

23 only been one counsel and the attorney attending in phase

24 2, our team is due to expand.

25 Chair, with regard to phase 2, which those who

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1 spoke before me have already submitted that it will be on

2 paper –

3 CHAIRPERSON: I think very largely on

4 paper. There may be some evidence.

5 MS CHABEDI: Yes, Sir.

6 CHAIRPERSON: Some oral evidence, but

7 that's something we can't be sure about at this stage to

8 what extent there will be oral evidence and who the

9 witnesses, if any, will be, but obviously the nature of the

10 monitoring that your department did will come under the

11 microscope and there may have to be some oral evidence, but

12 we won't get there yet.

13 MS CHABEDI: Indeed, Chair. However, the

14 DMR would just for the benefit of the Bapo and in their

15 reply to us, just to sound that even on paper the DMR does

16 intend to place it on record in the papers that we will

17 file, the relevance of their participation and that will be

18 addressed at the appropriate time in papers, and this is in

19 particular in relation to paragraph 7.1 of the ruling made

20 by this Commission with regard to the conduct of

21 proceedings with regard to phase 2. Even then, Chair,

22 we'll argue that the interests indicated by the request for

23 discoveries that have already been filed, that interest,

24 Chair, we'll argue at that appropriate time that it would

25 remain peripheral. I don't want to take the point any

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1 further. I just wanted to make the submission for the

2 benefit of the Bapo in their submissions to the Commission.

3 CHAIRPERSON: Thank you. Again just

4 before we ask Ms Kgoroadira to speak, anyone else who

5 wishes to say anything on behalf of any of the parties? I

6 don't see any red lights. Alright, Ms Kgoroadira, your

7 chance to speak now. You can do so after we take the tea

8 adjournment. I see it's 3 minutes to 11, unless you can

9 give me the assurance you'll be finished in three minutes?

10 MS KGOROEDIRA: Yes, we should be.

11 CHAIRPERSON: In three minutes?

12 MS KGOROEDIRA: In three minutes? No,

13 no, no, Chair, let's take tea.

14 CHAIRPERSON: No, I thought not. Do you

15 want to take the tea adjournment?

16 MS KGOROEDIRA: Yes.

17 CHAIRPERSON: Very well, we'll reassemble

18 after the tea adjournment to hear your argument.

19 MS KGOROEDIRA: Thank you, Chair.

20 [COMMISSION ADJOURNS COMMISSION RESUMES]

21 [11:18] MS KGOROEDIRA: Kgoroadira. Karabo,

22 Kgoro-e-a-dira. It's Greek.

23 CHAIRPERSON: Yes, I thought I got it

24 wrong, I'm sorry, but I did try.

25 MS KGOROEDIRA: Yes, you did. Thank

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1 you. Thank you, Mr Chair, Commissioners. I'm Karabo

2 Kgoroadira. I am representing the first to the fifth

3 respondents. Yeah, looking at my colleagues I feel like

4 the wicked witch of the west who wants everybody to stay in

5 Rustenburg, but be that as it may. I would like to deal

6 with the issue of locus standi and the interests of the

7 first respondents to the fifth respondents. The

8 traditional communities have been largely defined as

9 indigenous communities by a number of institutions. One is

10 the African Charter on Human & People's Rights, commonly

11 known as the African Charter, the African Commission on

12 Human & People's Rights, referred to as the African

13 Commission, and particularly when it was mandated to

14 consider the rights of the Nigerian indigenous, traditional

15 community in relation to their participation in the mining

16 activities which took place on their land. The World

17 Business Council for Sustainable Development, article

18 drafted by the International Institute for Environment and

19 Development similarly referred to traditional communities

20 as indigenous communities. So for the purposes of this

21 application, and to deviate from referring to these

22 communities as the traditional mining communities, or

23 traditional communities, I submit that I will refer to them

24 as indigenous communities.

25 The International Institute for Environment &

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1 Development, article on mining and minerals and sustainable  
 2 development, entitled "Indigenous communities and mineral  
 3 development," highlighted key principles where indigenous  
 4 communities and extracting of minerals on tribal land is  
 5 concerned. In the main it pointed out that the conflicts  
 6 with indigenous communities related to the land property  
 7 and its resources which arose with the inception of mining  
 8 activities, are present not only in developing countries,  
 9 but also in the developed world.

10 The connection of indigenous people with their  
 11 land is almost the same worldwide. The indigenous  
 12 communities do not consider land as a commodity to provide  
 13 any material profit. The land for these communities has a  
 14 spiritual connotation. The land for the indigenous  
 15 community is the mother earth. They do not own it, but  
 16 conversely the land owns them. It is therefore imperative  
 17 to understand that the opposition from the indigenous  
 18 communities, such as the first and fifth respondents, to  
 19 this type of development in certainly understandable –

20 CHAIRPERSON: I'm sorry to interrupt you.  
 21 There's something that I don't understand.

22 MS KGOROEDIRA: Yes.

23 CHAIRPERSON: I can understand how the  
 24 first respondent in some way is regarded as representing  
 25 the indigenous people, but I don't understand how the

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1 second and fifth respondents, that's the local authorities,  
 2 can be so regarded.

