

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 37904/2013

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED.
	2013.10.14.
	DATE
	
	SIGNATURE

In the matter between:

MZOXOLO MAGIDIWANA

First Applicant

INJURED AND ARRESTED PERSONS

Second to Further Applicants/Class

Action Participants

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second Respondent

LEGAL AID SOUTH AFRICA

Third Respondent

THE MARIKANA COMMISSION OF ENQUIRY

Fourth Respondent

**PARTIES TO THE MARIKANA COMMISSION
OF ENQUIRY**

Fifth to Eighteenth Respondents

J U D G M E N T

MAKGOKA, J:

[1] This application concerns the right of the applicants to state-funded legal representation in proceedings before the fourth respondent, a commission of inquiry established by the first respondent (the President). The first applicant acts in his personal capacity and as a member of a class of people¹ known as 'the injured and arrested persons', consisting of approximately 300 survivors of a shooting incident on 16 August 2012 in Marikana, Northwest Province. The latter group is cited as 'the second to further applicants'. They were either injured during that incident or subsequently arrested and prosecuted in various magistrate courts in the Northwest Province.

[2] This is part B of the application. Part A, which was brought on urgency, was disposed of in this court, where Raulinga J, on 30 July 2013, dismissed the applicants' relief for interim funding of their legal representation before the commission. An application for leave to appeal against that finding was dismissed by the Constitutional Court on 19 August 2013.² In their amended notice of motion,³ the applicants seek an order setting aside as unconstitutional, the respective decisions taken by the President, the second respondent (the Minister) and the third respondent (Legal Aid SA), to refuse them legal aid in the proceedings of the commission. They also seek an order compelling such respondents to provide them with legal aid.

[3] The relief sought by the applicants is opposed by the President and the Minister (whom I shall collectively refer to as 'the State') and Legal Aid SA. The latter is a statutory body whose function is described in s 3 of the Legal Aid Act 22 of 1969 as

¹ The class action has been certified in terms of s 38 of the Constitution by this court during the hearing of part A of the application. See *Magidiwana and Others v President of the Republic of South Africa and Others (No. 1)* [2013] ZAGPPHC 220 para 27

² *Magidiwana and Others v President of the Republic of South Africa and Others (No. 2)* [2013] ZACC 27.

³ The original notice of motion was amended without objection during the hearing of part A.

being to 'render or make available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution.' Where I refer to the President, the Minister and Legal Aid SA collectively, I use 'the opposing respondents'. I shall refer to the commission as such, or the Marikana commission, depending on the context.

[4] The commission does not take part in these proceedings, and neither do the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and eighteenth respondents, who are parties admitted as such in the commission. The fifth respondent (South African Police Service) and the sixth respondent (Lonmin) have each filed a notice to abide the decision of this court. Lonmin's notice was accompanied by a short answering affidavit, joining issue with the first applicant on the factual correctness of some of the contents of the latter's affidavit.

[5] The seventh respondent comprises 36 families of the deceased miners (families of the deceased). The eighth respondent is a labour union, Association of Mining and Construction Union (AMCU). The sixteenth respondent is the South African Human Rights Commission (HRC). The seventeenth respondent⁴ is the family of the late John Kutiwano Ledingoane⁵ (Ledingoane family). All of the respondents mentioned in this paragraph make common cause with the applicants and support the relief sought. I refer to these respondents collectively as 'the supporting respondents'.

⁴ Legal Resources Centre has been erroneously cited as the seventeenth respondent. It is not a party to the commission. It is a public interest law firm that represents the Ledingoane family in phase 1 of the inquiry and the Bench Marks Foundation, a non-governmental organisation, in phase 2.

⁵ Mr. Ledingoane was one of the striking and protesting miners shot dead by the police on 16 August 2012. The Ledingoane family was a party to the commission until they withdrew pending the resolution of the applicants' funding issue. The family withdrew in solidarity with the applicants.

Preliminary issues - application for a further amendment

[6] In terms of a notice of amendment dated 5 September 2013, the applicants sought an amendment to their amended notice of motion, which entailed an alternative prayer, in the event it is found that Legal Aid SA is not authorised to provide funding in commissions of inquiry, declaring the Legal Aid Act 22 of 1969, to that extent, unconstitutional and invalid. The applicants also sought to include a prayer for the reviewing and setting aside the impugned decisions of the opposing respondents.

[7] The opposing respondents initially objected to both the proposed amendments. At the commencement of the hearing, I was informed from the bar that the amendment concerning the constitutionality of the Legal Aid Act was no longer in issue, as Legal Aid SA had conceded that there is no impediment in the Act to funding legal representation before commissions of inquiry. As a result, this part of the proposed amendment was no longer pursued by the applicants. Legal Aid SA also abandoned its objection to the 'review' amendment.

[8] The State, however, persisted with its objection to that amendment. In the light of the view I take of the matter, and given Legal Aid SA's abandonment of its opposition to the amendment, it is not necessary to consider the matter in any detail, save to state briefly, the general principles, which are trite and well-settled. The general approach when a court considers an amendment is that an amendment will readily be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, in other words, unless the parties cannot be put back for the

purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.⁶

[9] A court considering an application for an amendment has discretion whether or not to grant it, which discretion must be exercised judiciously. The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between the parties, so that justice may be done.⁷ I am satisfied, in the circumstances, that the applicants' proposed amendment would not result in prejudice to any of the respondents.

[10] In any event, part B of the application has always been a review application in substance, as prayer 1 of the amended notice of motion in part B seeks to declare the Legal Aid SA's decision unlawful and invalid. It follows that should I come to that conclusion, the result would be the reviewing and setting aside the decision. In these circumstances, substance must triumph over form.⁸ I therefore conclude that the amendment should be granted.

Factual background and establishment of the commission

[11] The events giving rise to the establishment of the commission have been widely reported in local and foreign media, both in print and electronic. Although there is no common understanding, yet, of what took place, for purposes of this application, and without pre-empting the findings of the commission, it can broadly be stated that the events were triggered by an unprotected strike for wage increases involving mainly employees of Lonmin Platinum Mine in Marikana, near Rustenburg,

⁶ *Moolman v Estate Moolman* 1927 CPD 27 at 29.

⁷ *Affordable Medicines Trust v Minister of Health* 2006 (3) 247 (CC) at 261C).

⁸ See *Municipal Manager: Quakeni Local Municipality and Another v FV General Trading* CC 2010 (1) SA 356 (SCA) para 26.

between 9 and 16 August 2012. On 12 and 13 August 2012, respectively, 10 people, including mine workers, mine security officers and police officers, were killed.

[12] On 16 August 2012, during a police operation, 34 striking and protesting miners were shot and killed by SAPS. More than 78 people were injured, and 259 were arrested, and subsequently charged criminally. The tragic events of those days, especially the one on 16 August 2013, captured national and international headlines. On 26 August 2012, the President, acting in terms of s 84(2)(f) of the Constitution of the Republic of South Africa Act, 108 of 1996 (the Constitution), proclaimed the establishment of a commission 'to investigate matters of public, national and international concern arising out of the tragic incidents at Lonmin Mine in Marikana.' The Commissions Act 8 of 1947 was made applicable to the commission.

[13] The terms of reference enjoin the commission to 'inquire into, make findings, report on and make recommendations' concerning the conduct of various role-players, namely Lonmin; the police; trade union Association of Mining and Construction Union (AMCU) and trade union National Union of Mineworkers (NUM); the role played by the Department of Mineral Resources or any other government agency, as well as 'the conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict which may have given rise to the tragic incident.'

