

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 129

6 SEPTEMBER 2013

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1 [PROCEEDINGS ON 6 SEPTEMBER 2013]
 2 [09:14] CHAIRPERSON: The Commission resumes. Mr
 3 Oosthuizen, you are sitting where the witnesses normally
 4 sit but I won't swear you in.
 5 MR MPOFU: I accept the offer,
 6 Chairperson. Chairperson, sorry, I'm very sorry for the
 7 inconvenience. I've just received a message that the
 8 attorney for the families of the deceased is probably stuck
 9 in the same accident that delayed me. He, according to his
 10 SMS he'll be here at 9, at 9:30, Chairperson. I'm not
 11 saying anything, that's what he –
 12 CHAIRPERSON: Are you agreeable
 13 [microphone off, inaudible] – sorry, I must it on record.
 14 Are you agreeable to us starting before he comes or do you
 15 want us to wait till 9:30?
 16 MR MPOFU: Okay, Chairperson, I will take
 17 responsibility, we can start. I'll –
 18 CHAIRPERSON: You'll take the
 19 responsibility.
 20 MR MPOFU: Yes.
 21 CHAIRPERSON: Alright, thank you for
 22 that. We did indicate times for counsel, an hour and a
 23 half for the applicants, an hour and a half for all the
 24 respondents who wish to speak and then half an hour for the
 25 applicants in reply. So effectively that means you will

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1 argue, you and the attorney when he comes, will argue until
 2 about quarter to 11.
 3 MR MPOFU: Quarter to 12.
 4 CHAIRPERSON: Quarter to 11 and
 5 thereafter the respondents will argue till half past 12 and
 6 you will have till 1 o'clock to –
 7 MR MPOFU: Chairperson, I'm very sorry
 8 about this. Can we just stand down for five minutes? I
 9 now have just got another message that my attorney might be
 10 involved in an accident on the way here. Can we just –
 11 CHAIRPERSON: We will adjourn for five
 12 minutes.
 13 MR MPOFU: Thank you, Chair.
 14 [COMMISSION ADJOURNS COMMISSION RESUMES]
 15 [09:29] CHAIRPERSON: The Commission resumes.
 16 Yes, Mr Mpofo, you were explaining to me that the attorney
 17 hasn't come but you again took it on your, took the
 18 responsibility on yourself to say we can proceed without
 19 your attorney. You can tell your attorney, when he comes,
 20 what happened in his absence.
 21 MR MPOFU: Yes, thank you Chairperson.
 22 The position is, the attorney, Mr Ntsebeza's attorney but
 23 my attorney who was supposed to be involved in an accident,
 24 I'm not able to reach her but other people are trying to
 25 get to the scene.

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1 CHAIRPERSON: I hope that she wasn't
 2 injured.
 3 MR MPOFU: Yes, we hope so. Someone has
 4 gone to the scene. Thank you, Chairperson.
 5 CHAIRPERSON: We'll have to adjust the
 6 time allocation to allow for the fact that we lost half an
 7 hour but we won't penalise your side or the respondents –
 8 MR MPOFU: I'm indebted to the
 9 Chairperson, thank you Chair. Chairperson, what I will do
 10 is not to repeat the grounds of our application insofar as
 11 those were outlined in the address that I gave on, last
 12 week, and maybe to save time what I will do is to deal with
 13 some of the issues that, or rather the points that have
 14 become issues, as it were, either because I had raised them
 15 or because they are raised by the opposing parties. So as
 16 it were, hopefully that will make me save time when I have
 17 to do the reply because in a way I'll be having two replies
 18 because I'm going to deal with the matter that was raised
 19 in the answering papers, as it were. Thank you, Chair.
 20 The first issue, Chairperson, is a preliminary
 21 issue of the opposition that is being advanced on behalf of
 22 the Department of Justice. As it were, we have three
 23 parties that have indicated opposition or rather two
 24 parties and the department and all I need to say about the
 25 involvement of the department at this level is that it is

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1 very unfortunate and inappropriate.
 2 The Department of Justice, as we all know, is not
 3 a party to the Commission and the nature of the Commission
 4 is that the President has delegated, so to speak, to the
 5 Commission the procedure and everything to do with how the
 6 Commission should run. And in terms of the law the
 7 President, even in appointing the Commission, had to act
 8 personally by himself. Now, it is also true of course in
 9 terms of the operational arrangements for the Commission,
 10 the President can take advice from one of his ministers or
 11 any of his ministers, as he wishes, but let that not mean
 12 that there's an implied delegation to such a Minister to
 13 participate directly in a Commission. That, I think, goes
 14 against everything that is sought to be done by appointing
 15 an independent Commission and even going as far as to
 16 appoint a judge, a retired judge and an independent
 17 advocate to assist that judge. All those measures are
 18 taken to assure the public and the participants of the
 19 crucial issue of the independence of that Commission. Now
 20 if that independence is going to be threatened by either
 21 the President or one of his ministers literally coming,
 22 descending into the arena, which is what they're doing,
 23 that can only have the effect of undermining that
 24 independence because then they might as well have run the
 25 Commission as an investigation themselves and not give a

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1 fiction of independence which can be withdrawn at will.
 2 So it's regrettable that the Minister of Justice
 3 can see it fit to come here, effectively, and intimidate
 4 the Commission directly, you know, in a matter that
 5 involves the parties and that is full, even on their own
 6 version, that matter is fully within the discretion of the
 7 Commission.
 8 The Minister in the affidavit supposedly done on
 9 his behalf says, firstly, at 6.4.2 of his affidavit, "The
 10 refusal of a postponement by an investigatory body cannot,
 11 with respect, infringe upon the procedural rights of the
 12 applicant for postponement." That's a matter I'll deal
 13 with when we deal with the merits, which is wrong, but he
 14 goes on to say that, "We submit that because of the legal
 15 nature of the Marikana Commission, it is the convenience
 16 thereof and its obligation to report to the President that
 17 comes first." There is just in reality only one interest
 18 to consider, that of the Marikana Commission and not
 19 competing ones.
 20 And then they say, "In any event, the granting of
 21 a postponement, whatever the nature of the discretionary
 22 power, is an indulgence" and so on and so on.
 23 So what they're really saying is the truth, which
 24 is that – in the last part – that this is a matter that is
 25 discretionary and that discretion, by law and also in terms

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1 of the terms of reference, is a question that is fully in
 2 the hands of the Commission. So the Minister of Justice
 3 cannot directly himself come and settle that discretion.
 4 I see that my learned friend Mr Oosthuizen is
 5 here, presumably to argue on behalf of the Minister. He is
 6 the person who, in the litigation, is acting for the
 7 Minister of Justice and the President of the country so I
 8 don't know what hat he's wearing now. Is he also, is the
 9 President also here to oppose the postponement?
 10 CHAIRPERSON: Well, let's ask him. Mr
 11 Oosthuizen, who is your client?
 12 MR OOSTHUIZEN: Chair, I represent the
 13 Department today. I'm on brief from the State Attorney for
 14 the Department of Justice and Constitutional Development.
 15 CHAIRPERSON: You're not appearing for
 16 the President?
 17 MR OOSTHUIZEN: I'm not briefed for this
 18 matter on behalf of the President.
 19 CHAIRPERSON: Thank you.
 20 MR MPOFU: Right. Well, in that case the
 21 Minister, if he's here in his own right, can also only be
 22 here because he's been delegated by the President because
 23 the Commission belongs to the President. The Minister's
 24 role in the whole bus –
 25 CHAIRPERSON: I'm sorry – acting for the

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1 department. Now, I understand the head of, the political
 2 head of the department is the Minister but he didn't say
 3 he's appearing for the Minister as such. He's appearing
 4 for the department. That's what I understood him to say so
 5 –
 6 MR MPOFU: Ja, well, I don't –
 7 CHAIRPERSON: - may make no difference.
 8 I just –
 9 MR MPOFU: No, it makes no difference
 10 whatsoever for the purposes of what I'm saying. The
 11 department, whatever, any state organ that is directly
 12 involved with the executive. It is the exec – the point of
 13 the matter is that the executive, the constitution gives
 14 executive powers to the President to appoint a Commission.
 15 The President then delegates that or rather delegates the
 16 running of the Commission to you, Mr Chairman, and your
 17 commissioners. That's the point we're making.
 18 So any other executive arm of government that
 19 seeks to interfere in the Commission as a party as it were,
 20 quote/unquote, and to come and tell us whether there should
 21 be a postponement or not a postponement, that is direct
 22 interference by the executive. That's the point I'm making
 23 because the power as to whether there should be a
 24 postponement or an adjournment, how long a witness is going
 25 to be, whether questioning, cross-examination is going to

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1 be halved, all those have been delegated to you and your
 2 Commission. What is next? Is the executive going to come
 3 here and tell us which questions should be asked or not?
 4 This is very improper and unprecedented and ill-advised and
 5 it sends a chilling effect insofar as it is meant to
 6 intimidate anybody – not that I believe that the
 7 intimidation is going to work but the attempt alone is
 8 abhorrent.
 9 Now, so my take, Chairperson, is that the matter
 10 of the postponement or non-postponement of this matter
 11 pending, in terms of the relief we've prayed for, is a
 12 matter that concerns only the parties to this matter and
 13 also the Commission itself and should be determined without
 14 the direct involvement of any arm of government. And I
 15 suppose the Chairperson will have to make a ruling on that
 16 point at whatever point suits the Chairperson.
 17 Let me just add this, the situation that we have
 18 now is the following. We were informed at the meeting, as
 19 I said earlier, that the evidence leaders would oppose the
 20 application. I think they've decided not to and I think
 21 they're well-advised not to but – so what has happened –
 22 CHAIRPERSON: Sorry, Mr Mpofo, I thought
 23 I saw Mr Budlender shake his head. Perhaps we should get
 24 clarity from him at this stage –
 25 MR MPOFU: Okay, maybe he's not as well-

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1 advised as I've heard.

2 CHAIRPERSON: - what stance he is going

3 to adopt and whether he's going to take the good advice

4 that you suggest he should take or some, possibly some bad

5 advice of his own. Mr Budlender, what is the stance of the

6 evidence leaders going to be?

7 MR BUDLENDER SC: The evidence leaders,

8 Chairperson, will submit that there's no basis for a

9 postponement and the application for postponement should be

10 refused.

11 CHAIRPERSON: So you withdraw your

12 comments about Mr Budlender being well-advised and you can

13 now carry on with the argument.

14 MR MPOFU: Well, yes. I'll withdraw it,

15 I won't say whether he's well-advised or ill-advised now.

16 I'll just withdraw the comment. Well, that makes the

17 matter even worse then, Chairperson, because what we really

18 have here is a situation where you have the evidence

19 leaders appointed by the Department of Justice -

20 CHAIRPERSON: No, that's not correct.

21 The evidence leaders were appointed by the Commission. We

22 chose them, we told the department whom we wanted to be

23 briefed to be evidence leaders. They had no say at all in

24 the matter. We told them what we were proposing to do and

25 they accepted it and these evidence leaders are people

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1 chosen by us, not appointed by the department. That's a

2 very important point to have that on record. Briefed, as I

3 said, by the State Attorney but appointed by us, not the

4 department.

5 MR MPOFU: Okay, then I'll amend it. The

6 evidence leaders who are on the payroll of the Department

7 of Justice -

8 MR BUDLENDER SC: Chair, I object to

9 that.

10 CHAIRPERSON: I'm not sure whether

11 counsel -

12 MR MPOFU: Well, I'm sure -

13 CHAIRPERSON: - who are briefed from the

14 State Attorney, can be regarded as being on the payroll of

15 the department.

16 MR MPOFU: They are.

17 CHAIRPERSON: The Department of Justice

18 is obliged to put the State Attorney in funds so that the

19 State Attorney can pay counsel, but on that argument the

20 Commission is on the payroll of the Department of Justice

21 as well because they've also got what amounts to -

22 MR MPOFU: Well, that's a different

23 matter, Chairperson -

24 MR BUDLENDER SC: Chair, can I just say

25 that if - we've tried to conduct this on a basis, on a

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1 civil and co-operative basis but if there are going to be

2 allegations that the evidence leaders are not acting

3 independently and that they're acting on the instructions

4 of the Department of Justice, I would like my learned

5 friend to say that and to justify it and to take the

6 consequences.

7 MR MPOFU: Well, if I was Mr Budlender I

8 would have waited until I say that. There's no point in

9 him saying it for me.

10 CHAIRPERSON: So are you not saying that?

11 MR MPOFU: No, of course, I've not said

12 it. How can he object to something I have not said -

13 CHAIRPERSON: - Mr Budlender will

14 satisfied -

15 MR MPOFU: Let me tell you what I am

16 saying. What I'm saying is that - not me, by the way, what

17 the Department of Justice says in its affidavit is that the

18 amounts coming from the budget of the department are 2.2

19 million per month for the running, operational costs of the

20 Commission and 4 million per month for legal fees.

21 Paragraph - sorry, paragraph 5.3 of their affidavit. So

22 let me not say anything, I'll just read you what the

23 department is saying and -

24 CHAIRPERSON: I don't understand where

25 that takes you. Presumably the - because I have been

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1 recalled from retirement to preside over this Commission,

2 I'm paid an extra salary for that purpose, not the full

3 salary because certain allowances aren't paid twice but

4 presumably what I'm paid also comes from the department's

5 budget.

6 MR MPOFU: Yes -

7 CHAIRPERSON: So on your argument then

8 I'm also on the department's payroll.

9 MR MPOFU: No, Chairperson -

10 CHAIRPERSON: And so -

11 MR MPOFU: If I may - okay, maybe I

12 should read this thing fully so that you can appreciate the

13 point I'm making. It says, "In general terms the

14 department" - that's the Department of Justice - "has

15 already expended some 32 million on the Marikana Commission

16 in the previous financial year whilst in the current year

17 we have already expended some R24.7 million thereon, giving

18 a total of some R54.7 million to date. The average monthly

19 operational costs of the Marikana Commission" - and to

20 cover your point it says, this covers your point,

21 Chairperson, to show that that is nothing to do with the

22 Commission, it says in brackets "(excluding the legal fees

23 payable to the commissioners and the evidence leaders) is

24 some 2.2 million per month, whilst estimated legal fees are

25 some R4 million per month."

<p style="text-align: right;">Page 13533</p> <p>1 Now what I'm saying is that we accept that for 2 practical purposes with the other operational costs and the 3 commissioners have to be compensated, that's not what this 4 is about. What I'm saying is that the part of this 54.7 5 million that's the payroll I'm talking about, is the fees 6 that are paid for the evidence leaders. 7 In any event, it doesn't matter, Chairperson, I'm 8 talking about perceptions. My clients' perception is that, 9 firstly, the evidence leaders' association, direct or 10 indirect, with the department is there, is established in 11 the paragraph that I'm – 12 MR OOSTHUIZEN: Chairman – 13 MR MPOFU: Number 1. Number 2 – 14 MR OOSTHUIZEN: Mr Chairman, can I please 15 ask that we be shown in the papers before the Commission 16 where this perception is canvassed in the papers and where 17 we had an opportunity to deal with it in our affidavit? To 18 make – 19 CHAIRPERSON: Isn't that a point you can 20 make in reply? I think let Mr Mpofo argue his case. He's 21 subject to time limits – 22 MR OOSTHUIZEN: As it pleases the Chair. 23 CHAIRPERSON: Let's be fair to him and 24 allow him to – 25 MR MPOFU: No Chairperson, I think –</p>	<p style="text-align: right;">Page 13535</p> <p>1 before and I submit it's the latter. To their knowledge 2 the issue was raised by me. So that's the first issue, 3 Chairperson, that we need to raise. As I say, either for a 4 point of view of propriety or from the legal structure of 5 the Commission itself. 6 [09:48] CHAIRPERSON: Let me make sure I write 7 that down. So far you've been addressing us on what you 8 call the first issue. 9 MR MPOFU: Preliminary issue, yes. 10 CHAIRPERSON: Preliminary, and you argued 11 that it was unfortunate and you used, I think, stronger 12 words than that that the Department had seen fit to 13 intervene and to oppose. 14 MR MPOFU: Correct. 15 CHAIRPERSON: Now can you give me in one 16 sentence what the first issue is, so that I can – 17 MR MPOFU: Yes. 18 CHAIRPERSON: I've tried to write down 19 what you said but I didn't get it all but if you could 20 summarise just in one sentence or two – 21 MR MPOFU: Thank you, Chairperson. What 22 I'm saying is that in terms of the constitutional powers 23 that are at play, which the President has delegated the 24 powers to determine the issue that we've put here to the 25 Commission itself and it is improper and inappropriate and</p>
<p style="text-align: right;">Page 13534</p> <p>1 CHAIRPERSON: - deliver his argument 2 without unnecessary interruption. 3 MR MPOFU: Yes, thank you. I appreciate 4 that, Chairperson, and quite frankly that intervention is 5 startling because the department in its affidavit has dealt 6 with this issue. I don't know why they dealt with it if 7 they didn't think it was raised. It's dealt with in 8 paragraph – 9 CHAIRPERSON: I'm sure they raised, they 10 dealt with it – 11 MR MPOFU: - paragraphs 2, 3 – 12 CHAIRPERSON: I'm not sure they dealt 13 with - sorry to interrupt you – 14 MR MPOFU: Ja, that's what – 15 CHAIRPERSON: I'm not sure they dealt 16 with the perception point but your argument I take it is 17 that the perception is based upon the statement they make. 18 MR MPOFU: Yes. Well, just a minute, 19 Chairperson. Yes, dealt with up to paragraph 5, including 20 the part that I was reading. 21 CHAIRPERSON: You rely on para 5 of the 22 department's – 23 MR MPOFU: Yes, ja, but all the 24 paragraphs even preceding that, deal exactly with this 25 point. So either they were prophetic or it was raised</p>	<p style="text-align: right;">Page 13536</p> <p>1 ill-advised for the Department of Justice to appear in this 2 Commission directly to influence whether or not a 3 postponement should be granted or not. I think that would 4 be in a nutshell the submission and it's a matter on which 5 we seek a ruling. 6 CHAIRPERSON: [Microphone off, inaudible] 7 is in terms of the constitutional powers at play the 8 President has delegated certain issues to be determined by 9 this Commission. 10 MR MPOFU: Including the issue at hand. 11 CHAIRPERSON: And it is improper and 12 inappropriate and ill-advised for the Department to appear 13 in this Commission and seek to oppose postponement. Is 14 that what you are saying? 15 MR MPOFU: Directly and it is a matter on 16 which we seek a ruling. 17 CHAIRPERSON: Yes, what I suggest you do 18 is present your whole argument. 19 MR MPOFU: Okay. 20 CHAIRPERSON: I will then ask Mr 21 Oosthuizen to reply on that point only and then we'll give 22 a ruling. Hopefully he can do that before the tea 23 adjournment or he can consider it over tea adjournment and 24 if we have come to a clear view on the matter we'll then 25 give the ruling that's sought, one way or the other, after</p>

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1 that and then we can carry on - but argue in the meanwhile
 2 your whole argument.
 3 MR MPOFU: Correct, yes thank you,
 4 Chairperson. Right, now –
 5 CHAIRPERSON: Are you now moving onto the
 6 second issue?
 7 MR MPOFU: Yes, I'm now moving to the
 8 merits of the –
 9 CHAIRPERSON: The merits?
 10 MR MPOFU: The merit, yes -
 11 CHAIRPERSON: There are a number of sub-
 12 issues there as it were, is that right?
 13 MR MPOFU: In the merits?
 14 CHAIRPERSON: Yes.
 15 MR MPOFU: Oh yes - yes.
 16 CHAIRPERSON: What's the first issue on
 17 the merits that you want to argue?
 18 MR MPOFU: Right, Okay as I said,
 19 Chairperson, I will –
 20 CHAIRPERSON: May I ask do you have a
 21 note, if I asked you what the issues on the merits are, if
 22 you can give them to me in summary, you know almost like
 23 headings because you haven't given us heads but I
 24 understand there are problems about that.
 25 MR MPOFU: Ja.

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1 CHAIRPERSON: But can you just tell me
 2 shortly, you know, the heading as it were of the issues
 3 that you're going to deal with in the merits so I can write
 4 them down and then better follow your arguments?
 5 MR MPOFU: Yes, I'll attempt to do so,
 6 just gleaning on my notes, Chairperson. The first kind of
 7 cluster of points that I'm going to make will be points
 8 that are taken from the answering affidavit, mainly the one
 9 of the Department of Justice. So I'm going to have to
 10 assume that the Chairperson is going to take it into
 11 consideration.
 12 CHAIRPERSON: We can assume that we
 13 studied all the papers filed by all the parties including
 14 the transcripts of what you and the attorney for the
 15 families said.
 16 MR MPOFU: Yes and what I call that
 17 cluster of issues, Chairperson, deals with some of the
 18 factual allegations made there regarding the number of
 19 witnesses that are still going to testify, the need for
 20 closure and the effect of the outcome of the Commission on
 21 pending civil and criminal proceedings. I'll deal with
 22 those as I said as one cluster.
 23 CHAIRPERSON: This pending civil
 24 proceeding?
 25 MR MPOFU: Pending civil and criminal –

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1 CHAIRPERSON: Civil and criminal –
 2 MR MPOFU: Yes, then I will deal with
 3 what would seem to be the nub of the legal issue raised by
 4 the Department, namely, that the refusal of a postponement
 5 cannot infringe upon the procedural rights of the
 6 applicants.
 7 CHAIRPERSON: By the applicants I take it
 8 you mean your clients, you mean your clients, not the –
 9 MR MPOFU: The main applicants.
 10 CHAIRPERSON: Not the Solidarity
 11 applicants.
 12 MR MPOFU: Yes, the main applicant, I
 13 think somewhere in one of these affidavits they've been
 14 referred to that, I'll adopt that nomenclature. Then I'll
 15 point the Chairperson to a series of what I call
 16 misrepresentations of fact upon which the opposition is
 17 based. Then I'll deal with the allegation that says the
 18 participation of the applicants, of the main applicants, is
 19 not essential. Then I'll deal with the allegation that
 20 such prejudice that the main applicants might suffer would
 21 be cured by the so-called cross-examination of the
 22 witnesses by the evidence leaders. And then there are two
 23 points – excuse me, Chairperson, I'm trying to edit as I'm
 24 going along. There are two points which probably belong to
 25 what I called the legal issue. One is that there's an

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1 allegation made that the findings of the Commission are
 2 advisory and I suppose it means therefore no rights will be
 3 infringed, so we can take it as part of the earlier point.
 4 CHAIRPERSON: There were two points which
 5 belong really to the legal issue. The first one is that
 6 the findings of the Commission are advisory, that's that
 7 point.
 8 MR MPOFU: Yes.
 9 CHAIRPERSON: And what's the other one?
 10 MR MPOFU: The other one is –
 11 Chairperson, I think I will also, okay, it will be infused
 12 in the second point, these are what I call the legal
 13 points. And yes, that's basically the length of it.
 14 CHAIRPERSON: That's the summary of the
 15 points?
 16 MR MPOFU: That's the summary of the
 17 points.
 18 CHAIRPERSON: A summary of the points
 19 you're going to raise and you've identified the issues
 20 which I've been able to write down, thank you, and now
 21 you're going to address the points.
 22 MR MPOFU: The points, yes, thank you,
 23 Chairperson.
 24 CHAIRPERSON: We'll keep an eye on the
 25 clock because you've got until 11 o'clock.

