

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON
MR TOKOTA SC
MS HEMRAJ SC

HELD ON

DAY 114 22 JULY 2013 PAGES 12158 TO 12205



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1 [PROCEEDINGS ON 22 JULY 2013]
 2 [10:31] CHAIRPERSON: The Commission resumes. We
 3 were due to commence at 9:30, but we were asked to wait
 4 until half past 10 to enable people who are on the way here
 5 and whose bus broke down, to be here. That's one of the
 6 reasons why we're starting late. Mr Mpofo, I understand
 7 you propose bringing an application. Would you tell us
 8 briefly what the nature of the application is, and I will
 9 then ask some of the other parties present to give us their
 10 reaction to it before we see whether it's necessary for you
 11 to proceed at this stage with your argument.
 12 MR MPOFU: Thank you very much,
 13 Chairperson. Chairperson, and thank you for the indulgence
 14 of giving us a few minutes. I just, I thought I should
 15 start with addressing that issue. As you and I once
 16 agreed, Chairperson, sometimes when people are uneducated,
 17 we don't realise their wisdom. What happened is the last
 18 time when we were in court, we suggested that we should
 19 come here and we were instructed to come here and we
 20 thought it would not be necessary for the clients
 21 themselves to be here since we are just doing an
 22 application, but they were very adamant that they wanted to
 23 be here. So it's unfortunate that the bus broke down, and
 24 they stated their reason, they said if you were not there
 25 it will look like this is your call, as the lawyers; we

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1 want to be there so that it's clear that it's ours, and we
 2 took instructions from them that time.
 3 CHAIRPERSON: We're pleased that they are
 4 here. I think we'll allow Mr Mahlangu to interpret what
 5 you've said so far for their benefit before we proceed.
 6 MR MPOFU: No, Chairperson, then those
 7 particular ones are still not here, but we've decided in
 8 the interest of time to start. The people who are here are
 9 the widows mainly, and other victims, but the group –
 10 CHAIRPERSON: I see.
 11 MR MPOFU: - the other representatives,
 12 ja.
 13 CHAIRPERSON: Do we have any information
 14 as to when the persons to whom you referred are likely to
 15 be here?
 16 MR MPOFU: Yes, Chairperson, they were,
 17 typically they said they're not far and so they've been
 18 saying that, that's why we thought we should start at half
 19 past – we told them that if they're not here by half past
 20 10, we would start. So hopefully they might join us in the
 21 course of the proceedings.
 22 CHAIRPERSON: Thank you.
 23 MR MPOFU: So I was just expressing, save
 24 for the bus, that they really wanted to be here, if the bus
 25 had not broken.

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1 CHAIRPERSON: Major-General, as you have
 2 heard, there's going to be an application argued, possibly
 3 argued, and the viewpoints of the various parties are going
 4 to be heard in relation to questions arising from the
 5 withdrawal of the parties. So it won't be necessary for
 6 you to give evidence this morning. So you're welcome to
 7 sit there, if you wish, but if you wish to be excused, you
 8 may be. Yes, Mr Mpofo.
 9 MR MPOFU: Thank you very much,
 10 Chairperson. Having said that, Chairperson, before I move
 11 the application, I also thought that I should give the
 12 Commission a brief report back since the last time that we
 13 were here, which is also relevant to the issue of the
 14 postponement. Chairperson, indeed we reported to the
 15 Commission the judgment was delivered on Thursday afternoon
 16 and effectively the judgment dealt, or at least purported
 17 to deal with part A of the application, which part, the
 18 most important order of which was dismissed, which was the
 19 order for interim relief that we have alluded to last week.
 20 We then indicated, because we already had
 21 instructions at that stage that the intention was to appeal
 22 the judgment directly to the Constitutional Court.
 23 Unfortunately the judge was not at that stage prepared to
 24 hand down the judgment, the written judgment. He indicated
 25 that he still wanted to edit a few parts of the judgment,

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1 and we tried to put some subtle pressure on the basis that
 2 we would have to attach the judgment on the application.
 3 The best we could get was that he would do it on Tuesday,
 4 or as soon as possible, which I suppose also means on
 5 Tuesday. So if that happens then, Chairperson, by tomorrow
 6 we will have a written judgment, but we have not, we're not
 7 waiting for that literally. We have started drafting the
 8 papers on the basis that we'll simply attach the judgment,
 9 and we're drafting the papers on the basis of the notes
 10 that we all took in court, given that that's the best we
 11 have. So that's the –
 12 CHAIRPERSON: Sorry to interrupt you, Mr
 13 Mpofo. I just received a message from Ms Schubert that
 14 Herman wants to speak to me. So I'm going to adjourn now
 15 for 10 minutes.
 16 MR MPOFU: Thank you, Chairperson.
 17 [COMMISSION ADJOURNS COMMISSION RESUMES]
 18 [10:43] CHAIRPERSON: The Commission resumes.
 19 I'm sorry about that interruption, but please proceed, Mr
 20 Mpofo.
 21 MR MPOFU: Thank you very much,
 22 Chairperson. As it happened, Chairperson, I had finished
 23 with the preliminaries, so I'll now move into the
 24 application proper.
 25 CHAIRPERSON: Tell us briefly what the

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1 nature of the application is. You've told me privately,
 2 but I think it's important that you should tell us here in
 3 the auditorium, and then I will ask the representatives of
 4 the various parties if they have comments to make, and in
 5 the light of the comments we will either proceed or do what
 6 they suggest. Let's see how it turns out.

7 MR MPOFU: Thank you. Chairperson, the
 8 application we'll make is an application for a postponement
 9 of the proceedings of the Commission. It is pending the
 10 hearing of the Constitutional Court appeal that we intend
 11 to lodge, given the background that I explained earlier,
 12 which will be lodged in the course of this week.

13 CHAIRPERSON: When do you anticipate will
 14 the Constitutional Court be in a position firstly to hear
 15 your application, and secondly to give judgment thereon?

16 MR MPOFU: Yes, Chairperson, based on
 17 previous experience, but also on some informal enquiries
 18 that we have made, we reasonably anticipate the hearing to
 19 be in the week starting on the 5th to the 8th. It should be
 20 the 5th to the 9th, but the 9th is a public holiday. It's
 21 that week, round about the 7th, to be more specific,
 22 Chairperson.

23 CHAIRPERSON: Of August, I take it.

24 MR MPOFU: Of August, yes, that's right.
 25 Of August 2013, and once again, Chairperson, we anticipate

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1 that because it's quite a substantial matter and a complex
 2 matter, we anticipate that the judgment would then be the
 3 following week, starting on the 12th sometime, thereabouts,
 4 especially given the long weekend.

5 CHAIRPERSON: So effectively what you are
 6 proposing is that we should postpone the sitting of the
 7 Commission until after the judgment, which you anticipate
 8 will be given then?

9 MR MPOFU: In that week, and therefore we
 10 ask for the 19th.

11 CHAIRPERSON: The 19th.

12 MR MPOFU: Postpone it to the 19th, yes.

13 CHAIRPERSON: I see. So we would
 14 effectively, if your application is granted, not sit for
 15 something over three weeks.

