

<p style="text-align: right;">Page 12215</p> <p>1 [PROCEEDINGS ON 29 JULY 2013] 2 [10:40] CHAIRPERSON: The Commission resumes. 3 I'm sorry that we're starting later than we intended this 4 morning, but there were a number of matters that we had to 5 deal with in chambers, which caused the delay. Mr Mpofo, I 6 see you're back with us this morning? 7 MR MPOFU: Yes, Chairperson – 8 CHAIRPERSON: Is there anything you have 9 to report with regard to the matters that were discussed 10 when you were last with us? 11 MR MPOFU: Yes. Well, Chairperson, I'm 12 here for two reasons. One is to, because we were summoned 13 to come here by letter, but also to – 14 CHAIRPERSON: I think "requested" might 15 be a more accurate word, but let's not debate that now. 16 MR MPOFU: Well, okay, I can leave it 17 there, Chairperson. Well, not politely, but the second 18 reason is of course what the Chairperson is raising, which 19 is to report on progress, and also we've been told that 20 there's going to be opposition from an unknown quarter of 21 the application for postponement. 22 CHAIRPERSON: - quite what that means. 23 MR MPOFU: Well, it says here – 24 CHAIRPERSON: But please proceed with 25 what you –</p>	<p style="text-align: right;">Page 12217</p> <p>1 interpretation. 2 MR MPOFU: Yes, thank you. Chairperson, 3 yes, I think I wanted to read from the letter we received, 4 which says, "You are specifically advised that you should 5 not assume that the application will be unopposed." That's 6 what I was addressing, but the next sentence is one in your 7 favour, Chairperson, which says, "You are invited to be 8 present to reply to the submissions which are to be made." 9 CHAIRPERSON: Well, yes, my understanding 10 is that that letter was written on the basis that we would 11 have definite information at this stage as to the outcome 12 of the funding application or applications, and as I will 13 be telling you in a moment, that aspect of the matter is 14 not yet final. So it was just a warning, a letter written 15 on the basis that if we were going to consider the 16 postponement application this morning and not consider the 17 possibility of a further adjournment for a few days, then 18 you should be here to deal with it, otherwise it will be 19 dealt with in your absence. But – 20 MR MPOFU: Yes – 21 CHAIRPERSON: That's, as I understand it, 22 as we explained, will be explained more fully in a moment, 23 that's not the position at the moment. So I don't think 24 you need to deal with that any further, unless there's 25 something further you want to say on the matter. I</p>
<p style="text-align: right;">Page 12216</p> <p>1 MR MPOFU: Alright, ja. Okay, what it 2 means is that letter that we received on Friday say "You 3 are specifically advised that you should not assume that 4 the application will be unopposed." I also don't know what 5 that means. 6 CHAIRPERSON: Yes, sorry, Mr Mpofo, 7 before you carry on I think we should wait for the 8 interpreter to be with us. I wasn't aware of the fact that 9 he wasn't. He's coming now, I believe. 10 MR MPOFU: No, there's no need, 11 Chairperson – 12 CHAIRPERSON: No, I think the people in 13 the auditorium are entitled to have an interpretation of 14 what's being said; not only those in the auditorium, but if 15 this is being available to a wider audience outside the 16 auditorium, I think it's also desirable that people who – 17 MR MPOFU: Ja, maybe for later, yes. 18 CHAIRPERSON: Yes. Mr Mahlangu is now 19 with us. I think he didn't realise we were going to start 20 when we did. I asked Mr Mpofo to give Mr Mahlangu, to give 21 us a report of what has happened that's relevant to our 22 proceedings since he was last with us, and he started 23 making some remarks. Perhaps he should repeat them so you 24 can then interpret them into Xhosa for the benefit of 25 people in the auditorium who are dependent upon that</p>	<p style="text-align: right;">Page 12218</p> <p>1 obviously don't want to stop you from saying what you 2 consider appropriate. 3 MR MPOFU: Yes. Yes, Chairperson, we 4 understand that, and I don't want to muddy the waters more 5 than it is necessary. I just want to say that there's a 6 letter that we wrote - I won't go much into it – which 7 deals with the reply to this letter, save to just say that 8 we want to register our serious protest at the idea of 9 people who are approaching our funders directly without 10 informing us, but the rest of that has been dealt with in 11 the letter that I referred to. We would have expected 12 people to have the courtesy to talk to us about our, you 13 know, the efforts that we have repeatedly mentioned here. 14 Just to recap, Chairperson, firstly the reason 15 that we are here is because, as you know that there were 16 these intimations or rumours that there was possible 17 funding either coming from private sources or from the 18 State – "possibility" I think is the word that was used. 19 Our position, which did not carry the day, was that we 20 should have the postponement and if any of that 21 materialises then we would be the first ones to inform the 22 Commission. But nevertheless, despite the fact that we are 23 expressed our scepticism about the possibility even of that 24 funding materialising within two or three days, as was 25 intimated, we left here and spent the next 24/48 hours</p>

