IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT 188/14

In the matter between:

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

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STATEMENT OF FACTUAL FINDINGS
AS AGREED TO BY THE FIRST, SECOND AND FURTHER, EIGHT, NINTH AND EIGHTEENTH RESPONDENTS

This statement is delivered on behalf of the first and second respondents[1], the eighth and ninth respondents[2] and the eighteenth respondent[3] ("the respondents").

The parties were unable to reach agreement on a statement of facts. The applicant has delivered its own statement of facts.

The respondents do not dispute any of the factual findings of the trial court or the Supreme Court of Appeal.

For the convenience of the Court, however, the respondents set out below a statement of the material facts as found by the trial court and the Supreme Court of Appeal. This statement has been agreed between the respondents.

A The Marikana massacre

1 The Marikana massacre refers to incidents at the Lonmin Mine in Marikana from 11 to 16 August 2012, which led to the deaths of 44 people, injuries to more than 78 people and the arrests of 259 people. [4]

2 Of the people killed, 34 were miners who were killed as a result of shots fired by members of the South African Police Service ("the SAPS") on 16 August 2012. [5] All of the arrested persons referred to are the miners who were arrested and charged with the murders of the aforementioned 34 miners. [6]

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[1] The injured mineworkers and the 259 arrested persons, represented by Maluleke, Msimang & Associates.

[2] The families of 33 of the deceased miners and the Association of Mineworkers and Construction Union (AMCU), represented by the Socio-Economic Rights Institute of South Africa (SERI).

[3] The family of the late Mr John Ledingoane, one of the deceased mineworkers, represented by the Legal Resources Centre (LRC).

[4] High Court Judgment (Annexure "PRH2" to the Applicant's founding affidavit, referred to as "HC") para 12.

[5] HC para 12.

[6] HC para 44.

3 The events followed an unprotected wage strike by employees of Lonmin Plc ("Lonmin"), working as miners at its Platinum Mine in Marikana, near Rustenburg. [7]

4 The shooting by the SAPS on 16 August 2012 is the single most lethal use of force by the police against civilians since the Sharpeville massacre in 1960. [8]

B Marikana Commission of Inquiry ("the Marikana Commission")

5 On 26 August 2012, the President of the Republic of South Africa, who is the third respondent in these proceedings ("the President"), appointed the Commission of Inquiry for Marikana ("the Marikana Commission"). [9]

6 The Marikana Commission was appointed to investigate matters arising out of the Marikana massacre.

7 The Commission commenced on 1 October 2012. It was originally scheduled to complete work by 31 January 2013. This period was twice extended. [10]

8 The Marikana Commission's terms of reference require it to inquire into and make findings and recommendations on (i) the conduct of Lonmin; (b) the conduct of the SAPS; (c) the conduct of the two trade unions involved, Association of Mineworkers and Construction Union ("AMCU") and the National Union of Mineworkers ("NUM"); (d) the role played by the Department of Mineral Resources or any other government departments or agencies; and (e) the conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident, whether directly or indirectly. [11]

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[7] HC para 11.

[8] HC para 63.

[9] Supreme Court of Appeal Judgment (Annexure "PRH1" to the Applicant's founding affidavit, referred to as "SCA") para 4; HC para 12.

[10] SCA para 5; HC para 14.

[11] SCA para 4; HC para 12 – 13.

9 The fifth group (e) includes the injured mineworkers and the 259 people arrested as a result of the incidents at Marikana from 11 to 16 August 2012. They are cited as the First and Second and Further Respondents in these proceedings, and are referred to as "the miners" in this statement.

10 These groups reflect the key participants before the Marikana Commission, with one exclusion: The families of 36 of the deceased miners ("the families"). [12]

C The interests of the groups participating in the Marikana Commission

11 All of the groups were participating in the Marikana Commission to try to prevent adverse factual findings being made against them or their interests. [13]

11.1 The SAPS was attempting to avoid reputational harm and civil claims, by arguing that they are not responsible for the Marikana massacre, and specifically the events of 16 August 2012. [14] The SAPS wants the Marikana Commission to find that the miners are the cause of the violence which led to the deaths, injuries and arrests at Marikana from 11 and up to and including 16 August 2012. [15]

11.2 AMCU may face enormous civil claims if it is found that the miners were responsible for the violence from 11 to 16 August 2012, and in this way, AMCU's participation was directly linked to the meaningful participation of the miners. [16]

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[12] SCA para 5. The families are cited in this application as the eighth respondent (the 33 families represented by SERI) and the eighteenth respondent (the family of Mr Ledingoane, represented by the LRC).