3 MS KGOROEDIRA: If Mr Chair gives me the  
 4 opportunity in, as I advance my argument –

5 CHAIRPERSON: No, perhaps you should deal  
 6 with this point first before you advance the rest of the  
 7 argument.

8 MS KGOROEDIRA: The second respondent to  
 9 the fifth respondent are the local municipalities which  
 10 really govern traditional communities, or indigenous  
 11 communities in the area, therefore the recommendations that  
 12 will come out of the Marikana Commission will indirectly,  
 13 or similarly directly, have an impact on their traditional  
 14 communities in that –

15 CHAIRPERSON: Are you talking about phase  
 16 1 or phase 2?

17 MS KGOROEDIRA: I'm talking about phase  
 18 2.

19 CHAIRPERSON: Yes, so what do you say  
 20 about the point made by Mr Chaskalson that when we reach  
 21 the beginning of phase 2, the question of removal can be  
 22 revisited, if necessary? That's if the application is  
 23 granted.

24 MS KGOROEDIRA: Yes.

25 CHAIRPERSON: But the issues with which

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1 we are presently concerned are different. The argument, he  
 2 made the point the consideration as set out in the  
 3 affidavit filed on behalf of your clients relate to phase 2  
 4 and that it may well be important, if the application is  
 5 granted, when we start on phase 2, to revisit the question  
 6 of the venue, but what relevance have these points got at  
 7 the present stage of the proceedings in phase 1?

8 MS KGOROEDIRA: In phase 1, granted, we  
 9 are dealing with the August 9th to the 12th –

10 CHAIRPERSON: 16th.

11 MS KGOROEDIRA: To the 16th of August, I  
 12 beg your pardon, and the traditional communities have also  
 13 the right to attend the Commission as to listen to how the  
 14 Marikana tragedy actually occurred, as well to attend, as  
 15 it occurred in its area. It is also a healing process for  
 16 the indigenous people as it also affected them, hence the  
 17 President –

18 CHAIRPERSON: I'm sorry, how does it  
 19 affect them? I understand that all the people who died,  
 20 certainly on the 16th, were what was commonly described as  
 21 migrant labourers, were they not?

22 MS KGOROEDIRA: Not all. The security –

23 CHAIRPERSON: All the people, the 34 that  
 24 died on the 16th.

25 MS KGOROEDIRA: Yes, but the other

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1 people that died –

2 CHAIRPERSON: But they were migrant  
 3 labourers. Is that right?

4 MS KGOROEDIRA: They were? I beg your  
 5 pardon, Chair?

6 CHAIRPERSON: They were what is commonly  
 7 described as migrant labourers. Most of them came from  
 8 Pondoland, some of them –

9 MS KGOROEDIRA: Mr Chair, I wish I could  
 10 just finish my –

11 CHAIRPERSON: - one from Swaziland and  
 12 one from – no, but I'll give you the opportunity to finish  
 13 your argument, but it's customary for counsel to answer  
 14 questions when questions are put. It normally advances the  
 15 argument. To say to a judicial officer who asked a  
 16 question, let me finish my argument, I don't want to answer  
 17 your questions, is not customary, certainly not in the  
 18 courts in which I've practised.

19 MS KGOROEDIRA: As Mr Chair pleases.

20 CHAIRPERSON: So answer my question,  
 21 please.

22 MS KGOROEDIRA: The violence in the area  
 23 that led to the killings regrettably of the migrant  
 24 workers, was similarly in indigenous communities and the  
 25 migrant workers and the housing, mining houses, as it will

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1 be demonstrated further that it involved the indigenous  
 2 people, the migrant workers, and everybody who lives in the  
 3 area. Therefore, Mr Chair, if I could just continue I  
 4 would then demonstrate the very same fact. Thank you.

5 COMMISSIONER HEMRAJ: May I just pose  
 6 something to you as well? Is the opposition predicated on  
 7 the desire of the communities to attend the proceedings?  
 8 Because we've had but a handful of attendees on a number of  
 9 occasions and frequently counsel were also not representing  
 10 the community during the hearing as phase 1.

11 MS KGOROEDIRA: The people have been  
 12 coming in smaller numbers ever since the application for  
 13 the relocation has been made alert that if they do not  
 14 participate fully in this Marikana it may be taken away  
 15 from them. It is rather expensive. Most people are  
 16 unemployed. Even on the mines they are unemployed.  
 17 Therefore they also need transport to get here to attend,  
 18 but since there has been an awareness that non-attendance  
 19 would mean that they are not following the proceedings  
 20 and/or, recently there has been – I think you'll agree with  
 21 me – a number of Bapo Ba Mogale, Bakgatla, Bafokeng, that  
 22 are actually attending this Commission. As presently even  
 23 today we've got members of the communities in the gallery,  
 24 therefore it is very important to these people, and there  
 25 was also a lack of information as to the resources that

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1 would be made available to them as to attending the  
 2 Commission. The administrator and the other municipalities  
 3 have made them aware of those certain resources that can  
 4 also be available to them for them to attend the  
 5 Commission, and they then had to be also educated as well  
 6 as to their rights, as to how it will affect their lives,  
 7 and to that extent the numbers have increased.

