

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 49521/2016

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

30/5/2021

DATE

SIGNATURE

In the matter between:

GENERAL VICTORIA MANGWASHI PHIYEGA

Applicant

And

JUDGE I.G FARLAM (N.O)

First Respondent

ADVOCATE P.D HEMRAJ SC (N.O)

Second Respondent

ADVOCATE B.R TOKOTA SC (N.O)

Third Respondent

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

Fourth Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 1 June 2021.

JUDGMENT

RANCHOD, J

Introduction

[1] This is an application to review and set aside the findings made against the applicant by the first to third respondents sitting as the Marikana Commission of Inquiry (the Commission). The review is premised on the legality and rationality of the recommendations and findings under review.

[2] The applicant alleges that the recommendations and findings by the Commission were irrational because they were not supported by the evidence that was before it and relevant evidence was not taken into account.

Issues for determination

[3] It appears from the papers that the following issues are sought to be determined by this court:

- 3.1 Whether condonation for the late filing of the fourth respondent's answering affidavit and the applicant's replying affidavit should be granted.
- 3.2 Whether the first to third respondents' findings and recommendations as set out in prayers 1.1 to 1.3 of the notice of

motion were irrational and fall to be set aside, considering the evidence that was before the Marikana Commission.

- 3.3 Whether the first to third respondents' verbatim reproduction of the Marikana Commission Evidence Leaders' heads of argument and the cut and paste exercise undertaken by them is inconsistent with their obligation to apply their minds independently. If it was inconsistent, whether the report should be reviewed and set aside to the extent that it made negative findings against the applicant. The applicant contends that the Commission's approval of some of the arguments made by the evidence leaders is a "cut and paste job" that resulted in contradictions, which are in turn an indication of a failure on the part of the Commission to apply its mind; rendering the conclusions reached irrational and vulnerable to review.

[4] The fourth respondent contends as follows in his answering affidavit:

- 4.1 The applicant has misconceived the correct review standard, or purports to subject a judicial commission of inquiry's report to appeal scrutiny; and in any event, even were the appeal standard to be applied, the applicant has failed to establish any basis for criticising the correctness of the Marikana Commission's report;
- 4.2 The applicant has failed to satisfy the test for legality and rationality review as articulated by the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at para 37;

- 4.3 The criticisms advanced against the selected parts of the Marikana report by the applicant does not establish reviewable irregularities, and the Marikana Commission was justified in making the observations it did in the circumstances in which it sat; and
- 4.4 The applicant has failed to show that the impugned findings and recommendations of the Marikana Commission's report has direct and external legal effect on the applicant.

Points in limine

[5] The fourth respondent has raised three points *in limine* and contends that if any one of them is upheld, it would be dispositive of the application:

- 5.1 There has been an unreasonable delay by the applicant in the launching of the review application;
- 5.2 The recommendations and findings sought to be reviewed by the applicant have become moot as a result of the findings of the Claassen Board of Inquiry, which was constituted pursuant to the Marikana Commission; and
- 5.3 The applicant – in accepting before the Claassen Board of Inquiry that the Marikana Commission's report constituted *prima facie* evidence, electing not to testify before the Claassen Board of Inquiry but to participate in it and to subject herself to it – perempted this review application.

Factual background

[6] The factual background to this application is set out in the first to third respondent's 'answering affidavit' filed in response to the application after a notice of intention to oppose was filed by them. However, in the answering affidavit the first respondent says that it was filed 'to provide an overview of the contextual facts, in an effort to be of assistance to this Honourable Court, and to address the averments made by the applicant herein. . . . I further state that we shall abide by the decision of this Honourable Court.'

[7] The applicant objected to this approach of the members of the Commission on the basis that they either opposed the application or abided the decision of the court. If it was the latter, their answering affidavit should be disregarded. However, at the hearing counsel for the applicant, Mr Mokhare SC informed the court that the applicant was no longer persisting with the objection. Counsel for the first to third respondents, Ms Moroka SC, made very short submissions and stated that since the applicant no longer opposed the filing of the answering affidavit of the first to third respondents, this court must consider its contents. The first to third respondents also accept that it is more appropriate for the fourth respondent to respond to the review application.

