

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 208

**Lukmos**  
—communications—

17 MARCH 2014

TRANSCRIPT PAGES 24831 TO 25004

1 **[PROCEEDINGS ON 17 MARCH 2014]**

2 **[09:14] CHAIRPERSON:** Mr Semenya. I am sorry, I

3 did not say, the Commission resumes. The Commission

4 resumes. I would be grateful if every person who has a cell-

5 phone will see to it that the cellphone 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:** Chairperson, 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 have prepared heads of argument. We have

16 distributed these to the parties and we have 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 have 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 are ready to hear the full argument from everybody. I

24 received yesterday a set of heads, which had been sent by

25 SAPS. You will be arguing from these heads.

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 13<sup>th</sup>  
5 of August, and the families of 33 of the 34 miners who were  
6 killed on the 16<sup>th</sup>, and from AMCU, and I understand  
7 that the argument on behalf of those parties will be  
8 presented by Mr Mpofo and Mr Ntsebeza and possibly, it  
9 was not clear, counsel on behalf of AMCU as well. So those  
10 heads I have. Those are the sets of heads I have. Is  
11 there any other party to wishes to argue, apart from the  
12 ones I have mentioned, and if so, do they have 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

1 is presented in camera and by video link, that is (1).

2 (2), That only the Commissioners, the legal

3 representatives, and accredited media are 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, Chairperson.

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

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 do not 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."

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, Chairperson, 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

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

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,

1 in what manner they should present their evidence, it is  
2 regulated, or the Commission is empowered, it is part of the  
3 procedures of the Commission that the Commission has the  
4 power to regulate, and that is 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 have had is  
8 we have 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 had 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 enquire, 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 is going to  
25 be extensive reporting on what happens today, I think it

1 will assist the media considerably if they are given copies  
2 of the heads of argument. I do not know whether that has 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 Mpofu, 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, Chairperson.

11 **MS BALOYI:** We will do so, Chairperson.

12 **CHAIRPERSON:** And I take it the evidence  
13 leaders can do the same.

14 **MS PILLAY:** We will do so, Chairperson.

15 **CHAIRPERSON:** Yes, 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 could not 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

1 external video, television link.

2 **MS BALOYI:** Indeed so, Chairperson –

3 **CHAIRPERSON:** That is 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 has been submitted to the Commission. We  
14 summarise that in paragraph 10.

15 **CHAIRPERSON:** Yes, while you are busy with  
16 paragraph 10, I see you are 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

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 cannot 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

1 seek in this application, I have to make certain orders,  
2 which are set out in section 18. You have not incorporated  
3 those orders in the relief that you seek, but in terms of  
4 the act it is 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 am not told what the  
12 attitude of the Director is, I am not told whether he is  
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 does not include the orders which I am  
16 obliged to make –

17 **MS BALOYI:** Yes.

18 **CHAIRPERSON:** - in terms of the section.

19 So that is 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.

1 **CHAIRPERSON:** Is that not so?

2 **MS BALOYI:** Chairperson, that is indeed

3 the case. We do not deal with section 18 in the heads of  
4 argument, neither in our oral submissions.

5 **[09:34]** Chairperson what we will need to do, we realise  
6 is that even before the Chairperson delivers, the  
7 Commission delivers its rulings on this issue.

8 **CHAIRPERSON:** I make the ruling.

9 **MS BALOYI:** Yes.

10 **CHAIRPERSON:** That is clear from the terms  
11 of the Act and the regulations.

12 **MS BALOYI:** Yes.

13 **CHAIRPERSON:** If there is going to be an  
14 empowering ruling in relation to, for example, the external  
15 video link, which involves the whole Commission.

16 **MS BALOYI:** Yes.