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1 MR MPOFU: Thank you, Chairperson.
 2 CHAIRPERSON: We will endeavour not to
 3 interrupt you. I just was seeking clarity on the issues
 4 and if there are interruptions I'll have to allow injury
 5 time but I hope it won't arise.
 6 MR MPOFU: Thank you, Chairperson, thank
 7 you very much. Well the issue I was going to start with
 8 we've already dealt with in another context which was the
 9 issue of the spend. I've already read that out, so to save
 10 time I'm not going to go there again. There is an
 11 allegation which I want to note about, at 5.4.1 that says
 12 that there are still 28 witnesses to testify, 22 have
 13 already testified and 28 witnesses still to testify.
 14 CHAIRPERSON: Paragraph 5 point?
 15 MR MPOFU: 5.4.1 and just in passing,
 16 Chairperson, if I may deal with that issue at the same time
 17 as I deal with an issue raised by, in SAPS. My approach
 18 really is that some of the issues overlap. They have been
 19 raised by SAPS and they've also been raised by the
 20 Department, so I'm not going address them individually.
 21 And in fact even, there's an affidavit from Bapo but they
 22 also raise the same issues, the evidence leaders can do it
 23 and so on. So it's one issue. Now SAPS takes what is a
 24 kind of technical point in limine, that's where they say
 25 that strictly speaking the lifespan of the Commission is

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1 till the end of October and therefore a postponement cannot
 2 be allowed which will have the effect of not finishing on
 3 that date. All I want to point is that is –
 4 CHAIRPERSON: I'm sorry, Mr Mpofu,
 5 forgive me, there's something I meant to ask you at the
 6 beginning which may be relevant on this point and that is
 7 we were told in chambers and you can - that the relief
 8 sought in the main application in the High Court is subject
 9 to an amendment. And I think you should put that on record
 10 because that may have a bearing on some of the arguments.
 11 MR MPOFU: Yes.
 12 CHAIRPERSON: I should have asked you
 13 that at the outset, I'm sorry.
 14 MR MPOFU: No, - actually Chairperson,
 15 this other issue that I didn't want to canvass that deals
 16 with that, ja. Firstly, it deals with that but it also
 17 deals with another, some distortions of the meeting that we
 18 had with the Deputy Judge President which appears in this
 19 affidavit.
 20 CHAIRPERSON: There's a problem there.
 21 Affidavits have been filed by the Department setting out
 22 allegations about what happened at the meeting. You didn't
 23 choose to file a reply dealing with that. So is it
 24 permissible for you to seek to traverse from the bar
 25 allegations on oath which have not been challenged by any

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1 affidavit filed from your side?
 2 MR MPOFU: Yes, it is.
 3 CHAIRPERSON: How can that be so?
 4 MR MPOFU: Because firstly, the special
 5 procedure that has been allowed in this particular
 6 application –
 7 CHAIRPERSON: The procedure related, the
 8 special procedure related to allowing you to tell us what
 9 your notice of motion would contain orally and what
 10 amounted to the founding affidavit, there was in fact no
 11 affidavit –
 12 MR MPOFU: Yes.
 13 CHAIRPERSON: That was a point that
 14 nobody took. Effectively what would have been the founding
 15 affidavit you also told orally and it was transcribed. The
 16 Department filed and the other party too filed affidavits,
 17 you chose not to reply to those affidavits. I'm not sure
 18 that one can permit a party who hasn't filed an affidavit
 19 traversing what's said in an affidavit filed by another
 20 party then to challenge the contents of the affidavit from
 21 the bar.
 22 MR MPOFU: No, Chairperson.
 23 CHAIRPERSON: In any event if it were to
 24 happen the question that arises with the Plascon Evans
 25 rule, Plascon Evan's rule applies but I take it we're don't

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1 have to get there if there's no affidavit contradicting the
 2 only affidavits on the point which are before us.
 3 MR MPOFU: No. Well, Chairperson,
 4 firstly that's an overly technical approach. Our
 5 understanding is that the affidavits, such affidavits as we
 6 were to file, whether they were –
 7 CHAIRPERSON: I told you last time –
 8 MR MPOFU: Oh yes –
 9 CHAIRPERSON: If you raise your fingers
 10 in the air to indicate quotation marks, the transcribers
 11 won't pick that up, so please if you want to put something
 12 in quotation marks make it clear on the record that's what
 13 you're doing.
 14 MR MPOFU: Thank you, Chairperson, yes.
 15 Well okay, what I meant is really that our understanding of
 16 your earlier ruling was that such affidavits as would be
 17 filed on behalf of the applicants would be done in the same
 18 manner. We never understood it that the final affidavit
 19 could be done from the bar but the replying affidavit
 20 cannot be done from the bar. Neither when we got to the –
 21 CHAIRPERSON: If what you're telling us
 22 now from the bar counts as an affidavit then it's got to be
 23 on oath.
 24 MR MPOFU: It's not an affidavit, I'm
 25 telling you a meeting that I attended as an advocate,

<p style="text-align: right;">Page 13545</p> <p>1 Chairperson, if I cannot tell you as an officer of a 2 meeting in which I participated -</p> <p>3 CHAIRPERSON: Excuse me a second - 4 MR MPOFU: - with no less than the Deputy 5 Judge President -</p> <p>6 CHAIRPERSON: Commissioner Hemraj wants 7 to say something. 8 MR MPOFU: - then we are in trouble. 9 CHAIRPERSON: You see the problem that 10 arises is there's now a dispute of facts. You are raising 11 a dispute of facts as to what happened at the meeting and 12 the dispute of facts is a dispute which arises from an 13 affidavit on one side and certain remarks made from the bar 14 on the other. Even if one says, being non-technical as you 15 suggest one should be, that the statements made from the 16 bar in reply to the affidavit don't have to be on oath and 17 still are sufficient to raise a dispute of fact, the fact 18 is there is a dispute of facts. Now if there's a dispute 19 of fact, how can we determine the matter, what approach 20 would be appropriate in your submission? 21 MR MPOFU: Chairperson, maybe - 22 CHAIRPERSON: The reason that the 23 particular dispute of fact is important is and not one that 24 can just be swept under the carpet is the dates are 25 important in that regard and what is said and whether said</p>	<p style="text-align: right;">Page 13547</p> <p>1 say happened in the meeting in his presence, if he disputes 2 that then we can deal with the matter. But for now that if 3 I, who is a member of the bar, was at the meeting with the 4 Deputy Judge President then my opponent, who is a member of 5 the bar, was also there if that's what - and there's a 6 letter from the Deputy Judge President nogal. If that 7 doesn't resolve what happened at the meeting nothing ever 8 will except calling the Deputy Judge President. 9 CHAIRPERSON: I'll let you proceed with 10 your argument at this stage. 11 MR MPOFU: Thank you, Mr Chairman. 12 CHAIRPERSON: We'll hear perhaps what Mr 13 Oosthuizen says about that if necessary. 14 MR MPOFU: Thank you, thank you. 15 CHAIRPERSON: But before - he wants to 16 say something, before I hear what he has to say can you not 17 perhaps tell me the other point that I raised with you? I 18 understand and you conceded that I think in chambers this 19 morning that the relief sought in the High Court - whether 20 it's going to be heard provisionally or definitely on those 21 two dates is a different matter - that the relief sought 22 has now been expanded, is that correct? 23 MR MPOFU: Yes. A notice of amendment 24 which has been served in terms of Rule 28, Chairperson. 25 CHAIRPERSON: What is the nature of that</p>
<p style="text-align: right;">Page 13546</p> <p>1 on oath by the Department is the dates were only 2 provisional, now you say that's not correct. 3 MR MPOFU: That's not true, I'll not - 4 CHAIRPERSON: I understand that but how - 5 MR MPOFU: - put it stronger than that. 6 CHAIRPERSON: How can we, sitting here in 7 the Commission, decide that dispute of facts where we have 8 an affidavit on one side and let's call a quasi-affidavit 9 on the other which raises or a virtual affidavit, which 10 raises that 11 MR MPOFU: No, Chairperson - 12 CHAIRPERSON: How do we resolve that dispute, 13 that's my question. 14 MR MPOFU: Okay, I'll tell you how you 15 resolve it. It's not a question of a quasi-affidavit only, 16 there's a letter from no less than the Deputy Judge 17 President that outlines what happened in the meeting with 18 him and that letter you've got, everyone here has got. 19 It's dated 28th August. Here it is, if the Deputy Judge 20 President must do an affidavit, well then I'll go and ask 21 him but the issue is that what happened at the meeting is 22 captured there. And what I was hoping to do is to tell you 23 from the bar of what happened in the meeting. Fortunately 24 my learned friend Mr Oosthuizen, who is also a member of 25 the bar, is here, who was also at the meeting and if what I</p>	<p style="text-align: right;">Page 13548</p> <p>1 amendment? 2 MR MPOFU: The nature of the amendment, 3 off the top of my head probably here is, firstly, the most 4 important thing is that it is in our view an amendment that 5 does not necessitate the supplementing of the papers 6 because those issues are canvassed in - 7 CHAIRPERSON: No, I just want to know 8 what the relief - 9 MR MPOFU: What I'm telling you is in 10 the document. I'm explaining what the document says. 11 CHAIRPERSON: Yes, well carry on, carry 12 on. 13 MR MPOFU: Ja. It says that it does not 14 necessitate the supplementation of the papers because it 15 deals with two issues. One which has been canvassed in the 16 founding affidavit or in the papers as such. The one issue 17 is we say that although our main argument is that the Legal 18 Aid Act does provide for the granting of assistance in 19 Commissions and as proof of that is the fact that the Legal 20 Aid Board assisted in this Commission in respect of the 21 deceased families, so unless if they were breaking the law, 22 the Act must allow them and in any event they've conceded 23 that point. They said they were acting in terms of some 24 discretionary power. So that's our standpoint but we are 25 saying if we are wrong on that standpoint then to that</p>

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1 extent the Legal Aid Act would be unconstitutional if
 2 indeed it does not allow for legal aid assistance where
 3 injustice would result simply because of it's a Commission
 4 or it's this or that or the other. That in a nutshell,
 5 that's the first amendment.
 6 CHAIRPERSON: Are you asking then for a
 7 declarator that the Legal Aid Board, insofar as it doesn't
 8 permit legal aid to be given for Commissions or possibly as
 9 of right for people who appear in them, is
 10 unconstitutional?
 11 MR MPOFU: That's the first part.
 12 CHAIRPERSON: Now that of course, if that
 13 were granted the case would have to go to the
 14 Constitutional Court to confirm that declarator, would it
 15 not?
 16 MR MPOFU: Ja.
 17 CHAIRPERSON: Okay. So that's the one
 18 amendment and the other?
 19 [10:08] MR MPOFU: Okay, the second amendment,
 20 Chairperson, is that the refusal by the first, second and
 21 third respondents who are the President, Minister and Legal
 22 Aid South Africa, the refusal, so to speak, or their
 23 decisions not to grant legal aid should be set aside on the
 24 basis of irrationality, which is a ground that's based on
 25 the rule of law. In other words, so-called –

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1 CHAIRPERSON: So effectively you're
 2 seeking to review those decisions?
 3 MR MPOFU: And set aside.
 4 CHAIRPERSON: Yes, yes, obviously review
 5 and –
 6 MR MPOFU: But the crucial thing really
 7 is that the –
 8 CHAIRPERSON: Sorry, let me just write
 9 down quickly what you said, and then you can carry on.
 10 MR MPOFU: Okay.
 11 CHAIRPERSON: Thank you. Please carry
 12 on.
 13 MR MPOFU: Yes –
 14 COMMISSIONER TOKOTA: Sorry, may I ask
 15 you this? You say you filed that amendment in terms of
 16 rule 28. I take it it's a notice for them to oppose if
 17 they so wish?
 18 MR MPOFU: Object if they want, yes.
 19 COMMISSIONER TOKOTA: I see.
 20 MR MPOFU: But as you definitely sitting
 21 up there know, an amendment can even be raised at the
 22 hearing. The points that we have done here is to say that
 23 – let me put it this way; we can't second-guess whether it
 24 will be objected to or not. If it is, it will be obviously
 25 debated on the 25th before anything else happens on that

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1 day. That's really the bottom line.
 2 CHAIRPERSON: Now Mr Oosthuizen indicated
 3 he wanted to say something. I'm not sure what it is. I'm
 4 not sure whether I'll allow him to say, but I've got to
 5 first hear what he wants to say before I decide to let him
 6 speak or not. Yes, Mr Oosthuizen, you wanted to intervene
 7 at on stage.
 8 MR OOSTHUIZEN SC: Mr Chair, in order to
 9 assist my learned friend and just to make it clear, I
 10 drafted the answering affidavit of the department. I was
 11 at that meeting before the Deputy Judge President, together
 12 with my junior, Adv Modisa –
 13 CHAIRPERSON: So now what you're telling
 14 me is there is a dispute of facts?
 15 MR OOSTHUIZEN SC: There is a dispute.
 16 CHAIRPERSON: Okay, thank you. Yes, Mr
 17 Mpofo, please carry on.
 18 MR MPOFU: Yes, okay. Well let me then
 19 jump quickly back to that issue. The –
 20 CHAIRPERSON: I understand your argument
 21 is that – whether it's right or wrong is not presently
 22 relevant – your argument is that the contentions raised by
 23 the department are contradicted by the letter of the Deputy
 24 Judge President. That's your argument?
 25 MR MPOFU: And also contributed by what

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1 actually happened.
 2 CHAIRPERSON: Well, I think what actually
 3 happened, we have to resolve a dispute facts.
 4 MR MPOFU: Ja.
 5 CHAIRPERSON: But your argument is that
 6 the letter of the DJP is decisive of the issue and
 7 effectively eliminates the dispute.
 8 MR MPOFU: Yes.
 9 CHAIRPERSON: That's what I understood
 10 you to say. I don't want to put words in your mouth.
 11 MR MPOFU: No, your right, Chair.
 12 CHAIRPERSON: If I understood you
 13 correctly, that's fine.
 14 MR MPOFU: I'm happy with that.
 15 CHAIRPERSON: If there's anything else
 16 you want to add on that point you can do so, but that
 17 seemed to me to be your argument, which we understand.
 18 Whether it's right or not –
 19 MR MPOFU: Well, I can add something else
 20 maybe –
 21 CHAIRPERSON: Okay.
 22 MR MPOFU: - now that Mr Oosthuizen is
 23 here, which is that on Tuesday I spoke to him -
 24 unfortunately I was in the presence of three other
 25 colleagues, Mr Varney, Ms Barnes, and Ms Lewis – about

1 their request which they had asked me to convey to him,
2 that their heads should not be filed today but on Monday,
3 and Mr Oosthuizen told me that all the heads must be filed
4 today, which is in line with the letter of the DJP, because
5 he has an urgent matter next week. He never said anything
6 about provisional or what am I talking about, what heads am
7 I talking about.

8 CHAIRPERSON: That's the extra point you
9 added.

10 MR MPOFU: Ja, that's the extra point.

11 CHAIRPERSON: Now you want to go back to
12 the point you were debating a moment ago?

13 MR MPOFU: Yes. Right, the point really
14 was that the idea of SAPS saying that taking that technical
15 point is directly contradicted by the department's view
16 that there are still 28 witnesses. I think that what the
17 department's view is more accords with the reality which
18 has been articulated here, which is that the Commission is
19 not going to finish on the 31st of October, whatever we do,
20 and even if we sit 24 hours a day. So that point in limine
21 can be discarded on that basis alone.

22 Then Chairperson, if I can just take you back to
23 what you said at the very beginning of this matter on day 1
24 on the 1st of October. We were also told that it's our view
25 that this process is in a sense a mini TRC which is meant

1 was about, which was the balance between expedition and
2 effectiveness. Let's call it that. All that we get in all
3 these pages here is about expedition. Everything that is
4 said, is about this must be finished; the minister says
5 this must be finished because foreign direct investment is
6 threatened, the reputation of our mining industry, and all
7 sorts of things like that. But the point is that if you
8 read all the documents, they deal simply with one point,
9 which is expedition.

10 Now our simple answer is that the Commission has
11 to take into account what you, Chairperson, correctly said
12 should be the focus of the Commission. Expedition, yes of
13 course, we can't argue with that, but expedition to what
14 end? Are we going to come here and say we must just finish
15 the Commission so that we can pat ourselves on the back and
16 say we finished in record time, and have an outcome that is
17 discredited, that does not achieve any of the goals set out
18 in the logo behind you – the truth, restoration, and
19 justice? Then if we do that then we might as well stop the
20 Commission right now, or rush it through so that we can say
21 we finished expeditiously. That can never be the point
22 about an exercise of this nature.

23 An exercise of this nature must be finished as
24 soon as possible; that we concede, but it must achieve its
25 ends, and it cannot achieve its ends if the victims are

1 to bring the truth and reconciliation, is "outlandish," and
2 I just wanted to make it clear that we took that
3 'outlandish' idea from what you said, Chairperson, at the
4 beginning of the Commission, which was that you do your
5 work "in the firm belief and conviction that getting to the
6 truth of what, how, and why it happened will be part of the
7 healing and restoration process which is so necessary. As
8 Commission we'll do everything in our power to make sure
9 that your attendance and participation" – underline
10 participation – "in this inquiry will not add to your grief
11 and trauma. It is for this reason that the Commission has
12 deemed it fit to subscribe to the values of truth,
13 restoration, and justice, which we adopted in our official
14 logo."

15 Then later on you said, "It's very important that
16 the truth insofar as what happened over the period should
17 become clear as soon as possible. We have to balance the
18 need to deal with the matter with expedition, with the need
19 to be thorough, and we certainly want to give everyone
20 concerned the assurance that we'll do so to the best of our
21 ability," and so on. I have no doubt that you remember
22 that, Chairperson.

23 The point being this; if you look at the
24 opposition, from which quarter, to this postponement, it
25 negates exactly what the Chairperson said the Commission

1 being shut out of the door. It cannot achieve its ends if
2 the victims right to participate, let alone anything else,
3 just participation, because as you said, Chairperson, the
4 participation itself has a healing power. As we said
5 before when I made the examples of my discussions with the
6 victims of the police and the security guards, that the
7 participation in this process has itself already yielded
8 certain positive results. What's the point of saying we're
9 finished, but the truth has not been uncovered and a
10 massacre of this kind, or 10 times more of this kind will
11 happen next week in another community simply because – and
12 we will get the Nobel Peace Prize for expedition. That
13 can't be the purpose of this exercise.

14 So that we must get out of the way as soon as
15 possible, and to the extent that everything that has been
16 said by anybody in opposition deals only with expedition,
17 to the exclusion of effectiveness, then the postponement
18 should be granted on that basis alone, because it means as
19 far as the issue of effectiveness is concerned, it is
20 unopposed.

21 Then, Chairperson, the point is really this; if
22 the victims feel that they have not had their say, not only
23 have they not had their say, but they've not been able to
24 probe the witnesses who are bringing the other side of the
25 truth, so to speak - quote, unquote – then we must kiss

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1 goodbye any notions of reconciliation, because
 2 reconciliation is like fairness, is a matter of two sides.
 3 You can't reconcile with yourself. If the government and
 4 its agencies want to sit here and have a commission and
 5 then reconcile with themselves, well, good luck to them.
 6 The truth is that they have to reconcile with the victims
 7 that they killed, and it is those victims and the ones that
 8 were injured who must find it within themselves, and I
 9 suppose vice versa, if it's found that some of the people
 10 we represent also got involved in criminal activity. The
 11 reconciliation is going to have to be between the two sides
 12 in either event. It can't be in a kind of – I can only say
 13 it in isiXhosa, [African language], it means you sing and
 14 you dance to your own tune, I think, in English. That's
 15 not what the Commission is meant to do.

16 Then the department even has the nerve to say
 17 that they oppose this because closure is needed on the part
 18 of the victims, but once again that misses the point
 19 because it says that closure will be achieved by speedy
 20 outcome. Closure can never be achieved by speedy outcome.
 21 Closure is achieved by an effective outcome, and fair
 22 outcome, a just outcome, and the truth. And once again I
 23 don't need to isolate all the submissions that are made
 24 because they really come to the same effect. Either it's
 25 money, we've spent a lot of money, or expedition, we must

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1 do it very quickly, and those considerations, quite
 2 frankly, are irrelevant to the effectiveness of the
 3 outcome, and the legitimacy.

4 I cannot put it better than the Constitutional
 5 Court, Chairperson, which says that if there is a feeling
 6 that one party is not fully represented and assisted
 7 legally, then the outcome of this Commission will be
 8 compromised. I would think it's polite to say it will be
 9 compromised. I'm saying that it will ineffective and not
 10 worth the paper that it's written on.

11 Then the next point, Chairperson, as I said, was
 12 a more kind of legalistic point, which is contained in
 13 6.4.2 of the affidavit, which –

14 CHAIRPERSON: [Microphone off, inaudible]
 15 trouble again. You've just been quoting from paragraph 15
 16 of the Constitutional Court's judgment. You don't have to
 17 read it again.

18 MR MPOFU: Yes, Chairperson, paragraph 15
 19 which - the reason why I was paraphrasing is because I
 20 quoted it verbatim in the application itself. Thank you,
 21 Chairperson.

22 Now I'm now moving to the point, the refusal of a
 23 postponement cannot infringe upon the procedural rights of
 24 applicants. That's contained in 6.4.2, and I said I would
 25 marry that point with the point that the findings are

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1 merely advisory and that kind of submission. Chairperson,
 2 these submissions are based on the incorrect and outdated
 3 notion of what commissions are regarded as doing. There
 4 was a time in the ancient past where commissions were
 5 regarded merely as investigative and advisory, but nowadays
 6 the law is captured in – I'm reading from LAWSA now,
 7 Chairperson, where it says LAWSA –

8 CHAIRPERSON: I take it this is the
 9 second edition, volume?

10 MR MPOFU: Second edition, part 2, volume
 11 – or rather, second edition, volume 2, part 2, paragraph
 12 169. It says, and I quote, "The argument that the
 13 recommendations of a commission do not prejudicially affect
 14 existing rights because they decide nothing in themselves,
 15 has been rejected. It is now accepted that serious
 16 repercussions can flow from the report of a commission.
 17 For example, very damaging findings of fact could be made
 18 in respect of people who are named. In addition, a
 19 commission's report may accuse or condemn persons who may
 20 then be subject to civil or criminal proceedings. The
 21 whole process, it has been held, is potentially prejudicial
 22 to a person's rights of personality," and then it goes on
 23 to say why PAJA applies and so on, and so on, which is a
 24 point which you may or may not canvass it, the point simply
 25 being, Chairperson, that a whole cluster of argument that

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1 simply because the Commission is going to make
 2 recommendations, therefore no rights are affected and only
 3 the President has an interest, that kind of argument,
 4 really falls out of the window and is not in line with the
 5 law, and even reality.

