

# 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 203

17 MARCH 2014

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1 [PROCEEDINGS ON 17 FEBRUARY 2014]  
 2 [09:14] CHAIRPERSON: Mr Semenya. I'm sorry, I  
 3 didn't say, the Commission resumes. The Commission  
 4 resumes. I'd be grateful if every person who has a cell  
 5 phone will see to it that the cell phone is switched off.  
 6 A cell phone going off in the middle of proceedings can be  
 7 very disturbing. I just want to remind everyone present  
 8 about that ruling. Mr Semenya?  
 9 MR SEMENYA SC: Chair, we will have my  
 10 learned colleague Baloyi give the argument on behalf of the  
 11 SAPS.  
 12 CHAIRPERSON: I see. Yes, yes, Ms  
 13 Baloyi.  
 14 MS BALOYI: Thank you, Chairperson.  
 15 Chairperson, we've prepared heads of argument. We've  
 16 distributed these to the parties and we've also made copies  
 17 for the Commissioners. Chairperson, I will not be speaking  
 18 to each paragraph in the heads of argument, but will speak  
 19 covering the topics that we've covered in the heads of  
 20 argument.  
 21 CHAIRPERSON: I think before you start,  
 22 just from a housekeeping point of view just make sure that  
 23 we're ready to hear the full argument from everybody. I  
 24 received yesterday a set of heads which had been sent by  
 25 SAPS. These are the heads from which you'll be arguing.

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1 This morning I received heads of argument from the LRC who  
 2 will argue on behalf of the Ledingwane family, from the  
 3 evidence leaders, from the injured and arrested persons,  
 4 the families of the three miners who were killed on the 13th  
 5 of August, and the families of 33 of the 34 miners who were  
 6 killed on the 16th, and also from AMCU, and I understand  
 7 that the argument on behalf of those parties will be  
 8 presented by Mr Mpfu and Mr Ntsebeza and possibly, it  
 9 wasn't clear, counsel on behalf of AMCU as well. So those  
 10 heads I've got. Those are the sets of heads I've got. Is  
 11 there any other party to wishes to argue, apart from the  
 12 ones I've mentioned, and if so, have they got heads that  
 13 they wish to hand in? Ms Baloyi, would you please commence  
 14 your argument.  
 15 MS BALOYI: Thank you, Chairperson.  
 16 Chairperson, the orders that we seek with this application  
 17 are set out in the notice of application and what we seek,  
 18 what the SAPS seek, Chairperson, is rulings that would  
 19 allow the witness at this stage identified as Mr X to  
 20 testify in the absence of members of the public and to  
 21 testify by video link, necessarily from a remote location,  
 22 Chairperson.  
 23 The rulings are set out in the notice and for the  
 24 record, if I may read the rulings that we seek, the notice  
 25 says that we seek an order that the oral evidence of Mr X

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1 be presented in camera and by video link, that's (1).  
 2 (2), That only the Commissioners, the legal  
 3 representatives, and accredited media be permitted to be  
 4 present in the auditorium during the evidence of Mr X.  
 5 (3), The name of Mr X is to be disclosed only to  
 6 the Commissioners and to the legal representatives of the  
 7 injured and arrested persons in the Commission, which name  
 8 shall not be disclosed by them to anyone else other than  
 9 for the purpose of obtaining instructions.  
 10 (4), Neither the name or any information that may  
 11 reveal the identity of Mr X shall be disclosed by any  
 12 person save for the purpose of obtaining instructions.  
 13 (5), Members of the public wishing to listen to  
 14 the evidence of Mr X will do so by listening to audio  
 15 transmission of the –  
 16 CHAIRPERSON: I take it that should be  
 17 "may do so."  
 18 MS BALOYI: May, indeed so, Chair.  
 19 CHAIRPERSON: I'll amend the  
 20 application accordingly –  
 21 MS BALOYI: "May do so," as the  
 22 Chairperson pleases.  
 23 (6), Accredited members of the media reporting on  
 24 the evidence may not disclose the identity of Mr X or  
 25 provide any information which may lead to the disclosure of

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1 his identity.  
 2 (7), All video recordings of the evidence of Mr X  
 3 must be bled or blacked out so as to not to disclose his  
 4 identity in any manner.  
 5 Chairperson, you would have seen from our heads  
 6 of argument that in fact with respect to ruling 3 we have  
 7 introduced some amendment which is that we will also  
 8 disclose, make that disclosure to the representatives of  
 9 AMCU, and this is in the light of the acknowledgement that  
 10 Mr X does implicate, makes certain allegations that pertain  
 11 to Mr Mathunjwa.  
 12 CHAIRPERSON: So do you want then to  
 13 amend paragraph 3 –  
 14 MS BALOYI: As the Chairperson pleases.  
 15 CHAIRPERSON: - by inserting the words  
 16 "and AMCU" after the words "injured and arrested persons"?  
 17 MS BALOYI: As the Chairperson pleases.  
 18 CHAIRPERSON: Well, I don't think there  
 19 can be any objection to that, so I grant the application  
 20 for the amendment. Paragraph 3 now reads, "The name of Mr  
 21 X is to be disclosed only to the Commissioners and to the  
 22 legal representatives of the injured and arrested persons  
 23 and AMCU in the Commission, which name shall not be  
 24 disclosed by them to anyone else other than for the purpose  
 25 of obtaining instructions."

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1 MS BALOYI: Thank you, Chairperson.  
 2 Chairperson, the supporting affidavit sets out the concern  
 3 that back up this application and primarily, or essentially  
 4 it is that Mr X makes allegations, or will testify and make  
 5 allegations that implicate certain persons. Those persons  
 6 are presently the subject, some of them are subject of  
 7 police investigation, pending police investigation, but  
 8 also subject of pending criminal prosecution, or criminal  
 9 proceedings, and there is a real concern that his  
 10 testimony, or his testifying before this Commission may  
 11 well expose him to harm and harm to his family.  
 12 To underpin that, Chair, in the affidavit we  
 13 state that in fact as things stand, Mr X is under witness  
 14 protection precisely because of the concern about his  
 15 safety and the safety of his family. That is essentially  
 16 what underpins the application, Chairperson, and we set out  
 17 in more detail in the affidavit.  
 18 Now Chairperson, to the specific questions that  
 19 we must address and which have been raised by the  
 20 Commission, whether the Commission has the power to grant  
 21 this application, and if so, where that power derives, we  
 22 deal with that in our heads of argument and what we say in  
 23 that regard, Chairperson, is that the Commissions Act in  
 24 section 4 –  
 25 CHAIRPERSON: Where are you in your heads

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1 at the moment?  
 2 MS BALOYI: At paragraph 7, Chairperson.  
 3 CHAIRPERSON: Yes, thank you.  
 4 MS BALOYI: In section 4, Chairperson, of  
 5 the Commissions Act what it does in its terms, it permits  
 6 the exclusion of persons that the Chairperson, or that the  
 7 Commission, whose presence the Commission deems not  
 8 necessary or desirable when a witness testifies, when  
 9 certain testimony is presented or certain submissions are  
 10 made. Chairperson, our submission is that it is inherent  
 11 in section 4, in the wording of section 4 that in fact  
 12 certain members of the public may as the Commission is  
 13 proceeding, listening to evidence may as it becomes  
 14 necessary be excluded from sitting in through that  
 15 evidence. That is the first source, Chairperson, of the  
 16 power that we submit the Commission has to exclude persons  
 17 from evidence of the witness.  
 18 Chairperson, if I may for the record read section  
 19 4, Chairperson, section 4 provides, the heading is "(4),  
 20 Sittings to be public. All the evidence and addresses  
 21 heard by a commission shall be heard in public, provided  
 22 that the chairman of the commission may in his discretion  
 23 exclude from the place where such evidence is to be given  
 24 or such address is to be delivered any class of persons or  
 25 all persons whose presence at the hearing of such evidence

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1 or address is in his opinion not necessary or desirable."  
 2 Now, Chairperson, section 4 is also backed up, or  
 3 finds further support or expression in regulation 10, which  
 4 provides, "Where at the time of any person presenting  
 5 information to or giving evidence before the commission  
 6 members of the general public are or have been excluded  
 7 from attendance at the proceedings of the commission, the  
 8 chairperson may on the request of such a person direct that  
 9 no person shall disclose in any manner whatsoever the name  
 10 or address of such person or any information likely to  
 11 reveal his or her identity."  
 12 Chairperson, what regulation 10 does, in fact  
 13 what it does is it supports and further strengthens the  
 14 power that you find in section 4, which is to preserve the  
 15 identity and confidentiality of a witness that the  
 16 Commission has deemed it necessary to hear his evidence in  
 17 camera.  
 18 Chairperson, we also make further reference in  
 19 our heads of argument to regulation 19 as another source of  
 20 the powers of the Commission with respect to the relief  
 21 that we seek. Chairperson, at paragraph 8 of the heads of  
 22 argument we make reference to regulation 19 which provides,  
 23 "The Commission may determine its own procedures." In this  
 24 regard, Chairperson, the submission that we make is that  
 25 the question about witnesses testifying, how they testify,

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1 in what manner they should present their evidence, it is  
 2 regulated, or the Commission is empowered, it's part of the  
 3 procedures of the Commission that the Commission has the  
 4 power to regulate, and that's what regulation 19 does. It  
 5 empowers the Commission to determine how evidence before  
 6 the Commission should be present.  
 7 Chairperson, to this point what we've had is  
 8 we've had witnesses testifying orally by being present in  
 9 the open forum, but in addition to that, Chairperson, we  
 10 have considered that certain witnesses who will testify  
 11 only by way of affidavit, that that decision, or that power  
 12 of the Commission to determine that witnesses may well  
 13 indeed present their evidence by way of affidavit is a  
 14 power we submit that derives from regulation 19.  
 15 Chairperson, in the –  
 16 CHAIRPERSON: It appears to me that you –  
 17 I mentioned at the beginning that I'd received sets of  
 18 heads of argument from the various parties wishing to  
 19 participate in the argument this morning, firstly from the  
 20 SAPS, but thereafter from those who oppose various parts of  
 21 the relief sought, and also from the evidence leaders. May  
 22 I enquiry, have copies of these heads of argument been  
 23 given to the representatives of the media? Because I see a  
 24 number of members of the media here and if there's going to  
 25 be extensive reporting on what happens today I think it

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1 will assist the media considerably if they are given copies  
 2 of the heads of argument. I don't know whether that's been  
 3 that, but if it hasn't been done may I suggest that that be  
 4 arranged in the course of the morning. Has it been done  
 5 already, Mr Mpofo, or is it going to be done?  
 6 MR MPOFU: No, Chairperson, unfortunately  
 7 I think it can be done during the comfort break, because we  
 8 do have extra sets, I think, all of us here.  
 9 CHAIRPERSON: Yes, alright.  
 10 MR MPOFU: Thanks, Chair.  
 11 MS BALOYI: We'll do so, Chairperson.  
 12 CHAIRPERSON: And I take it the evidence  
 13 leaders can do the same.  
 14 MS PILLAY: We will do so, Chair.  
 15 CHAIRPERSON: Ja, thank you. Yes, sorry,  
 16 I interrupted you. You were explaining to me that  
 17 regulation 19 of the Commissions Regulations, which  
 18 empowers the Commission to determine its own procedures  
 19 would include a power obviously I couldn't exercise on my  
 20 own –  
 21 MS BALOYI: Yes.  
 22 CHAIRPERSON: - but which I could  
 23 exercise provided I have the consensus of my two colleagues  
 24 to provide for a procedure whereby if an appropriate case  
 25 is made out for it, for a witness to testify by means of an

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1 external video, television link.  
 2 MS BALOYI: Indeed so, Chair –  
 3 CHAIRPERSON: That's the point you were  
 4 making?  
 5 MS BALOYI: That is the submission.  
 6 Chairperson, in paragraph 10 of the heads of argument we  
 7 set out the areas of evidence that will be covered by Mr X  
 8 and we do so, Chairperson, only to illustrate the nature of  
 9 the evidence that he will present to the Commission and to  
 10 indicate that on the basis of this evidence, which,  
 11 Chairperson, is evidence that, or allegations that are  
 12 already contained in the statement of Mr X, statements of  
 13 Mr X that have been submitted to the Commission. We  
 14 summarise that in paragraph 10.  
 15 CHAIRPERSON: Yes, while you're busy with  
 16 paragraph 10, I see you're going to move on in paragraph  
 17 10.1 and following to deal with the fact that Mr X is  
 18 currently under witness protection.  
 19 MS BALOYI: Yes.  
 20 CHAIRPERSON: And you refer to the  
 21 Director of Witness Protection.  
 22 MS BALOYI: Yes.  
 23 CHAIRPERSON: And you say in the, it is  
 24 said in the replying affidavit by Mr Pretorius that, in  
 25 paragraph 4.22, that the permission of the Director for

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1 Witness Protection is required before the identity of a  
 2 person under witness protection is disclosed, and you say  
 3 such consent may be given in the circumstances provided in  
 4 section 17 of the act.  
 5 MS BALOYI: Yes.  
 6 CHAIRPERSON: Then he says, "I will  
 7 before the hearing of this application seek to obtain the  
 8 attitude of the Director for Witness Protection to the  
 9 disclosure of the name of Mr X." Now has that been done?  
 10 MS BALOYI: Chairperson, that –  
 11 CHAIRPERSON: Because as I understand it  
 12 you can't even disclose to us who he is, or to the  
 13 representatives of the injured and arrested persons and  
 14 AMCU, as you seek to do –  
 15 MS BALOYI: Yes.  
 16 CHAIRPERSON: - unless you have his  
 17 permission, as I understand it.  
 18 MS BALOYI: Yes.  
 19 CHAIRPERSON: Is that correct?  
 20 MS BALOYI: Yes, that is correct,  
 21 Chairperson. As things stand now we are in the process of  
 22 procuring that consent, the written consent from the  
 23 Director of Witness Protection.  
 24 CHAIRPERSON: Yes, and the section 18 of  
 25 that act provides that, apart from any relief that you may

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1 seek in this application, I have to make certain orders,  
 2 which are set out in section 18. You haven't incorporated  
 3 those orders in the relief that you seek, but in terms of  
 4 the act it's obligatory for you, as I read the act, but the  
 5 section concludes by saying, by having said that I must  
 6 make certain orders in relation to a person under  
 7 protection, it says, "Unless the Director satisfies the  
 8 presiding officer concerned that exceptional circumstances  
 9 which are in the interest of justice exist why such an  
 10 order should not be made" – now clearly your application is  
 11 defective in the sense that firstly I'm not told what the  
 12 attitude of the Director is, I'm not told whether he's  
 13 going to endeavour to satisfy me to make an order such as  
 14 dealt with in the last section, last portion of the  
 15 section, and also it doesn't include the orders which I'm  
 16 obliged to make –  
 17 MS BALOYI: Yes.  
 18 CHAIRPERSON: - in terms of the section.  
 19 So that's a matter that receives - are not referred to in  
 20 your heads of argument anywhere –  
 21 MS BALOYI: Yes.  
 22 CHAIRPERSON: - or in the papers to  
 23 section 18 of the act, but I would be acting contrary to  
 24 the terms of that act unless I complied with section 18.  
 25 MS BALOYI: Yes.

<p style="text-align: right;">Page 24843</p> <p>1 CHAIRPERSON: Is that not so?</p> <p>2 MS BALOYI: Chairperson, that is indeed</p> <p>3 the case. We do not deal with section 18 in the heads of</p> <p>4 argument, neither in our oral submissions.</p> <p>5 [09:34] Chairperson what we will need to do, we realise</p> <p>6 is that even before the Chairperson delivers, the</p> <p>7 Commission delivers its rulings on this issue.</p> <p>8 CHAIRPERSON: I make the ruling.</p> <p>9 MS BALOYI: Yes.</p> <p>10 CHAIRPERSON: That's clear from the terms</p> <p>11 of the Act and the regulations.</p> <p>12 MS BALOYI: Yes.</p> <p>13 CHAIRPERSON: If there's going to be an</p> <p>14 empowering ruling in relation to, for example, the external</p> <p>15 video link, that involves the whole Commission.</p> <p>16 MS BALOYI: Yes.</p> <p>17 CHAIRPERSON: All three of us would be</p> <p>18 involved in that, if that's going to happen, but everything</p> <p>19 else I'm afraid is for me to decide alone. I may say that</p> <p>20 I've read, I read your heads last night and obviously</p> <p>21 studied the papers and I've also looked at some of the</p> <p>22 cases which have a bearing on the matter. There are some</p> <p>23 quite important points that arise for decision. I don't</p> <p>24 propose giving an ex tempore judgment or ruling at the end</p> <p>25 of the day.</p>	<p style="text-align: right;">Page 24845</p> <p>1 happens. That's in the event of my making the order that</p> <p>2 you seek. If I don't, well, then of course that problem</p> <p>3 won't arise.</p> <p>4 MS BALOYI: Indeed so, Chair.</p> <p>5 CHAIRPERSON: Adv Hemraj points out to me</p> <p>6 that if we're only going to know what the attitude of the</p> <p>7 director is, the director clearly is an important person in</p> <p>8 relation to the kind of relief you're seeking, the other</p> <p>9 parties here who will be opposing the relief sought may</p> <p>10 well wish to say something about the attitude of the</p> <p>11 director has to communicate to me as Chairman of the</p> <p>12 Commission. So if it can be done today, it would be</p> <p>13 better. I suppose if it can't be done today, well, we'll</p> <p>14 have to either try to do something about it tomorrow or</p> <p>15 even possibly next week if that becomes necessary but</p> <p>16 clearly it's important, regard being had to the role or</p> <p>17 potential role the director would play, that all the</p> <p>18 parties get an opportunity to deal with what he has to say</p> <p>19 as well. I'm sorry to have interrupted you but that is an</p> <p>20 important point that –</p> <p>21 MS BALOYI: Thank you, Chairperson.</p> <p>22 CHAIRPERSON: - has to be addressed at</p> <p>23 the very beginning.</p> <p>24 MS BALOYI: Thank you, Chairperson.</p> <p>25 MR MPOFU: Sorry, Chairperson, may I</p>
<p style="text-align: right;">Page 24844</p> <p>1 MS BALOYI: Yes.</p> <p>2 CHAIRPERSON: As you know, we're not</p> <p>3 sitting on Wednesday and Thursday and I was proposing, if</p> <p>4 possible, to make the order next Monday after I've had an</p> <p>5 opportunity to consider the arguments that will be</p> <p>6 presented as well as the cases that have a bearing on that.</p> <p>7 So far as the Director of Witness Protection is concerned</p> <p>8 and his involvement, that will afford you the opportunity</p> <p>9 to ensure that what has to be put before me or what you</p> <p>10 wish to put before me will in fact be put before me before</p> <p>11 I'm in a position – before I'm in a position to make the</p> <p>12 ruling and in fact make the ruling. As I say, I hope to be</p> <p>13 able to make the ruling next Monday but it may be that in</p> <p>14 the course of considering the matter and reading the</p> <p>15 authorities and re-reading the argument I may find it</p> <p>16 difficult to give the ruling as soon as next Monday but</p> <p>17 I'll obviously do it as soon as I can because I understand.</p> <p>18 MS BALOYI: Yes.</p> <p>19 CHAIRPERSON: The next witness is going</p> <p>20 to be Colonel Vermaak. I understand you'd like to call Mr</p> <p>21 X. I anticipate that Colonel Vermaak will be some time in</p> <p>22 the box or at the witness table but clearly you have to be</p> <p>23 ready, not only to call Mr X when Colonel Vermaak has</p> <p>24 finished but if there are certain things that have to be</p> <p>25 put in place you'd obviously need time to ensure that that</p>	<p style="text-align: right;">Page 24846</p> <p>1 enquire – I agree with the Chairperson's outline but may I</p> <p>2 enquire how, in that regime, we will accommodate our right</p> <p>3 of reply? In other words, obviously what the Chairperson</p> <p>4 is proposing will happen before the ruling is given but how</p> <p>5 are we to deal – how is the other side, so to speak, going</p> <p>6 to –</p> <p>7 CHAIRPERSON: It depends – sorry to</p> <p>8 interrupt you, it depends what he says. Section 18 of the</p> <p>9 Act, that's the Witness Protection Act, says,</p> <p>10 "Notwithstanding any other law, the presiding officer at</p> <p>11 any proceedings" – which, by the way, include proceedings</p> <p>12 before a Commission – "in which the protected person is a</p> <p>13 party or a witness" – well, he would be a witness – "must</p> <p>14 make an order." So "Notwithstanding any other law, the</p> <p>15 presiding officer at any proceedings in which the protected</p> <p>16 person is a witness must make an order prohibiting the</p> <p>17 publication of any information, including any drawing,</p> <p>18 picture, illustration, painting, photograph" and then they</p> <p>19 go on to describe that, "pamphlet, poster or other printed</p> <p>20 matter which may disclose the place of safety or location</p> <p>21 where he or she is as being under protection or where he or</p> <p>22 she has been relocated in terms of the Act, the</p> <p>23 circumstances relating to his protection, the identity of</p> <p>24 any other protected person, the relocation or change of</p> <p>25 identity of a protected person. Unless the director has</p>

<p style="text-align: right;">Page 24847</p> <p>1 satisfied the presiding officer concerned the exceptional 2 circumstances which are in the interests of justice exist 3 why such an order should not be made." So his involvement 4 is of such a nature that I would imagine that, depending on 5 what he says, you may not consider it necessary to reply. 6 Alternatively, if you do reply you could possibly reply in 7 writing or, it's impossible to look with too much accuracy 8 into the future, you may wish to address me orally on that 9 point but these are all matters that – it's not very clear 10 what exactly is going to happen so we can't say at this 11 stage what facilities or opportunities will be afforded you 12 to deal with what the director has to say.</p> <p>13 MR MPOFU: Thank you, Chairperson. 14 CHAIRPERSON: Yes, Ms Baloyi, sorry. 15 MS BALOYI: Thank you, Chairperson.</p> <p>16 Chairperson, I've been alerted to the fact that not 17 everybody in this room has a copy of the heads of argument 18 and perhaps I should read as much as possible into the 19 record of what is contained in the heads.</p> <p>20 CHAIRPERSON: I don't think that's 21 strictly necessary. I would imagine that the general 22 thrust of what you have to say will be apparent. The media 23 will, I understand, be given copies in the course of the 24 morning but I doubt whether the other people here would 25 want exactly to know every word that's in your heads. As</p>	<p style="text-align: right;">Page 24849</p> <p>1 Chairperson, the application or the relief that 2 we seek, in particular that the witness testify in camera 3 as contemplated in section 4, immediately implicates 4 section 34 which is that all disputes should be resolved by 5 public hearing –</p> <p>6 CHAIRPERSON: Well, does it? The reason 7 I ask you that is, have you got section 34 in front of you? 8 MS BALOYI: I do. 9 CHAIRPERSON: Will you read it to us, 10 please? 11 MS BALOYI: I do, Chairperson. 12 CHAIRPERSON: Yes, will you read section 13 34 to us please? Do you have the section? 14 MS BALOYI: I do, Chairperson. 15 CHAIRPERSON: Sorry, would you read it 16 please? Sorry. 17 MS BALOYI: Section 34 reads, "Access to 18 court. Everyone has the right to have any dispute that can 19 be resolved by the application of law decided in a fair 20 public hearing before a court or, where appropriate, 21 another independent and impartial tribunal or forum." 22 CHAIRPERSON: Well, does that apply to a 23 Commission? The language is a bit ambiguous. 24 MS BALOYI: Yes. 25 CHAIRPERSON: It talks about another</p>
<p style="text-align: right;">Page 24848</p> <p>1 long as the general thrust is clear it should be in order. 2 MS BALOYI: As the Chair pleases. 3 CHAIRPERSON: You will remember Mr Mpofo 4 indicated he thought the whole argument would be over by 11 5 o'clock. Well, it may be an impossible target but 6 obviously the longer we take, the less time we have for the 7 conclusion of Major-General Naidoo's evidence.</p> <p>8 MS BALOYI: Thank you, Chairperson. 9 Chairperson, I was at the point where I was pointing out 10 that in paragraph 10 we set out in summary some of the 11 allegations that are contained in the statement of Mr X, 12 which we say are matters about which he will testify. 13 Chairperson, at paragraph 11 we set out the legal framework 14 that we say applies to a determination of an application of 15 this nature and in that regard, Chair, we – the Chairperson 16 will see at paragraph 11.3, at paragraph 11.3 that we set 17 out the rights that are implicated in this application. 18 11.3.1 The right to life as provided for in section 11 of 19 the Constitution, 11.3.2 the right to freedom and security 20 of the person which includes freedom from all forms of 21 violence, whether from public or private sources, that is 22 section 12 of the Constitution. And at 11.3.3 we speak of 23 section 34 which provides for the right to have any dispute 24 that can be resolved by application of law, decided in a 25 fair public hearing.</p>	<p style="text-align: right;">Page 24850</p> <p>1 forum or tribunal, this is clearly not a court. 2 MS BALOYI: Yes. 3 CHAIRPERSON: We don't make orders at the 4 end although I can understand that the findings we make and 5 the recommendations we make may involve some reputational 6 damage to some of the people concerned, but is there 7 authority on the question as to whether this Commission 8 could be regarded as a forum or tribunal within the meaning 9 of those expressions as they are used in section 34? 10 MS BALOYI: Yes. Chairperson, we haven't 11 come across anything specifically that deals with the 12 proceedings of the Commission. The reason that we are 13 prepared to make the concession or to concede, perhaps ill- 14 advised even, to concede that section 34 may well be 15 implicated, Chair, it is because the terms of reference 16 requires the Commission to make certain findings, and 17 perhaps to pick an easy example, whether the conduct of the 18 members of the SAPS was reasonable in the circumstances. 19 Perhaps a second example that pertains to the strikers is 20 whether any of their conduct in any way contributed to the 21 events in Marikana, to what transpired in Marikana. 22 Chairperson, this is not merely, we submit, that it will 23 probably not be just a factual enquiry. The Commission 24 will probably have to get into principles of law applicable 25 to see whether certain findings are justified and in that</p>