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1 concentrating on pursuing the rumours, and to that end we
 2 wrote letters to the State Attorney representing the
 3 President and the Minister of Justice, and to the Raith
 4 Foundation, which is the funder that was rumoured to be
 5 ready to assist, and also to Legal Aid South Africa, and
 6 the gist of those letters, although differently worded,
 7 mutatis mutandis depending on who was the recipient, the
 8 gist of those was to say that we've heard that there is
 9 this possibility, if it's true can we meet or can you act
 10 on it, or tell us what we should do effectively.
 11 [cellphone disturbance] Chairperson, since I've
 12 provisionally withdrawn –
 13 CHAIRPERSON: Mr Mpofu, I wouldn't like
 14 to be an interpreter having to interpret what you've said
 15 for 10 minutes, so perhaps we can stop at this stage, give
 16 Mr Mahlangu chance to catch up and when he's ready –
 17 MR MPOFU: And Chairperson, thank you,
 18 Chairperson.
 19 CHAIRPERSON: We have simultaneous
 20 translation facilities in place, but I understand the family
 21 who's supposed to be in the place where the simultaneous
 22 translation was going to happen aren't there, so we will
 23 proceed for the moment with consecutive translation, as we
 24 have up to now.
 25 MR MPOFU: Yes. I was saying,

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1 Chairperson, all I was saying was that since I've
 2 provisionally withdrawn I'll only buy half a cake for the
 3 cell phone.
 4 CHAIRPERSON: Yes, well I did think Mr
 5 Mahlangu was going to interpret more than just that remark
 6 about your cell phone going off.
 7 MR MPOFU: Yes, apologies to all.
 8 Chairperson, we have then – well, let me put it this way.
 9 Of those letters that we wrote, in addition we approached
 10 other possible funders outside of the three that I've
 11 mentioned, and so I'll deal with the responses. Chair, the
 12 Legal Aid Board did not even bother to reply.
 13 I think they thought we're out of our minds or
 14 something. The State Attorney also probably harboured
 15 similar thoughts because they, in their letter they say
 16 that, "Our clients are dismayed that such rumours or their
 17 source thereof. To this end our clients' position
 18 regarding the legal funding has not changed." So we now
 19 add dismay to their previous situation that they were not
 20 willing to assist; now they are dismayed.
 21 Then the Raith Foundation, I'll paraphrase really
 22 what – what they say effectively is that they feel that the
 23 different levels of financial support available to those
 24 affected by and involved in the Marikana crisis is unfair
 25 and unjust, and they say, "This is particularly the case in

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1 relation to those groups with the least resources who were
 2 witnesses to the events and who were directly affected by
 3 them, such as the clients of Maluleke Msimang &
 4 Associates." They say, "We feel that should these parties
 5 not be able to be involved in the Commission, the
 6 Commission and its finding will be the poorer for it."
 7 They say, "In the interest of equality and justice for the
 8 full truth to emerge, we feel that all concerned parties
 9 should be supported so as to ensure legal representation
 10 and a robust Commission." Then they say in the next
 11 paragraph, "We obviously noted the pending litigation which
 12 is intended to be brought before the Constitutional Court,
 13 and advise that it is our intention to await the decision
 14 of the Constitutional Court on this matter." And finally
 15 they say, "In the result we decline to provide further
 16 funding at this time."
 17 So the – or before I deal with that, I can say
 18 some good came out of the, what was otherwise a wild goose
 19 chase for this money, namely that the, some outstanding
 20 issue or misunderstanding or disagreement which obtained,
 21 was resolved by the Raith Foundation in that they agreed
 22 with what we had suggested, which until that point there
 23 was a bit of a problem. I don't want to get into that. I
 24 simply want to say there was some resolution.
 25 But apart from that, as I say, Chairperson, it

