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IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(THE REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 37904/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
DATE <u>30/07/2013</u>	<u>[Signature]</u> SIGNATURE

In the matter between:

MZOXOLO MAGIDIWANA
INJURED AND ARRESTED PERSONS

First Applicant
Second to Further Applicants/
Class Action Participants

THE PRESIDENT OF THE REPUBLIC OF SA
THE MINISTER OF JUSTICE & CONSTITUTIONAL
DEVELOPMENT

First Respondent
Second Respondent

LEGAL AID SOUTH AFRICA
THE MARIKANA COMMISSION OF ENQUIRY

Third Respondent
Fourth Respondent

PARTIES TO THE MARIKANA COMMISSION OF
ENQUIRY

Fifth to Eighteenth Respondents

JUDGMENT

RAULINGA J.

[1] This is an urgent application, in which the applicants seek an order, as set out in the amended notice of motion. Part A of the amended notice of motion reads as follows:

- (i) Dispensing with the requirements of the ordinary Rules of Court, in terms of Rule 6(12)(a);
- (ii) Certifying the application as a class action in terms of Section 38 of the Constitution;
- (iii) Pending the final determination of Part B of this application, ordering the first, second and/or third respondents to provide or to ensure the provision of interim legal aid to the applicants on the scale/ tariff ordinarily employed by the third respondents;
- (iv) Setting down the hearing of Part B hereof on an expedited date, as agreed by the parties, alternatively as determined by the above Honourable Court, further alternatively the Deputy Judge President;
- (v) Ordering the opposing respondents to pay the costs of the applicants;
- (vi) Further and/or alternative relief.

Part B

- (i) Declaring the conduct of the first, second and third respondents in failing and/or refusing to provide the applicants with legal aid in respect of the commission proceedings, unlawful, unconstitutional and accordingly invalid.;
- (ii) Ordering the first, second and third respondents to take reasonable steps to provide adequate, fair and equitable legal aid to the applicants in respect of the future proceedings of the Commission, on the scale/tariff ordinarily employed by the third respondent, including all reasonable costs incurred to date less any amount received from third parties;
- (iii) Ordering the opposing respondents to pay the costs of the application, jointly and severally;

(iv) Further and/or alternative relief.

- [2] I mention Part B of the amended notice of motion because there are issues in Part A which overlap with some of the issues in Part B. The relief sought in Prayer (iii) of the original notice of motion was different from the relief now sought in prayer (iii) of the amended notice of motion. The original prayer (iii) reads:

"Interdicting the fourth respondent from convening and/or conducting the proceedings of the Marikana Commission of Enquiry pending the determination of the relief sought in Part B of the application, as set out hereunder".

As this judgment unfolds, it will become clear that some of the respondents are not comfortable with the changing of course at such a late stage.

- [3] This case was consolidated with case NO 40732/2013. The two cases were to be heard together, but due to time constraints, case NO 40732/2013 was postponed to be heard on another date. It is also important to mention that the Black Lawyers Association (BLA) was admitted as Amicus Curiae in support of the applicant's application to access state funding. They were provisionally admitted only in relation to Part B. The state respondents oppose the application. Most of the other respondents have chosen to abide the decision of the court. The 17th respondent supports the application partially.

- [4] I must mention right at the outset that by its nature the matter is complex involving issues of magnitude importance. The record is extensive and I had to hear many Counsel within a short period of time. Most of the papers were received a day before the hearing of the application, whereas other papers were received on the day of hearing. Because of the high profile of the matter I had to prepare my judgment under hurried circumstances. It is therefore

not possible for me to deal with the minute detail of the aspects involved within the time available.

- [5] The principal issue in this application is whether legal aid at state expense can and ought to be extended to the applicants for the purpose of their participation in the Marikana Commission of Enquiry. Other aspects which arise from the above is whether there is a right to legal representation at state expense in the Commission; and/or whether the constitutional rights to access justice and to equality have been infringed due to the conduct of the second and the third respondents in refusing legal aid and assistance for the applicants. The court is also requested to, if the answer is in the affirmative, determine what relief ought to be granted pending the determination of the relief set out in Part B. However, the court still has to deal with the urgency of the matter as well as the application to determine if it qualifies for certification as a class action.
- [6] According to the applicants the background facts are that, the first applicant is a 24 year old labourer employed by Lonmin's (the sixth respondent's) platinum mine in Marikana. The second to further applicants are the proposed class members or participants and/or arrested mainly on the 16 August 2012, or detained the week preceding that date. In one way or the other, they are all survivors of the incident commonly referred to as "the Marikana Massacre" (some of the respondents prefer to refer to it as the Marikana incident)
- [7] All the applicants are represented by a consortium of three attorneys firms and they participate in the Commission under the category "injured and arrested persons". Those falling under the "arrested category", whether or not they were also injured, are approximately 270 accused persons and they are involved in a criminal matter pending in the Garankuwa Magistrate Court.