Composition of the commission and its work

[14] The commission is chaired by a retired Judge of Appeal, assisted by two senior advocates as commissioners. The commission has since appointed seven evidence leaders, comprising 4 senior and 3 junior advocates. The sitting of the commission commenced on 1 October 2012. It was supposed to conclude its work by 31 January

2013. However, its duration has been extended twice already, and it is now expected to conclude its business on 31 October 2013. The commission has divided its work into two phases. In broad terms, the first phase deals with the events which took place from 11 to 16 August 2012, and the second phase is meant to deal with underlying causes of those events.

[15] According to a letter dated 2 July 2013 by the commission's secretary to the registrar of this court, as of the date of launching of this application, the commission had dealt only with the first phase, and has conducted *in loco* inspections on three days. The transcript of the commission's hearings is reported to run to 11816 pages, with approximately 340 exhibits received into evidence. A substantial number of witnesses are still to testify in the first phase.

The applicants' funding issues

[16] The applicants received funding from Raith Foundation, a private South African foundation for over R2.6 million for the period 1 October - 31 December 2012. On 16 March 2013 the foundation approved in principle, an additional grant of R2 million in respect of the legal costs of the applicants for the period 18 March – 31 May 2012. Due to certain issues between the legal representatives of the applicants and the foundation that need further discussion and finalisation, no funding agreement has yet been concluded between the parties, nor have the funds been disbursed.

[17] The applicants' first request to the State for legal funding was made through their attorneys of record to the Minister on 10 October 2012. On 15 October 2012 they made a similar application to Legal Aid SA, which promptly responded on 18 October 2012, and pointed out that the Legal Aid guide of 2011/2012 made no provision for the funding of proceedings before commissions of inquiry. However,

Legal Aid SA disclosed that it had already decided to fund legal representation for the families of the miners who were killed by the police.

[18] This was done by its chief executive officer (CEO) pursuant to clause 10.2.3 of the 2012 Legal Aid guide, which gives her a general discretion to waive any condition, procedure, or policy set out in the guide, as long as this is within the overall authority of the Act. The discretion provides for any issue that is not covered in the guide. The all-inclusive budget allocated by Legal Aid SA to the families would cover the cost of a senior counsel and two junior counsel, to the maximum of R1 219 800.00.

[19] The reason to fund only the legal representation of the families of the deceased miners was stated by Legal Aid SA to be the families' 'substantial, proximate and material interest in the outcome of the inquiry.' In respect of the applicants, it was concluded, in light of the considerations stated above, and 'severe budgetary constraints' that Legal Aid SA was not in a position to provide the applicants with legal aid funding. The letter from Legal Aid SA was met by a response from the applicants' attorneys, contesting the basis on which it was implied that the applicants did not have a 'substantial, proximate and material interest' in the outcome of the commission, and the logic of distinguishing between the injured and the deceased miners.

[20] The Minister, through the State Attorney, responded on 14 March 2013, as follows:

- '2. After careful consideration of your request, we find no legal framework through which government can contribute to the legal expenses of any of the parties who participate in the commission of inquiry.'
3. The Legal Aid Board of South Africa (sic) is the only existing framework through

which the State can provide legal assistance in legal proceedings to persons who meet the requirement (sic) for such an assistance (sic). As you are aware, the Legal Aid system is intended for criminal proceedings and certain civil proceedings before court and do not (sic) include representation before commission of inquiry.

4. Our client (the Minister) has advised that there are considerations to effect amendments to the Commissions Act No. 8 of 1947 with a view to providing a legal basis for legal assistance to be given (to) parties who appear before Commissions of Inquiry where this is desirable. As is the position currently, legal assistance may only be provided to a person who appears before a Commission as a witness.'

The issues

[21] From the outset, I must mention that it is not in dispute that there is a right to legal representation before the commission. Regulation 8 of the commission's own regulations (proclamation No. 59, 2012) permits legal representation but is silent on the question of legal assistance. However, the fact that the right to legal assistance has not been specifically provided for, does not mean it is not permissible. The State however, asserts that the applicants do not have a constitutional right to legal representation in the proceedings before the commission to be provided at state expense.

[22] Thus, the primary and crisp issue for determination is whether the applicants are entitled to state-funded legal representation for their participation in the proceedings of the commission. Flowing from that, two constitutional rights are contended by the applicants. First, the right to equality in terms of s 9 of the Constitution, and the right to access to the courts (s 34). The applicants argue that these two rights have been infringed by the conduct of the opposing respondents in refusing to afford them state-funded legal representation. Against Legal Aid SA, it is

further contended that its differentiation between the deceased and injured miners, considered in the light of s 9, is irrational.

[23] Before I consider the contentions of the parties, I need to make two preliminary observations, which set the tone for this judgment. The first concerns the remarks in the judgment of the Constitutional Court refusing the applicants' leave to appeal. The second relates to the necessity for the applicants to fully and meaningfully participate in the proceedings of the commission.

Constitutional Court judgment

[24] In my view, the Constitutional Court lit the path regarding the framework within which this matter should be considered, in its customarily lucid judgment refusing leave to appeal:⁹

'[15] It may be that it would be commendable and fairer to the applicants that they be afforded legal representation at state expense in circumstances where state organs are given these privileges and where mining corporations are able to afford the huge legal fees involved. The power to appoint a commission of inquiry is mandated by the Constitution. It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those affected need to know the truth: the country at large does, too. So ordinarily, a functionary setting up a commission has to ensure an adequate opportunity to all who should be heard by it. Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised.

[16] This means that unfairness may arise when adequate legal representation is not afforded. But this does not mean that courts have the power to order the executive branch of government on how to deploy state resources. And whether the desirable

⁹ *Magidiwana v President of the Republic of South Africa & Others* (No. 2) paras 15 and 16.

objective of 'equality of arms' before a commission translates into a right to legal representation that must be provided at state expense is a contestable issue. A consideration that comes into play is that it is the object of the Legal Aid Act to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution. Its provisions have not been challenged as constitutionally invalid, nor has the refusal by Legal Aid South Africa to grant the applicants legal aid been challenged on review.'

(Footnotes omitted)

Necessity of the applicants' participation

[25] All parties seem to agree that the applicants' participation is necessary, but differ on what the nature and content of such participation should be. It can safely be accepted from the outset, however, that the absence of legal representation, effectively means the exclusion of the applicants in the proceedings of the commission. In fact, the applicants have withdrawn their participation, following the withdrawal of their legal representatives. It is common cause, and has not been seriously disputed that the applicants cannot afford legal representation, due, entirely, to their poverty.

Is s 34 of the Constitution implicated?

[26] I now consider the parties' contentions. Section 34 provides for the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The purpose of the section is—

'to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the Judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other *fora* which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee', for it prevents legislatures, at whatever

level, from turning themselves by acts of legerdemain into 'courts'. One recent notorious example of this was the High Court of Parliament Act. By constitutionalising the requirements of independence and impartiality the section places the *nature* of the courts or other adjudicating *fora* beyond debate . . .¹⁰

(Footnote omitted.)

In *Zondi v MEC for Traditional and Local Government Affairs and Others*¹¹ held that s 34 'is an express constitutional recognition of the importance of the fair resolution of 'social conflicts' by impartial and independent institutions.'

[27] The State argues that the 'dispute' referred to in the section must be justiciable and its adjudication must bring an end to the dispute. It is contended that there is no such dispute to be resolved by the commission, and neither does it legally 'determine' rights, nor can it impose any kind of liability. The commission is merely investigative in nature, with a view to make recommendations to the President. Counsel for the State submitted for that reason, that the commission is neither a quasi-judicial tribunal nor a court of law, and no finding of fact or recommendation by the commission can affect or even threaten any of the rights of the individual applicants, which rights will remain intact.