8 As to counsel representing the communities,  
 9 similarly there's been a different mandate and a bit of  
 10 confusion as to this Commission is concerned, but that has  
 11 since been resolved and though counsel for, that would be  
 12 myself, and I'm alone, I have to consult, if ever I'm being  
 13 questioned about my attendance, I have to consult. I have  
 14 to still tender to the hearing, and I'm working alone here,  
 15 and I'm also not taking a fee. That is usually what would  
 16 be my day fee. I am also sacrificing a lot for this  
 17 community, as I have been doing for the last seven years.  
 18 May I continue?

19 CHAIRPERSON: Yes.

20 MS KGOROEDIRA: As I was saying, it is  
 21 therefore imperative to understand that the opposition from  
 22 the indigenous community such as the first respondent and  
 23 the fifth respondent, to this type of development is  
 24 certainly understandable because in the past the  
 25 exploitation of mineral resources has provided sustainable

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1 substantial profits only for the State, government and  
 2 mining companies, who have overlooked the fact that  
 3 resources were located in indigenous land. Now there's a  
 4 general concern on how to create adequate instruments that  
 5 will permit the mineral activities to contribute to the  
 6 global transition towards sustainable development –

7 CHAIRPERSON: That's a phase 2 question –  
 8 MS KGOROEDIRA: Yes.  
 9 CHAIRPERSON: - if it's a question at  
 10 all. Is that right?

11 MS KGOROEDIRA: Yes, it is. The  
 12 International Institute for Environment & Development  
 13 emphasises that in the agenda 21 adopted by the UN  
 14 Conference on the environment and development in Rio dated  
 15 June 12, 1992, and the draft of the inter-American  
 16 Declaration of the Right of Indigenous People promotes the  
 17 participation of indigenous communities in policy-making  
 18 process relating to resource management.

19 It further specifies the State's obligation to  
 20 guarantee the participation of the indigenous communities  
 21 in decisions over mineral resources. Furthermore,  
 22 Convention number 169 concerning indigenous and tribal  
 23 people in independent countries, adopted by the General  
 24 Conference of the International Labour Organisation (ILO)  
 25 Geneva, June 27, 1990, entered into force in September 5,

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1 1991, supports the same notion – participation, full  
 2 participation of indigenous communities.

3 Now in South Africa land was one of the primary  
 4 means by which black South Africans were oppressed.  
 5 Statutes such as –

6 CHAIRPERSON: Before you carry on, can I  
 7 ask you this question? In what way do you propose or are  
 8 you instructed to contribute to the issues arising in phase  
 9 1? I understand the points you make relate to phase 2, to  
 10 some extent, but we're busy with phase 1. In what way do  
 11 you propose participating in phase 1?

12 [11:38] MS KGOROEDIRA: In phase 1, as I said  
 13 before, Mr Chair, was that the phase 1, the parties can  
 14 then attend the Commission –

15 CHAIRPERSON: I see. So you're not  
 16 suggesting they will participate; you just say they should  
 17 have the right to attend, as any member of the public can.

18 MS KGOROEDIRA: I cannot even say we may  
 19 not participate –

20 CHAIRPERSON: No, but I asked you –  
 21 MS KGOROEDIRA: The evidence is still –  
 22 CHAIRPERSON: No, I asked you in what way  
 23 you propose to participate, or are instructed to  
 24 participate. You know what the issues are. You know what  
 25 the evidence has been about. You know that the remaining

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1 witnesses will come from the side of the police, from  
 2 Lonmin, and Mr Mpofu may decide to call certain of his  
 3 clients as well. That's all. All the other witnesses who  
 4 come, no question has ever been asked of any of the  
 5 witnesses so far on behalf of your clients. So in what way  
 6 do you propose, or are you instructed to participate in  
 7 phase 1? Let me ask you another question, so you can  
 8 answer two together. Have you filed any affidavits on  
 9 behalf of your clients in relation to phase 1?  
 10 MS KGOROEDIRA: Participation in phase 1  
 11 – my instructions are the Commission should be open for the  
 12 traditional and indigenous people to also attend the  
 13 Commission.  
 14 CHAIRPERSON: I know that. I asked you a  
 15 question. I'd be grateful if you'd answer it. You made  
 16 the point about people attending, but I then asked you  
 17 about participation and I asked you some specific  
 18 questions, and I would like an answer.  
 19 MS KGOROEDIRA: Yes. I'm sorry.  
 20 Inasmuch as we have not filed affidavits for phase 1, Mr  
 21 chair –  
 22 CHAIRPERSON: You haven't filed  
 23 affidavits?  
 24 MS KGOROEDIRA: No, we haven't filed  
 25 affidavits. However, we still have the right to cross-