17 **CHAIRPERSON:** All three of us would be  
18 involved in that, if that is going to happen, but everything  
19 else I am afraid is for me to decide alone. I may say that  
20 I have read, I read your heads last night and obviously  
21 studied the papers and I have also looked at some of the  
22 cases which have a bearing on the matter. There are some  
23 quite important points that arise for decision. I do not  
24 propose giving an ex tempore judgment or ruling at the end  
25 of the day.

1 **MS BALOYI:** Yes.

2 **CHAIRPERSON:** As you know, we are not

3 sitting on Wednesday and Thursday and I was proposing, if

4 possible, to make the order next Monday after I have had an

5 opportunity to consider the arguments that will be

6 presented as well as the cases that have a bearing on that.

7 So far as the Director of Witness Protection is concerned

8 and his involvement, which will afford you the opportunity

9 to ensure that what has to be put before me or what you

10 wish to put before me will in fact be put before me before

11 I am in a position – before I am in a position to make the

12 ruling and in fact make the ruling. As I say, I hope to be

13 able to make the ruling next Monday but it may be that in

14 the course of considering the matter and reading the

15 authorities and re-reading the argument I may find it

16 difficult to give the ruling as soon as next Monday but

17 I will obviously do it as soon as I can because I understand.

18 **MS BALOYI:** Yes.

19 **CHAIRPERSON:** The next witness is going

20 to be Colonel Vermaak. I understand you would like to call Mr

21 X. I anticipate that Colonel Vermaak will be some time in

22 the box or at the witness table but clearly you have to be

23 ready, not only to call Mr X when Colonel Vermaak has

24 finished but if there are certain things that have to be

25 put in place you'd obviously need time to ensure that that

1 happens. That is in the event of my making the order that  
2 you seek. If I do not, well, then of course that problem  
3 will not arise.

4 **MS BALOYI:** Indeed so, Chairperson.

5 **CHAIRPERSON:** Adv. Hemraj points out to me  
6 that if we're only going to know what the attitude of the  
7 director is, the director clearly is an important person in  
8 relation to the kind of relief you are seeking, the other  
9 parties here who will be opposing the relief sought may  
10 well wish to say something about the attitude of the  
11 director has to communicate to me as Chairman of the  
12 Commission. So if it can be done today, it would be  
13 better. I suppose if it cannot be done today, well, we will  
14 have to either try to do something about it tomorrow or  
15 even possibly next week if that becomes necessary but  
16 clearly it is important, regard being had to the role or  
17 potential role the director would play, that all the  
18 parties get an opportunity to deal with what he has to say  
19 as well. I am sorry to have interrupted you but that is an  
20 important point that –

21 **MS BALOYI:** Thank you, Chairperson.

22 **CHAIRPERSON:** - has to be addressed at  
23 the very beginning.

24 **MS BALOYI:** Thank you, Chairperson.

25 **MR MPOFU:** Sorry, Chairperson, may I

1 enquire – I agree with the Chairperson’s outline but may I  
2 enquire how, in that regime, we will accommodate our right  
3 of reply? In other words, obviously what the Chairperson  
4 is proposing will happen before the ruling is given but how  
5 are we to deal – how is the other side, so to speak, going  
6 to –

7 **CHAIRPERSON:** It depends – sorry to  
8 interrupt you, it depends what he says. Section 18 of the  
9 Act, that is the Witness Protection Act, says,  
10 “Notwithstanding any other law, the presiding officer at  
11 any proceedings” – which, by the way, include proceedings  
12 before a Commission – “in which the protected person is a  
13 party or a witness” – well, he would be a witness – “must  
14 make an order.” So “Notwithstanding any other law, the  
15 presiding officer at any proceedings in which the protected  
16 person is a witness must make an order prohibiting the  
17 publication of any information, including any drawing,  
18 picture, illustration, painting, photograph” and then they  
19 go on to describe that, “pamphlet, poster or other printed  
20 matter which may disclose the place of safety or location  
21 where he or she is as being under protection or where he or  
22 she has been relocated in terms of the Act, the  
23 circumstances relating to his protection, the identity of  
24 any other protected person, the relocation or change of  
25 identity of a protected person. Unless the director has

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 is 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 is not very clear  
10 what exactly is going to happen so we cannot say at this  
11 stage what facilities or opportunities will be afforded you  
12 to deal with what the director has to say.