- [8] On 2 February 2013, a long postponement was granted by agreement in the main criminal matter pending the finalisation of the Commission, which was anticipated for approximately September 2013. The matter was accordingly postponed to 22 October 2013.
- [9] All the applicants have also given instruction to their attorneys to initiate civil proceedings in relation to their injuries and/or arrests. The first applicant acts in his own capacity and in the interest as a member of the class. He was severely injured on 16 August 2012 and has appeared in the Commission as a witness.
- [10] The Commission was established on the basis of the incidents which occurred between the 9 and 16 August 2012 at the Marikana Lonmin mine. During the period 12-14 August 2012 there were fatalities between security guards, members of the SAPS and protesting workers. That led to more bloodshed on the 16 August 2012 in a clash between mine workers and police. Thirty four people were killed on that day alone.
- [11] The Commission commenced its work on the 1 October 2012 and has since sat for more than 100 days. The Commission has since been extended twice and is to sit until the 30 October 2013.
- [12] The applicants' legal team has to date received a retrospective paid emergency grant of R2.6 million in fees demarcated for the period 1 October to 31 December 2012. There is also an amount of R2 million which has been approved by a funder, but this amount has not yet been received. The said amount has been offered strictly for the period 18 March to 31 May 2013.
- [13] The Commission has been run on a largely quasi-adversarial basis, with cross-examination by "opposing" counsel dominating the proceedings. The state respondents are represented by highly qualified counsel, whereas the

applicants are represented by only one counsel. The first, second and third respondents spend millions on their counsel on a monthly basis.

[14] I deal first with the issue of urgency. The first, second, third and fifth respondents oppose the application on the basis that it is not urgent. The majority of the parties agree that Part A of the application is urgent and ought to be dealt with during the commission recess.

[15] The applicants contend that the application was not brought earlier because they were avoiding the disruption to the Commission – therefore “minimum disruption to the Commission has been paramount”. They submit that there was also a possibility of securing funding for the period 17 March to 31 May 2013, which coincided with the rejecting letter of the second respondent. It was only once it became clear that the problem was still persistent and likely to continue for at least another five months or possibly more, that action had to be taken.

[16] One must be mindful of the fact that funding ran out in November- December 2012. Their attorney already realised on 19 January 2013 that the Marikana Commission would possibly be extended to September 2013. On 14 March 2013 the State Attorney informed the attorney for the applicants that the second respondent could not find any legal framework (under the doctrine of legality) which allowed or permitted the funding of legal representation under the circumstances of the matter. The applicants did not respond to this letter. This gave the second respondent the impression that the applicant accepted this position. It is the contention of the first and second respondents that the urgent application ought to have been launched at that time and not on 21 June 2013. Further to that, the applicants allege in their founding affidavit that their legal representatives have for a long time discouraged the launching of the application, because they were waiting for the Commission’s recess.

- [17] The applicants also state that there is an amount of R2million which has been offered but has not yet materialised due to a number of outstanding issues. The applicants do not explain to the court what those outstanding issues are. It could be that more funds will be allocated or that the R2million will be allocated for a specific purpose. The applicants are not saying anything about it.
- [18] The deviation from ordinary process to urgency has caused prejudice to the first, second, third and fifth respondents in that there was no opportunity to investigate the allegations by the applicants. They also had no time to consult with all relevant witnesses, to gather information on the legal fees paid from public funds for the Marikana Commission. They could not obtain information on the relevant programmes on the approved budget and to consider properly the issue of justification under section 38 of the Constitution.
- [19] Having said all these, I am minded to take all the circumstances of the applicants cumulatively. The applicants bring this matter on a semi-urgent basis. One can accept for the sake of this aspect of the matter that the applicants are indigent persons, they come from a poor background. Their legal representatives are subsidising their fees. Their legal representatives had to take advantage of the cleansing ceremony on the 17 June 2013 to obtain instructions. Because it involved a diverse group of people consultations were not easy. That took some time. The applicants allege human rights issues, equality and human dignity. The applicants did not rest on their laurels and do nothing. They were trying to raise funds from potential donors. One can also accept that in those circumstances the delay is justified. The matter is urgent.
- [20] The applicants brought an application for certification of a class action in terms of section 38 of the Constitution. This application was moved together with the main application. In the normal parlance of litigation, the application for certification must be brought before institution of the main action. In