[8] When the application for review was launched the applicant did not cite the fourth respondent. It was the fourth respondent who applied for leave to intervene in the application. The application was not opposed and this court granted it with cost to be determined at a later stage. The fourth respondent thereafter filed his answering affidavit.

[9] Mr Mokhare SC informed this court that the applicant did not oppose the late filing of the fourth respondent's answering affidavit.

[10] The fourth respondent, however, takes issue with the late filing of applicant's replying affidavit but says that, if it was granted, then, certain hearsay allegations contained therein should be struck out. In light of the view I take of this matter I do not deem it necessary to deal with the application to strike out.

[11] The trigger for the late filing of the replying affidavit was apparently the fourth respondent's heads of argument, which were filed on 25 July 2018. The replying affidavit was filed some seven months later on 21 February 2019. The fourth respondent contended that this is an extraordinary delay, particularly in circumstances where the applicant says in the replying affidavit that "the President's answering affidavit is confined to opposing [the] review application on legal grounds only." Therefore, since no factual matter required investigation and traversed a delay of seven months was not warranted.

[12] The applicant says the fourth respondent himself also filed his answering affidavit late, to which she does not object and therefore the fourth respondent should not raise 'technical objections' to the late filing of the replying affidavit. Again, at the hearing fourth respondent's counsel, Ms Pillay SC did not strenuously object to its filing.

[13] I deem it appropriate in the circumstances that condonation should be granted in respect of both affidavits bearing in mind the interests of justice.

[14] The background to this application is accordingly sketched from the first to third respondents' affidavit:

14.1 On 9 August 2012, some of the mineworkers of Lonmin PLC (Lonmin) (a platinum producer in the district of Rustenburg in the North-West Province) embarked on a strike.

14.2 The miners objected to the low salaries and wages paid to them and demanded a minimum of R12,500.00 (twelve thousand five hundred rand) after deductions, as a living wage.

14.3 Members of two trade unions, namely, the National Union of Mineworkers (NUM) and the Association of Mineworkers Construction Union (AMCU) as well as workers who were not members of a union, were involved in the strike. Although some of its members took part in the strike, NUM itself was opposed to the strike and there was, as a result, conflict between some of the strikers and the NUM.

14.4 During this period and up until the 16th August 2016, there were several incidents of violence involving security guards employed by Lonmin, the mineworkers (including amongst themselves), and members of the South African Police Services (SAPS). This resulted in

injury to and the death of members of SAPS, Lonmin security guards and mineworkers.

14.5 On 16 August 2012, 33 mineworkers and a family member of a mineworker were tragically killed at Marikana¹ and many other mineworkers were seriously injured in a confrontation between members of SAPS and the striking mineworkers.

14.6 Subsequent to the events at Marikana, the President of the Republic of South Africa appointed a Judicial Commission of Inquiry in terms of section 1 of the Commissions Act, 8 of 1947. Retired Judge Farlam was appointed as chairperson to preside over the Commission and senior advocates P.D Hemraj and B.R Tokota were appointed as members of the Commission. They are the first, second and third respondents in this application.

14.7 The Commission was mandated to inquire into, make findings, report and make recommendations concerning the conduct of the Lonmin PLC, the SAPS, AMCU, and the NUM and the role they played in the tragedy; and individuals and loose groupings in fomenting and/or promoting conflict and confrontation which may have resulted in the tragedy.

¹ Marikana, formerly known as Rooikoppies, is a town in Rustenburg local municipality, Bojanala Platinum District Municipality district in the North West province of South Africa.