13 **MR MPOFU:** Thank you, Chairperson.

14 **CHAIRPERSON:** Yes, Ms Baloyi, sorry.

15 **MS BALOYI:** Thank you, Chairperson.

16 Chairperson, I have 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.

20 **CHAIRPERSON:** I do not think that is  
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 is in your heads. As

1 long as the general thrust is clear it should be in order.

2 **MS BALOYI:** As the Chairperson pleases.

3 **CHAIRPERSON:** You will remember Mr Mpofu

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.

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, Chairperson, 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.

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 –

6 **CHAIRPERSON:** Well, does it? The reason  
7 I ask you that is, do you have 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

1 forum or tribunal, this is clearly not a court.

2 **MS BALOYI:** Yes.

3 **CHAIRPERSON:** We do not 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 have not

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, Chairperson, 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

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, Chairperson.

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

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, Chairperson.

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 have not 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 is

21 a – I will give the Chairperson the correct citation. I

22 think it is a 2008 decision of the Constitutional Court –

23 **CHAIRPERSON:** It cannot be the DPP

24 Transvaal if it is 2008 because the Transvaal as such had

25 ceased to exist but anyway if you can give me the

1 reference.

2 **MS BALOYI:** I will give the correct

3 citation, Chairperson.

4 **CHAIRPERSON:** Of course, there is 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 is 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 is 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 are not saying

25 that it is regulated, save for what you find in section 4

1 which –

2 **CHAIRPERSON:** Well, section 4 would have

3 to be interpreted, would it not?

4 **MS BALOYI:** Indeed so, Chairperson.

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, Chairperson.

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 are 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

1 may have been an earlier case that involved the DPP of

2 Transvaal and was only reported later, I do not 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 &

8 Others 2009(7) BCLR 637, a decision of the Constitutional

9 Court.

10 **CHAIRPERSON:** Do you know if it is

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 is

15 reported in the South African Law Reports as well?

16 **MS BALOYI:** Chairperson, I could not find any

17 other reference.

18 **CHAIRPERSON:** Well, I wouldd be grateful if

19 you could try to get us a copy of the judgment.

20 **MS BALOYI:** Yes.

21 **CHAIRPERSON:** Because it will obviously be

22 necessary in fact to refer to it.

23 **MS BALOYI:** Chairperson, we will do that.

24 **CHAIRPERSON:** Or it may be necessary to

25 refer to it, I do not know yet.

1 **MS BALOYI:** We shall do that, Chairperson, but

2 Chairperson, perhaps to –

3 **MR NTSEBEZA SC:** Chairperson, 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, Chairperson. Perhaps,

11 Chairperson, 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 Chairperson, 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 have

24 the dates; by reference to the website of the

25 Constitutional Court and also the website of the South

1 African Legal Information Institute we will 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 now has them. So you can proceed.

7 **MS BALOYI:** Chairperson, in paragraph

8 166, insofar as it is relevant to the question that the

9 Chairperson 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 am indebted to the

25 Chairperson.

1 **CHAIRPERSON:** You are really indebted to

2 Adv. Hemraj.

3 **MS BALOYI:** I am indeed, Chairperson.

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 does not seem to be any dispute –

10 **CHAIRPERSON:** You are now at paragraph?

11 **MS BALOYI:** Chairperson, 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 does not seem to be in dispute between the parties that

17 there may well be a risk to Mr X is he is 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 Chairperson, 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

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 am 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 are 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,

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 cannot be disclosed  
12 to Mr Ntsebeza for example because he appears for the  
13 families.

14 **MS BALOYI:** Yes.