certain instances the certification may be done at an early stage of the proceedings. Such is the case in this matter. This is a procedural requirement which may not be met in urgent applications.

[21] Section 38 of the Constitution provides:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

(a) anyone acting in their own interest;

(b).....;

(c) Anyone acting as a member of, or in the interest of, a group or class of persons;

(d).....;

(e)....."

[22] It is clear from section 38 above that it is rational for the court to sanction a class action in cases where a constitutional right has been invoked. It is now trite that even in cases where the applicants are unable to point to the infringement of a right protected under the Bill of Rights; the court may certify class action – *Trustee, Children's Resource Centre v Pioneer Food (Pty) Ltd 2013(3) BCLR 279 (SCA)*. This is sanctioned by section 38(c), which recognises a class action specifically in relation to infringements of or threats to rights guaranteed in the Bill of Rights.

[23] A court faced with an application for certification of a class action must consider the following factors and be satisfied that they are present before granting certification. The existence of a class identifiable by objective criteria, a cause of action raising a triable issue, that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members

of the class, that the relief sought, or damages claimed, flow, from the cause of action and are ascertainable and capable of determination; that, that the proposed representative is suitable to be permitted to conduct the action and represent the class, whether given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of the class members – Trustee, Children’s Resource Centre *supra*.

[24] The first, second and third respondents object to the certification of class action on the basis that;

- (a) the particulars of each member of the alleged class are already known and they all have already given mandates to their attorneys.
- (b) no notice to all concerned has been given and it therefore deprives an individual of the right to opt out of the purported class action and locks him in for no apparent reason.
- (c) the court was not notified in advance of which members are willing to be bound by the judgment and which members are not willing to be bound by the judgement.
- (d) There is no commonality among the applicants as some of the applicants were unlawfully arrested, some were criminally charged, some were injured and some unlawfully detained.

[25] There is no merit in the submissions of the respondents above on this aspect. The applicants meet the criteria provided for in Section 38 of the Constitution. The class is so numerous that joinder of all its members is impracticable. There are questions of law and fact common to the class. One can mention a few features that bind the members of the class as an entity. Their participation in the strike and/or their presence at the “koppie”. Their collective arrest and their pending criminal and/or civil matters based on the same cause of action.

- [26] The approach of our courts has been to lean towards the certification of class action albeit with caution. The requirements laid down in *Trustee, Children's Resource Centre* case, *supra* must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. As Jafta J observed in *Ismail Mukaddam v Pioneer Foods (PTY) LTD & others CCT 131/12(2013) ZACC 23 in paras 32 and 37 at 14 and 16*: "*It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that courts are established for rules. Therefore, the primary function of the rules of the courts is the attainment of justice*". And in para 37: "*In the light of section 34 read with section 38 of the Constitution, there can be no justification for elevating requirements for certification to the rigid level of prerequisites for the exercise of the power conferred without restrictions. Indeed in section 173, the Constitution does not limit the exercise of the power nor does it lay down any condition, except that what is done must be in the interest of justice. Compelling reasons would therefore be necessary for introducing inflexible requirements*".
- [27] These expressions are a confirmation that, in the absence of anything untoward, the court should grant certification of class action. I am convinced that in this instance, the applicants have met the requirements of class action. The requirements that, applicants in a certification class action application, must first meet the criteria, prior to instituting the main action is important, and cannot be ignored. However, an exception must be made particularly in urgent matters. I am aware that it deprives the respondents the opportunity to show why the action should not proceed and also to curtail lengthy and costly litigation. However, in the interest of justice the class action is certified.
- [28] In their original notice of motion in Part A, the applicants sought to interdict the Commission from conducting its proceedings pending the determination of the Part B relief. The applicants in their replying affidavit, changed course and they now seek an alternative interim relief, as proposed by the

seventeenth respondent. As conceded by the seventeenth respondent, this would remove both urgency and the need for halting the Commission's proceedings. The relief now sought by the applicants, is contained in an amendment which was handed into court on the 10 July 2013, when the matter was proceeding. This caused animosity among some of the respondents. This is so, because their answering affidavits only responded to the original Part A of the notice of motion. They could not file supplementary affidavits because the matter was brought on urgent basis. Further to that, time constraints could not give them an opportunity for filing further affidavits.