<p style="text-align: right;">Page 24851</p> <p>1 way, Chairperson, you would be applying the law and perhaps  2 the famous example is the SAPS having, the account of the  3 SAPS in these proceedings is that its members would have  4 acted in self-defence in some of the cases. That does  5 require the Commission to look into the principles of law  6 and to come to certain conclusions on that and,  7 Chairperson, to that extent this forum does look into  8 questions or does decide issues applying principles of law.  9 Secondly, Chairperson, indeed this is not a court  10 of law but perhaps it is possible that this Commission is  11 covered by the part of section 40 – 34, rather – that says  12 another independent and impartial forum. Chairperson, it  13 may well be that this Commission is such a forum which  14 determines certain questions applying principles of law and  15 to that extent, Chairperson, it would appear that section  16 34 is relevant for purposes of this Commission.  17 CHAIRPERSON: Thank you.  18 MS BALOYI: Thank you, Chair.  19 Chairperson, what section 34 – rather what section 4 of the  20 Commissions Act does in its terms is to in fact say –  21 CHAIRPERSON: The reason I asked you the  22 question is this, if section 34 applies to this Commission,  23 then any statute which delegates from the entrenched right  24 created by section 34 would have to comply with the  25 limitation provisions in the Constitution and there may be</p>	<p style="text-align: right;">Page 24853</p> <p>1 reference.  2 MS BALOYI: I will give the correct  3 citation, Chairperson.  4 CHAIRPERSON: Of course, there's a  5 further complication of course, that if there is a statute  6 which it is contended is unconstitutional, I would have no  7 power to declare it unconstitutional.  8 MS BALOYI: Yes.  9 CHAIRPERSON: I would have to accept, I  10 take it, that it is constitutional but obviously if the  11 Constitution applies in interpreting the statute, I would  12 obviously be obliged to accept it's constitutional but I  13 would have to interpret it in such a way, if I could, as to  14 make it constitutional and that might have a bearing on the  15 way the statutes, the ones you rely on, are to be  16 construed. That's also one of the main reasons why I ask  17 the question.  18 MS BALOYI: Yes.  19 CHAIRPERSON: I take it you would concede  20 that to be the case as well.  21 MS BALOYI: Yes, Chairperson.  22 Chairperson, we are not making the submission that there is  23 specific legislation or statute that deals with this kind  24 of application before the Commission. We're not saying  25 that it is regulated, save for what you find in section 4</p>
<p style="text-align: right;">Page 24852</p> <p>1 issues that arise in respect of that, so that that was the  2 focus, the reason why I asked you the question.  3 MS BALOYI: Thank you, Chair.  4 CHAIRPERSON: You, in effect, have  5 conceded that the section of the Constitution does apply so  6 that further consequences would follow.  7 MS BALOYI: Yes. In fact, Chairperson,  8 what – on that our submission is that the provisions, the  9 statutes that in fact provide or deal with the kind of  10 relief that we are seeking in this application have not  11 been found to be unconstitutional. Perhaps a good example,  12 Chairperson, a point of reference is the Criminal Procedure  13 Act. The provisions of section 153 of the Criminal  14 Procedure Act which provides for hearings in camera and  15 section 158 which provides for testimony by way of video  16 link. Those provisions post '94 have been found to be  17 applicable, they haven't been declared unconstitutional.  18 Chairperson, a further authority in fact that we  19 do not refer to in our heads of argument is the matter of  20 DPP Transvaal v The Minister of Justice. Chairperson, it's  21 a – I'll give the Chairperson the correct citation. I  22 think it's a 2008 decision of the Constitutional Court –  23 CHAIRPERSON: It can't be the DPP  24 Transvaal if it's 2008 because the Transvaal as such had  25 ceased to exist but anyway if you can give me the</p>	<p style="text-align: right;">Page 24854</p> <p>1 which –  2 CHAIRPERSON: Well, section 4 would have  3 to be interpreted, would it not?  4 MS BALOYI: Indeed so, Chair.  5 CHAIRPERSON: If possible, so as to  6 render it constitutionally valid and the same would apply  7 to regulation 10.  8 MS BALOYI: Yes.  9 CHAIRPERSON: Is that right?  10 MS BALOYI: Yes.  11 CHAIRPERSON: And also, I take it, in  12 relation to the sections in the Witness Protection Act that  13 are relevant.  14 MS BALOYI: Yes. Thank you, Chair.  15 Chairperson, perhaps the last point that I was making was,  16 in fact, where the Constitution Court has had occasion to  17 look at –  18 CHAIRPERSON: You're going to give us the  19 reference of this.  20 MS BALOYI: Yes.  21 CHAIRPERSON: This DPP of –  22 MS BALOYI: I will, Chairperson. Mr  23 Pretorius is trying to assist me.  24 CHAIRPERSON: Of somewhere in the old  25 Transvaal, apparently, versus the Minister of Justice. It</p>

<p style="text-align: right;">Page 24855</p> <p>1 may have been an earlier case that involved the DPP of 2 Transvaal and was only reported later, I don't know. 3 MS BALOYI: Chairperson, in fact I do 4 have the citation, if I may. 5 CHAIRPERSON: Yes, please give it to me. 6 MS BALOYI: Yes. It is, surprisingly it 7 is DPP Transvaal, Chairperson, v Minister of Justice &amp; 8 Others 2009(7) BCLR 637, a decision of the Constitutional 9 Court. 10 CHAIRPERSON: Do you know if it's 11 reported in the South African Law Reports as well? 12 MS BALOYI: I beg your pardon, 13 Chairperson? 14 CHAIRPERSON: Do you know if it's 15 reported in the South African Law Reports as well? 16 MS BALOYI: Chair, I couldn't find any 17 other reference. 18 CHAIRPERSON: Well, I'd be grateful if 19 you could try to get us a copy of the judgment. 20 MS BALOYI: Yes. 21 CHAIRPERSON: Because it'll obviously be 22 necessary in fact to refer to it. 23 MS BALOYI: Chair, we'll do that. 24 CHAIRPERSON: Or it may be necessary to 25 refer to it, I don't know yet.</p>	<p style="text-align: right;">Page 24857</p> <p>1 African Legal Information Institute we'll be able to find 2 the judgment - 3 MS BALOYI: Yes. 4 CHAIRPERSON: - electronically, so we 5 will get copies. Mr Ntsebeza wants to know full details, 6 he's now got them. So you can proceed. 7 MS BALOYI: Chairperson, in paragraph 8 166, insofar as it is relevant to the question that the 9 Chair just raised with me, that in paragraph 166 of that 10 judgment the Constitutional Court says that, "These 11 procedures," and this is testimony of a child in camera 12 through a mediator and by video link, the court there says 13 that, "These special procedures should not be seen as a 14 justifiable limitation on the right to a fair trial, but as 15 measures conducive to a trial that is fair to all." 16 CHAIRPERSON: Thank you. I see the case 17 is reported in the South African Law Reports and in the 18 South African Criminal Reports. Adv Hemraj has drawn my 19 attention to a passage in Adv du Toit's textbook on 20 Criminal Procedure where he says at page 22-30 and on to 21 22-31 that the case is reported 2009 (2) SACR 130, and 2009 22 (4) SA 222 (CC). So that should make it easier for us to 23 find the case. 24 MS BALOYI: I'm indebted to the 25 Chairperson.</p>
<p style="text-align: right;">Page 24856</p> <p>1 MS BALOYI: We'll do that, Chair, but 2 Chair, perhaps to - 3 MR NTSEBEZA SC: Chair, can we get the 4 full citation? 5 CHAIRPERSON: The reference is 2009(7) 6 BCLR637 (CC). If we can give them the gate then through 7 the SAFLII website we should, or even the Constitutional 8 Court website we should be able to obtain an electronic 9 version of the judgment. 10 MS BALOYI: Thank you, Chair. Perhaps, 11 Chair, for completeness to point out that in fact in this 12 matter before the Constitutional Court the court was 13 concerned with the equivalent of section 153 and 158 so far 14 as they pertain to child witnesses and child complainants 15 and the court recognised that the purpose of those 16 provisions are to protect from stress. 17 [09:54] (1), distress of testifying, but also the 18 possible harm that may be caused to them by having to 19 testify in the presence for example of the person that they 20 are accusing of wrongdoing, and Chair, the date of the 21 judgment, the matter in fact was decided on 1 April 2009. 22 It was heard on 6 November 2008. 23 CHAIRPERSON: Thank you. Now we've got 24 the dates; by reference to the website of the 25 Constitutional Court and also the website of the South</p>	<p style="text-align: right;">Page 24858</p> <p>1 CHAIRPERSON: You're really indebted to 2 Adv Hemraj. 3 MS BALOYI: I am indeed, Chair. 4 CHAIRPERSON: But anyway, you say the 5 passage in the judgment which is particularly relevant for 6 us is paragraph 166? 7 MS BALOYI: 166, Chairperson. 8 Chairperson, we make the point in the heads of argument 9 that there doesn't seem to be any dispute - 10 CHAIRPERSON: You're now at paragraph? 11 MS BALOYI: Chair, if you would bear with 12 me. Chairperson, perhaps to finish off on paragraph 10 in 13 which we set out, the one thing that I should have 14 mentioned is we make the point, and I think Mr Pretorius 15 may well, in his replying affidavit makes the point that it 16 doesn't seem to be in dispute between the parties that 17 there may well be a risk to Mr X is he's required to 18 testify in an open forum. The point of difference it 19 appears is the measures that can and should be put in place 20 to secure him from any risk of harm, and Chair, we submit 21 that that is significant to take into account in 22 considering the facts in an application of this nature. 23 Chairperson, section 4 that empowers the 24 Commission to order a hearing in camera, we say that that 25 power of the Commission, or the ability of the Commission</p>

<p style="text-align: right;">Page 24859</p> <p>1 to grant that kind of relief, although we do not come 2 across authority that deals specifically with section 4 or 3 the exercise of the power under section 4, there are 4 parallels and guidelines or guidance to be drawn from the 5 decisions of our courts which have dealt with these issues, 6 and many of these decisions, they in fact are rendered in 7 the period after 1994 under the current Constitution. 8 Chairperson, we make reference to in fact a 9 decision that predates our Constitution, and here, 10 Chairperson, I'm at paragraph 12.1 of the heads of argument 11 – the decision of State versus Leepile and Others (1) 1986 12 (2) SA 333 (W), and we make the point, Chairperson, that it 13 was well argued by the esteemed counsel in that matter. 14 CHAIRPERSON: You're referring to junior 15 counsel- 16 MS BALOYI: Chairperson, the issue is 17 about balancing what are competing rights; the right of Mr 18 X to life, but also his physical safety, and the right of 19 parties who have an interest in the proceedings in this 20 Commission to participate in the proceedings of this 21 Commission, and the issue really is to strike the correct 22 balance. 23 Now Chairperson, we do not seek to withhold the 24 identity of Mr X from everybody. In the extreme cases, 25 Chairperson, I think in the Leepile matter along the way,</p>	<p style="text-align: right;">Page 24861</p> <p>1 says he did. That's if he's telling the truth, because if 2 he's a total impostor and he wasn't there at all – 3 MS BALOYI: Yes. 4 CHAIRPERSON: - they won't know who he 5 is. But you presumably can't be heard to contend that I 6 must make an order on the assumption that they don't know 7 him. 8 MS BALOYI: Yes. 9 CHAIRPERSON: They must know who he is. 10 So, and in any event counsel would have had, as you concede 11 in effect by implication in prayer 3, counsel have to 12 disclose his name to their clients to get instructions. So 13 I must confess I have difficulty in understanding why his 14 name can't be disclosed to the parties who on the facts 15 before – particularly the strikers, I mean, because on the 16 facts before us they must already know who he is. 17 MS BALOYI: Yes. 18 CHAIRPERSON: But that's something that 19 you will deal with in due course, I trust. 20 MS BALOYI: Yes. Chairperson – 21 CHAIRPERSON: Now when you've reached a 22 suitable stage I've been asked to authorise a comfort 23 break. It may be you would want to think about some of the 24 points I've put to you during the comfort break, but when 25 you – I don't want to interrupt the flow of your argument –</p>
<p style="text-align: right;">Page 24860</p> <p>1 it must be Leepile (5) where in fact there was a request 2 to, where the State requested, or required to withhold the 3 name and identity of the witnesses from even counsel and 4 the Court. This is not such a case, Chairperson. This is 5 a case where we say for his safety members of the public 6 should not have access to his identity and – 7 CHAIRPERSON: Well, you go a bit further 8 than that. What you say in paragraph 3 of the notice of 9 motion is "His name should only be disclosed to the 10 Commissioners and the legal representatives of the injured 11 and arrested persons and AMCU." So it can't be disclosed 12 to Mr Ntsebeza for example because he appears for the 13 families. 14 MS BALOYI: Yes. 15 CHAIRPERSON: It can't be disclosed to 16 the representatives of the Ledingwane family either. So 17 that seems to be unduly restrictive I would have thought, 18 prima facie. 19 MS BALOYI: Yes. 20 CHAIRPERSON: But it can't even be 21 disclosed to the parties except for the purposes of 22 obtaining instructions. Now if Mr X is telling the truth 23 and he did all the things that he says he did, then he must 24 be known to the other strikers. They must know who he is 25 because they would have seen him doing the things which he</p>	<p style="text-align: right;">Page 24862</p> <p>1 MS BALOYI: Yes. 2 CHAIRPERSON: - but when it's convenient 3 for you would you let me know and we'll take the comfort 4 break? 5 MS BALOYI: Yes. Chairperson, perhaps 6 the note to take the comfort break would be that it is 7 indeed what we propose, that he should, his details should 8 be disclosed to those persons, we say, where it will be 9 necessary for the legal representatives to obtain 10 instructions in order to deal with the evidence of Mr X 11 insofar as it implicates parties before this Commission. 12 Chairperson, we will give further thought - 13 CHAIRPERSON: You may then have to 14 redraft the terms of prayer 3 for purposes of that. 15 MS BALOYI: Yes. 16 CHAIRPERSON: I mean you'll remember the 17 section, as far as disclosure is concerned that's governed 18 by regulation 10. 19 MS BALOYI: Yes. 20 CHAIRPERSON: And in line with the cases 21 to which you've referred me by way of analogy, quite a 22 strong language is used there. The regulation 10 itself 23 doesn't indicate the test to be applied by the Chairperson 24 if he should comply with the request that the name, 25 address, and other information of a person not be</p>

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1 disclosed. So I would imagine that by analogy I would have  
 2 to have regard to some of the cases, or tests formulated in  
 3 the cases to which you've referred me, with due regard of  
 4 course to the fact that this is a Commission and not a  
 5 trial, but having said that, the principles will apply at  
 6 least to some extent by analogy and the cases talk about  
 7 things such as necessity, "strict necessity" is used in  
 8 some of the cases. So I mean I can't just make the order  
 9 that the names not be disclosed to the parties where the  
 10 probabilities are overwhelming that the parties, certainly  
 11 the striking parties know who he is. But apart from that  
 12 some basis would have to be advanced to justify an order in  
 13 the restricted terms you've asked for, but I'm not  
 14 expecting you to give me an answer now. Perhaps we should  
 15 take the comfort break now and we'll resume in quarter of  
 16 an hour.

17 MS BALOYI: Thank you, Chairperson.

18 CHAIRPERSON: And then perhaps some of  
 19 the housekeeping matters that have been addressed up to now  
 20 can have been attended to in the interim as well.

21 MS BALOYI: Thank you, Chair.

22 [COMMISSION ADJOURNS COMMISSION RESUMES]

23 [10:36] CHAIRPERSON: The Commission resumes. We  
 24 have now on our desks a copy of the Constitutional Court  
 25 judgment in the DPP Transvaal v The Minister of Justice and

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1 Constitutional Development and Others, for which we wish to  
 2 express our gratitude to those responsible for making it  
 3 available to us. The evidence leaders, I think, are those  
 4 to whom our thanks must be directed. Ms Baloyi, you were  
 5 addressing us when we took the comfort break.

6 MS BALOYI: Thank you, Chair.

7 CHAIRPERSON: Please proceed.

8 MS BALOYI: Chairperson, perhaps to start  
 9 with the issue that the Chairperson raised and perhaps a  
 10 good point to start, on the issue of the extent of the  
 11 disclosure of the name of Mr X. As we've set out in the  
 12 notice we, as amended, we had offered that we would  
 13 disclose to the legal representatives of the injured and  
 14 arrested and to the legal representatives of AMCU. In  
 15 fact, Chairperson, perhaps we could make a further  
 16 amendment to that prayer or that order, that part of the  
 17 order, that we will make disclosure to all the legal  
 18 representatives. That would be in order, such a ruling.

19 CHAIRPERSON: Well, yes, it may be that  
 20 as your argument proceeds and you hear, have the benefit of  
 21 inputs from your learned friends, you may want to amend  
 22 your relief further. So I'd be grateful if at the end you  
 23 give me a typed version of what you seek.

24 MS BALOYI: Thank you, Chair.

25 CHAIRPERSON: Yes, please proceed. What

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1 paragraph were you busy with when we adjourned?

2 MS BALOYI: Well, Chairperson, perhaps  
 3 even before I go back to the paragraph, if I may address  
 4 some of the questions. They are addressed in the heads of  
 5 argument and I would have addressed them in the  
 6 submissions, it's just that the Chairperson, you've  
 7 prompted them in the engagement – which I'm not complaining  
 8 about, Chairperson, I'm happy to deal with –

9 CHAIRPERSON: You must deal with it as  
 10 you consider, you know, most appropriate.

11 MS BALOYI: Yes.

12 CHAIRPERSON: If you wish to deal with  
 13 them at the appropriate point in your heads, do so. If you  
 14 want to deal with them now you may do so as well. Either  
 15 way I'll hear what you have to say and consider it.

16 MS BALOYI: Chairperson, I'm happy to  
 17 take this approach that on the – Chairperson, you asked the  
 18 question that if the name is disclosed and it's going to be  
 19 disclosed for purposes of taking instructions and I  
 20 understanding the question really to be about the efficacy  
 21 of such an order as we ask for –

22 CHAIRPERSON: No, the main point was that  
 23 if they know, if on the overwhelming probabilities the  
 24 strikers already know who Mr X is –

25 MS BALOYI: Yes.

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1 CHAIRPERSON: Because the point being if  
 2 Mr X played the prominent role he says he did, if he's  
 3 telling the truth in other words, then there's an  
 4 overwhelming probability that they know who he is and they  
 5 know what he looks like and they even know his name. So  
 6 it's a little bit artificial then to say, to impose a  
 7 restriction that his name can only be given to legal  
 8 representatives only for the purposes of obtaining  
 9 instructions and so on, whereas in fact you can imagine the  
 10 strikers looking in amazement at their legal  
 11 representatives if they tell them that and they say, but we  
 12 know him already. Of course they mightn't admit that  
 13 that's so and in fact they may be being truthful if they  
 14 don't admit it but if he is correct that he did all the  
 15 things he says he did, it's overwhelmingly probable they  
 16 know who he is.

17 MS BALOYI: Yes.

18 CHAIRPERSON: So, or the vast majority I  
 19 would've thought know who he is, so what's the point then  
 20 in imposing an artificial restriction which is in fact,  
 21 practically speaking, meaningless? That was the purpose of  
 22 the question and flowing from that was, all restrictions  
 23 that are imposed are in some ways derogations from the  
 24 right people have to start with and the more restrictive  
 25 the order is, the more the need for justification and if

<p style="text-align: right;">Page 24867</p> <p>1 the justification is, well, they mustn't know his names  2 except for certain limited purposes, but it's  3 overwhelmingly probable they know them anyway – well, then  4 the basis for granting the restriction becomes weaker. So  5 you understand my problem?  6 MS BALOYI: I do understand.  7 Chairperson, it is not contended that this is a perfect  8 measure that protects a witness in perpetuity and forever.  9 In fact, in the authorities that we rely on it is accepted  10 that it is effective only so far but in fact the important  11 thing about that measure of protection or to protect the  12 witness is that it is intended to enable the witness to  13 testify with as little concern about his safety, the safety  14 of his family as possible and thereby - that's the theory  15 behind it, as we understand it, Chairperson – and thereby  16 assist the Commission because he comes to the Commission  17 and he testifies, he's prepared to testify freely, in fact  18 enabled to testify hopefully freely, without constraints,  19 without any anxiety as much as possible and the remedy  20 being not so much to protect him forever against harm  21 because that cannot be done, but for the purposes of his  22 testimony as he is testifying. Chairperson, the decision  23 in S v Leepile (1) speaks to that fact that indeed it is  24 acknowledged, in fact it is doubtful how efficient the  25 remedy or the protection that is supposed to be given to</p>	<p style="text-align: right;">Page 24869</p> <p>1 – what's the point of imposing restrictions that the  2 strikers mustn't know who he is, if it's overwhelmingly  3 probable that they do know who he is, if he's telling the  4 truth?  5 MS BALOYI: Yes.  6 CHAIRPERSON: That's the point you have  7 to deal with. I'm not sure what the answer is, that's why  8 I'm asking you the question.  9 MS BALOYI: Yes. Chairperson, of course  10 with the ruling that the legal representatives will know  11 his identity and that might include his image as well,  12 Chairperson, we accept what is inherent in that is that the  13 clients that Mr Mpofo, for example, represent, will get to  14 know the name of the witness. They will probably even get  15 to see the image of the witness because they need to be  16 able to give proper instructions but, Chairperson, that  17 doesn't, it's not anything that arises in the special  18 circumstances of this case. That is a problem that is  19 inherent in the relief that section 153, drawing reference  20 to the Criminal Procedure Act, that in fact perhaps to  21 bring it closer home, that is inherent in section 4 in the  22 relief that section 4 contemplates, that he will be in  23 camera. If he testifies in camera and his identity must be  24 disclosed – as we concede must be, it has to be disclosed  25 to the legal representatives of the party that he</p>
<p style="text-align: right;">Page 24868</p> <p>1 the witness, how efficient it is but that is not the point.  2 The point is you give it anyway because underlying that  3 remedy is that a witness should get the comfort of knowing  4 that there is some protection that they have and for the  5 purposes of them testifying at that point as they testify,  6 they speak much more freely, less anxiously and therefore  7 are of greater assistance in the course of –  8 CHAIRPERSON: I understand that but if  9 the witness, when he gives evidence, knows that most of the  10 strikers know who he is anyway and know what he looks like  11 and so on, then the factor for which you content won't be  12 present because he already has the fear that these people  13 know who I am, they know what I look like and that operates  14 from the moment he starts giving evidence. So the argument  15 could be on the other side – I'm not putting it because I  16 have a fixed view on it because I haven't but I want to get  17 the benefit of your submissions – the argument on the other  18 side will be, if you want to impose restrictions by all  19 means impose sensible restrictions. Impose restrictions,  20 even if they won't be entirely successful, which have a  21 chance of working to some extent, have a chance of reducing  22 the risks to the witness. I understand that argument but  23 what's the point of imposing a restriction which in fact is  24 totally unnecessary because, it will be contended – rightly  25 or wrongly, I don't know but I suspect it will be contended</p>	<p style="text-align: right;">Page 24870</p> <p>1 implicates – it is inherent in that that you couldn't  2 safeguard completely the exposure of his identity including  3 his image, it is accepted. What we are concerned about,  4 Chairperson, is a wide, uncontrolled distribution of his  5 identity. Chairperson, if by way of example –  6 CHAIRPERSON: No, but the question I put  7 to you doesn't relate to that. It doesn't relate to  8 excluding the public, it relates to excluding the parties.  9 If it's correct – I don't know that it is but if it is  10 correct that the parties already know who he is, that when  11 the statements were given – you remember long ago Mr  12 Semenya distributed copies of X's statement, there were  13 certain names blanked out but I take it that the statements  14 at that stage were already shown or the contents were  15 communicated to the strikers, months and months ago. How  16 likely is it that the striker, if he's telling the truth,  17 that the strikers who heard him saying I am the person who  18 did all these things, that the strikers wouldn't know who  19 he is? If he's telling the truth and they were present,  20 they would have seen him doing the things that he says he  21 did. In other words, it's not a question of them  22 discovering later on who he is. The problem is, do they  23 not already know who he is?  24 MS BALOYI: Yes.  25 CHAIRPERSON: Anyway, that's the</p>

<p style="text-align: right;">Page 24871</p> <p>1 question. I'm not debating it with you, I'm just asking 2 you the question so that you can give me the answer. 3 MS BALOYI: Chairperson, indeed, it is a 4 shortcoming in this remedy as contemplated in section 4 and 5 then the simple point or the only point that I'm making 6 about it is, Chairperson, it is not proposed that this is a 7 perfect measure by any means. It does have inherent in it 8 the difficulty that witnesses, not only before this 9 Commission as we speak about Mr X, but every witness that 10 seeks, where it is sought to use similar provisions as you 11 find them in the different legislation, where it is sought 12 to use that, that it is inherent in that that perhaps the 13 remedy or the protection that seeks to be given it may well 14 be that at the end of the day it is purely academic but it 15 is then nonetheless and to the extent that witnesses may 16 well draw comfort from it, the Commission in this case 17 should be inclined to grant that, notwithstanding the 18 difficulties with its efficacy. 19 CHAIRPERSON: Even in a criminal case the 20 accused isn't excluded. An order is made under 153 or is 21 it 158, the other section, the accused is normally in the 22 courtroom, onlooker outside but the accused is there 23 inside. The accused sees the person on the screen if 24 that's appropriate, that's a point we can talk about later. 25 The identity of the witness isn't disclosed from the</p>	<p style="text-align: right;">Page 24873</p> <p>1 you, you actually – if the analogy is with a criminal 2 trial, you're asking for relief which goes beyond even what 3 would be acceptable in a criminal trial. It may be that 4 you can make out justification for it but I'm just probing 5 the point with you so that you can give me the benefit of 6 your argument on it. 7 MS BALOYI: Yes. Chairperson, can we 8 deal with those kinds of concerns in the fullness of our 9 submissions. Chairperson, on the question of when the 10 Chairperson exercises his discretion to grant the ruling 11 such as we seek under section 4, with respect, Chairperson, 12 Chairperson is correct that you have to be satisfied that 13 it is necessary and in fact some authorities, as the 14 Chairperson says, require that it is strictly necessary, it 15 should be strictly necessary in the – 16 CHAIRPERSON: I'm sorry to interrupt you. 17 Section 4 talks about desirable. 18 MS BALOYI: Yes, necessary and/or 19 desirable, Chair. 20 CHAIRPERSON: One of the problems might 21 be, there might be Constitutional problems in relation to 22 that, so "desirable" would also have to be restrictively 23 interpreted perhaps, as would "necessary" although I would 24 think necessary is necessary. You know, there isn't really 25 scope that something be half necessary, it's either</p>
<p style="text-align: right;">Page 24872</p> <p>1 accused, isn't concealed or withheld from the accused. So 2 you're in fact asking now for relief which is in fact wider 3 than the relief that's normally granted in a criminal case. 4 Now I know the argument may, will be that this isn't a 5 criminal trial, this is a Commission, and I understand that 6 and that's a factor which has got to be given appropriate 7 weight and that's what I'm trying to find out what that 8 weight should be. 9 The problem with a Commission of course, like 10 this, is it can substantial reputational damage to the 11 parties if it makes findings which reflect adversely on 12 them. So it's true it's not a trial, it's true that 13 there's no order at the end of the day but because it can 14 do reputational damage to people, findings – even findings 15 of Commissions can be set aside on review. There was a 16 case years ago in the Privy Council where a Commission 17 dealing with the crashing of an aeroplane in the Antarctic 18 was overturned by the Privy Council and there was a case in 19 the Eastern Cape some years ago where a finding of a 20 judicial commission was set aside in the Motion Court in 21 Grahamstown, you may be familiar with that. So the 22 principle of a Commission's finding being overturned on 23 review because of, I take it because of the reputational 24 damage that could be done to the people affected, is one 25 that also has to be borne in mind. Anyway, I'm putting to</p>	<p style="text-align: right;">Page 24874</p> <p>1 necessary or it isn't but desirable is a more flexible 2 concept which might occasion difficulties in its 3 application, particularly against the background of section 4 34 which you concede – of the Constitution – which you 5 concede applies. 6 MS BALOYI: Yes. Chairperson, with 7 regard to the requirement of section 4 when the Chairperson 8 can exercise his discretion, insofar as it is required to 9 be necessary, the submission we make in that regard, 10 Chairperson, is the nature – firstly, the Commission is 11 required to resolve the issues or to make decisions and 12 findings on the issues set out in the terms of reference 13 and these include what we set out, Chairperson, in 14 paragraph 4 of the heads of argument and, Chairperson, it 15 is that the Commission is required to make findings, report 16 on and make recommendations concerning the conduct of 17 individuals and loose groupings in fermenting or otherwise 18 promoting a situation of conflict and confrontation which 19 may have given rise to the tragic incident, whether 20 directly or indirectly. 21 Now, Chairperson, the evidence of Mr X as set out 22 in his statement which has been distributed to the 23 Commission, we submit speaks to those issues. He speaks, 24 Chairperson, of specific incidents, for example the 25 incident of the killing of the two Lonmin security, he</p>

