

Marikana-myners kry nie geld

James-Brent Styan

Kaapstad. – Die regering sal geen finansiële steun gee vir die regskoste van die oorlewende en gearresteerde mynwerkers wat deel is van die Farlam-kommissie van ondersoek na die Marikana-slagting nie.

Jeff Radebe, minister van justisie, het dié aankondiging gister gedoen en gesê die staat kan nie “buite die bepalings van die wet optree nie”.

Radebe het onder meer ook gesê die staat “ervaar ernstige finansiële uitdagings” weens die ekonomiese insinking sedert 2008.

Die regering is nie “onsimpatiek jeens die myners nie”.

“Maar dis ons plig (as die regering) om seker te maak ons bestee openbare geld binne die raamwerk van wetgewing.”

Radebe is gevra hoe dié stelling gelees moet word met inagneming van



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pres. Jacob Zuma se Nkandla-bouprojek van sowat R205 miljoen en die Vrystaatse webwerf wat R100 miljoen kos. “Dié forum is nie vir daardie sake nie. Daardie kwessies is provinsiale sake,” het Radebe gesê.

Hy het gesê die mynwerkers sal kan steun op die getuienisleiers wat deel is van die Farlam-kommissie.

Radebe het gesê tot dusver het die regering reeds R48,5 miljoen bestee aan die Farlam-kommissie en die Seriti-kommissie van ondersoek na die strategiese wapenpakkette.

“Die verwagting is dat ons vanjaar nog R101 miljoen aan die Seriti-kommissie sal bestee en R83 miljoen aan die Farlam-kommissie,” het Radebe gesê.

John Jeffery, adjunkminister van

justisie, het gesê die staat se verteenwoordigers, insluitend die polisielede wat betrokke was by Marikana, sal almal steeds finansiering ontvang vir regshulp tydens die kommissie se sittings.

“Hulle is werknemers van die staat en geregtig daarop,” het Jeffery gesê.

Hy het gesê daar moet ook beklemtoon word dat die Farlam-kommissie niemand sal straf of boetes kan opleë nie.

“Dis net ’n kommissie om te bepaal wat gebeur het.”

Hy het gesê die mynwerkers en hul gesinne sal die kommissie se bevindings moontlik kan gebruik om ’n eis teen die staat in te stel.

Adv. Dali Mpofu, wat die slagoffers tot nou toe verteenwoordig het, het reeds gesê die kommissie gaan nie by die waarheid uitkom as een party in die saak nie regsverteenwoordiging het nie.

State can't pay for Marikana lawyers

BABALO NDENZE

THE STATE can't afford to pay the legal teams representing the families of miners killed at Marikana because of "financial constraints", says Justice and Constitutional Development Minister Jeff Radebe.

He said it would also be illegal to do so and that evidence leaders were perfectly positioned to deal with the investigation on behalf of the families and injured miners.

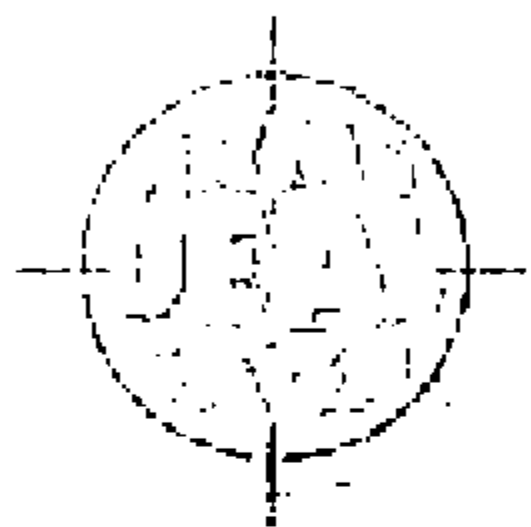
He said South Africa, like the rest of the world, was "experiencing serious financial constraints".

Radebe said the government would be using only one legal team at the arms deal commission to save on costs.

"There has been much debate in the public domain relating to the funding of legal representation at commissions of inquiry, and I deemed it necessary to address this issue to provide clarity."

He said his department was accountable for the financial arrangements and sustainability of these various commissions.