15 **CHAIRPERSON:** It cannot 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 cannot 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

1 says he did. That is if he is telling the truth, because if

2 he is a total impostor and he was not there at all –

3 **MS BALOYI:** Yes.

4 **CHAIRPERSON:** - they will not know who he

5 is. But you presumably cannot be heard to contend that I

6 must make an order on the assumption that they do not 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 cannot 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 is something that

19 you will deal with in due course, I trust.

20 **MS BALOYI:** Yes. Chairperson –

21 **CHAIRPERSON:** Now when you have reached a

22 suitable stage I have been asked to authorise a comfort

23 break. It may be you would want to think about some of the

24 points I have put to you during the comfort break, but when

25 you – I do not want to interrupt the flow of your argument –

1 **MS BALOYI:** Yes.

2 **CHAIRPERSON:** - but when it is convenient

3 for you would you let me know and we will 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 will remember the

17 section, as far as disclosure is concerned that is governed

18 by regulation 10.

19 **MS BALOYI:** Yes.

20 **CHAIRPERSON:** And in line with the cases

21 to which you have referred me by way of analogy, quite a

22 strong language is used there. The regulation 10 itself

23 does not 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

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 have 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 cannot 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 have asked for, but I am not  
14 expecting you to give me an answer now. Perhaps we should  
15 take the comfort break now and we will 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, Chairperson.

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

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, Chairperson.

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 have 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 would be grateful if at the end you  
23 give me a typed version of what you seek.

24 **MS BALOYI:** Thank you, Chairperson.

25 **CHAIRPERSON:** Yes, please proceed. What

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 is just that the Chairperson, you have

7 prompted them in the engagement – which I am not complaining

8 about, Chairperson, I am 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 will hear what you have to say and consider it.

16 **MS BALOYI:** Chairperson, I am happy to

17 take this approach that on the – Chairperson, you asked the

18 question that if the name is disclosed and it is 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.

1 **CHAIRPERSON:** Because the point being if  
2 Mr X played the prominent role he says he did, if he is  
3 telling the truth in other words, then there is 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 is 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 might not admit that  
13 that is so and in fact they may be being truthful if they  
14 do not admit it but if he is correct that he did all the  
15 things he says he did, it is 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

1 the justification is, well, they must not know his names  
2 except for certain limited purposes, but it is  
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 is 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 is 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

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 will not 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 am not putting it because I  
16 have a fixed view on it because I have not 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 will not 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 is the point of imposing a restriction which in fact is  
24 unnecessary because, it will be contended – rightly  
25 or wrongly, I do not know but I suspect it will be contended

1 – what's the point of imposing restrictions that the  
2 strikers must not know who he is, if it is overwhelmingly  
3 probable that they do know who he is, if he is telling the  
4 truth?

5 **MS BALOYI:** Yes.

6 **CHAIRPERSON:** That is the point you have  
7 to deal with. I am not sure what the answer is, that is why  
8 I am 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 Mpofu, 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 does not, it is 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

1 implicates – it is inherent in that that you could not  
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 does not relate to that. It does not relate to  
8 excluding the public, it relates to excluding the parties.  
9 If it is correct – I do not 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 is telling the truth,  
17 that the strikers who heard him saying I am the person who  
18 did all these things, that the strikers would not know who  
19 he is? If he is 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 is 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 is the

1 question. I am not debating it with you, I am 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 am 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 is not 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 is appropriate, that is a point we can talk about later.

25 The identity of the witness isn't disclosed from the

1 accused, is not concealed or withheld from the accused. So  
2 you are in fact asking now for relief which is in fact wider  
3 than the relief that is 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 is a factor which has to be given appropriate  
7 weight and that is what I am 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 is true it is not a trial, it is true that  
13 there is 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 am putting to

1 you, you actually – if the analogy is with a criminal  
2 trial, you are 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 am 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 am sorry to interrupt you.  
17 Section 4 talks about desirable.