16 MR MPOFU: About three weeks, that's
 17 correct, Chairperson.

18 CHAIRPERSON: So we would lose that time.

19 MR MPOFU: We'd lose three weeks – well,
 20 obviously we won't lose the other days where we would not
 21 be sitting –

22 CHAIRPERSON: Yes, yes, I understand.

23 MR MPOFU: - and the public holiday, ja.

24 CHAIRPERSON: I understand that. Okay,
 25 thank you. So I propose calling upon the parties, the

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1 others parties represented, for their comments at this
 2 stage. Does someone wish – Mr Semenya, do you wish to tell
 3 us what the attitude of your client, the SAPS is to the
 4 application?

5 MR SEMENYA SC: Chairperson, we will
 6 abide the ruling that you make in this regard.

7 CHAIRPERSON: Thank you. Lonmin?

8 MR SHOZI: Thanks, Chair. We too will
 9 abide the decision that you will make. Thank you.

10 CHAIRPERSON: Thank you. Mr Ntsebeza on
 11 behalf of the families?

12 MR NTSEBEZA SC: Thank you, Mr Chairman.
 13 Mr Chairman, we have instructions not only to abide, but to
 14 support the application because we are instructed to be
 15 appellants in the appeal to the Constitutional Court. You
 16 may or may not know that we were merely respondents in the
 17 court a quo. We took instructions. We indicated to those
 18 who were affected by the nature of the judgment, and we got
 19 a very clear and firm instruction that we must now be
 20 involved in the appeal, as well as to move the application
 21 as co-applicants in this forum for the postponement.

22 CHAIRPERSON: Thank you, Mr Ntsebeza.
 23 Adv Barnes, you appear for AMCU.

24 MS BARNES: Yes, thank you, Chair. We
 25 also support the application for the postponement and will

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1 also be participating actively, supporting actively the
 2 appeal to the Constitutional Court. We will be submitting
 3 affidavits and making submissions in that appeal.

4 CHAIRPERSON: Thank you. Mr Tip for NUM?

5 MR TIP SC: Thank, you, Mr Chairperson.
 6 We will abide the decision.

7 CHAIRPERSON: Thank you. Mr Bizos for
 8 the Legal Resources Centre.

9 MR BIZOS SC: Mr Chairman, I want to
 10 place on record that we are on the side of the people who
 11 lost their loved ones and the persons who have been
 12 injured. I think that our conduct before this Commission
 13 must be clear to everyone as to which side we are on. We
 14 are on their side. We also in relation to the litigation
 15 brought by the applicants, we participated in it, filed
 16 papers, and two of the counsel that argued strenuously
 17 before the provincial judge that they are entitled to legal
 18 representation and to funding. We submit with the greatest
 19 respect that the learned judge was wrong and we intend
 20 applying to be joined as amicus in support of the
 21 application if the Constitutional Court grants leave. We
 22 will be on the side of the victims, if the Constitutional
 23 Court wants us to repeat the submissions that we made
 24 before the provincial division.

25 This matter is of great importance to the Legal

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1 Resources Centre and also to our board of trustees, persons
 2 not strangers to the legal process, and we don't have to
 3 identify them. We had a meeting on Saturday afternoon when
 4 certain information that had come to our notice that there
 5 was a possibility of funding being made available to the
 6 applicants, and our trustees instructed us to make an
 7 application for three or four days in the hope that the
 8 information that we then had and we transmitted to them may
 9 bear fruit in order to avoid a lengthy postponement of the
 10 whole of August –
 11 CHAIRPERSON: Sorry, I'm interrupting.
 12 You say an application of three or four days – you mean, I
 13 take it an application for three or four days'
 14 postponement; in other words the matter should stand down
 15 for three or four days while these other possibilities in
 16 relation to obtaining funding will be explored. Is that
 17 what you're saying?
 18 MR BIZOS SC: This is the request that we
 19 make on behalf of the Legal Resources Centre, with the
 20 support of our trustees. Mr Chairman –
 21 CHAIRPERSON: Mr Bizos, give the
 22 interpreter an opportunity, Mr Mahlangu, to interpret –
 23 MR BIZOS SC: I'm sorry.
 24 CHAIRPERSON: It's important that those
 25 who are in the auditorium who only understand Xhosa should

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1 understand what's happening.
 2 MR BIZOS SC: Yes. Mr Chairman, our
 3 belief as counsel for the Legal Resources Centre and our
 4 attorneys within the centre, believe that it is important
 5 for the applicants to get funding. Equally important, with
 6 respect, is that this Commission should try and do its work
 7 as expeditiously as possible. I want to place on record
 8 that the headline, or headlines that the LRC has withdrawn
 9 from the Commission are incorrect, and we believe that we
 10 should try and be of assistance to the Commission, and
 11 particularly the people representing the injured people,
 12 that the sooner this Commission makes a finding, the better
 13 for all of us, including themselves, the country, and the
 14 administration of justice.
 15 On the information available to us, there is a
 16 possibility – a possibility, not a probability, or we
 17 cannot make promises for others – that a few days of this
 18 week may lead to the settlement of the dispute between the
 19 representatives of the deceased and the injured people to
 20 provide funding to the applicants. If there is a –
 21 CHAIRPERSON: I'm sorry, Mr Bizos, I'm
 22 sorry to interrupt you, Mr Bizos. It's only the injured
 23 people, isn't it? As I understand it, the representatives
 24 of the deceased people, in other words the families, they
 25 are receiving legal aid. The dispute is between the

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1 injured and arrested people on the one hand who had been
 2 represented by Mr Mpofu, and the main respondents in the
 3 application in the High Court. Am I correct?
 4 MR BIZOS SC: Yes, this is correct, Mr
 5 Chairman, but because for obvious reasons they are aligned,
 6 this is why I speak to both, and appeal to them, as I would
 7 appeal to the three respondents in the application, and I
 8 have spoken to the senior counsel representing each one of
 9 them, to use their good offices in order to get a
 10 settlement of the dispute between those three respondents,
 11 the President, the Minister of Justice, and the Legal Aid
 12 Board. I would appeal to them publicly, and even though Mr
 13 Ntsebeza is shaking his head, to both of them to try and
 14 take an opportunity that may be offered to settle the
 15 matter. If both sides behave in good faith, the difficult
 16 issue of a lengthy postponement may be avoided.
 17 We have no definite instructions from our
 18 trustees and our clients as to whether we should support or
 19 abide by the application for a postponement for a lengthy
 20 period. We are meeting again tonight. In the meantime the
 21 probabilities are that we will abide the decision, but we
 22 want you, Mr Chairman and the other members of the
 23 Commission, to seriously consider a short postponement to
 24 Thursday in order to give an opportunity for the benefit of
 25 all for negotiations to take place to solve the problem.