On the Farlam Commission, Radebe said the government's legal representation was informed through the State Attorney Act, which mandated the State attorney to provide representation to the government. He reiterated the government's decision not to fund the miners' legal



representatives.

"The request for funding by the said attorneys was considered, but could not be granted, as the legal framework of the State Attorney Act and the Commissions Act does not provide for legal representation for witnesses who are not in the employ of the state when the incidents or events being investigated happened," said Radebe.

He also noted that the Pretoria High Court had dismissed an urgent application that was brought before it to force the state to pay for the legal representation of the injured and arrested miners.

"As government, we are not unsympathetic to the cause of the injured miners. Our duty

is to expend public funds within the legal framework, which sets the parameters for spending public funds and how the said funds can be spent," said Radebe.

He denied reports that his department had refused to fund former president Thabo Mbeki and his cabinet's legal team in the Seriti Commission into the arms deal.

Justice director-general Nonkululeko Sindane said it was estimated that R101 million would be used in the 2013/14 financial year for the Arms Procurement Commission.

She said the Farlam Commission costs stood at R32m, with a projected R83m for the 2013/14 financial year.

DA parliamentary leader Lindiwe Mazibuko slammed the decision not to fund the miners. "Denying the mine-workers' right to legal representation is not only unfair, but could threaten the credibility of the findings of a commission that is bound to have both criminal and civil claim implications," she said.

Radebe also announced that the state would use a centralised legal team under the State attorney to represent all departments, ministers, former ministers and Mbeki.

There are two legal teams appearing for the state at the hearing, one for the Department of Defence and one for Armscor. *Additional reporting by Louise Flanagan*

State cannot fund Marikana miners' legal costs — Radebe

WYNDHAM HARTLEY

Parliamentary Editor

CAPE TOWN — Justice Minister Jeff Radebe is adamant that no legal framework exists for the state to fund the legal representation of the miners who were injured and arrested during and after the Marikana tragedy.

The lack of funding has resulted in several postponements of the Farlam Commission probing the death of the miners killed at Lonmin's Marikana mine last August.

On Tuesday the commission chairman, retired judge Ian Farlam, was expected to make an announcement about possible funding, but nothing was forthcoming and the matter remains unresolved.

There was speculation that the government would give in to the mine workers' funding demands, with the Treasury the mystery donor involved in negotiations with lawyers. However, spokesman Jabu Sikhakhane said on Tuesday "the Treasury does not allocate money just like that".

Two court attempts by the representative for the arrested and injured miners, Dali Mpofu, failed recently. The miners are expected to return to court to pursue the matter.

Mr Radebe said yesterday the attorneys representing the injured and arrested miners had requested that the government pay for legal representation, but this could not be granted, as the legal frameworks of the State Attorney Act and the Commissions Act did not provide for legal representation for witnesses who were not in the employ of the state when the incidents or events under investigation happened.

The police and government departments have retained senior counsel to represent them at the commission. "Government's legal representation is mandated through the State Attorney Act 1957, which mandates the State Attorney to provide legal representation to government." Mr Radebe said that a question had arisen as to why Legal Aid SA was funding the representation of the families of the dead miners and not the representation of the injured and arrested ones. "The families' legal representatives were funded to assist the families to understand the proceedings in the event of civil liabilities arising from the tragic events at Marikana.

"This decision was motivated by the fact that these were families that had lost breadwinners and were without support to access the commission. The application of the families of the deceased was considered after their individual applications were placed before Legal Aid SA."

Mr Radebe said the government was not unsympathetic to the plight of the injured miners, but pointed out that the evidence leaders at the commission were senior lawyers and "in this regard, the evidence of the injured miners could be ably dealt with by the evidence leaders".

Yesterday, lawyers pledged to bring the commission to a close as soon as possible as all parties were "anxious" for decisive steps to be taken a year after the tragedy. A unanimous call as was made for the commission's deadline to be extended. The deadline has already been extended to the end of October. *With Colleen Goko*

‘Winner take all’ is bad for Lonmin

AFTER Lonmin formally recognised the Association of Mineworkers and Construction Union (Amcu) as the majority trade union at the company last week, CE Ben Magara enthused that the agreement was “excellent news for Lonmin, for our employees and for all our stakeholders”.