6 In a commission of this kind, which has itself
 7 defined phase 1 as, among other things, the determination
 8 of whether or not people should be prosecuted, and which
 9 has been given the power in the terms of reference to
 10 recommend prosecutions, you can't then argue that oh well,
 11 the NDPP might just throw it away and not follow what the
 12 Commissioners have said. The point of the matter is that
 13 by then the condemnation would have been done, and
 14 therefore the constitutional rights, particularly to
 15 reputation and to privacy of the individuals would have
 16 been already compromised. So to the extent that that
 17 argument is advanced as well, it should just be rejected
 18 out of hand, and it amounts to no opposition at all, and
 19 that covers both the point about whether rights are
 20 affected, and whether the fact that it's "mere
 21 recommendations" is a point that should sway you against
 22 granting the postponement. Our submission is that it
 23 should not. On the contrary, the correct state of affairs,
 24 as I've quoted out, should sway you in favour of granting a
 25 postponement where it may look like the rights might be

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1 prejudicially affected without the participation of the
 2 applicants.
 3 The next issue, Chairperson, deals with what I
 4 called the misrepresentations. There are several
 5 misrepresentations about, even about what happened here in
 6 front of all of us. We are told that because of us,
 7 because of the applicants there have been two postponements
 8 before in this Commission, which has resulted in the loss
 9 of so-called 18 hearing days. Well, nothing could be
 10 further from the truth. Unless if I've missed something,
 11 there's not been a postponement granted at the instance of
 12 the applicants in this Commission.
 13 [10:28] CHAIRPERSON: There were adjournments
 14 granted because there was the possibility that private,
 15 that funding might be available from some or other source
 16 and in the end it wasn't but because that possibility was
 17 still existing, the adjournments were given from to time.
 18 So it's not fair to say that there was a postponement as
 19 such which you sought and which you obtained.
 20 MR MPOFU: Yes. Well, it's not fair and
 21 it's not correct, Chairperson, but also even those
 22 adjournments were at the instance of the Commission because
 23 the Commission was kindly doing its best to assist. So it
 24 cannot be put at the door of the applicants. So that's
 25 just fiction, it didn't happen.

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1 Then we are also told that there have been six
 2 weeks in which the evidence leaders have been doing good
 3 work of cross-examining the witnesses on behalf of the
 4 applicants. That's also another fiction which has not
 5 happened, just to cut it short. And then at 6.11 they
 6 cover – oh no, we've already dealt with this point. What
 7 is said is that application for a postponement, "It's
 8 denied that an application for a postponement will deal any
 9 kind of blow to the perceived credibility of the outcome of
 10 the Commission." As I say, the Constitutional Court thinks
 11 differently.
 12 And the issue about whether the participation of
 13 these applicants is essential or not, I think I've already
 14 covered in what I've said already. Our view, Chairperson,
 15 is that that participation is essential for the reasons of
 16 putting your view, you know, for the obvious reasons but
 17 also for more moral reasons or reasons to do with the
 18 objective, the long-term objectives of reconciliation and
 19 assuaging and the feelings of those who lost their loved
 20 ones or their limbs. Without participation then none of
 21 what we're doing here will yield any result.
 22 Then here's the one, the common thread one
 23 Chairperson – or no, before I do that let me, while I'm
 24 dealing with fiction, we've also been told that part of the
 25 basis that is advanced in – there's an annexure called MP2

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1 to the founding affidavit, which is the media statement
 2 which was read by the Major-General in justifying why they
 3 will not fund this Commission and even there, there are a
 4 number of misrepresentations. The one is that, it says
 5 "The request for funding by the said attorneys was
 6 considered but could not be granted as the legal framework
 7 of the State Attorneys Act and the Commissions Act do not
 8 provide for legal representation for witnesses who are not
 9 in the employ of the state when the incident or event being
 10 investigated happened."
 11 I've already said that the Legal Aid Act, at
 12 least in our view, provides for such legal assistance and
 13 in fact it was granted by the Legal Aid, by Legal Aid South
 14 Africa which is a functionary of the Ministry of or
 15 Department of Justice.
 16 And then it also said that the policy does not
 17 make provision, "policy of Legal Aid South Africa does not
 18 make provision for it to fund legal expenses incurred at
 19 commissions of inquiry," the same issue. Not only has
 20 legal aid been given in other commissions but it has been
 21 given in the Marikana Commission itself. So it's not true
 22 to say that it's prohibited, so to speak. What we concede,
 23 of course, is that if you go to the Act you're not going to
 24 find where that says you can help in commissions. What
 25 happened, for example, in the Land Claims Court Moloto, J

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1 found that people involved in the land tenure disputes
 2 could be – and Mr Budlender was involved in that case,
 3 that's why he's smiling – that legal aid could be extended
 4 and that is merely from a reading of the Constitution which
 5 says that legal aid must be granted in terms of the
 6 Constitution. In other words, you can read within the
 7 Constitution that, in a particular situation, assistance
 8 should be given and that can be the only reason that Legal
 9 Aid South Africa assisted the families of the deceased.
 10 And then it's said that those families were
 11 funded to assist the families to understand the proceedings
 12 in the event of civil liabilities arising from the charges
 13 against them at Marikana. Now this is a strange one
 14 because why should the families be funded so that they can
 15 understand the proceedings simply because those people died
 16 and the ones who are injured are not supposed to understand
 17 the proceedings. This is the puzzling thing that – what it
 18 really means is that the people who survived and who were
 19 injured, are punished simply because they did not die and
 20 they'll only assist those who died.
 21 In any event, that reasoning is spurious because
 22 as you know, two of our persons died in apparent suicides
 23 and therefore – but the department has not now been
 24 forthcoming to say, oh, now they've lost their loved ones
 25 and they are breadwinners, therefore we will find you legal

<p style="text-align: right;">Page 13565</p> <p>1 representation. So it's just a contrived reason. 2 The next one, it says, "The application of the 3 families of the deceased was considered after their 4 individual applications were placed before the Legal Aid 5 South Africa." That did not happen, it's also untrue and 6 we challenge anyone to provide those individual 7 applications that were placed before the Legal Aid South 8 Africa, there's no such thing. 9 So the grounds that were given to the public 10 about why the funding is not being given, do not hold any 11 water or are factually incorrect. So I think the real 12 reason is what was contained in the letter that I read out 13 once here, which is that the first and second respondents 14 were unwilling to assist the victims, not that they were 15 legally barred from doing so but that's a matter for 16 another – 17 CHAIRPERSON: You're now dealing with 18 another point. I can understand the argument about the 19 Legal Aid Board and the Legal Aid Act but you're now 20 talking about the first and second respondents, the 21 President and the Department of Justice, the Minister of 22 Justice. They contend also apparently that they are 23 legally debarred because funds weren't voted, as I 24 understand the argument, funds weren't voted by Parliament 25 to them to defray expenses of this kind. Funds that were</p>	<p style="text-align: right;">Page 13567</p> <p>1 which is clearly not the case. 2 Then comes the big issue which is the one that 3 runs through all, everybody's affidavit and it is this, 4 that the cross-examination by the evidence leaders cures 5 any prejudice that may be suffered by the applicant. Well, 6 Chairperson, once again I'm not going to belabour the point 7 because I did make submissions earlier but let me just make 8 a couple of points. 9 One, the measure, well-intentioned as it might 10 have been, of allowing the evidence leaders to "cross- 11 examine", quote/unquote, or to present the version of the 12 absent applicants can never even begin to cure the 13 prejudice. Firstly, Chairperson, it would be the first 14 time in living memory or even beyond that, that any party 15 is cross-examining a witness on behalf of a party that they 16 have not consulted with, that they have, whose – the only 17 knowledge of their version is based on the summarised two 18 or three page statement from that party. Well, let me tell 19 you something, Chairperson, those three page statements, at 20 least as far as those that were drafted by me, were a 21 result of weeks and weeks of consultations with those 22 people and therefore if I cross-examine based on those 23 statements, you must accept that it is based on a lot of 24 information which might be captured in those statements but 25 which does not appear there. I've never – I mean I don't</p>
<p style="text-align: right;">Page 13566</p> <p>1 voted by Parliament for legal expenses, legal aid, were the 2 funds voted for the Legal Aid Board. So I don't understand 3 your argument without more, as it were, on this point in 4 respect of the first and second respondents. I understand 5 it in respect of the third but not the first and second. I 6 don't know whether you want to elaborate on that shortly. 7 I don't want to take up too much of your time – 8 MR MPOFU: Yes. 9 CHAIRPERSON: But it is a point I don't – 10 MR MPOFU: No, that's a fair point, 11 Chairperson. Well, firstly, the first answer is that the 12 affidavit that I'm reading from to which this is attached 13 is an affidavit made on behalf of the second respondent. 14 The second point is that the statements that I'm refuting 15 were read out by the second respondent in person, himself, 16 but insofar as the absence of the so-called first and 17 second respondent rely on, it's symbiotically related to 18 this because in the letter that they sent on the 14th of 19 March 2013 they said two things, one, that the Commissions 20 Act is probably going to be amended to cater for this but 21 also that the current framework which is Legal Aid South 22 Africa prohibits them from assisting, which is wrong as 23 I've – so the two points are interrelated because they 24 also, in their own letter they rely on the same 25 justification of the legal aid being legally precluded,</p>	<p style="text-align: right;">Page 13568</p> <p>1 claim, I don't, I've asked other people as well, I'm 2 prepared to say that it has never happened in this country 3 or in any other country that somebody can cross-examine 4 based on not having even consulted with a particular 5 witness. So it's a gross injustice. It does not cure 6 anything. It cannot cure anything, it can never cure 7 anything. In fact, the mere fact that the Commission has 8 promised that if and when we come back some of those 9 witnesses will be recalled so that we can cross-examine 10 them, is a clear concession of the fact that the other 11 cross-examination does not remove the prejudice, even if it 12 was not unprecedented on a large scale. Number 1. 13 Number 2, because of the nature in which or 14 rather the mode in which the proceedings had taken place 15 before, because nobody could predict the future – once 16 again I'm not blaming my learned colleagues the evidence 17 leaders because this is not a situation of their own making 18 – it's simply unfair and it's unfair on the applicant, it's 19 also unfair on the evidence leaders for that matter but 20 because previously they were put in a situation where they 21 had to cross-examine these witnesses that they are now 22 supposedly, whose versions they are supposedly asserting, I 23 mean that just becomes a mind-boggling exercise which will 24 never achieve anything except confusion and resentment, 25 which is already brewing on the part of the applicants.</p>

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1 And it's unfortunate, as I said, because it's not the fault
2 of the evidence leaders. We've been at pains to explain
3 that it's not as if they eagerly usurped the functions of
4 their representatives.

5 So that cure, quite frankly, is just adding
6 petrol to the fire and if there was prejudice, if by
7 adopting that course which is acceptance that there's
8 prejudice, one was trying to cure it, then I can
9 authoritatively say that it will not achieve the result, it
10 will only magnify the problem.

11 I'm coming to the last point, Chairperson. I've
12 already dealt with the outlandishness – I suppose that's
13 outlandishness – of the reconciliatory motives of this
14 Commission.

15 The last point, yes Chairperson, is that, that is
16 made is that the submissions were made about the
17 possibility of an irregularity resulting from the refusal
18 of a postponement are only applicable in criminal
19 proceedings and I suppose that's simply because the cases
20 that were relied on come from that area of the law, but
21 that submission misses the point completely, Chairperson.
22 What we were trying to show the court is that, or rather
23 the Commission, is that the courts have taken a particular
24 view about the fairness or otherwise of refusing a
25 postponement if that postponement is premised upon the

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1 desire to seek effective legal representation. That is a
2 principle of fairness, it's a principle of justice and we
3 showed you, Chairperson, that the courts have gone so far
4 as to expunge convictions and sentences on that basis
5 alone.

6 Now if that is so and the three cases at least
7 that we relied on would seem to indicate that that is so,
8 then the question really is whether fairness can be –
9 whether there's something called criminal law fairness and
10 other fairness. Our submission in that respect is that
11 fairness is fairness. If it's unfair, it's unfair and I've
12 read out a situation that shows how, in what way fairness
13 gets imported into a situation of commissions of inquiry.

14 Surely the very appointment of people like
15 yourselves, respected people like yourselves, was meant to
16 assure the people that I represent of the fairness not only
17 of the outcome but also of the process and a process in
18 which their participation is not taken into account is
19 distinctly unfair. A process in which the police have the
20 nerve to say that the applicants must rely on the evidence
21 leaders but they, the police, must keep their seven
22 representatives and not rely on the evidence leaders, is
23 really kicking the victims in the teeth because if it was
24 fair for other parties to rely on the evidence leaders,
25 then that should apply to everybody. You can't say do as I

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1 say, not as I do. You remove your representatives because
2 the evidence leaders will take care of your interests but
3 I'll keep my seven advocates to look after my interests.
4 Why, because I'm a perpetrator, because I have money to do
5 so and why must you go, because you don't have money,
6 because you are poor and because already you are in a
7 skewed situation where you are represented by one advocate
8 and I'm represented by seven, but that's fine. The
9 solution to that is not to say you must increase your
10 representation and move it from 7-1. The solution is that
11 you must make it 7-nil. Really Chairperson, some of the
12 things we've heard here, as I say, send a chilling effect
13 to even people who are not lawyers. I've heard this
14 expression said to me so many times in the past few weeks
15 where everyone says, on this one of the Marikana Commission
16 you don't need to be a lawyer and that is true because
17 fairness, as you know Chairperson, is an intuitive thing.
18 We all know what's fair and what's not fair. You don't
19 have to be a philosopher and describe it.
20 [10:48] A child of 5 in a kindergarten, if you give the
21 other one five cookies and the other one, one cookie,
22 they'll say it's not fair, because we know what is fair.
23 How can we even sit here and debate whether it is fair for
24 300 to 350 people to be consulted, to be precognised, to be
25 led in examination, to prepare cross-examination of the

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1 other side, by one advocate, when everybody else who has
2 looked at this matter, starting with yourself, with
3 respect, Chairperson, when you looked at the complexity of
4 this matter, you decided that it will require seven
5 advocates, and you were probably right. When SAPS sitting
6 separately somewhere in Pretoria looked at the complexity
7 of this matter, they decided that it will require seven
8 advocates. When Lonmin sat, they decided it would need
9 five advocates, or whatever the number is, and so on. Why
10 does anyone think that these victims are okay to be
11 represented by one person, who does not even get the
12 assistance for logistical things? That argument,
13 Chairperson, you know, I don't even have to repeat it, that
14 is the argument we put to you when we made the application
15 for relocation from Rustenburg to Centurion, and we said we
16 are trying to mitigate this blatant unfairness, and
17 mercifully that was allowed to happen, and we did, and that
18 made us to go on for a while. But there came a time when
19 even that was not able to fulfil the representation needs
20 of the applicants, and now we are told no, okay, well if
21 that's it then we must just go home and leave these
22 applicants and the victims in the hands of the evidence
23 leaders. But the others will bring their private and
24 highly-paid representatives, as the Constitutional Court
25 put it.

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1 Now against all that blatant unfairness, all we
 2 are asking for really is, Chairperson, please give us a
 3 short postponement. We are doing everything we can. These
 4 applicants, despite being shunted all over the show and
 5 kicked in the teeth, as I've put it, have decided to
 6 exhaust all legal avenues, including going to court, going
 7 back to court. They have now decided that they're going to
 8 embark on a peaceful march, but the common thread in all
 9 those things is that they are exhausting all legal avenues,
 10 legally permissible avenues, to try and get to the bottom
 11 of the truth of what happened, and we are saying some of
 12 those avenues might yield something, including the raising
 13 of private funding, or the outcome of the case, and during
 14 that time, for the sake of the effectiveness of the
 15 outcome, we'd like the matter to be postponed. It's not
 16 something we do gleefully, or something that we do readily,
 17 Chairperson. We can't. We are the same people who went to
 18 court and said we do not want to interdict the Commission;
 19 let's rather be given interim funding so that the
 20 Commission can be proceeding in parallel with whatever
 21 legal proceedings there are. We are those people. So the
 22 fact that that plea for interim funding was unsuccessful is
 23 not something that should be forgotten.

24 But when we are now in a situation where the
 25 Commission is proceeding, you know, new witnesses are being

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1 called, and witnesses are being cross-examined on our
 2 behalf, or whatever the correct expression is, then there's
 3 cause for concern, Chairperson. And I'll close by saying
 4 this; its very tempting, as I've said, to take a short-term
 5 view of this and say let's just get on with it, we'll
 6 finish, we'll all go home. But in a year or so when
 7 another massacre happens, we must know that it is because
 8 we allowed a situation where the truth was never uncovered,
 9 where the police were allowed to get away with murder,
 10 literally, or figuratively, where –

11 CHAIRPERSON: Are you suggesting –
 12 MR MPOFU: - in the view of the –
 13 CHAIRPERSON: Are you suggesting that if
 14 your clients don't get funding and you therefore don't
 15 return, we will inevitably find that the police can get
 16 away with murder?
 17 MR MPOFU: No, Chairperson, that –
 18 CHAIRPERSON: Are you aware of the very
 19 serious manner in which the police version so far has been
 20 examined and cross-examined and scrutinised?
 21 MR MPOFU: I'm aware. I participated
 22 in –
 23 CHAIRPERSON: Obviously one must keep an
 24 open mind. If at the end of the day we find in favour of
 25 the police, it won't necessarily be because they're getting

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1 away with murder; it will be because we're satisfied that
 2 they, rightly or wrongly, that they're not guilty of
 3 murder, or culpable homicide, for that matter. But you
 4 seem to be suggesting that if your clients don't
 5 participate in the way that you suggest they should
 6 participate, through funded representation, the result of
 7 this Commission is inevitable and will lead to a whitewash
 8 of the police.

9 MR MPOFU: No, Chairperson –
 10 CHAIRPERSON: Now if that's what you're
 11 suggesting –
 12 MR MPOFU: No, no, no. No, please,
 13 Chairperson, you know that is not what I'm suggesting.
 14 What I'm saying is simply this, and I can say this
 15 authoritatively because I'm speaking on behalf of my
 16 clients; if the outcome of this Commission is achieved
 17 without the effective and meaningful participation of the
 18 victims, it will not be worth the paper it is written on.
 19 Whether it finds against, for, or in the middle of the
 20 police, it will not achieve reconciliation. It will not
 21 assuage the feelings of the victims. It will not result in
 22 closure of anything, whatever the outcome. That is what
 23 I'm saying. Thanks, Chairperson –

24 CHAIRPERSON: I understand that argument.
 25 MR MPOFU: Ja. Thank you, Chairperson.

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1 So the reality is that –

2 CHAIRPERSON: When you've finished your
 3 argument, my colleague Mr Tokota wants to ask you a
 4 question.

5 MR MPOFU: And Chairperson, I don't want
 6 to go back to things that I've already said. The point
 7 here is that one should conceive of what I call the right
 8 to participation, almost as a standalone right,
 9 irrespective of the outcome, and that's really what I've
 10 been trying to say, which is being denied, or maybe to even
 11 put it properly, the right to meaningful participation,
 12 which is enjoyed by all the other parties who have money to
 13 do so, to participate meaningfully. That's really the
 14 bottom line.

15 We have said, Chairperson, the criticism that
 16 this might be a never-ending saga of postponements, we have
 17 said here last time, responding to a question I think which
 18 was put by yourself, Chairperson –

19 CHAIRPERSON: In response to a question
 20 by Mr Budlender you made it clear –
 21 MR MPOFU: Oh, yes, to Mr Budlender.
 22 CHAIRPERSON: - that you're only asking
 23 for a postponement until the outcome of the proceedings in
 24 the High Court.
 25 MR MPOFU: Yes, and we would come back –

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1 CHAIRPERSON: And even if the case goes
 2 further, you would not wish the postponement to follow –
 3 MR MPOFU: To cover that –
 4 CHAIRPERSON: - the further progression
 5 of the matter after the High Court. You made that clear –
 6 MR MPOFU: Thank you.
 7 CHAIRPERSON: - in response to a question
 8 Mr Budlender asked.
 9 MR MPOFU: Yes, thank you, Chairperson.
 10 CHAIRPERSON: You're approaching nearly
 11 the end of your time –
 12 MR MPOFU: I am –
 13 CHAIRPERSON: You are on the last point,
 14 so –
 15 MR MPOFU: Yes, Chairperson, I'm
 16 finished –
 17 CHAIRPERSON: - if you wish to conclude.
 18 MR MPOFU: I'm actually finished. I just
 19 want to round off by saying that as we said last week, the
 20 decision on your shoulders is not an easy one because it's,
 21 as you said on day 1, they are weighing up the two
 22 important criteria, as it were. But let us not be
 23 unmindful, Chairperson, that we are dealing with people who
 24 are aggrieved here, who are simple people, uneducated. We
 25 have to be forever explaining to them why, when we have

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1 said that there's a postponement application for example,
 2 the Commission is still continuing and churning out
 3 witnesses, and you know, there comes a time when we also
 4 run out of explanations about these things. We do our best
 5 to make sure that the integrity of the Commission and its
 6 outcomes is protected, but if these people, who have really
 7 been disadvantaged from day 1, or even before day 1 of the
 8 Commission, starting from the days when they were arrested
 9 for the murder of their comrades, if people who have been
 10 disadvantaged from then are not given a simple request of a
 11 postponement, which might have – looking into posterity –
 12 the effect of having a commission whose outcome is
 13 acceptable, whether, as one of them said yesterday, all we
 14 want is the truth, whether that truth is for us or against
 15 us, but we want the truth to be out, and that's really all
 16 they're asking for, Chairperson. It's an opportunity for
 17 them to assert the truth or for the truth to be asserted
 18 against them, if there's such a thing. But there can never
 19 be any reconciliation, as they say, without justice, and
 20 there can't be – or rather, no reconciliation without the
 21 truth, and there's no truth without justice, and those are
 22 issues that are covered in your objectives, which is where
 23 I started, in the logo behind you, "Truth, restoration, and
 24 justice," and what is happening here is unjust and it will
 25 never result in the truth. Thank you, Chairperson.