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1 provides information regarding that. He speaks to the  
 2 killing of another person on the 13th in the morning who was  
 3 attacked, he provides details of that. He speaks to the  
 4 involvement and his own involvement, together with others,  
 5 with the Nyanga and the services that were rendered by the  
 6 Nyanga and the purposes of that. Chairperson, we will  
 7 submit eventually that the involvement of the Nyanga and  
 8 the explanation as given by Mr X of the reasons why he was  
 9 engaged and what it is that he did or what kind of service  
 10 he provided to them, does provide some answers to the  
 11 questions that have been raised in this Commission and  
 12 specifically the one that comes to mind, Chairperson, is  
 13 the repeated question about why would the strikers have  
 14 acted the way that they did. Mr X's evidence touches on  
 15 that. Chairperson, that is necessary evidence that this  
 16 Commission, we submit, must receive and if the Commission  
 17 denies itself the opportunity to receive that information,  
 18 the answer to some of these questions becomes that poorer  
 19 for lack of a witness who was directly involved with some  
 20 of these activities.  
 21 CHAIRPERSON: There would only be  
 22 circumstantial evidence on those points, evidence of -  
 23 MS BALOYI: Indeed so, Chairperson.  
 24 CHAIRPERSON: - rituals being observed  
 25 and photographed but the evidence would obviously fall far

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1 short of the detail –  
 2 MS BALOYI: Yes.  
 3 CHAIRPERSON: - and direct evidence which  
 4 Mr X can provide.  
 5 MS BALOYI: Yes.  
 6 CHAIRPERSON: If what he says is true.  
 7 MS BALOYI: Indeed so, Chairperson.  
 8 Chairperson, I list these by way of, these instances by way  
 9 of example to make the submission that his evidence is  
 10 relevant to the questions that the Commission must decide  
 11 and a failure to take into account that account or those  
 12 accounts of the various instances may well not serve the  
 13 interests of justice in the context of the Commission in  
 14 that we will not have as complete explanations as we would  
 15 otherwise gain from the evidence of this witness.  
 16 [10:56] CHAIRPERSON: Yes, I don't think it's  
 17 contended by those who oppose the relief you seek that the  
 18 evidence is not material, not evidence which, if true,  
 19 would assist the Commission in answering the questions  
 20 posed in the terms of reference. I don't think that's the  
 21 suggestion raised. The suggestion raised is that if he is  
 22 allowed to testify in circumstances where they are  
 23 restricted in the exercise of their rights to test his  
 24 evidence, the test will be inadequate and there'll be a  
 25 greater chance of false evidence being accepted as true

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1 because some of the factors which operate normally to  
 2 enable the court to be satisfied that – the tribunal,  
 3 Commission – to be satisfied that evidence is true, would  
 4 be lacking and it's difficult sometimes to compensate for  
 5 that. I think I'm correctly summarising the arguments that  
 6 have been put up on the other side. So I don't think they  
 7 say that the evidence isn't material. I don't think you  
 8 even have to address me on that, quite clearly it is  
 9 material and if it's true it'll obviously assist us  
 10 substantially. I don't say we would be unable to come, to  
 11 make findings on the secondary circumstantial evidence we  
 12 have but certainly it would make it much easier. There'd  
 13 be far more detail and that sort of thing, but that's not  
 14 their argument. Their argument is the Commission will be  
 15 handicapped in coming to the truth and their clients would  
 16 be prejudiced, at least from a reputational point of view,  
 17 in consequence because some of the safeguards which operate  
 18 in trials to assist in the obtaining of the truth would be  
 19 lacking and they will contend that the justification for  
 20 removing those safeguards hasn't been shown by the SAPS,  
 21 which of course if they seek the, if they want the relief  
 22 they seek they must show that the removal of those  
 23 safeguards will not adversely affect the outcome. I think  
 24 that's a summary, in a few sentences, of their argument but  
 25 they'll probably advance the argument at greater length

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1 than I have, some of them anyway.  
 2 MS BALOYI: Of course, Chair, we are not  
 3 – we are not proposing any measure that withholds the  
 4 necessary and relevant information from the other parties,  
 5 Chairperson. The evidence of Mr X will be, will continue  
 6 to be publicised as it has always been. That is a relevant  
 7 factor, Chairperson. So to the extent that there's  
 8 concerns about ability to take instructions about whatever  
 9 it is that he says, Chairperson, such concerns are easily  
 10 addressed by an answer that his evidence will continue to  
 11 be publicised in the same way that the Commission has been  
 12 doing all along.  
 13 Chairperson, the other point that we make in our  
 14 heads of argument at paragraph 11.7 is that –  
 15 CHAIRPERSON: Before you get to 11.7, I'm  
 16 just looking for something in the opposing affidavit I want  
 17 to put to you. You don't necessarily have to deal with it  
 18 now but while it occurs to me. If you look at paragraph  
 19 11.2 of the opposing affidavit, page 5 – the whole of  
 20 paragraph 11 actually sets out, they say that the order  
 21 sought by SAPS will breach common law principles which are  
 22 established which relate to fair procedure. The first is  
 23 the point about the identity but I think you've  
 24 substantially altered that because the identity will not,  
 25 his identity will not in fact be withheld. Their counsel

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1 will have the information and clearly the person getting  
 2 instructions –  
 3 MS BALOYI: Yes.  
 4 CHAIRPERSON: - their counsel will convey  
 5 it to them. Of course whether that really is his identity  
 6 and whether - you say he's John Smith and they say right,  
 7 well, we don't know John Smith. He may not really be John  
 8 Smith, he may be Peter Jones and they won't know anything  
 9 about that but from a practical point of view I think we  
 10 can accept, prima facie at least, that the identity problem  
 11 has probably been addressed by the order that you propose.  
 12 The second point they make is something you don't  
 13 address at all in your argument, as far as I can see, and  
 14 that's why I'd be pleased to get – not necessarily now, you  
 15 understand, I'm putting problems to you as they occur so  
 16 that you can answer them at your convenience. The second  
 17 one is as follows. The application envisages that Mr X  
 18 will not be in the same room as the cross-examiner and that  
 19 the proceedings, including cross-examination, will be  
 20 relayed by video feed. This will water down the power and  
 21 utility of cross-examination to such an extent as to render  
 22 it virtually nugatory - well, that may be an overstatement  
 23 but anyway, it's a point they make – both because the  
 24 witness will not be required to give his evidence and have  
 25 it tested in the heightened atmosphere of a live

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1 adversarial exchange and because judgments about the  
 2 witness's demeanour, often so critical to the outcome of a  
 3 case, will be difficult if not impossible to make in the  
 4 circumstances. I don't know that the point about demeanour  
 5 is very powerful because you could presumably see the  
 6 demeanour over a video link but what about the point about  
 7 the heightened atmosphere of a live adversarial exchange?  
 8 And one of the points to be considered there, which you  
 9 don't address at all, is that – was expressed by Wigmore in  
 10 a passage quoted with approval in the first Leepile case to  
 11 which you referred. It's at page 266 of the All South  
 12 Africa Reports, I'm not sure where it is in the South  
 13 African Law Reports but in the judgment, after quoting from  
 14 what Lord Haldane said in the Scott case, the leading case  
 15 on public trials in the Anglo-American system of  
 16 jurisprudence, Judge Ackermann quotes, Ackermann says this  
 17 – he cites what was said by Lord Loreburn in another case  
 18 and he then says this, "In the present case the contingency  
 19 is, of course, expressly laid down in the section under  
 20 consideration, namely the likelihood that harm might result  
 21 to the witness but Scott's case does support the approach  
 22 that the discretion should only be exercised where this is  
 23 strictly necessary for the attainment of justice" -  
 24 transferring that to the facts here where it is strictly  
 25 necessary for the ascertainment of the truth this

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1 Commission is appointed to find. "It is also important, in  
 2 my opinion, to consider the objects of justice which public  
 3 hearings are calculated to promote and the underlying  
 4 reasons therefore. Wigmore on Evidence, the Chadbourn  
 5 revision 1976, volume 6 paragraph 1834 deals with these  
 6 under two heads. Firstly, those reasons which make  
 7 publicity of judicial proceedings a security for  
 8 trustworthiness and completeness of testimony and,  
 9 secondly, those which have other advantages in view.  
 10 Dealing with the first head, the following is stated by the  
 11 learned author" – and this is now a quotation from Wigmore  
 12 – "Its operation, intending to improve" and he italicises  
 13 the word "improve," "Its operation intending to improve the  
 14 quality of testimony is twofold. Subjectively it produces  
 15 in the witness's mind a disinclination to falsify, first by  
 16 stimulating the instinctive responsibility to public  
 17 opinion symbolised in the audience and ready to scorn a  
 18 demonstrated liar and next, by inducing the fear of  
 19 exposure of subsequent falsities through disclosure by  
 20 informed persons who may chance to be present or hear of  
 21 the testimony from others present."  
 22 Now that second point, of course, is dealt with  
 23 by the provision in the order you seek that the press  
 24 should be allowed to be present, the press should be  
 25 allowed to report but of course the press won't be allowed

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1 to report who he is. So people who know that that  
 2 particular person wasn't there on the day and therefore  
 3 he's telling a pack of lies, assuming those are the facts,  
 4 I'm not saying they are – won't be able to come forward.  
 5 We know that John Smith isn't telling the truth when he  
 6 says he was in Marikana on the 13th because we happened to  
 7 be with him in Johannesburg on that day. That evidence of  
 8 course won't be able to be forthcoming but nevertheless  
 9 there will be a substantial degree of disclosure which  
 10 would presumably meet most of the second point made. But  
 11 what about the first point, the instinctive responsibility  
 12 to public opinion symbolised in the audience and ready to  
 13 scorn a demonstrated liar? And I think many of us who have  
 14 been in practice for a long time can recount instances  
 15 where a person was quite happy to tell a tale if there's  
 16 hardly anybody in court but if there were a lot of people  
 17 there that knew him and knew he wasn't telling the truth  
 18 and who looked at him, he wasn't prepared to persist. That  
 19 may or may not be a cogent factor in this case but it's  
 20 certainly one of the safeguards, one of the things to use,  
 21 Wigmore's language, which improves the quality of testimony  
 22 and if you remove that safeguard, which is what you're  
 23 asking to happen, then you've got to justify it because  
 24 effectively the ability of the Commission to reach the  
 25 truth will to some extent be minimised. It may be that

<p style="text-align: right;">Page 24883</p> <p>1 it's not a factor that operates very powerfully in this  2 case, it may be a point that you can argue but certainly if  3 you're taking – you know, if you have a balance, all the  4 factors that you mentioned, the fear of the witness, the  5 need, the risk he's exposed to, the danger that he won't  6 come or terrible things will happen to him if he does, all  7 those factors operate in favour of the relief you seek. On  8 the other hand, on the other side of the scale you have got  9 to put the diminutions that will follow from making the  10 order you seek, the respects in which the traditional  11 safeguards are not present and those have got to be weighed  12 up as well because as you also said at the beginning of  13 your argument, this is a balancing exercise but one has got  14 – you can't balance things unless you know what's on each  15 side, each pan of the scale. Now what do you say about  16 that one? You don't have to tell me now, you can tell me  17 in due course but it is a factor which obviously one has to  18 consider.</p> <p>19 MS BALOYI: Chairperson, we will deal  20 with it later. Chairperson, I was at the point of  21 discussing the, or making the submission that we make at  22 paragraph 11.7 of our heads of argument and, Chairperson,  23 the point – this is with reference to regulation 9(1) which  24 compels a witness to answer questions. Chairperson, we  25 make the point or we make the submission notwithstanding</p>	<p style="text-align: right;">Page 24885</p> <p>1 evidence that Mr X will give is in fact evidence that is  2 contemplated under regulation 11. We have in the  3 answering, in the affidavit in support of this application  4 and we further discuss it in the heads of argument that he  5 is assisting with the pending criminal proceedings against  6 specified named individuals that he is implicating in his  7 evidence. He is also assisting the police in continuing  8 investigation arising from the events in Marikana and his  9 testimony here may well have implications for those pending  10 proceedings and investigations and, Chairperson, we submit  11 that his evidence falls, is evidence as contemplated in  12 regulation 11 which would require the Commission to direct  13 that it be dealt with in ways that seek not to compromise  14 those other processes that are unfolding outside the  15 Commission.</p> <p>16 Chairperson, the rulings that we seek indeed seek  17 to achieve that which regulation 11 contemplates. It is  18 that he will testify but we should not, the Commission  19 should not or should assist to avoid a situation where his  20 evidence here compromises other processes that are  21 unfolding.</p> <p>22 CHAIRPERSON: What do you mean by  23 compromise? I'm not sure that I understand how that  24 regulation operates here but again you don't have to answer  25 me now but I'm a bit puzzled about that.</p>
<p style="text-align: right;">Page 24884</p> <p>1 being mindful of the fact that in this case we deal with a  2 witness who is not under compulsion, has not been  3 subpoenaed and has volunteered to testify. The point we  4 make, Chairperson, our submission we make about it is, that  5 doesn't take away from affording – the fact that he's  6 volunteering to testify in this case, he is also though a  7 compellable witness. The Commission, knowing what it knows  8 about him, could easily elect or have elected to compel  9 him. He would have been entitled, in that capacity, to  10 some measure of protection to the extent to the Commission,  11 if satisfied, if the Commission is, if the Chairperson is  12 satisfied that in fact he does require the protection that  13 we seek, he would have been entitled to that kind of  14 protection. Chairperson, the submission we make about it  15 is, the fact that he volunteers to testify in this case  16 doesn't take away from the need to provide protection if,  17 in the opinion of the Chairperson, it is warranted. It is  18 such a case that requires that protection.</p> <p>19 Chairperson, at paragraph 11.8 we also refer to  20 regulation 11 which prescribes or which – indeed, which  21 prescribed that the Commission, the Chair, the Commission  22 may give directions about how evidence should be dealt with  23 if such evidence which is being given may have an impact or  24 consequences for other proceedings.</p> <p>25 Chairperson, we submit that the nature of the</p>	<p style="text-align: right;">Page 24886</p> <p>1 MS BALOYI: Chairperson, what we –  2 perhaps an easy example is that when he does testify and he  3 is warned to mention names, for example, specific names and  4 give detail of what people did as per his account, it may  5 well be that it becomes necessary for the Commission to  6 give some direction about how that aspect of evidence  7 should be handled, even by the SAPS, if its being tendered  8 in this Commission in a certain manner may affect criminal  9 proceedings, for example, later on, Chairperson.</p> <p>10 Chairperson, we refer in the heads of argument to  11 the – I've made reference, Chairperson, to Leepile, the  12 decision in Leepile (1) both for the –</p> <p>13 CHAIRPERSON: Sorry, which paragraph are  14 you at now? 12.2?</p> <p>15 MS BALOYI: I'm looking at 12.1,  16 Chairperson.</p> <p>17 CHAIRPERSON: 12.1, 12.2 yes.</p> <p>18 MS BALOYI: And 12.2. Chairperson, about  19 the task that confronts the Commission when required to  20 adjudicate the application such as what we are seeking and  21 specifically, Chairperson, at this point I'm speaking to  22 the in camera, the request that he should be permitted to  23 testify in camera, that in the balancing act that is  24 required the Commission has to determine that how best is  25 justice to be served in the circumstances, if it to be best</p>

<p style="text-align: right;">Page 24887</p> <p>1 served by having testimony presented in camera, that is the 2 path that the Commission should prefer or that the 3 Chairperson should prefer – of course with the necessarily 4 safeguards that protect the interests of other parties and 5 that is something which is within the power of the 6 Commission, to impose conditions on which the testimony of 7 this witness will be received, if it is received in camera. 8 Chairperson, we further make those references to 9 the authorities in 12, in paragraph 12.3 and specifically 10 in 12.3, Chairperson, we refer to the decision in S v Ntoae 11 and Others. It's an unreported decision in 1999 of the WLD 12 in which the point is made with reference to section 13 153(2)(b) of the Criminal Procedure Act – 14 CHAIRPERSON: Ntoae - I don't know how to 15 pronounce it, probably – is it N-T-O-A-E – 16 MS BALOYI: Chairperson, we have 17 struggled with the pronunciation. 18 CHAIRPERSON: - I don't know whether Mr 19 Ntsebeza can help us, it looks like a Sotho name. 20 MS BALOYI: Yes, it is. 21 CHAIRPERSON: How do you pronounce it? 22 MS BALOYI: Well, it seems it's Ntoae but 23 it's possible – 24 CHAIRPERSON: Ntoae, okay. It is 25 reported –</p>	<p style="text-align: right;">Page 24889</p> <p>1 will be afforded the necessary protection that the law 2 permits for them to be provided in the circumstances. 3 Chairperson, on the question of the fairness of 4 the process in the balancing of the scales, Chairperson, 5 the issue on our submission arises not so much when the 6 evidence, the witness is permitted to testify in camera 7 because in camera he testifies in the presence of legal 8 representatives who have ample opportunity to cross-examine 9 him and to observe his reactions, his immediate reactions, 10 as the Chairperson alluded to earlier on. It arises when 11 we talk about the issue or part of the application that 12 seeks that he presents his evidence by video link. 13 Chairperson, we have stated the reasons why that is the 14 preferred mode – 15 CHAIRPERSON: In fact you concede that 16 what I can call the first safeguard mentioned by Wigmore is 17 removed where he gives evidence away from the chamber in 18 which the hearing is taking place. 19 MS BALOYI: When he testifies by video 20 link, Chairperson. 21 CHAIRPERSON: Yes, if he gives evidence 22 in camera – 23 MS BALOYI: Yes. 24 CHAIRPERSON: - that factor is also 25 removed, of course, but a fortiori if he's testifying by</p>
<p style="text-align: right;">Page 24888</p> <p>1 MS BALOYI: It must be Ntoae, 2 Chairperson. 3 CHAIRPERSON: It is reported, 2000(1) 4 SACR 17. 5 MS BALOYI: I'm indebted to the 6 Chairperson. 7 CHAIRPERSON: And the passage you're 8 referring to is at page 29, I am informed by Adv Hemraj 9 who's been doing some work on this case for me. 10 MS BALOYI: Yes. Chairperson, the point 11 that is made there is – 12 CHAIRPERSON: Sorry, can we just write 13 the reference in on your heads? This is para 12.3, isn't 14 it? 15 [11:16] MS BALOYI: Yes, indeed Chair. 16 CHAIRPERSON: Yes, thank you. The 17 passage referred to is set out in your heads. 18 MS BALOYI: It is, Chair. And Chair, the 19 point of it is to emphasise the purpose of a provision such 20 as section 4. In this case that we refer to, Chair, it is 21 in the context of the Criminal Procedure Act section 22 153(2)(b) but it is emphasised, the purpose, and the 23 purpose being as I've previously alluded to, Chairperson, 24 that it is to ensure that members of the public such as Mr 25 X become willing to come and testify, knowing that they</p>	<p style="text-align: right;">Page 24890</p> <p>1 video link, it must be. The audience there who, on the 2 passage put, know, theoretically may know that he is lying 3 and by their very body language indicate it and the 4 suggestion is that a witness is reluctant to tell a pack of 5 lies in front of a whole lot of people who know he's lying. 6 He's much happier to tell a pack of lies before an audience 7 of people who don't know he's lying and may well be taken 8 in by what he says. 9 MS BALOYI: Yes. 10 CHAIRPERSON: That's the point. 11 MS BALOYI: Yes. 12 CHAIRPERSON: Now, it may not be decisive 13 but it's one of the factors that's obviously got to be 14 borne in mind. I take it you'd concede that, would you? 15 MS BALOYI: Chairperson, I accept that 16 but inasmuch as the presence of the public may well have 17 the effect of intimidating him from testifying honestly, 18 fully and frankly, Chairperson – 19 CHAIRPERSON: No, no, I understand that 20 but of course the parties are the ones I'm talking about 21 primarily. The parties know, their argument would be – I 22 may not be correct of course, everything he says may be 23 true but in testing it one has got to consider various 24 possibilities and the safeguard which Wigmore mentions 25 which is cited with approval by Judge Ackermann in the</p>

<p style="text-align: right;">Page 24891</p> <p>1 Leepile case is the one I read you –</p> <p>2 MS BALOYI: Yes.</p> <p>3 CHAIRPERSON: And that would be removed,</p> <p>4 would it not?</p> <p>5 MS BALOYI: Chairperson, that much is</p> <p>6 conceded, that becomes the consequence of it but again,</p> <p>7 Chairperson, it is part of the burden of achieving the</p> <p>8 correct balance between serving the interests of having the</p> <p>9 witness testifying as fully, as comprehensively and as</p> <p>10 freely as possible and yet minimising as much as possible</p> <p>11 the safeguards that may be there to ensure that his</p> <p>12 evidence is true and correct. Chairperson, insofar as the</p> <p>13 evidence about video link is concerned, Chairperson, again</p> <p>14 this is – the Act, the Commissions Act doesn't deal with</p> <p>15 this at all and here we have to draw parallels from the</p> <p>16 statutes that permit.</p> <p>17 CHAIRPERSON: Yes, but the fact that the</p> <p>18 Commissions Act doesn't deal with it at all and the</p> <p>19 regulations don't deal with it at all, would give rise to</p> <p>20 an argument that I haven't got the power. It may be</p> <p>21 desirable to do it but if I haven't got the power to do it</p> <p>22 then I can't make the order.</p> <p>23 MS BALOYI: Yes.</p> <p>24 CHAIRPERSON: And if the order I – if I</p> <p>25 were to grant the relief you seek without the power, then</p>	<p style="text-align: right;">Page 24893</p> <p>1 put it, I hope, without being terribly unfair, you're</p> <p>2 conceding that I haven't got the power but I may get the</p> <p>3 power if the Commission decides to give it to me. And that</p> <p>4 raises a further question, it's whether the Commission has</p> <p>5 got the power to give me the power. I'm not saying the</p> <p>6 answer to all those questions is necessarily against you</p> <p>7 but they're all matters I've got to consider and you've got</p> <p>8 to persuade me that the Commission has got the power to</p> <p>9 give me the power because if it hasn't got the power to</p> <p>10 give me the power then even if it purports to give me the</p> <p>11 power, it won't help.</p> <p>12 Alternatively, if there's another basis for</p> <p>13 saying I have the power, well, then I can do that also but</p> <p>14 it doesn't help to say it'll be a good thing if I do it and</p> <p>15 it would be very sensible, if Parliament didn't consider it</p> <p>16 necessary in 1947 or subsequently because the Commissions</p> <p>17 Act has been amended from time to time since then, to give</p> <p>18 the power expressly and if the President didn't give me the</p> <p>19 power in the regulations, then the power has got to come</p> <p>20 from somewhere. Anyway, and it doesn't help to tell me</p> <p>21 that it can be done in criminal cases where the power is</p> <p>22 expressly conferred because I know that.</p> <p>23 So the first question has got to be, have I got</p> <p>24 the power? Now most of the orders you seek, I haven't got</p> <p>25 the power to give and you very fairly set out the statutory</p>
<p style="text-align: right;">Page 24892</p> <p>1 of course a court of review would set aside the order.</p> <p>2 MS BALOYI: Yes.</p> <p>3 CHAIRPERSON: So you've got to satisfy me</p> <p>4 that I've got the power. Now you say that I can get the</p> <p>5 power if the Commission, in other words not Chair alone but</p> <p>6 all three Commissioners are prepared to say that that</p> <p>7 procedure would be appropriate. Well, yes, the Commission</p> <p>8 would say that in an appropriate case the Commission could</p> <p>9 have that, could follow that procedure. I, of course,</p> <p>10 would still have to decide whether it was appropriate in</p> <p>11 this particular case but it may well be said that our</p> <p>12 powers to regulate procedure don't go so far as to actually</p> <p>13 confer a power on the Chairman which the statute doesn't</p> <p>14 give him and there's a lot of what we lawyers pompously</p> <p>15 call legal learning on the subject of the distinction</p> <p>16 between procedural regulations and actual powers that are</p> <p>17 exercised.</p> <p>18 So it may be that the solution that you seek to</p> <p>19 find in regulation 19 may be an unsafe way of proceeding.</p> <p>20 So the first question I've got to consider, even before I</p> <p>21 decide whether it's appropriate to exercise the power in</p> <p>22 relation to a video link, is to see whether I've got the</p> <p>23 power and, if so, what the source of the power is. Now you</p> <p>24 concede, as I – you only rely on 19, as I understand,</p> <p>25 regulation 19 – so effectively you're conceding, if I may</p>	<p style="text-align: right;">Page 24894</p> <p>1 provisions that apply and one has got to add in a reference</p> <p>2 to what the Witness Protection Act says, but as far as the</p> <p>3 video link point is concerned, which we're busy with now,</p> <p>4 the first thing you've got to do is to persuade me I have</p> <p>5 the power, alternatively that the Commission has the power</p> <p>6 to give me the power and that it would be appropriate for</p> <p>7 them to do so.</p> <p>8 MS BALOYI: Yes. Chairperson, the</p> <p>9 question, in our understanding, is about how the Commission</p> <p>10 receives evidence. The Commissions Act, Chairperson,</p> <p>11 doesn't by way of example stipulate, specifically stipulate</p> <p>12 that the Chairperson can receive evidence by way of</p> <p>13 affidavit. It doesn't have that specific stipulation. It</p> <p>14 is beyond –</p> <p>15 CHAIRPERSON: But it also doesn't say</p> <p>16 that evidence has got to be given orally.</p> <p>17 MS BALOYI: Yes.</p> <p>18 CHAIRPERSON: And be subjected to cross-</p> <p>19 examination and obviously the affidavit that comes and is</p> <p>20 read out or is otherwise made available, is part of the</p> <p>21 public hearing just as a court in a matter on motion, an</p> <p>22 application court is sitting in public even though there's</p> <p>23 no oral evidence being given –</p> <p>24 MS BALOYI: Yes.</p> <p>25 CHAIRPERSON: There are affidavits, so</p>