[28] On this premise, it was contended that s 34 does not find application in the present case. Counsel for the State placed reliance for this argument, on, among others, *Islamic Unity Convention v Minister of Telecommunications*.¹² There, the Constitutional Court found it unnecessary to express a firm view on the applicability of s 34 to the proceedings before the Broadcasting Monitoring Complaints Committee (BMCC), established under the Independent Broadcasting Authority Act,

¹⁰ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) para 105.

¹¹ 2005 (3) SA 589 (CC); 2005 (4) BCLR para 61

¹² 2008 (3) SA 383 (CC) para 55

153 of 1993. The court expressed doubt whether the section was implicated in that matter. This was based on the fact that even if a complaint before it could be characterised as a 'dispute', the commission did not resolve it. The BMCC's function of investigating and adjudicating the complaint was but the first of a two-stage process. It was a higher authority, namely the Independent Communications Authority of South Africa (ICASA) which took the final decision.

[29] Counsel further relied on the minority judgments in *Sidumo v Rustenburg Platinum Mines Ltd*,¹³ where Ngcobo and O' Regan JJ concluded that the Commission for Conciliation, Mediation and Arbitration (CCMA) is an independent and impartial tribunal within the contemplation of s 34, since its task was 'adjudicative in character'. Obviously, reliance on the minority judgments was sought to distinguish it from the Marikana commission, which, it was contended, did not have that attribute.

[30] The State also criticised the applicants' reliance on *Mbebe and Others v Chairman, White Commission and Others*¹⁴ and *Bongoza v Minister of Correctional Service and Others*¹⁵. In *Mbebe*, a commission appointed by the President in terms of s 236 of the interim constitution, had found that the promotions of the applicants, who had been members of the Transkeian police force, just before the advent of democracy, had been irregular and either set them aside or altered them. The applicants sought to have the findings of the commission set aside for various

¹³ 2008 (2) SA 24 (CC).

¹⁴ 2000 (7) BCLR 754 (Tk).

¹⁵ 2002 (6) SA 330 (TKH).

reasons, among which, the constitutionality of s 236 as being inconsistent with s 34 with the final constitution.¹⁶

[31] In rejecting this argument, the court observed, among others, that the procedures adopted in that commission were largely consistent with those employed in an ordinary court of law. The applicants had been given the right to cross-examine the witnesses, the right to give evidence and to call witnesses. As such, the applicants were afforded the same rights as those enjoyed by a litigant in ordinary civil proceedings. The court concluded on that basis, that the commission was compliant with s 34.

[32] In *Bongoza* the court reached the same conclusion in respect of the same commission of inquiry as that considered in *Mbebe*. The court confirmed that the rules of evidence applicable to the commission differed from a court of law in that the commission could have regard to a wider range of evidence, such as hearsay, and was not obliged to allow cross-examination of witnesses. The court further confirmed that the requirements of fairness are flexible. Though not a court of law, that commission qualified as an 'independent and impartial hearing'.

[33] Counsel for the State sought to distinguish the White Commission (the subject in both *Mbebe* and *Bongoza*) on the basis that that commission exercised 'judicial' function in that it had the powers to finally determine the rights of the parties. I agree. But, as I demonstrate below, the fact that the Marikana commission only investigates and reports, possibly with recommendations, is not in and of itself, the reason for s 34's non-applicability. This is also the context in which counsel relied on the *dicta*

¹⁶ Item 24 of schedule 6 to the final constitution, which deals with transitional arrangements, preserved s 236(6) of the interim constitution 'subject to consistency with the new Constitution'.

in *Islamic Unity Convention* and the minority judgments in *Sidumo*, to press their central argument that the findings and recommendations of the commission would not affect or even threaten any of the rights of the applicants.

[34] That proposition was not accepted in *Grundling v Van Rensburg NO*¹⁷, where Conradie AJ recognised the potential prejudice to rights as a basis for requiring fairness in commission proceedings. *Du Preez and Another v Truth and Reconciliation Commission*,¹⁸ concerned the activities of a committee on human rights violations of the Truth and Reconciliation Commission (TRC) whose function was to undertake a fact-finding inquiry, and submit a report to the TRC on its activities and findings. The report was to include, among others, measures on how to prevent violation of human rights. Corbett CJ held that because of the potential prejudice flowing from the allegations which could be made at the hearing and from the findings and recommendations of the committee, the committee had a duty to treat the people who could be so implicated, fairly. At 543I-544B, the Chief Justice said:

‘The committee is charged with the duty of establishing, inter alia, whether such violations (of human rights) took place and the identity of persons involved therein. The committee’s findings in this regard and its report to the commission may accuse or condemn persons in the position of the appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly’

[35] The Chief Justice cited with approval a passage by Lord Denning MR in the English case of *Re Pergamon Press Ltd*,¹⁹ which was concerned with procedures in an investigative inquiry conducted by inspectors in terms of the Companies Act. The

¹⁷ 1984 (4) SA 680 (W) at 689B.

¹⁸ 1997 (3) SA 204 (A).

¹⁹ [1970] 3 All ER 535 (CA)

directors of the company concerned claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a court of law. Lord Denning MR said of this (at 539a-f):

'It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that counsel for the inspectors went too far on the other ... he did suggest that in point of law, the inspectors were not bound by the rules of natural justice ... He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply I cannot accept (counsel for the inspectors') submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings ... They are not quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: ... They do not even decide whether there is a *prima facie* case.

But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. The report may expose persons to criminal prosecutions or to civil actions...'

[36] Of course, all of these were in the context of procedural fairness inside the proceedings of committees or commissions, which is not the case in the present application. However, I can see no reason why they should not be applicable with equal force, to a case such as the present, where, similarly, the rights of persons, including those of the applicants, are potentially in danger of infringement. The common denominator is the recognition that, committees and commission like the Marikana commission, have the power to make far-reaching findings and recommendations, which carry potential prejudice to rights of individuals and

corporations, the bearers of which are entitled to protect, even at that investigative stage. In *LAWSA* vol. 2 part 2 para 169, the position is neatly summed up as follows:

'The argument that the recommendations of a commission do not affect existing rights because they decide nothing in themselves has been rejected. It is now accepted that serious repercussions can flow from the report of a commission. For example, very damaging findings of fact could be made in respect of people who are named. In addition, a commission's report may accuse or condemn persons who may then be subject to civil or criminal proceedings. The whole process, it has been held, is potentially prejudicial to a person's rights of personality'

[37] In the context of the present application, it is of no consequence that the commission is not of a judicial or quasi-judicial nature. That does not, in my view, place the Commission outside the scope of s.34 of the Constitution. At conceptual level, the general proposition that the proceedings of commissions of inquiry fall outside the scope of s 34 at the outset, is, to my mind, an over-simplification of a complex situation involving constitutional rights and a distinct possibility of those rights being adversely affected by the outcome of the commission. A preferable view is that the right to legal representation at commissions is not an absolute one, but depends on the context. Counsel for Ledingoane family asserted that the right arises in the following circumstances:

- (a) when the nature and type of inquiry demands that some or all interested parties be legally represented;
- (b) when the interests of justice and the rule of law would be undermined by a failure to uphold the right;
- (c) when the constitutional rights of parties or witnesses appearing before a commission are implicated or potentially threatened.

