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FILE NUMBER IS IN THE NORTH GAUTENG HIGH COURT, PRETORIA
 (THE REPUBLIC OF SOUTH AFRICA)
 (1) REMOVABLE: YES/NO.
 (2) OF INTEREST TO OTHER JUDGES: YES/NO.
 (3) REVISED: ☒
 DATE 16/08/2013 SIGNATURE [Signature]

CASE NUMBER: 40732/13

16
20 / 8 / 2013

In the matter between:

LIEUTENANT SHITUMO SOLOMON BALOYI

APPLICANT

and

NATIONAL COMMISSIONER OF THE SOUTH

AFRICAN POLICE SERVICES-GENERAL MANGWASHI

VICTORIA PHIYEGA

FIRST RESPONDENT

MINISTER OF POLICE IN SOUTH AFRICA

SECOND RESPONDENT

MARIKANA COMMISSION OF ENQUIRY

THIRD RESPONDENT

PARTIES TO THE MARIKANA COMMISSION OF ENQUIRY

FOURTH TO NINETH

RESPONDENTS

JUDGMENT

RAULINGA J.

[1] This is an urgent application in which the applicant seeks an order:

- 1.1 Declaring the decision of the first respondent not to fund separate legal representation for him at the Marikana Commission of Enquiry, as unlawful, invalid, unethical and unconstitutional.
 - 1.2 Interdicting the first and second respondents from appointing the SAPS legal team to represent him at the Commission.
 - 1.3 That the first and second respondents be ordered to pay all the applicants necessary costs including legal costs, incurred and to be incurred, in representing him at the Commission.
- [2] In essence, the applicant does not only assert a right to legal representation, funded by SAPS, but also the right to have representatives of his choice funded by the SAPS.
- [3] The events in this matter took place between the 9 and 16 August 2012. On 16 August 2012 police shot and killed 34 mine protesters at Marikana Lonmin Mine. Prior to that incident a number of other people were injured or killed bringing the number of fatalities to 44 people killed. Seventy protesters were injured and approximately 272 protesters were arrested.
- [4] On the 13 August 2012, as a response to a volatile mine strike, the applicant and other police officers were deployed to Rustenburg, Marikana, in the North West Province. While patrolling the area under the command of Major General William Mpembe, the police confronted a group of protesters who were marching and armed with dangerous weapons along the railway line. The Commander, General William Mpembe requested the protesters to surrender their weapons to the police. The armed protesters breached the police line and even an attempt to disperse the protesters could not deter them. The protesters brutally attacked and stabbed the applicant. Two other police officers, Warrant Officer Mosese and Warrant Officer Lepaaku were shot and hacked to death by the armed protesters.
- [5] After the Commission was established, the first and second respondents appointed a team of three senior counsel and private attorneys as legal representatives to represent them at the Commission of Enquiry. The first respondent further appointed another team of attorneys and a junior counsel

to represent the family of the late Warrant Officer Mosese who was hacked to death on 13 August 2012. The second respondent further appointed another senior counsel and a junior counsel on a "watching brief".

- [6] The applicant alleges that the first and second respondents informed him that he was a "risky and conflicted witness" to be called on behalf of the first and second respondents in the Commission. As a consequence, he was never consulted by the legal representatives of the first and second respondents to hear his version of the incident of the 13 August 2012. He was therefore, never included in the initial list of witnesses to be called to testify, on behalf of the first respondent in the Commission.
- [7] The Police and Prisons Civil Right Union (Popcru) of which the applicant is a member, intervened and appointed a firm of attorneys and a counsel to represent the applicant and the family of the late Warrant Officer Lepaaku. The applicant's legal representatives were funded by Popcru since October 2012 until 31 May 2013.
- [8] As matters stand, the first respondent has already testified before the Commission. She was led and assisted by her legal representatives and cross-examined by parties in the Commission and re-examined by her legal representatives. It is also intimated by the applicant that he is willing to testify before the Commission about the incident of the 13 August 2012, and has engaged and instructed his legal representatives to assist since the commencement of the Commission.
- [9] This matter must be decided on the backdrop that the Commission is an investigative fact finding body. Its mandate is to report and to make recommendations. The Commission promulgated its own regulations in terms of the Commissions Act 8 of 1947. Regulation 9(3) provides that a witness testifying before the Commission can only be cross-examined if the chairperson permits such examination because the chairperson deems it necessary in the interests of the functions of the Commission. In *Bongazo v Minister of Correctional Services and others* 2002(6) SA 330(TKH) para 18,

the court held that this is a distinguishing feature of the functions of the commissions and constituted *"a fundamental distinction between the commission and a court of law wherein the right to cross-examine witnesses does not depend on permission by the presiding officer. I agree with counsel for the first respondent that a commission of enquiry deals with matters of public interest and not individual witnesses"*.

"An enquiry before a Commission is not a proceeding in which there are interested individual parties who are entitled to a hearing and a verdict of the evidence. A commission of enquiry deal with matters of public interests, frequently matters which have already been publicly ventilated"- S v Sparks 1980(3) SA 952(T).