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1 CHAIRPERSON: Thank you, Mr Mpofu. Adv
 2 Tokota wants to ask you a question. Or he did a minute
 3 ago. I don't know if he still wants.
 4 MR MPOFU: Sorry, Advocate, if I can just
 5 make one last point, seeing that my learned colleague has
 6 not arrived. Is he here? Okay, Mr Mosikidi is here, so
 7 I've told him that I've eaten up most of his time. So –
 8 CHAIRPERSON: You've eaten up all of his
 9 time.
 10 MR MPOFU: Yes, so maybe then I'll deal
 11 with the question and then he can say his piece. Thank
 12 you.
 13 CHAIRPERSON: Yes, alright. Okay, Mr
 14 Tokota will now ask you a question.
 15 COMMISSIONER TOKOTA: All I want you to,
 16 you don't have to deal with the merits of that application
 17 for the review. I just want you to respond to this
 18 allegation of the SAPS affidavit in paragraph 31 where they
 19 say that the prospects of success in that review
 20 application are poor. What's your summary of your response
 21 to this?
 22 MR MPOFU: Yes, well Chairperson, I think
 23 it's arrogant, to say the least, for the police to say
 24 that. The fact of the matter is this; and it also comes
 25 from one of the things that was said by the minister here

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1 in his statement, that the application was rejected, warra-
 2 warra-warra. The point of the matter is, I'm saying this
 3 for the third time, the only issue that was determined by
 4 the court was whether or not we are entitled to interim
 5 relief so that the Commission can continue while the main
 6 application is being debated, and the court found in the
 7 High Court, and also in the Constitutional Court for
 8 technical reasons, because it's interim relief, that it had
 9 to defer to the High Court. The Constitutional Court said
 10 it had to defer to the High Court. But apropos the issues
 11 we are debating here, the Constitutional Court made it
 12 clear, the statement that the Chairperson and I were
 13 referring to now, that it is patently unfair and would
 14 compromise the outcome of this Commission if the situation
 15 that I've described is allowed to continue. And that's
 16 really, we are simply saying that.
 17 So nobody knows what's going to happen in the
 18 application, and in any event, the application is not – the
 19 review is simply the amendment that I was talking about.
 20 The application as it stands now is for a declaration of
 21 unconstitutionality based on sections 34 and 9 of the
 22 Constitution, and the prospects of success, as we say,
 23 well, in my book are good. They are good because for
 24 example the differentiation between deceased victims and
 25 the injured victims, even our Chairperson he has said was

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1 puzzling. It might be equally puzzling to the High Court,
 2 and we go more than to say that it's puzzling; it's
 3 irrational, we say, and on the basis of the irrationality
 4 of the differentiation between victims, because the one is
 5 dead and the other one is alive, that offends anybody,
 6 should offend anybody's sensibility of the notion of
 7 equality, because the only reason really is that the
 8 assistance is not being granted, cannot be reconciled with
 9 the attainment of justice, which is what both the Legal Aid
 10 Act and this Commission should be committed to do.
 11 So we do think that when the merits are
 12 discussed, and also in terms of section 34 the only
 13 defences that have been given are that no rights are
 14 affected, which I've dealt with already, because that's
 15 just out there. And the other defence that has been given
 16 is that the Commission is not a court, which also has been
 17 covered by many cases, that if a commission that,
 18 particularly one that adopts a quasi adversarial approach,
 19 such as this one, that the notion of fairness must - not
 20 just notion of fairness, notion of fairness as described in
 21 section 34 of the Constitution, should be imported thereto.
 22 Thank you.
 23 CHAIRPERSON: Thank you.
 24 MR MPOFU: Sorry, Mr Mosikidi would
 25 prefer to say his little piece after tea.

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1 CHAIRPERSON: How little is his piece?
 2 MR MPOFU: I don't know.
 3 MR MOSIKILI: Chair, I wouldn't call it
 4 that little, but it wouldn't be more than at least five to
 5 10 minutes, Chair.
 6 CHAIRPERSON: We did indicate in advance,
 7 and I understood it was accepted by the parties that the
 8 applicants can have an hour and a half, the respondents an
 9 hour and a half, and then half an hour in reply. Now that
 10 is what we said, but alright, I'll give you five minutes
 11 after tea. Five minutes.
 12 MR MOSIKILI: I'm indebted, Chair, thank
 13 you.
 14 CHAIRPERSON: We'll now adjourn.
 15 [COMMISSION ADJOURNS COMMISSION RESUMES]
 16 [11:23] CHAIRPERSON: The Commission resumes. Mr
 17 Shozi, you're going to speak on behalf of the, who is
 18 speaking on behalf of the - Mister?
 19 MR MOSIKILI: Mosikili, sir. Mosikili on
 20 behalf of the families of the deceased.
 21 CHAIRPERSON: You are quoted in the
 22 transcript as being Mr Shozi but of course it's a mistake
 23 because Mr Shozi appears for one of the other parties.
 24 Tell me how you spell your name, I'm afraid I didn't get it
 25 correctly.

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1 MR MOSIKILI: It's M-O-S-I-K-I-L-I,
 2 Chair.
 3 CHAIRPERSON: You're going too fast for
 4 me. M-O-S-I-?
 5 MR MOSIKILI: K-I.
 6 CHAIRPERSON: K-I-
 7 MR MOSIKILI: L-I.
 8 CHAIRPERSON: L-I. Mosikili?
 9 MR MOSIKILI: Mosikili, Chair.
 10 CHAIRPERSON: Forgive my not having your
 11 name correctly. Yes, Mr Mosikili? I said I'd give you
 12 five minutes but you did say five or 10 and if there's
 13 something important you want to say and it takes you 10
 14 minutes, you've got 10 minutes but you don't have to use
 15 the full 10 minutes if you don't want to.
 16 MR MOSIKILI: I'm indebted, Chair. I
 17 will try not to use up the whole 10 minutes and I will try
 18 by all means, Chair, not to repeat submissions already made
 19 by my learned colleague. Chair, one thing I am aware of,
 20 Chair, is that we can argue this case, this postponement
 21 case, Chair, till probably Jesus comes but what I'm certain
 22 of, Chair, is that as things stand - and those who instruct
 23 me, Chair, we are aware that the Commission can indeed
 24 proceed without the miners and without the families, as it
 25 has indeed done so. Chair, I say this because, Chair, I

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1 too, Chair, have confidence, Chair, in the evidence leaders
 2 and the commissioners that are presiding for this
 3 Commission.
 4 However, Chair, the question today, Chair, is not
 5 really about can the Commission proceed without the miners
 6 or not, Chair. The question that we are dealing with,
 7 Chair, is not even the question of prejudice or expedition
 8 or balance of convenience or the integrity of the
 9 Commission but rather, Chair, we are dealing with the issue
 10 of fairness, Chair. Amongst others, Chair, we submit that
 11 the Commission needs to be seen as a caring and a fair
 12 Commission at the end of the day.
 13 Now, Chair, it is common cause, Chair, as to why
 14 the miners themselves have withdrawn from the Commission,
 15 Chair. Chair, we submit that, Chair, they did not
 16 withdraw, Chair, because they are worried about the
 17 integrity of the Commission or they are worried that the
 18 truth is becoming unbearable or for any other reason for
 19 that matter, Chair, but they simply withdrew because they
 20 don't have money and that's the only reason why they're not
 21 at this Commission, Chair.
 22 Chair, unfortunately Chair, as we see things and
 23 as we have engaged with the miners, the situation is that
 24 they see themselves at loggerheads with the South African
 25 Police Service who are beefed up with legal representation

<p style="text-align: right;">Page 13585</p> <p>1 and who have actually raised a legal defence to the whole 2 Marikana saga and for them, Chair, to not have any funds 3 set aside to beef themselves up or to prepare themselves 4 for their case, it's quite unfortunate. And Chair, to 5 those who instruct me as well, Chair, they also, Chair, are 6 worried that they too are poor and the way they have, at 7 least the other poor people have been treated at this 8 Commission, it's not – it's not fair at all, Chair.</p> <p>9 CHAIRPERSON: Your clients have got legal 10 aid.</p> <p>11 MR MOSIKILI: Chair?</p> <p>12 CHAIRPERSON: Your clients have got legal 13 aid.</p> <p>14 MR MOSIKILI: That's certainly correct, 15 Chair.</p> <p>16 CHAIRPERSON: Your clients are not just 17 the families, many of the families of course involved are 18 miners and I take it that your clients have – or certainly 19 those, the miners and their guardians in their capacity as 20 guardians would have a constitutionally entrenched right to 21 legal aid.</p> <p>22 MR MOSIKILI: Indeed, Chair, but Chair 23 the point is this, Chair, and this point, Chair, I tried 24 last time, Chair, when I was making my deliberations at 25 length, Chair, to set out the reasons, Chair, as to why</p>	<p style="text-align: right;">Page 13587</p> <p>1 Chair, they say they seek to know the truth for three 2 reasons, Chair, and I've read them. I'll summarise them, 3 Chair. The first reason, Chair, is that they hope that 4 this Commission will bring them some sort of measure of 5 healing, it will bring them some closure and restoration. 6 That's reason number 1.</p> <p>7 They also want to know the truth, Chair, because 8 they want to safeguard their rights in relation to the 9 possible future civil claims that they might have against 10 the South African Police or anyone else for that matter, 11 Chair. And thirdly, Chair, the reason why they want to 12 know the truth is to see, at least in a hope to see those 13 who are responsible for the killing of their loved ones 14 being brought to justice.</p> <p>15 Now, Chair, the last two points I'm also – we 16 submit, Chair, that I'm sure they can be achieved one way 17 or the other but the first point, Chair, which is that 18 they're hoping to get some measure of healing, closure and 19 restoration, Chair. There can be no other way that it can 20 be achieved without fair proceedings or without at least 21 the Commission proceeding in a fair manner, Chair.</p> <p>22 Chair, I'm instructed to record that, Chair, we 23 or at least our clients, Chair, they don't want to boycott 24 the Commission. No-one wants to withdraw or remain 25 withdrawn from the Commission, Chair. It hurts the</p>
<p style="text-align: right;">Page 13586</p> <p>1 those who instruct me have also withdrawn their 2 instructions and, Chair, we submit that they did not only 3 withdraw out of solidarity, Chair. We gave reasons as to 4 why they too, as much as they have legal representation, 5 they feel that their continued participation at the 6 Commission without the miners is indeed meaningful – 7 meaningless, Chair.</p> <p>8 CHAIRPERSON: Sorry, I understand that 9 you, I think I understand what you are saying. It's 10 essentially based upon the statement by Ms Zaneka Nungu –</p> <p>11 MR MOSIKILI: Indeed, Chair.</p> <p>12 CHAIRPERSON: - which you read to us, 13 which appears at pages 13124 and following of the 14 transcript. You don't have to repeat that because we've 15 read it and studied it.</p> <p>16 MR MOSIKILI: Indeed.</p> <p>17 CHAIRPERSON: If there are points of 18 course that you want to stress now, you're free to do so 19 but you can be assured that we have read the statement and 20 we've considered it, but let me not stop you.</p> <p>21 MR MOSIKILI: Indeed, Chair. Chair, just 22 to summarise, Chair, what those I represents or my clients, 23 Chair, and what the statement at the end of the day that I 24 read of Ms Nungu says, Chair, is they say they participate 25 at the Commission because they seek to know the truth. Now</p>	<p style="text-align: right;">Page 13588</p> <p>1 families, Chair, as they are saying that while there is 2 money set aside for them to be at the Commission, that they 3 are not participating because of a principle decision that 4 they took. As indicated, Chair, last time, their sub - my 5 submission is that, Chair, and my instructions are that 6 however it will hurt them more, Chair, for them to sit here 7 and participate in an unfair or what is seen to be an 8 unfair Commission, Chair. Where the truth is told and how 9 beautiful or ugly the truth is, unfair is unfair and those 10 are their sentiments, Chair, and they're asking that at 11 least this Commission conduct itself in a fair manner.</p> <p>12 And what is being asked, Chair, is simply that 13 while we appreciate the Chair's gesture at least last 14 month, Chair, of standing the matter down a couple of times 15 in order to allow, and the Chair himself to at least try 16 and find some sort of financial assistance for the miners, 17 all that is being asked now, Chair, out of fairness is to 18 give them an opportunity at least, at worst, for them to 19 pursue the High Court case with the peace of mind, knowing 20 that they too matter, that they matter to this Commission, 21 that the Commission can say let's give them that chance, 22 let's give them that fair chance to pursue their rights at 23 the High Court, whatever the result might be. That's all 24 they're asking for, Chair. And Chair, what we are 25 submitting, Chair, is that it can be, Chair, that your</p>

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1 gesture, Chair, of postponing, formally postponing the
 2 proceedings, no matter the length Chair, whether a week or
 3 two weeks but formally postponing it, it might send the
 4 correct message out there to say the Chair too, the
 5 Chairperson too is fair and sees this matter, as much as
 6 his hands are bound but he can do something about it, as
 7 temporary as it is but it might send a message and it might
 8 be a message that is finally heeded to, Chair.
 9 Chair, lastly what I need to record, Chair, is
 10 that the statement of Ms Nungu, Chair, as it was read and
 11 all the factual allegations that were put there as to why
 12 the Commission cannot proceed without the miners or at
 13 least according to the families why they need the
 14 participation of the miners, we need to record that, Chair,
 15 out of all the papers that were filed this week, none of
 16 those papers challenge those factual allegations that were
 17 put forward, Chair.
 18 Just to make an example, the issue around Mr
 19 Noki, the issue around Mr X, which we submit that only the
 20 miners can really come and put a different version against
 21 Mr X. We wish to record that, Chair, those Chair, remain
 22 unchallenged and we wish for the Chair to take those into
 23 account when the Chair is making, and the Commissioners are
 24 essentially making their ruling in terms of this
 25 application. I thank you, Chair.

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1 CHAIRPERSON: Thank you. Yes?
 2 MR MOSIKILI: Chair, I'm just –
 3 obviously, Chair, what affected my, what will probably
 4 affect, Chair, whether I can reply or not after the
 5 opposing parties, Chair –
 6 CHAIRPERSON: We've made half an hour
 7 available for reply to be divided up between you and Mr
 8 Mpfu. If you persuade him to give you 25 minutes and you
 9 give him five, that's fine. Alternatively you can make any
 10 other division of the time you wish.
 11 MR MOSIKILI: Indeed Chair, but Chair,
 12 the question really is, Chair, on the point in limine
 13 raised, Chair, it might well be that I don't need to – if
 14 that point is dealt with there, I just want to - the
 15 Chair's ruling in that regard if there's any ruling as yet,
 16 Chair.
 17 CHAIRPERSON: I'm going to call on Mr
 18 Oosthuizen now to deal with that point alone and then I'll
 19 give you and Mr Mpfu a short time to reply if you wish.
 20 MR MOSIKILI: Indeed Chair, and we record
 21 that obviously we do support the allegation.
 22 CHAIRPERSON: Mr Oosthuizen, I'd like to
 23 hear you now just on the preliminary point, whether your
 24 client should be entitled to appear here and to argue
 25 against the postponement. I'll hear you on that only –

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1 MR OOSTHUIZEN: As it pleases –
 2 CHAIRPERSON: - and then I'll ask Mr
 3 Mpfu and Mr Mosikili, is that right? Mosikili – I'm
 4 sorry, Mr Mosikili, I got it wrong the first time – give Mr
 5 Mpfu and Mr Mosikili the chance to reply and thereafter we
 6 will proceed
 7 MR OOSTHUIZEN: As it pleases you
 8 CHAIRPERSON: - once we've given a ruling
 9 on that point and you may be excused at that point or
 10 alternatively you may stay, depending on the ruling we
 11 give.
 12 MR OOSTHUIZEN: As it pleases, Chairman.
 13 Mr Chair, Commissioners, briefly in three points. First of
 14 all, the factual basis for our standing here is contained
 15 in paragraph 3 of the affidavit that is before you. That
 16 demonstrates the financial, political, legal and
 17 administrative responsibility of the department in this
 18 Commission and in its proceedings and that in itself
 19 justifies our participation. I'm not going to elaborate on
 20 that, it has already been done in the affidavit.
 21 The second point that I wish to make is, you've
 22 heard submissions here today and the issue of prospects of
 23 success in the High Court is a very relevant consideration
 24 for you. The legal team that is here is the legal team
 25 that is appearing for the President and the Minister in the

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1 High Court and we are perfectly situated to assist you, as
 2 the Commission, with any issues or information that you
 3 require as far as prospect of success is concerned. Some
 4 of those issues have now been raised here from the bar by
 5 Mr Mpfu. There were a number of allegations made but we
 6 are in a position to assist you with that.
 7 Then the last point that I want to make and that
 8 I want to make very clear is that the department is not
 9 here today because it wants to dictate or intimidate or
 10 bully anyone. We are here –
 11 CHAIRPERSON: If you tried you wouldn't
 12 get very far.
 13 MR OOSTHUIZEN: Well, even if we tried
 14 but I want to make it clear –
 15 CHAIRPERSON: I take it you wouldn't
 16 dare.
 17 MR OOSTHUIZEN: No, I wouldn't, Mr Chair,
 18 but the point is Mr Mpfu accused us of acting
 19 inappropriately, of doing something that should not be
 20 done. I take umbrage to that. That is not the motive of
 21 the department. That is not why they're here. They are
 22 acting as a responsible department of state, aware of their
 23 constitutional duties and their obligations and on this
 24 first point we fully respect the rule of law and the
 25 principles that are applicable to this Commission. You are

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1 the master of your own procedure. I cannot demand as of
 2 right to address you on behalf of the department. You
 3 determine your own procedure and procedure includes issues
 4 of standing. I have shown our interest, I have shown how
 5 we can assist you and we are asking you, under your
 6 procedure, to allow us to help and assist you on a matter
 7 that is of importance.

8 This postponement is not simply some formal and
 9 procedural issue to get out of the way. It has important
 10 repercussions and that is why we are here today, to look
 11 after the public interest, the interest of the state and we
 12 do it on those three bases. One, the factual basis
 13 concerning finances and administration set out in the
 14 affidavit, two, the position that we are in to assist you
 15 and, three, the respect that we have for you as the master
 16 of your own procedure. That is our –

17 CHAIRPERSON: Well, the third point
 18 wouldn't give you locus standi, would it?

19 MR OOSTHUIZEN: No, but –

20 CHAIRPERSON: The third point doesn't
 21 give you locus standi. The third point is a point you make
 22 really in response to the suggestion made by the other side
 23 that it's improper and inappropriate, ill-advised and
 24 intimidatory and so forth for you to be here.

25 MR OOSTHUIZEN: No, but Mr Chair, the

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1 point that I'm trying to make is not that I am claiming
 2 locus standi as a matter of right. This Commission is in
 3 control of its own procedure and in view of that power that
 4 is in the hands of the Commission, I cannot claim to be
 5 entitled to address you. I must get an indulgence from you
 6 and you are empowered to grant me that indulgence on the
 7 basis of regulation 19 of the Commission Regulations and on
 8 the basis of provisions of the Commission Act itself. And
 9 the bases for that request are the first two points that
 10 I've made, the factual basis in paragraph 3 and the fact
 11 that we are in a position to assist you. Thank you, Mr
 12 Chair.

13 CHAIRPERSON: Any reply, Mr Mpofo and Mr
 14 –

15 MR MPOFU: Yes.

16 CHAIRPERSON: - Mosikili.

17 MR MPOFU: Ja, thank you. Chairperson,
 18 very briefly. On – well, the issue really is that, and I
 19 won't read this, I just will give you the heading,
 20 Chairperson. It's 178 of LAWSA that I referred to, which
 21 says "The President must appoint a commission of inquiry,
 22 him or herself," and the writing there deals with passing
 23 the buck and abdication of that power and so on and the
 24 fact that it has to be done personally by the President.
 25 So I'll just refer you to that.

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1 As far as this new approach is concerned now, I'm
 2 puzzled. There's no - it can't be that my learned friend,
 3 he's now asking for an indulgence. If he was asking for an
 4 indulgence he would have done so in the papers. He
 5 wouldn't have waited for us to raise the objection. He's
 6 not asking for any indulgence. Actually in his document he
 7 says that he's entitled to participate and then the whole
 8 thing would have been different.

9 CHAIRPERSON: If he's wrong on that then
 10 –

11 MR MPOFU: Well, if he's wrong –

12 CHAIRPERSON: If he's wrong on that then
 13 it's sensible of him to apply.

14 MR MPOFU: Well –

15 CHAIRPERSON: You applied –

16 MR MPOFU: That's a different matter.

17 CHAIRPERSON: He can apply as well for an
 18 indulgence if he needs it.

19 MR MPOFU: Well, Chairperson, please,
 20 with respect, all I'm saying is that –

21 CHAIRPERSON: I'm putting a point to you
 22 so you can answer it.

23 MR MPOFU: Yes. No, no –

24 CHAIRPERSON: If it's a bad point you can
 25 show me why.

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1 MR MPOFU: Well, I'm showing you that it
 2 is not true. It cannot be that they came here to ask for
 3 an indulgence. If you're saying because I've objected,
 4 he's asked for an indulgence, that's a different matter but
 5 you know, Chairperson, what I'm saying is that when they
 6 came here and did this they (a) assumed, which is exactly
 7 what he says they didn't do, assumed that they have such a
 8 power. If he had asked for an indulgence, the process
 9 would have been different. He would have asked for the
 10 indulgence, I would have been answering, he would be
 11 replying. The only reason that I'm now, I spoke first and
 12 he's answering and I'm replying, is because he asked for no
 13 such indulgence. I'm not saying he cannot ask for it now,
 14 I'm just saying that is not what is happening here.