[29] The applicants and those of the respondents, who support them, in particular the seventeenth respondent, as well as the *amicus curiae*, are of the view that the applicants have a clear right to legal aid support, which entitles them to a final relief under Part B of this application. They also are of the view that the applicants have a *prima facie* right to interim legal aid under Part A of the application. It therefore follows that the issue of constitutional invalidity does not arise under Part A, but may only arise under Part B of the application.

[30] It is also noted that the applicants conceded that they are not entitled to the same or equitable legal support provided to the state parties. They submit that they are only entitled to such legal aid support that is sufficient for purposes of enabling them to be represented adequately and meaningfully in the Commission.

[31] The justification of the applicants' case for an interim interdict is premised on the standard requirements of this concept. They canvass the *prima facie* requirements by raising a plethora of constitutional and statutory rights. Those are, access to justice in terms of section 34 of the Constitution, the prohibition against unfair discrimination in terms of the equality clause, section 9 of the Constitution; and the right to legal representation (both as an adjunct to section 34 and section 35 on constitutional rights, but also as a

right recognised in the regulations of the Commission and in the actual conduct of the proceedings). They submit that fairness is the common thread which runs between these two constitutional rights. That section 9 prohibits unfair discrimination based on class while section 34 guarantees the right to a fair trial. In section 9 context, fairness relates to "equality before the law" whilst, in section 34 context, it related to the concept of "equality of arms".

[32] The state respondents are of the view that no prima facie or clear rights of the applicants are affected by the issues raised in this matter. They argue that there is no right to legal representation at state expense since a commission is not a court of law, it is investigative, and inquisitorial in nature. It is only the President and his executive members who have a vested interest in the Commission.

[33] It is indeed true that fairness applies and the said rights have to be established on a prima facie basis. The question is whether the issue concerning legal aid at state expense applies to Commissions as well - See in this regard section 34 of the Constitution – *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate in another independent and impartial tribunal or forum."* The applicants referred this court to a passage by Lord Denning MR which seems to suggest that even Commissions are included. *".....seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many bodies, even though they are not judicial, nor quasi-judicial, but only administrative"*. – per Conradie AJ in *Grundling v Van Rensburg NO 1984 (4) 680 (W) at 689B*.

[34] As I said above, this seems to suggest that even Commissions must act fairly to ensure that there is no potential prejudice on the rights of the applicants. This view finds support in *Bongoza v Minister of Correctional Services and*

others 2002(6) SA 330(TKH), in which Jafta AJP (as he then was) postulates that, the fact that a commission has the power to set aside contracts does not change it from being a commission to a court of law..... where the rights of other people can be affected by an administrative decision, whether by an administrative tribunal or whether by a court of law there is a duty to act fairly. In support of this dictum, I dare say that the Constitution ordains fairness. What must be noted though is that the requirements of fairness are not rigid, but are flexibly applied to each case. Fairness is embodied in both sections 33 and 34 of the Constitution.

- [35] I have been referred to the case of *Mbebe and others v Chairman, White Commission and Others 2000(7) BCLR 754 (TK) at 77 C-D* in which the court held that the procedures adopted by the first respondent were largely consistent with those employed in an ordinary court of law. It has been held that in practice the applicants were afforded the same rights as those enjoyed by litigants in ordinary civil proceedings. Whether this principle must be extended to all commissions remains a matter that must be developed further by the courts.
- [36] In the first place this was a special commission dealing with promotion disputes concerning transitional arrangements. It is important to mention that the commission was still bound to make recommendations like any other commission. I need to demystify the issue pertaining to the Truth and Reconciliation Commission. This commission was established in terms of an Act of Parliament, Act 34 of 1995. It is not comparable to many other commissions. Further, it was not resolving disputes, but had to submit a report to government. For instance, as was held by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA (CC) para (163)*: “making *the Commissions Act applicable to a commission of enquiry therefore ensures that a commission can call witnesses and obtain the production of documents and objects at pain of punishment. Nevertheless, a commission remains an investigative body whose*

primary responsibility is to report to the President upon its findings. A commission is not generally entitled or empowered to take any action as a result of its findings." Regulations 8 and 9 of the Commission cannot be used to elevate the commission to the status of a court of law, although it is accepted, that the applicants were entitled to legal representation but not at state expense.