<p style="text-align: right;">Page 24895</p> <p>1 I'm not sure that reliance on the fact that we've received 2 affidavits necessarily helps because I would think that 3 we're sitting in public, operating in public, even in the 4 absence of oral testimony, if we rely on affidavits which 5 are available to all concerned to see if they wish. 6 MS BALOYI: Chairperson, the evidence of 7 Mr X becomes available to the public proceeding on the same 8 line, logic, Chairperson, that if it is accepted that 9 affidavits that are submitted to this Commission are 10 available to the public and therefore the evidence that is 11 contained in those affidavits is evidence in public, we're 12 not asking for any less or for anything more than that from 13 Mr X. It is purely a practical issue of location, 14 Chairperson, that we are talking about, and delivery. The 15 evidence of Mr X will be presented, will be available 16 publicly. It will be, he will do so by video link, it will 17 be capable of being followed by any member, any interested 18 member of the public, Chairperson. So to that extent it 19 falls in the same category as evidence that is presented in 20 this chamber and that is followed by members of the public. 21 It falls in the same category as the evidence that is 22 presented by way of affidavit, which affidavits are 23 available to interested members of the public. 24 So, on that score, Chairperson, that evidence is 25 available to the public. It is capable of being followed</p>	<p style="text-align: right;">Page 24897</p> <p>1 effectively observe the demeanour of a witness who is 2 testifying by video link, even with the limitations that he 3 is not in the same room. The only difference is he is not 4 in the same room as the cross-examiner, otherwise he is 5 fully visible to the cross-examiners and to members of the 6 Commission to evaluate his body language, his demeanour, 7 his stutterings, his hesitations and all of that. And that 8 therefore the fact, by itself, that he's testifying by 9 video link is not in any way, it doesn't in any way take 10 away from the fairness of those proceedings. 11 CHAIRPERSON: While we're on it, what 12 exactly is a factual necessity or desirability, depending 13 which of those is the test, for him giving evidence by 14 video link? He is not a child who's going to be overborne 15 by some battering kind of cross-examination which is more 16 fashionable elsewhere than here. He is an adult who, on 17 his own version, has behaved in the manner that one expects 18 from a hardened criminal, so why is it suggested that it's 19 necessary that he must give evidence by video link? I know 20 there are concerns for his safety. I'm not quite sure that 21 I understand them fully. I'd be grateful if you could 22 elaborate on that. 23 MS BALOYI: Yes. 24 CHAIRPERSON: It's very often a case of 25 video link if a witness is likely to be overborne by</p>
<p style="text-align: right;">Page 24896</p> <p>1 by the public. The issue about a video link, Chairperson, 2 is the practicality of the location of the witness when he 3 testifies. Any concerns about that form of presentation of 4 evidence, Chairperson, could only be about what has been 5 alluded to or what has been raised in the opposing 6 affidavit which is, we lose the power of observing the 7 demeanour of the witness because it is by video link. 8 Chairperson, those are the only concerns that 9 could be raised about it but as to the question of whether 10 this evidence is evidence that is being presented in 11 public, it is, Chairperson. In what we propose, we propose 12 nothing less than that. Chairperson, to deal with the 13 concerns about the limitations of testimony being presented 14 by video link, the concerns that arise from that, we deal 15 with that Chairperson in our heads of argument from 16 paragraph 12.4 and make reference there to the decisions in 17 S v Nisavant, one, 1973(3) SA 582 but also to S v Staggie 18 and Another 2003(1) SACR 232 (C). These dealing, 19 Chairperson - and perhaps for completeness, Chair, if I 20 could also refer to the authority that we state in 21 paragraph 12.6 which is K v Regional Magistrate NO and 22 Others 1996(1) SACR 434 (E). Chairperson, these deal with 23 the concern about the ability to assess and to evaluate the 24 demeanour of the witness and, Chairperson, what all these 25 decisions find is that in fact it is still possible to</p>	<p style="text-align: right;">Page 24898</p> <p>1 powerful cross-examination in the case of children, for 2 example, or possibly a woman who's been subjected to a 3 sexual assault and there are all sorts of things that are 4 associated with the trial procedure which constitute 5 intrusions on her dignity and so forth and also can give 6 rise to distinct emotional distress. I can understand all 7 those factors but none of those, I would take it, apply 8 here when you have a man who behaved the way Mr X says he 9 behaved, who's not a child and so on. It's solely for his 10 safety but what is the compelling argument for that? 11 MS BALOYI: Yes. Chairperson – 12 CHAIRPERSON: I mean he's an accomplice, 13 isn't he? 14 MS BALOYI: He would be, Chair. 15 CHAIRPERSON: He'd be an accomplice. So 16 what exactly are the pressing – and I deliberately use the 17 word “pressing” – what are the pressing safety and security 18 concerns which arise in his case and make it necessary or 19 desirable for us to depart from the ordinary principles? 20 MS BALOYI: Chairperson, we – the issues 21 pertain to security, his security and the practicalities, 22 the practical arrangements that would have to be made. 23 Chairperson, we have – 24 CHAIRPERSON: I take it that often exists 25 in cases where courts make orders for a trial to proceed in</p>

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1 camera. One of the reasons is, one of the most common  
2 reasons, one of the strongest reasons advanced for such  
3 orders is the need to protect the witness but it's very  
4 rare in an ordinary case, I'm not talking about children,  
5 sexual cases and that kind of thing, it's very rare for a  
6 court to have to give evidence by video link from an  
7 accomplice. So obviously it would be more convenient for  
8 him to give evidence from afar by video link but is it  
9 necessary, is it desirable? That's what you have to show,  
10 don't you?

11 MS BALOYI: Yes.

12 CHAIRPERSON: I'm not saying you can't, I  
13 just want to understand the basis upon which the contention  
14 is advanced.

15 MS BALOYI: Yes. Chairperson, one of the  
16 things that we will do and perhaps we have foreshadowed it  
17 in the replying affidavit of Mr Pretorius, is that we will  
18 obtain certain affidavits that we will – before the  
19 Commission delivers its decision in this matter,  
20 alternatively before Mr X testifies – that will deal with  
21 some of the issues that we haven't fully addressed and part  
22 of it, Chairperson, pertained to the –

23 CHAIRPERSON: I'm sorry to interrupt you.  
24 I'm not sure that it would be a very satisfactory procedure  
25 because your learned friends who oppose would obviously

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1 want to have a say about those affidavits –

2 MS BALOYI: Yes.

3 CHAIRPERSON: - and see them and deal  
4 with them, possibly even file affidavits in reply, so you  
5 can't just sort of augment your case as you go along and  
6 just before I'm ready to give the order, give me some extra  
7 material. That's not the way it works so, you know, part  
8 of fairness involves giving the opponents the opportunity  
9 to deal with the new material you want and you know in  
10 applications you don't always get an opportunity, you're  
11 not supposed to supplement your case in reply although  
12 there are exceptions and this may be one of them. One  
13 mustn't be unduly technical in a case which may literally  
14 involve life and death, I understand that also but you  
15 can't just augment your case as you go along and say, well,  
16 you've ready to give judgment, if you're satisfied or need  
17 to be satisfied, here's an extra affidavit. They would  
18 have to deal with it. I mean if you want to augment your  
19 case it may be sensible – I don't suggest it necessarily is  
20 so, I'm just putting it to you to consider - for us to  
21 stand the matter down to possibly next week when you can  
22 then come with what effectively is your case, so your  
23 learned friends can reply if they wish, but I don't think  
24 it's a good idea to proceed with it on a sort of piecemeal  
25 basis, argue a bit and then add an affidavit and they reply

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1 and we have another affidavit. That's not the way, the  
2 sensible, practical way to deal with a matter of this  
3 moment and importance, is it?

4 [11:35] MS BALOYI: Chairperson, the point is  
5 taken, if I may.

6 CHAIRPERSON: My colleague Adv Hemraj  
7 wants to refer our attention to a case, which she does  
8 almost in a role as a spectator but I'll allow her to  
9 mention it all the same.

10 COMMISSIONER HEMRAJ: I think if you look  
11 at S v Madlavu and Others 1978(4) SA 218 during the tea  
12 break, it might assist you to answer the Chairman's last  
13 question.

14 MS BALOYI: I'm indebted to the  
15 Commissioner. Chairperson, I'm getting noises at the back  
16 here that I should realise that it's tea break, past.

17 CHAIRPERSON: No, the matter to which you  
18 now refer is one that cannot be ignored. We'll take the  
19 tea adjournment.

20 [COMMISSION ADJOURNS COMMISSION RESUMES]

21 [12:07] CHAIRPERSON: The Commission resumes. Ms  
22 Baloyi.

23 MS BALOYI: Thank you, Chairperson.

24 CHAIRPERSON: You were round about  
25 paragraph 12.8 I think when we took the comfort break, but

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1 you were off your heads a bit. But anyway, it does help me  
2 if you more or less keep to them, but you must obviously  
3 argue the matter as you think will be most appropriate and  
4 most effect.

5 MS BALOYI: Chairperson, I'm not  
6 complaining. Chair, on the question of the – we were  
7 discussing the question of testimony by video link and the  
8 Chairperson had asked the question where that power drives  
9 and perhaps, Chairperson, I should start off by thanking  
10 Commissioner Hemraj for the reference to Madlavu.

11 Chairperson, what we see in State versus Madlavu  
12 referred to is that in that matter the Court did not draw a  
13 distinction between the, from the fact that the witness  
14 that sought protection was in fact an accessory.  
15 Protection was still provided notwithstanding because  
16 certain jurisdictional facts were present that warranted  
17 that kind of protection to be provided.

18 Now, Chairperson, again because we do not have in  
19 the Commissions Act specific provisions that deal with  
20 authorising evidence by video link we resort to, as we said  
21 in our heads, to regulation 19, but also the parallels that  
22 we are drawing from comparable, from other statutes that  
23 deal with the issue. Chairperson, specifically –

24 CHAIRPERSON: You must forgive me, but  
25 I've got a problem with that one. The fact that there's a

<p style="text-align: right;">Page 24903</p> <p>1 statute that authorises it doesn't help me at all because  2 here there isn't a statute that authorises it, so I don't  3 see a parallel there. I can understand the argument based  4 on 19. I could also understand your argument that on a  5 proper construction of the expression "in public," someone  6 who testifies by video link but the television set is in  7 the court chamber and everyone in court can see it, there  8 isn't a problem created by that. I understand that, but my  9 difficulty is I don't see, it helps to tell me that 158 of  10 the Criminal Procedure Act says you can do it in the case  11 of a juvenile, therefore you can do it in the case of a  12 commission where there's no such section as 158.</p> <p>13 MS BALOYI: Yes.</p> <p>14 CHAIRPERSON: That's my problem. So in  15 other words I'm not saying I haven't got the power; all I'm  16 saying is it doesn't help me –</p> <p>17 MS BALOYI: Yes.</p> <p>18 CHAIRPERSON: - to say that I have got  19 the power because in other circumstances courts have the  20 power because of a statutory provisions. That's the point  21 I'm putting to you.</p> <p>22 MS BALOYI: Yes.</p> <p>23 CHAIRPERSON: You understand that?</p> <p>24 MS BALOYI: Chairperson, the point really  25 that I wanted to make, or the reference that I would make</p>	<p style="text-align: right;">Page 24905</p> <p>1 doesn't help me on the first question. If I haven't got  2 the power, I can't exercise it.</p> <p>3 MS BALOYI: Yes.</p> <p>4 CHAIRPERSON: However appropriate it  5 might be for me to exercise it if I had it. You understand  6 the point?</p> <p>7 MS BALOYI: Chairperson, our primary  8 submission, or our direct submission and the question  9 whether the Chairperson has the power is that, is our  10 reliance on regulation 19. We say regulation 19 empowers  11 the Commission to determine its own procedures and in our  12 submission, Chairperson, the question of a witness  13 testifying from a remote location by video link is an issue  14 of procedure. It's how the evidence of that particular  15 witness, the form in which it is going, or the means by  16 which it is going to be presented, it is by video link,  17 Chair, and we submit that acting under regulation 19 the  18 Commission does have the power. Chairperson, you asked the  19 question –</p> <p>20 CHAIRPERSON: The Commission has got the  21 power to provide that in an appropriate case the witness  22 can testify from elsewhere, and if the Commission does  23 that, not just the Chairman but the Commission does it,  24 then the power would be there and then of course whether I  25 should exercise the power would depend on questions of</p>
<p style="text-align: right;">Page 24904</p> <p>1 to 158 was to the factors that get taken into account in  2 deciding whether a witness or an accused can testify, or  3 should testify by video link, and these, Chairperson, are  4 questions of delay, costs, convenience and security.</p> <p>5 CHAIRPERSON: They're relevant surely on  6 the exercise of the power where the power exists.</p> <p>7 MS BALOYI: Yes.</p> <p>8 CHAIRPERSON: The question I asked you  9 was have I got the power, and I said there's a lot to be  10 said for the proposition that if I had the power, I  11 obviously haven't heard the argument of the other side yet,  12 but there's a lot to be said that if I had the power it  13 might be appropriate for me to use it, but the question is  14 have I got the power.</p> <p>15 MS BALOYI: Yes.</p> <p>16 CHAIRPERSON: And it doesn't help to tell  17 me that in other cases where the Court has got the power  18 there are factors that are relevant in deciding whether it  19 should be exercised.</p> <p>20 MS BALOYI: Yes.</p> <p>21 CHAIRPERSON: And those factors I take it  22 could appropriately be looked at here if I had the power to  23 decide whether I should exercise it, because they would be  24 the common sense considerations, considerations, points  25 that fairness would be implicit. I understand that, but it</p>	<p style="text-align: right;">Page 24906</p> <p>1 appropriateness, and as you say, 158 for example would give  2 help because it would give, by way of analogy would mention  3 considerations that are relevant as to whether the power  4 should be exercised. That's correct, isn't it?</p> <p>5 MS BALOYI: It is correct, Chairperson.</p> <p>6 CHAIRPERSON: Ja.</p> <p>7 MS BALOYI: Chairperson, the factors that  8 would favour that the Commission exercises its power and  9 allows the evidence by video link, you've asked the  10 question what are the reasons in this case. Chairperson,  11 we allude in the affidavit, in the replying affidavit, to  12 the concerns about security and that includes, Chairperson,  13 an issue about if Mr X is required to commute on a daily  14 basis to this location to testify, the concerns that arise  15 from that is that it may well compromise the safety of his  16 location, the place where he is located, the daily exposure  17 to commute to this place. That's the one concern, or the  18 fact or factor that favours, that we submit favours that he  19 should be allowed to testify from a remote location.</p> <p>20 Chairperson, there is the issue of costs as well  21 that are involved should he be required to come and testify  22 here, and again those, Chairperson, relate to securing not  23 only him but this location and the people that are here on  24 a daily basis. Chairperson, when I referred earlier on to  25 an affidavit that would have to be filed or that we're</p>

<p style="text-align: right;">Page 24907</p> <p>1 working on, it is merely to set out the measures that would  2 be involved in having him being presented to this  3 Commission, and Chairperson, given the nature of that  4 affidavit, or the information that is contained in an  5 affidavit that we contemplate, or that is being prepared in  6 that regard, it is doubtful, not impossible, given that we  7 have different parties with different interests in the  8 Commission, that it is the kind of information that would  9 call, or require an answer from a qualified person because  10 what it does, Chairperson, it sets out practical steps, so  11 practical measures on a daily basis that would have to be  12 implemented to ensure that he attends here, he is safe,  13 everyone that is here is safe and secure while Mr X  14 testifies. It's that kind of affidavit, Chairperson, and  15 for that reason we do not believe that it should even be  16 necessary that we stand down because of that kind of  17 affidavit.  18 Chairperson, in addition to those kind of  19 security measures, as I've already submitted it is really  20 about whether the Commission has the power in terms of  21 regulation 19 to determine how, where, and in what form  22 evidence would be presented. Chairperson, those are our  23 submissions, if there's nothing else.  24 CHAIRPERSON: Nothing else that you wish  25 to say? You stand by what's in your written –</p>	<p style="text-align: right;">Page 24909</p> <p>1 to which the opponents would wish to answer. I don't think  2 it's satisfactory to have answers on as it were new points  3 at the end because that's not fair to the opponents. But  4 anyway, it may well be that many of the points that have  5 been the subject of consideration will be addressed in the  6 argument of the evidence leaders, so Ms Pillay, are you  7 ready to argue now?  8 MS PILLAY: I am, Chair.  9 MS BALOYI: Chairperson –  10 CHAIRPERSON: Yes, sorry, Ms Baloyi.  11 MS BALOYI: Ja, perhaps in the light of  12 the valid concern that the Chairperson expressed, perhaps I  13 should say that on a quick look it does appear that in fact  14 we have addressed all the issues that the Chairperson  15 raised and it may well be that there's nothing else,  16 there's nothing new to address.  17 CHAIRPERSON: I see. Alright, thank you,  18 then there's no reason why Ms Pillay shouldn't start and  19 why your learned friend should then address after she has  20 done. So, but perhaps we can do a bit of housekeeping  21 before we carry on. How many people are going to argue on  22 behalf of the opponents? I understand Mr Mpofu is going to  23 argue. Is that correct? And I saw Mr Ntsebeza's name on  24 the heads. Is he going to argue as well?  25 MR MPOFU: Yes, Chairperson, there will</p>
<p style="text-align: right;">Page 24908</p> <p>1 MS BALOYI: Not at this stage, Chair.  2 We'll deal with some of the issues that, Chairperson, you  3 have raised, we'll address them in reply once we've had  4 sufficient time to consider them.  5 CHAIRPERSON: Well, with respect, that's  6 not satisfactory because then your learned friends would  7 want to reply to your reply if there are material points  8 that you want to deal with.  9 MS BALOYI: Yes.  10 CHAIRPERSON: I wonder whether we  11 shouldn't proceed this way; we've received heads from the  12 evidence leaders and the evidence leaders have prepared a  13 detailed argument. It might be helpful, I think, for the  14 parties who oppose to have the benefit of hearing what the  15 evidence leaders say because in the main they support the  16 application, although they have suggestions as to how the  17 order should be varied to make it fairer and more  18 effective.  19 MR MPOFU: Yes.  20 CHAIRPERSON: So what I suggest we do now  21 is we let Ms Pillay, who's going to present the argument on  22 behalf of the evidence leaders, argue and then perhaps  23 after that, I don't know about what stage we'll be, but it  24 may well be that we could then stand down or take some kind  25 of adjournment to give the SAPS chance to deal with points</p>	<p style="text-align: right;">Page 24910</p> <p>1 be three people who are going to argue, but they'll be  2 covering different sections, so effectively it won't –  3 CHAIRPERSON: I don't think we should  4 have any repetition.  5 MR MPOFU: Yes.  6 CHAIRPERSON: So who are the three?  7 MR MPOFU: It's myself, Mr Brickhill, and  8 Mr Ntsebeza, in that order, Chairperson.  9 CHAIRPERSON: What topics are you going  10 to cover?  11 MR MPOFU: Well, I'll be covering mainly  12 the issue of the powers.  13 CHAIRPERSON: You've got written heads,  14 have you?  15 MR MPOFU: We've given you the heads,  16 Chairperson.  17 CHAIRPERSON: I see.  18 MR MPOFU: In the morning.  19 CHAIRPERSON: Yes, you're quite right.  20 MR MPOFU: Yes.  21 CHAIRPERSON: I got them. I haven't had  22 a chance to read them.  23 MR MPOFU: Yes, we'll –  24 CHAIRPERSON: You're quite right.  25 MR MPOFU: I'm dealing mainly with the</p>

<p style="text-align: right;">Page 24911</p> <p>1 question of the powers and some of the factual issues 2 insofar as they concern my clients. 3 CHAIRPERSON: Yes. 4 MR MPOFU: And also countering some of 5 the issues that the Chairperson has raised. Mr Brickhill 6 will deal mainly with the section 34 point, a little bit of 7 section 35, and that act, that protection – 8 CHAIRPERSON: Witness Protection Act. 9 MR MPOFU: The Witness Protection Act, 10 yes, and Mr Ntsebeza will deal with the – assuming both 11 myself and Mr Brickhill are wrong, then the issue of the 12 discretion that the Commission has – 13 CHAIRPERSON: Oh, I see. 14 MR MPOFU: - as well as international – 15 CHAIRPERSON: Yes, if I have the power 16 that I shouldn't exercise it on the facts of this case in 17 my discretion. That's going to be the argument? 18 MR MPOFU: Yes, because if you don't have 19 the power, the discretion doesn't arise. 20 CHAIRPERSON: Ja, I understand. Alright, 21 no that seems satisfactory division of labour. Ms Pillay, 22 you've got to deal with all the matters yourself, of 23 course. 24 MS PILLAY: Yes, I am, Chair. If I may 25 kick off, Chair, with the question of the application of</p>	<p style="text-align: right;">Page 24913</p> <p>1 disclosure and so forth of the identity of the protected 2 person. Now clearly, presumably we can carry on but the 3 disclosure part is quite important. The section says, 4 "Notwithstanding any other law," I'll read the relevant 5 bits, "Notwithstanding any other law, the presiding officer 6 at any proceeding," which includes a commission, "in which 7 the protected person is a witness must make an order 8 prohibiting the publication of any information which may 9 disclose the place of safety or location where he is or has 10 been under protection or where he or she has been relocated 11 in terms of the act, circumstances relating to his 12 protection, identity of any other protected person, the 13 place of safety or location of such person being protected, 14 or a relocation or change of identity of a protected 15 person, unless the Director satisfies the presiding officer 16 concerned that exceptional circumstances which are in the 17 interest of justice exist why such an order should not be 18 made." 19 So it's the Director who has to satisfy me that 20 exceptional circumstances in the interest of justice exists 21 why I shouldn't make an order such as the order which the 22 statute compels me to make. Now I take it there's been 23 contact with the Director, has there? What does the 24 Director say? Or hasn't there been – I mean the role of 25 the Director was foreshadowed in the replying affidavit</p>
<p style="text-align: right;">Page 24912</p> <p>1 the Witness Protection Act, the submissions that we make, 2 Chair, are made on the assumption that the Director for 3 Witness Protection will give his consent for the order that 4 SAPS eventually seek from this Commission. Obviously the 5 act prescribes a default position that applies should the 6 Director not give his consent. 7 CHAIRPERSON: I must say this, that I'm 8 rather surprised that we haven't yet been told what the 9 Director's attitude is because assuming the Director comes 10 and says no then we've wasted the whole time listening to 11 argument in respect of orders that I'm prevented by the 12 statute from making. So I would have thought, with 13 respect, that the SAPS would have got their ducks in a row 14 by now. Can you help us on that, Mr Semenya? 15 MR SEMENYA SC: Chair, I think the quick 16 answer to that is that whatever the powers the Director has 17 will not include a power to exclude evidence from a 18 tribunal such as we have. Now he's either going to testify 19 voluntarily, or we'll subpoena him. On the force of a 20 subpoena the Director cannot preclude his giving of 21 evidence and for that reason it must be a shortcut answer 22 to that concern, Chair. We anticipate the answer will be a 23 yes though. 24 CHAIRPERSON: I don't think that's right. 25 Section 18 deals with orders relating to the identity,</p>	<p style="text-align: right;">Page 24914</p> <p>1 filed, deposed to by Mr Pretorius, and we were told in that 2 affidavit that the necessary consents and so forth from the 3 Director would be forthcoming. Are you not yet in a 4 position to give me that information? 5 MR SEMENYA SC: Chair, our reading of 6 section 18 is the following; that that the Chair has the 7 power that is in 18 is admitted. The only thing, there is 8 a caveat to that which is the "unless" part of that 9 section. 10 CHAIRPERSON: No, with respect, it's not 11 a power, it's an obligation. "Notwithstanding any other 12 law the presiding officer must make an order prohibiting" 13 certain things. So it's not, I haven't got a power to do 14 it, I've got to do it. If I don't do it, on review the 15 order I make will be dealt with. So it may be that it will 16 play a subsidiary role, obviously not relevant to the main 17 thrust of the relief which you seek, but it is something 18 which has to be dealt with and I would have expected that 19 information to be forthcoming now when the application is 20 being argued. 21 MR SEMENYA SC: I should have preferably 22 said the power is, I mean the section is obligatory what 23 relief the Chair can give, but to that obligation the 24 caveat, as we read the section, only says this to us; that 25 if the Director has exceptional circumstances why Chair</p>

<p style="text-align: right;">Page 24915</p> <p>1 should not exercise that power, then he must say so, but I 2 thought we're answering to a different enquiry. 3 CHAIRPERSON: Yes. No, the only reason I 4 raise it was in the replying affidavit there's reference to 5 the Director and I was told that we would be told when the 6 application was argued what his attitude was. That's 7 really where it comes from. 8 MR SEMENYA SC: We expect the Director to 9 say yes, Chair. Can we argue on that provisional basis? 10 CHAIRPERSON: Alright, you – 11 MR SEMENYA SC: I'm told he says yes. 12 We'll just have to put it on paper. 13 CHAIRPERSON: I see. No, if you give me 14 the assurance that it's on the way, that you have the, you 15 communicated with him and you are conveying his attitude to 16 me, all we're waiting for really is documentary proof of 17 that, then obviously you can carry on. No problem. Ms 18 Pillay, after that interruption, are you now going to 19 start? 20 MS PILLAY: I am, Chair. If I may pick 21 up from paragraph 2.1 of our heads of argument, Chair, and 22 just to set out the issues which the evidence leaders 23 intend to deal with; the first is that we intend to analyse 24 the relief sought by SAPS and we do so to answer the second 25 issue which we want to deal with, namely the fact, whether</p>	<p style="text-align: right;">Page 24917</p> <p>1 the fourth category of relief which we say needs to be 2 looked at specifically in the context of the powers of this 3 Commission to grant the relief sought by SAPS, is the 4 application for the live audio feed of Mr X's testimony to 5 an adjoining room. 6 Now just to preface our argument, Chair, that is 7 not specifically foreshadowed in either the Commissions Act 8 or in the regulations. So it is something that the 9 Commission will have to look at as – 10 CHAIRPERSON: About that, the point that 11 I'd noticed was that in the relief sought they envisage 12 that the members of the public will hear that and they 13 assume that the parties – from para 3 it's clear – the 14 parties will be excluded, and the parties will only be 15 there, if they are there at all, in their capacity as 16 members of the public. They're not given any special 17 rights as parties. That's correct, is it? 18 MS PILLAY: That's our understanding as 19 well, Chair. 20 CHAIRPERSON: Ja. 21 MS PILLAY: To begin, Chair, then with 22 the first question, and that's whether this Commission has 23 the authority to order that the testimony of Mr X be in 24 camera, the starting point obviously is, Chair, as has 25 already been argued, section 4 of the Commissions Act which</p>
<p style="text-align: right;">Page 24916</p> <p>1 or not this Commission has the power to grant the 2 individual orders sought by SAPS. 3 We intend also, Chair, to identify the factors 4 which are relevant to whether or not the Commission should 5 grant the relief sought and the exercise of its discretion, 6 and finally, Chair, we intend to make submissions on the 7 question of appropriate relief. 8 [12:27] To begin then, Chair, by analysing the relief 9 sought by SAPS as paragraph 3 of our heads of argument, 10 essentially we say that there are three categories of 11 relief which SAPS seek. The first is the application for 12 an in-camera hearing of the evidence of Mr X. The second 13 is a ruling preventing the public disclosure of the 14 identity of Mr X. The third is that he testifies via video 15 link. 16 Now we note in paragraph 4, Chair, that the form 17 of the proceedings sought differs slightly from our 18 traditional understanding of in-camera proceedings and 19 there are two special features which we seek to draw the 20 Commission's attention to at this stage. The first is that 21 the application envisages that the media will be present 22 during the testimony of Mr X, and we say that this is a 23 significant factor which we will deal with when we address 24 the issue of the exercise of this Commission's discretion. 25 The second one, Chair, and which in a sense is</p>	<p style="text-align: right;">Page 24918</p> <p>1 expressly confers the power on this Commission to order an 2 in-camera hearing in circumstances where in the opinion of 3 the Chairperson it is necessary or desirable. 4 Now we say that this section, section 4 confers a 5 wide discretion on the Commission and in fact we later on 6 make submissions that the word "desirable" should in fact 7 be restrictively applied, and we will give authority for 8 that proposition. 9 We also say, Chair, that – and just picking up on 10 a debate that was had earlier, that it's important that 11 this Commission adjudicate this application on the 12 assumption that section 4 is constitutional and valid – 13 CHAIRPERSON: I wouldn't have power to 14 make any contrary assumption, would I? 15 MS PILLAY: No, you wouldn't, Chair. 16 CHAIRPERSON: If someone were to try to 17 attack my ruling on review, the police if I go against 18 them, or the opponents if I go in favour of the police, 19 then different considerations might apply, but I'm not 20 empowered to do anything other than to assume that the 21 statute is constitutional. 22 MS PILLAY: Well, that is not – 23 CHAIRPERSON: And no contention is raised 24 in the heads as far as I can see that the – of course I'm 25 not even sure what my powers are in relation to the</p>