14.8 The terms of reference insofar as they relate to the applicant and the conduct of the SAPS, are contained in the Commission's mandate, namely:

14.8.1 The nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to the incident;

14.8.2 The precise facts and circumstances which gave rise to the use of all and any force and whether this was reasonable and justifiable in the particular circumstances;

14.8.3 To examine the role played by the SAPS through its respective units, individually and collectively in dealing with the incident; and

14.8.4 Whether any act or omission it directly or indirectly caused loss of life or harm to persons or property.

14.9 The Commission had the power, *inter alia*, to refer any matter for prosecution, further investigation, or the convening of a separate enquiry to an appropriate law enforcement agency, government department or regulator, regarding the conduct of certain persons.

14.10 In the conduct of the proceedings, the Commission followed a quasi-adversarial procedure. The first respondent was empowered in terms of Regulation 5, as the Chairperson, to designate one or more knowledgeable and experienced persons to assist the Commission in the performance of its functions in a capacity other than that of a member. The Commission appointed evidence leaders and investigators, to assist in the conduct of its work. The evidence leaders were required, at the instance of the members of the Commission, to

investigate the facts, lead the evidence of witnesses that the Commission wished to hear and cross-examine witnesses who testified at the instance of the various participants in the Inquiry. They were also required to make submissions on fact and law at the end of the hearing of the evidence, to assist the members of the Commission in the execution of their mandate.

14.11 The investigations carried out by the evidence leaders and the witnesses led by them were undertaken at the instance of the members of the Commission. The first respondent says it is in this context that the Commission used some of the submissions of the evidence leaders as a framework for the findings in the report.

14.12 The Commission also heard evidence and legal argument by legal teams representing the various participants at the Commission. A report was compiled and submitted to the President at the end of March 2015.

14.13 After the release of the Marikina Report ("the Report") in June 2015, the President acted on its recommendations and appointed a Board of Inquiry ("the Claassen Board") in terms of section 9 of the South African Police Service Act 68 of 1995. Its mandate was to conduct an inquiry into the fitness of the applicant to remain in her post and to investigate whether she is guilty of any misconduct in attempting to mislead the Commission.

14.14 The Claassen Board duly completed its inquiry and filed its report with the fourth respondent.

14.15 The fourth respondent suspended the applicant in October 2015 and she remained suspended with full pay and all benefits forming part of her remuneration package until, by the effluxion of time, her five year term of office came to an end on 31 May 2017. (The five-year term commenced a mere some two months before the Marikana tragedy occurred.)

The impugned findings

[15] The impugned findings and recommendations of the Commission, set out in prayers 1.1 to 1.3 of the notice of motion are:

“1.1 A finding that the leadership of the police, on the highest level appears to have taken the decision not to give the true version of how it came about that the Tactical option was implemented on the afternoon of 16 August 2012 and to conceal the fact that the plan to be implemented was hastily put together without POP inputs or evaluation;

1.1.1 that a decision at the NMF was not disclosed to the commission;

1.1.2 an inaccurate set of minutes for the 06h30 meeting was prepared and a number of SAPS witnesses testified before the commission in support of the incorrect version; and

1.1.3 that there is at least a prima facie case that the National Commissioner and the Provincial Commissioner for the North West Province, who knew the true facts, approved Exhibit “L”, an SAPS presentation which contained the incorrect facts.

1.2 A finding that the media statement dated 17 August 2012 which was read by the applicant to the media on 17 August 2012 created the impression of only one shooting incident

and that the most reasonable conclusion is that the report which had been prepared for the President was deliberately amended in order to obscure the fact that there had been two shooting incidents separate in time and space, and that this resulted in deliberate misleading of the public, who were brought under the impression that all of the deaths had been caused at the confrontation at scene one which they had seen on television.

1.3 The recommendation that steps be taken in terms of section 9 of the SAPS Act to inquire into the fitness to remain in office of the applicant and whether the applicant is not guilty of misconduct in attempting to mislead the commission"

Commissions of Inquiry

[16] It would be apposite to mention briefly the legal principles governing commissions of inquiry.