[37] Ian Currie et al – The Bill of Rights Handbook 5th ed; at pages 704 – 705 para 31.2 opine that, section 34 applies only when there is a "dispute" that can be resolved by the application of law..... Section 34 does not apply to criminal proceedings. This is because, as the Constitutional Court noted in *S v Pennington 1997 (4) SA 1076 (CC)*; criminal proceedings are not ordinarily referred to as disputes. Apart from the language, the structure of the Bill of Rights is a further indication that it is intended to govern the manner in which criminal proceedings are conducted. Section 35, on the other hand, does not apply to disputes governed by section 34 or the administrative proceedings governed by section 33. In my view the Marikana Commission is not involved in resolving disputes. It will of course make recommendations to the President.

[38] It does not seem to me that there is a dispute on the right to legal representation per se, but whether a claim to have legal representation at state expense must be granted. It also does not seem to me that there is a dispute that persons appearing before a Commission of Enquiry have the right to legal representation. Authorities abound on this topic both domestically and internationally. Section 34(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995 is a good example. There will always be exceptions. It is the prerogative of the executive to decide how to fund commissions.

[39] I part ways with the state respondents when they submit that only the President and his executive have a vested interest in the commission. The

fact that the President has a prerogative not to publish or implement the recommendations of the Commission does not mean that he alone has a vested interest. The applicants and other stake holders have a vested interest.

- [40] However the first and second respondents are correct when they submit that section 9(1) provides for a fundamental right to formal equality before the law. The right to legal representation falls squarely within the parameters of this fundamental right. Section 9(2) provides for a fundamental right to substantive equality and in this context, of pursuing the full and equal enjoyment of all rights and freedoms. The Constitution authorises that, to promote the achievement of equality, legislative and other measures designated to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. They argue that the discretionary power to fund such persons falls within the parameters of the legislator and the executive. The first and second respondents base their argument on the decision in *National Treasury & Others v Opposition to Urban Tolling Alliance and Others 2012(6) SA 223(CC)*, in which the Constitutional Court emphasised that, the duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive government function and domain.
- [41] The seventieth respondent, which supports the relief sought by the applicants, submits that the court does not have to dictate to government how they should effect a programme or try to compel them to do it in a better, less intrusive or more cost effective and efficient manner. They say the separation of powers is not implicated in this matter. I disagree.
- [42] Even before I revert to the National Treasury case, *supra*, I refer to the case of *Legal Aid Board v The State 363/09 (2010) ZASCA 112 (21. 09.2010)*. Ponnann JA cautions us that courts do not control the public purse, nor do they have the power to conscript the legal profession to render services without

reward. It is for other arms of the government to ensure that adequate provision is made for Legal representation at state expense. Courts should be slow to attribute superior wisdom to themselves in respect of matters entrusted to other branches of government.

- [43] In *National Treasury*, supra, the Constitutional Court reminds us that we are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources.
- [44] Although in this case, the court dealt with a temporary restraining order, the principle applied is the same. I need therefore to ask myself not only whether an interim interdict against an authorised state functionary is competent, but rather whether it is constitutionally appropriate to grant the interdict. The funds allocated to the second and third respondents is a result of executive decision about ordering of public resources, over which the government disposes and for which it, and it alone has the public responsibility. The duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive government function domain. I can only grant such an order if there is proof of unlawfulness or fraud or corruption. I do not find any in this case. Therefore, I will not interfere with the power and the prerogative to formulate and implement policy on how to finance public projects and even how the applicants must be funded. That power resides in the exclusive domain of the national executive subject to budgetary appropriations by parliament. The collection and ordering of public resources inevitably call for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order – *National Treasury* supra. There are also other competing interests, such as, food-security, education, health and human-settlement.
- [45] I must mention that the dicta would apply to all the requirements for an interim order. The court is hamstrung by the principle that no mandatory

interdict may be granted unless, there is proof of unlawfulness or fraud or corruption. The first, second and third respondents are acting under a power bestowed on them by law - the Legal Aid Act No 22 of 1969 and the Public Finance Management Act No 1 of 1999 under section 213 of the Constitution. There is a distinction between ordinary interdicts and interdicts against the exercise of power within the camp of government, in which the separation of powers must serve as a precursor to other considerations.