He could not be more wrong. Amcu, which now represents about 60% of the workforce, probably agrees with him. But the rest of Lonmin’s employees, represented mainly by the National Union of Mine-workers (NUM) with 20%, but also Solidarity and Uasa with about 4% between them, certainly don’t consider the Amcu recognition agreement to be “excellent news”.

That is because their recognition by Lonmin has been summarily revoked, in line with the “winner takes all” principle incorporated in the Labour Relations Act. This means Lonmin has gone from being an NUM-dominated company to an Amcu-dominated company at the stroke of a pen, with no attempt to recognise the tragic and tumultuous events that led to Amcu’s rise.

That is extremely short-sighted on both Lonmin’s and Amcu’s part, because those who ignore history are doomed to repeat it. And nobody, surely, wants a repeat of the massacre of violently protesting Lonmin employees that took place at its Marikana mine a little over a year ago. It would be a gross oversimplification to attribute the Marikana killings solely to our archaic labour legislation — a range of factors played a role in creating the conditions that resulted in almost 50 lives being lost in a matter of a week, as is emerging, gradually, from the Farlam Commission of Inquiry into the incident.

But the fact that the disgruntled miners were unable to express adequately their unhappiness with their work and living conditions via the union they identified with at the time — Amcu — was to a large extent a result of the inflexibility and antidemocratic nature of the sys-

tem. The NUM was the majority union, and Amcu’s memorandum to management was simply not taken seriously enough as a result.

Majoritarianism has other implications, and none of them should leave Mr Magara feeling so delighted. While dealing with just one union may be simpler for the company, it results in issues that do not concern that union being swept under the carpet. For instance, Solidarity and Uasa may only represent a small fraction of the Lonmin workforce, but they have historically attracted more skilled and middle management-level employees who have influence over the fortunes of the company disproportionate to their number. It makes no sense to alienate a union that could cripple operations by pulling a handful of its members off site.

In addition, while the NUM’s Damascene conversion to a more democratic recognition system since it lost its majority should be treated with scepticism, it too has the capacity to disrupt Lonmin’s operations if its members are unhappy. The tit-for-tat murders of rival union members that continue at Marikana to this day are testimony to that. The NUM’s position at Lonmin today is little different to that of Amcu’s a year ago — must its members now arm themselves and take to a koppie to ensure their grievances are heard?

Recognising that the right to freedom of association includes ensuring that people’s voices are heard is not the only labour market reform needed. As has been argued before in these columns, compulsory, anonymous strike ballots would also help ensure that individuals could express their opinions without being intimidated. It is also against the spirit of the constitution and the right of freedom of association that the labour minister is empowered to impose wage agreements negotiated at sector bargaining councils on nonparties. It is in government, business and labour’s best interests that these flaws be addressed without delay.

Joburg Bar Council sheds some light on lawyers' fees

LUCRATIVE: SENIOR ADVOCATES EARN UP TO R30 000 A DAY AND JUNIORS ABOUT R15 000

» Commission has sat for 120 days and are set for many more, which means the lawyers will make a killing.

Yadhana Jadoo

The Johannesburg Bar Council has shed some light on the legal fees of counsel representing Marikana miners at the Farlam Commission of Inquiry.

This is amid a funding crisis currently plaguing Senior Advocate Dali Mpofu and his team, who have indicated that they may have to withdraw from the commission due to lack of funds.

The Justice Department yesterday indicated that while government was "not unsympathetic to the cause of the injured miners", the State would not be able to render finance.

"Our duty is to expend public funds within the legal framework which sets the parameters for spending public funds and how the said funds can be spent," Justice Minister Jeff Radebe said.

Bar Council chairman Advocate William Mokhari SC told *The Citizen* that senior advocates on the "top end" typically charged between R20 000 and R30 000 a day for services.

Juniors - which include four attorneys on the Mpofu team - would charge between R5 000 and R15 000 a day. In a situation such as the Farlam Commission, the attorneys could potentially claim fees two thirds of what the senior advocate earns.

So if a senior advocate was earning R25 000 a day, the total fees earned in the past 100 sittings of the commission amounts to R2 500 000.