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1 May I remind the Commission of the well-published
 2 appeal by the judge who dismissed the application, that
 3 attempts should be made to do what I have articulated here.
 4 We are not alone in that, in hoping that that will happen.
 5 CHAIRPERSON: Thank you, Mr Bizos. Is
 6 there anything else that you wish to say?
 7 MR BIZOS SC: No, Mr Chairman, I think
 8 that I said what I, we wanted to say on behalf of the Legal
 9 Resources Centre.
 10 CHAIRPERSON: Thank you. Do we have a
 11 representative here of the Human Rights Commission?
 12 MR FISCHER: Yes, Chair.
 13 CHAIRPERSON: Mr Fischer.
 14 MR FISCHER: Thank you, Chairman. The
 15 South African Human Rights Commission will abide by the
 16 decision of the Commission. The Human Rights Commission
 17 is, however, very concerned at the current situation and
 18 will support the Constitutional Court appeal. The judgment
 19 of the High Court did not preclude funding to the injured
 20 and arrested miners; it merely determined that there was no
 21 obligation on the State or Legal Aid Board to do so. In
 22 that light the Human Rights Commission calls on this
 23 Commission and all parties to the Constitutional Court
 24 appeal to do everything in their power to reach a solution
 25 that can allow the injured and arrested miners to continue

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1 to take part in this Commission process. This Commission
 2 of Inquiry must remain inclusive and must remain responsive
 3 and allow a fair procedure. We would support the LRC's
 4 suggestion of a stand-down until Thursday to see if these
 5 appeals for sense can have effect. Thank you, Chair.
 6 CHAIRPERSON: Thank you, Mr Fischer. Is
 7 there any other representative of one of the parties before
 8 us who wishes to say something before I call upon the
 9 evidence leaders to give us their attitude? Mr Gumbi?
 10 MR GUMBI: Yes, Chairperson. On behalf
 11 of Lieutenant Shulumu(?) we are still awaiting the High
 12 Court's judgment in our application. As soon as that
 13 judgment is delivered, then we will see, I will get
 14 instruction whether are we taking the matter forward or
 15 not, but we will abide by the decision of the Chairperson
 16 in this regard.
 17 CHAIRPERSON: Do we have a representative
 18 of the Monene family?
 19 MS MASEVHE: Yes, Chairperson, on behalf
 20 of the Monene family we'll abide the decision of the
 21 Commissioner of the Constitutional Court.
 22 CHAIRPERSON: Thank you. Any other
 23 representative of any of the other parties who wishes to
 24 say something?
 25 [11:03] MS CHABEDI: Chairperson, the DMR will

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1 abide the decision of the Commission.
 2 CHAIRPERSON: Thank you, and the
 3 Administrator of the Traditional Authority, do you wish to
 4 say something on behalf of your client?
 5 MR KGAKA: Thank you, Mr Chairperson,
 6 Bapo Ba Mogale also will abide by the decision.
 7 CHAIRPERSON: Thank you. Mr Madlanga.
 8 MR MADLANGA SC: Mr Chairman, I've asked
 9 Mr Budlender to address the question of the postponement;
 10 that will include the question of the stand-down, thank
 11 you.
 12 CHAIRPERSON: Thank you. Mr Budlender.
 13 MR BUDLENDER SC: Chair, in our view it
 14 is possible that it will be necessary for the application
 15 for the postponement to be fully argued and decided, but
 16 it's also our view that it's possible that over the next
 17 few days arrangements can be made which will make that
 18 unnecessary. We believe that every effort should be made
 19 to resolve the matter without the necessity of dealing with
 20 the application for the postponement, or for that matter,
 21 the application, or the contemplated application to the
 22 Constitutional Court, and we believe that all avenues
 23 should be exhausted before we reach those points.
 24 So the evidence leaders therefore support the
 25 proposal that this application should stand down until

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1 Thursday. There is, in any event, plenty of work which can
 2 be done in the meantime, certainly on the part of the
 3 evidence leaders, which will mean that the time is not
 4 entirely lost. So in summary, we support the proposal that
 5 the application stand down till Thursday. If by then the
 6 problem has been resolved, the application for a
 7 postponement will fall away. If by then it has not been
 8 resolved, the application can then be argued and decided by
 9 the Commission. Thank you, Chair.
 10 CHAIRPERSON: Thank you, Mr Budlender.
 11 Mr Mpofo, that seems prima facie to be a satisfactory way
 12 of dealing with the matter.
 13 MR MPOFU: Well no, Chairperson, it's
 14 not. I'll make my response. Firstly, Chairperson, I must
 15 thank the majority of the parties for supporting or abiding
 16 by the decision of the Commission; particular thanks to
 17 SAPS and Lonmin because we had anticipated them to be the
 18 ones who were going to - and we want to say that we think
 19 they took that position sensibly, understanding that what
 20 we're asking for the Commission is not something that is
 21 easy to ask. It's the lesser of two evils. One is
 22 obviously the delay in the Commission, which nobody wants,
 23 and the other evil is where the Commission might continue
 24 in the absence of certain important parties, which also we
 25 don't think anybody wants.

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1 We would rather have a situation where the power
 2 of what happens is really taken back to the hands of the
 3 Commission to avoid all this drama of people walking out
 4 and all sorts of things like that, and that the Commission
 5 itself should hear our plea that we would like to shorten
 6 the time within which we will, under pressure, draft the
 7 papers to the Constitutional Court, appeal to that court,
 8 to the Chief Justice, because he's the one who gives the
 9 directions, to hear this matter expeditiously, mindful of
 10 minimising the delay in the Commission. So it's a very
 11 difficult weighing process, it's not something that was
 12 frivolously made, and that's why we appreciate those
 13 parties that support that difficult situation.
 14 Chairperson, we also support the calls by the
 15 other parties for everything to be done to try and get this
 16 matter settled out of court. There is no party, I'm
 17 prepared to say this without any fear of equivocation,
 18 there is no party in this room that has tried more than we
 19 have since October last year to have this matter resolved
 20 out of court. We have written letters to the Minister, we
 21 have written letters to the President. One of those
 22 letters took five months for us to even get a response.
 23 After that we did the application for relocation to try and
 24 mitigate our situation. After that we approached the
 25 courts; after that, during the course of the discussion -

1 we made sure we approached the courts during the recess of
 2 the Commission so that minimum disruption to the Commission
 3 should be caused. Even when we were at the doorstep of the
 4 court, Chairperson, we approached the State Attorney, and
 5 with your indulgence, Chairperson, I'll read out a letter
 6 that we wrote to them where we said - we made informal
 7 representations and I'll jump the first paragraph. We say,
 8 "Our clients' proposal" - this was on the 5th of July, a few
 9 days before the hearing, "Our clients' proposal is
 10 therefore that your clients" - that is the President and
 11 the Minister and Legal Aid, first, second and third
 12 respondents, "together or separately consider offering to
 13 pay the applicants' reasonable and agreed legal fees for
 14 the period pending the hearing of part B of the
 15 application. This would be along the lines suggested in
 16 the 17th respondent's answering affidavit, the LRC." We
 17 say, "This important step and gesture would ensure that,
 18 (1), All the parties have adequate time to prepare for and
 19 deal with the important constitutional and jurisprudential
 20 issues raised by all sides. (2), More importantly the
 21 resumption of the Commission on the 15th of July would be
 22 guaranteed. Our clients have specifically indicated that
 23 they will not participate in the Commission unless the
 24 issues they raise are addressed. It is not the lawyers who
 25 will, in that event, withdraw; it is the clients. The

1 withdrawal of the lawyers is merely consequential and
 2 incidental. (3), It would save considerable costs for all
 3 the parties." Then we say, "(4), It is not necessary at
 4 this stage to get into the specific details of the required
 5 interim funding, save to say that it would be paid, (1),
 6 without any admission of liability on your client's part;
 7 and (2), Only after some discussions as to its exact
 8 parameters and nature. (5), Should there be the necessary
 9 political will, we are confident that such a step would be
 10 beneficial to all parties and be in the public interests.
 11 We await your urgent response."
 12 This was the response that we got from the
 13 attorneys of the President and the Minister. "(1), The
 14 discussion today 5 July prior to the conference with Deputy
 15 Judge President concerning this matter refers. (2)," this
 16 is the important one, "Your proposal has been conveyed to
 17 the first respondent," that's the President, "and the
 18 second respondent," that's the Minister. "We have received
 19 firm instructions that the said proposal is not acceptable
 20 to our clients and they are not willing, even on a
 21 provisional basis, to fund the legal representation of your
 22 clients before the Marikana Commission of Inquiry. Under
 23 the circumstances we await your replying affidavit," and so
 24 on. It's very important, Chairperson.
 25 So that's the last word, Chairperson, with