[17] The appointment of a commission of inquiry constitutes executive action, not administrative action.² The President is not required to consult with the subject-matter of the inquiry before appointing a commission.³ The function of a commission of inquiry is to determine facts and to advise the President through the making of recommendations.⁴ The President is not obliged to follow the recommendations, nor is he bound by the factual findings.⁵

² *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at paras 147 and 156. See now section 1(i)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which expressly excludes the President's constitutional power under section 84(2)(f) of the Constitution to appoint a commission of inquiry from PAJA's definition of administrative action (and therefore from the application of PAJA, which governs administrative action).

³ *Id* at para 159.

⁴ *Id* at para 146.

⁵ *Id* at paras 146 and 220.

[18] A commission of inquiry is not a court.⁶ A commission is entitled to receive evidence *or information* relevant to the issues before it,⁷ and is entitled to determine its own procedure.⁸ It has the inherent power to determine how it will perform its functions.⁹ It may receive evidence of any nature, including hearsay evidence and newspaper reports, and it may “even [receive] submissions and representations that are nothing more than opinions”.¹⁰

Pre-liminary points (points *in limine*)

[19] As I said, the fourth respondent has raised three preliminary points any one of which, if upheld, says counsel, would be dispositive of the review application. Firstly, the unreasonable delay in the bringing of the review application. Secondly, that the review application has become moot. Thirdly, peremption.

Delay in instituting the review application

[20] The fourth respondent contends that there has been an unreasonable delay by the applicant in instituting this application. It is not in dispute that the application was launched more than twelve months after the Marikana Commission’s report was published.

⁶ *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King* NO 2000 (4) SA 973 (C) at para 49; Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2003) part 2(2) at para 171.

⁷ *S v Naude* 1975 (1) SA 681 (A) at 698B.

⁸ *Id* at 698*sup* and 699 A/B.

⁹ *Id* at 701*fin*-702*sup*.

¹⁰ Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2003) part 2(2) at para 171. See, too, *S v Mulder* 1980 (1) SA 121F-*fin*.

[21] The Constitutional Court has stated that review proceedings are to be instituted without any undue delay.¹¹ An application for condonation must provide a full and satisfactory explanation for the entire period of the delay.¹² Whether condonation is to be granted depends *inter alia* on the following factors:

‘the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of the delay; the importance of the issue to be raised; and the prospects of success.’¹³

[22] The impugned report is attacked in only three respects. Firstly, two of the three attacks are academic on the bases of mootness and peremption – which I deal with below. Thus only a small residue of the applicant’s case and the relief she seeks is still alive. Secondly, the delay is substantial - twice the period applicable under PAJA.¹⁴ It militates against granting condonation. Thirdly, the only reason advanced for the delay is that the applicant elected to participate in the proceedings of the Claassen Board of Inquiry, which is a self-defeating explanation, as I point out below regarding the second point *in limine*. Fourthly, the importance of the issues to be raised relate exclusively to the applicant herself in circumstances where her tenure as National Commissioner has expired (on full pay), and who has no career in the SAPS or reputation as

¹¹ *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at para 37, confirming the refusal of condonation in the context of a one-year delay. Also *Camps Bay Ratepayer's and Resident's Association v Harrison* 2011 (4) SA 42 (CC), which confirmed that the legal policy against undue delay is so strong that a court can and should raise the issue even *mero motu*.

¹² *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at para 20.

¹³ *Cape Town City v Aurecon* supra at para 47

¹⁴ The Promotion of Administrative Justice Act 3 Of 2000.

police commissioner to defend. Finally, it seems to me that the applicant's prospects of success are particularly poor, more so after having agreed to participate in the Claassen Board of Inquiry on the basis I referred to earlier. On these grounds the point *in limine* falls to be upheld.

Mootness

[23] The Commission made certain (*prima facie*) adverse findings against the applicant. It recommended to the fourth respondent that steps be taken in terms of section 9 of the South African Police Service Act 68 of 1995.¹⁵ The fourth respondent thereupon appointed a board of inquiry (which is referred in these proceedings as the 'Claassen Board of Inquiry' which was chaired by retired Judge Neels Claassen) to conduct an inquiry into the fitness of the applicant to remain in her post and to investigate whether she is guilty of any misconduct in attempting to mislead the Commission.