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1 examine any witness that may raise a point that relates to  
 2 anything that the parties may raise in phase 2. So if a  
 3 witness comes to the stand –  
 4 CHAIRPERSON: No, no –  
 5 MS KGOROEDIRA: We don't have the right  
 6 –  
 7 CHAIRPERSON: I don't understand that.  
 8 Are you suggesting that somehow in the course of phase 1 a  
 9 witness comes who can throw light on something in phase 2,  
 10 you'd like to ask a question here in part of phase 1?  
 11 Let's take a practical example. Mr Ramaphosa, I understand  
 12 may come and give evidence on phase 1. He also may be able  
 13 to give evidence, either by way of affidavit or otherwise,  
 14 in relation to some of the phase 2 issues because he was on  
 15 the board of Lonmin. Are you suggesting that if Mr  
 16 Ramaphosa comes to give evidence on phase 1, you would like  
 17 to be able to jump up and ask him questions relating to  
 18 phase 2? Because I can tell you if you want to do that,  
 19 you won't succeed.  
 20 MS KGOROEDIRA: I wouldn't necessarily  
 21 jump up, Mr Chair, and just ask him a question on phase 1.  
 22 He would have to have –  
 23 CHAIRPERSON: - if he's giving evidence  
 24 on phase 1 –  
 25 MS KGOROEDIRA: Yes.

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1 CHAIRPERSON: - do you propose during  
 2 phase 1 to ask him questions that relate to phase 2?  
 3 MS KGOROEDIRA: No.  
 4 CHAIRPERSON: Alright, so where, so in  
 5 what way are you going to participate in phase 1?  
 6 MS KGOROEDIRA: Mr Chair, I cannot  
 7 anticipate how the proceedings will go or I may find a  
 8 point that relates to phase 1 that I may want to  
 9 participate in on behalf of, or advise –  
 10 CHAIRPERSON: You have chambers, I  
 11 understand, in Johannesburg.  
 12 MS KGOROEDIRA: Yes.  
 13 CHAIRPERSON: So if we were to move to  
 14 Centurion – I'm not saying we will, it will depend  
 15 obviously on the decision the Minister and I make, but if  
 16 there were to be a move to Centurion you would be able to  
 17 come to Centurion to ask those questions that you may think  
 18 of in relation to phase 1. Is that correct?  
 19 MS KGOROEDIRA: For me, yes, but this is  
 20 not about me, Mr Chair. It's about the community.  
 21 CHAIRPERSON: It's a question of a way in  
 22 which your clients will be able, if there's something they  
 23 can think of or someone else can think of on their behalf,  
 24 to participate in phase 1 the way which they vote to  
 25 participate. They're not going to ask the questions

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1 themselves anyway, are they?  
 2 MS KGOROEDIRA: No, they're not.  
 3 Anyway, I'll carry on. In the premise, and due to the  
 4 Marikana tragedy, his Excellency, the honourable President  
 5 Jacob Zuma, appointed this Commission to investigate the  
 6 core conflicts inherent in the area. In the Terms of  
 7 Reference honourable President Zuma mandated this  
 8 Commission to investigate among other things, matters of  
 9 public, national, and international concern arising out of  
 10 the events of the 9th of August to the 16th of August 2012,  
 11 and the role played by the relevant stakeholders, but more  
 12 importantly, the purpose of this Commission is to ensure  
 13 the events such as the Marikana tragedy do not reoccur in  
 14 South Africa. Accordingly, the participation of the  
 15 indigenous communities, mining companies, employees, is  
 16 vital in order to uncover the iniquities, if any, for this  
 17 Commission to make available input in the North West  
 18 province as a whole. Accordingly, it is against the  
 19 background that I submit that the first respondent has  
 20 locus standi, and substantial interest in this Commission.  
 21 Another issue is jurisdiction.  
 22 CHAIRPERSON: Isn't the point taken in  
 23 the opposing affidavit in relation to jurisdiction in the  
 24 light of what Mr Mpofu submitted about section 2 of the  
 25 Commissions Act?

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1 MS KGOROEDIRA: Yes, I'm dealing with  
 2 that now.  
 3 CHAIRPERSON: You persist in those  
 4 arguments?  
 5 MS KGOROEDIRA: Yes, I am.  
 6 CHAIRPERSON: Is that your main argument?  
 7 MS KGOROEDIRA: No, it's not my main  
 8 argument, but I –  
 9 CHAIRPERSON: I see. Oh well, well carry  
 10 on with your argument.  
 11 MS KGOROEDIRA: I will deal with that  
 12 now. Jurisdiction – now the relocation of a commission and  
 13 issue of jurisdiction relating thereto, issues of  
 14 jurisdiction relating thereto, have not been sufficiently  
 15 debated in our domestic courts.  
 16 CHAIRPERSON: - because is section 2 of  
 17 the Commissions Act -  
 18 MS KGOROEDIRA: I am about to –  
 19 CHAIRPERSON: - which says the Commission  
 20 can sit anywhere in the Republic.  
 21 MS KGOROEDIRA: I'm about to address  
 22 that.  
 23 CHAIRPERSON: I see.  
 24 MS KGOROEDIRA: However, while I was  
 25 reading I came across a Supreme Court of Appeal judgment in