<p style="text-align: right;">Page 24919</p> <p>1 regulations. You know judges and magistrates even –  2 except, no, a magistrate wouldn't be able to deal with a  3 regulation that's a presidential regulation, but judges  4 have the power to decide whether a regulation ultra vires,  5 but I happen to be a judge for life, but I'm not sitting  6 here as a judge, I'm sitting here as a different kind of  7 official. So I must assume both that the section 4 of the  8 fact and the regulations are valid and constitutional.  9 MS PILLAY: That is our submission,  10 Chair. The question therefore, Chair, and having regard to  11 that point the question really is whether on the facts it's  12 been demonstrated that it is necessary, and we say that the  13 act says "or desirable," but we would advocate a  14 restrictive interpretation. We would say that the Court  15 should –  16 CHAIRPERSON: Clearly I have the power to  17 interpret –  18 MS PILLAY: Yes.  19 CHAIRPERSON: - and I can strangely  20 enough take constitutional factors into account in  21 interpreting, but all I'm prohibited from doing is striking  22 down or reading in or reading out or whatever the  23 constitutional experts do.  24 MS PILLAY: Well, the Commission would  25 have the power to adopt the section 39(2) interpretation of</p>	<p style="text-align: right;">Page 24921</p> <p>1 Minister in drafting regulations to confer additional  2 powers on the Commission, that what is clear from that is  3 that the powers which eventually find themselves in the  4 regulations promulgated by the Minister are additional  5 powers to those set out in the Commissions Act. So it's an  6 additional source of power, and in that context, Chair,  7 when regulation 19 gives the Commission the power to  8 determine its own procedure, those powers are not  9 necessarily restricted to the powers set out in the  10 Commissions Act already but may go beyond that because the  11 Minister is expressly empowered to grant additional powers.  12 The power in regulation 19, Chair, is not defined  13 in the regulations. It's not circumscribed in the  14 regulations. So we will submit that it's actually a wide  15 power, indeed a procedural power, but a wide power which  16 allows the Commission to adopt procedures which best, will  17 allow the Commission to best carry out its function, namely  18 the carrying out of the investigation.  19 Now we couple with regulation 19, which is the  20 wide procedural power, Chair, we couple the power on the  21 Commission in terms of section 3(1) of the act, of the  22 Commissions Act to compel a witness to appear before it and  23 we make the argument that if this Commission has the power  24 to compel and it's also got the power to adopt its own  25 procedures, given those two express powers this Commission</p>
<p style="text-align: right;">Page 24920</p> <p>1 the legislation.  2 The second issue then, Chair, is the application  3 for a ruling prohibiting the disclosure of the identity of  4 Mr X. Once again we see an express power on the Commission  5 in the regulations to grant such an order, and that's in  6 regulation 10 which expressly states that the Chair in  7 instances where the Commission, the Chair has allowed an  8 in-camera hearing the Chair may on the request of a person  9 order that no person shall disclose in any manner  10 whatsoever the name or address of such person or any other  11 information likely to reveal his or her identity. That's  12 at paragraph 10 of the heads of argument. So clearly,  13 Chair, in relation to those two orders there's express  14 powers on this Commission to grant those orders.  15 The third category, and clearly the more tricky  16 one is the application to testify via video link. Now  17 neither the Commissions Act nor the regulations deal  18 expressly with whether or not the Chairperson or the  19 Commission has the power to authorise a witness to testify  20 via video link, and this would apply equally to what we  21 have identified as the fourth category, that the order that  22 there be a live audio feed in circumstances where the  23 Commission has granted an in-camera application.  24 We state though, Chair, that picking up from  25 section 1(b)(1) of the Commissions Act, which permits the</p>	<p style="text-align: right;">Page 24922</p> <p>1 must have the implied power to take steps to protect a  2 witness by any other means, which we say includes the power  3 to enable a witness to testify by alternative means,  4 particularly where modes of alternative means have been  5 recognised in other fora, and for example section 158 of  6 the Criminal Procedure Act in a different context but  7 certain a recognised alternative form of having a witness  8 testify –  9 CHAIRPERSON: I haven't had an  10 opportunity to read your heads because I only got them this  11 morning, but you deal with, by quoting Baxter or  12 something –  13 MS PILLAY: Yes.  14 CHAIRPERSON: - circumstances in which  15 powers can be implied. You don't cite, though, what I  16 think is the leading case that's been followed by the SCA  17 many times, Middelburg Municipality versus Gertzen, 1914  18 AD, where Sir James Rose Innes said that "An authority  19 granted to a functionary in regard to any specified subject  20 'must in the absence of clear intent to the contrary be  21 taken to include such legislative powers as are reasonably  22 required to carry out the objects of the enactment, that is  23 to deal fully and effectively with the subjects assigned."  24 That is referred to amongst others in the National Lottery  25 Board case versus Brooks –</p>

<p style="text-align: right;">Page 24923</p> <p>1 MS PILLAY: Yes.</p> <p>2 CHAIRPERSON: - 2009. So that is – I</p> <p>3 mean I prefer, with respect, the formulation by Sir James</p> <p>4 Rose Innes rather than a paraphrase by an academic, but</p> <p>5 there doesn't appear to be a material difference between</p> <p>6 what Professor Baxter said and what Sir James Rose Innes</p> <p>7 said.</p> <p>8 MS PILLAY: It is in fact a trite</p> <p>9 proposition, Chair –</p> <p>10 CHAIRPERSON: Yes.</p> <p>11 MS PILLAY: - but it's the powers which</p> <p>12 are reasonably necessary to carry out the express powers.</p> <p>13 Now we would again -</p> <p>14 CHAIRPERSON: [Microphone off, inaudible]</p> <p>15 MS PILLAY: We would submit that in the</p> <p>16 context where you have an express power to compel a witness</p> <p>17 to appear before the Commission, and given the fact that</p> <p>18 you've got the power to determine your own procedure, there</p> <p>19 must be –</p> <p>20 CHAIRPERSON: [Microphone off, inaudible]</p> <p>21 Sir James Rose Innes said it was "the powers reasonably</p> <p>22 required to carry out the object of the enactment that is</p> <p>23 to deal fully and effectively with the subject assigned."</p> <p>24 MS PILLAY: Yes.</p> <p>25 CHAIRPERSON: Now the point would be, I</p>	<p style="text-align: right;">Page 24925</p> <p>1 the heads of argument is that we have been unable to locate</p> <p>2 any specific South African cases dealing, which expressly</p> <p>3 recognise the implied power of a commission like this one</p> <p>4 to order that witnesses testify via alternative means. It</p> <p>5 might be, Chair, that one of the reasons for that is that</p> <p>6 the Criminal Procedure Act has got an express power and</p> <p>7 that the cases which had emerged from that had been based</p> <p>8 on the section 158 express power rather than an implied</p> <p>9 power to protect a witness.</p> <p>10 We do, however, point out that we've found case</p> <p>11 law in Australia where the Courts have recognised an</p> <p>12 implied power to allow witnesses to testify –</p> <p>13 CHAIRPERSON: Do you have copies of those</p> <p>14 judgments?</p> <p>15 MS PILLAY: We do, Chair. We can make</p> <p>16 those available.</p> <p>17 CHAIRPERSON: The New South Wales case,</p> <p>18 the John Fairfax case –</p> <p>19 MS PILLAY: Yes.</p> <p>20 CHAIRPERSON: - that presumably is the</p> <p>21 publication case that deals with –</p> <p>22 MS PILLAY: Yes, that is so.</p> <p>23 CHAIRPERSON: Press publication case, I</p> <p>24 imagine.</p> <p>25 MS PILLAY: That is so, Chair.</p>
<p style="text-align: right;">Page 24924</p> <p>1 suppose, that it could be contended anyway, and I take it</p> <p>2 you're contending that in order to deal fully and</p> <p>3 effectively with the matter in hand, to get evidence from a</p> <p>4 witness whom we've compelled to come, may be reluctant to</p> <p>5 testify because of the fear of fatal consequences if he</p> <p>6 does, that that power must be included. I take it that's</p> <p>7 the contention.</p> <p>8 MS PILLAY: That is our submission,</p> <p>9 Chair. We tie this argument, Chair, or this interpretation</p> <p>10 to section 39(2) of the Constitution to the extent that we</p> <p>11 are bound to adopt an interpretation of both the act and</p> <p>12 the regulations, an interpretation that will further the</p> <p>13 spirit, purport and objects of the Bill of Rights,</p> <p>14 including, Chair, the right to life, the right to dignity,</p> <p>15 the right to freedom and security of the person.</p> <p>16 So we would urge the Commission to adopt an</p> <p>17 interpretation to the question of whether it has the</p> <p>18 procedural power under regulation 19 or an implied power</p> <p>19 derived from regulation 19, read with section 3(1) of the</p> <p>20 act, in a manner to promote and protect the rights of</p> <p>21 witnesses who appear before it, and enable the Commission</p> <p>22 to order that witnesses testify via alternative means in</p> <p>23 circumstances where it has been shown to be necessary to do</p> <p>24 so.</p> <p>25 The argument we make at paragraph 21, Chair, of</p>	<p style="text-align: right;">Page 24926</p> <p>1 CHAIRPERSON: John Fairfax &amp; Sons is a –</p> <p>2 MS PILLAY: Yes.</p> <p>3 CHAIRPERSON: - media house, I think, in</p> <p>4 Australia.</p> <p>5 MS PILLAY: Yes.</p> <p>6 CHAIRPERSON: Is that a single judge</p> <p>7 sitting in New South Wales, or the New South Wales Court of</p> <p>8 Appeal? Do you know?</p> <p>9 MS PILLAY: I think, Chair, if I'm just –</p> <p>10 that was the one case which we struggled to find, so we've</p> <p>11 had to rely on writings on that case. I think it's not a</p> <p>12 single-judge case, if I'm not mistaken.</p> <p>13 CHAIRPERSON: Is it not available</p> <p>14 through –</p> <p>15 MS PILLAY: We've struggled to find that</p> <p>16 particular –</p> <p>17 CHAIRPERSON: Oh, of course –</p> <p>18 MS PILLAY: We've got the others.</p> <p>19 CHAIRPERSON: It's 1986. I think a lot</p> <p>20 of the websites in this case were only established after</p> <p>21 that.</p> <p>22 MS PILLAY: Yes, but we've managed to</p> <p>23 find substantial academic writing on the case.</p> <p>24 Essentially, Chair –</p> <p>25 CHAIRPERSON: The University of Cape Town</p>

<p style="text-align: right;">Page 24927</p> <p>1 has got a good set of Australian reports, even the State 2 one, so maybe we can get it from there. But anyway, if 3 necessary I – 4 MS PILLAY: Yes, we'll look into it, 5 Chair. 6 CHAIRPERSON: If necessary, I should be 7 there on Wednesday anyway in the library, so if the case is 8 there, but it would be nice to have a copy, you know. 9 Obviously your learned friends would – the BUSB case? 10 MS PILLAY: That we have a copy of, 11 Chair, and can make – 12 CHAIRPERSON: Which court is that? 13 MS PILLAY: I'm just looking, Chair. 14 I've got my copies of the cases. 15 CHAIRPERSON: Well, you don't have to 16 answer immediately, but there is a copy for me, is there? 17 MS PILLAY: There are, we are making 18 copies for you. 19 CHAIRPERSON: Alright, well that will be 20 helpful, thank you. 21 MS PILLAY: Essentially what we see in 22 these Australian cases, Chair, is that the Courts have 23 recognised an implied power to allow witnesses in certain 24 circumstances to testify by alternative means and the 25 implied power in the Australian cases was derived from the</p>	<p style="text-align: right;">Page 24929</p> <p>1 basis for the audio feed power is exactly the same as the 2 one for the video link power. 3 Coming then, Chair, to the third issue which we 4 wanted to address, and that's the question of whether the 5 Commission should exercise its discretion in favour of 6 granting the application sought by SAPS, which is at 7 paragraph 22 of the heads of argument; the default position 8 we've dealt with already, Chair, which is in section 4, is 9 that all hearings should be in public, but there is a 10 proviso permitting the Chairperson to exclude persons where 11 it's not necessary or desirable. 12 We say in paragraph 20, Chair, and it's an 13 important principle, that it is in the public interest that 14 all hearings be public and that witnesses testify in person 15 and that this must be the default position which is 16 entrenched. 17 We refer to the Minister of Police versus Premier 18 of the Western Cape judgment where the Constitutional Court 19 recognised the important public purpose served by a 20 commission of inquiry in terms of not only educating the 21 public, but also exposing the investigation to the public, 22 and we say, and the Constitutional Court refer to the 23 Canadian case of Phillips versus Nova Scotia where it was 24 emphasised that "Open and public nature of hearings helps 25 restore the public confidence not only in the institution</p>
<p style="text-align: right;">Page 24928</p> <p>1 Court's jurisdiction to serve the administration of 2 justice. 3 Similarly, Chair, we would say that the issue on 4 the audio feed also is not dealt with expressly in either 5 the act or the regulation, but it is an order which is 6 designed to allow greater accessibility to the hearings 7 conducted in the Commission in circumstances that is an in- 8 camera – 9 CHAIRPERSON: But prima facie I haven't 10 got a problem with that. If the first part comes, if the 11 exclusion of the public from the chamber, I have power to 12 do that and if it's appropriate to do that - obviously it's 13 something I still have to be satisfied on - that order is 14 actually designed to mitigate the effects of the exclusion 15 of the public from the chamber in a way which protects the 16 identity of the witness so that his identity would not 17 become apparent to those who know him and see him on the 18 screen, members of the public. So – 19 MS PILLAY: So on a similar basis – 20 CHAIRPERSON: So prima facie there's far 21 less difficulty, shall we say, in implying that power if 22 there's power to grant the other order, but although there 23 will still be argument whether it is appropriate, but 24 that's, we in a field of vires at the moment, aren't we? 25 MS PILLAY: But we would submit the legal</p>	<p style="text-align: right;">Page 24930</p> <p>1 or the situation being investigated, but also in government 2 as a whole," and we say this is an important reason why as 3 a default position it should be that the Commission's 4 hearings be public and that witnesses be called to testify 5 in person. This is the basis on which we argue that a 6 Court should take a restrictive interpretation to the 7 desirability aspect of the power on the Commission to order 8 in-camera hearings. 9 It's important, Chair, just to emphasise that the 10 Australian cases have utilised the test of reasonably 11 necessary, that a witness can testify by alternative means 12 where it is reasonably necessary, it's been shown that it's 13 reasonably necessary to do so. So the test that we're 14 advocating in terms of the interpretation of the 15 Commissions Act and the regulations is consistent with this 16 approach, and we say on a factual basis, having regard to 17 all of the factors, which we will go through shortly, 18 Chair, that it has been shown to be reasonably necessary 19 for Mr X to testify firstly in camera, and secondly via 20 video link. 21 We just want to emphasise, Chair, that in the 22 exercise of this Commission's discretion on whether or not 23 to grant the application it's important that the 24 constitutional principles and the constitutional – that the 25 discretion be exercised to the prisms of the Constitution,</p>

<p style="text-align: right;">Page 24931</p> <p>1 having regard to the rights, the competing rights of both 2 parties. 3 [12:46] The one we've already dealt with, which is in a 4 sense a corollary of the principle of open justice and why 5 it's necessary for the hearing to be public. 6 But the others, Chair, which is what we deal with 7 from paragraph 26 of our heads of argument, is the specific 8 rights which SAPS have relied on as a basis for the 9 application that they make, and the primary right which 10 SAPS have relied on is Mr X's right to life. We would 11 submit that there are other rights implicated, namely his 12 right to be free from violence, his right to bodily 13 integrity, his right to dignity. 14 The factual basis on which SAPS claim that Mr X's 15 right to life is threatened is set out in their founding 16 affidavit and replying affidavit, but before we deal 17 specifically with the factual matter, if I can just go back 18 to the case that Commissioner Hemraj referred us to 19 earlier, and that's the case of Madlavu. Now an important 20 aspect of that decision, Chair, was that the Court said 21 that in that case the Court is not restricted to looking at 22 the factual basis which a particular party relies on in 23 order to motivate an in-camera hearing, and that the Court 24 is entitled to go beyond that, having regard to its own 25 experiences and understanding of the threat that the</p>	<p style="text-align: right;">Page 24933</p> <p>1 implicates individuals and individuals who on his version 2 are capable of brutal violence, that it is reasonable to 3 draw the conclusion that Mr X's life will be in danger if 4 his identity is known and if he is forced to testify in 5 person at the Commission. 6 Now we say, Chair, and we've gone quite carefully 7 through the opposing affidavit filed by the respondents to 8 this application, and we don't see anywhere where the 9 respondents assert as a matter of fact that there is no 10 threat to the life of Mr X, and we say that this is a 11 telling factor. What they do say is that there are other 12 methods of ensuring his safety before the Commission, but 13 the fact that they do not assert that he is free from any 14 threat whatsoever we say is a very telling factor, and once 15 the parties are all ad idem that in fact Mr X is under 16 threat to his person, to his life, we would submit it's 17 appropriate for this Court to err on the side of caution 18 and to take a more conservative approach to an order which 19 might ultimately result in protecting his life. 20 Just to pick up then, Chair, on an issue which 21 was raised with Ms Baloyi on behalf of SAPS on why the need 22 for a video link as opposed to Mr X testifying in person; 23 as we understand SAPS' case the need for the video link is 24 firstly to further safeguard and protect the identity of Mr 25 X. In other words there's a risk that by Mr X travelling</p>
<p style="text-align: right;">Page 24932</p> <p>1 witness may face. 2 Now this is an important dimension, we submit to 3 the question of the exercise of this Commission's 4 discretion. This Commission is free to travel beyond the 5 factual information which SAPS have placed before the 6 Commission and to draw on its own experiences, importantly 7 of how witnesses have been dealt with thus far in the 8 Commission, and it's trite that there have been a number of 9 witnesses who've not only lost their lives but who've also 10 been threatened, and that's an important feature which 11 ought to factor into the exercise of the discretion. 12 Now crucially, Chair – 13 CHAIRPERSON: Those are summarised in Mr 14 Pretorius's replying affidavit. 15 MS PILLAY: That is so, Chair, and that – 16 CHAIRPERSON: Particular one person who 17 was at the inspection in loco and was clearly going to be a 18 witness, pointed out spots at the NUM office and then I 19 think within two weeks thereafter was killed. 20 MS PILLAY: That is so, Chair. 21 CHAIRPERSON: That's a factor which 22 obviously must weigh very heavily. 23 MS PILLAY: Yes. We say, Chair, that 24 having regard to what we understand to be Mr X's version 25 and the extent to which he implicates, and directly</p>	<p style="text-align: right;">Page 24934</p> <p>1 every day to and from the hearing that his identity may in 2 fact become known, and secondly the concern for his safety 3 and the need therefore for him to testify from an 4 undisclosed location, or in the words of Mr Pretorius in 5 his founding affidavit, "a venue that is not easily 6 identifiable." 7 Now those are the two factual bases on which we 8 understand SAPS seek the order for a video link as opposed 9 to Mr X actually appearing in person and we would submit in 10 the broader balance to be struck between all of the 11 competing interests that these are not unreasonable orders 12 and we will demonstrate why we believe on balance that the 13 order introduces sufficient safeguards to protect the 14 interests of the parties who oppose the application. 15 If I may then go to that topic, which is 16 balancing the competing rights, we deal with that from 17 paragraph 31 of our heads of argument. 18 CHAIRPERSON: [Microphone off, inaudible] 19 cases where admittedly the phrase under consideration was 20 the probability that something might happen, that was 21 paraphrased as saying that what you have regard to is 22 whether there's a risk, where there's a reasonable risk 23 that these things would happen and that I take it would be 24 the appropriate test to apply here. 25 MS PILLAY: We would submit that that</p>

<p style="text-align: right;">Page 24935</p> <p>1 would be an appropriate test. It would be akin –</p> <p>2 CHAIRPERSON: That was dealt with in the</p> <p>3 Leepile cases by Judge –</p> <p>4 MS PILLAY: And that's the akin of what</p> <p>5 we have thus far put the test as reasonably necessary for</p> <p>6 the protection of his life.</p> <p>7 CHAIRPERSON: In Mr du Toit's textbook at</p> <p>8 page 22-32 he summaries the Madlavu case, says you don't</p> <p>9 need a probability, and he makes the point that you've just</p> <p>10 made, that the Court can use its own experience, and then</p> <p>11 he goes on to refer to Leepile's case where it was held</p> <p>12 that the requirement is not probability, but reasonable</p> <p>13 possibility, and I remember in that case the word "risk"</p> <p>14 was used at one stage as well, so that on your argument</p> <p>15 what is required would be the reasonable possibility, or</p> <p>16 the risk - not a remote risk of course, or remote</p> <p>17 possibility – of harm. That's what would have to be shown.</p> <p>18 MS PILLAY: We would submit –</p> <p>19 CHAIRPERSON: And whether it has been</p> <p>20 shown of course is a matter you'll be dealing with in due</p> <p>21 course.</p> <p>22 MS PILLAY: And in assessing whether</p> <p>23 what's reasonable, the Court can have regard to the</p> <p>24 experience of the Commission thus far and the treatment of</p> <p>25 witnesses.</p>	<p style="text-align: right;">Page 24937</p> <p>1 MS PILLAY: We accept that that's</p> <p>2 correct, Chair. Now we would say, Chair, that the primary</p> <p>3 issue which weighs heavily in tipping the balance in favour</p> <p>4 of the order sought by SAPS is this acceptance that there</p> <p>5 is a threat to the life of Mr X and –</p> <p>6 CHAIRPERSON: Don't we need – isn't that</p> <p>7 putting it perhaps too high? Don't we need a reasonable</p> <p>8 possibility or a substantial risk as opposed to – does it</p> <p>9 have to go higher than that? It may well be of course that</p> <p>10 they may argue that they have gone higher, they succeeded</p> <p>11 in showing more than they have to show, but for purposes of</p> <p>12 determining the test have I stated it correctly, prima</p> <p>13 facie obviously subject to argument we're going to hear</p> <p>14 later, we don't need a probability, we need a reasonable</p> <p>15 possibility, or what one can perhaps paraphrase by calling</p> <p>16 a real risk.</p> <p>17 MS PILLAY: Yes. Chair, we're happy to</p> <p>18 accept the test that what's required is a reasonable</p> <p>19 possibility of harm, but what's telling is that none of the</p> <p>20 parties argue that that possibility doesn't exist and if</p> <p>21 you move from that basis, Chair, we say that the orders</p> <p>22 that have been sought by SAPS have built into them</p> <p>23 sufficient mechanisms and safeguards in order to ensure</p> <p>24 that the balancing exercise ultimately is in favour of</p> <p>25 granting the orders firstly for the testimony to be</p>
<p style="text-align: right;">Page 24936</p> <p>1 We summarise in paragraph 31 –</p> <p>2 CHAIRPERSON: You're now moving to</p> <p>3 paragraph 31. Is that right?</p> <p>4 MS PILLAY: That is so, Chair. We</p> <p>5 summarise in paragraph 31 the rights that have been relied</p> <p>6 upon by the respondents and the right, we say the rights</p> <p>7 that are being relied on, we say, Chair, doesn't take the</p> <p>8 matter much further than what we've referred to as the</p> <p>9 Constitutional Court dicta that require as a default</p> <p>10 position to the hearings be public. But ultimately the</p> <p>11 rights are not absolute and the rights are subject to</p> <p>12 limitation, especially in the context of then what the</p> <p>13 Court is called upon to do is to conduct a balancing</p> <p>14 exercise.</p> <p>15 So the real enquiry – and this is where we would</p> <p>16 ask the Commission to locate the debate amongst the parties</p> <p>17 – the real enquiry is around balancing all the competing</p> <p>18 interests.</p> <p>19 CHAIRPERSON: Yes, I was really concerned</p> <p>20 when Ms Baloyi was arguing to make sure that we had all the</p> <p>21 competing interests. As I said, if you're going to perform</p> <p>22 a balancing exercise correctly you've got to make sure that</p> <p>23 everything that's appropriate goes into each of the two</p> <p>24 pans of the scale, otherwise your balancing exercise will</p> <p>25 be inappropriately done.</p>	<p style="text-align: right;">Page 24938</p> <p>1 admitted in camera, and secondly via video link.</p> <p>2 The first special feature which we want to draw</p> <p>3 the Court's attention to is the fact, as we've already</p> <p>4 stated, that the in-camera order is a watered-down one in</p> <p>5 the sense that members of the media will be present while</p> <p>6 Mr X is testifying, and secondly that there will be a live</p> <p>7 audio feed of his testimony to an adjoining room.</p> <p>8 Now this mechanism, this special feature we would</p> <p>9 submit, Chair, in a sense addresses some of the concerns</p> <p>10 which have been identified by Wigmore around inclination to</p> <p>11 falsify evidence, etcetera, if Mr X is aware that while he</p> <p>12 is testifying that the members of the public will be</p> <p>13 following his testimony via live audio feed. It's not an</p> <p>14 ideal solution to that concern raised by Wigmore, but it</p> <p>15 certainly goes a long way to answering some of the</p> <p>16 concerns.</p> <p>17 CHAIRPERSON: When you've reached an</p> <p>18 appropriate stage in the argument will you tell me so we</p> <p>19 can take the lunch adjournment? I'm not cutting you off</p> <p>20 immediately now, but when you consider it appropriate, let</p> <p>21 me know.</p> <p>22 MS PILLAY: Chair, I've got a number of</p> <p>23 factors to go through, so I think if it's okay with the</p> <p>24 Chair we can take the break now.</p> <p>25 CHAIRPERSON: We'll take the lunch</p>

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1 adjournment. Let's try to be back at quarter to 2. I know  
 2 it's not always easy with so many people here, but I would  
 3 appreciate it if we can resume at quarter to 2.  
 4 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 5 [13:52] CHAIRPERSON: The Commission resumes. Ms  
 6 Pillay?  
 7 MS PILLAY: Thank you, Chair.  
 8 CHAIRPERSON: During the adjournment you  
 9 gave me a copy or sent me a copy of the B. USB case as  
 10 well as another case, at least one other case from the High  
 11 Court of Australia but I take it you'll be referring to  
 12 that later, but thank you very much for sending these to  
 13 me.  
 14 MS PILLAY: Thank you, Chair. Chair, we  
 15 pick up from paragraph 34.3 on page 14 of our heads of  
 16 argument where we are still identifying the factors which  
 17 we say weigh in favour in the balancing process, weigh in  
 18 favour of granting the order sought by SAPS. The third  
 19 factor which we identify, Chair, is that even though Mr X  
 20 would be testifying via video link, the legal  
 21 representatives of the parties will be able to see him and  
 22 will therefore be able to observe his demeanour and his  
 23 responses to questions. And we draw your attention in  
 24 paragraph 34.3, Chair, to the case if S v Staggie where in  
 25 the context of section 158 of the Criminal Procedure Act