1 respect, that's the last word we had. It's not that they
 2 say they have legal constraints or they don't have money or
 3 whatever. They say they are "not willing" to fund the
 4 legal representation of our clients, and that was on the 5th
 5 of July.
 6 After the judgment, Chairperson, again we had
 7 discussions, including yesterday I called my learned
 8 opponent representing these parties and he informed me that
 9 his attorneys are on holiday. We were talking more about
 10 the practicalities of trying to speed up also the
 11 constitutional process, Constitutional Court processes, and
 12 he would only be able to even respond even on those issues
 13 later in the week. So we are here, Chairperson, as parties
 14 that have tried everything, but everything under the sun to
 15 have this matter settled, as I say, even before when we
 16 were at the doorstep of the court. So, and we have a
 17 mandate to continue to do so, and we will do so, as we did
 18 yesterday, as we did on Thursday in court, as we will do
 19 tomorrow, as we will do this afternoon, Chairperson. But
 20 the point we are making is that we are asking the
 21 Commission to give the postponement now so that we can then
 22 spend the time exactly continuing with those efforts, but
 23 also drafting the papers that we have to draft, because
 24 should we delay in delivering the papers in the
 25 Constitutional Court, the same parties might come back and

1 say we got the judgment, we relaxed, we didn't do anything
 2 and therefore now we want to put pressure on the court, and
 3 all those stories that we heard in the previous
 4 application. So we have a duty, a professional duty to
 5 come to the Constitutional Court as soon as humanly
 6 possible, which is why we asked the judge last week, almost
 7 put pressure on him to give us the written judgment.
 8 So what we are saying is not different,
 9 Chairperson; we will continue to try. Obviously we are not
 10 so foolhardy that if a solution presents itself on
 11 Thursday, or on Wednesday or this afternoon, that we will
 12 say no, Chairperson, remember you gave us the postponement
 13 until the 19th of August. We are not that infantile. What
 14 we will do, if such a solution does come to the fore is to
 15 approach, is obviously to approach the Chairperson at an
 16 informal level, as we always do, and the evidence leaders
 17 and all the parties, and we will reconvene should that
 18 miracle, which I'm not at this stage sure is going to
 19 happen in the next couple of days, but you never know,
 20 miracles do happen.
 21 So our suggestion is not opposed as such to the
 22 other suggestion. It simply says that instead of making it
 23 compulsory for us to come back here, to be shuttling up and
 24 down and come here on Wednesday or on Thursday, let us
 25 concentrate on the work that is in our hands, which is to

1 try and continue to make this overture, but also to
 2 discharge our duties to the Constitutional Court, to
 3 prepare the papers and be there as soon as possible, and
 4 should the optimism of the other parties be well placed,
 5 then we'll be back tomorrow for that matter. If this
 6 happens and somebody says to us there's a solution, forget
 7 Thursday; we'll be back tomorrow or any other time before
 8 the Constitutional Court hearing takes place.

9 Lastly, Chairperson, we have strict instructions
 10 to be here today, given our position that we had
 11 publicised, or rather announced here, to be here today for
 12 the specific purposes of making this application. We have
 13 no instructions to be here on any other day, and even those
 14 instructions, as I explained, we obtained because we wanted
 15 sense to prevail to our clients on the basis that it would
 16 be better if it is the Commission itself that governs its
 17 owns procedures, as it were, so that if we come back on the
 18 19th, in the unlikely event that there's a problem we'll
 19 still come back. It's a more orderly way of doing things
 20 than having some people remaining, others going and so on.
 21 We really think that if anything protects the integrity of
 22 the Commission it is the suggestion that we are making,
 23 which as I say, is made not easily; it's made reluctantly
 24 because even three weeks lost in this Commission is three
 25 weeks too much. But we have the choice between that or

1 having a skewed commission that is seen by the public to be
 2 only attended by certain types of parties, which is not
 3 desirable and must be avoided at all costs, Chairperson.

4 So the bottom line, Chairperson is that we'd
 5 like, particularly in view of the fact that there's no
 6 party that is really opposing the application, we'd beg the
 7 Commission to grant us this indulgence for the reasons that
 8 we have put, but also for the reasons that we, apropos Mr
 9 Budlender's suggestion that we will not be here on Thursday
 10 to move the application. We are here to move it today, and
 11 those are our instructions at this stage. So our
 12 suggestion embraces everything that has been said in terms
 13 of making the attempts; that we can guarantee on the record
 14 without any contradiction that we will pursue, as we have
 15 done for the past eight months or so, a solution that does
 16 not involve litigation and unnecessary waste of money and
 17 time. Thank you.

18 CHAIRPERSON: Mr Ntsebeza.
 19 MR NTSEBEZA SC: Mr Chairman, if you
 20 could grant me the indulgence to support the applicants in
 21 their application for a postponement, which has been
 22 calculated would be for three weeks. I have been told over
 23 the weekend, before we even took instructions, that the
 24 LRC's position would be that we should ask for a stand-
 25 down.

1 [11:23] That was canvassed with our clients and we as the
 2 legal advisors were open-minded, as we always are, but the
 3 prevalent view was that it is important not to engage in
 4 this two-stage approach, especially because it is premised
 5 on nebulous suggestions that approaches are going to be
 6 made to nameless and faceless people – I'm more than 60
 7 years old, Mr Chairman, certainly not the 80 years that Mr
 8 Bizos is, but I expect Mr Bizos, whom I respect, to have
 9 the decency to call me aside. We have been sitting here,
 10 waiting for this Commission to start. I have known him for
 11 a long time, for him to know that if there was anything
 12 that he wanted to share with me in confidence about the
 13 approaches he is making, to whomsoever he is making,
 14 trustees, government, or anybody, I would seriously have
 15 taken those into account and I would have caused my clients
 16 to take that into consideration. He hasn't. He is
 17 expecting me, when I have instructions, when he has
 18 instructions, he is expecting me on the basis of a
 19 possibility - he said it's not even a probability - a
 20 possibility probably from his trustees, offering some
 21 assistance to the arrested and detained, to go against the
 22 instructions of my clients who say this has now become a
 23 fundamental issue of whether this country says it is okay
 24 for the taxpayer to fund seven lawyers representing SAPS,
 25 but my clients – and I represent those who are allegedly

1 being funded – Mr Chairman, I'm on record here as having
 2 stated the basis on which the families are being funded.
 3 You yourself, Mr Chairman, using your statutory power,
 4 appointed evidence leaders because you were appreciative of
 5 the volume of work, the complexity of the issues that were
 6 going to be dealt with here. Now we want the highest court
 7 in the land, that is why we are getting in now as co-
 8 applicants; we're not asking for sameness of resources.
 9 That's never been our position. Our position is for that
 10 highest court in the land to tell us an everybody else,
 11 including my learned friend Mr Bizos, that it is okay that
 12 these families must be supported on the basis that their
 13 senior counsel will be funded for 30 days, or so many days,
 14 for the duration of the funding. I'm just indicating the
 15 first terms that we arrived at, and that it is okay for the
 16 families to have only one silk, two juniors, when it is so
 17 complex to go through footage, to go through records, and
 18 to prepare.