[13] HS para 42.

[14] HC para 54.

[15] HC para 42.

[16] HC para 61.

11.3 The families participated in the Marikana Commission to seek the truth in respect of the killings of their loved ones, to protect their interests in pursuing civil claims against those found responsible for the killings, to protect their interests in seeking criminal justice against that same group. [17] They have a direct and material interest in its outcome. [18] Like AMCU, the participation of the families in the Marikana Commission was inextricably connected to the participation of miners, as they relied on the miners' eye-witness accounts to protect their interests. [19]

12 The work of the Commission involved investigating, amongst others, the miners who are cited as respondents in these proceedings. [20]

13 The Marikana Commission also decided, during the course of proceedings to include in its work an investigation into whether the miners should be held criminally liable for the deaths of the 34 miners who were killed by police fire, and the alleged attempted murder or assault of SAPS officers present. The commission further decided to investigate the direct causes of, and legal responsibility of any party for, the deaths and injuries to any persons and damage to property from 9 to 16 August 2012. [21]

14 The findings of the Marikana Commission will directly impact on the (arrested) miners' criminal liability (which is currently being investigated) and the risk of long-term imprisonment, and on their ability to hold other participants in the commission liable in terms of civil claims. [22]

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[17] HC para 56.

[18] HC para 19.

[19] HC para 57.

[20] SCA para 65.

[21] HC para 40.

[22] HC paras 40 – 42; 50 – 53; 65.

15 The miners' participation in the proceedings of the Marikana Commission was therefore necessary. [23] It was not only necessary to safeguard the legal, moral and personal interests of the miners themselves, [24] but it was also necessary to secure the interests of the families and AMCU, who relied on the miners' eyewitness accounts.

D Legal representation at the Marikana Commission

16 The Marikana Commission proceedings, although not litigious, were complex and bore elements of a full-blown trial. [25] Specifically, it was an adversarial proceeding where the Commission sought to determine the truth through methods used in courts of law, such as (lengthy) cross-examination. [26]

17 The Marikana Commission has the power to make significant findings which are potentially detrimental to the rights of its participants.[27]

18 All of the participants in the Marikana Commission had legal representation. The state legal teams before the Marikana Commission were as follows:

18.1 The SAPS was represented by five advocates, including three senior counsel, and a private firm of attorneys.

18.2 The former Minister of Mineral Resources was represented by her own separate legal team. [28]

19 The full and meaningful participation of the miners could not be ensured without legal representation. [29]

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[23] HC paras 25; 63.

[24] HC paras 50 – 54.

[25] HC para 14; 38.

[26] HC paras 45 – 47; 84.

[27] HC para 36; 38 – 39; 43.

[28] HC para 49.

[29] HC paras 25; 45.

E The miners' request for funding for legal representation

20 The miners, despite having been full-time employees of one of the largest producers of platinum in the world, are indigent and cannot afford private legal representation. [30]

21 The miners' legal representatives were funded by the Raith Foundation from 1 October 2012 to 31 December 2012. The Raith Foundation agreed to also fund the miners' legal representation for the period between 18 March 2013 and 31 May 2013, following the first extension of the commission. [31]

22 The miners did not, however, have funding for the remaining period of the Marikana Commission after it was extended for a second time. Due to a funding shortfall for this extended duration of the Marikana Commission, the miners made applications to the President, the Minister for Justice and Constitutional Development and Legal Aid South Africa ("the Applicant") to request funding for their legal representation. [32]

23 The application for funding made to the Applicant was a group application made on behalf of all of the miners on 15 October 2012. [33]

24 The Applicant responded on 18 October 2012, stating that it would not provide funding to the miners for the following reasons:

24.1 the Legal Aid Guide for 2011/12 made no provision for the funding of proceedings before commissions of inquiry; [34]

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[30] HC para 25; 43.

[31] HC para 16.

[32] HC para 17.

[33] HC para 86.

[34] HC para 17.