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1 the court found that the section does not infringe on the  
 2 right to a fair trial and the right of an accused to have  
 3 proceedings conducted in his presence but that it merely  
 4 creates a different form of the testimony being presented  
 5 to court, other than the actual physical presence of the  
 6 witness.  
 7 In addition, Chair, to these factors, the  
 8 evidence leaders have introduced three further measures  
 9 which we say would render the ultimate order one which the  
 10 Commission should grant in exercising this balancing act.  
 11 The first is that an evidence leader would be present or  
 12 must be present at all times in the room with Mr X while he  
 13 is testifying. Now this is obviously a precautionary  
 14 measure to ensure that there is no prospect, not only of  
 15 his evidence not being distorted but of claims that his  
 16 evidence was distorted through interference by some SAPS  
 17 personnel.  
 18 The second factor introduced by the evidence  
 19 leaders is that the identity of Mr X should be disclosed to  
 20 all legal representatives participating in the hearing.  
 21 Obviously the legal representatives will be able to see Mr  
 22 X. It doesn't make any sense that they wouldn't then –  
 23 CHAIRPERSON: Before you carry on, let me  
 24 ask Mr Semenya a question. I don't want you to tell me  
 25 where the witness will be but if I were to grant the order

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1 that Ms Pillay suggests, that's in 35.1, would there be  
 2 practical problems? Do you understand the point?  
 3 Theoretically, I put this up, obviously it's a theoretical  
 4 possibility, if the witness is giving evidence in New York  
 5 it might be difficult to get an evidence leader there to be  
 6 present but I deliberately gave an exaggerated example, but  
 7 if an order were to be made in terms of 35.1 – all the  
 8 other things that are necessary to persuade me to make an  
 9 appropriate order – would that create problems or would it  
 10 be practical to carry that out?  
 11 MR SEMENYA SC: We have tendered that  
 12 concession in the replying affidavit, Chair.  
 13 CHAIRPERSON: Thank you.  
 14 MS PILLAY: Thank you, Chair. The third  
 15 factor introduced by the evidence leaders would be that an  
 16 advance of Mr X's testimony that SAPS provide all legal  
 17 representatives with the name of Mr X as well as a  
 18 photograph identifying him so that the parties are able to  
 19 go through photographic and video evidence in order to  
 20 prepare for his cross-examination. And we say, Chair that  
 21 having regard to these three additional factors and there  
 22 safety mech – the safeguards that have already been  
 23 introduced by SAPS, that these are important factors which  
 24 weigh in favour of granting the relief sought.  
 25 The section headed "appropriate relief," Mr

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1 Chair, what we've done is introduced into the order sought  
 2 by SAPS just the additional issues raised by the evidence  
 3 leaders. So paragraph 2 of the new order is a new addition  
 4 by the evidence leaders.  
 5 In relation to paragraph 3, Chair, just a  
 6 correction. We've asked that reference to accredited media  
 7 representatives be removed and that the order should only  
 8 read, "Legal representatives and media representatives."  
 9 CHAIRPERSON: You remember at the  
 10 beginning of our sessions in 2012 we had a process whereby  
 11 media representatives were accredited and if there are to  
 12 be restrictions one doesn't, there might well be practical  
 13 problems if people arrived and said, we're from the media.  
 14 So I would imagine that the accredited media, the  
 15 requirement that media representatives be accredited is  
 16 important. Those who were accredited, if there are any of  
 17 them left, would still be able to use that accreditation.  
 18 The accreditation, as far as I remember was done by the  
 19 secretary of the Commission, was it not? So if there are  
 20 new people who come along and want to be accredited then  
 21 they must apply to him. That's if we're going to do that.  
 22 I mean if I refuse the order completely, the point would  
 23 fall away but otherwise you could have some person  
 24 pretending to be a media representative who is just a  
 25 member of the public and there might be difficulties, so I

<p style="text-align: right;">Page 24943</p> <p>1 think from a practical point of view it's probably 2 necessary, if we're going to go that route. If we're not 3 going to grant the order at all then this problem will fall 4 away.</p> <p>5 MS PILLAY: Chair, if the accreditation 6 process is in place then obviously we would be happy with 7 that. The next new paragraph is paragraph 4, just to 8 create a mechanism where parties are able to get the 9 identity and photograph of Mr X, the legal representatives 10 are able to get the photograph and identity of Mr X to be 11 able to go through video and photographic evidence to 12 prepare for cross-examination. And 5 flows from 4, Chair, 13 and there's also an additional insertion and I think that 14 the rest of the orders are exactly as sought by SAPS. 15 Chair, those are our submissions.</p> <p>16 CHAIRPERSON: Thank you, Ms Pillay. Mr 17 Mpopfu?</p> <p>18 MR MPOFU: Yes, thank you very much, 19 Chairperson. Chairperson, it might be appropriate, having 20 listened to my colleagues, to just get rid of some of the 21 peripheral issues by explaining what our case is not, so 22 that we don't waste time on that peripheral material. It 23 is certainly not our case, Chairperson, that Mr X's 24 evidence is not relevant or necessary for the purposes of 25 this Commission. He, after all, purports to have been an</p>	<p style="text-align: right;">Page 24945</p> <p>1 that that test could be, could legitimately be borrowed 2 from the criminal law example although we'll argue that the 3 criminal law, section 58 and those kinds of sections are 4 not directly applicable but I think the Chairperson has 5 made that point and in fact to a certain extent what is 6 contained in those sections assist our argument but, 7 Chairperson, before I even go – I just want to explain that 8 issue of the possibility in more detail.</p> <p>9 CHAIRPERSON: Let's just finish your 10 recital of what your argument is not about.</p> <p>11 MR MPOFU: Is not about, yes.</p> <p>12 CHAIRPERSON: Are those the three points? 13 The first is that you don't say that X's evidence is not 14 relevant or necessary, you don't say the Act or the 15 regulations are unconstitutional but you say they must be 16 interpreted through the prism of the Constitution.</p> <p>17 MR MPOFU: Correct?</p> <p>18 CHAIRPERSON: And you say, you don't say 19 there's no possibility of harm but you say –</p> <p>20 MR MPOFU: That's not sufficient –</p> <p>21 CHAIRPERSON: - that a likelihood is 22 required and you will submit in due course that the 23 likelihood is –</p> <p>24 MR MPOFU: Is required, yes. Well, maybe 25 I might as well say two things in that regard, Chairperson.</p>
<p style="text-align: right;">Page 24944</p> <p>1 eye witness. We ourselves have called eye witnesses so we 2 would be the last people to say his evidence is irrelevant 3 but as the Chairperson correctly pointed out in an exchange 4 with Ms Baloyi, that is not the issue in this application.</p> <p>5 The other thing we are not saying is that either 6 the Act or the regulations are unconstitutional and Mr 7 Brickhill will deal with that in more detail but I simply 8 want to say is that what we are saying about the 9 Constitution is that, as Ms Pillay has put it, when you are 10 interpreting the Act or the regulations or anything, it 11 must be done through the prism of the Constitution because 12 after all this Commission has been established in terms of 13 84(2)(f) of the Constitution of the Republic. I'll come 14 back to the question, the issue of interpretation.</p> <p>15 The third thing that we are not saying is that 16 there is no possibility of harm, however remote that 17 possibility might be. What we are saying in that regard, 18 and I'll address it later, is that something more than a 19 mere possibility of harm is needed and only to that extent 20 we can borrow from the examples of criminal law, that we're 21 talking about a likelihood which we will argue is something 22 higher than a mere possibility.</p> <p>23 CHAIRPERSON: You say a likelihood is 24 required?</p> <p>25 MR MPOFU: A likelihood, yes. We'll say</p>	<p style="text-align: right;">Page 24946</p> <p>1 We say a likelihood is required but more importantly, a 2 causal connection between the testifying and the 3 eventuation of that likelihood is needed. So the last, the 4 third one has two legs, as it were. Between the act of 5 testifying and the eventuation of the harm, in other words 6 the testifying in ordinary court, not in camera or not by 7 video link and all those things and the occurrence of the 8 harm or likelihood of the harm.</p> <p>9 CHAIRPERSON: Thank you, I've got it.</p> <p>10 MR MPOFU: Yes, thank you. And maybe, 11 Chairperson, I can start with dealing with that issue 12 before I even talk about the powers.</p> <p>13 CHAIRPERSON: When you are referring to 14 things that are in your heads I'd be grateful if you'd tell 15 me.</p> <p>16 MR MPOFU: Yes, yes.</p> <p>17 CHAIRPERSON: It means I don't have to 18 write it.</p> <p>19 MR MPOFU: Yes, yes. No, Chairperson, I 20 will, I will. Now at the outset, Chairperson, one has to 21 go to the Leepile case just to make this point that I made 22 now and as Ms Baloyi has already indicated, that case was 23 argued by one IG Farlam SC, otherwise described earlier as 24 eminent counsel, appropriately.</p> <p>25 CHAIRPERSON: The passage in – which</p>

<p style="text-align: right;">Page 24947</p> <p>1 Leepile judgment you're referring to because I appeared in 2 them all, which judgment are you referring to, at what page 3 of the report? 4 MR MPOFU: Yes, I'm starting, 5 Chairperson, against the letter I on page 336 on this issue 6 of the connection or the causal link. It says there, "Mr 7 Farlam" – 8 CHAIRPERSON: This is Leepile (1), is it? 9 MR MPOFU: Yes, Leepile (1), 336 ja. 10 CHAIRPERSON: Thank you. 11 MR MPOFU: "Mr Farlam also emphasised, 12 correctly in my view, that there must be a causal link 13 between the act of testifying and the harm to the witness 14 which is envisaged before the jurisdictional facts are 15 established" and then it talks about the discretion. Now 16 the learned judge also then says, or then the Wigmore part 17 which the Chairperson has already cited, I'll jump that and 18 then at 341 against the letter H, Chairperson, "There is no 19 evidence at all in the present case that any witness in the 20 present case has been threatened with harm or reprisal if 21 he testifies. I have thus far only heard the testimony of 22 Warrant Officer Pienaar" or whatever. "I have thus not 23 seen any witness called in court or his testimony in any 24 way affected because of the fear of reprisal. The 25 atmosphere of the case has been free of any negative</p>	<p style="text-align: right;">Page 24949</p> <p>1 unrelated and that's exactly why he's not even on Mr 2 Pretorius's list. So you know one should not jump into 3 causal link simply because of things that happen outside. 4 Then Chairperson, the third quotation which 5 supports again leg 3 of what I said, where we say that the 6 likelihood test, as it were, is – or on page 345 of the 7 Leepile case against the letter C, B, ja, 345B yes and 8 there the learned judge said, "Of course there is the 9 possibility that any witness who testifies in a case such 10 as this may come to harm. I am, however, unable to find 11 that in the present case on all the material, evidential or 12 otherwise, which I am bound to consider in this regard, 13 that there is a likelihood that harm might result to a 14 witness if he or she testifies as required by section 153. 15 On the facts of this case such a possibility or harm is too 16 remote to constitute a reasonable possibility." Now that 17 says two things, Chairperson. It says that the possibility 18 which the judge considered is there, is something lower 19 than the likelihood of harm which he required and which he 20 found to be absent. So the mere existence of the 21 possibility did not graduate to the sufficient standard of 22 likelihood. So the reason possibility and likelihood, if 23 you read that passage, seem to be the acceptable test. And 24 we will submit, Chairperson, that that standard which we 25 concur with, we agree with, has not been met by any stretch</p>
<p style="text-align: right;">Page 24948</p> <p>1 features." Now what we say about this, Chairperson, again 2 it goes to the issue of the causal link. We obviously do 3 not deny the list that was supplied and referred to by both 4 Ms Baloyi and Ms Pillay but what we are saying is that 5 there has been no evidence of any link between any harm 6 suffered by any of those people and their testifying before 7 this tribunal. In fact in the case of Mr Bongo, he never 8 even testified so there could not have been such a causal 9 link. 10 CHAIRPERSON: He did point spots out – 11 MR MPOFU: Well, Chairperson – 12 CHAIRPERSON: He did point spots out at 13 the inspection in loco. 14 MR MPOFU: Yes. 15 CHAIRPERSON: And it was indicated that 16 he would be a witness. 17 MR MPOFU: Ja, that – 18 CHAIRPERSON: So there is that. 19 MR MPOFU: True, but that doesn't provide 20 a causal link between those pointing and whatever harm he 21 may have suffered. Similarly we know, Chairperson, and a 22 good example of this is the Nyanga murder. We were told in 23 this Commission that there was a connection between that 24 and, as the Chairperson, and possible testimony. It turns 25 out that he was killed in taxi violence, completely</p>	<p style="text-align: right;">Page 24950</p> <p>1 of the imagination nor has it been shown to exist. 2 So that's the canvas, as it were, Chairperson, 3 but let's come to the real issue which is simply whether or 4 not the Commission or the Chairperson have the necessary 5 power – 6 CHAIRPERSON: You're now at paragraph 9 7 of your heads. 8 MR MPOFU: Yes, thereabouts, Chairperson. 9 If, Chairperson, the power does not – if the Commission 10 does not have the power then that's the end of the matter, 11 with respect, because it does not matter if the Commission 12 thinks that it would be a good idea or whatever, if it is 13 shackled by the absence of power the Commission cannot act 14 ultra vires nor can it violate the principle of legality. 15 Now this, Chairperson, is a very crucial point which is why 16 we're talking about the prism and all that because 17 essentially on that leg of the case the issue is simply one 18 of interpretation. One has to interpret the instruments 19 that are there as to whether they confer that power, either 20 directly or implied, as the evidence leaders would like us 21 to believe and if the power is not there then it is not 22 there. 23 [14:12] Now as everyone has said, Chairperson, the 24 starting point is obviously section 4 of the Commissions 25 Act and I'm just going to spend a few minutes demonstrating</p>

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1 that that section does not even remotely confer the power  
 2 that is sought here and that we can only do by going to the  
 3 section itself. The heading says "Sitting to be public."  
 4 Well, firstly maybe I should say this, Chairperson, and I  
 5 don't think my learned colleagues are arguing to the  
 6 contrary, that the whole, the idea, the very, very notion  
 7 of a commission of inquiry held in secret is an oxymoron  
 8 and a contradiction in terms because remember, Chairperson,  
 9 that what sparks a Commission in the first place is the  
 10 fact that there's a public interest in that matter. So  
 11 before one even opens their mouth the mere fact, the mere  
 12 existence of a Commission presupposes a public interest.  
 13 And as I say, my colleagues I think have all said that what  
 14 is being contended for here is an exception to that rule  
 15 and – but the important thing here, Chairperson, is that in  
 16 so – once you accept the general rule, as it were, and the  
 17 genesis of any Commission and particularly this one, then  
 18 it means that when we are interpreting these instruments we  
 19 have to do so not only through the prism of the  
 20 Constitution but we must, insofar as they take away  
 21 liberties, must do so restrictively and in a manner that is  
 22 not against the taking away, or rather in favour of the  
 23 taking away of those liberties. And once again I think  
 24 that my colleagues concede that certain liberties would be  
 25 taken but they are saying that it is necessary or

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1 desirable.  
 2 So let's go then, with that background, to  
 3 section 4 of the Act. "All the evidence and addresses  
 4 heard by a Commission shall be in public," which is just a  
 5 repetition of the general rule, "provided that the Chairman  
 6 of the Commission may, in his discretion, exclude from the  
 7 place where such evidence is to be given or such address to  
 8 be delivered, any class of person or persons or all persons  
 9 whose presence at the hearing of such evidence or address  
 10 is, in his opinion, not necessary or desirable."  
 11 So let's start with, "from the place where such  
 12 evidence is to be given." Chairperson, the place where  
 13 evidence has to be given is here in this room. So that's a  
 14 crucial thing. You can't have – and the Commission or the  
 15 proceedings are what happens around these walls. The  
 16 minute you, Chairperson, allow a witness to be in New York  
 17 as the Chairperson, such as the example, then it means a  
 18 part of this Commission is taking place in New York or  
 19 Houghton or whatever, wherever that other place is. So the  
 20 place where the evidence must be heard is here and you  
 21 can't have a portion of the Commission occurring somewhere  
 22 else.  
 23 Now to illustrate that, Chairperson, that you do  
 24 not have the power to just play around, with respect, with  
 25 the place, when we had to move from Rustenburg to come

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1 here, whatever the personal feelings of the Chairperson or  
 2 of the Commissioners might have been, it was clear that the  
 3 Commission did not have the powers – the Commission  
 4 couldn't simply say, oh well, there's regulation 19 which  
 5 says you can dictate your own procedures and you know we'll  
 6 just relocate sommer to Centurion. The Chairperson  
 7 correctly understood the limitation of his powers and as I  
 8 say, whatever his feelings were, he had to go and seek from  
 9 the Minister the permission and that dealt with the place.  
 10 That then allowed the place of where the Commission is to  
 11 be moved from Rustenburg to Centurion.  
 12 Now, so there's simply no power for that to be  
 13 done under either some implied power which I'll talk about  
 14 now, or certainly not under a proper interpretation of this  
 15 statute. But more importantly, Chairperson, this whole  
 16 thing misses the whole point of section 4. Section 4,  
 17 Chairperson, does not – you have no power to exclude a  
 18 witness from this place. Section 5 deals with something  
 19 completely different. It is to exclude any class of  
 20 persons or persons whose presence at the hearing is, in  
 21 your opinion, not necessary or desirable. Well, let me  
 22 start by saying, making a big concession. We think that  
 23 the presence of Mr X here is necessary and desirable. So  
 24 he does not fall under the kind of people that you may  
 25 exclude because you see, Chairperson, one doesn't even need

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1 a restrictive interpretation here because the statute is  
 2 very clear. You may exclude a group of people, a class of  
 3 persons or – so even the plural suggests that we are not  
 4 talking about an individual here, least of all are we  
 5 talking about the witness. So that power is just simply  
 6 not there again, for that reason alone.  
 7 Thirdly, thirdly Chairperson, one of the biggest  
 8 fallacies of this argument from the other side is again to  
 9 lump the parties, and Chairperson hinted to this, the  
 10 parties with the general public. That lumping is  
 11 misplaced. One cannot use in the same breath the exclusion  
 12 of the general public to then willy-nilly cover the parties  
 13 themselves and, Chairperson, you have no power to exclude  
 14 the parties here, even if one were to say, okay, they might  
 15 be excluded on the basis of necessity or desirability,  
 16 which is something I will address now. So quite clearly,  
 17 on an interpretation of the statute, the power, the  
 18 Commission does not have those powers.  
 19 Now the evidence leaders, in an apparent slip of  
 20 the tongue, effectively concede this point by saying that –  
 21 at paragraph 12 of their heads when they talk about the  
 22 video link issue they say, "It is, however, significant  
 23 that section 1(b)(1) of the Commissions Act contemplates  
 24 that the Minister may confer powers additional on the  
 25 Commission which are additional to those set out in the

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1 Commissions Act.” We agree. So it would seem that at best  
 2 on this formulation, if the Commission were to assume such  
 3 powers or rather were to desire such powers, they would  
 4 have, the Minister would have to confer those powers just  
 5 as the Minister conferred the powers – the Chairperson  
 6 remembers there are two instances, two other examples.  
 7 When the Department of Justice refused to supply the  
 8 families with lunch money and those kinds of facilities,  
 9 once again the Chairperson expressed his views on it but  
 10 that was not sufficient. It could not have just happened  
 11 just because the Chairperson wished it to happen. There  
 12 had to be a promulgation of the regulations which was done  
 13 to make that possible. So the desires and wishes of the  
 14 Chairperson unfortunately cannot create powers that are not  
 15 there, or of the Commission for that matter. And even then  
 16 section 19 did not, the Chairperson did not, or the  
 17 Commission, assume that well, we'll just use section 19 to  
 18 order that the families must be provided with accommodation  
 19 and lunch.  
 20 The third example, Chairperson, happened more  
 21 recently. Again when there were all sorts of problems and  
 22 a crisis, to put it mildly, in the Commission on the  
 23 question of funding. Once again I think it was very clear,  
 24 the Commission very properly made its views very clear and  
 25 even went further than just making its views very clear,

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1 went further and made attempts to obtain such funding but  
 2 the Commission emphasised time and again and it's all on  
 3 the record, that its own hands were tied in that regard  
 4 because it didn't have the power to simply say, well, the  
 5 lawyers of the injured must be paid or whatever.  
 6 Now, those are examples that make it very clear,  
 7 the difference between what one might want to happen and  
 8 what one is empowered by law to do.  
 9 Now, another misconception here, Chairperson, is  
 10 the misconception of the words, “were, in his opinion, not  
 11 necessary or desirable.” Those words are clearly linked to  
 12 the exclusion of the persons who are un desirable. They  
 13 are not to be construed to mean the Chairperson must use  
 14 those, that test to, for example, allow the issue of a  
 15 video link – actually the two things are not to do with  
 16 each other at all. So the test of necessity and  
 17 desirability, yes, is a test but it's a test not to permit  
 18 the derogation from the interests of justice and all the  
 19 general rule but to exclude people, certain people who are  
 20 undesirable. So those, I think, I'm afraid are what my  
 21 learned colleagues have misconstrued about section 4.  
 22 So let's quickly dispose in the same breath of  
 23 the subsidiary argument based on regulation 19. There,  
 24 Chairperson, the law is very clear. One cannot just rely  
 25 on a general provision like that. First of all, we don't

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1 think this is a matter of procedure. We think this is a  
 2 matter of substance but even if it was not, the maxim which  
 3 is quoted in paragraph 19, *lex specialis derogat legi*  
 4 *generali*. What it means, Chairperson, is that one cannot –  
 5 when the, let's call it the legal framework has made  
 6 specific provisions for the situation where the Chairperson  
 7 or the Commission may allow certain things, then there's no  
 8 room to rely on the general provision. In other words, if  
 9 it was the intention of the legislature that under the  
 10 rubric of procedure the Chairperson or the Commission is  
 11 basically at large to do whatever they want to do in order  
 12 to facilitate the Commission, then that would be it but the  
 13 minute the legislature specifies certain things and says  
 14 you may exclude certain people under these circumstances  
 15 and so on and this is what you must take into account, it  
 16 means that had the legislature wanted to give you this  
 17 power, it would have done so. So one cannot jump into the  
 18 – if my argument around section 4 is correct then that's  
 19 the end of the matter. You can't then seek refuge in  
 20 regulation 19 because the matter is specifically dealt  
 21 with, as it were. Now - and that, Chairperson, deals with  
 22 the issue of the implied power as well. You may, one may  
 23 not imply a power where there is statute or a regulation  
 24 that regulates that matter.  
 25 And ironically, that argument is defeated by the

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1 existence of section 158 of the Criminal Procedure Act that  
 2 my learned colleagues wanted to indirectly rely on because  
 3 what section 158 symbolises is that when the legislature  
 4 wants people to be, or witnesses as such to be, for their  
 5 evidence to be conducted via video link, then the  
 6 legislature says so. And the fact that it has not said so  
 7 in the case of this Commission means it did not  
 8 specifically want those powers to be conferred because the  
 9 legislature – otherwise the legislature would not have  
 10 bothered to pass section 158. It would have simply said,  
 11 well, courts will, whenever they feel like, you know, if  
 12 there's a child or a person in sexual offences obviously  
 13 they will find ways and provide for video links because the  
 14 presumption that the legislature doesn't just legislate for  
 15 the sake of legislating, it legislated that specific  
 16 section 158 exactly to make those powers and the absence of  
 17 a similar provision when it comes to commissions of inquiry  
 18 must imply exactly the opposite of what the evidence  
 19 leaders say it implies. It must imply that that power does  
 20 not exist.  
 21 Now, if then, Chairperson, broadly speaking  
 22 really what I've been saying is that if the Commission were  
 23 to grant the relief asked for, it would be acting *ultra*  
 24 *vires* and it would be, as the Chairperson correctly said,  
 25 the principle of legality says any public official or

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1 functionary can only act within the powers conferred upon  
 2 that person. Otherwise the Commission would be opening  
 3 itself to a court challenge and a constitutional challenge  
 4 and to review the exercise of powers that it does not  
 5 possess.  
 6 So, Chairperson, in a nutshell what these parties  
 7 are asking for is not the exclusion of the persons  
 8 mentioned in section 4, it's actually the exclusion of two  
 9 important categories of people. They want to exclude the  
 10 parties or participants and they also want to exclude Mr X  
 11 who is a witness. That's really what is happening. It's  
 12 not – of course the first part, that it be in camera, one  
 13 can say this is excluding the public but the gist of what  
 14 they're asking for here is to exclude the parties and to  
 15 exclude Mr X and that, I'm afraid, is not empowered by  
 16 section 4, neither does the Commission have any other  
 17 subsidiary power to do such a thing.  
 18 Then, Chairperson, if you go to – and then in  
 19 terms of the interpretation of the Act insofar as, in  
 20 addition to whatever I have said, that Act must be  
 21 interpreted through the prism of the Act, of the  
 22 Constitution, Mr Brickhill will deal specifically with the  
 23 prisms as far as section 34 and maybe section 35 is  
 24 concerned.  
 25 [14:32] Then, Chairperson, let's deal with the issue of –

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1 oh, just to emphasise this point, Chairperson, when the  
 2 legislator wants to say something about parties and about  
 3 witnesses it has shown in paragraph – I think it's  
 4 paragraph 17 of Mr Brickhill's heads – no, it's not  
 5 paragraph 17, probably page 17. Yes, it's paragraph 19,  
 6 I'm sorry, Chairperson – rather page 19, paragraph 50,  
 7 five-zero, of the LRC heads. It's just a convenient way  
 8 of, I'm actually just looking for section 18 of the Witness  
 9 Protection Act. I'm just using that because it's quoted  
 10 there in full. It says, section 18 provides,  
 11 "Notwithstanding any other law the presiding officer at any  
 12 proceedings or at civil proceedings in which the protected  
 13 person is a party or a witness," so this clearly shows that  
 14 if the legislator wants to deal with a party or a witness  
 15 it does so. It doesn't just call them a class of persons  
 16 and lump them in the manner that section 4 is being  
 17 squeezed to mean.  
 18 Then, Chairperson, if I can quickly deal with – I  
 19 think on the question of the power and the absence thereof,  
 20 unless if there's any other issue, those would be our  
 21 submissions. On an interpretation as it is on all the  
 22 things that, on the way the Commission has been handled up  
 23 to now and on the reading of the text of the relevant  
 24 legislation it's quite clear that the power simply does not  
 25 exist.