[38] I find the above proposition both attractive and persuasive as a basis for a general framework. In each commission regard would be had to the context-specific factors of the commission to determine whether s 34 finds application. It is therefore not feasible, nor desirable, to lay down an inflexible list of such considerations. For the present purposes I take the following into consideration:

- (a) substantial and direct interest of the applicants in the outcome of the commission;
- (b) the vulnerability of the applicants as participants in the proceedings of the commission;
- (c) the complexity of the proceedings and the capacity of the applicants to represent themselves;
- (d) the procedures adopted by the commission;
- (e) Equality of arms
- (f) the potential consequences of the findings and recommendations of the commission for the applicants.

[39] I briefly consider the above issues, in turn.

The applicants' interests in the outcome of the commission

[40] Apart from seeking the truth as to how their colleagues died, the applicants have a direct and substantial interest in the outcome of the commission. The commission's investigation is not limited to the 44 deaths that occurred during the week of 9 to 16 August 2012, but extends to the 70 persons who were injured and approximately 250 persons who were arrested on 16 August 2012. Those are the applicants. In this regard, it is well noting that in its ruling on the scope of the first phase of its investigation, the commission has decided to include:

'An investigation into whether participants in the crowd of protestors at Wonderkop on 16 August 2012 should be held criminally liable for the death of 34 of their fellow protestors and/or in respect of the alleged attempted murder or assault of SAPS members at the scene; and

The direct causes of, and legal responsibility of any party for the deaths and injuries to any persons and damage to property during the period 9 to 16 August 2012.'

[41] The reference to 'participants in the crowd of protestors', is to the applicants. Regard being had to the above, it admits of no debate of the applicants' direct and substantial interest in the outcome of the commission. That interest is two-fold. Firstly, it is to ensure that the criminal charges preferred against many in their class, are not proceeded with. Secondly, it is to safeguard their potential right to claim damages from the police. Both these aspects are intrinsically linked to, and are dependent on, the findings and recommendations of the commission. Considering the fact that it is common cause that it is the police who shot and injured them, the applicants' interests and those of the state are diametrically opposed.

[42] It appears to be common cause that the police want the Commission to find that the applicants are the source of the violent environment in which they and others got shot. The applicants, on their part, want the Commission to find that the police unjustifiably shot them and those who died. It is, therefore, unjust that the applicants be unable to present their version of the events, whilst their adversaries, the police, are afforded legal representation, at state expense, to present theirs.

[43] All of the other parties specifically named in the commission's terms of reference are participating in the commission proceedings to avert adverse factual findings against them. Similarly, the applicants are entitled to prevent even the possibility of criminal prosecutions against them being proceeded with. They are

furthermore entitled, to ensure that their right to claim damages is not negated by an adverse finding against them. As a result, there can be no doubting the implications of the commission's findings. The temptation to dismiss the potential prejudice likely to be suffered by the applicants as inconsequential, should be resisted. The fact that they are poor should never be a basis to summarily dismiss their potential substantial prejudice. It is unthinkable and deeply offensive to basic fairness and the rule of law in a democratic state that the poor and vulnerable be left to their own devices, in a manner that will deny them exercise of their constitutional right in terms of s. 34 of the Constitution.

The vulnerability of the applicants

[44] Of all participants before the commission, the applicants are the most vulnerable. Primarily, their indigence renders them unable to participate on an equitable footing with all other participants. As already stated above, some in their class have already been criminally charged with the death of their 34 colleagues. The very fact of the commission specifically investigating the applicants (who were part of 'the crowd of protesters') for possible criminal liability, places beyond doubt, their vulnerable position as a group, before the commission.

The complexity of the proceedings

[45] The applicants say they need legal representation. From what has appeared in the media about the proceedings of the Commission, including how long witnesses have been kept in the witness box, and the technicality of some of the evidence, there is no doubt that the conduct of the Commission's proceedings is beyond the scope of the applicants. That is why they withdrew when their legal representatives withdrew.

The procedures adopted by the commission

[46] It was contended on behalf of the State that there are no 'parties' before the commission, and that the applicants' reference to 'parties' is an attempt to turn the commission into 'litigation', which it is not. I do not think much turns on this aspect. Whether one refers to 'parties' or 'participants' is immaterial, and does not alter the nature of the commission. It should follow from the events giving rise to the commission, and its terms of reference (where specific parties are specifically cited for investigation) that there would be partisan contestation between some of those parties identified for investigation.

[47] Correctly in my view, the proceedings of the commission have been described as quasi-adversarial. But it is a fact that the commission has adopted and implemented procedures largely similar to and consistent with those applied in ordinary courts of law, in which adversarial elements like cross-examination of witnesses, tend to dominate the proceedings. Indeed, the nature of the issues referred to in the terms of reference and the provisions of the regulations all point to recognition of the reality that in respect of some of the key issues, e.g. the assertion of self-defence by the police, would only be resolved by application of the law. I therefore agree with the contention of the applicants and the supporting respondents that the commission bears the hallmarks of an adversarial inquiry. Of course, this does not mean that the proceedings before the commission are litigious.

Equality of arms

[48] Equality of arms is a jurisprudential principle issued by the European Court of Human Rights (ECHR) and is a part of the right to a fair trial written in the European Convention for human and fundamental freedoms. The principle requires each party

to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent.²⁰ Given the common cause fact that it is the police who shot and injured them, their interests and that of the State are diametrically opposed. The State seeks to persuade the commission that the shooting by the police was justifiable. To this end, it has marshalled formidable forensic and legal skills to prevent even a possibility of an adverse finding from arising.

[49] The SAPS legal team is said to comprise five advocates (three senior counsel and two senior-junior counsel). In addition, SAPS also use the services of a private firm of attorneys in Rustenburg, instead of State Attorney. Furthermore, the Minister of Police, whose interests should ordinarily coincide with those of SAPS, maintains a separate legal team from that of SAPS. Apparently, the Minister of Police's legal team has been on the so-called 'watching brief'. The applicants have alleged that the State parties' legal representation costs approximately R2 million to R3 million per month. This has not been denied, and accordingly, the allegation should be accepted as factually correct. All other participants are adequately resourced. From these observations, lack of equality of arms, as far as the applicants are concerned, is patent. Our society is premised on the constitutional values and principles of social justice, fairness, equality and justice. A process which enables only the police, other State organs and a multi-national corporation to be legally represented to the exclusion of the survivors of the police shooting is 'entirely inconsistent with the principles and values that underlie our Constitution'.²¹

²⁰ *Niderost-Huber v Switzerland* [1997] ECHR 18990 para 23 (18 February 1997).

²¹ *Albutt v Centre for the Study of Violence & Reconciliation* 2010 (3) SA 293 (CC) para 71.

Consequences of the commission's findings and recommendations

[50] The commission is a public inquiry, operating under considerable local and international scrutiny and the outcome thereof will have potentially massive ramifications for individual and institutions. The implications of the commission's findings and recommendations will be far-reaching. The evidence before the commission is likely to stand as the authoritative historical record of what took place in Marikana during August 2012. There will be reputational, moral, criminal and civil repercussions on those in respect whom adverse findings are made by the Commission. It is true that the President is not obliged to act on the recommendations (if any) of the commission.

[51] However, that does not mean there will be no consequences. It is to be borne in mind that some in the class of the applicants have already been charged criminally, with among others, common-purpose murder. The latter charges have been provisionally withdrawn. The criminal proceedings concerning the remainder of the criminal charges (including possession of dangerous weapons, attendance of an illegal gathering and public violence) have been remanded pending the outcome of the commission). A finding that the police acted in self-defence would no doubt encourage the prosecuting authority to pursue those charges. In this regard, it bears mention that the then acting National Director of Public Prosecutions has provisionally withdrawn the criminal charges against pending among others, the completion of the commission's work.