However, Mokhari explained that fees were relative and depended on the field of law practised and the years of experience gained. The more senior the counsel, the more they are paid.

The Farlam Commission has sat for a total of 120 days.

He said while senior counsel are "free to agree on a fee", there is a fair understanding in the industry of the rates charged commonly.

In the private sector, an experienced senior counsel could earn up to R40 000 per day when serving a large corporate.

It was also very rare for senior counsel to take on cases such as Marikana on a pro-bono basis, he said.



VOCAL. Workers chanting at an Anglo American Platinum mine shaft in Rustenburg on Tuesday. Around 2 000 mineworkers, angry at plans to cut 6 900 jobs, protested, but said they would meet management before deciding on strike action. Miners gathered to protest against Amplats's plan, announced days after the anniversary of police shooting dead 34 miners at the nearby Marikana mine. Picture: AFP.



Henry Msimang
Attorney representing the Marikana miners

This was due to the length of time set down for the commission.

"That (the time) certainly is a deterrent factor. It is quite easy for senior counsel to take on pro-bono cases, but only if the matter would last two to five days. This is because counsel could make up the fees list in the remaining 25 days in a month."

The Constitutional Court this week dismissed an application by Mpofu to appeal a High Court ruling that the State was not liable to foot the bill for the miners' legal fees in the short term.

Attorney Henry Msimang, for the miners, said judging from the number of witnesses to still take the stand, the commission was likely to extend to the whole of

Looking at the numbers

After two failed court appeals to force government to grant a request for interim funding of legal fees for miners injured and arrested at the Marikana massacre, their legal teams might have reached the end of their involvement in the Farlam Commission of Inquiry. Take a look at some of the figures involved:

44

- the number of people who were killed

270

- the number of miners who were injured and arrested

R 12 500

- the monthly salary that the striking miners wanted

R 25 000

- what one senior advocate representing miners at the commission can conservatively earn for a day's work

R 3 000 000

- what one senior advocate has earned if they worked the 120 days that the commission has sat

R 6 000 000

- what one senior advocate will earn if funding and the commission carries on for another year

R 6 700 000

- what has allegedly already been paid to the legal teams representing the South African Police Service (SAPS)

R 32 million

- cost of the commission of inquiry for the state for the 2012/2013 financial year

R 83 million

- estimated cost of the commission for the 2013/2014 financial year

COMPILED BY YADHANA JADOO

GRAPHIC: STEPHANIE PRETORIUS

next year.

"Look at where it is now; we have not even touched the tip of the iceberg," he said.

The commission began its sitting in October last year and was originally set down for four months. It was then extended for a second time from May 31 to October 31 this year.

"But I don't see it being complete before then," said Msimang. "We only have one advocate and we actually need more hands."

Mpofu currently represents over 200 miners arrested and injured during the Marikana massacre of August 16 last year. Thirty-four Lonmin Platinum mineworkers were killed during police dispersal operations in Wonderkop in the North West.

Msimang would not divulge the actual legal fees Mpofu and the team earned a day but mentioned that they were earning far below what is expected under normal circumstances.

"Exactly how much we earn is private and confidential, but I can tell you that Advocate Mpofu is getting far below what senior advocates earn and the four other attorneys, far lower than even junior advocates."

The miners have meanwhile indicated that they would embark on raising funds for their lawyers.

The Marikana Support Campaign has said the failure to ensure interim State funding called into question government's commitment to uncovering the cause of the massacre.

Right call made on Marikana fees

Justice Minister Jeff Radebe has answered the question we asked on Wednesday: should taxpayers pay the legal fees of miners and their families at the Farlam Commission of Inquiry into the Marikana massacre? The short answer is no. While the government is not unsympathetic to the cause of injured miners and the families of victims, it won't be paying the fees of their legal representatives. Radebe says miners wounded or arrested should rely on State evidence leaders to represent them.

It's a tough call but we believe the right decision has been made. The alternative could set precedents which would make compliance financially impossible.

Bear in mind that taxpayers are already paying the fees of these State evidence leaders in addition to the hefty team representing the South African Police Service. The SAPS need legal guidance and protection at the commission, where they have come under persistent verbal attack.