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1 Now maybe one should take one step back,  
 2 Chairperson. One has to look at this, what is being asked  
 3 for here are three things. We certainly have no quarrel  
 4 with the fact that the Chairperson and the Commission have  
 5 the right to declare in-camera proceedings.  
 6 CHAIRPERSON: The Chairman?  
 7 MR MPOFU: The Chairman, yes, chairman in  
 8 that case. That goes without saying, but that is not what  
 9 is being asked for here. What is being asked for here are  
 10 three things; one is that Mr X must testify in camera,  
 11 which as I've explained now is something I'll address in  
 12 another context. But let's say for now that we accept in  
 13 the context of the powers that the Chairman has those  
 14 powers.  
 15 But the second thing that is being asked for is  
 16 assuming that he may testify in camera, should he be here?  
 17 Here in this place? And we say the Chairperson has no  
 18 power, or the Commission no powers to answer that question  
 19 in the negative.  
 20 Then the third one that is being asked is what  
 21 I've just addressed; can the parties be excluded. Once  
 22 again we say the Chairman has no powers to do that. So if  
 23 the application is looked at in those three constituent  
 24 parts then the only power that you have is the first leg,  
 25 which is should he testify in camera. Not that we are

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1 saying that we concede that he should, but at least we are  
 2 saying as far as the powers are concerned you do have those  
 3 powers. The other two legs of the application you simply  
 4 do not have the power.  
 5 So let's now then go to the issue of the harm.  
 6 Even Ms Baloyi could not put it higher than that this is  
 7 about the situation that Mr X may well be exposed to harm.  
 8 Well, Chairperson, with respect, anybody may well be  
 9 exposed to harm. It goes even further than that; Mr  
 10 Phatsha, who I'm sure is here – oh, there, Mr Phatsha, if  
 11 you can just lift your hand – Mr Phatsha has been sitting  
 12 here right through the proceedings and Mr Phatsha, you'll  
 13 remember, Chairperson, during his testimony, it's on the  
 14 record that I even had to pay from my own pocket for his  
 15 hotel accommodation because he was feeling unsafe, there  
 16 were strange people visiting his place, and so on, but you  
 17 know, he's still here, and so in his case it was more than  
 18 the fact that he may well have a risk. Mr Magidiwana had  
 19 the same problems. Mr Mabuyakhulu exactly, we had to do  
 20 that when we were still in Rustenburg, and accommodate them  
 21 for their own safety as it were.  
 22 So that is exactly what Judge Ackerman was  
 23 dealing with, that the mere possibility cannot be  
 24 sufficient, and it is only to that extent that we agree  
 25 with what Ms Pillay was saying, that we don't argue with

<p style="text-align: right;">Page 24963</p> <p>1 the issue of the possibility. But that doesn't mean that 2 we concede that there's a likelihood of harm. Far from it 3 that we concede that even if such harm is there, it has 4 anything, or connected in any way with his giving of the 5 testimony in public.</p> <p>6 But Chairperson, the other thing, and Mr Ntsebeza 7 will deal with the question of the discretion and under 8 what circumstances that discretion can be exercised. Mine 9 is simply to say that one has to understand the kind of 10 person we are dealing with here, and I'll deal with that 11 issue not so much on the discretion point, but insofar as 12 Mr X implicates some of the people that I represent. 13 There's already evidence by both Mr Magidiwana I think, and 14 Mr Phatsha, which refutes and challenges Mr X's testimony 15 in a few respects, admittedly not holistically.</p> <p>16 So from the point of view of the people we 17 represent Mr X is a liar and he's not just an accomplice, 18 as the Commission correctly pointed out, that being 19 accomplice actually is the least of his problems. He's a 20 multiple murderer and a self-confessed habitual criminal, 21 having at least three murders under his belt himself and 22 having participated in those.</p> <p>23 Now we have not been told what the deal is 24 really, so to speak. Is this habitual criminal going to be 25 charged? Has he been promised immunity? Is he exchanging</p>	<p style="text-align: right;">Page 24965</p> <p>1 arrested or injured. It's the whole – because he says the 2 whole crowd intended to attack the police, which is, I mean 3 apart from it just being – it's not even the version of 4 SAPS. It's so farfetched that it borders on being 5 ludicrous. But it means that all those people have a 6 right, having been accused of a nefarious intention by Mr 7 X, to refute what he says about them, all 3 000 of them are 8 entitled because their reputations and their names, it 9 means anybody, if a friend of mine or a relative of mine 10 was one of those 3 000 people sitting on that koppie, then 11 according to Mr X they were all harbouring murderous 12 intentions against the police. So all those people are 13 entitled to – and those 3 000 can tell another 3 000, who 14 will tell another 3 000, until such time that the whole 15 world knows.</p> <p>16 So whether you look at it from the point of view 17 that the probability is that they already know, or even if 18 you discount that and say they will certainly know as soon 19 as it is disclosed to us as the legal representatives, then 20 it means the order really is not going to protect him, if 21 that was its intention, and from that point of view it's 22 impractical and ineffective.</p> <p>23 But more than that, more than that, that reality 24 takes away the causal link because it means whatever harm 25 he may or may not suffer after his testimony will not have</p>
<p style="text-align: right;">Page 24964</p> <p>1 his so-called safety so that he can fry other people 2 falsely? Where is he? Is he staying in some posh hotel so 3 that he can come and lie here and perpetuate what he has 4 been saying? But more importantly, Chairperson - and this 5 is a point that the Chairperson raised in a different 6 context – going back to the issue of the causal link, if 7 indeed Mr X participated in the things that he says he 8 participated in, and if he's the only person out of those 9 hundred people who were on the 13th involved in the incident 10 of the 13th, he's the only person who has suddenly 11 disappeared in the last 18 months, then clearly the other 12 99 people know who he is.</p> <p>13 Now that's the one issue. The second issue is 14 that it – so it would be impractical - and it's a point of 15 practicality – it would be impractical, or rather the 16 Commission cannot be asked to grant an order whose 17 practical effectiveness is doubtful at best, because if 18 they already know who he is then whatever precautions which 19 are there to protect his identity will just serve no 20 purpose whatsoever.</p> <p>21 But let's even be kind and say they don't know 22 who he is. If they don't know who he is, well as soon as 23 Mr Semenya gives me the photo I'm going to give it to them, 24 all 300 of them, and Mr X implicates 3 000 people, so it 25 won't just be confined to the 300 who happened to be</p>	<p style="text-align: right;">Page 24966</p> <p>1 been caused, or rather could not have been prevented by the 2 video link option, and so once again from that point of 3 view the order would be not only ineffective but also not 4 serve any particular purpose really.</p> <p>5 I've already addressed the issue of section 19, 6 or rather regulation 19. The only thing I want to add 7 there, Chairperson, is that the hierarchy, there's a clear 8 hierarchy of statutes. Just like legislation cannot 9 supersede the Constitution, regulations also can't 10 supersede a statute, particularly the statutes that gave 11 birth to those regulations.</p> <p>12 Now the next issue that I want to deal with, 13 Chairperson, is the evidence leaders' assertions. I've 14 already said that they themselves concede - inadvertently, 15 I suspect – that the powers lie with the Minister, but 16 their answer is that the Chairperson or the Commission may 17 imply certain powers. But in the body of legislative 18 material where they require you to seek this implication is 19 exactly the section that refers you back to the Minister. 20 So it's a merry-go-round which will not assist them because 21 if part of the material that you have to consider to distil 22 your implied power is a section that clearly demonstrates 23 that you do not have such a power, then clearly you cannot 24 imply it from that very same section.</p> <p>25 But in any event, a power such as this is not one</p>

1 that could be implied easily, and Mr Brickhill will show  
 2 why if anything, if there's any doubt, the interpretation  
 3 should be in favour of the constitutional provisions that  
 4 he will cite. So there's no power, express or implied, and  
 5 if there was going to be such implied power then it should  
 6 have been given directly.

7 Now the evidence leaders, we would contend that  
 8 their siding with SAPS on this issue is badly advised.

9 Well, firstly it doesn't add anything except just to echo  
 10 what SAPS is saying, except on this point of the implied  
 11 power, and they make the very same fundamental mistake, if  
 12 one looks at their proposed order. Yes, there's number 7,  
 13 their proposed order number 7, which is on page 17 of their  
 14 heads. "Members of the public may listen to the audio  
 15 transmission of the testimony of Mr X in the overflow  
 16 room." That obviously makes the fundamental mistake of  
 17 treating the parties as members of the public because I've  
 18 no doubt when they say that they are assuming these people  
 19 who are sitting here now will have to go to that overflow  
 20 room, which could not have been what is contemplated.

21 These people are not members of the public within  
 22 the meaning of what is contemplated. They are interested  
 23 parties. They are participants, and more than that, some  
 24 of them are people who are accused of all sorts of unseemly  
 25 things by none other than Mr X himself. So they have a

1 right to face their accuser. They have a right to see  
 2 their accuser performing and they have a right to have  
 3 their accuser being cross-examined without artificial  
 4 advantages that other witnesses who have to face the music  
 5 here will not have. And incidentally, seeing that the  
 6 evidence leaders have sided with SAPS, the fact that the  
 7 evidence leaders may be with them there, not to impugn on  
 8 their integrity, will be cold comfort to the litigants. To  
 9 us as lawyers it might be. It might create the comfort,  
 10 but for people who don't think, who think that these  
 11 people's rights must be ignored, as it were,  
 12 [14:51] Then I don't think that we can say to them no,  
 13 now relax because a member of, someone who doesn't even  
 14 believe that you are being prejudiced is sitting there.

15 So it is to that extent that we say it would have  
 16 been better if the evidence leaders had not entered the  
 17 fray on this one, just from the point of view of the  
 18 litigants, because you know, this is reminiscent of what  
 19 was in fact during the funding application when the  
 20 chattering classes were telling us that the evidence  
 21 leaders would represent the interests of the litigants. It  
 22 would mean now that this application would not have been  
 23 opposed. In fact it would have been supported.

24 So I'm afraid that it's going to be difficult for  
 25 us as litigants to, or rather as legal representatives to

1 convince the clients that such prejudice as they may  
 2 perceive is going to be cured merely by the measures that  
 3 have been suggested.

4 Chairperson, I think I'll leave it there. The  
 5 issue that really I wanted to emphasise, the issue of  
 6 practicality, it has so many other ramifications, but I  
 7 won't give more examples as to how impractical it is, but  
 8 if need be, some of my colleagues will deal with it.

9 Suffice to say that an order that is granted which is not  
 10 going to serve any purpose, in fact it would be better if  
 11 it's not serving any purpose. It is serving a purpose; it  
 12 is restricting the rights of participants. It is giving Mr  
 13 X unfair advantages, and you know, it simply means that he  
 14 would get preferential treatment unlike any other witness.

15 The last point maybe, Chairperson, is the issue  
 16 of security. We say that to the extent that - SAPS is  
 17 entitled to protect its witnesses, we have no quarrel with  
 18 that, but to the extent that they may perceive some  
 19 theoretical dangers then SAPS have got within their means  
 20 the methods to meet those dangers, as it were. If Mr X, if  
 21 by coming here, or rather what they can do is to provide  
 22 him with security; we're not going to quarrel if he comes  
 23 here with a hundred people surrounding him. That's SAPS'  
 24 problem, but here he must be and he must sit in that chair  
 25 and be cross-examined like everybody else.

1 We have been told that there might be logistical  
 2 issues and so on. We raise that issue at paragraph 42 of  
 3 our answering affidavit as specifically to say they must  
 4 say what logistical problems there might be. In the reply  
 5 that was not dealt with, so we should assume that that  
 6 allegation falls by the wayside because maybe the  
 7 Chairperson might have been sympathetic in the event that  
 8 the discretion comes to the fore, which we argue it  
 9 doesn't. If they were saying - let me give one last  
 10 example, Chairperson, if they were saying for example by  
 11 coming here to this particular venue there is this and that  
 12 and that risk, then maybe they should then be asking the  
 13 Chairperson or the Minister or whoever makes those  
 14 decisions, that the evidence must be heard in a place that  
 15 is more conducive to protecting him, and then they'll go  
 16 through what we all had to go through for the relocation of  
 17 the Commission to that particular place. But now that we  
 18 are here it must be done here and they must provide ways of  
 19 protecting him. Thank you, Chairperson. The rest of the  
 20 allegations, or rather submissions are in our answering  
 21 affidavit and in the heads. I didn't go through the heads  
 22 sequentially. I wanted to highlight and save time. Thank  
 23 you, Chairperson.

24 CHAIRPERSON: Thank you, Mr Mpofu, and  
 25 you timed the end of your address very conveniently. We'll

<p style="text-align: right;">Page 24971</p> <p>1 take the tea adjournment.</p> <p>2 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>3 [15:14] CHAIRPERSON: The Commission resumes. Mr</p> <p>4 Brickhill, we have your heads.</p> <p>5 MR BRICKHILL: Thank you, Chair, I</p> <p>6 suppose –</p> <p>7 CHAIRPERSON: I'm sorry, I understood the</p> <p>8 order to be Mr Mpofu first, Mr Brickhill second, Mr</p> <p>9 Ntsebeza third, but if I'm wrong, perhaps you'll correct</p> <p>10 me?</p> <p>11 MR NTSEBEZA SC: No, that's the order.</p> <p>12 I've reconciled myself with that kind of order. There's a</p> <p>13 natural flow from what Mr Mpofu submitted to be followed by</p> <p>14 him.</p> <p>15 CHAIRPERSON: Alright, so I was right for</p> <p>16 once. For once. Mr Brickhill?</p> <p>17 MR BRICKHILL: Chairperson, that is</p> <p>18 indeed the batting order. I propose to make this a</p> <p>19 relatively short innings and deal principally with two</p> <p>20 issues.</p> <p>21 CHAIRPERSON: Are you going to retire or</p> <p>22 are you going to be dismissed?</p> <p>23 MR BRICKHILL: I'll leave Mr Ntsebeza to</p> <p>24 score the winning runs, Chair, but Chair, I propose to deal</p> <p>25 with two issues principally, the first is the principle of</p>	<p style="text-align: right;">Page 24973</p> <p>1 would submit is in any event a broader power, the inherent</p> <p>2 power of the Courts to determine their own process, to</p> <p>3 regulate their process, but that power has important</p> <p>4 limitations which we say would be relevant also to an</p> <p>5 interpretation of regulation 19.</p> <p>6 We say at paragraph 10 of our heads of argument</p> <p>7 that the Constitutional Court in Phillips has emphasised</p> <p>8 that the section 173 power to regulate the process of the</p> <p>9 Courts is designed to meet extraordinary procedural</p> <p>10 situations and cautioned subsequently that the power itself</p> <p>11 must be exercised with caution. That's in State versus</p> <p>12 Pennington. And in Phillips the Constitutional Court held</p> <p>13 further that this power, the section 173 power may not be</p> <p>14 used to ignore or circumvent legislation that already</p> <p>15 provides for a procedural issue, and in this regard we link</p> <p>16 to the submissions made by my learned friend Mr Mpofu in</p> <p>17 respect of section 4 of the Commissions Act, but also</p> <p>18 section 18 of the Witness Protection Act, both provisions</p> <p>19 contemplating in sum that evidence will be presented</p> <p>20 physically in the auditorium and that witnesses will be</p> <p>21 physically present, in particular in relation to section 4</p> <p>22 of the Commissions Act.</p> <p>23 So we make the point that the interpretation</p> <p>24 sought to be attached to regulation 19 would in our</p> <p>25 submission circumvent section 4 of the Commissions Act and</p>
<p style="text-align: right;">Page 24972</p> <p>1 open justice rooted primarily in the right of access to</p> <p>2 courts and section 34, that's the first issue, principle of</p> <p>3 open justice, and the second is the application of the</p> <p>4 Witness Protection Act in the present context.</p> <p>5 But before I approach those two issues, I have</p> <p>6 two brief submissions to make by way of Gloss on the issue</p> <p>7 of powers.</p> <p>8 We endorse –</p> <p>9 CHAIRPERSON: Are these in your heads or</p> <p>10 must I write them down?</p> <p>11 MR BRICKHILL: Chairperson, the first</p> <p>12 point is in our heads at paragraph 10, on page 4 of our</p> <p>13 heads of argument, and the second is not but it arises from</p> <p>14 the debate earlier in the day and was foreshadowed by Mr</p> <p>15 Mpofu.</p> <p>16 Chair, both points relate primarily to the</p> <p>17 question of the power to make the video link order.</p> <p>18 Reliance has been placed on regulation 19 in that context,</p> <p>19 which provides generally for the power of the Commission to</p> <p>20 determine its own procedures.</p> <p>21 The first point we make in paragraph 10 of our</p> <p>22 heads of argument is by way of analogy to section 173 of</p> <p>23 the Constitution, which is the inherent power of the Courts</p> <p>24 to determine their own process, and we simply point to some</p> <p>25 of the authorities on the limits of that power, which we</p>	<p style="text-align: right;">Page 24974</p> <p>1 for that reason we would argue against such an</p> <p>2 interpretation.</p> <p>3 Chair, I then move to the first of the broader</p> <p>4 issues – excuse me; there's one further interpretive point</p> <p>5 that goes to the powers -</p> <p>6 CHAIRPERSON: [Microphone off, inaudible]</p> <p>7 second point now that's not in your heads.</p> <p>8 MR BRICKHILL: This is our second point</p> <p>9 that's not in the heads, Chair. Chair, the submission</p> <p>10 simply is that the right of access to courts and section 34</p> <p>11 indeed applies to proceedings of commissions of inquiry and</p> <p>12 I'll provide those authorities shortly in dealing with the</p> <p>13 content of the right, but section 34 applies to commissions</p> <p>14 of inquiry. The orders sought would constitute a</p> <p>15 limitation of that right and that has two consequences,</p> <p>16 Chair. The first is the section 39(2) consequence that the</p> <p>17 legislation must be narrowly construed to bring it within</p> <p>18 the bounds of the Constitution. So where there is reliance</p> <p>19 on regulation 19, section 4, or any other provision to</p> <p>20 assert a power it must be interpreted narrowly as required</p> <p>21 by section 39(2) of the Constitution.</p> <p>22 The second consequence is the point that's</p> <p>23 already been made; it's simply that the legislation must</p> <p>24 exist. There must be a law of general application that</p> <p>25 justifies the limitation of section 34 of the Constitution.</p>

<p style="text-align: right;">Page 24975</p> <p>1 Chair, those are our only additional submissions 2 in relation to the powers issues. For the rest we endorse 3 my learned friend Mr Mpfu's submissions. 4 Chair, moving then to the principle of open 5 justice, we deal with it from page 5 of our heads of 6 argument and we say that assuming for the purposes of this 7 argument that the Commission has the power to grant all the 8 orders sought, the principle of open justice is central to 9 determining whether such orders should be granted. 10 We refer to the terms of reference and purpose of 11 the Commission, emphasising that the aim of the Commission 12 is fundamentally a truth-seeking one and that its mandate 13 is undoubtedly of great public importance. That informs 14 the application of the principle of open justice. 15 Chair, it has long been accepted that the public 16 has a vested interest even in ordinary judicial hearings, 17 in cases of much less public interest or moment. The 18 public has a general right to participate in legal 19 proceedings and we've quoted from the Constitutional 20 Court's decision in State versus Mamabolo where the Court 21 held as follows, paragraph 29, "Since time immemorial and 22 in many divergent cultures it has been accepted that the 23 business of adjudication concerns not only the immediate 24 litigants but is a matter of public concern which for its 25 credibility is done in the open where all can see." The</p>	<p style="text-align: right;">Page 24977</p> <p>1 is ordinarily in the context of court proceedings, the 2 principal of open justice has also been held to apply to 3 other bodies, including statutory bodies, and we provide 4 the example of the Refugee Appeal Board in the matter 5 involving Mr Krejcir, it's cited in our heads of argument 6 at footnote 21 as Mail &amp; Guardian Limited versus Chipu, NO. 7 That concerned the right of the media to have access to 8 proceedings of the Refugee Appeal Board which are 9 ordinarily confidential proceedings. 10 Chair, we don't refer to it in our heads of 11 argument, but the media was also granted access to the 12 internal disciplinary proceedings in relation to prosecutor 13 Glynnis Breytenbach – 14 CHAIRPERSON: Was that a decision of a 15 Court or is that just an administrative ruling, as it were? 16 MR BRICKHILL: It was an administrative 17 ruling, as I understand it, Chair. Just one further 18 example of the expanded application of the principle of 19 open justice, beyond simply the courts. But we're here 20 dealing, Chair, with a commission of inquiry and the 21 question arose earlier whether section 34 in particular is 22 applicable to commissions of inquiry. We make the 23 submission that the right is applicable and we rely on a 24 line of authorities that have applied section 34 and 25 different aspects of that right to various commissions of</p>
<p style="text-align: right;">Page 24976</p> <p>1 quote continues, but we emphasise that first sentence. 2 The principle of open justice, Chair, rests on a 3 cluster of constitutional rights, principally three rights; 4 section 34 in relation to civil proceedings, section 35 in 5 relation to criminal proceedings, and the right to freedom 6 of expression in section 16 of the Constitution. 7 In relation to section 34, the requirement of a 8 public hearing is explicit. Similarly in section 35 it's 9 required that criminal proceedings be held in public, and 10 in relation to the right to freedom of expression the right 11 has been held to include not just the right to impart ideas 12 and information, but also the right to receive ideas and 13 information, and the Court in SABC, this is the 14 Constitutional Court in SABC versus NDPP &amp; Others held that 15 the general public is in fact the primary bearer of the 16 right to receive information and ideas. 17 So on these three constitutional rights, the 18 right of access to courts in section 34, the right to a 19 fair criminal trial in section 35, and the right to freedom 20 of expression in section 16, rests what has come to be 21 known as the principle of open justice. It's a principle 22 that enhances the pursuit of truth, an objective which we 23 submit is central to the purpose of this particular 24 Commission. 25 Chair, although the application of the principle</p>	<p style="text-align: right;">Page 24978</p> <p>1 inquiry. We cite four cases in footnote 22 on page 8 of 2 our heads of argument; Bongoza, which was a case argued by 3 former evidence leader, now Justice Madlanga, Mbebe's 4 matter, and the matters of Grundlingh and De Beer, all of 5 which concerned different aspects of the right of access to 6 courts, including the right to procedural fairness. 7 Chair, further than that the High Court has 8 specifically confirmed that section 34 of the Constitution 9 applies to this very Commission in the context of the 10 litigation in respect of State-funded legal representation 11 of the parties. That was in the part B hearing of the 12 Magidiwana matter in which Makgoka J held at paragraph 37 13 that section 34 is indeed applicable, and Chair, we 14 emphasise that his lordship Mr Justice Makgoka was dealing 15 with one of the more contentious aspects of section 34, the 16 right to free legal representation which must be located in 17 that word "fair". 18 Chair, the aspect of a public hearing is much 19 less contentious. It's clear from the text of section 34, 20 but his lordship confirmed in that matter that the right to 21 section 34 applies to commissions of inquiry. It may not 22 apply in all respects identically to its application in a 23 court, but in principle the right is applicable. 24 CHAIRPERSON: Now that case is on appeal. 25 Do we know whether it's been set down for the May term?</p>

<p style="text-align: right;">Page 24979</p> <p>1 There was speculation at an earlier stage, you'll remember, 2 that the appeal might be set down for hearing in the May 3 term. 4 MR MPOFU: Yes. 5 CHAIRPERSON: Can we be informed whether 6 that – I take it the May roll has been drawn by now. 7 MR MPOFU: No, Chairperson, no, there's 8 no date which has been set down, but I think there's just 9 two aspects which I might bring to the attention of the 10 Commission, namely that the appeal does not concern the 11 facts of this matter, and so they were appealing in broad 12 principle kind of appeal, which is why we didn't oppose the 13 application. 14 CHAIRPERSON: [Microphone off, inaudible] 15 MR MPOFU: Yes, I have mentioned that, 16 and secondly, Chairperson, well at the risk of stating the 17 obvious, that until it's appealed it's good law at the 18 moment, ja. 19 CHAIRPERSON: That's true, but the fact 20 it's on appeal might make one a bit apprehensive about 21 applying it too prematurely. But it may well be correct on 22 that point. I'm not expressing an opinion; I'm just 23 curious to know whether it was going to be dealt with soon. 24 MR MPOFU: Fair enough, Chair. 25 CHAIRPERSON: But it would seem not. Is</p>	<p style="text-align: right;">Page 24981</p> <p>1 grateful. 2 MR BRICKHILL: We'll certainly do so, 3 Chair. 4 CHAIRPERSON: You obviously don't have to 5 do it today, but as soon as you can. 6 MR BRICKHILL: Chair, we therefore submit 7 that the principle of open justice and specifically its 8 civil component in section 34 of the Constitution applies 9 to the proceedings of this Commission. Chair, we make the 10 submission in paragraph 20 of our heads of argument that 11 that principle of open justice extends beyond merely 12 ensuring a public hearing, the holding of proceedings in 13 public. In the Independent Newspapers matters, which was a 14 spinoff of the litigation involving the dismissal of former 15 Head of Intelligence Billy Masetlha, the Constitutional 16 Court confirmed that the principle of open justice extends 17 to the appeal record itself, so the documents before a 18 Court. Accordingly the principle of open justice applies 19 to the evidence that is before a Court of a commission or 20 other tribunal and not merely to the idea of holding public 21 proceedings. 22 Accordingly the principle of open justice would 23 normally require that the proceedings of the Commission be 24 open to the public and that Mr X testify in person and 25 without any measure of anonymity. The question in the</p>
<p style="text-align: right;">Page 24980</p> <p>1 that right, Mr Mpofo? 2 MR MPOFU: That's very correct, 3 Chairperson, yes. 4 MR BRICKHILL: Chair, in any event the 5 decision of the High Court relied upon and rests upon that 6 line of authority cited in footnote 22 of our heads of 7 argument. The contentious aspect in Magidiwana's matter is 8 whether there's a right to free legal representation. The 9 application question is we submit less contentious, given 10 that there's other authority on that issue, and in the same 11 breath, Chair, the Constitutional Court's ambivalence in 12 the part A appeal similarly related to the question whether 13 there's a right to free legal representation rather than 14 these questions of application. 15 Chair, we therefore submit that the SAPS 16 correctly concede that section 34 – 17 CHAIRPERSON: Sorry, before you proceed, 18 Mr Brickhill, have you got a copy of the judgment in De 19 Beer's case? I see it's, you say it's unreported. Perhaps 20 if you can perhaps – 21 MR BRICKHILL: Chair, we do have a copy 22 here. 23 CHAIRPERSON: If you have one, which you 24 must have I take it because you refer to paragraph 11 as 25 well, if you could make a copy available to me I'd be</p>	<p style="text-align: right;">Page 24982</p> <p>1 present matter, Chair, is whether a departure from the 2 principle of open justice is warranted in any of these 3 respects and we had authorised in terms of the law of 4 general application the prior question of powers. 5 Chair, in the next section of our heads of 6 argument from paragraph 22 we deal briefly with the 7 reliance by the SAPS on the protection of the right to life 8 and the right to dignity and security of the person of Mr 9 X. We obviously acknowledge that these are 10 constitutionally protected rights of fundamental 11 importance. We reiterate the submission that my learned 12 friend Mr Mpofo made that the threshold here ought to be a 13 likelihood of harm. I shan't repeat those submissions, but 14 what we do say, Chair, in paragraph 24 – 15 CHAIRPERSON: Sorry, you said the 16 likelihood of harm and I understood from Mr Mpofo's 17 submissions that he was referring amongst other things to 18 the Leepile case, and the wording of course that was 19 considered there is the wording in section, the same words 20 as in 153(2) of the Criminal Procedure Act, "likelihood 21 that harm might result," and that was held to mean a 22 reasonable possibility. There's a difference clearly 23 linguistically between a likelihood of harm and a 24 likelihood, in other words a likelihood that harm will 25 result and a likelihood that harm might result, and the</p>