18 **MS BALOYI:** Yes, necessary and/or  
19 desirable, Chairperson.

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 is either

1 necessary or it is not 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

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

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 do not think it is

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 do not think that is the

21 suggestion raised. The suggestion raised is that if he is

22 allowed testifying 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

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 is difficult sometimes to compensate for  
5 that. I think I am correctly summarising the arguments that  
6 have been put up on the other side. So I do not think they  
7 say that the evidence is not material. I do not think you  
8 even have to address me on that, quite clearly it is  
9 material and if it is true it'll obviously assist us  
10 substantially. I do not 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 is 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 has not 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 is a summary, in a few sentences, of their argument but  
25 they will probably advance the argument at greater length

1 than I have, some of them anyway.

2 **MS BALOYI:** Of course, Chairperson, 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 is

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 am

16 just looking for something in the opposing affidavit I want

17 to put to you. You do not 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 have

24 substantially altered that because the identity will not,

25 his identity will not in fact be withheld. Their counsel

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 is John Smith and they say right,  
7 well, we do not know John Smith. He may not really be John  
8 Smith, he may be Peter Jones and they will not 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 do not  
13 address at all in your argument, as far as I can see, and  
14 that is why I'd be pleased to get – not necessarily now, you  
15 understand, I am 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 is 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

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 do not 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 life adversarial exchange?  
8 And one of the points to be considered there, which you  
9 do not 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 is at page 266 of the All South  
12 Africa Reports, I am 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

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 will not be allowed

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 is telling a pack of lies, assuming those are the facts,  
4 I am not saying they are – will not 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 will not 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 is  
16 hardly anybody in court but if there were many people  
17 there that knew him and knew he was not telling the truth  
18 and who looked at him, he was not prepared to persist. That  
19 may or may not be a cogent factor in this case but it is  
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 are  
23 asking to happen, then you have 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

1 it is 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 are 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 is exposed to, the danger that he will not  
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  
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 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 cannot balance things unless you know what is on each  
15 side, each pan of the scale. Now what do you say about  
16 that one? You do not 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.

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

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 does not take away from affording – the fact that he is  
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 does not 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.

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 Chairperson, 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.

25 Chairperson, we submit that the nature of the

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.  
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.

22 **CHAIRPERSON:** What do you mean by  
23 compromise? I am not sure that I understand how that  
24 regulation operates here but again you do not have to answer  
25 me now but I am a bit puzzled about that.

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 it is being tendered  
8 in this Commission in a certain manner may affect criminal  
9 proceedings, for example, later on, Chairperson.

10 Chairperson, we refer in the heads of argument to  
11 the – I have made reference, Chairperson, to Leepile, the  
12 decision in Leepile (1) both for the –

13 **CHAIRPERSON:** Sorry, which paragraph are  
14 you at now? 12.2?

15 **MS BALOYI:** I am looking at 12.1,  
16 Chairperson.

17 **CHAIRPERSON:** 12.1, 12.2 yes.

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 am 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

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 is 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 do not 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 do not 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 is Ntoae but  
23 it is possible –

24 **CHAIRPERSON:** Ntoae, okay. It is  
25 reported –

1 **MS BALOYI:** It must be Ntoae,

2 **CHAIRPERSON.**

3 **CHAIRPERSON:** It is reported, 2000(1)

4 SACR 17.

5 **MS BALOYI:** I am indebted to the

6 Chairperson.

7 **CHAIRPERSON:** And the passage you are

8 referring to is at page 29, I am informed by Adv. Hemraj

9 who has 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 paragraph 12.3, is

14 it not?

15 **[11:16] MS BALOYI:** Yes, indeed Chairperson.

16 **CHAIRPERSON:** Yes, thank you. The

17 passage referred to is set out in your heads.