19 Now I don't want to think that this is still
 20 consistent with what Mr Bizos has submitted earlier on when
 21 we raised this issue, that we are in this predicament
 22 because we are not knocking on the right doors. Maybe
 23 those are the doors that he seeks to go and knock at. I am
 24 very disturbed when he says he is appealing to us in public
 25 because what he does is to portray us as recalcitrant, as

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1 people who are not advising our own clients properly. I
 2 take offense, Mr Chairman, to that kind of attitude because
 3 it is something that Mr Bizos in his knowledge of where I
 4 come from with him in a number of these issues knows I
 5 would not - I'm not here to posture. You will note, Mr
 6 Chairman, that I've not been coming to these proceedings
 7 and I've not moved the application because I moved the
 8 application in October before you, and I stated the basis
 9 why I thought it was important for us to be funded
 10 adequately, not on the same basis, but adequately for us to
 11 be able to deal with the issues that are raised. So for me
 12 to be called in public, and for my learned friend to say so
 13 in so many words that he's calling upon us in public - you
 14 know, to use our influences with our clients for them to be
 15 able to agree only to a stand down is an assumption that we
 16 have not done so.

17 My learned friend Mr Mpfu has indicated the
 18 correspondence that he has made to the department. Those
 19 who instruct me in the Socio-Economic Rights Institute had
 20 written similar letters right at the very beginning,
 21 prevailing upon the Minister of Justice to understand why
 22 we needed to be funded even on a better basis than we are
 23 currently being funded. So I just want to correct in the
 24 same public that Mr Bizos called upon me to put my position
 25 here, that I am quite sympathetic, I'm the first person

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1 who'd love this Commission to come to an expeditious
 2 finding and end to the deliberations. But I've got
 3 instructions and I understand, I understand fully why the
 4 families are feeling that - Mr Chairman, in your name, you
 5 know the Commission spokesman is reported, and I saw it
 6 also on television this morning that they don't need is.
 7 That's what he has been saying, that the Commission does
 8 not need the presence of any parties because the Commission
 9 can subpoena any people. But I know that is not your
 10 position -

11 CHAIRPERSON: I wasn't aware of that
 12 statement.

13 MR NTSEBEZA SC: There is the -

14 CHAIRPERSON: I did speak to the
 15 spokesman this morning about something I heard on the
 16 radio, but certainly that's not our attitude.

17 MR NTSEBEZA SC: So, Mr Chairman, I know
 18 that, you know, the spokesman may not have meant it in that
 19 sense, but that's how it came across, and that's how our
 20 people hear these things. So if they don't need us, we may
 21 just as well stay at home until the Constitutional Court
 22 has given a decision. So there is a delicateness with
 23 which we must handle our submissions, and I would prevail
 24 upon my elder statesman and counsel to understand that
 25 sometimes what he says, you know, in good faith, may come

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1 across out there as very insensitive. Incidentally, I
 2 don't want to be portrayed in the light that I simply want
 3 to put a spanner in the wheels of the Commissioner's
 4 proceedings.

5 CHAIRPERSON: I think we'll take the tea
 6 adjournment now and then I'll hear Mr Bizos in reply, and
 7 perhaps the evidence leaders as well. We'll now take the
 8 tea adjournment.

9 [COMMISSION ADJOURNS COMMISSION RESUMES]

10 [12:03] CHAIRPERSON: The Commission resumes. Mr
 11 Ntsebeza?

12 MR NTSEBEZA SC: Thank you, Mr Chairman.
 13 Mr Chairman, Commissioners, I just wanted to indicate to -

14 CHAIRPERSON: Sorry, I'm sorry, I thought
 15 you had finished when I took the tea adjournment. I was
 16 informed subsequently that you had not finished and so -

17 MR NTSEBEZA SC: No.

18 CHAIRPERSON: - I'm sorry for having
 19 created the impression that you had finished. Please
 20 proceed.

21 MR NTSEBEZA SC: No, it was just giving
 22 the interpreter an opportunity, who had been feeling that
 23 I'm not giving him the opportunity. I was going on a long
 24 tirade. Mr Chairman, there are just two points that I
 25 wanted to make. The first one is that whether it is or it

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1 is not an argument, the families want to make it very clear
 2 that even though we as legal advisors indicated to them
 3 there are ways and means of assisting the Commission - even
 4 if the injured and arrested are not physically here, we can
 5 use all sorts of things, technology, best evidence
 6 documentation, footages. Their position is a principled
 7 one and it is to say we are largely dependent on the
 8 arrested, detained, and injured, for us to get the comfort
 9 that what is communicated to the Commission, also at least
 10 comes from those widows of our relatives who died, came
 11 from. They were mineworkers, and they were unfortunate to
 12 have been killed, but we would love them to be represented,
 13 and if they are not represented, we don't really see much
 14 point.

15 Now I'm saying, I'm not, these are the merits,
 16 but that's the reasoning behind all of this, and it is not
 17 being challenged, it's not being disrespectful of the
 18 efforts made by the Department of Justice in bringing them
 19 to be here in the first place. They take offense at the
 20 indication that they are being kept at hotels, why are they
 21 now not coming to this Commission when they have lost, I
 22 mean when the case has been lost. They feel if there is a
 23 possibility that by an approach to the highest court in the
 24 land there might be a different view held by that court,
 25 then that should be given an opportunity, and if it is so

1 that the Department of Justice takes a view that because
 2 they are here and not attending, then they are quite ready
 3 to go home, back home. In fact, as things are, some of
 4 them have not even arrived back from the recess period
 5 because when, once things started to happen in the way in
 6 which they did, they said until the question of funding has
 7 been sorted out, we may just as well stay away.
 8 Then our instructions are to say you tell us all
 9 the time that you are officers of the court and therefore
 10 even in the Commission your word will be taken. Give the
 11 word that as soon as there is a viable solution, and if the
 12 viable solution is the one that we are promised might come
 13 on Thursday, then in the meantime let's go home, but you as
 14 officers of the court, if it is so that you are told that
 15 there is a solution on Thursday, your word must be taken
 16 because you will have to go back immediately there is an
 17 indication that some solution has been taken. What we are
 18 uncomfortable about is to be remaining here when there is a
 19 view taken by the Department of Justice that we should not
 20 be wasting taxpayers' money by being at hotels when we are
 21 not attending the Commission. If that is the view, then
 22 pending either an approach to the Constitutional Court or a
 23 resolution that is satisfactory, we are quite happy to go
 24 home. Those were the submissions that I wanted to make for
 25 the record.