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1 the matter of Stopforth versus Minister of Justice &  
 2 Others, 2001 (1) SA 113 (SCA). The court in this instance  
 3 had to enquire whether the Promotion of National Unity and  
 4 Reconciliation Act 34 of 1994 entitled the Truth and  
 5 Reconciliation Commission to jurisdiction to grant amnesty  
 6 of acts committed outside of South Africa.  
 7 However, the interesting part of this judgment  
 8 was the manner in which the court interpreted the Promotion  
 9 of National Unity and Reconciliation Act where jurisdiction  
 10 was concerned. In particular, Judge Olivier indicated that  
 11 in analysing the jurisdiction of the amnesty committee, it  
 12 is the purposive interpretation that should be given to the  
 13 TRC Act. The court went further to say that, "In giving  
 14 effect to this approach, one should at least look at the  
 15 preamble of the act, or at the express indications in the  
 16 act as to the object that has to be achieved, study various  
 17 sections wherein the purpose may be found, look at what led  
 18 to the enactment not to show the meaning but to show the  
 19 mischief that the act was intended to deal with, and then  
 20 draw logical inferences from the context of the enactment."  
 21 Now section 2 of the Commissions Act 8 of 1947  
 22 reads as follows. "The commission may sit at any place in  
 23 the union," meaning the republic, as my learned colleague  
 24 has indicated, "for the purpose of hearing evidence or  
 25 addresses or deliberating," and the preamble of this act

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1 says, "To make provisions for conferring certain powers on  
 2 commissions appointed by governor-general," which would be  
 3 the President in this instance, "for the purpose of  
 4 investigating matters of public concern and to provide for  
 5 matters incidental thereto."  
 6 Section 1(b)(iii) of the Commissions Act protects  
 7 any member of the commission from being insulted,  
 8 disparaged or belittled, and prevents the proceedings or  
 9 the findings of the commission from being prejudiced,  
 10 influenced, or anticipated.  
 11 Furthermore Judge Olivier, in reaching a  
 12 decision, referred to the following cases. The Secretary  
 13 for Inland Revenue versus Sturrock Sugar Farm (Pty)  
 14 Limited, 1965 (1) SA 897 (A) at page –  
 15 CHAIRPERSON: Yes, I was in that Sturrock  
 16 case and the passage to which you are referring was  
 17 discussed later by the SCA in a subsequent case between the  
 18 Standard Bank, National Bank, and Registrar of Banking, and  
 19 it was pointed out that there were some miss-citations in  
 20 the passage concerned, although the purposive principle was  
 21 still upheld by the court.  
 22 MS KGOROEDIRA: Yes.  
 23 CHAIRPERSON: But that passage that  
 24 you're now relying on has to be read in the light of the  
 25 criticism contained in the subsequent appellate division

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1 case. I'm not sure it's going to help us at all in this  
 2 matter.  
 3 MS KGOROEDIRA: Yes, my learned friend  
 4 in his reply can deal with it from that angle, and it  
 5 reads, Judge Thompson –  
 6 CHAIRPERSON: - no point in reading a  
 7 passage which – it's no good saying your learned friend  
 8 will deal with it in reply. You're dealing with it now.  
 9 What's the point in dealing with a passage which has been,  
 10 the judgment of the appellate division which has been  
 11 discredited, if I can put it that way –  
 12 MS KGOROEDIRA: Okay.  
 13 CHAIRPERSON: In a subsequent decision of  
 14 the SCA it was pointed out that there were, there was the  
 15 quotation supposedly in that passage which was shown not to  
 16 be a correct quotation. No such quotation appears in the  
 17 judgment cited, so it's no good saying your learned friend  
 18 will deal with it in reply; you're dealing with it now. I  
 19 understand the argument, which was upheld in the subsequent  
 20 case, that the purposive approach applies.  
 21 MS KGOROEDIRA: Yes.  
 22 CHAIRPERSON: And clearly in modern  
 23 jurisprudence cases have to be interpreted in the light of  
 24 – I mean statutes to be interpreted in the light of the  
 25 purpose sought to be achieved by –

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1 MS KGOROEOADIRA: Yes.

2 CHAIRPERSON: We know that. I would

3 think that first-year law students are taught that these

4 days. So you don't have to quote slightly discredited

5 authority in support of that trite proposition, but anyway,

6 please proceed.

7 MS KGOROEOADIRA: Okay. In the premise

8 section 2 of the Commissions Act should be read with

9 section 1(b)(iii) of the Commissions Act, and the preamble

10 of the Commissions Act, they should be read together.