Budget constraints played a big role in Radebe's decision. His department's resources are finite, and some advocates charge R25 000 a day. For everyone's sake we must all hope the evidence leaders do a thorough, impartial job in unearthing the truth.

State has to tighten belt and can't pay Marikana miners' lawyers – Radebe

BABALO NDENZE

POLITICAL BUREAU

THE STATE cannot afford to pay the legal teams representing the families of miners killed in Marikana, says Justice and Constitutional Development Minister Jeff Radebe and it would also be illegal to do so.

Evidence leaders were perfectly positioned to deal with the investigation on behalf of families and injured miners, he said.

The government would also be tightening its financial belt by using only one legal team in the arms deal commission.

"There has been much debate (on) the funding of legal representation at commissions of inquiry and I deemed it necessary to address this issue to provide clarity," said Radebe.

His department was accountable for the financial arrangements and sustainability of the

commissions.

"Our country, as is the rest of the world, is experiencing serious financial constraints arising from the economic downturn of 2008. This has resulted in government having to manage its budgets more prudently and to spend cautiously."

On the Marikana Commission, Radebe said the government's legal representation was informed through the State Attorney Act which mandated the state attorney to provide representation to the government.

"The request for funding by the said attorneys was considered but could not be granted, as the legal framework of the State Attorney Act and the Commissions Act do not provide for legal representation for witnesses who are not in the employ of the state when the incidents or events being investigated happened," said Radebe.

He also noted how the Pretoria High Court had dismissed an

urgent application that had been brought before it to force the state to pay for the legal representation of the injured and arrested miners.

"As government we are not unsympathetic to the cause of the injured miners. Our duty is to expend public funds within the legal framework which sets the parameters for spending public funds and how the said funds can be spent," said Radebe.

Justice director-general Nonkululeko Sindane said R101 million had been projected for the 2013/14 financial year for the arms deal commission.

The Marikana commission cost R32m, with a projected R83m for this year.

DA parliamentary leader Lindiwe Mazibuko slammed the decision not to fund the miners.

"Denying mineworkers' right to representation could threaten the credibility of the findings," she said.

Union strife at root of Marikana

NUM and ANC have given Malema a chance to continue participating as the people's hero

THE EVENTS in Marikana this year raised new and important questions for all South Africans who are concerned with our political trajectory. Based on last week's no-show, the National Union of Mineworkers (NUM) and the ANC have provided a perfect opportunity for Julius Malema's continued participation as the people's hero in Marikana.

The community is now a no-go area for the ANC at a time when a Mathunjwa-Malema alliance could give real teeth to the EFF project by providing it with a home base beyond Malema's Limpopo. The question is, why would the ANC allow this to happen? The answers indicate that, in their eyes, SA is no country for new unions.

Many of us who watched the massacre on television last year, believed that it was the result of a police operation gone wrong. As such, we thought that the Farlam Commission would simply be a tactic to "protect a government from popular outrage" by putting off the inevitable admission of police culpability before ultimately indicating at some distant point in the future that better police training would be necessary to prevent another tragedy of these proportions.

If this straightforward interpretation were correct, then why would the ruling party and the NUM have boycotted the commemorative events?

Carol Paton has argued the state demonstrated callousness in dealing with the families. Paton is on to something, but I don't think she goes far enough. In addition to callousness, the state and the ANC have demonstrated absolute contempt towards the families whose husbands, sons and fathers were gunned down by the police.

The question is, why? Where does the contempt come from and why is it so stubborn in the face of public sentiment to the contrary? What would the ANC and the NUM have lost by showing up and demonstrating their empathy for the fallen miners and their families last week?

To answer these questions it must be clear that the state's refusal to provide legal aid to the miners' families, and the refusal of the NUM and the ANC to attend the commemorative ceremonies represent a single coherent act. Although one decision (the refusal of legal services) was carried out by a state organ, and the other (the

Sisonke
Msimang

boycotting of the event) by political structures, they both position the miners as enemies of the state and/or the party.

The families – the wives and sisters and brothers of the miners who were killed by the state – have been treated as though their husbands and sons were terrorists rather than citizens with rights to representation and freedom of association.