[52] Once criminal proceedings resume, the applicants face a distinct possibility of imprisonment, including life or long-term imprisonment. It is cold comfort for the applicants that they will be entitled to state-funded legal representation for their

criminal trials when that happens. They are entitled, like all other parties before the commission, to present (and rebut) evidence before the commission, to prevent even the possibility of criminal proceedings against them being proceeded with or resumed.

[53] As far as civil claims are concerned, a finding that the police acted in self-defence, would discourage the applicants from pursuing civil claims against the police. Although the evidence of the commission would not necessarily be admissible in subsequent civil proceedings, a finding in this regard is likely to influence the course of action adopted by either the applicants or the state, and is most likely to encourage settlement of civil claims (in the event it is found that the police did not act in self-defence).

[54] The applicants' rights are therefore as important as those of SAPS and Lonmin, who stand to suffer considerable reputational harm, and possible civil claims, in the event of adverse findings against them. This explains the massive resources deployed by them to ensure that such a possibility does not even arise. Not only are the rights of the applicants implicated, but those of the supporting respondents, which I consider briefly, below.

The supporting respondents

The families of the deceased miners (including Ledingoane family)

[55] At conceptual level, the families' unquestionable interest in the commission finds support in international law. Principle 11 of the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides:

'Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence.'

[56] Practically, that interest arises from the commission's terms of reference, in particular the conduct of SAPS in relation to the death of their loved ones. The families seek to know the truth about the incidents at Marikana on 13 and 16 August 2012 for three primary reasons: (i) in the hope that the truth will bring them some measure of healing, closure and restoration; (ii) in order to safeguard their rights in relation to possible civil claims against SAPS following the alleged unlawful killing of their loved ones; and (iii) in the hope that those criminally liable for their loved ones' death are brought to justice.

[57] Needless to say, none of the above goals can be achieved without the full and effective participation of the applicants, who are the eye witnesses of the shooting incident that resulted in the death of their loved ones. The families argue that the consequences of the applicants being unable to participate effectively in the commission, are that their own participation would be rendered meaningless. That, in turn, they contend, would violate their loved ones' fundamental right to life under s 11, and their own rights to dignity under s 10, of the Constitution.

[58] The families' contention concerning s 11 similarly finds support internationally. In *McCann v United Kingdom*²² the ECHR held that the right to life includes an effective investigation into deaths that resulted from the use of force by the State. In *Jordan v United Kingdom*,²³ the ECHR held further in this regard that an effective investigation includes the right of the victim's next-of-kin to be involved in the

²² [1996] 21 EHRR 97 para 161

²³ Judgment delivered on 4 May 2001

procedure to the extent necessary to safeguard their interests. *Jordan's* case concerned the death of the applicant's son who was shot and killed by the police. The applicant had alleged that his son had been unjustifiably shot and killed by a police officer and that there had been no effective investigation into, or redress for, his death.

At para 109 the following was stated:

'[T]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interest ...'

[59] As to the families' right to dignity, Mr *Ntsebeza* SC, counsel for the families, referred to the following apposite and poignant extracts from the Report of the Truth and Reconciliation Commission:

'By providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but also assisted in the creation of a narrative of truth. In doing so, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless ... These principles constituted the essence of the Commission's commitment of restorative justice. The Act required the Commission to help restore the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations of which they were victim.'²⁴

²⁴ 2010 (3) SA 293 (CC) para 58.

These remarks were quoted with approval by the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation*,²⁵ which then concluded as follows at para [61]:

'Excluding victims from participation keeps victims and their dependants ignorant about precisely happened to their loved ones; it leaves their yearning for the truth effectively unassuaged; and perpetuates their legitimate sense of resentment and grief. These results are not conducive to nation-building and national reconciliation.'

AMCU

[60] AMCU's interest in the commission arises out of paragraph 1 read with paragraph 1.3 of the commission's terms of reference in terms which provide:

'1. The commission shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other relevant legislation, policies and guidelines:

.....

1.3 The conduct of the Association of Mineworkers and Construction Union (AMCU), its members and officials and in particular:

1.3.1 whether it had exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or NUM or any other parties;

1.3.2 the extent to which it exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and

1.3.3 whether by act or omission it directly or indirectly caused loss of life or damage to persons or property'

²⁵ 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[61] Amcu, like the families of the deceased, relies on the eye-witness evidence of the applicants to protect its reputation. In the absence of meaningful participation of the applicants, adverse factual findings may be made against it. The consequences would be far-reaching. For example, if it is found that it directly or indirectly caused loss of life, it could face massive and fatal civil damages proceedings. Reputationally, the consequences might prove devastating. In order for it to prevent that eventuality, Amcu is dependent on the evidence of the applicants.

Discussion and conclusion on the applicability of s 34

[62] Counsel for the opposing respondents down-played the importance of the applicants' participation in the commission. Reduced to its bare essence, the totality of their argument is this: the applicants may participate if they wish - legally represented or not. In any event, the evidence leaders are there to assist them. If they do not participate voluntarily, they may be *subpoenaed* and be forced to testify. This is an unfair, heavy-handed and insensitive approach concerning alleged victims of a police shooting.

[63] The Marikana commission is not just an ordinary commission. The events being investigated by it have captured the collective consciousness of our nation and have drawn widespread interest of the international community. The shooting incident on 16 August 2012 is the single most lethal use of force by the police against civilians in our country since the Sharpeville massacre in 1960. It is therefore absolutely vital that the integrity and credibility of its findings and recommendations (if any), are beyond reproach. Like the TRC, the Marikana commission is concerned, mainly, with the rights of the poor and the vulnerable. For it to fulfill its terms of

reference, the full participation of all involved, including the applicants, is therefore essential.

[64] At the heart of the commission's mandate is the search for the truth. Apart from its clear terms of reference, it is worth noting that, like the Truth and Reconciliation Commission, the Marikana commission has committed itself to the values of truth, restoration and justice.²⁶ It is doubtful whether, without the participation of the applicants, the commission will achieve its goals. They will not have the opportunity to state their version of the events and possibly exonerate themselves. It follows that it is to the benefit, not only of all the participants in the commission, but also of the President and the country at large, that the truth emerges from all available and authentic sources, such as the applicants will be if their versions or portions thereof are accepted by the Commission.

[65] To sum up, the applicants' claim to State-funded legal representation before the commission should not be considered in the abstract, but in its proper context, which is this. This is a State-appointed commission, tasked to investigate among others, the conduct of the applicants, who admittedly cannot afford to fund their own legal representation. The State, on the other hand, has marshalled a formidable team of experienced legal representatives. The commission has adopted a decidedly adversarial nature. The consequences arising from the commission's findings include possible criminal prosecution for, among others, murder (with the concomitant possibility of life or long term imprisonment).

²⁶ *Adopted in its official logo.*

[66] These factors, in my view, call for fairness and equality of arms, which in turn, locates the commission squarely within the purview of s 34 of the Constitution. I find the interpretation contended for by the State too rigid, formalistic and inconsistent with the ethos of our Constitution. Section 34 has to be interpreted purposively and expansively. Apart from its primary purpose of separation of powers, it carries with it the constitutional values of justice and fairness. Ours, as noted by the Chief Justice, is a "never again" Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away.²⁷

[67] For all of the above considerations, I conclude therefore that s 34 finds application to the Marikana commission of inquiry, and therefore a constitutional right to legal representation before the Marikana commission. Having reached that conclusion, it remains to be determined whether that right translates into a right for State-funded legal representation. Differently stated, does the State bear an obligation to fund the applicants' legal representation?