[46] A clear distinction should be drawn between the right, of an accused to be informed of his entitlement to legal representation, more particularly the right to apply to the Legal Aid Board for assistance and to be afforded an opportunity to seek such representation, and the right to obtain Legal assistance at state expense. The common law acknowledges the former and the Constitution the latter - *Hlantlalala v Dyanti NO 1999(2) SACR 541 (SCA)*. I must reiterate that in all fairness, the applicants are entitled to legal representation and they have the right to seek such representation. Whether they are entitled to legal representation at state expense is another kettle of fish. Based on the reasons I have given above I am of the view that they are not entitled thereto.

[47] While the applicants are entitled to the fundamental right to equality under section 9 of the Constitution, there is a need to examine whether any right has been breached and whether discrimination on one or more of the grounds listed in 9(3) is unfair unless it is established that the discrimination is fair. One must approach this matter from a perspective that there is funding for indigent people through the Legal Aid Board. This funding is governed by the Public Finance Management Act No 1 of 1999 – under section 213 of the Constitution. It might be that outside the realm of the applicants there are those who are even poorer, but are not receiving funding. This may therefore be used as a yardstick for fair discrimination. The true facts are that the applicants are compared with those lawyers who are funded by the state respondents. The argument is that, funding that is sanctioned by law is

neither unlawful nor fraudulent. Therefore no direct discrimination exists. The fairness that must be considered on the part of the state is that it has already allocated such financial resources as were approved by Parliament through the Legal Aid Board for legal aid to the indigent in dispute resolution proceedings.

[48] The right to Legal aid is not absolute – it is limited by section 36 of Constitution. Legal aid at state expense is expressly mentioned in sanctions 28 and 35 of the Constitution, if substantial injustice will result. Only persons who are arrested, detained or accused will be catered for in section 35. The applicants do not appear before the commission as arrested and detained persons, they are witnesses. The argument of the applicants on procedural fairness is fundamentally flawed, because section 34 deals with disputes. The Marikana Commission of Enquiry does not determine rights finally – it will submit a report to the President of the country and only then may the applicants' rights be determined finally.

[49] Section 3A of the Legal Aid Act 22 of 1969, provides the mechanisms of the Legal Aid Guide. The said guide has statutory status. In section 3B provision is made for direction for legal aid by court in criminal matters. The court in *Legal Aid Board (Ex parte) v Pretorius and Another 2007 (1) SA 458(SCA)*, used this section to extend legal aid to the accused at state expense. As already stated above, the applicants are not at the commission in their status as accused persons. They are there as witnesses. Moreover, the first applicant (the deponent) has already testified. Providing financial assistance for purposes of legal representation at the Commission, save under exceptional circumstances will constitute conduct ultra-vires the powers of the board as determined in the Legal Aid Guide. In this regard the CEO of the Legal Aid Board exercises his or her discretionary power, subject to the report of such exercise of the discretion to the board at the next regular meeting. Such discretion is regarded as reasonable and justiciable in an open and democratic society based on human dignity, equality and freedom. The fact that the

Legal Aid Act and the Guide are still operative bears testimony that they have not been declared invalid by a court of law.

- [50] The state respondents submit that the applicants cannot proceed directly against them. They are of the view that the applicants could have taken the first, second and third respondents on review because the said respondents took an administrative decision which remains valid until it is set aside by a court of law – section 33 of the Constitution. The applicants submit that they have a right to a forum of their choice.
- [51] In practice, an administrative decision must be taken on review in terms of section 33 of the Constitution. I also agree with the state respondents that the applicants could have utilised the Promotion of Equality and Prevention of Unfair Discrimination Act No 2 of 2000 to access their rights. Several rights require the enactment of Legislation to give effect to the right in question: the right to equality, the right of access to information, and the right to just administrative action, and the right to security of tenure. With respect to all four rights, the envisaged national legislation has been enacted. Other rights envisage, but do not require national Legislation – Woolman et al - Constitutional Law of South Africa 2ed at 3-7 and 3-8.
- [52] It was held in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others 2004(4) SA 490 CC*, that where legislation gives effect to a constitutional right, it is not permissible to invoke the right directly. Instead, recourse must be had, in the first instance, to the statute giving effect to the right. Thus where reliance is placed upon the right to just administrative action, a party is obliged to bring the case under the Promotion of Administrative Act, 3 of 2000. If the party contends that this Act does not go far enough to give effect to the fundamental right, only then may it invoke section 33 of the Constitution to challenge the constitutionality of PAJA.