- [10] Regulation 8 provides that any person who appears before the Commission may be assisted by an attorney or advocate. Regulation 8 does not give the applicant the right to appear as witness. It is a matter entirely within the discretion of the Commission as to whether the applicant is called as a witness or not. Regulation 8 does not create a right for the applicant to be represented by an attorney or counsel at the expense of the State in the instant case. The assertion that the applicant will suffer irreparable harm does not arise.
- [11] In the case of Mzoxolo Magidiwana and others v The President of the Republic of South Africa and others, case no 37904/2013, which was consolidated with this case, I intimated that the relief sought by the applicants can be justified by a sound argument on constitutional and statutory rights. Such an argument can be premised on 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 sections 34 and 35 of the Constitution, but also as a right recognised in the regulations of the Commission and in the actual conduct of the proceedings. 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 "equity before the law" whilst, in section 34 context, it related to the concept of "equality of arms".

[12] I must reiterate that it does not seem to me that there is a dispute on the applicant's right to legal representation per se, but whether a claim to have legal representation at state expense and that legal representation must be of his own choice, 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. The distinction though, between these two cases is that in the instant case the applicant is entitled to legal representation at the state expense i.e as funded by SAPS. I do not agree that applicant is entitled to a legal representative of his choice, as the applicant claims "a right to be represented by a non-conflict legal representative". It can be discerned from the submissions of the first respondent that there is no intention by the first respondent to appoint any legal team to represent the applicant contrary to his wishes and without his agreement.

[13] While one agrees that fairness applies in this case, one must also examine whether any right under section 9 of the Constitution has been breached and whether discrimination on one or more of the grounds listed in 9(3) of the Constitution, is unfair and whether there is discrimination at all. The question is whether the applicant can have a legal representative of his own choice, at the expense of the South African Police Service.

[14] In the first place, the applicant cannot access his right on the bases of section 34 and secondly on section 35 of the Constitution which provides that:

"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."

This was confirmed in *S v Pennington 1997(4) SA 1076 (CC)* in which the court noted that, section 34 does not apply to criminal proceedings since criminal proceedings are not ordinarily referred to as disputes. Section 35, on the other hand, does not apply to disputes governed by section 34 or the administrative proceedings governed by section 33. The Marikana Commission

is not involved in resolving disputes. Further, in the event that the applicant is called as a witness, he will appear in the Commission as such and not as an arrested or accused person – section 35 does not cover him.

[15] Section 3(4) of the Commission Act supra provides that:

“any person who has been summoned to attend any sitting of a commission as a witness or who has given evidence before a commission shall be entitled to the same witness fee from public funds, as if he had been summoned to attend or had given evidence at a criminal trial in a superior court held at the place of such seating”.

The Act does not provide for payment to or for witness by the SAPS. The Commission Act does not bestow on the applicant a right to the relief claimed.

[16] It appears to me that the applicant in his notice of motion seeks a review of the decision of the first respondent without complying with the requirements of PAJA. The application must fail on that ground alone.

[17] The applicant contends that he was informed by the first and second respondent that he was a “risky and conflicted witness” and as a consequence he was not consulted by the legal representatives of the first and the second respondents. In the first place, the applicant chose to be represented by the legal representatives funded by Popcru who in turn had consulted with him. In the second place, there is no obligation on the first and second respondents to consult with him. The Commission is the one that has a prerogative to call witnesses. The argument of the applicant cannot stand, because the first respondent was prepared to assign a legal representative of its choice, but the applicant instead wants a legal representative of his own choice.

[18] I wish to revert to the issue of joint-representation, which gave rise to the objection by the applicant that, this will amount to a conflict of interest on the part of the legal representatives of the first and second respondents. On the 21 July 2013, the first respondent directed a letter to the attorneys of the applicant with an offer that the legal team led by Advocate Semanya SC,

should represent the applicant. The applicant rejected this offer on the basis that the legal representative must render a conflict free legal representation. The applicant also claims that he will suffer irreparable harm and prejudice since the issue of perjury may ensue.

- [19] On page 183 of the record, paragraphs 23.11 to 23.14 the first respondent in her answering affidavit gives guarantee of the absence of conflict of interest and any possibility of irreparable harm or prejudice that maybe suffered by the applicant should he be called as a witness. In paragraph 47 page 208 of the record, in reply to paragraphs 23.14 and 23.15, the applicant is silent on the aspect of conflict. He simply noted the content thereof. The first respondent emphasises that "*no conflict of interest will ensue if the applicant is represented by Advocate Masevhe who is representing other members of the South African Police Service*".
- [20] Contrary to the assertions made by the applicant that he was never consulted by the legal representatives of the first respondent, there is evidence that the evidence leaders (who are not necessarily representatives of the first respondent) consulted with the applicant at one stage or another. It would appear that the applicant had no interest whatsoever on the outcome of the consultation. An altercation arose which culminated in the attorneys of the applicant withdrawing certain assertions made in an earlier correspondence. This was apparently done on the 8 July 2013. It is in this correspondence that the allegations about the conflict of interest were withdrawn.
- [21] Based on the above reasoning, I have reached a conclusion, that while the applicant is entitled to legal representation funded by the first respondent, he is however not entitled to a legal representative of his choice. The SAPS is not bound by the applicant's choice. In the result the application must fail.
- [22] I make the following order:

- (a) The application is dismissed.

(b) There is no order as to costs.

A handwritten signature in black ink, appearing to read 'TJ Raulinga', with a horizontal line drawn underneath it.

TJ RAULINGA

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