18 **MS BALOYI:** It is, Chairperson. And Chairperson, 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, Chairperson, 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 have 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

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 is testifying by

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 is lying.  
6 He is much happier to tell a pack of lies before an audience  
7 of people who do not know he is lying and may well be taken  
8 in by what he says.

9 **MS BALOYI:** Yes.

10 **CHAIRPERSON:** That is the point.

11 **MS BALOYI:** Yes.

12 **CHAIRPERSON:** Now, it may not be decisive  
13 but it is one of the factors that is obviously got to be  
14 borne in mind. I take it you would 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 am 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 to consider various  
24 possibilities and the safeguard which Wigmore mentions  
25 which is cited with approval by Judge Ackermann in the

1 Leepile case is the one I read you –

2 **MS BALOYI:** Yes.

3 **CHAIRPERSON:** And that would be removed,  
4 would it not?

5 **MS BALOYI:** Chairperson, that much is

6 conceded, that becomes the consequence of it but again,

7 Chairperson, it is part of the burden of achieving the

8 correct balance between serving the interests of having the

9 witness testifying as fully, as comprehensively and as

10 freely as possible and yet minimising as much as possible

11 the safeguards that may be there to ensure that his

12 evidence is true and correct. Chairperson, insofar as the

13 evidence about video link is concerned, Chairperson, again

14 this is – the Act, the Commissions Act does not deal with

15 this at all and here we have to draw parallels from the

16 statutes that permit.

17 **CHAIRPERSON:** Yes, but the fact that the

18 Commissions Act does not deal with it at all and the

19 regulations do not deal with it at all, would give rise to

20 an argument that I do not have the power. It may be

21 desirable to do it but if I haven't got the power to do it

22 then I cannot make the order.

23 **MS BALOYI:** Yes.

24 **CHAIRPERSON:** And if the order I – if I

25 were to grant the relief you seek without the power, then

1 of course a court of review would set aside the order.

2 **MS BALOYI:** Yes.

3 **CHAIRPERSON:** So you have to satisfy me

4 that I have the power. Now you say that I can get the

5 power if the Commission, in other words not Chairperson alone but

6 all three Commissioners are prepared to say that that

7 procedure would be appropriate. Well, yes, the Commission

8 would say that in an appropriate case the Commission could

9 have that, could follow that procedure. I, of course,

10 would still have to decide whether it was appropriate in

11 this particular case but it may well be said that our

12 powers to regulate procedure do not go so far as to actually

13 confer a power on the Chairman which the statute does not

14 give him and there is a lot of what we lawyers pompously

15 call legal learning on the subject of the distinction

16 between procedural regulations and actual powers that are

17 exercised.

18 So it may be that the solution that you seek to

19 find in regulation 19 may be an unsafe way of proceeding.

20 So the first question I have to consider, even before I

21 decide whether it is appropriate to exercise the power in

22 relation to a video link, is to see whether I have got the

23 power and, if so, what the source of the power is. Now you

24 concede, as I – you only rely on 19, as I understand,

25 regulation 19 – so effectively you are conceding, if I may

1 put it, I hope, without being terribly unfair, you are  
2 conceding that I haven't got the power but I may get the  
3 power if the Commission decides to give it to me. And that  
4 raises a further question, it is whether the Commission has  
5 got the power to give me the power. I am not saying the  
6 answer to all those questions is necessarily against you  
7 but they are all matters I have to consider and you have  
8 to persuade me that the Commission has the power to  
9 give me the power because if it hasn't got the power to  
10 give me the power then even if it purports to give me the  
11 power, it will not help.

12 Alternatively, if there is another basis for  
13 saying I have the power, well, then I can do that also but  
14 it does not help to say it'll be a good thing if I do it and  
15 it would be very sensible, if Parliament did not consider it  
16 necessary in 1947 or subsequently because the Commissions  
17 Act has been amended from time to time since then, to give  
18 the power expressly and if the President didn't give me the  
19 power in the regulations, then the power has to come  
20 from somewhere. Anyway, and it does not help to tell me  
21 that it can be done in criminal cases where the power is  
22 expressly conferred because I know that.