- [53] In this case the applicants would have been entitled to challenge certain provisions of the Legal Aid Act 22 of 1969. Indeed, the applicants refer to section 172(1)(a) of the Constitution which is an indication that they wish to challenge certain provisions of the Act. However the applicants insist that only Part A of the application must be dealt with. This prevents the court from exercising its mandate in terms of section 172(1)(a) of the Constitution, because the court can only do so in Part B of the application. As matters stand, this court is not empowered to change the policy of the Legal Aid. It can only do so in terms of section 172 of the Constitution if it finds that any law or conduct is inconsistent with the Constitution and declares that it is invalid to the extent of its inconsistency. I have already said that the issue concerning constitutional invalidity resides in Part B of this application, where a clear right will be alleged.
- [54] If the order is granted, it will have an effect of a final order. The clock can never be turned back. It will be difficult to get the money back in case of an impropriety or misconduct. Looking at the substance rather than form the court concludes that the relief sought is final and cannot be granted – *BHT Water Treatment (Pty) Ltd v Leslie and Another 1993 (1) SA 47(W)*. The relief sought in the amended notice of motion is not a preservation or restoration of the status quo. It will affect the final determination of the main issue, because the existence of such a right is a matter of law whilst the presence thereof, depends on evidence. An interim interdict is by definition, a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination – *National Gambling Board v Premier, Kwazulu – Natal 2002(2) SA 715 (CC)*. I support the submission by the state respondents that the same interdict will affect final determination.
- [55] I am with the state respondents that the applicants do not address the issue of interim funding in their founding affidavit. As a result, the state

respondents were deprived the opportunity of investigating the consequences and potential or actual prejudice regarding such relief. Since the applicants have changed tack, and now argue on the basis of an amended notice of motion, there is no basis for irreparable harm and no alternative remedy. The state respondents as a result could not file further affidavits to strengthen their case. They were ambushed. The Commission is investigative and will merely make recommendations. There will be no harm caused to the applicants. The balance of convenience favours the continuance of the investigation by the Commission, which in turn favours the President and the public at large. The Commission determines its own procedures. The alternative available to the applicants is to approach the Commission for a postponement. The Commission is free to decide what route to take. This court cannot direct the Commission what to do. I am encouraged by the endeavours the state respondents are making to extend funding to all persons who will appear in future Commissions. There is nothing that prevents parties from settling the matter.

[56] All the respondents do not ask for costs. In the circumstances the application is dismissed.

[57] I make the following order:

- (a) The application is urgent.
- (b) The class action is certified.
- (c) The main application in Part A is dismissed.
- (d) There is no order as to costs.


TJ RAULINGA

**JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT**

For the Applicants : Adv D Mpofu
 : Adv M Lekone

Instructed by : Maluleka Msimang & Associates

For 1st & 2nd Respondents : Adv M M Oosthuizen SC
 : Adv HOR Modisa

Instructed by : State Attorney

For 3rd Respondents : Adv L Van der Merwe SC
 : Adv Tsatsi

Instructed by : Legal Aid South Africa

For 4th Respondent : Adv C Wesley
 : Marikana Commission of enquiry

For 5th Respondents : Adv I M Semanya SC
 : Adv Mathibedi SC

Instructed by : State Attorney

For 6th Respondent : Adv K H Shoji

Instructed by : Cliffe Dekker Hofmeyr Inc

For 7th & 8th Respondents : Adv T Mosikill

For 11th Respondent : Adv T Ntsonkota

Instructed by : Cheadle Thompson & Hayson Inc

For 16th Respondent : Adv M le Roux

For 17th Respondent : Adv G Bozos SC
 : Adv H Varney

Instructed by : Legal Resource Centre

HEARD ON: 11 -13 July 2013
DATE OF JUDGMENT: 18 July 2013