1 CHAIRPERSON: Thank you, Mr Ntsebeza. Mr
 2 Bizos?
 3 MR BIZOS SC: Mr Chairman –
 4 CHAIRPERSON: Sorry, I'm sorry, I beg
 5 your pardon, before I called upon you I should have allowed
 6 the interpreter to interpret what Mr Ntsebeza had said. So
 7 I withdraw my invitation calling upon you to speak. I will
 8 renew it later when the interpreter is finished. Mr Bizos.
 9 MR BIZOS SC: Mr Chairman, I was saddened
 10 by the contents of the letter written by the respondents to
 11 the legal representatives of the injured people. It's
 12 written from a very high horse, if I may use the
 13 expression, but experience has taught us that potential
 14 litigants do ride high horses, but that doesn't mean that
 15 we must not attempt to get people off high horses for the
 16 benefit of all of us.
 17 One of the great lawyers that I was happy to be
 18 the junior of, Bram Fischer, reminded me when I was in
 19 despair of failure in a particular case, I must remember
 20 that no-one has been condemned for trying and having
 21 failed. I would appeal both to the government and the
 22 legal representatives here to get off high horses and
 23 really try in the next few days to solve the problem. May
 24 I say, Mr Chairman, that you have a precedent of the
 25 Pretoria High Court judge in making an appeal to both of

1 them to try and settle the difference between them. I
 2 think that such, or similar words from the Chairman of this
 3 Commission may favourably resound in the ears of both
 4 parties.
 5 I do not want to enter into a debate with my
 6 learned friend Mr Ntsebeza and his statements. They are
 7 personal; they are not of particular relevance to the
 8 problem that we are facing, but I do wish to place on
 9 record that in the morning we spent half an hour, we, the
 10 Legal Resources Centre, about half an hour of explaining
 11 our attitude to Mr Mpofo. It was in the foyer. We
 12 deliberately came early in order to apprise Mr Mpofo of our
 13 attitude to the application for postponement, and for the
 14 sake of clarity might we say that we do not disagree with
 15 Mr Mpofo in that a postponement may be necessary in the
 16 circumstances. Unfortunately, Mr Chairman, Mr Ntsebeza was
 17 not around in the foyer. We assumed that what we told Mr
 18 Mpofo would have been transmitted to Mr Ntsebeza, who I did
 19 not see until the first time this morning. A couple of
 20 minutes before the Commission came in I came here and I saw
 21 my learned friend, Mr Ntsebeza, sitting here. There was no
 22 opportunity for me to speak to him. I want to place on
 23 record that we mustn't personalise things; there are more
 24 important things happening here, and let us concentrate on
 25 that, Mr Chairman.

1 CHAIRPERSON: Mr Mpofo, I see you've
 2 turned your light on.
 3 MR MPOFU: Yes, thank you, Chair.
 4 Chairperson, firstly I think on a positive note I just want
 5 to confirm that we've also renewed our instructions about
 6 what Mr Ntsebeza was saying, namely that the, should a
 7 solution arise from any quarter whatsoever during the
 8 period of the postponement, starting with the next few
 9 minutes, then we will not only be here running, but we'll
 10 be here as soon as possible and ready actually to run. So
 11 I think it's important to place that on the record, so that
 12 our position is simply that we now want to focus on the
 13 drafting and on the attempts that are referred to, and we
 14 hope that our word as professionals and officers of the
 15 court will be taken at face value, that should any of these
 16 things succeed, we will be back here with the speed of
 17 light. So there's no question about that.
 18 Apropos the discussions this morning, well
 19 Chairperson, I'm afraid since these things are said in the
 20 public, I have to say this. There is no discussion that
 21 took place between me and Mr Bizos this morning. The
 22 discussions that did take place were, included some people
 23 in his team, but all stages they also included Mr
 24 Ntsebeza's juniors and other representatives.
 25 Unfortunately Mr Ntsebeza had a mishap this morning where

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1 he was locked out of his own gate, or inside the yard, so
 2 he arrived a bit late, (1).
 3 (2), in none of those discussions was it ever –
 4 of this morning, was it ever mentioned that there is some
 5 specific attempts which might bear fruit. There couldn't
 6 have been because Mr Bizos himself has said that it's not
 7 even a probability.
 8 The third issue is that what did happen is that
 9 yesterday evening I had a discussion with Mr Varney, who is
 10 Mr Bizos' junior, and he mentioned two things. One was to
 11 do with government overtures, which I've already addressed.
 12 The other one was he said there's somebody who lives next
 13 door to somebody who said that they might help – no names,
 14 no nothing – and I take it, all that I take it in good
 15 faith that Mr Varney – as a colleague, I accept that if he
 16 said there was that rumour, there was that rumour, and we
 17 would like to pursue it, but all we are saying is that let
 18 us not belabour the point; let us get the postponement on
 19 the understanding that both Mr Ntsebeza and myself, and I'm
 20 sure any other parties, those who have supported or abide
 21 by the decision will be prepared to come back here should
 22 any of these probabilities, possibilities, whatever, bear
 23 any fruit. Thanks, Chairperson.
 24 CHAIRPERSON: Thank you, Mr Mpofo.
 25 MR MPOFU: Sorry, Chairperson, just – I'm

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1 sorry, one small thing that I forgot. I just want also to
 2 place on record that as I've already indicated, we do not
 3 need anybody's encouragement to try and settle this matter.
 4 We've done everything, more than anybody, to try and settle
 5 this matter, and all these attempts that we have made over
 6 the past eight months, if they are portrayed as high horse,
 7 well then so be it, but we certainly do not – of course if
 8 the Chairperson is minded to encourage us to settle, we
 9 will accept that humbly, but rest assured, Chairperson,
 10 that there's nobody in this room who has tried to settle
 11 this matter quietly - we have even sent deputations,
 12 diplomatic deputations, I can't mention people's names. If
 13 I show you SMSes that I've made to senior government
 14 people, I would be compromising them, but we've done
 15 nothing else in the past few months but to try and settle
 16 this matter out of court, and if that's called a high
 17 horse, well so be it.
 18 MR VARNEY: Chairperson -
 19 CHAIRPERSON: Yes, Mr Varney –
 20 MR VARNEY: With your leave, since my
 21 learned friend has disclosed the discussion that we did
 22 have last night, I must correct him on one small aspect. I
 23 did disclose the name of the funder, who I mentioned was
 24 amenable to a further approach for funding. So that, the
 25 name of the organisation was made clear to my learned

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1 friend. Thank you.
 2 CHAIRPERSON: Thank you.
 3 MR MPOFU: Confirm that, Chairperson.
 4 CHAIRPERSON: Mr Mpofo has very fairly
 5 said that what Mr Varney has stated was correct. Mr Bizos,
 6 my colleague Adv Tokota wants to ask you a question.
 7 MR BIZOS SC: Yes, of course, Sir.
 8 COMMISSIONER TOKOTA: Mr Bizos, all I
 9 want to check from you, do I understand you correctly that
 10 you are not opposed to the application for postponement as
 11 such; all you need is to see if any efforts can bear fruit
 12 until Thursday, that the funding may come out or – and if
 13 it doesn't, then you are not opposed to the postponement?
 14 Is that understanding correct?
 15 MR BIZOS SC: No, that is correct, but
 16 you know, unless you put deadlines, people say well – the
 17 good Afrikaans expression, "more is ook 'n dag," and we
 18 don't want –
 19 CHAIRPERSON: What the interpreter would
 20 say, tomorrow is also a day.
 21 MR BIZOS SC: Yes, so time is of
 22 fundamental essence. People want to know when is this
 23 going to end. Having long postponements which may or may
 24 not bear fruit is not helpful, and this is why we have
 25 suggested that if something can be done, the appeals that

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1 have been made by the judge in Pretoria, we hope the appeal
 2 that will be made by this Commission and other persons that
 3 may be concerned, by limiting the period to Thursday may
 4 make the engine run better in the hope that a settlement
 5 will be entered into.
 6 [12:23] COMMISSIONER TOKOTA: Thank you, Mr
 7 Bizos.
 8 CHAIRPERSON: Mr Budlender?
 9 MR BUDLENDER SC: Chair and
 10 Commissioners, very briefly, the view of the evidence
 11 leaders is that the best solution for the difficult
 12 situation which arises at the moment is twofold; firstly
 13 that a suitable interim arrangement should be made for the
 14 next month, which would make it unnecessary – when I say
 15 interim arrangement, interim arrangement for funding should
 16 be made for the next month, which would make it unnecessary
 17 for the Commission to decide whether a postponement would
 18 otherwise be necessary because there will be funding for
 19 the representation, and then secondly, the second leg,
 20 meanwhile the applicants should proceed with their case to
 21 the Constitutional Court and obtain a decision from that
 22 court on a permanent arrangement. So we think that's the
 23 best way to deal with this now, an interim arrangement
 24 which solves the problem while the court, while the case is
 25 pending in the Constitutional Court, and that is in fact

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1 what the applicants in Mr Magidiwana's case were seeking as
 2 part A of their relief. They were seeking it from the
 3 government. It may be that the government will do it; it
 4 may be other people will do it.