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1 turned out to be a wild goose chase and those are the
 2 responses, and in relation to the other, just for
 3 completion, for the sake of completion, in relation to
 4 other people that we approached, the attitude that is
 5 displayed by the Raith Foundation seems to be the prevalent
 6 view, namely that the private sector, or the non-
 7 governmental sector, is not prepared to assume what they
 8 feel is the primary responsibility of the State, and that
 9 in effect they support the move to appeal the judgment in
 10 the Constitutional Court and only thereafter will they,
 11 obviously depending on the outcome, either – I suppose if
 12 we succeed in the Constitutional Court then their position
 13 will have been vindicated. If not, then we will obviously
 14 then try other means to ensure our participation.
 15 On a related matter, Chairperson, our position
 16 remains unchanged. We feel that coming in here, in and out
 17 of here, is completely uncalled for and we repeat our
 18 assurance that if the situation changes – or assuming that
 19 the Commission is inclined to grant the postponement and if
 20 the situation changes, as we have already said, we will
 21 inform yourselves, as we should. Until then, really the
 22 only purpose served by us coming in and out of here is just
 23 to distract us from the task of concentrating on the
 24 Constitutional Court preparations, which we are busy with
 25 and which is my next subject of discussion.

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1 Apropos the Con Court application, Chairperson,
 2 we sadly have not yet received a judgment, a written
 3 judgment, some 15 days or so after we finished the
 4 argument. We remain optimistic and hope that maybe today,
 5 or within a short space of time we will receive the
 6 judgment. Our instructions at this stage were to await the
 7 judgment, despite what I said to you last time,
 8 Chairperson, but after this weekend we're back in that
 9 situation where we will probably, I think tomorrow, to be
 10 realistic, because now we thought we'd be here just for
 11 about an hour, but already we're almost here for half of
 12 the day, and so realistically I think we'll be able to
 13 serve the application by tomorrow.
 14 [11:00] Chairperson, maybe I think given the urgency of
 15 the matter, we might effect short service and give the
 16 application to one of the judges who's going to be in the
 17 Constitutional Court.
 18 CHAIRPERSON: I understood his
 19 appointment was as to be a judge, not for some kind of
 20 messenger or courier.
 21 MR MPOFU: As you know, Chair, being a
 22 judge encompasses everything. But yes, on a more serious
 23 note, Chairperson, one of the implications of that will
 24 obviously be, will make it unrealistic for us to do the
 25 set-down that we had mentioned to you, which was the 7th.

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1 The notice of application as it currently stands sets it
 2 down for the 12th, which is the following Monday after the
 3 long weekend. But as you know, Chairperson, that is not to
 4 say that we will get that date, but we have put that date
 5 so that hopefully it does not change our target date for
 6 the postponement here. In other words if it's still heard
 7 on the 12th, we obviously have to pray that we get the
 8 judgment by the end of that week, or we'll try and hint
 9 that it should be done in that way, and our return on the
 10 19th would still materialise. But all that is subject to
 11 the chief justice's directions, which of course as soon as
 12 we receive them, we will transmit to the Commission and all
 13 the parties.
 14 I'm sure he won't mind if I mention that I
 15 received a call this morning from my opponent, Mr
 16 Oosthuizen, regarding this issue of fixing times. When the
 17 phone rang I assumed he was going to say he has interim
 18 funding, but it wasn't to be. He just wanted to know what
 19 the set-down date was, and so we continue to engage them.
 20 It will be better if the date is by agreement.
 21 Yes, so Chairperson, it would seem that the
 22 position is that the, assuming that the threatened
 23 opposition will come, that we will await that, but we will
 24 not going to have much to add by way of application to what
 25 we had already said, and then the Chairperson will be at