15 CHAIRPERSON: - is you get two bites at
 16 the cherry, otherwise you would only have had one.

17 [11:43] MR MPOFU: Yes, right, I'm happy, I'm
 18 grateful for that but let's call a spade a spade. The
 19 issues of the – if indeed the Commission is a master of its
 20 own procedure, that must necessarily include the question
 21 of granting or not granting a postponement. That is an
 22 indulgence, as my learned friend correctly puts it, which
 23 is squarely but squarely in the hands of the Commission.
 24 There is no place in the exercise of that indulgence for
 25 the people who appointed the Commission in the first place,

<p style="text-align: right;">Page 13597</p> <p>1 so that it may exercise those powers to themselves –</p> <p>2 CHAIRPERSON: No, no, I'm going to say,</p> <p>3 the department didn't appoint us; the President appointed</p> <p>4 us.</p> <p>5 MR MPOFU: Well, it's played a role.</p> <p>6 According to these papers they say they play –</p> <p>7 CHAIRPERSON: The President appointed us.</p> <p>8 MR MPOFU: Yes.</p> <p>9 CHAIRPERSON: The appointment was by him.</p> <p>10 MR MPOFU: Yes, but – yes, sorry,</p> <p>11 Chairperson.</p> <p>12 CHAIRPERSON: The department plays</p> <p>13 administrative role, they provide logistical support and</p> <p>14 they provide funds. That's their role, as I understand it,</p> <p>15 and if they try to do anything else, we'll tell them where</p> <p>16 to get off.</p> <p>17 MR MPOFU: No, that's not what they say.</p> <p>18 That might be what you say, Chairperson. They say at 3.4,</p> <p>19 "In addition to its political and constitutional duty to</p> <p>20 the department," whatever, "to assist and support the</p> <p>21 President of the Republic of South Africa in the exercise</p> <p>22 of his constitutional powers and functions under section</p> <p>23 84(1) of the Constitution," so the powers of the President</p> <p>24 under section 84(1) of the Constitution are the powers he</p> <p>25 exercised to appoint you, Chairperson. So if they assisted</p>	<p style="text-align: right;">Page 13599</p> <p>1 postponement not to be granted. Chair, we had a situation</p> <p>2 where there was a lady who was killed just few days after</p> <p>3 the commencement of the Commission, Ms Masutlhe, and really</p> <p>4 we had to fight to get her to be part of the Commission</p> <p>5 because she was an outsider, but then for someone who we</p> <p>6 think died within that ambit of the terms of reference</p> <p>7 should not get included, but then to have the opposition</p> <p>8 coming from the direction it's coming from, Chair, it just</p> <p>9 simply does not look good and does not seem to be correct,</p> <p>10 and we'll desist any suggestion that they have a right to</p> <p>11 at least oppose any postponement, Chair.</p> <p>12 CHAIRPERSON: Thank you. We'll take a</p> <p>13 short adjournment, or a long adjournment, depending how</p> <p>14 long we require, and we'll come back as soon as we're in a</p> <p>15 position to announce our ruling on this point.</p> <p>16 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>17 [11:52] CHAIRPERSON: The Commission resumes.</p> <p>18 RULING</p> <p>19 CHAIRPERSON: We've come to the</p> <p>20 conclusion that the department should be allowed to</p> <p>21 intervene in these proceedings in order to oppose the</p> <p>22 application for a postponement. The reasons which have</p> <p>23 induced us to come to this conclusion will be set out in</p> <p>24 our ruling when we deal with the merits of the matter.</p> <p>25 CHAIRPERSON: The first speaker who I've</p>
<p style="text-align: right;">Page 13598</p> <p>1 - they might not have been the principals, but if they</p> <p>2 assisted in such an exercise then they played a role.</p> <p>3 In any event, the point I'm making is this; the</p> <p>4 people who appointed the Commission, or assisted, whatever,</p> <p>5 have no place in directly – that's where the emphasis is –</p> <p>6 in directly participating in these proceedings to influence</p> <p>7 that exercise which they themselves had delegated to</p> <p>8 yourselves. That is re-usurping the very powers that had</p> <p>9 been delegated, which should have been delegated fully to</p> <p>10 assure the independence of the Commission. It's a matter</p> <p>11 of principle; it's wrong. I don't think it's ever been</p> <p>12 done in this country or any other country, but that's why</p> <p>13 we object that it should not be allowed to be done now.</p> <p>14 CHAIRPERSON: Is that what you have to</p> <p>15 say, Mr Mpofu?</p> <p>16 MR MPOFU: That's all, Chairperson.</p> <p>17 CHAIRPERSON: And now Mr Mosikidi –</p> <p>18 MR MPOFU: On this point –</p> <p>19 CHAIRPERSON: Yes, yes, yes, I</p> <p>20 understand. Now Mr Mosikili, is there anything you want to</p> <p>21 add? I got it right this time.</p> <p>22 MR MOSIKILI: I thank you, Chair. Chair,</p> <p>23 all you have to say is that it will seem very, very bad for</p> <p>24 this Commission that someone who at least seems to be</p> <p>25 outside the terms of reference, comes here and asks for a</p>	<p style="text-align: right;">Page 13600</p> <p>1 been asked to call upon to, the first respondent who I've</p> <p>2 been asked to call upon in relation to the response by the</p> <p>3 respondents is the counsel for Lonmin, Mr Burger.</p> <p>4 MR BURGER SC: Chair, thank you. We</p> <p>5 abide the decision by the Commission. I just want to put</p> <p>6 two things right which I think the Commission understands.</p> <p>7 In his opening, Mr Mpofu referred again to the toxic</p> <p>8 relationship between my client and the police. Well,</p> <p>9 that's not the version of his clients that we have, that's</p> <p>10 not the evidence before the Commission and, Chair, you are</p> <p>11 aware that there's a debate out there, we'll address that</p> <p>12 at the end of the day but we shouldn't be seen to accept</p> <p>13 that statement as being non-challenged, coming from Mr</p> <p>14 Mpofu.</p> <p>15 Secondly, he referred to his notice of motion and</p> <p>16 the annexure in the High Court as to the number of counsel</p> <p>17 employed by Lonmin. That's also factually wrong. Lonmin</p> <p>18 has, for phase 1 have had three. We were whittled down to</p> <p>19 two. You know for the past month or two we were one, today</p> <p>20 we're two again, Monday we'll be one again but we don't</p> <p>21 employ five people. What the relevance of that is, is</p> <p>22 beyond my comprehension but I just don't want to allow</p> <p>23 perceptions or political stances to go into the world which</p> <p>24 are factually incorrect, even if they're irrelevant to the</p> <p>25 process. But for those two corrections, we abide your</p>

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1 decision, sir.

2 CHAIRPERSON: Thank you, Mr Burger. Mr

3 Oosthuizen, I'm told that the respondents have agreed among

4 themselves that you are to be the second speaker.

5 MR OOSTHUIZEN: Yes.

6 CHAIRPERSON: On behalf of the, as part

7 of the response to the application.

8 MR OOSTHUIZEN: That's right. Thank you,

9 Mr Chair, Commissioners. I want to address you on three

10 levels. Level 1 is an introductory remark where I wish to

11 make three points. Then I will, in level 2 I'll address

12 you on the merits where I wanted to make four points but

13 the issue of standing has now been resolved so then I'm

14 going to address you only on three further points and then

15 in the last level or phase I will deal with some of the

16 matters that Mr Mpfu has raised, in response to what he

17 said. As far as the first level –

18 CHAIRPERSON: Have you got heads to give

19 us?

20 MR OOSTHUIZEN: Yes, I don't –

21 CHAIRPERSON: And to make available to

22 your learned friends as well?

23 MR OOSTHUIZEN: Not yet. I will ask them

24 to be made available now.

25 CHAIRPERSON: I see they're skeletal

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1 heads, they're only eight pages.

2 MR OOSTHUIZEN: Yes, that's right but I'm

3 not going to follow them. They are there just as a

4 precaution. In view of the way in which the debate has

5 developed, I'm going to address you orally. May I start

6 first of all by way of introduction to make three points.

7 First of all, the evidence and the factual matter that we

8 rely upon is before you. There was no replying affidavit

9 to that so it stands uncontested. I'm not going to repeat

10 it, it is on record before you.

11 Secondly, for the first hour and a half this

12 morning I did not hear any argument on postponement. I

13 heard an attack or a critique of the department and I heard

14 re-argument of what is pending before the High Court. And

15 the third point that I then want to make by way of

16 introduction is that coming to an issue of postponement –

17 CHAIRPERSON: I don't think that's right.

18 I mean he did say, his argument was, it's important that

19 his clients should participate in the proceedings. If they

20 don't participate in the proceedings it's unfair, the

21 proceedings will be unfair. Therefore the proceedings

22 should be postponed until an order is obtained in the High

23 Court or alternatively until they've got private funding,

24 whichever comes earlier. That was the argument and

25 admittedly it wasn't put perhaps as crisply as that but

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1 that was essentially the thrust of the argument put up. So

2 it's not fair to say that there was no argument to support

3 a postponement.

4 MR OOSTHUIZEN: Mr Chair, if that was the

5 argument then the rationale for the postponement is to

6 obtain funding so that they can return and then one

7 would've expected that there would've been an address to

8 you on the prospects of funding –

9 CHAIRPERSON: No, no, that's not right.

10 I'm sorry to interrupt you again. The argument is, there

11 must be a postponement to prevent an unfairness which would

12 result from the fact that they haven't got funding and they

13 can't participate. Whether it's a good argument or not is

14 another matter but that was the argument put up.

15 MR OOSTHUIZEN: Well, I will then deal

16 with it on that basis. Now we've already made the point in

17 the affidavit and my learned friend and I are in agreement

18 thereon that basically the request for a postponement is an

19 indulgence and it is therefore incumbent upon Mr Mpfu to

20 put those facts and arguments before you that would

21 convince you in favour of such a postponement.

22 May I then go to the merits of this matter. This

23 matter turns basically on the prospects of obtaining

24 funding. Now, as far as private funding is concerned I see

25 that one of the other parties have filed an affidavit in

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1 which they describe this as a pipe dream. We know that for

2 a few months now there's been an attempt to get private

3 funding, none of that has really been successful. There

4 was forced funding but it stopped, from the private sector,

5 and since then there hasn't been any funding forthcoming

6 from the private sector. Now we are told about attempts

7 that are going on but with all due respect, Mr Chair, the

8 detail that is given is so vague and so sweeping that one

9 cannot evaluate what the prospects of success with regard

10 to such funding are. As far as getting funding –

11 CHAIRPERSON: I'm sorry, do they have to

12 – so you are talking about the prospect of private funding?

13 MR OOSTHUIZEN: Yes.

14 CHAIRPERSON: Do they have to go that

15 far? What they're saying is the terminus ad quem, as it

16 were, of the relief they seek is the outcome of the

17 proceedings in the High Court. They say if before that we

18 get funding from a private source, then we'll be back in

19 any event. So that's just put in by way of a qualification

20 to meet an argument that even if, before the proceedings in

21 the High Court are over, they've got funding, well then

22 they should be back anyway on their own basis.

23 MR OOSTHUIZEN: No, I –

24 CHAIRPERSON: The real issue is they say

25 we want a postponement until the outcome of the proceedings

<p style="text-align: right;">Page 13605</p> <p>1 in the High Court. They don't ask for any relief after 2 that.</p> <p>3 MR OOSTHUIZEN: Ja.</p> <p>4 CHAIRPERSON: Their claim is limited to 5 relief up to the outcome of the proceedings in the High 6 Court and they say if something happens before that, well, 7 obviously it'll fall away. So the prospects of success of 8 getting private funding, with respect, are irrelevant 9 surely on that approach?</p> <p>10 MR OOSTHUIZEN: Well –</p> <p>11 CHAIRPERSON: But I don't want to 12 interrupt you but I don't think the submission you put to 13 us is entirely correct.</p> <p>14 MR OOSTHUIZEN: Mr Chair, they put it in 15 the alternative. They will come back either if they have 16 private funding or upon judgment being given in the matter 17 in the High Court and because they put it in the 18 alternative, I must deal with both legs. I can't leave the 19 alternative leg out of the picture and that is why I make 20 my submission on the private funding, to cover that 21 conditional qualification that they add to their argument.</p> <p>22 As far as the judgment itself is concerned, there 23 was a notice of amendment delivered late yesterday 24 afternoon. Mr Mpofo has already given you the brunt 25 thereof but he then told you that the relief that is now</p>	<p style="text-align: right;">Page 13607</p> <p>1 requirements of an interdict.</p> <p>2 I already have instructions to oppose the 3 application for an amendment and I don't have a crystal 4 ball but in all probability that will cause the matter to 5 be postponed and not finalised on the 20 – or even be heard 6 on the 25th and the 26th of September.</p> <p>7 Now, Mr Chair, what concerns the department is 8 this, the injured and arrested miners are prepared to come 9 back to this hearing and continue upon judgment in the High 10 Court, even if it goes against them. Now if that is their 11 attitude, why do they have to wait a month?</p> <p>12 CHAIRPERSON: I'm not sure they say that. 13 All they say is, they ask for a postponement until judgment 14 in the High Court. Their papers, if one can call it, 15 transcript of what was said, described those papers, the 16 papers appear to be silent on what's going to happen if 17 they lose in the High Court, or is there something I've 18 overlooked?</p> <p>19 MR OOSTHUIZEN: On page 13133 at line 10, 20 "Thank you, Mr Chairperson, yes, that is a fair question. 21 No, it does not. As I indicated, maybe not clearly, we're 22 talking about the outcome in the first instance. In other 23 words, we would assume to ourselves a duty to come back at 24 that stage of the outcome of the first instance."</p> <p>25 CHAIRPERSON: Sorry, what line – sorry?</p>
<p style="text-align: right;">Page 13606</p> <p>1 being pursued has been canvassed in the papers. They have 2 not, and you don't have to take my word for it. You can 3 look at paragraph 16 of the judgment of the Constitutional 4 Court. In the last paragraph or in paragraph 16 in the 5 middle, "A consideration that comes into play is that it is 6 the object of the Legal Aid Act to render or make available 7 legal aid to indigent persons and to provide legal 8 representation at state expense as contemplated in the 9 Constitution. Its provisions have not been challenged as 10 constitutionally invalid, nor has the refusal by Legal Aid 11 South Africa to grant the applicants legal aid been 12 challenged on review."</p> <p>13 CHAIRPERSON: [Microphone off, inaudible] 14 those two sentences which were the precipitating factor for 15 the application for an amendment.</p> <p>16 MR OOSTHUIZEN: Yes, but the point is 17 that that has not been canvassed on the papers. This now 18 turns into a review application. Whether or not the review 19 was launched in time, according to PAJA, has not been 20 canvassed on the papers. Whether the Legal Aid Act in 21 itself is unconstitutional has not been canvassed on the 22 papers. the main relief that was pursued on the papers was 23 a final interdict ordering legal representation at state 24 expense and the papers were dealt with and the issues were 25 canvassed on the basis of that analysis, the trite three</p>	<p style="text-align: right;">Page 13608</p> <p>1 MR OOSTHUIZEN: Line 10.</p> <p>2 MR OOSTHUIZEN: Mr Oosthuizen, that's in 3 response to the question that was raised as to the time 4 frame for which the adjournment was sought, whether it 5 would be at the end of the High Court case or whether any 6 one party would take that on appeal. That was the question 7 in response to which Mr Mpofo said that.</p> <p>8 MR OOSTHUIZEN: Yes, and as I understand 9 the transcript, if there is an appeal they will not let 10 that deter them. Whatever be the outcome of the court a 11 quo, the High Court, upon that judgment they will assume 12 the duty to come back at that stage at the outcome of the 13 first instance. They don't say favourable outcome, they 14 don't say adverse outcome, they say once there's an outcome 15 we will come back.</p> <p>16 MR MPOFU: Chairperson, I'm sorry, I 17 don't want to interrupt my learned colleague but just to –</p> <p>18 CHAIRPERSON: You are –</p> <p>19 MR MPOFU: No, Commissioner Hemraj is 20 quite correct. I just don't want my learned colleague to 21 go on a wild tangent. The question was whether the word 22 "outcome" encompassed appeal, which it sometimes does, and 23 I just made it clear that we would have a duty, as counsel 24 at least, to come back. The question I suppose you could 25 ask is, come back and do what? It would depend on the</p>

<p style="text-align: right;">Page 13609</p> <p>1 outcome. We would come back, certainly if we were 2 successful we would obviously come back and participate. 3 If we were unsuccessful we would come back and either ask 4 for a postponement or say we are not going to be here or we 5 are withdrawing permanently, I can't say what would happen. 6 It will depend on the instruction but the only thing that 7 is clear is that if the application is successful we would 8 come back to participate, but that was the context. 9 CHAIRPERSON: Yes, thank you. 10 MR MPOFU: It does not – 11 CHAIRPERSON: But Mr Oosthuizen it does 12 seem to be clear, they're not saying that they will come 13 back even, and participate- 14 MR OOSTHUIZEN: Well, then I apologise – 15 CHAIRPERSON: - in the proceedings 16 thereafter if they lose in the High Court. They make take 17 the decision in the High Court further, of course, but they 18 accept that the relief they seek only, will come to an end 19 if granted once the High Court has given its decision. 20 That's the thrust of the passage. 21 MR OOSTHUIZEN: Well – 22 CHAIRPERSON: It was, I understand why 23 you said what you said but it was ambiguous but I think the 24 ambiguity has now been cleared up by what Mr Mpofu said. 25 MR OOSTHUIZEN: I'll accept that. Just</p>	<p style="text-align: right;">Page 13611</p> <p>1 would suggest to us it goes because it uses the word 2 "necessarily." "The Commission's finding is not 3 necessarily to be equated," which means the Constitutional 4 Court is leaving the point open, as I read that paragraph, 5 but anyway. 6 MR OOSTHUIZEN: Well, with respect – 7 CHAIRPERSON: I put that point to you. 8 MR OOSTHUIZEN: No, true. I mean I read 9 out the paragraph in the words that it has been reported 10 and, with respect, this must be read against the natural 11 inclination of any court on appeal that does not want to 12 pre-empt whatever is going to be decided by the High Court 13 but this is already, in my respectful submission, a strong 14 indication of how the Constitutional Court views the 15 matter. 16 In paragraph 15 the Constitutional Court deals 17 with an issue of fairness and they approach this from a 18 moral analysis and they conclude to say, "Absent the fair 19 opportunity, the search for the truth and the purpose of 20 the Commission may be compromised." But then comes 21 paragraph 16 which must be read together with this. "This 22 means that unfairness may arise when adequate legal 23 representation is not afforded, but this does not mean that 24 courts have the power to order the executive branch of 25 government on how to deploy state resources and when the</p>
<p style="text-align: right;">Page 13610</p> <p>1 to explain, that was our concern when we read what was said 2 in the transcript. And also the fact is that they have 3 already withdrawn from these proceedings, albeit 4 provisionally, and for the past six weeks the Commission 5 was able to continue. So the fears that are expressed and 6 the statements that are made that you won't be able to do 7 without us, is simply unfounded. 8 Now, as far as the judgment in the High Court is 9 concerned, the issue of the prospects of success therein is 10 important. My learned friend has indicated that they rely 11 on section 34 and section 39. Now the Constitutional Court 12 has already given an indication of its view as far as that 13 is concerned. If I can take you to paragraph 14 of that 14 judgment, there the Constitutional Court says the 15 following, "Section 34 deals with disputes that can be 16 resolved by the application of law. The Commission's 17 findings are not necessarily to be equated to a resolution 18 of legal dispute by a court of law." That is already a 19 firm indication that the case, as based on section 34, is 20 simply, with respect, misconceived. 21 Then there is the reliance by my learned friend 22 on paragraph 15. Now in paragraph 15 there's a long 23 discussion and ultimately the – 24 CHAIRPERSON: I'm sorry to interrupt. 25 Para 14, I'm not sure if paragraph 14 goes as far as you</p>	<p style="text-align: right;">Page 13612</p> <p>1 desirable objectivity of equality of arms before a 2 commission translates into a legal right to representation 3 that must be provided at state expense, it is a contestable 4 issue. 5 The consideration that comes into play is that it 6 is the object of the Legal Aid Act to render or make 7 available legal aid to indigent persons and to provide 8 legal representation at state expense as contemplated in 9 the Constitution." The point being this, on both the legs 10 that my learned friend showed you the case for the 11 applicants is relying, there's been an indication already 12 by the Constitutional Court that they are not so sure that 13 those legs are very firm. And on that basis I respectfully 14 submit that there is no real prospect of success with the 15 judgment in the High Court, accepting that it proceeds on 16 the 25th and 26th September despite the logistical problems. 17 That brings me then to the public interest issue. 18 We've dealt with that in paragraph 5 of our affidavit. I 19 am not going to repeat the factual allegations that were 20 made therein. 21 [12:11] My learned friend at no stage countered the 22 argument or the submissions that were made in that 23 paragraph, and I didn't hear one single submission from him 24 to say that those considerations of public interest are 25 irrelevant or should not be taken into consideration.</p>

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1 CHAIRPERSON: It's not traversed on the
 2 papers. There's no affidavit filed in response denying
 3 those allegations.
 4 MR OOSTHUIZEN SC: But there was also –
 5 CHAIRPERSON: So we have to take the
 6 allegations, insofar as they're based on fact –
 7 MR OOSTHUIZEN SC: Yes.
 8 CHAIRPERSON: - as being a correct
 9 statement of the facts.
 10 MR OOSTHUIZEN SC: Correct.
 11 CHAIRPERSON: I understand sometimes an
 12 affidavit contains arguments; presumably the fact that
 13 those aren't traversed by another affidavit doesn't mean
 14 the argument is accepted. The rules apply in relation to
 15 dispute of facts, not disputes of argument.
 16 MR OOSTHUIZEN SC: No.
 17 CHAIRPERSON: But insofar as they are
 18 factual averments, they're not traversed.
 19 MR OOSTHUIZEN SC: I accept that, but in
 20 this case when this procedure was followed, Mr Mpofu on at
 21 least three or four occasions indicated that he realises
 22 he's now busy with legal argument, but that would
 23 ordinarily have also been stated, or advanced in the
 24 affidavit, and he was then allowed to proceed. We returned
 25 the favour. Our paragraph 5 contains a lot of factual

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1 allegations, but there are also conclusions, inferences,
 2 and submissions made, and what I'm saying is that none of
 3 those submissions have been countered or made off as
 4 irrelevant, or play no role at all as far as a postponement
 5 is concerned.
 6 So the international reputation of the country is
 7 important, and delay will compromise that. The ability of
 8 the government to put preventative measures in place to
 9 prevent a reoccurrence of the Marikana is being compromised
 10 the longer it takes for this Commission to finish its
 11 inquiry and make its recommendations. So looked at from
 12 that perspective, there are very good and pressing reasons
 13 for the Commission to continue, whilst there are, with all
 14 due respect to my learned colleague, no good reason why
 15 there should be a postponement.
 16 Mr Chair, allow me then to deal with a few of the
 17 submissions that Mr Mpofu made. Now unfortunately you will
 18 have to bear with me; some issues I've already addressed.
 19 I just want to eliminate them, and I just want to select
 20 that I really want to address you on. So just bear with me
 21 for a moment.
 22 As far as the submission was made, or as far as
 23 there was an attempt to suggest that the evidence leaders
 24 is on the payroll of the department, regulation 5 and
 25 regulation 6 of your Commission Regulations address that