[24] The applicant elected to participate in the proceedings of the Claassen Board of Inquiry. At the inquiry, the parties had agreed that the evidence before the Marikana Commission will constitute evidence before the Board of Inquiry.

¹⁵ **9 Misconduct by or incapacity of National or Provincial Commissioner**

- (1) Subject to this section, subsections (1) to (8) of section 8 shall apply *mutatis mutandis* to any inquiry into allegations of misconduct by the National or Provincial Commissioner, or into his or her fitness for office capacity for executing his or her official duties efficiently.
- (2) The board of inquiry established by virtue of subsection (1) shall make a finding in respect of the alleged misconduct or alleged unfitness for office or incapacity of executing official duties efficiently, as the case may be, and make recommendations as contemplated in section 8(6)(b).
- (3) If the National Commissioner has lost the confidence of the Cabinet or a Provincial Commissioner has lost the confidence of the Executive Council or the National Commissioner, as the case may be, following on an inquiry in terms of this section, the provisions of section 8(7) shall apply *mutatis mutandis*.

The applicant says it is for this reason that she elected not to testify before the latter Board as it would have meant regurgitating what she had said at the Marikana Commission of Inquiry.

[25] The fourth respondent contends that the applicant's election to participate in the proceedings of the Claassen Board of Inquiry and the latter's report (which supports the Marikana Commission's report), renders at least the second and third of the three impugned paragraphs in the Marikana Commission's report academic. This quite apart from confirming these paragraphs' correctness. Because the Claassen report confirmed the crucial findings and has overtaken the recommendations, the second and third impugned paragraphs are rendered academic in their entirety. As regards the third impugned paragraph the Claassen report confirmed the Marikana Commission report's finding. It concluded that the applicant's "deliberate attempt to mislead South Africa by amending the media statement to read as if the tragic incident only occurred at scene 1 where the police acted in self-defence is not in keeping with the duties commensurate to her office. A reasonable National Commissioner would have known that this amounted to misrepresentation to the people of the country and would not have acted in this way."¹⁶

[26] I turn now to the first impugned paragraph. The Claassen report concluded that the applicant did not conceal from the Marikana Commission "in

¹⁶ Record pp 1326 – 1327 para 138.6.

her initial testimony” the fact “that a decision was taken during the evening of Wednesday 15 August 2012 to effect the disarming and dispersal of the strikers the next day on Thursday 16 August 2012”.¹⁷ Thus the finding that “[t]here is at least a *prima facie* case that the National Commissioner and the Provincial Commissioner for the North West Province who know the true facts approved Exhibit ‘L’, SAPS’ presentation, which contained the incorrect facts” is by implication confirmed by the Claassen report.

[27] The applicant contends that her rights to dignity and just administrative action have been impaired and therefore the recommendations in the Marikana Commission’s report cannot be considered moot despite the fact that the fourth respondent has already acted on them by appointing the Claassen Board of Inquiry. I do not find this argument persuasive.

[28] As regards any residual reputational effect of the first impugned paragraph is concerned, the relief sought by the applicant cannot be sustained. The Claassen report is entirely destructive of any such relief being granted. The report records that whereas the Marikana massacre manifested the worst possible policing practices, the applicant described it as “the best possible policing”.¹⁸ It also analysed all the evidence and concluded that the applicant “was not a satisfactory witness in all respects”; was “ambivalent and contradictory on the topic whether or not the tactical option was discussed”; “attempt[ed] to avoid taking responsibility for the conduct of the police at

¹⁷ Record p 1289 para 47.

¹⁸ Record p 1326 para 138.5.

Marikana by denying that she took the decision”, and this “tainted her evidence to the extent that her credibility is in serious doubt”; and her self-exculpatory argument “was disingenuous and somewhat facile.”¹⁹

[29] Mootness is not surmounted by claiming that rights ‘have been impaired’. It must be met by demonstrating that the prejudice resulting from the contended ‘impairment’ still has practical effect.²⁰ In my view the applicant has failed to do so. She merely denies that the Marikana report did not have ‘tremendous impact’ on her person and as National Commissioner and says it in fact continues to have that impact. What this alleged ‘tremendous impact’ is has not been explained or disclosed.