5 So the question is what is the best way to create
 6 a space for an interim solution to be found while the
 7 principal matter is being debated in the Constitutional
 8 Court, and we suggest that the best way to do that is to
 9 stand the matter down to Thursday so that efforts which are
 10 being made can be made, can be pursued, and that other
 11 efforts can be pursued, and then for the Commission only to
 12 deal on Thursday, and then only if it's necessary, with the
 13 question of whether a postponement will be necessary in the
 14 absence of interim funding.

15 CHAIRPERSON: Mr Mpofu, how do you react
 16 to the point which Mr Budlender has made, that if money can
 17 be found either from the fiscus or from some other
 18 organisation, to give you what you sought before the High
 19 Court, namely interim funding until the decision on the
 20 merits, as it were, is given? Is that the thing that would
 21 bring you back, to which you referred earlier?

22 MR MPOFU: Chairperson, yes, that
 23 question doesn't even have to be asked. I'm sure you're
 24 asking it for clarity, but surely what Mr Budlender is
 25 saying is exactly the prayer we sought under part A, so how

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1 could we reject that what we went to court for? What we
 2 are saying is simply this; we agree that if – this is why I
 3 read these letters, Chairperson, because what Mr Budlender
 4 is saying is exactly what was contained in the
 5 correspondence that I read to yourself, Chairperson, and it
 6 was rejected on the basis of unwillingness.

7 Now if between the 5th of July, when that was the
 8 position, and today something has changed, then I think the
 9 people who are here owe us as colleagues to tell us what it
 10 is because clearly there are people here who know something
 11 we don't know. We know the position to be what is written
 12 in black and white, which I've read out. As I say, I spoke
 13 to the representatives of the President and the Minister
 14 yesterday; he did not mention anything of the sort, but if
 15 Mr Budlender, Mr Bizos, or Mr Varney or whoever knows
 16 something that we do not know, then they must follow what
 17 Mr Ntsebeza has said – as colleagues, take us to the side,
 18 outside of this glare of cameras, and tell us what it is
 19 that is likely to happen between now and Thursday. Failing
 20 that, then we take the position to be what it is, always
 21 laced with the guarantee that we are giving that should
 22 their efforts succeed, we will be back.

23 CHAIRPERSON: To be fair, of course, they
 24 may have been told things by people on a confidential
 25 without-prejudice basis, which they're not at liberty to

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1 disclose –

2 MR MPOFU: Well, they must even say that.
 3 They even need to say that. We don't want names. Tell us,
 4 just say there's a –

5 CHAIRPERSON: I did understand Mr Varney
 6 actually gave you the name of an organisation which might –

7 MR MPOFU: No, that's irrelevant,
 8 Chairperson, with greatest respect. What Mr Varney said is
 9 that a particular organisation, whose name we've been at
 10 pains not to drag into these things, and that's the only
 11 reason that I didn't mention it, but knowing the name of
 12 the organisation is neither here nor there. The issue is
 13 whether those efforts, whether they come from Father
 14 Christmas or whoever, must just, they must just tell us
 15 there is a possibility as colleagues, they are working on
 16 it. We will trust them, as our colleagues, and we'll leave
 17 it at that. We won't pry them and say what, who, who,
 18 where, what time. We don't want this –

19 CHAIRPERSON: You're now using the word
 20 Mr Bizos used, which is possibility.

21 MR MPOFU: Yes.

22 CHAIRPERSON: But anyway, we will take an
 23 adjournment at this stage to consider what's been put to
 24 us, but before we do that, my colleague Hemraj wants to ask
 25 a question.

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1 COMMISSIONER HEMRAJ: Mr Mpofu, in the
 2 light of what you've just said, you can then have no
 3 objection to us standing over for a couple of days until
 4 these matters about interim funding is sorted out before
 5 you actually bring your application, because your
 6 application might not be necessary if that is sorted out in
 7 the interim.

8 MR MPOFU: Well, thank you very much,
 9 Commissioner Hemraj, what you've just said portrays the
 10 dilemma that we are being placed in by these parties. Let
 11 us assume that we accept what you say and we sit until
 12 Thursday, and then on Thursday these overtures don't
 13 materialise; we would have wasted four days of the
 14 Constitutional Court's time within which they would have
 15 been able to give us the time, which is already squeezed,
 16 to get a hearing, and only on Friday must we then start
 17 pursuing that course. That is undesirable. What we are
 18 saying, that's why we are saying the most – and what we are
 19 saying is not opposed to anybody. We are saying we are
 20 committing as professionals that we will attend, if the
 21 meeting is at midnight today, we will be there, and if it
 22 bears fruit, we will be back tomorrow. So what can be
 23 wrong with that? But in the meantime let us pursue the
 24 parallel work that needs to be done. A lot of work still
 25 has to be done in analysing the judgment, drafting the

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1 necessary affidavit, and giving the Chief Justice
 2 sufficient time to give us direction. If all that drafting
 3 is, it turns out to have been unnecessary, I'll be the
 4 first one to jump for joy and I will not blame anyone and
 5 say I was drafting here and now you've brought a solution.
 6 But we cannot be asked to sort of put everything on pause
 7 because time doesn't go on pause. By Friday we will have
 8 jeopardised our chances of being heard expeditiously at the
 9 Constitutional Court, if it doesn't work. If it works -
 10 hallelujah.

11 CHAIRPERSON: Sorry, I don't understand
 12 the last point you've made.

13 COMMISSIONER HEMRAJ: Perhaps we're
 14 talking here at cross purposes. It's not being suggested
 15 by Mr Budlender at all that you do not proceed with your
 16 Constitutional Court matter. What is being suggested is
 17 that interim funding to enable you to carry on for the next
 18 month while that process is being followed. Now that being
 19 the case, you can't have an objection to us standing over
 20 while the issue of interim funding is discussed. That
 21 doesn't preclude you from proceeding with your papers.

22 MR MPOFU: No, no, well I've already
 23 answered that question. How on earth could I have an
 24 objection to the thing, the very thing that we went to
 25 court to seek? It's not possible. All we are saying, the

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1 only question here is whether we come back here on Thursday
 2 or not, and we are saying, I've said to the Commission and
 3 I'll say it again, I have specific instructions to be here
 4 today to seek the postponement. If other people want to
 5 come back here on Thursday, well they can come back on
 6 Thursday, but - and if their efforts have borne fruit, once
 7 again we will be back on Friday. But we cannot be
 8 schizophrenic and on the one hand be pursuing what we have
 9 to pursue in the interest of time, and then on the other
 10 hand come and sit here again to say exactly what we have
 11 already said, which is that we seek a postponement. Or if
 12 the Commission is prepared to then take what we have said
 13 into account as our application, full stop, then what the
 14 Commission does with its time on Thursday is none of our
 15 business.