To understand why a group of men who earned R2 000-R4 000 a month could be seen as enemies, you must first know the story of Joseph and Gwede and the battle for the soul of the NUM.

If you have not heard the story it will be hard to understand that the seeds of the Marikana massacre were sown 15 years ago when a fiery young man called Joseph Mathunjwa was dismissed from the Douglas Colliery in Mpumalanga. (Mathunjwa, local chairman of the NUM, had supported his members in an unprocedural strike.)

Mathunjwa was enormously popular as the leader of the local NUM branch, and his dismissal in September 1999 led to a massive strike. Three thousand workers took over the underground sections of the mine for two weeks in protest against his dismissal, halting operations.

The mine was forced to reinstate Mathunjwa, but he was faced with disciplinary action from the NUM bosses in Joburg. Mathunjwa was called to order through a disciplinary process chaired by the general secretary of the NUM, one Gwede Mantashe. The process led to Mathunjwa's expulsion from the NUM.

Mathunjwa's departure from the union under these acrimonious circumstances triggered a mass resignation. The 3 000 men who had backed him against the mining bosses were the first recruits to the new formation that Mathunjwa set up. Thus the Association of Mineworkers and Construction Union (Amcu) was created.

In the decade since it was officially registered, Amcu has eaten considerably into the traditional membership base of the NUM. At the same time, the NUM has undergone significant changes.

An in-depth report in MiningMx notes

that the NUM's members are "literate, well spoken and wealthy compared to the general workers and machine operators underground".

Amcu's membership, on the other hand, comes from the ranks of those employed by mining contractors, the most insecure labourers in the market.

Even within the traditional mining houses, Amcu's membership has grown. It is now present in five provinces and is growing rapidly, especially in the light of its public role in Marikana.

In the months leading up to the Lonmin strike the tensions between Amcu, on the one hand, and the NUM and Lonmin on the

other, were palpable.

Despite Amcu's control of the majority of the workers, the NUM had (and continues to have) considerable political clout. In addition to having Mantashe on-side, Cyril Ramaphosa (who sent "dastardly" e-mails on behalf of Lonmin) was a member of the company's board and served as the first secretary of the NUM. As such, Lonmin's intransigence in dealing with the striking Amcu workers was understandable: the company had two of the most powerful members of the new elite on their side, and if Ramaphosa's e-mails are anything to go by, they had access to many more.

Where does this story lead us? It is clear

that sides were chosen in the Marikana battle long before the police marched in to quell the violence. The massacre was about the very legitimacy and survival of Amcu and the NUM.

The police were used by the ANC in much the same way that one might instruct a private militia to protect the interests of its members. Rather than forestalling further violence, the use of force by the police in Marikana sent a strong and chilling message to Amcu.

Irrespective of these theories, which will need testing through a legitimate and objective process, based on last week's no-show, the NUM and the ANC have given

Malema a chance to continue participating as the people's hero in Marikana. The community has turned into a no-go area for the ANC at a time when an alliance between Mathunjwa and Malema could provide the EFF with a home base beyond Limpopo.

This background is important as South Africans collectively try to understand the meaning of Marikana.

It also might explain why a president who has never missed a populist moment was in Malawi shaking hands with Mugabe while an angry nation mourned.

● *Sisonke focuses on race, class and gender. This article comes from the Daily Maverick, www.dailymaverick.co.za.*

Travesty of justice if state doesn't fund miners' legal team

THE GOVERNMENT should make public money available for legal fees to ensure justice at the Farlam Commission of Inquiry investigating the Marikana massacre.

Public funding must be made available to the legal team representing the 270 miners injured and arrested following the massacre on August 16 last year.

We, the undersigned, call on the government urgently to make financial resources available for the legal team representing the miners injured and arrested

The failure to ensure that all legal parties before the commission have adequate

funding calls into question the government's commitment to uncovering the cause of the massacre.

It also poses a risk to the commission's integrity.

The government has a duty to uphold the constitution. Two critical constitutional principles – access to justice and equality before the law – are at stake.

The government has not provided funding for any of the victims of the violence, although it indirectly provided some funding via Legal Aid South Africa to the team of advocates (as briefed by the Socio-Eco-

nomic Rights Institute of South Africa (Seri) representing the families of the 36 dead miners.