11 Accordingly consideration should be had to the following,

12 that the Marikana tragedy occurred in this area and all the

13 evidence necessary for the Commission to make an insightful

14 recommendation to the honourable President Jacob Zuma may

15 be adequately presented and submitted from this area. The

16 proceedings, or the evidence of the Marikana Commission may

17 not be prejudiced, influenced, or anticipated.

18 CHAIRPERSON: Will the proceedings not be

19 prejudiced if there isn't full participation from parties

20 who have to withdraw because the hundreds of thousands of

21 rand that have to be spent, obviously spent in this area,

22 which I can understand the concern of certain parties, but

23 the hundreds of thousands of rand that have to be spent in

24 this area, if these parties continue to be represented,

25 will mean that they can no longer be represented? Will

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1 that not in fact adversely impact on the work of the

2 Commission and the quality of the answers that it gives to

3 the questions that are posed in the Terms of Reference?

4 MS KGOROEOADIRA: As it has been

5 previously indicated by my learned friend that I was not

6 opposing to the fact that there is money spent; I was not

7 opposing to the costs involved, and I will deal with that

8 after I make this point –

9 CHAIRPERSON: But by implication, if

10 you're not opposing that, then what do you say about the

11 point, which is a major point stressed by a number of the

12 counsellors who addressed me today –

13 MS KGOROEOADIRA: Yes.

14 CHAIRPERSON: - namely that the work of

15 the Commission will in fact be adversely affected if it has

16 to continue here in Rustenburg, for the reasons set out,

17 which are not challenged, that there is an enormous

18 financial drain on not just the State, but the parties as

19 well, and some of them tell us in all candour that if we

20 stay here in Rustenburg they will have to withdraw. Now

21 that's the point that you've got to deal with. That's the

22 major point, or certainly one of the major points advanced

23 in support of the application and you've got to deal with

24 it. So far you haven't dealt with it at all.

25 MS KGOROEOADIRA: Yes, I haven't. I was

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1 going to deal with it after I make this point, because

2 that's an issue of costs that is being raised by most

3 parties.

4 CHAIRPERSON: No, it's not an issue of

5 costs; it's an issue of the continued effective operation

6 of the Commission –

7 MS KGOROEOADIRA: Yes.

8 [11:58] CHAIRPERSON: - in the light of the

9 assistance it will no longer, probably will no longer be

10 receiving from parties who up to now have been

11 participating and making a meaningful contribution to the

12 proceedings thus far.

13 MS KGOROEOADIRA: Yes. As I said the

14 proceedings, or the evidence of the Marikana Commission may

15 not be prejudiced, influenced, or anticipated. Therefore I

16 humbly submit to that extent that the relocation of the

17 Marikana Commission, taking into account all that which he

18 has said, relocation from Rustenburg, North West province,

19 to Pretoria, Gauteng province, would prejudice, belittle,

20 and insult the indigenous communities of the North West,

21 therefore denying the indigenous communities the access to

22 the very justice that this Marikana Commission stands to

23 achieve in addressing imbalances and inequalities that have

24 advanced over the years, which tragically led to the

25 Marikana tragedy.

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1 Now the applicant's main contentions are in

2 relation to their ability to continue with the

3 representation due to the amount of money that's being

4 spent. I'm not opposing that. It is true, we've got good

5 advocates representing SERI, representing the families,

6 representing the evidence leaders coming here, which are

7 employed by the Department of Justice - I will deal with

8 them separately – who are making a valuable contribution to

9 this Marikana Commission, and seeing them having to leave

10 would really be tragic.

11 However, the indigenous people also need to

12 participate fully in this process. In the SERI replying

13 affidavit it is indicated that sponsorship is being sourced

14 from international, national, and private communities

15 alike. I publicly appeal that those who are sponsoring to

16 continue sponsoring, those who can sponsor to continue

17 sponsoring SERI and all the applicants that need

18 sponsorship because losing their legal representatives

19 would be prejudicial, and I also appeal to the North West

20 Bar to participate, probably on a pro bono basis, in the

21 Marikana Commission as this affects the indigenous

22 community of their area.

23 The evidence leaders are employed by the

24 Department of Justice –

25 CHAIRPERSON: Not employed; they're

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1 briefed by the Department of Justice.  
 2 MS KGOROEDIRA: They are briefed by the  
 3 Department of Justice, I beg your pardon –  
 4 CHAIRPERSON: They're briefed by the  
 5 State Attorney on behalf of the Department of Justice.  
 6 MS KGOROEDIRA: I beg your pardon. They  
 7 are briefed by the State Attorney, who is instructed by the  
 8 Department of Justice –  
 9 CHAIRPERSON: The evidence leaders were  
 10 chosen by the Commissioners themselves. We chose them,  
 11 decided who would be briefed, requested the State Attorney  
 12 to do the necessary. The executive played no part in  
 13 deciding which advocates would appear as evidence leaders  
 14 here. That's a very important point –  
 15 MS KGOROEDIRA: I beg your pardon.  
 16 CHAIRPERSON: - that must be stressed.  
 17 MS KGOROEDIRA: I beg your pardon,  
 18 Chair. The point I was trying to make was the fund that  
 19 fund legal representation for the lawyers on the part of  
 20 representing the evidence leaders and perhaps the operation  
 21 of this Commission are sourced from the Department of  
 22 Justice, and the department, or in light of the fact that  
 23 the Chair has to meet with the Minister in order to  
 24 reconsider, or to consider the relocation of this  
 25 Commission, the department or the Minister, or those in

