IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. 188/14

In the matter between:

LEGAL AID SOUTH AFRICA	Applicant
and	
MZOXOLO MAGIDIWANA	First Respondent
INJURED AND ARRESTED PERSONS	Second Respondents
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
THE MARIKANA COMMISSION OF INQUIRY	Fifth Respondent
PARTIES TO THE MARIKANA COMMISSION OF INQUIRY	Sixth to Nineteenth Respondents

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EIGHTH AND NINTH RESPONDENTS' PRACTICE NOTE

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1 **COUNSEL APPEARING FOR THE EIGHTH AND NINTH RESPONDENTS**

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2 **THE NATURE OF THE PROCEEDINGS**

This is an application for leave to appeal against an order of the Supreme Court of Appeal ("SCA"). The SCA dismissed the applicant's appeal, because it was moot.

3 **THE ISSUES THAT WILL BE ARGUED**

The following issues are raised –

- Whether it is in the interests of justice to entertain the applicant's appeal, despite its mootness;

- Whether the applicant's decision to withhold legal aid to the first and second respondents ("the miners"), having already granted legal aid to the families, was rational and consistent with sections 1 (c) and 9 (1) of the Constitution;

- Whether the refusal to provide legal aid to the miners was in breach of sections 34 and 35 of the Constitution.

The eighth and ninth respondents will confine themselves to the first two issues. We understand that the issues arising from section 34 and 35 of the Constitution will be addressed by counsel for the eighteenth respondent ("the Ledingoane family") and counsel for the miners, respectively.

4 PORTIONS OF THE RECORD NECESSARY FOR DETERMINING THE MATTER

The issue of mootness and the interests of justice are canvassed in SCA's judgment (volume 1, pages 82 to 201 of the Record) and in the papers filed in the application for leave to appeal. It is, we respectfully submit, important to read all the papers filed in the application for leave to appeal in this Court.

On the merits of the appeal, we respectfully submit that the whole record is relevant.

5 ESTIMATED DURATION OF ORAL ARGUMENT

Less than a day.

6 SUMMARY OF THE ARGUMENT FOR THE EIGHTH AND NINTH RESPONDENTS

Mootness

7 It is not in the interests of justice to entertain Legal Aid SA's appeal. Legal Aid SA has now satisfied the High Court judgment. Funding has been extended to the miners. The Commission itself has been wound up, and its report has been submitted to the President.

8 In other words, the controversy that animated the parties before the High Court is now at an end. A decision in Legal Aid SA's proposed appeal will make no practical difference to any of the parties to the Commission.

9 Nor will it make a difference to Legal Aid SA, because it disavows any right to claim the money back if its appeal is successful, and it has changed its funding policy since the proceedings in the High Court were determined. The provision of funding to parties to commissions of inquiry is no longer dealt with in terms of the CEO's discretion. It is addressed under a comprehensive and detailed amendment to the Legal Aid Guide.

10 There is accordingly nothing left of the case as it was pleaded and argued in the High Court. All of the issues of practicality and principle that arose there have now been resolved.

11 Deciding the appeal would have no practical effect on the parties' interests, or on the public interest.

The Merits

12 Legal Aid SA's decision to fund the families but not the miners plainly manifested an irrational differentiation. All of the reasons that Legal Aid SA originally gave for funding the families apply equally to the miners. None of the reasons Legal Aid SA gave for not funding the miners was rationally connected to the established facts.

13 For these reasons, Legal Aid SA's decision was –

13.1 irrational at administrative law;

13.2 in breach of section 1 (c) of the Constitution; and

13.3 in breach of section 9 (1) of the Constitution.

Legal Aid SA's Technical Arguments

14 Legal Aid SA relies on two technical defences which, it says, should have precluded the miners from challenging the rationality of its decision. It is alleged miners' case was not pleaded and argued under the Promotion of Administrative Justice Act 2 of 2000 ("PAJA") or the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA")

15 We submit that neither of these defences has any merit. Quite simply –

15.1 the miners' case was pleaded and argued in terms of PAJA. An amendment to their notice of motion seeking a review of Legal Aid SA's decision was sought and granted in the High Court. Legal Aid SA consented to the amendment. It cannot be heard to complain about non-compliance with PAJA now. Although, given the urgency of the case, the miners' papers did not genuflect to every possible ground of review, the case Legal Aid SA had to meet was clear from the papers.

15.2 PEPUDA does not apply to claims under section 9 (1) of the Constitution. As is clear from its Preamble, PEPUDA regulates claims under section 9 (3) of the Constitution.

16 **MAIN AUTHORITIES ON WHICH THE EIGHTH AND NINTH RESPONDENTS WILL RELY**

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2011 (4) SA 337 (SCA)

Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC)

Harksen v Lane 1998 (1) SA 300 (CC)

Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC)

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street,

Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC)

President of the Ordinary Court Martial v Freedom of Expression Institute 1999 (4) SA 682 (CC)

Treatment Action Campaign v Minister of Health (No. 2), 2002 (5) SA 721 (CC)

STUART WILSON

FRANCES HOBDEN

Counsel for the 8th and 9th Respondents

Chambers, Johannesburg, 2 April 2015