24.2 the Applicant was unable to determine from the miners' funding application that there will be a substantial and identifiable benefit to the miners being separately represented; and

24.3 the interests of all miners will be protected at the Marikana Commission by trade unions NUM and AMCU, which are represented;

24.4 severe budgetary constraints. [35]

25 It has since been agreed among all the parties (including the Applicant) that, although the Legal Aid Guide for 2011/12 made no provision for the funding of legal representation before commissions of inquiry, the Applicant's CEO has a discretion to provide for issues not covered in the Guide, provided she acts in compliance with the Legal Aid Act 22 of 1969. The Legal Aid Act does not prohibit the Applicant providing funding to participants in commissions of inquiry. [36]

26 One day after rejecting the miners' application, on 19 October 2012, the Applicant's discretion (vested in its CEO) was exercised to provide funding to the families pursuant to their group application. [37] The families received funding of R1,219,800 for the duration of the Marikana Commission, pursuant to their group application. This included the costs of one senior counsel and two junior counsel. [38]

27 The Applicant differentiated between the families and the miners in refusing to exercise her discretion in favour of granting the miners' application for funding.

28 The Applicant first explained the differentiation in correspondence to the miners' attorneys, arguing that the families were granted funding on the basis

[35] HC para 79.

[36] HC paras 18 – 19; 79.

[37] HC para 86.

[38] HC paras 18 – 19.

that they have a "*substantial, proximate and material interest in the outcome of the inquiry*". [39] It was later added that the reasons for exercising her discretion in favour of the families was that:

28.1 the families as a group consisted of vulnerable persons, whose vulnerability was, in each case, exacerbated by the loss of breadwinners in circumstances unknown to each of the families; and

28.2 the families faced a practical disadvantage because, as they were not present at Marikana when events unfolded, they would not be in a position to provide their attorneys with instructions in any civil claim. [40]

29 The Minister declined to provide funding assistance to the miners on 14 March 2013. [41]

30 There is no legal framework which allows or provides for the Minister or the President to provide funding to participants in commissions of inquiry. [42]

31 As a result, the only state channel by which indigent participants in commissions of inquiry may access funding for legal representation is through the Applicant.

32 Despite what is stated in paragraph 25 of the High Court judgment, it was in fact the miners who withdrew their participation and thereafter instructed their legal representatives to follow suit.[43]

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[39] HC paras 79 – 80.

[40] SCA para 11; HC para 93.

[41] HC para 20.

[42] SCA paras 7; 9; HC para 78.

[43] HC paras 25; 45.

F The miners' interim application to the High Court

33 Following their withdrawal from the Marikana Commission, the miners launched an urgent high court application for interim funding for their legal representation before the commission. The application was supported by the families, AMCU, and the South African Human Rights Commission (SAHRC).

34 On 30 July 2013, Raulinga J dismissed the miners' application for interim relief (Part A). [44]

35 An application for leave to appeal the judgment was made to this court, where it was dismissed.

G Additional reasons for refusal of the miners' funding application

36 Subsequent to the above, the main application (Part B) was set down for hearing and argued on 25 and 26 September 2013 before Makgoka J.

37 On 14 October 2013, Makgoka J delivered his judgment and made an order, *inter alia*:

37.1 reviewing and setting aside the decision of Legal Aid South Africa refusing legal funding to the miners for their participation in the Commission;

37.2 ordering Legal Aid South Africa to "*forthwith take steps to provide legal funding to (the miners) for their participation in (the Commission)*";

37.3 ordering Legal Aid South Africa to pay the miners' costs.

38 In delivering his judgment, Makgoka J made it clear that "*this finding is no authority for the proposition that in all commissions of enquiry, there is a right*

[44] HC para 2.

for state-funded legal representation. It depends on the context, having regard to the nature of the issues under investigation before a particular commission."

39 It was the above judgment and order of Makgoka J against which the applicant herein lodged and instituted appeal proceedings in the Supreme Court of Appeal.

H The Settlement Agreement and the closing of the Marikana Commission

40 Prior to the hearing of the appeal before the Supreme Court of Appeal, the parties entered into a settlement agreement. The agreement was that the Applicant would provide the miners with the required funding for the full duration of the Marikana Commission which was not already funded, irrespective of the end date. [45]

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41 Subsequent to the finalisation of the Commission's proceedings on 14 November 2014, the applicant has indeed paid out all the required funding in line with the settlement agreement

I Disputed conclusions at the Supreme Court of Appeal

42 The Supreme Court of Appeal found that the practical effect of the settlement agreement is that there is no longer any dispute or *lis* between the parties. [46] The Applicant disputes this finding, and will refer to the record to support its argument.

43 The respondents agree with the finding of the SCA and maintain that, in any event, the appeal ought to fail on the merits, as Makgoka J's judgment is unassailable.

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[45] SCA para 19.

[46] SCA para 20.

DATED AT JOHANNESBURG ON THIS THE 13TH DAY OF MARCH 2015.

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