[68] I am of the view, taking into account the considerations referred to above, and the fact that the rights of indigent and vulnerable persons are implicated, that the State is, in the circumstances, constitutionally obliged to provide legal assistance to the applicants. I agree with the applicants' and the supporting respondents' contention that the interests of justice and the rule of law would be undermined by a failure to uphold the applicants' right, especially in light of my conclusion that the constitutional rights of the applicants are not only implicated in the proceedings of the commission, but may possibly be threatened by its findings.

²⁷ *SATAWU & Another v Garvas and Others* 2012 (8) BCLR 840 (CC); 2013 (1) SA 83 (CC) para 63.

[69] To state the obvious, this finding is no authority for the proposition that in all commissions of inquiry, there is a right for State-funded legal representation. It depends on the context, having regard to nature of the issues under investigation before a particular commission. As noted by the Constitutional Court (in the context of legal representation before the Commission of Conciliation Mediation and Arbitration (CCMA))²⁸ that right is not an absolute one. With regard to context, the Constitutional Court has held that:

'Reasonableness and procedural fairness are context specific. What is reasonable and procedurally fair in one context is not necessarily reasonable or procedurally fair in a different context. In *R v Secretary of State for the Home Department, Ex parte Daly* Steyn LJ referred to an observation by Laws LJ emphasising that 'the intensity of review in a public law case will depend on the subject-matter in hand'. Steyn LJ went on to say '(t)hat is so even in cases involving convention rights. In law context is everything.'²⁹

(footnotes omitted)

[70] Having established that there is a right to legal representation before the Marikana commission, and that there is a duty on the State to provide funding for such legal representation, I must now determine whether the respective decisions of the opposing respondents, in refusing to provide State-funded legal representation, infringed that right. In this instance it is important to keep in mind, and consider separately, the applicants' case against the State and Legal Aid SA, respectively.

²⁸ In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 85.

²⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) Ackermann J referred with approval to this passage.

The case against the State

[71] It is perhaps prudent to set out what the applicants' case against the State is not. I formulate it in this manner because, in their written submissions and in oral argument, counsel for Ledingoane family, introduced new argument, seeking to impugn the President's decision to appoint the commission without providing for State-funded legal representation for the indigent, in the commission regulations, as being irrational and thus, unconstitutional. But that is not the case the President had to meet on the papers. This issue was not pertinently raised in the founding affidavit of the applicants, and was never a cause of action of the applicants, nor was it even contemplated in the family's own answering affidavit. It is not part of the relief sought against the State in the amended notice of motion, nor in the applicants' notice of intention to further amend their notice of motion.

[72] What has been the target of the applicants' attack, is the decision of the President and the minister to refuse legal funding to the applicants for their participation in the commission. I therefore agree with the State's counsel that the introduction of this issue in this manner, would be unfair and prejudicial to the State, in particular to the President. Our courts have repeatedly warned against the danger of seeking to raise issues not properly canvassed on the papers. See for example, *Minister van Wet en Orde v Mashaba*.³⁰ In *Albutt v Centre for the Study of Violence and Reconciliation*,³¹ Ngcobo CJ sounded the following caution:

'Sound judicial policy requires us to decide only which is demanded by the facts of the case and necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and wait for an occasion when both

³⁰ 1990 (1) SA 280 (A) at 285E-1.

³¹ Above at para 82

the facts and the proper disposition of the case require an issue to be confronted ... There may well be cases, and they are very rare, when it may be necessary to decide an ancillary issue in the public interest ...'

[73] As mentioned earlier, the State's impugned decision is contained in the letter of the State Attorney dated 14 March 2013. It is that decision, and it alone, which must be considered in determining whether the applicants' rights have been infringed by the State. To recap on that decision, the State's reason for refusing to provide legal aid to the applicants is the absence of a legal framework to do so. The State, correctly, in my view, suggested to the applicants to look to the Legal Aid SA for legal representation. However, it misconstrued the powers of Legal Aid SA when it stated that the latter does not provide legal aid in commission proceedings. But that does not mean the President and the Minister's decision is irrational.

[74] If anything, that decision is a sound one. Its correctness lies in the rule of law, and its offspring, the doctrine of legality, because constitutionally, the only framework within which legal aid for indigent people is provided, is in terms of Legal Aid Act. Thus, the only channel through which such funding can be accessed is Legal Aid SA, which is a separate juristic person with its own legislative mandate established for that purpose under the Legal Aid Act. Simply put, the only State agency charged with the responsibility to provide legal aid to the indigent, is Legal Aid SA. That should have been the applicants' first port of call, and not the President or the minister. Of course it would have been a different case had the President, in the commission regulations, made specific provision for State-funded legal representation, which he did not, and his decision in that regard, has not been challenged.

[75] The upshot of all the above, is that the decision of the President and the Minister in March 2013, cannot be faulted on any ground. This conclusion makes it unnecessary to consider the residual submissions by Mr *Mpofu*, counsel for the applicants, relating to the availability of resources at the disposal of the State. However, for completeness sake, I make brief comments on them. Mr *Mpofu* pointed out that the resources are available, only that the State lacks 'the will' to make them available for the applicants' legal funding.

[76] In this regard, counsel pointed to two occurrences to buttress his argument. The first is that when the applicants and the families of the deceased miners complained to the State that they were unable to attend the proceedings of the commission for lack of resources, the President immediately, and benevolently, amended the commission's regulations and made provision to accommodate, feed and transport the families. Counsel suggested that by the same stroke of a pen, the President can amend the regulations to provide State-funded legal representation for the applicants. The second is that the commission has saved the State millions of rands through the applicants' successful application for the relocation of the seat of the commission from Rustenburg to Centurion, which revenue, so was the argument, should be made available for the applicants' legal funding.

[77] The short answer to the above submissions lies in the principle of separation of powers. In *National Treasury v Opposition to Urban Tolling Alliance*³² the Deputy Chief Justice, with customary elegance and scholarly eruditeness, said:

The harm and inconvenience to motorists, which the High Court relies on, result from a National Executive decision about the ordering of public resources, over which the Executive Government disposes and for which it, and it alone, has the

³² 2012 (6) SA 223 (CC).

public responsibility. Thus, the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the National Executive subject to budgetary appropriations by Parliament ...

Another consideration is that the collection and ordering of public resources inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order ...'

[78] To conclude on this aspect, from the point of view of the doctrine of legality, the State is undoubtedly correct in its assertion that no legal framework exists within which the President and the Minister can lawfully, or are authorised to, fund the legal representation of the applicants in the proceedings before the commission. This reinforces the rule of law and the doctrine of legality, as being just as foundational to our Constitution as considerations of fairness, equality and freedom. The State's decision is therefore unassailable. That brings me to the role of Legal Aid SA.

The case against Legal Aid SA

[79] Given the concession by Legal Aid that the Legal Aid Act does not impede the provision of funding in commission proceedings, and that it has in fact provided such funding to the families of the deceased miners, the only question which arises is whether or not the differentiation between the two sets of 'victims' is rational and fair. I earlier set out the reasoning proffered by Legal Aid SA, which is that the families of the deceased miners have a 'substantial, proximate and material interest in the outcome of the commission'. In the penultimate paragraph of the letter, dated 18 October 2012, the following was stated on behalf of Legal Aid SA:

'We are not able to determine from your funding request that there will be a substantial and identifiable benefit to your clients from being separately represented at the Commission, especially as the interests of all the miners will be protected at the Commission of Inquiry by their respective unions, namely NUM and AMCU, who are legally represented.'

[80] From that letter, two reasons for refusing legal aid to the applicants, are discernable. The first is that the applicants, impliedly, do not have a 'substantial, proximate, and material interest in the outcome of the commission. There is no merit in this assertion. I have demonstrated the applicants' indubitable, direct and material interest in the outcome of the commission. The second is that the applicants' interests would be adequately protected by labour unions, NUM and AMCU.