[30] The limited relief sought by the applicant relating to the first impugned paragraph of the Commission’s report has been overtaken by the Claassen report. The latter report found that she did not mislead the Marikana Commission in certain respects but did so in other respects.

[31] As was said in *Rand Water Board supra*, judicial review does not lie against matters that are moot.²¹ The Constitutional Court has stated a number

¹⁹ Record pp 1239 – 1330 para 146.

²⁰ See the Supreme Court of Appeal’s most recent reiteration of the correct approach to mootness in *Mabotwane Security Services CC v Pikitup SOC (Pty) Ltd* [2019] ZASCA 164 (29 November 2019) at para 32 confirming that “what was stated by this Court in *Rand Water Board v Ratek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26 demands repetition. The present case is a good example of this Court’s experience in the recent past including unreported cases that there is growing misperception that there has been a relaxation on dilution of the fundamental principle ... that Courts will not make determinations that will have no practical effect.”

²¹ *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at para 54; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 21.

of times that a court may only determine issues which 'no longer present existing or live controversies' *if the interests of justice so require*.²² But, a prerequisite is that any order a court may make will have some practical effect either on the parties or on others.²³

[32] The applicant contends in her supplementary heads of argument that her rights to dignity and just administrative action have been impaired and therefore the recommendations in the Marikana Commission's report cannot be considered to be moot [despite the fourth respondent already having acted on them]. She says the review application is based on legality and rationality grounds. However, this contention (of rights to dignity and just administrative action) is in effect a reliance on rights that should be pursued under PAJA or other legislation giving effect to the rights entrenched in Chapter 2 of the Constitution – not Chapter 1, which governs legality and rationality.

[33] In my view, the applicant has failed to establish any subsisting prejudice resulting from the Marikana Commission's report. As I said, that report has been overtaken by the Claassen report. The applicant elected to participate in the proceedings of the Claassen Board of Inquiry but, as I said, did not give evidence there. It subsequently made its report.

²² *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para 17; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11.

²³ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11.

[34] The applicant merely states that she is to have the Claassen report also subject to review. However, no further details are provided. In any event, if she intends to pursue that course then, even more so, it seems to me, the present application is doomed to failure. The Claassen report resulted from the recommendations of the Marikana Commission. Hence the recommendations have been rendered moot as they have been acted upon by the fourth respondent. In any event, neither the right to dignity nor the right to just administrative action is infringed by a preliminary report recommending a subsequent inquiry.

[35] Counsel for the applicant contended, in the alternative, that mootness should be overlooked on the basis of an alleged high public importance nationally and internationally, of the tragic incident that occurred at the Lonmin Mine in Marikana.

[36] The difficulty I have with this alternative argument is that it is inconsistent with the express basis on which the application was brought. It was not brought in the public interest, but only the four bases set out in the notice of motion. Furthermore, the recommendations of the Marikana Commission are explicitly attacked only insofar as they relate to the applicant herself in her own personal capacity and her then official capacity as National Commissioner of Police. It is on that basis that she has approached this court.²⁴ The applicant has conflated

²⁴ See e.g. Record p 1356 para 47 where the applicant deposes (in her replying affidavit) as follows: "I wish to make it clear that I am not attacking the entire Marikana report at all. My focus is on the findings made against me. This is much bellied [sic] by the prayer in the notice of motion. I deny that I seek to attack the entire Marikana report and to seek an order setting it aside. I do not at all."

three issues, viz, the public interest, issues interesting to the public and the applicant's private interest. This is inconsistent with the applicant's averment that her focus is on the findings of the Marikana report against herself. Nowhere in the applicant's papers or argument is any discrete legal issue of public importance alleged to arise that would affect matters in the future, thus justifying this adjudication of the matter in the interest of justice.²⁵

[37] The point *in limine* that the application is moot falls to be upheld.