16 CHAIRPERSON: Yes, Mr Mpofu, a stand-down
 17 of the application wouldn't be a stand-down of your
 18 preparation for Constitutional Court. So I don't
 19 understand that argument. You say, one point you seem to
 20 suggest that if the application was stood down, you would
 21 then not do any work for your Constitutional Court
 22 application. I'm not sure that I understood you correctly
 23 -

24 MR MPOFU: No, that's certainly not what
 25 I -

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1 CHAIRPERSON: Of course then officially
 2 you would carry on with the work, and insofar as you might
 3 have to come back later if these attempts to raise interim
 4 funding fail, the point could never be taken against you
 5 even by the most ingenuous and inventive opponents, that
 6 you somehow delayed because you lost a day because you had
 7 to come back to the Commission. I mean it's a -

8 MR MPOFU: No.

9 CHAIRPERSON: - if they tried that,
 10 really they'd be scraping the bottom of the barrel.

11 MR MPOFU: Correct, Chair.

12 CHAIRPERSON: So anyway, you don't
 13 suggest -

14 MR MPOFU: I don't.

15 CHAIRPERSON: - that if the application
 16 stands down, you won't prepare in the meanwhile?

17 MR MPOFU: No, no -

18 CHAIRPERSON: So that's not what you say,
 19 as I understand it.

20 MR MPOFU: I'm not. That's not what I'm
 21 -

22 CHAIRPERSON: I understand that, right.

23 MR MPOFU: - not misunderstanding.

24 CHAIRPERSON: Okay, thank you.

25 COMMISSIONER TOKOTA: Mr Mpofu, I just

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1 want to ask you this question. In the event of us deciding
 2 to stand down this matter, I just want to check with you
 3 whether is there anything else that you would like to add
 4 in - because as I understand you, this is your application;
 5 you have given reasons why you apply for this postponement.
 6 Is there anything else, I'm asking, in case we decide
 7 nonetheless we're going to reserve judgment, or we're going
 8 to come back on Thursday, and I don't want you to say on
 9 Thursday when we come back, you wanted to renew an
 10 application, there were certain things that you wanted to
 11 add. Is there anything else that you would really - other
 12 than what you said today?

13 MR MPOFU: Thank you, Commissioner
 14 Tokota, I really appreciate that opportunity. There are
 15 two things that I want to say. One is that the application
 16 that we have made here so far is unopposed. (2), is to say
 17 that insofar as this practical, or kind of via media is
 18 being suggested, I can only repeat for the third time that
 19 the only problem on our side is that we cannot, we do not
 20 have instructions to be here. So we would like to register
 21 that if the Commission for some reason is minded to come
 22 back on Thursday, our absence should not be misconstrued
 23 because this is exactly what we are trying to avoid. We do
 24 not want the world to be saying victims have walked out,
 25 and all these things. We would rather have the Commission

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1 itself taking charge of the situation and granting the
 2 postponement on the understanding, and trusting our word
 3 that if a solution does come about, we will come back, and
 4 therefore I just want to say that because all sorts of
 5 interpretations, especially when we are not here to explain
 6 ourselves, might be given. I just want to say that we
 7 really, it will simply be because – at least Mr Ntsebeza
 8 has said that his clients want to go home in the meantime.
 9 My clients certainly have given us the limited instructions
 10 to come here and move this application today, and they even
 11 asked us for them to be present here so that they can
 12 supervise that we don't stray from that mandate, and so
 13 that's our position. It will be unfortunate, but ja, it
 14 will be very unfortunate if it happens that way, but we
 15 understand that the – we also don't want to put the
 16 Commission in a difficult position where it's seen to be
 17 blasé about the delay that we're suggesting, because we are
 18 also suggesting it as a very, very last resort.
 19 COMMISSIONER TOKOTA: Then I also
 20 understand that you will not be here on Thursday if we
 21 stand down until that date, on the understanding that there
 22 is no opposition and therefore you would be surprised if on
 23 Thursday someone else comes up and says I'm objecting to
 24 this postponement?
 25 MR MPOFU: Thank you. Yes, no, that is

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1 true, Commissioner, thank you very much.
 2 CHAIRPERSON: Your clients would
 3 obviously have to consider is there other possibility and
 4 they may wish to be in a position to answer any contentions
 5 that are put up, but they certainly can't say we won't come
 6 and therefore the Commission has got to do what we say
 7 because otherwise it will be said we weren't heard in
 8 reply, or anything of that kind. But anyway –
 9 MR MPOFU: No.
 10 CHAIRPERSON: That's not a matter that we
 11 need deal with at this stage.
 12 MR MPOFU: No, Chairperson, I think –
 13 yes, I think what Commissioner Tokota was saying is that if
 14 we are not here because of the constraints that we have
 15 defined, and should the position, let's assume – I don't
 16 want to make an example about my learned friend Mr Semenya,
 17 but I have to – let's assume he then now says no,
 18 Commissioner, we're no longer abiding, and this is the
 19 situation, I think that's the situation that Commissioner
 20 Tokota is addressing, and we say we would indeed be
 21 surprised, but it's unlikely; we don't think that it will
 22 arise, ja.
 23 CHAIRPERSON: Mr Budlender raised his
 24 hand; he wants to say something.
 25 MR BUDLENDER SC: Chair, I just want to,

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1 I want to be very careful that we shouldn't mislead anybody
 2 as to where we are going forward. The evidence leaders
 3 have very deliberately this morning not taken any position
 4 on the application for a postponement. We haven't said we
 5 oppose; we haven't said we support it; we haven't said we
 6 abide it, and we deliberately avoided being drawn into that
 7 because we think it's desirable, if possible for the matter
 8 to be resolved without the dispute about the postponement
 9 going. But I wouldn't like anybody to think that because
 10 we haven't said what our position is, that means we abide.
 11 Nobody should be under that misapprehension.
 12 MR MPOFU: I accept that, Chairperson.
 13 There's no dispute about the postponement. Nobody is
 14 opposing it.
 15 CHAIRPERSON: Mr Mpofo, my colleague
 16 Hemraj asks me to ask you this, and I take it, I would like
 17 to think the answer is self-evident. Do you commit
 18 yourself, that's you and your team on behalf of your
 19 clients, to working with any attempts that are being made
 20 or going to be made to obtain interim funding for you?
 21 MR MPOFU: On our word of honour,
 22 Chairperson.
 23 CHAIRPERSON: Alright.
 24 MR MPOFU: And Chairperson, on that note,
 25 as that is the scout's honour, I think, and I want to also

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1 adopt what rule number 1 is for the scouts – be prepared.
 2 CHAIRPERSON: That sounds a very sensible
 3 approach. – the circumstances we consider it appropriate
 4 to let the matter stand down until Thursday. There is a,
 5 from what we can ascertain, a possibility at the very
 6 least, I would think a reasonable possibility, that interim
 7 funding may be able to be obtained for the fees of the
 8 injured and arrested persons, interim funding, that is at
 9 least until the Constitutional Court has given judgment in
 10 the appeal which is to be brought. So in the circumstances
 11 the order we make is that the matter stands down until
 12 Thursday, and the Commission adjourns until then.
 13 [12:43
 14 I was going to do it at 9 o'clock, but I have to
 15 do these things unanimously, so it's going to be 9:30.
 16 [COMMISSION ADJOURNED]
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