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1 large to do whatever pleases the Commission, namely either
 2 to accede to our request to postpone the matter, or
 3 continue in our absence, which would be regrettable.
 4 You'll have noticed, Chairperson, that our
 5 clients are not here, neither are the representatives of
 6 the deceased families or the families themselves, and AMCU
 7 is not here. Those are the parties that have formally
 8 withdrawn provisionally and so I think it would stand to
 9 reason that should the Commission continue, it should also
 10 continue in their absence, and in that regard, Chairperson,
 11 and finally, I'd just like to reiterate that we hope that
 12 you and the Commissioners will exercise Solomonic wisdom
 13 and ensure that even if we invest two or three weeks by way
 14 of postponement, which is clearly not something that should
 15 be done as a first choice, but that that would preserve the
 16 integrity of the Commission and not drive us to a situation
 17 where maybe irreparable harm is done, so that we have
 18 something to salvage after the Constitutional Court
 19 application. But I've already made those submissions
 20 before.
 21 A matter that needs to be put in its true
 22 perspective as well is unfortunately I have to speak
 23 against my good friend, the spokesperson for the
 24 Commission. There was a report in one of the newspapers on
 25 Friday that the parties – I'm trying to paraphrase it – the

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1 parties representing the victims had asked to be given
 2 until Monday so that they can pursue alternatives for
 3 funding. Well, we want to place on record that no, that
 4 statement is incorrect. We didn't even know about this
 5 Monday thing until we received the letter referred to. So
 6 if it can be corrected in the public domain, I think
 7 similarly to the one, Chairperson, where it was said that
 8 the Commission does not need us, which was correct by
 9 yourself, that the Commission does not need anybody, which
 10 I think Mr Ntsebeza had raised and you, Chairperson, had
 11 corrected as not –
 12 CHAIRPERSON: It appears to have been
 13 some kind of misunderstanding. What you say is correct,
 14 yes.
 15 MR MPOFU: Yes. Thank you, Chairperson.
 16 CHAIRPERSON: Thank you, Mr Mpofu. Do
 17 the evidence leaders wish to say anything in response to
 18 anything that Mr Mpofu has said?
 19 MR MADLANGA SC: Mr Chairman, we have
 20 nothing to say, thank you.
 21 CHAIRPERSON: Is there anyone else
 22 representing any of the parties still here who wish to say
 23 anything?
 24 SPEAKER: Thank you, Chair. For the
 25 South African Human Rights Commission, we've prepared a

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1 short statement which I'd like to read.
 2 "Last Monday the South African Human Rights
 3 Commission indicated that it would abide by the decision of
 4 this Commission in respect of the adjournment application
 5 made on that day. That position was influenced by our
 6 support for the stand-down and by our strong desire to give
 7 the parties another chance to negotiate a settlement to the
 8 funding dispute. Given the failure of those efforts to
 9 date, and after consideration, the South African Human
 10 Rights Commission must now support the application for an
 11 adjournment. This Commission must be inclusive and must
 12 allow all voices to be heard, especially those who were
 13 most affected by the tragic events at Marikana. Although
 14 the SAHRC is concerned at the impact of an adjournment in
 15 light of the current October deadline for completing the
 16 Commission's work, we would call for an extension of that
 17 deadline in the public interest should an adjournment be
 18 granted. In the event that the Commission does not grant
 19 the adjournment and the proceedings continue in the absence
 20 of the injured and arrested persons, in the absence of the
 21 families, and in the absence of AMCU and the Bapo Ba Mogale
 22 Community, then the SAHRC will reconsider its position. We
 23 do not intend to withdraw from proceedings, but our
 24 continued participation will be informed by the
 25 Commission's willingness and ability to take into account

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1 the interests of those who are no longer able to be here.
 2 The SAHRC calls on the Commission to hold a meeting with
 3 all parties to discuss the way forward." Thank you.
 4 CHAIRPERSON: Thank you, Ms [inaudible] -
 5 MR MPOFU: Chairperson, just one small
 6 thing that I forgot to mention regarding our intention to
 7 file papers tomorrow. One of the reasons, as I've already
 8 said, is obviously the optimism that we'll get a judgment
 9 today, but the other is certainty as to what's going to
 10 happen this morning, so that we can then inform, properly
 11 inform the Constitutional Court in the papers as to whether
 12 there's an adjournment or not, because that's a factor that
 13 will obviously influence the urgency with which the matter
 14 is to be heard. Thank you.
 15 CHAIRPERSON: Does any other party wish
 16 to say anything? No? Mr Ramphile?
 17 MR RAMPHILE: Thank you, Judge. We
 18 represent the families of Mabebe and Mabelane and we have
 19 not been regular at the Commission precisely because of the
 20 issue of funding. We have conferred with Adv Mpofo and we
 21 wholeheartedly support this application and believe that if
 22 the Commission is going to consider this application for
 23 postponement, it will be in the benefit of our clients and
 24 it will also assist that even just these two families are
 25 able to present their cases to the Commission in the best