Peremption

[38] The applicant variously concedes that she had indeed 'subjected'²⁶ herself to the process of the Claassen Board of Inquiry. She also 'elected'²⁷ not to testify before it as it would have constituted a repetition of her evidence given at the Marikana Commission and she accepted that the latter's report constituted '*prima facie*' evidence against herself).²⁸

[39] The Constitutional Court has held that once a litigant subjected himself or herself to a court, its jurisdiction cannot subsequently be contested.²⁹ In my

²⁵ As the Supreme Court of Appeal held in *Centre for Child Law v Hoerskool Fochville* 2016 (2) SA 121 (SCA) at para 11, "there are number of cases where, notwithstanding the mootness of the issues as between the parties to the litigation, [the court] has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to enter into the merits of the appeal. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose."

²⁶ Paras 4.4 and 30 of applicant's supplementary heads of argument.

²⁷ Applicant's replying affidavit at para 23.2.

²⁸ Applicant's replying affidavit at para 23.1.

²⁹ *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 46, in which the Chief Justice held for a unanimous Court that:

"A jurisdictional challenge based only on certain specific grounds amounts to a submission to jurisdiction, subject to the dismissal of those specific concerns raised.

view, a similar consideration would apply with regard to a commission of inquiry. Thus the submission to the jurisdiction of the Marikana Commission is binding on the applicant. It accordingly constitutes a peremption, and the point *in limine* on this ground also falls to be upheld.

Costs

[40] There is the question of costs of:

- 40.1. The fourth respondent's application to intervene;
- 40.2 The costs of the application for condonation for the late filing of the answering affidavit of the fourth respondent;
- 40.3 Costs of the application for condonation for the late filing of the applicant's replying affidavit;
- 40.4 The fourth respondent's supplementary heads of argument; and
- 40.5. The costs of the main application.

[41] The application for intervention by the fourth respondent was unopposed. Costs were sought only in the event of opposition to the application to intervene. Only in the alternative was it prayed for that they be reserved for later determination. The application was granted but the costs were reserved for later determination. In my view there should be no order as to costs in the intervention application.

In other words, absent those objections, it is to be accepted that there was a submission to that court's jurisdiction. And that submission to jurisdiction must always stand. Once a litigant has submitted to the jurisdiction of a court, ordinarily, it may not in later or appellate proceedings dispute that jurisdiction. By parity of reasoning, once a litigant has chosen specific grounds for impugning the jurisdiction of court, it may not in later proceedings attack the jurisdiction of the first court on new or fresh grounds."

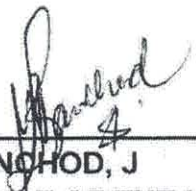
[42] I am of the view that there should be no order as to costs for the applications for condonation for the late filing of the fourth respondent's answering affidavit and the applicant's replying affidavit.

[43] The costs of the supplementary heads of argument of the fourth respondent should form part of the costs of the main application.

[44] In my view, there is no reason why the costs of the main application should not follow the result, including the costs of two counsel where so employed.

[45] In the result the following order is made:

1. Condonation is granted for the late filing of the fourth respondent's answering affidavit.
2. Condonation is granted for the late filing of the applicant's replying affidavit.
3. The points *in limine* raised by the fourth respondent, viz, unreasonable delay in the institution of the review application, mootness and peremption are upheld.
4. There is no order as to costs of the application to intervene by the fourth respondent.
5. The application for review is dismissed with costs including the costs of two counsel where so employed and shall include the costs of the supplementary heads of argument of the fourth respondent.



 RANOD, J
 JUDGE OF THE HIGH COURT

Date of hearing: 1 September 2020

Date of judgment: 30/5/21

Appearances:

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316 SALU Building, Ground
Floor
Corner Francis Baard & Thabo
Sehume Streets
Pretoria

Appearance for fourth respondent:

Adv K Pillay SC with Adv F.B
Pelser

Instructed by The State
Attorney

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