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1 charge are well aware of the costs of this Commission. But  
 2 even so, the Minister on the 3rd of April, having a meeting  
 3 with our Chairman and our Commissioners, still wanted to  
 4 hear what the indigenous people had to say, hence we were  
 5 granted a hearing today.  
 6 CHAIRPERSON: - the Minister, but he and  
 7 I –  
 8 MS KGOROEDIRA: Both parties, yes.  
 9 CHAIRPERSON: - thought it was  
 10 inappropriate to deal with the application while there was  
 11 opposition. The points raised by the respondent had to be  
 12 considered and the applicants had to get an opportunity to  
 13 answer. So it would have been totally inappropriate to  
 14 have done anything else.  
 15 MS KGOROEDIRA: In the premise, I submit  
 16 that, and I humbly – ja, I humbly submit that the  
 17 relocation of the Commission would be detrimental to the  
 18 traditional, or indigenous communities concerned, and that  
 19 the relocation application should be dismissed.  
 20 CHAIRPERSON: Thank you. Mr Chaskalson,  
 21 would you wish to reply, before I call on Mr Mpofu, on the  
 22 interpretation point about section 2 of the act?  
 23 MR CHASKALSON SC: No, Mr Chairperson, I  
 24 have no reply to the submissions. I'm happy to leave it to  
 25 Mr Mpofu.

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1 CHAIRPERSON: Mr Mpofu, in the light of  
 2 that show of confidence from the evidence leaders, do you  
 3 wish to say anything in reply?  
 4 MR MPOFU: Yes, thank you, Chairperson.  
 5 I'm happy to join the team of the evidence leaders, for  
 6 obvious reasons. Chair, quite frankly, there's no great  
 7 reason to reply. I don't think the issues have been  
 8 addressed at all. Instead what we've been given are new  
 9 issues not raised in the affidavit, about conventions in  
 10 Nigeria and Geneva and such places.  
 11 What we know, Chair, what has also not been  
 12 addressed of course is the fact that the Commission is in  
 13 possession of a letter that says that the traditional  
 14 communities will abide by the decision, and one would have  
 15 expected at the very least that the emergence of that  
 16 letter would have called for a supplementary affidavit, or  
 17 something of that nature. So as we are standing here, that  
 18 is the situation.  
 19 CHAIRPERSON: It's the suggestion that  
 20 the administrator of the traditional authority was on a  
 21 frolic of his own. He hasn't filed an affidavit dealing  
 22 with that at all.  
 23 MR MPOFU: Yes, well exactly,  
 24 Chairperson, he has not filed an affidavit that says he's  
 25 not on a frolic of his own, so we have to accept that he

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1 is. Then of course the issue of the Terms of Reference,  
 2 for what it's worth actually militate against the argument  
 3 of the respondents. It is true that the President in  
 4 promulgating, or rather in instituting the Commission  
 5 referred to it having to deal with matters of public,  
 6 national, and international concern. There was no mention  
 7 of matters of provincial concern or whatever we've been now  
 8 asked to concentrate on. So insofar as any – South Africa  
 9 is a unitary state, we no longer have the homeland system,  
 10 so insofar as any part of South Africa has a specific  
 11 interest, it is covered in the national, in the broad  
 12 national interest that the President referred to, and my  
 13 learned colleague says herself that one of the objectives  
 14 is that these tragic events should not reoccur in South  
 15 Africa, not in the North West or in the Rustenburg area,  
 16 and all those show that even if one were to take the so-  
 17 called purposive interpretation, it would work against the  
 18 opposition.  
 19 But for what it's worth, Chair, and the Chair has  
 20 correctly pointed out, the proposition that we must jump to  
 21 some purposive interpretation is itself against the first  
 22 principles of legal interpretation, which says that when  
 23 the plain grammatical meaning of the statute is clear, one  
 24 does not even have to go to the golden rule and all those  
 25 things, let alone the preamble –