The commission is set to continue until the end of October. By then it will have sat for a year – far longer than the four months originally planned.

This has stretched the resources of the donor-supported Seri, which represents the families of the 36 miners who were killed on and in the days before August 16 last year, as well as the Association of Mineworkers and Construction Union.

It has placed considerable strain, too, on

the Legal Resources Centre representing the Benchmarks Foundation.

The legal team for the injured miners, headed by advocate Dali Mpofu, has thus far only received donor support for three of the 10 months the commission has already sat.

All the while, the government supports large legal teams for the SAPS, as well as the police minister and the Department of Mineral Resources.

It is unacceptable that the government finances the legal teams for the police, who shot dead 34 miners and injured 270 on

August 16, but does not ensure that the legal teams for the victims are adequately financed.

Now that all the legal teams representing the victims have withdrawn in solidarity following the withdrawal of the Mpofu team, the only interested parties that are left at the commission are the heavily resourced Lonmin, the National Union of Mineworkers, SAPS, the SA Human Rights Commission, which is operating on a strained budget and in accordance with its constitutional mandate to monitor the process and ensure the protection of

human rights, along with various other government departments.

Without legal representation for the injured miners, there can be no level playing field.

Should the hearings continue without the participation of the legal teams representing the victims, it would be a travesty of justice.

That this matter will come before the Constitutional Court is a serious indictment of the government and, in particular, the Ministry of Justice and Constitutional Development and the Presidency.

Marikana ruling hardly 'excellent'

Concourt decision to dismiss miners' application was understandable, but not without fault

COMMENT

Stuart Wilson

On Monday, the Constitutional Court dismissed an application to compel the state to fund legal representation for the arrested and injured Marikana miners participating in the Farlam Commission of Inquiry.

All of the lawyers bringing the application must have known that it was a long shot. The claims made by the miners lay at the very periphery of the rights to legal representation, access to courts and fair trial guaranteed by the Constitution.

The court held that these rights did not apply at all.

Certainly, the commission itself is not a criminal trial. Testimony before it — and facts discovered as a consequence of that testimony — cannot be produced in subsequent criminal proceedings. But that shield is limited. The bulk of the evidence collected by the commission is not testimony, nor was it discovered as a result of testimony. There is nothing to bar the admission of that evidence in future criminal trials.

So the commission's findings will undoubtedly decide a great many questions in any trial to which the miners may eventually be brought. How can those trials be fair, or "substantially just" as the Constitution requires, if the miners are not given a reasonable opportunity to shape the evidence before the Commission?

The miners also relied on section 34 of the Constitution, which entitles them to access to a court or tribunal to settle disputes that can be resolved by the application of law. A commission is arguably not a tribunal. Its proceedings are not necessarily disputatious, and its conclusions are not

necessarily reached by the application of law.

But anyone who has actually been to the commission knows that it is a highly legalistic affair. Days and days are spent in examination, cross-examination and re-examination. Objections are taken and upheld or overruled. The rules of evidence and procedure that ordinarily festoon a criminal or civil trial are applied daily. It is therefore perhaps too quick to conclude that section 34 was not properly engaged. Indeed, the court could only bring itself to hold that section 34 did not "necessarily" apply before moving on — in effect leaving the section 34 issue hanging.

Perhaps the most obvious part of the miners' case was that it was a breach of the right to equality in section 9 of the Constitution for the state to fund the families of deceased miners but not the miners who survived with sometimes horrific injuries, only then to be arrested for the murder of their fallen comrades.

The court reduced the section 9 claim to a plea for "fairness", which, however laudable, did not authorise it to intervene. That is not quite right. Fairness was certainly a big part of the miners' case, but so was rationality. Under section 9 (1) of the Constitution, irrational distinctions drawn by organs of state can be set aside as unlawful. The court did not address the application of section 9 (1). If it had, it would surely have been

Perhaps the most obvious part of the miners' case was that it was a breach of the right to equality

hard-pressed to find that the distinction drawn by the state between the families and the arrested and injured miners was rational.