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1 fully. The evidence leaders are in terms of regulation 5
 2 in fact designated by the Chairperson. They're not even
 3 appointed by the department, and in terms of regulation 6,
 4 the regulation itself prescribes what fees or travelling
 5 allowances are to be paid, as the Minister of Justice with
 6 the concurrence of the Minister of Finance determines. So
 7 it's not really a case of he who pays the piper calls the
 8 tune, and the suggestion is deplorable.
 9 CHAIRPERSON: There's no reason to think
 10 that if we tried to call the tune that anyone would listen
 11 to it.
 12 MR OOSTHUIZEN SC: No, but Mr Chair, that
 13 is the reality, but we have a platform here where the media
 14 is present and this type of missile misses are sent into
 15 the wide world and it is repeated by people, who don't have
 16 the insight that you have, and it is misunderstood and a
 17 false perception is created. I realise that in reality if
 18 this was a close session I wouldn't even have to address
 19 you thereon, but I have to look after the interest of my
 20 client and the interest of the Commission, and any attempt
 21 to create that kind of an impression must immediately be
 22 nipped – in die kiem gesmoor word –
 23 CHAIRPERSON: Nipped in the bud.
 24 MR OOSTHUIZEN SC: Nipped in the bud.
 25 That is what happens when you ask an Afrikaner to speak

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1 English, Mr Chair.
 2 CHAIRPERSON: Nipped in the bud. We can
 3 also nip it in the bud by my saying now, as forcibly as I
 4 can, that any attempt by anyone to interfere with this
 5 Commission's functioning as an independent body will be
 6 vigorously resisted and publicly exposed, and there can be
 7 no prospect at all as far as we are concerned of anything
 8 of that kind happening, and if anyone were to try it, there
 9 would be very serious consequences. I must also say that
 10 there has been no attempt at all of any kind to do that,
 11 and if there had been such an attempt, what I've said would
 12 happen in the future if it were to be tried, would already
 13 have taken place. So the public can have the assurance
 14 from us as Commissioners that nothing of that kind has
 15 happened, and if anything of that kind does happen, there
 16 will be very serious public consequences.
 17 MR OOSTHUIZEN SC: Okay, may I then go to
 18 the number of witnesses. Mr Mpofu said well, if you still
 19 have 28 to go, you're not going to finish in any event.
 20 But surely we must make the most of the time that is
 21 available. We can't just throw in the towel and say well,
 22 if that's the case then we stop work today because we're
 23 not going to finish in any event. So the number of
 24 witnesses, the work that you have to do, the importance of
 25 the task resting upon your shoulders, all of that dictates

<p style="text-align: right;">Page 13617</p> <p>1 that we go on rather than stop. 2 Now Mr Mpfu says that we need closure on this. 3 Our argument on this is on the paper. We say ja, closure 4 is a good thing, but that does not mean that that is 5 necessarily part of the mandate of this Commission. The 6 Commission's mandate is defined in its appointment, and if 7 it achieves closer, well, that's a good thing. Now Mr 8 Mpfu's argument is that without them participating and in 9 their absence there will not be any effective outcome, and 10 with all due respect, why will it not be effective? That 11 is speculation. 12 He also makes the point that the Commission's 13 report and recommendations and referral will lack 14 credibility. Why? Because 350 miners and arrested persons 15 are not happy with it. What happens if the President 16 accepts it, if the department accepts it, if parliament 17 accepts it, and if the governing political party accepts 18 it, and if the general public accepts it? Why is it that 19 if things don't go the way of 350 injured and affected, or 20 arrested miners, then all of a sudden nothing will be 21 effective and nothing will have credibility? That is first 22 of all not a logical argument; secondly, it is not based on 23 any facts; and it is pure speculation. It's hyperbole. 24 There's no basis for that, Mr Chair. Now – 25 CHAIRPERSON: I think to be fair, Mr</p>	<p style="text-align: right;">Page 13619</p> <p>1 attention thereto that there was no replying affidavit. He 2 then made one point; he referred you to annexure M2, and he 3 analysed the public statement on behalf of the department 4 line by line, and in the course thereof he said but there 5 are other commissions where the Legal Aid Board paid for 6 legal representation, and he then referred to a case in the 7 Land Claims Court. Now this is something that has been 8 canvassed on the papers in the High Court. As far as the 9 Restitution of Rights in Land of 1994 is concerned, section 10 29 of that statute allows representation at State expense. 11 There's a legislative mandate for that. As far as the 12 Truth and Reconciliation Commission is concerned, in 13 section 34 of the act that created it there was a specific 14 mandate, legislative mandate given for legal aid 15 representation. 16 But when we deal with the so-called royal 17 commissions of inquiry that was always appointed under 18 royalty of the Crown, and it is now codified in section 19 84(1)(f) of our Constitution, when you look at that type of 20 a commission of inquiry, there is not a single reported 21 case of instance where there was a legislative provision 22 that allowed representation therein at State expense. 23 What we have here as far as the Legal Aid Board 24 is concerned is the following, and that is where the legal 25 aid to some of the parties before this Commission comes</p>
<p style="text-align: right;">Page 13618</p> <p>1 Mosikili put it in a slightly different way. 2 MR OOSTHUIZEN SC: Ja. 3 CHAIRPERSON: He said even if – I think 4 I'm being fair to him – even if the results are rights, 5 even if the truth has come out, if the process was seen to 6 be unfair, that would somehow affect its acceptability and 7 legitimacy and credibility, I think, to use words he used, 8 and that was his submission. So you're not, with respect, 9 correctly summarising the submission put up. 10 MR OOSTHUIZEN SC: Now I will deal with 11 that submission at the end when I come with his, but at the 12 moment I'm dealing with Mr Mpfu's submissions. Now Mr 13 Mpfu said that we make the point that a postponement will 14 not infringe their rights. Now the point that we made in 15 our paragraph 6.4.2 is that it won't infringe upon their 16 procedural rights, and that is their procedural rights here 17 in this Commission. He referred you to LAWSA and he 18 referred you specifically to paragraph 169. Our submission 19 in our original papers did not go so far to say that there 20 will be no infringement of any rights. This postponement 21 raises a procedural issue, and we are saying that there is 22 no procedural right of theirs that will be infringed. 23 Now my learned friend then went on to say that 24 there's a lot of misrepresentations, and he highlighted 25 some of them. In general I again want to draw your</p>	<p style="text-align: right;">Page 13620</p> <p>1 from. The Legal Aid Board's position on the papers and on 2 record is the following. As a general rule our statute 3 does not allow us to fund legal representation at 4 commissions, but our act, our empowering act prescribes a 5 legal aid guide, and that legal aid guide, in terms of 6 section 12, if I remember correctly, is clothed with the 7 force of law. It is basically recognised as a form of 8 subordinate legislation, and in that legal aid guide there 9 is provision made for an exception that under special and 10 exceptional circumstances there is a reserve discretionary 11 power to be exercised by the CEO of the Legal Aid Board, 12 and it was in the exercise of that exceptional power that 13 some legal aid was afforded at commission proceedings, but 14 as a general rule we don't do that. That is the 15 background. 16 Now it is against that background where, and on 17 matters that have already been canvassed on the papers, 18 that Mr Mpfu now criticises the Legal Aid Board, and he 19 says that their explanation and the statement is contrived 20 and it is wrong, but he doesn't give you the background. 21 He doesn't explain to you the legal structure in which this 22 decision was taken, and I have to rectify that. 23 Then Mr Mpfu deals with the issue of fairness is 24 whatever is unfair in one context, is also unfair in 25 another context. May I take you to paragraph 13 of the</p>

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1 Constitutional Court judgment, and I quote, "The applicants
 2 sought further succour for their claim for State-funded
 3 legal representation by alleging infringement of section 34
 4 (access to court) and section 9 (equality) of the
 5 Constitution, and by relying on general considerations of
 6 fairness. It suffices for the limited purposes referred to
 7 above to state that none of these arguments warrant our
 8 intervention in the order granted by Raulinga, and Raulinga
 9 dealt with fairness, not in a general context, but in a
 10 specific context."
 11 Now Mr Mpofu also used the alarmist argument that
 12 we mustn't take a short-term view because if we do, we run
 13 the risk of having another massacre like the one that was
 14 experienced. Now if this Commission doesn't finish its
 15 job, it will be ongoing when that unfortunate event
 16 reoccurs. The whole purpose of the Commission is to
 17 investigate and to prevent reoccurrence. So we can't take
 18 a long-term view. There is a certain measure of urgency in
 19 this investigation, not that we must compromise the
 20 Constitution or the search for truth, but we cannot ignore
 21 the urgency and the importance of this investigation.
 22 Now to come back again, Mr Mpofu made the point
 23 to say that the appeal to the Constitutional Court was only
 24 with regard to the interim relief. Now in paragraph 8 of
 25 his heads of argument in the North Gauteng High Court he

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1 made the point, and the point that he made was this; in
 2 order to decide part A of the notice of motion, which deals
 3 with interim relief, it will be necessary to consider and
 4 decide on certain aspects of part B of the notice of
 5 motion, which is concerned with the right to legal
 6 representation at State expense, and that is also dealt
 7 with in so many words in the judgment of Raulinga, and if
 8 you analyse that judgment, you'll find that one of the
 9 grounds upon which the interim relief was dismissed is that
 10 they haven't made out a case for a right to legal
 11 representation at State expense. It was at all times
 12 common cause that the parties and the witnesses before the
 13 Commission have a right to legal representation. The bone
 14 of contention was whether such legal representation had to
 15 be given at State expense or not. That is what the whole
 16 case is all about.
 17 Now when you draw a distinction between a final
 18 interdict and an interim interdict, as I understand it, Mr
 19 Chair, the situation is as follows –
 20 CHAIRPERSON: I'm sorry, Mr Oosthuizen, I
 21 don't understand that argument. It may be that Mr Mpofu
 22 was perhaps ill-advised enough to make that submission in
 23 the High Court, and it may be that Judge Raulinga took a
 24 similar approach, but one cannot ignore what's said in
 25 paragraph 11 of the Constitutional Court judgment where

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1 they say, "Our consideration of the High Court's finding
 2 must not, however, be seen as anticipating the outcome of
 3 the main review application and the final relief sought
 4 there." That's what the Constitutional Court said. So
 5 therefore whatever Mr Mpofu wisely or unwisely said in his
 6 heads in the High Court, that can't detract from what the
 7 Constitutional Court said in the sentence that I've read.
 8 MR OOSTHUIZEN SC: Mr Chair, yes, perhaps
 9 I've been a bit undiplomatic. I –
 10 CHAIRPERSON: I think you over-egged the
 11 pudding there, if I may say so.
 12 MR OOSTHUIZEN SC: Anyway, I'm a bit
 13 undiplomatic in my submission, but the point that I'm
 14 trying to make is that as far as prospects of success are
 15 concerned we have the following situation. There's an
 16 interim interdict called for, and there's a final interdict
 17 called for. Whether you've got a right is a matter of law.
 18 Whether that right has been prima facie or finally clearly
 19 established, is a matter of evidence. Now all the evidence
 20 is in, and it has been in also when part A has been decided
 21 and also when this matter went to the Constitutional Court.
 22 [12:31] So whether or not that right has been established
 23 on a prima facie basis or on a clear basis, that is no
 24 longer the debate. It has been the debate all along of
 25 whether they've got a right to that legal representation at

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1 State expense, and that is then where paragraph 12 of that
 2 same judgment comes in, and the Constitutional Court points
 3 this out. They say there are only three provisions in the
 4 Bill of Rights that explicitly entitles someone to claim
 5 legal representation at State expense. Then the
 6 Constitutional Court deals with each one of them, and on
 7 page 8, third line from the bottom, they say, "These do not
 8 apply here. The applicants are neither children, nor
 9 detained persons, and the proceedings that are the subject
 10 matter of this application, namely the Commission
 11 proceedings, are not a civil or criminal trial." So it is
 12 on that basis that I address you to show you that the
 13 prospects of success is not warra-warra-warra, as Mr Mpofu
 14 wishes you to believe. Now Mr –
 15 CHAIRPERSON: I'm afraid I've never seen
 16 those words 'warra-warra' in the dictionary. What do they
 17 mean?
 18 MR OOSTHUIZEN SC: I'm afraid I also
 19 don't understand.
 20 CHAIRPERSON: Is it a term of art used at
 21 the Pretoria Bar? I'm afraid I've never come across it
 22 before, but perhaps you could explain it to me now.
 23 MR OOSTHUIZEN SC: Mr Chair, Mr Mosikili
 24 then raises an argument which is fundamentally based on a
 25 golden rule, that justice must not only be done, it must be

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1 seen to be done, and his argument is basically that this
 2 whole process, also the process before this Commission,
 3 must be seen to be fair. But fairness is a two-edged
 4 sword. I may personally within the context of my own value
 5 system and my own morals view something as fair or unfair,
 6 but when we talk about fairness in the context where we are
 7 today, and where you are called upon to exercise a value
 8 judgment on what is fair or not, you are called upon to
 9 exercise that value judgment not only by taking into
 10 consideration the interests and the expectations of the
 11 injured and affected miners; there are other parties before
 12 this Commission who also have an interest that this matter
 13 proceeds. You have the Department of Justice and
 14 Constitutional Development who come here as guardians of
 15 the public interest and impress to you that it is in the
 16 interest of the country that this matter proceeds. So it
 17 isn't so simply as to say well, the procedure must be fair
 18 to a selected and identified and circumscribed group of
 19 individuals. It must be fair to everybody, and if we look
 20 at the broader picture, if we look at the concerns raised
 21 by the department, if you look at the importance of this
 22 matter, then fairness also requires us to proceed.
 23 The unfairness that they are complaining of is
 24 not an unfairness in these proceedings. It is the
 25 unfairness that in their perception is created by the fact

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1 that they don't have State-funded legal representation, and
 2 that is something beyond your control. That is something
 3 which, with all due respect, you can take note of, but it
 4 cannot inform your decision, and under those circumstances
 5 I would respectfully submit that on the one hand no proper
 6 case has been made out for a postponement, and on the other
 7 hand there are pressing considerations of logistics, and of
 8 public importance, and of public interest, that require
 9 this Commission to proceed where possible.
 10 If there's anything else that I can assist you
 11 on, I will gladly do so. If there's anything that you want
 12 me to answer, I am available. Those are my submissions.
 13 CHAIRPERSON: Thank you, Mr Oosthuizen.
 14 Mr Mathibedi, I think you are the next person who is
 15 prepared, as I understand, to address us on behalf of the
 16 respondents, in your case being the SAPS.
 17 MR MATHIBEDI SC: That's correct, Mr
 18 Chairman. Mr Chairman, we have prepared heads of argument,
 19 which I'm going to ask my instructing attorney to circulate
 20 them. Thanks, Mr Chairman. I've been –
 21 CHAIRPERSON: Has everybody who would
 22 like a set of the heads and are entitled thereto, got one?
 23 Has the Human Rights Commission been given a copy?
 24 MS MASEBE: Chairperson, on behalf of the
 25 Monene family, we haven't received a copy.

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1 CHAIRPERSON: Yes. No, you will receive
 2 it.
 3 MS MASEBE: Thank you.
 4 CHAIRPERSON: Everybody apparently now
 5 got a set of, who want a copy and who are entitled to a
 6 copy, got one. You may now proceed, Mr Mathibedi.
 7 MR MATHIBEDI SC: Thanks, Mr Chairman.
 8 Mr Chairman, I've been given strict instructions by my
 9 attorney to be "kort en bondig." That being the case, Mr
 10 Chairman –
 11 CHAIRPERSON: Perhaps for the benefit of
 12 those who don't understand Afrikaans, we should get the
 13 interpreter to interpret those words, unless you can do so.
 14 SPEAKER: To the point.
 15 CHAIRPERSON: Short and to the point.
 16 MR MATHIBEDI SC: Thanks, Mr Chairman.
 17 Mr Chairman, that being the case, I don't intend to
 18 traverse aspects that have been traversed by my colleague.
 19 I'm also not going to go through my heads of argument or
 20 the opposing affidavit prepared on behalf of SAPS.
 21 Mr Chairman, the first aspect that I would like
 22 to deal with is the issue of perception, and I think
 23 dealing with this, Mr Mpofu is very helpful in giving us an
 24 answer on this aspect, because as set out in the record,
 25 page 13121, that's day 29, starting at paragraph 12 –

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1 sorry, the 29th of August, sorry, 2013.
 2 CHAIRPERSON: [Microphone off, inaudible]
 3 MR MATHIBEDI SC: Day 126, from line 12
 4 the following appears. Mr Mpofu, "Thank you, Chairperson,
 5 and it's simply to say, Chairperson, that at least the
 6 perception of the people that we represent is that, you
 7 know, everyone has turned their backs on them, starting
 8 from the employer, the police, some government officials or
 9 ministers. They are BEE partners and all sorts of people,
 10 but they do have confidence in this Commission, as I've
 11 already indicated before, and we hope that the Commission
 12 will not find itself joining that illustrious list, and we
 13 know that if they feel like that, we will be the first ones
 14 to point out that about the difficulty of the task that you
 15 have in balancing the interest of everyone. So I just
 16 wanted to assure you, Chairperson, that we will, as we have
 17 always done, ensure that whatever the outcome of the
 18 application," this is not relevant going forward. But the
 19 point that we are making, Mr Chairman, is because of what
 20 is set out herein, then the perception that is, it's being
 21 argued that there is a perception on the part of the
 22 applicants regarding the proceedings in the Commission. We
 23 respectfully submit that because of what has been said by
 24 their counsel, such is unfounded.
 25 That also now ties in to the integrity of the

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1 evidence leaders. We respectfully submit, M'Lord, that
 2 this also is an indication that the integrity of the
 3 evidence leaders is solid; it's not being questioned, and
 4 the reason why evidence leaders have been appointed is to
 5 assist the Commission in finding out the truth as to what
 6 happened during the relevant period.
 7 Now that being the case, Mr Chairman, we
 8 respectfully submit that there is no reason why, if the
 9 applicants are in possession of any information or
 10 evidence, why that evidence can't be made available to the
 11 evidence leaders with the undertaking that if need be, they
 12 will come and testify as witnesses. There's nothing that
 13 precludes them. So our submission is that that perception
 14 is self-created, and when it comes to the families of the
 15 deceased persons, it's just unfortunately, Mr Chairman, my
 16 view is that that perception of unfairness or prejudice is
 17 self-created, for the simply reason that the Department of
 18 Justice has made funds available to them so that they can
 19 be accommodated, they can pay their legal representatives
 20 of choice. So there is no reason why they can't take part
 21 in the proceedings. Or alternatively, there is no reason
 22 why the applicants can't make available any information or
 23 evidence available to the legal representatives of the
 24 families so that they should cater for their interest,
 25 because it appears they have got no problem with that.

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1 Now with regard to the aspect of unfairness
 2 referred to by my learned friend, as set out in the
 3 judgment of the Constitutional Court at paragraph 15, the
 4 last line, which reads as follows, "Absent a fair
 5 opportunity, the search for the truth and the purpose of
 6 the Commission may be compromised." Now we respectfully
 7 submit, Mr Chairman, that that opportunity is not absent.
 8 It has been made available to them. The evidence leaders
 9 are there to cater for their interest. They decided not to
 10 take part in the proceedings of the Commission. No-one is
 11 stopping them. Now the other aspect –
 12 CHAIRPERSON: Sorry, are you saying that
 13 if the evidence leaders say we're prepared to listen to
 14 you, we'd like to hear what you have to say, we will convey
 15 your version to the Commission, and we will call you to
 16 give evidence in support of what we've conveyed in that
 17 regard, that will constitute a fair opportunity in the
 18 meaning of that expression as used by the CC in the last
 19 sentence of that paragraph?
 20 MR MATHIBEDI SC: That's my submission,
 21 and that has already been demonstrated that versions of
 22 some of the applicants who made statements which were
 23 submitted to the Commission, have been put to General
 24 Mpembe. "The search for the truth and the purpose of the
 25 Commission may be compromised."

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1 CHAIRPERSON: Carry on.
 2 MR MATHIBEDI SC: That's correct, Mr
 3 Chairman. "The search for the truth and the purpose of the
 4 Commission may be compromised." At this stage there is no
 5 evidence or indication that the proceedings of this
 6 Commission are being compromised. And not only that, Mr
 7 Chairman; currently rules have been adopted by this
 8 Commission to ensure that the evidence leaders, even in the
 9 past they've done their duties and responsibility to ensure
 10 that those who do not wish to take part in the proceedings,
 11 if they've made statements available to the Commission,
 12 then those versions are being put to witnesses called. Not
 13 only that, Mr Chairman; in the past it has been
 14 demonstrated that the evidence leaders have called for
 15 documents, have consulted with police witnesses, simply to
 16 ensure that all the relevant information and evidence is
 17 being placed before the Commission to enable the Commission
 18 to come to a just and fair conclusion of its inquiry.
 19 CHAIRPERSON: You're putting it on
 20 record, are you, which I understand to be a fact, that
 21 despite the fact that the police witnesses have been led by
 22 police counsel, they'd previously been interviewed by the
 23 evidence leaders who've obtained information from them with
 24 a view of ensuring that an accurate picture of what
 25 happened is put before the Commission? Is that what you're

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1 saying?
 2 MR MATHIBEDI SC: That's correct, and it
 3 continues and we –
 4 CHAIRPERSON: You're putting that on
 5 record.
 6 MR MATHIBEDI SC: We continuously get
 7 requests from, not only from the evidence leaders, even
 8 from [inaudible] about information that they require. So
 9 we respectfully submit that that takes care of any –
 10 CHAIRPERSON: The same procedure of
 11 course is capable of being applied to all other witnesses,
 12 and indeed other parties who – sorry, not other witnesses –
 13 other witnesses or other persons who can give evidence
 14 which can assist the Commission.
 15 MR MATHIBEDI SC: That's correct, Mr
 16 Chairman.
 17 CHAIRPERSON: I understand that the
 18 evidence leaders also are assisted by investigators and I
 19 understand - it's not a matter of record yet, but I'm
 20 putting it on record - the investigators also have, I
 21 understand, interviewed the police with a view to getting
 22 information for the purpose as previously mentioned. Is
 23 that correct?
 24 MR MATHIBEDI SC: That's correct, Mr
 25 Chairman, not only, you know, investigators, outstanding

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1 investigators. Now with the aspect of, or the contention
 2 that there is a discrepancy between what is said by the
 3 deponent who deposed an affidavit for the Department of
 4 Justice and the police, we submit that the contention that
 5 is being made is that if a postponed is granted, valuable
 6 time that could have been fruitfully used in ensuring that
 7 the proceedings go forward will be lost, and that is the
 8 submission that we are making.

9 Mr Chairman, you will have to take into account
 10 that at this stage two extensions have already been
 11 granted, and the reason for the granting of the extensions
 12 was with the hope that during these two periods the
 13 Commission would make progress; the Commission will
 14 finalise, if not the hearing of evidence, even the making
 15 available of its report.