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1 CHAIRPERSON: I'm not sure one needs to  
 2 go as far as that. I didn't say that, but –  
 3 MR MPOFU: Ja.  
 4 CHAIRPERSON: The purposive approach must  
 5 always be adopted, I would have thought, but I don't quite  
 6 understand how the purposive approach –  
 7 MR MPOFU: Helps us, ja.  
 8 CHAIRPERSON: - enables us to cut down  
 9 the clear wording of section 2.  
 10 MR MPOFU: Absolutely.  
 11 CHAIRPERSON: There's nothing in the  
 12 preamble or in the other parts of the Commissions Act which  
 13 points in that direction.  
 14 MR MPOFU: Which derogates from the clear  
 15 meaning, Chairperson, thank you.  
 16 CHAIRPERSON: Sorry, Mr Mpofu, before you  
 17 carry on, I think that if he's still in the building,  
 18 Major-General Annandale can be told that we won't be able  
 19 to hear him today, but as long as he's back here at half  
 20 past 9 – sorry, 10 o'clock on Monday. Thank you. I  
 21 understand he's going, I was informed that he wished to  
 22 leave at half past 12 because he had to attend a funeral,  
 23 but I think in fairness I could indicate now that if he  
 24 wants to go now there won't be a problem. We won't call on  
 25 him between now and half past 12, but he's got to be back

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1 here at 10 o'clock on Monday. Sorry Mr Mpofu, please  
 2 proceed.  
 3 MR MPOFU: Thank you, Chairperson. And  
 4 so insofar as one may still recall what I called the first  
 5 principles, also what one calls the *lex generalis*, which is  
 6 what the broader preambular issues would be, cannot  
 7 overrule the *lex specifica*. In this case we have *lex summa*  
 8 *specifica*, if one may coin a Latin phrase, because there  
 9 are specific regulations which have been given for this  
 10 particular Commission, so you go even beyond *lex specifica*.  
 11 So those are just some of the first principles of  
 12 interpretation.  
 13 Then, Chair, for what it's worth, I just want to  
 14 make this point very clear. Let's assume for argument sake  
 15 that there is some peripheral interest that the traditional  
 16 community concerned have; we have not been told, despite  
 17 the challenge that we put in the morning, at what point  
 18 does that interest supersede the interest of the direct  
 19 parties in respect of which and on behalf of whom, as Mr  
 20 Chaskalson put it very clearly, the Commission was put  
 21 together in the first place. Those are the primary  
 22 parties; there's no question about it, and therefore if  
 23 there was any overriding interest that might override their  
 24 own interest, then we should have been told about it, and  
 25 we haven't been told of such a thing. Instead we are told

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1 that the respondents actually do not oppose the submissions  
 2 we have made in relation to escalating costs and the  
 3 implications and the threat of no representation. So  
 4 therefore we should have been favoured at the very least  
 5 with something that says look, despite the fact that these  
 6 people will be deprived of their access to justice, their  
 7 right to representation, their ability to get to the truth  
 8 of why their loved ones died or were injured, there is this  
 9 other countervailing interest which must supersede all  
 10 that, but that has not been forthcoming at all, and  
 11 therefore the key issue really is this – once again  
 12 assuming that there is that interest, one taking it for  
 13 granted, we've also not been told why that interest may not  
 14 be well represented in another location. In other words,  
 15 let's assume for argument sake that one of the findings of  
 16 the Commission will be that the massacre was caused because  
 17 the local council of this and that place did not sit on a  
 18 specific day, then what difference does that make whether  
 19 that pronouncement is made in Rustenburg or in Pretoria?  
 20 It will still have the same impact, or it will require the  
 21 same action or non-action or whatever, wherever it is made.  
 22 So if anyone is going to be insulted by  
 23 deliberately continuing with a path of having the  
 24 Commission at a place which clearly is going to result in  
 25 their non-representation, it is the applicants and the

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1 parties and the victims and the families of the people who  
 2 died, and the other affected people who are mentioned in  
 3 the Terms of Reference, as it were. Thank you,  
 4 Chairperson, I just wanted to clarify those points, but  
 5 quite honestly, I think as I said in my closing statement  
 6 of the first round, the application as far as we're  
 7 concerned should still be regarded as not being opposed.  
 8 Thank you, Chairperson.  
 9 CHAIRPERSON: Thank you. I will consider  
 10 the arguments that have been addressed to us today and the  
 11 papers that have been filed and what was said previously,  
 12 and –  
 13 MR MPOFU: Sorry, Chairperson, there's  
 14 just one point. Also the invitation that was made by the  
 15 Chairperson and Mr Chaskalson of revisiting the matter  
 16 should the need arise in respect of phase 2 has quite  
 17 frankly not been addressed at all. Thank you, Chairperson.  
 18 [12:18] CHAIRPERSON: Yes, I will consider what's  
 19 been said today and previously and the papers filed, and  
 20 arrangements have been made for a full set of the papers to  
 21 be sent to the Minister and he will also receive a  
 22 transcript of what has been said today, and when he is  
 23 ready to discuss the matter with me, we will meet and  
 24 endeavour to ascertain whether reasonable grounds have been  
 25 shown for the removal. It's quite clear, it's now 20 past

1 12 – as I said earlier, I received a message this morning  
2 from Mr Semenya to the effect that General Annandale has to  
3 attend a funeral this afternoon and he wanted to know  
4 whether we would stop sitting at 12:30 and I said we would,  
5 but there's no point in just hearing 10 minutes of  
6 evidence. So as I said earlier, we will now adjourn until  
7 Monday morning at 10 o'clock.

8 [COMMISSION ADJOURNED]

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