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1 manner possible.
 2 We've also made two applications for funding,
 3 both to the Legal Aid and to Amnesty International. We are
 4 busy with Amnesty International and it could be that we
 5 may, even if not everything, but maybe in part be assisted
 6 in this application. We'll also be following with Adv
 7 Mpofo to see how best we can be accommodated in that
 8 application. So we support the application for
 9 postponement. Thank you, Judge.
 10 CHAIRPERSON: Is there anyone else who
 11 wishes to say anything? Mr Bizos?
 12 MR BIZOS SC: Mr Chairman, very briefly,
 13 you will recall that we submitted a letter on the Legal
 14 Resources Centre attitude. We do not want to add anything
 15 to that letter and we stand by it.
 16 CHAIRPERSON: Is there any other party
 17 who wishes to say anything? Yes, we've considered what has
 18 been said to us. We've come to the conclusion, for a
 19 reason which I will give in a moment, that we should make
 20 one more effort to see to it whether funding can be made
 21 available, and I will explain why I say that in a moment.
 22 As has been said last week, we're informed that there was a
 23 possibility that interim funding for the arrested parties
 24 might be made available by a charitable foundation. The
 25 proceedings were adjourned firstly to Thursday, and

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1 thereafter till today to await the decision of the
 2 foundation because if it were favourable, the postponement
 3 application would fall away. We have since learned – and
 4 Mr Mpofo has confirmed this, this morning – that the
 5 foundation concerned decided not to provide the interim
 6 funding sought. I have, however, been reliably informed
 7 that another body may well decide to provide the funding
 8 sought, and its decision should be made known by the end of
 9 tomorrow. I am not at liberty to say more than that.
 10 Though it is regrettable that another two days' sitting
 11 time will be lost in addition to the days which we've lost
 12 already, it is desirable, as counsel for the Human Rights
 13 Commission for example amongst others pointed out, that
 14 every effort should be made to ensure a process which is as
 15 inclusive as possible.
 16 In the circumstances the proceedings will be
 17 adjourned until Wednesday when, if the funding has not been
 18 made available, the Commission will have to address the
 19 question of whether the proceedings should be postponed.
 20 [11:20] So we adjourn until Wednesday at 9AM –
 21 MR MPOFU: Sorry, Chair –
 22 CHAIRPERSON: Yes, Mr Mpofo?
 23 MR MPOFU: Yes, Chairperson, yes, I just
 24 also thought for the sake of good order that we should
 25 mention that this toing and froing really has affected our

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1 preparation, so if, unless something materialises, that we
2 should be excused from being here on Wednesday. One of the
3 unintended consequences of the good intentioned efforts is
4 that because our team is already so thin on the ground, it
5 is not possible for us to be concentrating on the matter
6 that we should be concentrating on, and also preparing for
7 the Commission, and that in any event is a factor that we
8 hope will be taken into account, whatever the outcome of
9 those efforts are, because we do have to start doing heads
10 of argument within a very short space of time. So I'm just
11 saying, if we're not here on Wednesday, that will be the
12 context.

13 CHAIRPERSON: It might be advisable for
14 you to be here if the postponement matter is argued. On
15 the other hand, you have put your submissions before us –

16 MR MPOFU: We have; we have nothing to
17 add to the postponement application.

18 CHAIRPERSON: Well, you might wish to
19 reply to points that are made, if points are made of
20 substance which it is desirable that they should be replied
21 to, but it's your election, not mine.

22 MR MPOFU: Certainly.

23 CHAIRPERSON: We will adjourn now until
24 Wednesday at 9AM.

25 [COMMISSION ADJOURNED]

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