16 Now with respect to the issue of prejudice, we
 17 respectfully submit that neither the applicants nor the
 18 families have demonstrated that in the event that the
 19 proceedings go forward they will be prejudiced. We
 20 respectfully submit, Mr Chairman, that the granting of the
 21 postponement for the reasons as set out in the opposing
 22 affidavit of the South African Police Services, they will
 23 suffer serious prejudice because one of the aspects if that
 24 the findings of this Commission may play a very important
 25 role going forward as to how members of the South African

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1 Police Services should conduct themselves, and even
 2 probably taking remedial steps.

3 Now on the aspect that the South African Police
 4 Services say, because they are saying there are not
 5 prospects of success, that demonstrates arrogance, Mr
 6 Chairman, I think that is misplaced for the simple reason
 7 that when the affidavit was compiled and prepared, that was
 8 based on the case that was to be met. Now subsequently an
 9 amendment has been given that changes the initial order
 10 that was going to be sought in the High Court, and the
 11 answer –

12 CHAIRPERSON: In fact the order sought –
 13 oh, I see, changes the order sought in the High Court.

14 MR MATHIBEDI SC: That's correct. That's
 15 what we're saying-

16 CHAIRPERSON: It doesn't change the order
 17 sought here, but inasmuch as the order sought in the High
 18 Court will be different –

19 MR MATHIBEDI SC: That's correct.

20 CHAIRPERSON: - the time span and the
 21 time taken to give the judgment may be much longer. Is
 22 that –

23 [12:51] MR MATHIBEDI SC: That's our submission.
 24 Now the last aspect, with regard to the criminal cases that
 25 have been cited on which reliance is sought, Mr Chairman,

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1 our view is that in this Commission no competing rights are
 2 being adjudicated upon. All people who are being called
 3 before this Commission are called to testify as witnesses
 4 and not as parties. And even if at the end of the day the
 5 Commission makes a damning or an adverse finding against
 6 any person, such kind of person has a right to challenge
 7 the findings of the Commission. Nothing precludes such a
 8 person to launch a review. Those are my submissions, Mr
 9 Chairman.

10 CHAIRPERSON: Thank you. Mr Budlender, I
 11 think you're the last person whose name has been given to
 12 me as wanting to address us.

13 MR BUDLENDER SC: Thank you, Chair,
 14 members of the Commission. Can I say at the outset that
 15 the evidence leaders have been asked by counsel for the
 16 Department of Mineral Resources to advise that they do not
 17 wish to address the Commission on the application for a
 18 postponement but that they make common cause with the other
 19 state departments which oppose the application. Coming
 20 then to our, our own submissions, we submit that it's
 21 fundamentally important to distinguish between two related
 22 but very different questions. The first question is
 23 whether it is desirable that the injured and arrested
 24 persons should be legally represented before this
 25 Commission. And most of the argument which has been heard

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1 this morning has been about that, has been the contention
 2 as to why it is desirable that the injured and arrested
 3 persons should be represented before this Commission. In
 4 order to avoid any possible misunderstanding, I'd like to
 5 make it clear that it is the view of the evidence leaders
 6 that it is desirable that the injured and arrested persons
 7 should be represented before this Commission. We don't
 8 wish to comment on whether there's a legal entitlement in
 9 that regard, that's the matter which is before the High
 10 Court but we would hope that there's no doubts about the
 11 view we take as to the desirability question which has been
 12 debated at length.

13 CHAIRPERSON: You'll see the
 14 Constitutional Court itself gave its views on the matter in
 15 para 15.

16 MR BUDLENDER SC: It has said much, it's
 17 almost said the same thing. However, that is not a
 18 question which this Commission has the power to decide.
 19 This Commission doesn't have the power to order the State
 20 or the Legal Aid Board or anyone else to fund legal
 21 representation for the injured and arrested persons. The
 22 question of the desirability of representation before the
 23 Commission is simply not before the Commission and never
 24 has been before the Commission and it is not a matter for
 25 decision by the Commission. It's a matter for decision by

<p style="text-align: right;">Page 13637</p> <p>1 various state bodies, by various private bodies and in the 2 final analysis by the courts and it's being fought out in 3 the courts at the moment. So that's the first question and 4 one needs to park that question and be clear that that's 5 not what is before this Commission at the moment, the 6 desirability of representation.</p> <p>7 The second question is the matter of what is 8 before the Commission and that is this - what should the 9 Commission do while the injured and arrested persons are 10 continuing their efforts to raise the funds for 11 representation? That's the question which is before the 12 Commission and that's the question on which this 13 application for postponement turns, not desirability as a 14 general principle, but what should the Commission do while 15 the injured and arrested persons are pursuing such remedies 16 as they have to raise funds for representation? That, with 17 respect, is the real question before the Commission and we 18 say that there are two possibilities in this regard, two 19 possible options. One possibility is to stop the 20 proceedings while the accused and arrested persons continue 21 their efforts and we need to be clear in practical terms, 22 not in theoretical but in practical and actual terms what 23 that would mean. First, at the very least it would mean a 24 postponement for a month because the matter is set down 25 provisionally or otherwise for the 25th and 26th of</p>	<p style="text-align: right;">Page 13639</p> <p>1 matter is heard but when judgement is given and of course, 2 the longer the delivery of that judgment is delayed the 3 longer will be the period.</p> <p>4 MR BUDLENDER SC: That's right, Chair, so 5 we have a minimum of month on optimistic assumption which 6 is now plainly an unrealistic assumption in the light of 7 the amendment and then there's a further difficulty, Chair, 8 and that is that when the High Court eventually decides on 9 that, whenever that will be, the one thing one can be 10 certain about is that there will be an application for a 11 second postponement by whichever party has been 12 unsuccessful because it will want to pursue its application 13 for leave to appeal on whatever appeal rights it's got. 14 One can be certain that Mr Mpofu's clients, if they lose in 15 the High Court, will want to appeal it and one can be 16 equally certain that Mr Oosthuizen's clients, if they lose 17 in the High Court, will want to appeal it.</p> <p>18 CHAIRPERSON: Yes, but to be fair Mr 19 Mpofu did say in response to a question you asked before 20 that this application is for a postponement up to the date 21 when the High Court gives judgement and not thereafter and 22 he accepts, as I understand it, that if he loses in the 23 High Court the postponement, if he gets it, will come to an 24 end while he's pursuing other remedies in other courts.</p> <p>25 MR BUDLENDER SC: That's not the point</p>
<p style="text-align: right;">Page 13638</p> <p>1 September and there's no reasonable prospect that the 2 matter could be decided before in the High Court in less 3 than a month from now. So it means in the first instance 4 on the most optimistic scenario a postponement for a month.</p> <p>5 Secondly, it means in all probability a 6 postponement for a longer period because in the light of 7 the application which is now being made for amendment in 8 the High Court, it's very unlikely that the matter can be 9 heard on the 25th and 26th of September. There's clearly 10 going to be opposition to the amendment, the amendment will 11 have to be decided, the permissibility of the amendment 12 will have to be decided and only then will the main case be 13 argued and there may have to be further affidavits filed. 14 So the amendment proposed creates the virtual certainty, 15 I'd say, that the matter can't be heard on the 25th and 26th 16 of September anyway. So a month is hopelessly over- 17 optimistic.</p> <p>18 CHAIRPERSON: Of course, there's a 19 further point that, even if it is heard, the judge 20 obviously would have to deal with substantially more 21 matters in his or her judgment than would otherwise have 22 been the case and the preparation of the judgment may 23 accordingly take much longer than would otherwise be the 24 case. The date in respect of which the postponement, to 25 which the application relates, is not the date when the</p>	<p style="text-align: right;">Page 13640</p> <p>1 that I'm addressing, Chair. The point I'm addressing – 2 COMMISSIONER HEMRAJ: You're saying that 3 the prejudice that –</p> <p>4 MR BUDLENDER SC: No, I'm saying there 5 will be an application at that stage. There will have to 6 be an application. Assume the postponement is granted, 7 this postponement, the inevitable result is a second 8 application for a postponement when everybody comes back 9 here after the High Court has given judgment because 10 whoever loses is going to want to appeal. And at that 11 stage having granted this postponement there will be no 12 sensible basis on which you can say, oh no, we won't grant 13 a second postponement. We'll allow a postponement for the 14 High Court to decide but we won't allow a postponement for 15 the Constitutional Court to decide. That, with respect, 16 would be incapable of justification. So you have to 17 understand, we submit, the road we are going down. The 18 road we're going down is that if this application for 19 postponement is granted there will be a second application 20 for a postponement after the High Court has given its 21 decision and there will no sensible basis on which the 22 Commission, having granted the first postponement, will be 23 able to refuse the second postponement. And so its, with 24 respect, a never-never situation that we're looking at. 25 We're looking at the most – I'm an optimist by nature, the</p>

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1 most optimistic assertion I can make is that if the High
 2 Court hears the case not too late after the 25th and 26th of
 3 September and if the High Court gives a reasonably early
 4 decision and if the appeal procedures are then done very
 5 quickly and if there's a quick decision by the
 6 Constitutional Court or the SCA thereafter, even my
 7 optimism tells me that can't all be done in three months.
 8 That's the reality of what the Commission is looking at and
 9 that's why I'm asking the Commissioners to consider the
 10 practical consequences of granting the application for a
 11 postponement now. This is not a matter of a few weeks. A
 12 few weeks are serious enough but it's a matter of a long
 13 term postponement.

14 Add to that, Chair, the fact that the points to
 15 which you referred when Mr Mpofu was addressing the
 16 Commission, that now that one of the remedies sought is a
 17 declaration of invalidity of a statute, the matter can only
 18 be decided ultimately by the Constitutional Court. Or let
 19 me put it differently, that relief can only finally be
 20 granted by the Constitutional Court. In other words, he
 21 cannot get the relief he seeks without a decision of the
 22 Constitutional Court. So at least a two stage hearing is
 23 inevitable for him to get the relief which he now seeks.

24 CHAIRPERSON: That's the alternative?
 25 MR BUDLENDER SC: In the alternative,

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1 yes. So all of that suggests that we are, that if the
 2 postponement is granted now the Commission is going to
 3 effectively be binding, it's not binding itself but the
 4 logic of the situation is that there will be no hearing for
 5 several months until the High Court has heard it, on
 6 whenever it hears it, until the next leg takes place. And
 7 so that is the difficulty that we have with a postponement,
 8 granting the postponement application.

9 If you ask - Mr Mpofu, correctly I submit, said
 10 last time this was raised, he said that ultimately there's
 11 a question of prejudice. Well, the question of prejudice,
 12 we need to see what the facts are, the facts are a very
 13 long postponement. Then we say so what is the prejudice
 14 because that's the test. What prejudice will granting the
 15 postponement cause? We submit that there will be very
 16 considerable prejudice to the public who will be kept
 17 waiting for an outcome which is a matter of compelling
 18 national importance and for which many feel they've already
 19 been waiting too long. There will be another delay of at
 20 least several months before any outcome can be achieved.

21 We submit that there's a further prejudice that
 22 the result of the findings of the Commission may be that
 23 certain remedial measures have to be taken, whether it's by
 24 the police or anyone else. If those measures need to be
 25 taken it's in the public interest that they be taken sooner

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1 rather than later because there is always the risk if
 2 things go wrong once, they can go wrong again. So there is
 3 considerable - there is an urgency in achieving whatever
 4 remedies are the outcome of the Commission.

5 And thirdly, there is prejudice in that this is
 6 at its heart an exercise in accountability and one of the
 7 elements of accountability, of effective accountability is
 8 some promptness. Accountability which is in the history
 9 books assists nobody and the need for accountability and
 10 for prompt accountability is a further matter. So we
 11 submit that the prejudice of granting the postponement is
 12 very considerable, it is assuming that the President
 13 extends the term of the office, the term of the Commission
 14 for a long period, it is the prejudice caused by a very
 15 long delay in the findings caused by a very long delay in
 16 any - the findings which are a matter of public importance,
 17 a very long delay in any remedies and a delay and an
 18 undermining of accountability. By the time these things
 19 happen people have left office and they can't be held
 20 accountable. So that's the prejudice for granting a
 21 postponement, we say it's very material, particularly given
 22 the length of the postponement. If it was a day or two or
 23 three it would be different but this is a long postponement
 24 which stares us in the face.

25 Then on the other side, what is the prejudice of

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1 refusing the postponement and that was not really addressed
 2 or explained in the application because we've heard of the
 3 prejudice which is caused by people being unrepresented but
 4 as I tried to show, that's not a matter which is before the
 5 Commission. What we're talking about is the prejudice
 6 caused by the absence of legal representatives of the
 7 injured and arrested persons from now until legal
 8 representation is provided. That's the prejudice because
 9 the postponement is that there should be no - nothing
 10 should happen in the interim. So it's prejudice in the
 11 interim caused by the absence of - it's prejudice caused by
 12 the absence of representation in the interim and one has to
 13 say two things about that. Firstly, the absence of
 14 representation may be permanent, I hope it's not but it may
 15 be. But secondly, assuming that there is representation
 16 provided in due course, what is the prejudice caused by the
 17 temporary absence. We submit that if the postponement is
 18 refused the Commission will continue to hear evidence and
 19 if the legal representatives for the injured and arrested
 20 persons later return they'll be able to ask to cross-
 21 examine any witnesses who've already given evidence in
 22 their absence. They will have access to the running record
 23 which is produced on a daily basis and they'll be able at
 24 any time to say, well, General Mpembe gave evidence, we
 25 would like to cross-examine him. He was cross-examined but

<p style="text-align: right;">Page 13645</p> <p>1 he wasn't cross-examined on the following matters or we 2 want, he wasn't cross-examined adequately or we want to 3 address the following matters, please call him back for 4 this purpose. Colonel Scott has given evidence, we didn't 5 have the opportunity to cross-examine him, please call him 6 back for the following purposes. And if there's a need for 7 them to be further cross-examined the Commission will allow 8 it.</p> <p>9 And so the prejudice is not a prejudice in 10 inability to cross-examine, it's prejudice caused solely by 11 a delay in cross-examination. That's the only prejudice, 12 the sole prejudice which is caused by temporary absence is 13 that the cross-examination by the injured and arrested 14 persons will be delayed. That's it, no other prejudice has 15 been pointed to because they can cross-examine at any time 16 and they've got the record. And so one can fully – as I 17 say, we've been told repeatedly and forcefully that the 18 injured and arrested persons will be prejudiced if they are 19 not represented before the Commission and one can fully 20 understand that argument but that's not the issue. The 21 issue is what is the interim prejudice and the interim 22 prejudice is solely a delay in the exercise of whatever 23 cross-examination they may undertake.</p> <p>24 And so we submit that the only question left 25 before the Commission is what should happen while the</p>	<p style="text-align: right;">Page 13647</p> <p>1 legal representatives of the injured and arrested persons 2 return, they can make application for any witnesses they 3 want to cross-examine to be recalled. In the meantime 4 we'll be able to make progress and the Commission will be 5 able to do the job which the public waits and expects us to 6 do. Thank you, Chair. Chair, may I make one other thing - 7 draw your attention to one other thing? There's been an 8 affidavit submitted by Mr Eiser who represents part of the 9 Bapo community, they have stated that they oppose the 10 application for postponement. The other -</p> <p>11 CHAIRPERSON: You've seen that 12 application –</p> <p>13 MR BUDLENDER SC: He just says that he 14 abides.</p> <p>15 CHAIRPERSON: Thank you, Mr Budlender. 16 Mr Mpufo and Mr Mosikili, which of you is going to speak 17 first?</p> <p>18 MR MPOFU: I'll go first, Chairperson. 19 Chairperson, with the greatest respect, once again I 20 thought maybe it was just a deficiency in the papers but 21 once again we are hearing a lot about expediency and nobody 22 has addressed the question of the effectiveness of the 23 outcome.</p> <p>24 CHAIRPERSON: Do you really mean 25 expediency or –</p>
<p style="text-align: right;">Page 13646</p> <p>1 injured and arrested persons are attempting to obtain 2 funding. I've made, to summarise, that if the Commission 3 postpones at the very minimum for a month, more likely for 4 three months while they're attempting to obtain funding 5 there's very considerable prejudice to the public interest 6 and considerable prejudice to the country at large.</p> <p>7 Conversely, if the Commission proceeds and the legal 8 representatives return there is no material prejudice to 9 them caused by the postponement. The only prejudice is a 10 delay in their cross-examination of witnesses who have 11 come.</p> <p>12 And so we submit that the short answer to the 13 question identified by Mr Mpufo, which we submit is 14 correct, he said at page 13092 of the record that the test 15 is a test of prejudice. We agree with that. We say the 16 only possible answer to that question is that, however 17 sympathetic one may be to the claim to legal representation 18 and we are sympathetic, that cannot justify a postponement 19 because the prejudice is overwhelming on one side and very, 20 very limited, if at all, on the other side. And so we 21 submit that what the Commission ought to do is to get on 22 with the job which it has been given by the President and 23 for which the public is anxiously awaiting an outcome. If 24 the funding is found in due course, which we hope will be 25 the case, application – or if on any other basis the</p>	<p style="text-align: right;">Page 13648</p> <p>1 MR MPOFU: No, no I'm sorry, I think it's 2 expedition, sorry I'm making Mr Ntsebeza's mistake. I 3 don't, I don't and I didn't mean to be facetious about it, 4 expedition, Chair.</p> <p>5 CHAIRPERSON: I thought it was a slip of 6 the tongue, I was just giving you a chance –</p> <p>7 MR MPOFU: It was, yes. No, thanks. 8 Once again that's all that's been addressed which is really 9 where we started this morning. So there's been no 10 improvement, nobody has addressed the question of whether 11 or not the outcome will achieve the intended outcomes of 12 the establishment of the truth and justice, among other 13 things. Yes, finish, get on with it as Mr Budlender says 14 but to what end. This can't just be a sprint to the 15 finishing tape, surely it must be about achieving something 16 in the distance and a hollow expeditious finish really 17 means absolutely zero.</p> <p>18 [13:11] And if what has been postulated is that the 19 interest of the public, is that they would have spent up to 20 now, according to the Minister a 115 million rand has been 21 set aside for this commission. All that money could be 22 wasted if the outcome is hollow so expedition on its own is 23 meaningless. I'll start with Mr Budlender's submission 24 because there's a specific issue that I want to raise, 25 where he says that the issue of legal representation is not</p>

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1 before this commission. That cannot be so. Regulation 8
 2 of the terms of reference of this commission says any
 3 person appearing before the commission may be assisted by
 4 an advocate or an attorney. So the fact, that right is
 5 entrenched in the terms of reference of this commission and
 6 all that the injured and arrested are saying is that they
 7 want to assert that right of appearing before the
 8 commission assisted by an advocate or an attorney. The
 9 only other thing they say is that because of the economic
 10 station in life they cannot afford to do it themselves and
 11 therefore that duty must fall somewhere, it can't fall in
 12 the air, it either falls on them if they could afford it,
 13 like all the other parties or it falls on the state if they
 14 cannot afford it. Like health, like housing, like all
 15 those things. You can't say I have, yes, you have the
 16 right to health but if you cannot afford it tough luck. It
 17 must fall somewhere. It has be asserted. So that right
 18 that is asserted in paragraph 8 is that. But more
 19 pointedly this commission, this particular commission
 20 unless that right is capable of being exercised should not
 21 function and get on with it so called because in paragraph
 22 9.4 and paragraph 9.3 and 9.4 rather of the terms of
 23 reference says "any witness appearing before the commission
 24 may be cross-examined by a person only if the chairperson
 25 permits such cross-examination by such person because the

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1 chairperson deems it necessary and so on" and then 9.4 says
 2 "any witness may be re-examined by his or her legal
 3 representative for the purpose of explaining the evidence
 4 given by the witness during his or her cross-examination".
 5 In other words this, the terms of reference here
 6 postulate a situation even if you look at them not as a
 7 party, you don't want to be too technical but as witnesses,
 8 they have the right to be examined and re-examined by their
 9 legal representative, in other words the legal
 10 representative either that they have chosen or one that has
 11 been assigned to them at their request or whatever. So
 12 these are rights that have something to do with this
 13 commission. These are not esoteric rights out there about
 14 legal representation, they have been entrenched in the
 15 terms of reference and if the commission continues in a
 16 manner that undermines those rights that are entrenched
 17 here then it is not the commission that was promulgated by
 18 the President, it is another thing. One, two Mr
 19 Budlender's submissions are based on creating a monster and
 20 then running away from it. There's no three months
 21 postponement that is sought here. The postponement is for
 22 about three weeks as we have said and –
 23 CHAIRPERSON: It's for three weeks plus
 24 thereafter the time which is taken to, for the judge to
 25 give judgment, theoretically –

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1 MR MPOFU: Yes, two weeks –
 2 CHAIRPERSON: The judge could give
 3 judgment at the end of the hearing theoretically.
 4 MR MPOFU: Well that we'll never know,
 5 Chairperson.
 6 CHAIRPERSON: What he said is that
 7 looking realistically into the future he suggests that
 8 there's a strong possibility to put it gently I think, that
 9 the case may not be disposed of on the 26th, 25th or 26th A,
 10 because he thinks there may well be a postponement to deal
 11 with your amendment and thereafter the judge may take time
 12 to consider the judgment, a longer time because of the
 13 ambit of the issues to be considered will be increased.
 14 That is Mr Budlender's submission.
 15 MR MPOFU: No, that's not his submission,
 16 Chairperson, that's not –
 17 MR BUDLENDER SC: It is my submission,
 18 Chair.
 19 MR MPOFU: He then, well his submission,
 20 well we can play the tape.
 21 CHAIRPERSON: Between you and me which I
 22 decide in my -
 23 MR MPOFU: Well we can play the tape, Mr
 24 Budlender said ten minutes ago whatever the outcome either
 25 there will be another postponement application for sure by

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1 one of the parties, that's what I'm addressing.
 2 CHAIRPERSON: He made two submissions?
 3 MR MPOFU: Yes.
 4 CHAIRPERSON: The first submission was,
 5 the one I've summarised to you.
 6 MR MPOFU: Yes, that's not the one I'm
 7 addressing.
 8 CHAIRPERSON: He agrees with you. Then
 9 he makes another one which is a different one.
 10 MR MPOFU: Which is the one I'm –
 11 CHAIRPERSON: It may be the one you're
 12 doing now.
 13 MR MPOFU: Yes.
 14 CHAIRPERSON: He say in any event if the,
 15 you lose in the High Court you're likely to come back and
 16 bring another postponement application.
 17 MR MPOFU: Ja.
 18 CHAIRPERSON: if that's the point you
 19 want to deal with.
 20 MR MPOFU: That's where the three months
 21 come from, exactly.
 22 CHAIRPERSON: Well, no, no, the three
 23 months was, I think, also in the other one as well but this
 24 one, let's not debate that.
 25 MR MPOFU: Let's not debate it but –