[81] This is an unjustified assumption that all of the applicants belong to either of the two unions. But in any event, in terms of the commission's terms of reference, both unions are themselves to be investigated as possible perpetrators of the injuries suffered by the applicants, and there is therefore no room for the assumption that their interests would necessarily coincide. Legal Aid SA's reasons were met, comprehensively by Maluleke Msimang & Associates, the applicants' attorneys, in their letter to Legal Aid SA, dated 5 November 2012. The relevant paragraphs of the letter read:

'The first unfortunate and rather insensitive statement made in your letter is the insinuation that that our clients do not have a 'substantial, proximate and material interest in the outcome of the inquiry', coupled with the arbitrary discrimination between the deceased victims on the one hand and those maimed, injured and/or arrested, on the other.

You may be aware by now that the chairman of the Commission. Judge Farlam, found your distinction between the victims to be illogical. This is because it is clearly based on the failure to read or appreciate the terms of reference ...

.....

It should accordingly be clear that apart from identifying potential perpetrators, the terms of reference postulate at least three types of victims in the same breath, namely those killed, those injured, and those arrested.

There is accordingly no legal or logical basis for Legal Aid SA to disqualify and question the interests of our clients in the outcome of the Commission.'

[82] In respect of the second reason given by the Legal Aid SA for refusing to fund the applicants, the attorneys stated:

'Your second reason for declining assistance, that 'the interests of all the miners will be protected at the commission by their respective unions, namely NUM and AMCU, who are legally represented', equally defies logic.

As you may know it is well documented that almost half of the 272 arrested protestors were not even Lonmin employees, let alone members of AMCU or NUM. Even those who are Lonmin employees are not necessarily members of either AMCU or NUM, hence their stance to represent themselves directly at the subsequent negotiation process.

In any event, and as can be gleaned from the terms of reference, the unions are cited in the commission as possible perpetrators or causes of the injuries and arrests suffered by our clients. For example, when we brought the plight of our clients (who have recently been rearrested) to the attention of the commission, the legal representative of NUM stated that on record that they were opposed to their proposed release. Legal Aid SA however insists that these opposed interests coincide.'

[83] I need not say more on this aspect. The contents of the letter referred to above, are trenchant, and self-explanatory. During argument, Mr. *Notshe* SC, counsel for Legal Aid SA, argued that, despite their non-legal representation, the applicants' full and meaningful participation could be ensured through the evidence leaders. I do not

think that this submission is helpful. The evidence leaders, who are all admittedly competent and able counsel, have a particular role to play, in a neutral manner. They cannot be expected to present the partisan interests of any party being investigated by the commission.

[84] As pointed out earlier, the applicants have been succinctly identified for investigation in the first phase of the commission's investigations for possible criminal liability arising from the death of their colleagues, and the attempted murder of the police. Naturally, the evidence leaders have to necessarily, cross-examine the applicants. It is common cause that the first applicant was cross-examined by the evidence leaders. As a result, I do not see how, under those circumstances, the evidence leaders can be expected to safeguard the interests of the applicants.

[85] Another contention by the opposing respondents is that the applicants' application (through their attorneys) was not compliant with Legal Aid SA's procedures, as none of the applicants had individually submitted a separate application to be assessed on the basis of the so-called 'means test'. This is a disingenuous argument. First, this point was never raised as a ground for refusing legal aid to the applicants. I have fully set out in full the reasons for that refusal. Second, the families of the deceased miners were not required to comply with this requirement. Their application (through their attorneys) was dealt with in the very manner that Legal Aid SA now seeks to refute in respect of the applicants.

[86] There was no requirement that there be individual applications, nor a suggestion that a joint application by the attorneys on behalf of the families was not acceptable. There is no plausible reason why the applicants were treated differently. What is more, it appears that the application on behalf of the families was made, and

accepted, orally. In her letter to SERI dated 19 October 2012, the CEO of Legal Aid SA stated the following:

'We refer to your telephone discussion with our Legal Development Executive... when you sought legal assistance for the families of the deceased at the Marikana inquiry. The Legal Aid Guide does not make provision for the funding of such a matter. However as CEO, I have exercised my general discretion in consultation with the Board to approve legal aid for the families of the deceased ...'

(my underlining)

Equality

[87] I turn then to the applicants' equality contention, based on s 9 of the Constitution. The applicants' argument is that the conduct by Legal Aid SA in differentiating between them and the deceased miners, is irrational, and infringes their constitutional right to equality in terms of s 9(3) of the Constitution, which provides:

'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

[88] In *Harksen v Lane NO 1998 (1) SA 300 (CC)* the Constitutional Court laid down the stages of an enquiry into a violation of the equality clause, along the following lines:

- (a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate

government purpose? If it does not, then there is a violation of s 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination;

(b) Does the differentiation amount to an unfair discrimination? This requires a two-stage analysis:

- (i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- (ii) Secondly, if differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 9(3) and (4).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

[89] At para [46] the court held that differentiation on grounds that are analogous to those listed in s 9(3) will constitute discrimination. An analogous ground is one that is 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner. The court further enumerated the following factors to be taken into account in determining whether the discrimination has an 'unfair impact':³³

- (1) The position of the complainants in society and whether they have been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burden placed on those who are relatively well off;
- (2) The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal.
- (3) The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

[90] In *President of the Republic of South Africa and Another v Hugo*³⁴ the Constitutional Court contextualised the philosophical nature of unfairness contemplated in s 8 of the interim Constitution (the predecessor to s 9 of the Constitution) as follows:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the

³³ *Harksen v Lane NO*, paras 50 and 51

³⁴ 1997 (4) SA 1 (CC) (1997 (6) BCLR 708) para 41

establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.'

[91] The applicants contend that the conduct of Legal Aid SA discriminates against them on the grounds of 'social origin' or 'social class', in that it distinguishes between the deceased miners and those who were injured. I do not agree with this classification. The basis for their differentiation is clearly that they have survived the shooting. Of course, they are, as a class, poor and thus have a common social origin. But that is not the basis on which they have been differentiated by Legal Aid SA. This has nothing to do with their social origin or class. Their differentiation is on the basis of their survival of the shooting. However, that basis is not one of the specified grounds contained in s 9(3). However, is clear from s 9(3) that it does not contain an exhaustive list of prohibited grounds of unfair discrimination. In *Hoffman v South African Airways* the Constitutional Court held that 'at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings must be accorded equal dignity'.³⁵ To be considered an analogous ground of differentiation to those listed in s 9(3) the classification must, therefore, have an adverse effect on the dignity of the individual, or some other comparable effect.³⁶

[92] Therefore, that it is not specified does not mean that such differentiation cannot constitute unfair discrimination in terms in terms of s 9(3). It simply means that s 9(5) does not assist the applicants. That clause provides for the presumption of unfair discrimination on *prima facie* proof of discrimination on any of the specified grounds.

³⁵ 2001 (1) SA 1 (CC) para 27.

³⁶ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) paras 41-43.

As a result, the applicants will first have to establish that the ground upon which differentiation has been effected is one which gives rise to unfair discrimination. In interpreting s 9(3), the primary question is always whether the conduct complained about constitutes 'unfair discrimination'. In *Brink v Kitshoff NO*,³⁷ the Constitutional Court explained the primary purpose of s 8 of the interim Constitution:

'Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of s 8 and, in particular, ss (2),(3) and (4).'