The rationality part of the miners' case was dealt with, somewhat obliquely, when the court wondered out loud why the miners did not bring a review of the decision of Legal Aid South Africa not to fund the miners. That may well be a good question, but the miners' failure to launch a review did not preclude the court from considering the rationality question.

Arguably, the court should have said nothing at all about the merits of the miners' reliance on these constitutional rights. Ordinarily, the court hearing an appeal against an interim order confines itself to whether it is in the interests of justice to intervene with a lower court's decision on direct appeal at such an early stage of the case, in which the final deci-

sion can go either way. The court answered that question very firmly in the negative. Its decision then to remark on the merits of the case will place the miners at a disadvantage if they return to the high court for a final order.

The court's decision has been greeted a little uncritically. Eusebius McKaiser calls the decision "excellent" on Twitter. Johan Kruger of the Centre for Constitutional Rights says that the decision "cannot be faulted". Kruger added caustically — and incorrectly — that the miners, the Association of Mineworkers and Construction Union (Amcu) and the families of the deceased are represented by 20 advocates. They are actually represented by a team of six, all acting for sharply reduced rates. Only one of them is asking for state support. He has been working for nothing for some time.

In truth, the court's decision is neither excellent nor faultless. It is understandable, justifiable, but surely not the court's greatest moment. The court had a chance to enable the miners — and the families and Amcu, who will not rejoin the Commission without them — to be fairly and adequately represented before the most important commission of inquiry in South Africa since the Truth and Reconciliation Commission. Not only would their continued participation add crucial balance to what will otherwise be a lopsided investigation, it would also enable the victims of the Marikana massacre to participate in the only major institutional effort to put things right. In doing so, they may achieve a degree of healing, closure and perhaps even some reconciliation with the state that maimed them and took the lives of their loved ones.

Rightly or wrongly, the court decided not to take that chance. Whatever else may be said of the court's decision, it is a sad one.

Stuart Wilson is the executive director of the Socio-Economic Rights Institute of South Africa, which represents the families of 36 deceased miners and Amcu at the Commission. These views are his own

End of road for Mpofu?

SIYABONGA MKHWANAZI

IT'S the end of the road it seems for Dali Mpofu's attempts to get funding to represent the victims of the Marikana Massacre at the Farlam Commission of Inquiry.

Justice Minister Jeff Radebe said yesterday the laws of the country prevented the state from funding the injured and arrested miners in the commission.

The North Gauteng High Court and Constitutional Court emphasised this point when they

dismissed the applications by miners to be funded by the state, the minister said.

Radebe said that legal costs for former President Thabo Mbeki would be covered by the state in the arms deal inquiry.

Director-General in the department of justice Nonkululeko Sindane said the government had spent R32m on the Farlam Commission and R16.5m was spent on the arms deal commission.

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New rules mooted for commission

JULIA MADIBOGO

WITH the October deadline looming for the completion of the Marikana Commission of Inquiry, evidence leader Adv Geoff Budlender has asked for a procedural change in the hearings which were initially set to be completed within four months.

In the application, which was heard yesterday in Centurion, the evidence leaders suggested that written submissions be used to speed up the proceedings.

The proposed changes stipulate that a witness called to testify could be required to give a written statement which sets out in detail the evidence followed by short oral

evidence session, referring only to the main points of that evidence.

The proposal further suggests that a witness who is called to testify will give evidence by confirming a written statement which sets out in detail the evidence of the witness followed by giving short oral evidence to the commission.

The application also states that any lawyers interested in cross-examining a witness may apply to the commission for leave to cross-examine, indicating appropriate reasons why.

Retired judge Ian Farlam, who chairs the commission, said a ruling would be made after concerns were raised about a suggestion that evidence leaders could put a

version of absent parties to witness that are testifying.

Adv Vuyani Ngalwane, who represents the police, said it would be unfair for evidence leaders to

cite evidence of absent parties to witnesses.

"Such witnesses could be required to testify and if they are not present it could be a problem," he said.

The absent parties included Adv Dali Mpofu and his legal team who pulled out of the commission citing financial constraints. They represent surviving miners who were injured on August 16 last year when the police opened fire at striking Lonmin employees.

Some 44 people, including police officers, were killed on the day and during the days in the buildup to the massacre.

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