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1 CHAIRPERSON: Concentrate on this point.
 2 MR MPOFU: I was here.
 3 CHAIRPERSON: The point he made is -
 4 concentrate on the point he made in relation to what will
 5 happen if you lose in the High Court and you come back.
 6 That's the point that you want to deal with now, as I
 7 understand. Is that correct?
 8 MR MPOFU: No, it's not correct. What I
 9 want to deal with is the three months that he postulates
 10 which is based inter alia on the inevitability of another
 11 postponement application by one, by the so-called losing
 12 side, that's what I want to address and I'm saying that is
 13 a monster that is created which will never eventuate. Let
 14 me explain why, the, we have said on our side that the, at
 15 the out, once the outcome is given we will have not only an
 16 obligation but a duty to come here either way. If that is
 17 now, let's assume that we are the losing party but the most
 18 important thing is that Mr Budlender postulated this period
 19 on either side doing the same, I do not, I don't know what
 20 basis it is suggested that if the losing party is the other
 21 side they will come here of all places to ask for a
 22 postponement. That will never happen, on what basis could
 23 the President and the Minister, if they are the losing
 24 party -
 25 CHAIRPERSON: As -

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1 MR MPOFU: Yes. So it's just a monster
 2 that doesn't exist.
 3 COMMISSIONER HEMRAJ: But, Mr Mpofo, the
 4 prejudice that you complain of now will still be present if
 5 the matter's decided and one the parties decides to go on
 6 appeal. That prejudice will still be there after the High
 7 Court judgment if it's taken on appeal.
 8 MR MPOFU: No, how will it be the,
 9 Commissioner, if you can assist me.
 10 COMMISSIONER HEMRAJ: If you lose you
 11 won't be able to come back, the prejudice for your clients
 12 will still be there. If you win and the other side takes
 13 it on appeal that's not going to translate into an
 14 immediate representation for you here, so that prejudice
 15 still remains.
 16 MR MPOFU: No -
 17 COMMISSIONER HEMRAJ: So there is a
 18 further period that is envisaged by the appeal.
 19 MR MPOFU: No, that's not automatic. In
 20 terms of Rule 49(11) of the Supreme Court rules which have
 21 just been changed, so whatever the equivalent now in terms
 22 of Rule 49(11) it is possible that the judgment whether
 23 there's an appeal or not the effect of the judgment, the
 24 impact of the judgment, the execution thereof which is that
 25 funding will be granted will take place and I assure you

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1 now that's exactly the route we would take. So it's not
 2 God given -
 3 CHAIRPERSON: Sorry. If you win and the
 4 other side appeals then the application for leave to appeal
 5 or the appeal -
 6 MR MPOFU: Correct.
 7 CHAIRPERSON: Will suspend the
 8 operational judgment unless you apply -
 9 MR MPOFU: In terms of Rule 49(11) -
 10 CHAIRPERSON: Put it into operation.
 11 MR MPOFU: Correct.
 12 CHAIRPERSON: So it's not, it's
 13 absolutely clear perhaps but there's certainly a
 14 possibility -
 15 MR MPOFU: Ja, possibility I can accept.
 16 CHAIRPERSON: We won't go there.
 17 MR MPOFU: I'll accept the possibility.
 18 CHAIRPERSON: That even if you win you
 19 won't get legal, you won't get funding immediately.
 20 MR MPOFU: I can't -
 21 CHAIRPERSON: If you lose of course then
 22 you will appeal.
 23 MR MPOFU: Yes.
 24 CHAIRPERSON: But you conceded that the
 25 postponement you seek doesn't, will not extend beyond the

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1 dates on which the High Court will give its judgment.
 2 MR MPOFU: 100%, Chairperson, I agree
 3 with that and I'm happy to live with the possibility but
 4 it's not, but it must not be presented as an inevitability,
 5 that's all I'm saying. That further period will
 6 necessarily eventuate.
 7 CHAIRPERSON: Mr Budlender made another
 8 point that if you lose then the probability is you'll come
 9 back here and ask for another postponement pending your
 10 exhausting of the appeal procedures. Now the, are you
 11 resisting that submission as well?
 12 MR MPOFU: Yes, and I'm resisting on the
 13 following basis, Chairperson. You can't deny a
 14 postponement now because there's some theoretical
 15 possibility that at a later stage there will be another
 16 postponement application. That postponement application
 17 will be dealt with on its own merits. It will have its own
 18 dynamic, its own period of probable, possible, what we are
 19 dealing with here now is a postponement of the number of
 20 weeks it's going to take to come back here, win or lose.
 21 But how could you - what if this monster never eventuates
 22 then you would have denies the postponement now because it
 23 could possibly eventuate with its own - what I've committed
 24 to is that I'll come back and if I come back, if one of
 25 the, and I accept that one of the possibilities that I

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1 would come back with would be that, I might be coming back
 2 and say the clients have decided they've done enough and
 3 they're no longer going to participate or whatever, I don't
 4 know what the instructions are. What I'm saying is that it
 5 can't be decided on some speculative basis of what might or
 6 might not happen at that stage or there might be private
 7 funding that would have been obtained. I might come back
 8 and say Chairperson we have a private funding until the end
 9 of the year and we'll see what happens in between now, who
 10 knows.

11 So the, with respect the, we're not scared of the
 12 scarecrow let me put it that way. Because it might not
 13 happen. Then, so and I suppose I'm taking a favourable
 14 interpretation. If it's a short postponement that we're
 15 asking for and not the long that's postulated by Mr
 16 Budlender then I suggest that you grant it on the basis
 17 that we've asked for it. The I'll just go very quickly
 18 back to what other people have said. Mr Burger,
 19 unfortunately is not here but I think he misunderstood what
 20 I said, or did not read it properly, all I said which is
 21 true and which I repeat, is that in our opening statement,
 22 in our opening statement we referred to the issue of the
 23 toxic relationship and that is true. The opening statement
 24 is there, Ms Pillay is not here, she would tell us which
 25 exhibit it is, but all I was saying is that that's what it

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1 says in our opening statement. That its alleged it is
 2 toxic relationship. Now saying that in relation to the
 3 fact that on our version at least then those parties who
 4 were parties to that toxic relationship are represented by
 5 12 advocates as opposed to one and the reason why, which
 6 covers mister –

7 CHAIRPERSON: The complaint was raised,
 8 he had two complaints. The one about the toxic
 9 relationship, he said what he had to say about that. But
 10 he said the number was wrong as well.

11 MR MPOFU: I'm coming to that.

12 CHAIRPERSON: He said and he gave the
 13 numbers which were not the same numbers as the ones you
 14 gave.

15 MR MPOFU: Ja, he didn't give any number,
 16 he gave numbers that vary from two to one, to three, this
 17 is the situation. The people who were here, when I said
 18 the, remember what I said, Chair, I said you appointed the
 19 evidence leaders, they appointed their counsel and they
 20 appointed their counsel.

21 CHAIRPERSON: Sorry, those who read the
 22 transcript won't –

23 MR MPOFU: I'm sorry, yes.

24 CHAIRPERSON: He's pointing to counsel
 25 for the SAPS.

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1 MR MPOFU: SAPS and –
 2 CHAIRPERSON: You mean the SAPS appointed
 3 their counsel.
 4 MR MPOFU: Thank you.
 5 CHAIRPERSON: You then pointed to the
 6 direction of the Lonmin counsel.
 7 MR MPOFU: Yes.
 8 CHAIRPERSON: They appointed their
 9 counsel.
 10 MR MPOFU: Yes. That's right. So
 11 whether the number fluctuates from this or that is
 12 irrelevant. All I'm telling you, Chairperson, is that
 13 these are the people, when they got the brief they
 14 appointed the following five counsel. Mr Burger SC, Mr
 15 Bham SC, Mr Motau SC, Mr Van As and Mr Shozi, that's five
 16 in my book. So that's the situation, what happened to this
 17 one or that one in between and whether today there are two
 18 or three, is mightily irrelevant. Now then, Chairperson,
 19 the constitutional court judgment unfortunately has become
 20 a matter of a lot of debate. Firstly clearly the remarks
 21 that were made there were obiter in relation to the main
 22 application and I want to go to explain –

23 CHAIRPERSON: I made that point for you.
 24 MR MPOFU: You did. But the more, the
 25 bigger point that you made –

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1 CHAIRPERSON: I think you made it better
 2 than I did, carry on.
 3 MR MPOFU: Yes, no, Chairperson, the
 4 other point which you made for me, which I'm also going to
 5 repeat, not because it's better, but because I think it's
 6 still misunderstood. Is the sentence in paragraph 11,
 7 which says, "our consideration of the High Court finding
 8 must not however be seen as anticipating the outcome of the
 9 main review application, the final relief sought. Two
 10 things that come out of that. One, they don't anticipate
 11 the issue of prospect of success, secondly that they view
 12 the main application as a review application already, even
 13 before the amendment is made. So by referring it to you as
 14 a review application it vindicates the fact that the
 15 amendment codifies what is, at least in the eyes of the
 16 constitutional court already a review application.

17 Secondly when it comes to the other issue of,
 18 that Mr Budlender referred to of the constitutionality that
 19 is not going to delay. Firstly as I say it's a, that's an
 20 alternative, well as the Chair pointed out, but secondly a
 21 declaration of constitutionality is not money, is not
 22 funding. So the outcome of that particular declaration,
 23 whether it favours us or not is not going to determine
 24 whether we come back here. It's actually it's got nothing
 25 to do with it. It may well, it might influence someone to

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1 decide whether they give funding or not. But it on its own
 2 has got nothing to do with whether we come back or when we
 3 come back and in any event just going back to mister, for
 4 what it's worth Mr Oosthuizen's suggestion that that
 5 particular amendment is not canvassed in the papers. That
 6 means he probably has not read paragraph 73 of the founding
 7 affidavit. Which says "to the extent that it may be
 8 asserted that the hands of the respondents are tied by the
 9 absence of the legal framework which encompasses
 10 commissions I'm advised that it will be argued that the
 11 Legal Aid Act is to that extent unconstitutional. This is
 12 so firstly because it would amount to an irrational
 13 differentiation between commissions and other independent
 14 and impartial tribunals and forums and secondly because it
 15 would be manifestly unjust and unfair. Alternatively the
 16 legislation ought properly to be interpreted in such a way
 17 as to avoid all the said injustices and inequities".
 18 That's the basis, it's already in the papers, there's no
 19 need to supplement the papers and by the way the issue of
 20 irrational differentiation is a basis for the other
 21 amendment which is the review. The review is not done in
 22 terms of PAJA, so let me just disabuse them of that. It is
 23 on the basis of the irrationality test that's postulated in
 24 cases such as Badu Star and the rule of law. But that's a
 25 debate for another day.

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1 CHAIRPERSON: Mr Mpofo, you've got ten
 2 minutes left. I don't know whether you want to give some
 3 of it to your colleague, Mr Mosikili.
 4 MR MPOFU: Well, Chairperson, I'll give
 5 some of it –
 6 CHAIRPERSON: I don't know how much
 7 you've got to say. But I'm just alerting you to the –
 8 MR MPOFU: Yes.
 9 CHAIRPERSON: The time considerations, we
 10 did agree beforehand. Which I've been -
 11 MR MPOFU: Then let me just –
 12 CHAIRPERSON: In your –
 13 MR MPOFU: Yes, fair enough, Chairperson.
 14 Let me then just do this so that I can prioritise Mr
 15 Oosthuizen's contribution. It's, the part that I read from
 16 LAWSA which he says does not apply to procedural fairness
 17 does. Unfortunately I started in the middle of the
 18 paragraph. The part that I did not read says "while the
 19 extent to which requirements of procedural, underline,
 20 fairness apply to investigatory bodies might be answered
 21 in, there is no doubt that this requirements do apply to
 22 commissions appointed by the President or a Provincial
 23 Premier". So that's that. The rest of the passage that I
 24 read earlier then applies. So it's exactly about
 25 procedural fairness and then the next point, Chairperson,

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1 very quickly is that the consideration of fairness which Mr
 2 Mosikili also referred to are, should be and are ingrained
 3 in the, even international accepted procedures for
 4 commissions such as this one. The so-called Simon
 5 principles among others say the following and this is now
 6 in 172, paragraph 172 of LAWSA.
 7 CHAIRPERSON: Lord Simon.
 8 MR MPOFU: Lord Simon, yes, in his report
 9 he gave six requirements but –
 10 CHAIRPERSON: They're summarised in
 11 LAWSA.
 12 MR MPOFU: In LAWSA 172, same -
 13 [13:30] CHAIRPERSON: Paragraph?
 14 MR MPOFU: Para 172, Chairperson, the
 15 same, and (c), I'll just refer to two, (c) of those, it
 16 says, "The cardinal principles as laid down by someone
 17 commissioned," (1), (2), (3), which is (c), "such person
 18 should be given an adequate opportunity of preparing his or
 19 her case and being assisted by legal advisors." That means
 20 the participants. And (f), I'm jumping again, (f), "Such
 21 person should be given the opportunity of testing by cross-
 22 examination by his or her advisor, any evidence which may
 23 affect him." That covers it, and even Sir Richard Scott,
 24 who criticised the Salmon Principles, changed them around,
 25 but this is one of the ones that he retained.

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1 CHAIRPERSON: [Microphone off, inaudible]
 2 Scott?
 3 MR MPOFU: Yes. No, it's –
 4 CHAIRPERSON: When he was, I think –
 5 MR MPOFU: When he was still 'Sir.'
 6 CHAIRPERSON: When he was still in the
 7 High Court, before he was at the House of Lords -
 8 MR MPOFU: That's correct. He rearranged
 9 the Salmon Principles, but this is what he retained; (d),
 10 under his rearranged one, "Legal assistance should be
 11 available to those involved both at the stage of giving
 12 evidence and at the stage of responding to criticisms,"
 13 which would be probably as argument at the end. So any
 14 commission that does not even comply to those
 15 internationally accepted principles cannot be fair in the
 16 sense that was intended by those things.
 17 Chairperson, there's a lot of material. I just
 18 don't want to leave out something that's important. Oh
 19 yes, Mr Mathibedi; I think I just have one thing to say to
 20 him, and that is that if his high regard for the evidence
 21 leaders, which he says should present the version of the –
 22 CHAIRPERSON: [Microphone off, inaudible]
 23 MR MPOFU: Yes, the parties that are –
 24 actually, let's put it that way, which I share, then why is
 25 it necessary for him to remain here, him and six others to

<p style="text-align: right;">Page 13665</p> <p>1 remain here to represent the interest of SAPS? Because 2 then what's good for him should be good for the others as 3 well. The only reason, if I may venture to answer my own 4 question, the only reason is that he knows that in addition 5 to the highly respected evidence leaders, the SAPS is 6 entitled and is exercising its right to have its own 7 counsel to make sure that in addition – and that's what 8 we're asking for, we're not questioning the evidence 9 leaders or their integrity or competence, none of that, but 10 we're saying like all the other parties, in addition to the 11 evidence leaders, the applicants that I represent are 12 entitled to have their interests represented by their legal 13 representatives. So it's cold comfort for SAPS to say rely 14 on the evidence leaders, but we will stay here, all seven 15 of us, and assert those additional rights. Thank you, 16 Chairperson.</p> <p>17 CHAIRPERSON: Mr Mosikili, I think you've 18 got five minutes, but I hope you won't need more than that, 19 but do the best you can with the five minutes and then 20 we'll take stock.</p> <p>21 MR MOSIKILI: I'll be very short, Chair. 22 MNR MPOFU: Kort en bondig. 23 VOORSITTER: Bondig. 24 MR MOSIKILI: Indeed. Chair, just to 25 respond quickly to Mr Oosthuizen's submissions, first of</p>	<p style="text-align: right;">Page 13667</p> <p>1 suggested that why not, why don't we represent, seeing that 2 we all get along, I suppose, why don't the attorneys for 3 the families represent the injured and arrested, Chair, our 4 submission is simply that that suggestion is untenable 5 simply because we all know that those who are arrested and 6 injured are arrested for the exact murders of our clients. 7 So it is untenable to suggest that, Chair.</p> <p>8 CHAIRPERSON: I'm reminded that that's 9 not quite what he said. He didn't say you must represent 10 them. What he said was you can call them as witnesses so 11 that their version can be put before the Commission, and 12 presumably if you have their version you can then cross- 13 examine witnesses who come and give evidence which is 14 contrary to their version. I think that was his 15 submission, if I understood it correctly.</p> <p>16 MR MATHIBEDI SC: That's correct, Mr 17 Chairman, and also I said making available information, or 18 evidence available to them.</p> <p>19 CHAIRPERSON: Yes, so by all means deal 20 with his submission, but summarise his submission correctly 21 before you deal with it.</p> <p>22 MR MOSIKILI: Chair, indeed, I did say if 23 I heard him correctly, and clearly I didn't. But even that 24 alone, Chair, it might cause some conflict, but I don't 25 want to go down that route for now. Then Chair, on Mr</p>
<p style="text-align: right;">Page 13666</p> <p>1 all as the families our clients have not withdrawn. I 2 think we need to clear, to state that correctly. Our 3 clients have not withdrawn from the Commission. They still 4 remain interested and what they have done is simply 5 withdraw their instructions for us to be here to the extent 6 that we are here today. But they remain much part and 7 parcel of the Commission and they are still interested in 8 participating, if obviously, and when they feel that their 9 conditions are so conducive.</p> <p>10 Secondly, the issue of prospects of success for 11 funding, Chair, we simply submit that that is not the test 12 for this postponement application. It is not for this 13 Commission to be bothered with the prospects of success.</p> <p>14 The third point, Chair, is the public interest. 15 The public that we engage with, that engage with our 16 clients, Chair, we know that they are interested in the 17 continuance of the Commission, but they are more interested 18 in their taxpayers' money funding both the SAPS, to the 19 extent that it's funding SAPS, and funding the lawyers for 20 the arrested and injured. So it is not simply correct to 21 say that the public's interest is only to see the 22 Commission being at least completed expeditiously. That is 23 simply incorrect.</p> <p>24 Then Chair, to the submissions by Mr Mathibedi, 25 to an extent that if I heard him correctly that he</p>	<p style="text-align: right;">Page 13668</p> <p>1 Budlender's submissions on whether the postponement, or the 2 submission being that you should not be inclined to give 3 postponement because there's a possible postponement, the 4 issue of double postponement applications, Chair, we'll 5 submit that that is not the test as well.</p> <p>6 CHAIRPERSON: That point was argued by Mr 7 Mpofo. I don't know if there's anything you want to add to 8 that. He made that point, I thought.</p> <p>9 MR MOSIKILI: Chair, what I want to add 10 is this; is that another possibility, what might happen 11 after the High Court. It might be, it might well be, 12 Chair, we don't know, that the arrested and the injured, 13 they approach us and they say, "Families, we fought, we 14 fought it and failed, but you go back. Go back and be our 15 eyes and our ears for as long as we are out," and that 16 might not necessitate a postponement. I'm just putting 17 another possibility, Chair.</p> <p>18 The question that Mr Budlender also put again was 19 that, which I understand, is that is it desirable for this 20 Commission to continue while the arrested and the injured 21 are seeking funding. Chair, the answer should be no. 22 While we accept that there might be a day that, as 23 undesirable as it might be, where the Chair would not have 24 any powers but be forced to continue with the Commission, 25 as things stand, you do hold the power to do something</p>

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1 about it. Whether it might yield to any results, but it
 2 will send a message out there, Chair.
 3 Chair, just lastly, this case, as has been
 4 argued, it goes back to our point that we raised that our
 5 clients are also concerned with, which is that this boils
 6 to poverty and those who can afford legal representation,
 7 and it is according to those that I represent, that in
 8 their view those who are not poor are here inside the
 9 Commission. Yes, they might have been funded, or might be
 10 funded by Legal Aid Board, but unfortunately they do see
 11 themselves as poor, and Chair, it is sad that again we are
 12 here and we're dealing with the issue of poverty, that poor
 13 people are being denied access, and that just takes me to
 14 the quotation by Nelson Mandela, Chair, where he said, when
 15 dealing with the issue of poverty, saying that, "Overcoming
 16 poverty is not a act of charity, rather it is an act of
 17 justice. Like slavery and apartheid, poverty too is not
 18 natural. It is a manmade and it can be overcome and
 19 eradicated by actions of human beings."
 20 Chair, it is that action that we require you to
 21 take to say I am going to halt this Commission for now and
 22 give these poor people a chance, at least to have a shot, a
 23 last shot probably, at the High Court, whatever the result
 24 that might be. I thank you, Chair.
 25 MR MPOFU: With your permission, I

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1 the powers that be and ask for assistance, not for seven
 2 advocates or five or whatever, but one or two people who
 3 can assist so that the current unfairness is not
 4 perpetuated where one person has to do all these things.
 5 As it is right now, I have to rush back and file the heads
 6 of argument, which could have been done if there was
 7 someone else assisting. So it's not as if it's a happy
 8 situation; it's already unfair. We're just saying we don't
 9 want it to be irreversibly and completely, the outcome to
 10 be completely discredited. Thank you, Chair.
 11 CHAIRPERSON: We will take time to
 12 consider our ruling on the application for postponement.
 13 We hope to be able to give the judgment, or the ruling – it
 14 won't be a judgment, it will be a ruling – at 9:30 on
 15 Monday morning.
 16 MR OOSTHUIZEN SC: Mr Chair, might I ask,
 17 with your permission, that myself and Adv Modisa be excused
 18 from Monday morning. We will have our junior here to note
 19 your ruling.
 20 CHAIRPERSON: Yes. We'll be sorry not to
 21 see you, but we excuse you. We'll adjourn now until 9:30
 22 Monday morning.
 23 [COMMISSION ADJOURNED]
 24 .
 25 .

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1 promise I just want to make two quick points which arise
 2 from –
 3 CHAIRPERSON: If they're quick.
 4 MR MPOFU: Yes, they're very quick. The
 5 first one, Chair, is the issue of kind of surrogate
 6 representation by the families of the deceased. It's
 7 impractical, it's contained in a letter which we wrote to
 8 the Legal Aid Board. If you remember, that's the
 9 suggestion that they made as one of their rationale,
 10 reasons why they wouldn't fund us, and we traced to them
 11 the history of why it was that we did not represent any of
 12 the deceased persons, which Mr Mosikidi has dealt with, and
 13 that is, it is because we could not represent the murdered
 14 people and their alleged murderers at a particular point.
 15 So that's a major point which could never – that conflict,
 16 at least insofar as those charges are provisionally
 17 withdrawn, still remains there.
 18 The last point, Chair, is that there's this
 19 assumption that the status quo now is fair. Our argument
 20 has been from day 1 that the current status quo where the
 21 injured and arrested are represented by one advocate is
 22 itself skewed, and not something to be encouraged, and part
 23 of the effort we are making is to ensure that there is, if
 24 the time comes, whether because of a court order or
 25 whatever, there will be a day where we can sit down with

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