[93] The applicants are a vulnerable group in the context of this case. They are visited with disadvantages, solely because they have survived a police shooting. It is the argument of Legal Aid SA that the families of the deceased, as a group, differs in standing from the applicants in that they require representation to know the facts upon which their loss had occurred. This, it is the argument, in the event that the families intend to pursue civil claims for loss of support, for example. The irony of this submission is that it is not supported by the families of the deceased, who argue that for them to exercise those rights mentioned by Legal Aid SA, they require, and rely on, meaningful participation of the applicants.

[94] It seems to me that the differentiation between the families of the deceased and the injured miners is based on the assumption that the deceased miners have left behind destitute widows and orphans, while the injured miners are still able to

³⁷ 1996 (4) SA 197 (CC) para 42.

work and provide for their families. This is a simplistic and fallacious generalisation, which, without empirical evidence, cannot logically be made. Take this analogy. A deceased miner might have left no spouse, children, or any dependants, while a surviving one, who has dependants, has been rendered unemployed because of the injuries he sustained during the shooting. In the result I find no logical basis for this differentiation.

[95] Although the basis of differentiation in this case is not a ground specified in s 9(3), I consider it, in the light of the above considerations, a ground which can give rise to the concerns contemplated in s 9(3). Having regard to the disadvantages brought upon the applicants by the differentiation on the basis of having survived the shooting, I conclude that the applicants have established discrimination as contemplated in s 9(3). I turn now to consider whether that discrimination is an unfair one. To determine that question, I have to consider the impact of the discrimination on the applicants.³⁸

[96] For that determination, it is necessary to look at the applicants as a group affected by the discrimination, and the nature of the interests which have been affected by the discrimination. In this regard, I need look no further than the Legal Aid SA's letter to the institute which represents the families of the deceased miners. The letter is dated 19 October 2012, in which it is stated that 'legal representation afforded to the families will protect their rights to dignity, justice and ultimately fair compensation.' That is significant, as the converse is true: absent legal representation, the applicants would not be able protect the same rights. The

³⁸ *Harksen* (above) paras 51 and 53

adverse impact on the applicant is self-evident. I therefore have no difficulty in concluding that the discrimination is unfair.

[97] In any event, I am also of the view that Legal Aid SA's conduct would not pass a general rationality requirement, stemming from the rule of law in s 1 of the Constitution, as developed by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa*.³⁹ At para [85] the court held that all exercises of public power, whether they take the form of law or conduct, must be rational:

'[I]t is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given. Otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does, it falls short of the standards demanded by our Constitution for such action.'

[98] I conclude, therefore, that the refusal by Legal Aid SA to provide legal aid to the applicants was arbitrary, and not rationally related to the purpose of the Legal Aid Act, and its constitutional mandate of providing legal funding to the indigent. It therefore violated the applicants' right to equality guaranteed by s 9 of the Constitution. It is not necessary to consider whether this violation was justified. That consideration does not arise as I am not dealing here with a law of general application⁴⁰, and in any event it being common cause now that the Legal Aid Act does not prohibit the provision of funding in commission proceedings. It now remains to consider the remedy to which the applicants are entitled.

³⁹ 2000 (2) SA 674 (CC)

⁴⁰ See *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) para 23.

[99] Legal Aid SA argue that its decision not to fund the applicants' legal representation should be approached with deference, as it was taken after consideration, among others, of the available budgetary constraints. In my view, that is not a bar to an effective remedy. The Constitutional Court has repeatedly reaffirmed the need for courts to provide an effective remedy for infringement of fundamental rights. This applies even where the remedy would impact upon policy and/or have budgetary implications.⁴¹

[100] Mr *Notshe* urged me, in the event I am inclined to order any relief against Legal Aid SA, to, at the very least, order it to 'consider' granting legal aid to the applicants. Counsel made this submission relying on *Legal Aid SA v S*⁴². There, the Supreme Court of Appeal set aside an order of the High Court which ordered Legal Aid 'to provide each of the respondents with two advocates in private practice to be remunerated at the maximum of the legal aid tariff'. The SCA found that the court did not have such powers, based among others, on the separation of powers. Having arrived to that conclusion, Ponnar JA said the following at para [46]:

'Finally, nothing here stated should be construed as being emasculatory of a court's legitimate power of review. It is now well-established that the control of public power through judicial review is a constitutional matter. Courts have a duty to finally determine whether public power has been lawfully exercised and they would be failing in that duty were they to hold that the validity of the exercise of public power is beyond its jurisdiction. The Constitution places significant constraints on the exercise of public power through the Bill of Rights and the founding principle enshrining the rule of law.'

⁴¹ See for example *Minister of Health and Others v Treatment Action Campaign and Others* (No.2) 2002 (5) SA 721 (CC) paras 98-99;

⁴² [2011] All SA 378 (SCA)

[101] In my view, the present case falls within the ambit of circumstances referred to above, especially in light of my finding that Legal Aid SA's decision to fund legal representation of the families of the deceased miners, and not the applicants, cannot be justified on any rational basis. Public power has not been lawfully exercised by Legal Aid SA. As a result, I am inclined to order Legal Aid SA to provide funding for the applicants' legal representation in the proceedings of the Marikana commission. The application against the President and the Minister has to be dismissed for reasons stated earlier. The parties are agreed that there should not be any costs flowing from that dismissal. However, Legal Aid SA should be ordered to pay the applicants' costs.

[102] Just to make it clear about the nature and content of the applicant's legal funding. So far the applicants have been represented by two counsel, one senior junior and a junior counsel and a firm of attorneys. Without being prescriptive to Legal Aid SA, it would be commendable for that legal team to be maintained. I mention this in order to clarify that the principle of equality arms does not mean equal representation on the same scale as the State parties.

[103] In the result I make the following order:

1. The application for amendment of the applicants' notice of motion is granted in terms of paragraph 2 of the notice of amendment dated 5 September 2013;
2. The application against the first and second respondents is dismissed;
3. The third respondent's decision refusing legal funding to the applicants for their participation in the fourth respondent, is reviewed and set aside;
4. The third respondent is ordered to forthwith take steps to provide legal funding to the applicants for their participation in the fourth respondent;
5. The third respondent is ordered to pay the applicants' costs;

6. Save for the costs order between the applicants and the third respondent referred to above, there shall not be any costs order between any of the parties.



T.M. MAKGOKA
JUDGE OF THE HIGH COURT

DATES OF HEARING	: 25 & 26 SEPTEMBER 2013
JUDGMENT DELIVERED	: 14 OCTOBER 2013
FOR THE APPLICANTS	: ADV DC MPOFU
INSTRUCTED BY	: <i>MALULEKE MSIMANG & ASSOCIATES,</i> PRETORIA
FOR THE 1 st AND 2nd RESPONDENTS	: ADV. M.M. OOSTHUIZEN SC ADV. H.O.R MODISA ADV. K.F. MAGANO
INSTRUCTED BY	: <i>STATE ATTORNEY,</i> PRETORIA
FOR THE 3rd RESPONDENT	: ADV. V.S. NOTSHE SC ADV. T.J. MACHABA
FOR THE 7th RESPONDENT	: ADV. D. NTZEBEZA SC : ADV. N.T. LEWIS
INSTRUCTED BY:	: <i>SOCIO-ECONOMIC RIGHTS INSTITUTE</i>
FOR THE 8 TH RESPONDENT	: ADV. H.L. BARNES
INSTRUCTED BY:	: <i>SOCIO-ECONOMIC RIGHTS INSTITUTE</i>
FOR THE 17 th RESPONDENT	: ADV. J. BRICKHILL (Heads of argument co- signed with ADV. H. VARNEY)
INSTRUCTED BY	: <i>LEGAL RESOURCES CENTRE</i>