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1 words used were "likelihood that harm might result" and  
 2 that was held by Mr Justice Ackerman as meaning a  
 3 reasonable possibility. Now I know Mr Mpofu argued for the  
 4 higher test, namely likelihood. Are you arguing the same?  
 5 MR BRICKHILL: Chair, we accept that they  
 6 are largely functionally equivalent to the extent that – we  
 7 recognise that in Leepile's case his lordship Mr Justice  
 8 Ackerman equated the likelihood of harm that might result  
 9 to a reasonable possibility of harm. Chair, we submit that  
 10 on that threshold too the application fails. It's more  
 11 though, Chair, than a mere possibility of harm. It's  
 12 something higher than that.  
 13 CHAIRPERSON: He held in terms, mere  
 14 possibility is not enough. Anything is possible. That's  
 15 clearly not enough. So, but he interpreted the words we  
 16 discussed as a reasonable possibility, and that seems to  
 17 have been followed in all the subsequent cases. There were  
 18 aspects in which subsequent cases didn't follow what was  
 19 held in the appeal there, but wrongly so in my respectful  
 20 opinion, but that's an issue that doesn't arise here.  
 21 That's about the withholding of identity even from counsel  
 22 and so on. So you say an application fails on the  
 23 threshold of reasonable possibility also. Alright, thank  
 24 you.  
 25 MR BRICKHILL: Chair, in any event in the

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1 present matter we would submit that there's a second issue  
 2 that's more decisive on the question whether this  
 3 threshold, whatever it may be, is crossed and that's the  
 4 causation issue that my learned friend Mr Mpofu referred to  
 5 earlier, the causal link.  
 6 [15:34] And in this regard we would refer to the  
 7 submission made earlier by my learned friend Ms Pillay on  
 8 behalf of the evidence leaders, that in effect the  
 9 respondents, the opposing parties in this application,  
 10 failed to put up evidence to make out a case to show that  
 11 Mr X's safety when travelling to and from the Commission  
 12 each day and so on would be assured. In effect it was  
 13 submitted that we hadn't addressed this issue and, Chair,  
 14 the submission that we would make in response is that it  
 15 was for the SAPS at the outset to make out a case in this  
 16 regard and with respect, Chair, I would take the Commission  
 17 to the founding affidavit of the SAPS, Mr Pretorius, at  
 18 page 3 paragraph 9. And, Chair, this relates also to the  
 19 suggestion or the debate earlier with my learned friend Ms  
 20 Baloyi regarding possible or anticipated additional  
 21 evidence relating to the costs and logistical challenges of  
 22 transporting Mr X and assuring his safety. I'd like to  
 23 read paragraph 9, it reads "I am further advised, I am  
 24 advised further that the logistical requirements to secure  
 25 Mr X's attendance at the Commission regarding any possible

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1 threats to his life will be enormous. Such possible  
 2 threats may also entail taking measures to protect even the  
 3 Commissioners themselves. It is for this reason that  
 4 caution demands that Mr X gives his evidence, firstly, in  
 5 camera and, secondly, at a venue not easily identifiable."  
 6 Chair, this allegation was responded to directly  
 7 in the answering affidavit of the opposing parties at page  
 8 16, paragraph 42. Page 16, paragraph 42, the affidavit of  
 9 Ms Ketse and, Chair, it's a direct response to paragraph 9.  
 10 It states, "The content of this paragraph is denied. The  
 11 applicant has failed to show how or why the logistical  
 12 requirements will be 'enormous.' The applicant has failed  
 13 to provide any evidence as to how the Commissioners  
 14 themselves will be at risk. I submit that there are less  
 15 restrictive means to ensure the protection of Mr X that do  
 16 not infringe on the principle of open justice, the right to  
 17 a public hearing and the rights of the accused, the victims  
 18 and the public more broadly."  
 19 So, Chair, issue was taken with the bald  
 20 allegation that there would be enormous logistical  
 21 requirements and the SAPS was invited, it was invited to  
 22 present the evidence. In reply, Chair, paragraph 42 of the  
 23 answering affidavit received no response. There was simply  
 24 no reply directly to paragraph 42. So we have the bald  
 25 allegation of enormous logistical requirements, issue is

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1 taken with that, it's pointed out that there's no evidence  
 2 at all in support of the allegation and in reply, nothing.  
 3 So, Chair, we submit that whatever the threshold, that  
 4 issue is decisive because no causal link has been  
 5 established between the act of testifying in the ordinary  
 6 course and the risk, whatever it may be, to Mr X.  
 7 Chair, in the next section of our heads we deal  
 8 with the balance to be struck between the contesting rights  
 9 and principles at play and we deal with them in relation to  
 10 the three aspects of the relief sought in turn, dealing  
 11 first with the exclusion of the public, then with testimony  
 12 by video link and finally with the anonymity, the identity  
 13 of the witness.  
 14 Chair, in relation to the exclusion of the  
 15 public, I shan't repeat my learned friend Mr Mpofu's  
 16 submissions in relation to necessary, desirable and so on.  
 17 What we do point to, Chair, in paragraph 27, relying on  
 18 Leepile's case and Sexwale's case is that ultimately the  
 19 court must weigh the factors in favour of an open hearing  
 20 against the factors that favour excluding the public and  
 21 that a key consideration in that balance would be the  
 22 practical ramifications or efficacy of the proposed order  
 23 when deciding whether or not to depart from this  
 24 fundamental principle. We make the submission, Chair, that  
 25 even assuming for the purposes of the argument that there

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1 is a risk to Mr X, the measures proposed do not materially  
 2 reduce that risk and accordingly don't justify the  
 3 substantial departures from the principle of open justice  
 4 that are sought by the SAPS.  
 5 Chair, in paragraph 29 we deal with who  
 6 constitutes the public. This is a matter that received  
 7 some debate already in the course of today's proceedings.  
 8 My learned friend Ms Pillay made the submission that the in  
 9 camera order sought is watered down by the fact that the  
 10 excluded part, members of the public will be enabled to  
 11 view – well, to listen to the proceedings by audiovisual  
 12 link in a room outside the auditorium. We would make the  
 13 submission, Chair, that contrary to being, far from being  
 14 watered down, in fact the in camera order sought is of a  
 15 more extreme variety than the ordinary in camera order  
 16 because it seeks to exclude not just members of the public  
 17 but parties, an issue dealt with by –  
 18 CHAIRPERSON: Mr Brickhill, I don't think  
 19 it appropriate for – excuse me, excuse me, excuse me – I  
 20 don't think it appropriate for cameramen or anybody else to  
 21 walk between counsel and the Chair. That's not the kind of  
 22 behaviour we expect and if it happens again I'll have you  
 23 excluded from the chamber and if that means we won't sit in  
 24 public I'll take that on the chin. Carry on, Mr Brickhill.  
 25 MR BRICKHILL: I'm indebted to the Chair.

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1 Chair, the point that we make is that the in camera order  
 2 sought is not watered down. To the contrary, it's a more  
 3 extreme variety. An ordinary in camera order excludes the  
 4 true members of the general public from a courtroom, it  
 5 doesn't, it would never exclude the parties in the ordinary  
 6 course. And that raises, Chair, a difficulty that flows  
 7 from the breadth of the order sought, which is how one  
 8 would even define the public if one were to attempt to  
 9 narrow the order to the true general public and permit the  
 10 parties to be present because clearly, Chair, the parties  
 11 in this Commission are not a tightly defined category of  
 12 persons. They include all of the victims' relatives, they  
 13 include also the families of slain members of Lonmin  
 14 security, potentially slain policemen. There's a broad  
 15 category of persons, Chair, who would constitute something  
 16 akin to a party before this Commission and of course the  
 17 order in its current form seeks to exclude all of them but  
 18 including the true general public, but we make the further  
 19 point that it wouldn't be reasonably practicable to draw a  
 20 line between the public and parties for purposes of such an  
 21 order.  
 22 MR BRICKHILL: Chair, we therefore submit  
 23 that it will be contrary to the principle of open justice  
 24 and that no case has been made out to exclude the public in  
 25 the manner sought in prayers 1, 2 and 5 of the Notice of

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1 Application.  
 2 The second issue that we address, Chair, is the  
 3 testimony by video link in the context of the principal of  
 4 open justice and we refer, Chair, to the ordinary context  
 5 in which such evidence takes place via video link or  
 6 intermediary. It's commonly employed in matters involving  
 7 testimony by children or victims of sexual assault and,  
 8 Chair, in those circumstances the purpose of the mechanism  
 9 is to protect the child witness from the trauma associated  
 10 with giving oral evidence in a court. And similarly in  
 11 respect of victims of sexual assault, the aim is to limit  
 12 the public embarrassment or the humiliation and injury to  
 13 the complainant as well as to limit the possibility of  
 14 intimidation. We make the submission, Chair, that that  
 15 simply doesn't apply to Mr X. He doesn't fall within that  
 16 special category of persons who are effectively  
 17 complainants or victims in criminal proceedings.  
 18 There was some suggestion that one of the  
 19 purposes of the application was, in my learned friend Ms  
 20 Baloyi's terminology, to provide a more comfortable  
 21 atmosphere in which Mr X could testify. We submit that he  
 22 doesn't fall within the category of persons on whom the law  
 23 seeks to confer that more comfortable atmosphere.  
 24 From the founding affidavit, Chair, there appear  
 25 to be two main purposes behind the video link aspect of the

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1 application. The first is to bolster the anonymity sought  
 2 to be imposed by making it impossible for members of the  
 3 public to recognise the face of Mr X and secondly, there's  
 4 a suggestion that the measure is proposed to secure the  
 5 safety of the Commissioners and perhaps other persons  
 6 present in the auditorium. In relation to the second  
 7 issue, Chair, our submission is that there is no factual  
 8 basis on the papers to require video link evidence for the  
 9 purpose of making the venue more secure. The security of  
 10 the Commission venue is already managed in accordance with  
 11 security protocols that will remain in place and be managed  
 12 appropriately as different witnesses come and go. And in  
 13 relation to the first issue, Chair, the purpose of  
 14 protecting the anonymity of Mr X, that's the issue that we  
 15 deal with next, separately.  
 16 One aspect of the relief sought is to protect his  
 17 identity, the identity of Mr X. We point out in paragraph  
 18 37 some of the facts –  
 19 CHAIRPERSON: Before you carry on, the  
 20 point in paragraph 34, I'm not sure it's quite as simple as  
 21 you suggest. If there is – this is obviously based on that  
 22 assumption which may not be correct – if there is an  
 23 increased risk that someone may want to take a, what one  
 24 can describe as a pot shot at Mr X while he's here, in the  
 25 process of doing that it might involve the Commissioners

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1 and other people in the chamber being involved in the  
 2 cross-fire or hit by a badly aimed bullet or something of  
 3 that sort, that kind of risk of witnesses being potential  
 4 victims of attacks of that kind hasn't arisen so far and I  
 5 take it it's contended that if Mr X comes it will arise.  
 6 So I'm not sure it's quite as simple as you make it out in  
 7 34. There is surely an increased risk. It may well be  
 8 that – there's lots to be said for the proposition that the  
 9 security in place should be adequate enough to deal with  
 10 the situation but it does seem that there is a chance of an  
 11 increased risk which might eventuate in the way I've  
 12 described. So I'm not sure that your paragraph 34 as it  
 13 stands deals completely with that point but I must put the  
 14 difficulty to you so you can amplify it if you wish.  
 15 MR BRICKHILL: Chair, we don't mean to be  
 16 glib about the matter of the safety of all of the people  
 17 physically in the venue. The submission, Chair, is that  
 18 the security of the venue is something that needs to be  
 19 assured throughout the proceedings. It may be that one or  
 20 other witness presents a particular risk or a heightened  
 21 risk for a period of time but those are matters that  
 22 require to be dealt with independently of whether or not Mr  
 23 X is present in the venue and would continue to be  
 24 addressed within the protocol. We certainly, though, don't  
 25 mean to be glib or dismissive of the potential increased

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1 risk when a particular witness such as Mr X is physically  
 2 present.  
 3 Chair, turning then to the issue of anonymity and  
 4 the identity of Mr X, we summarise in paragraph 37 some of  
 5 the facts that have been set out in Mr X's two statements  
 6 and we make this point which was already debated at some  
 7 length earlier, that in effect he must already be known in  
 8 all probability and if he is not already known he will  
 9 become known, his identity will become known very shortly  
 10 after his evidence begins. The point therefore, Chair, is  
 11 that there really is no effective purpose to be achieved by  
 12 imposing any form of anonymity in relation to him.  
 13 We submit in paragraph 41, Chair, that three  
 14 factors are decisive in this regard. The first is that the  
 15 restrictions sought to be imposed in relation to Mr X's  
 16 identity constitute a substantial departure from the  
 17 principle of open justice and would significantly constrain  
 18 the capacity of other parties to challenge his evidence.  
 19 Chair, perhaps in development of that submission I just  
 20 need to address the breadth of paragraph 3 of the Notice of  
 21 Motion. Ms Baloyi at the outset sought to amend paragraph  
 22 3 to insert AMCU. There was also some indication that  
 23 paragraph 3 of the Notice of Application would be expanded  
 24 further to include at least the families –  
 25 CHAIRPERSON: Well, the evidence leaders

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1 in their proposed order, paragraph, extend it to all the  
 2 legal representatives, not just limiting it to the legal  
 3 representatives for the injured and arrested parties as was  
 4 originally asked for by the police or the legal  
 5 representative for AMCU as suggested from the bar by Ms  
 6 Baloyi. So the legal representatives, sorry, the evidence  
 7 leaders extended it in the way that I have read out.  
 8 MR BRICKHILL: Chair, that is – that is  
 9 so. The evidence leaders do propose a broader formulation.  
 10 In that regard, Chair, we would simply point out potential  
 11 difficulties relating to parties who fall within the terms  
 12 of reference who are currently unrepresented and potential  
 13 –  
 14 CHAIRPERSON: Sorry, which parties are  
 15 unrepresented? My understanding is that all the parties –  
 16 sorry, if one goes on to read 4, is what is important, para  
 17 4 of the evidence leaders' formulation, "At least two weeks  
 18 prior to the commencement of the testimony of Mr X, SAPS  
 19 legal representative shall disclose the name of X to  
 20 evidence leaders and legal representatives of all the  
 21 parties, provide the evidence leaders and legal  
 22 representatives of the parties with a photograph" – and  
 23 then there's another one in 4(c). I'm not aware of any  
 24 parties who are not represented. All the parties, as far  
 25 as I know, are represented. Their legal representatives

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1 aren't always in the chamber, of course, but as far as I  
 2 understand there's no unrepresented party who appears alone  
 3 or is, as it were, before us as a nominal party who doesn't  
 4 take part. So every party, to my knowledge, is represented  
 5 by a legal representative. So that's why, obviously  
 6 subject to the other points you make, if this is an  
 7 appropriate case for an order along the lines of that  
 8 sought, it would – prima facie to me it would seem at least  
 9 that the attempted restriction to only legal  
 10 representatives of the arrested and injured parties and  
 11 AMCU as being the people who could have disclosure made and  
 12 so on, that clearly wouldn't be acceptable. At the very  
 13 least, I'm not saying it would be so but at the very least  
 14 prima facie, it commends itself to me, will be an order in  
 15 the terms sought by the evidence leaders.  
 16 MR BRICKHILL: Chair, the additional  
 17 parties to which I refer might be more accurately referred  
 18 to as potential parties, interested parties or witnesses.  
 19 They would include, for example, striking mineworkers who  
 20 don't fall within the category of the injured and arrested,  
 21 don't constitute the parties known as the families. So  
 22 there are additional, perhaps I can call them interested  
 23 parties who may have relevant evidence and may have a  
 24 contribution to make if they became aware of the identity  
 25 of Mr X, theoretically they may come forward. If they're

<p style="text-align: right;">Page 24995</p> <p>1 not permitted to discover his identity that evidence may 2 not come forward. I accept that that's, it's speculative, 3 the submission but – 4 CHAIRPERSON: It's speculative, a little 5 bit on the remote side, isn't it because what is envisaged, 6 as I understand it, is that if I grant the order – it's not 7 self-evidence but if I were to grant it - that what Mr X 8 says would be reported, I take it fairly extensively in the 9 media and I would imagine that these potential parties you 10 talk about would be adequately informed as to all the 11 detail that he would give as to what happened over the 12 relevant period. So there would obviously be potentially 13 other matters, I suppose, that they might want to bring 14 before us but the vast majority of the factors that would 15 be contained in his evidence – in fact everything contained 16 in his evidence would in fact be available. You will 17 remember apart from the suggestion that people could be 18 here across the passage, as it were, watching on the 19 television screen or listening rather to the soundtrack of 20 what's being said, of course the transcript is available on 21 the internet. So interested parties, apart from what they 22 could read in the press, would be able also if they had the 23 access although I'm not sure all the people you mention 24 would necessarily have access but a vast number of them 25 presumably would have access to what's put up in the</p>	<p style="text-align: right;">Page 24997</p> <p>1 doesn't mean the general public knows. On the contrary, 2 the general public doesn't know and there are sometimes 3 people, particularly in circumstances of excitement and 4 tension such as we have as a background to the events at 5 Marikana, members of the public might feel encouraged to 6 take a pot shot at someone whom they regard as having acted 7 inappropriately, whose identity they're not aware of. And 8 I take it one of the factors which prompts the SAPS to 9 bring the application is the object, hope of ensuring that 10 the broader public don't discover who he is because the 11 more people who know who he is, the greater the danger is. 12 I take it that's the reasoning. Whether it's adequate to 13 justify the relief they seek is another matter, but that 14 seems to be what the application is about. 15 MR BRICKHILL: Chair, we would submit 16 that to the extent that my earlier submission was 17 speculative, that that line of reasoning is similarly 18 speculative and it's based on an assumption that this sort 19 of information won't travel once it reaches the initial 20 group of persons who would be permitted, in terms of the 21 order, to have the identity disclosed to them and my 22 learned friend Mr Mpofu extrapolated those numbers earlier 23 and how this information will effectively spread. We 24 submit that that is the likely consequence, Chair. The 25 only possible effect that the order might have would be to</p>
<p style="text-align: right;">Page 24996</p> <p>1 transcripts. So they would actually see what has been said 2 in written form. So I understand there still are some 3 restrictions, I'm not suggesting there aren't but the point 4 I think the evidence leaders are making is that such 5 handicaps as they would be, would be substantially reduced 6 by the proposals that are in place. 7 MR BRICKHILL: Chair, the more decisive 8 factor then we submit is that in any event anonymity would 9 be ineffective because the identity will become known if 10 it's not already known and that's the third factor that we 11 point to in paragraph 41 of our heads. The second factor, 12 and it's to this issue that I propose to turn now, is that 13 Mr X is already a witness under witness protection and I'll 14 deal now with what that, the implications of his protected 15 status, which is the final section of our heads of 16 argument, Chair. 17 [15:54] CHAIRPERSON: You talk about his 18 evidence, his identity being known. Now I indicated, I 19 think to Ms Baloyi when she was arguing, that the 20 probabilities are overwhelming that some, at least, of the 21 strikers know who Mr X is, if he's telling the truth. I 22 mean if he's talking total nonsense and he wasn't there at 23 all then they don't know who he is but if he did the things 24 he said he did, which you've summarised in your heads and 25 if that's true then they will know, but of course that</p>	<p style="text-align: right;">Page 24998</p> <p>1 delay that spread perhaps to some degree, by a matter of 2 days perhaps but again we're in the realm of speculation. 3 The fundamental submission, Chair, is that the identity, if 4 not already known, will become known as soon as Mr X begins 5 to give the substance of his evidence. 6 Chair, the final section of our heads deals with 7 the Witness Protection Act and I think I should be able to 8 deal with it before the close. 9 CHAIRPERSON: I'd better not ask you 10 anything more, to give you a chance of doing it before the 11 close. 12 MR BRICKHILL: Chair, at paragraph 42 we 13 set out the purpose of the Witness Protection Act and we 14 emphasise this, Chair. The purpose of the system is to 15 protect witnesses so that they are able to give evidence in 16 proceedings such as this Commission, notwithstanding 17 possible risks to their safety. That's the purpose of the 18 Act and a witness as defined would obviously include Mr X 19 and, Chair, you pointed out earlier that the definition of 20 proceedings similarly would include the proceedings of this 21 Commission. A key player is the director who bears the 22 responsibility to protect witnesses and related persons. 23 Chair, in terms of section 12 of the Act the 24 witness bears an obligation in terms of the statute itself 25 but also embodied in a witness protection agreement that</p>

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1 must be concluded, to give evidence. So there is that  
 2 obligation in terms of the Witness Protection Act on Mr X  
 3 as a witness under protection to give evidence in these  
 4 proceedings. So there's an additional layer of  
 5 compellability there. I'll come in a moment though to a  
 6 protection or a qualification in respect of his  
 7 compellability as a witness in terms of the Act.  
 8 Chair, in terms of the period of protection, my  
 9 learned friend Ms Baloyi in her submissions earlier  
 10 emphasised that the purpose of this application, the  
 11 present application, is to protect him during the current  
 12 proceedings and while he gives evidence and that protecting  
 13 him for the rest of his life is a more difficult matter  
 14 but, Chair, the purpose of the Witness Protection Act is  
 15 indeed to protect on an indefinite bases, witnesses under  
 16 protection. And that, we don't deal with this in our heads  
 17 of argument, Chair, but I would refer to section 13(6) of  
 18 the Witness Protection Act which deals with the duration of  
 19 that protected status. I won't read the submission but the  
 20 effect of it is that the protection is indefinite until it  
 21 is either waived by the witness under protection or  
 22 discharged by the director with the concurrence of the  
 23 Minister. So we're dealing here with a scheme that should  
 24 endure indefinitely, in effect until the risk has been  
 25 dealt with or is assessed to have gone away, either by, in

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1 the assessment of the witness him or herself or in the  
 2 assessment of the director, with the Minister.  
 3 Chair, we make the submission in paragraph 15  
 4 that the Witness Protection Act maintains the default  
 5 position in terms of the manner in which evidence is to be  
 6 given by a protected person. The default position in terms  
 7 of section 15 if that the person gives evidence in terms of  
 8 the laws regulating such proceedings, in other words in the  
 9 same way as any other witness. However, Chair, section  
 10 15(2) provides a safety valve, an insurance power for  
 11 presiding officers in effect to postpone proceedings where  
 12 there is a witness under protection or, to consider  
 13 imposing appropriate restrictions and the subsequent  
 14 provisions of the Act deal with some of the restrictions in  
 15 relation to disclosures concerning the witness.  
 16 Section 17, Chair, which we set out in paragraph  
 17 46 of our heads of argument, deals in effect with  
 18 disclosures by officials in the Witness Protection Act and  
 19 those related to them, persons discharging functions under  
 20 the Act. And in effect it is a general prohibition on  
 21 those persons discharging functions under the Witness  
 22 Protection Act from making disclosures about the protected  
 23 person.  
 24 Section 17 is effectively mirrored in regulation  
 25 3 of the Witness Protection Regulations, which those

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1 regulations, Chair, were made under section 185A of the  
 2 Criminal Procedure Act but were maintained in operation  
 3 beyond the repeat of that provision in terms of section 24  
 4 of the Witness Protection Act but regulation 3, Chair, we  
 5 submit doesn't deal with disclosures for the purpose of  
 6 judicial proceedings. There's an exclusion in relation to  
 7 judicial proceedings. The key provision, Chair, we submit  
 8 is section 18 to which my learned friend Mr Mpofo referred  
 9 earlier and which was debated earlier in the proceedings.  
 10 Chair, the submission that we would emphasise – I  
 11 won't read the provision, it's been referred to earlier –  
 12 the submission that we emphasise is that in paragraph 51.2  
 13 of our heads of argument. Section 28, Chair, is concerned  
 14 with information that would lead to the discovery of the  
 15 whereabouts of the protected person or, we would submit,  
 16 any new or assumed identity. In effect, the purpose of the  
 17 provision is to prevent the discovery of a protected person  
 18 and their exposure to risk as a protected person. It is  
 19 not concerned, we emphasise, Chair, with any prohibition on  
 20 the publication of the identity, the actual identity of the  
 21 witness.  
 22 Section 18 requires a presiding officer, unless  
 23 the Director of Witness Protection satisfies the presiding  
 24 officer that there are exceptional circumstances, to make  
 25 the order set out in (i) to (iv), paragraphs (i) to (iv) of

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1 section 18. Chair, those deal with the following matters –  
 2 the place of safety or location where he or she is or has  
 3 been under protection or where or she has been relocated in  
 4 terms of this Act, (ii) the circumstances relating to his  
 5 or her protection, (iii) the identity of any other  
 6 protected person and the place of safety or location where  
 7 such person is being protected or (iv) the relocation or  
 8 change of identity of a protected person. Chair, that  
 9 default order in terms of section 18 does not require the  
 10 imposition of anonymity in relation to a witness in the  
 11 proceedings. What it does is it puts in place a scheme to  
 12 protect the person in terms of their new identity, their  
 13 new location and their current whereabouts. And Chair,  
 14 importantly, section 19 of the Witness Protection Act  
 15 extends that protection to a protected witness by providing  
 16 that such a witness cannot be compelled to answer questions  
 17 in the proceedings on that very same subject matter. In  
 18 other words the witness cannot be compelled to disclose who  
 19 their managing official is in relation to their protected  
 20 status, they cannot be compelled to disclose their  
 21 whereabouts, they cannot be compelled to disclose the  
 22 whereabouts of their family members. All of that is  
 23 appropriate and entirely in accordance with the purpose of  
 24 the statute.  
 25 Chair, in conclusion we set out the basis on

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1 which the majority of the orders sought, we submit, fall to  
 2 be dismissed. We make the submission from paragraph 60  
 3 that the orders sought in prayers 6 and 7 of the  
 4 application are, in certain respects, over-broad and in  
 5 others too narrow. In effect, Chair, our submission is  
 6 that the appropriate order in these circumstances, and we  
 7 indeed propose such an order, is the order mandated in  
 8 terms of section 18 of the Witness Protection Act. That is  
 9 the order that has been carefully designed by the  
 10 legislature in the legislation specifically adopted to  
 11 protect witnesses in the witness protection programme and  
 12 in our submission, Chair, that, rather than the package of  
 13 orders sought by the SAPS, would be the appropriate order  
 14 in this matter.

15 It may further be appropriate, Chair, although  
 16 this could perhaps be dealt with in the course of Mr X's  
 17 testimony, to grant a ruling in respect of section 19 of  
 18 the Witness Protection Act that Mr X would not be  
 19 compellable, would not be required to answer questions in  
 20 relation to that specific subject matter but we would close  
 21 our submissions, Chair, with the emphasis that section 18  
 22 is narrow, it does not extend to a prohibition on the  
 23 disclosure of Mr X's identity, his actual name. Chair,  
 24 those are our submissions.

25 CHAIRPERSON: Thank you, Mr Brickhill.

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1 Mr Ntsebeza, you'll be ready to argue tomorrow morning.  
 2 Can you give me an indication of how long you're likely to  
 3 be? I say that because, as I indicated, I won't be in a  
 4 position to give a ruling as soon as the argument is over  
 5 and then course there'll be a reply from the police as well  
 6 but General Naidoo I think would very much like to conclude  
 7 his evidence tomorrow if he can. Is that likely? How long  
 8 are you likely to be?

9 MR NTSEBEZA SC: Mr Chairman, in the  
 10 light of the submissions made by Mr Mpofu and Mr Brickhill,  
 11 there's very little that I will be dealing with. It's  
 12 going to be really – I don't think I'll be more than an  
 13 hour.

14 CHAIRPERSON: I see. And then there'll  
 15 be a reply from the police service, so it does seem as if  
 16 Major-General Naidoo may well be able to conclude his  
 17 evidence tomorrow, we'll certainly try to see that that  
 18 happens. Very well, we will now adjourn until tomorrow at  
 19 9 o'clock.

20 [COMMISSION ADJOURNED]

21 .  
 22 .  
 23 .  
 24 .  
 25 .

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