23 So the first question has got to be, have I got  
24 the power? Now most of the orders you seek, I do not have  
25 the power to give and you very fairly set out the statutory

1 provisions that apply and one has got to add in a reference  
2 to what the Witness Protection Act says, but as far as the  
3 video link point is concerned, which we are busy with now,  
4 the first thing you have to do is to persuade me I have  
5 the power, alternatively that the Commission has the power  
6 to give me the power and that it would be appropriate for  
7 them to do so.

8 **MS BALOYI:** Yes. Chairperson, the  
9 question, in our understanding, is about how the Commission  
10 receives evidence. The Commissions Act, Chairperson,  
11 does not by way of example stipulate, specifically stipulate  
12 that the Chairperson can receive evidence by way of  
13 affidavit. It does not have that specific stipulation. It  
14 is beyond –

15 **CHAIRPERSON:** But it also does not say  
16 that evidence has to be given orally.

17 **MS BALOYI:** Yes.

18 **CHAIRPERSON:** And be subjected to cross-  
19 examination and obviously the affidavit that comes and is  
20 read out or is otherwise made available, is part of the  
21 public hearing just as a court in a matter on motion, an  
22 application court is sitting in public even though there is  
23 no oral evidence being given –

24 **MS BALOYI:** Yes.

25 **CHAIRPERSON:** There are affidavits, so

1 I am not sure that reliance on the fact that we have 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

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, Chairperson, 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

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 stuttering, his hesitations and all of that. And that  
8 therefore the fact, by itself, that he is testifying by  
9 video link is not in any way, it does not 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 is 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 is  
19 necessary that he must give evidence by video link? I know  
20 there are concerns for his safety. I am not sure that  
21 I understand them fully. I would be grateful if you could  
22 elaborate on that.

23 **MS BALOYI:** Yes.

24 **CHAIRPERSON:** It is very often a case of  
25 video link if a witness is likely to be overborne by

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 is not a child and so on. It is solely for his  
10 safety but what is the compelling argument for that?

11 **MS BALOYI:** Yes. Chairperson –

12 **CHAIRPERSON:** I mean he is an accomplice,  
13 is he not?

14 **MS BALOYI:** He would be, Chairperson.

15 **CHAIRPERSON:** He would 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

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 is very  
4 rare in an ordinary case, I am not talking about children,  
5 sexual cases and that kind of thing, it is 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 is what you have to show,  
10 do you not?

11 **MS BALOYI:** Yes.

12 **CHAIRPERSON:** I am not saying you cannot, 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 am sorry to interrupt you.

24 I am not sure that it would be a very satisfactory procedure  
25 because your learned friends who oppose would obviously

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 cannot just sort of augment your case as you go along and

6 just before I am ready to give the order, give me some extra

7 material. That is 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 do not always get an opportunity, you are

11 not supposed to supplement your case in reply although

12 there are exceptions and this may be one of them. One

13 must not be unduly technical in a case which may literally

14 involve life and death, I understand that also but you

15 cannot just augment your case as you go along and say, well,

16 you have ready to give judgment, if you are satisfied or need

17 to be satisfied, here is 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 do not suggest it necessarily is

20 so, I am 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 do not think

24 it is 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

1 and we have another affidavit. That is 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 am indebted to the  
15 Commissioner. Chairperson, I am getting noises at the back  
16 here that I should realise that it is tea break, past.

17 **CHAIRPERSON:** No, the matter to which you  
18 now refer is one that cannot be ignored. We shall 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

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 am not

6 complaining. Chairperson, 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 have a problem with that one. The fact that there is a

1 statute that authorises it does not help me at all because  
2 here there isn't a statute that authorises it, so I do not  
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 is not a problem created by that. I understand that, but my  
9 difficulty is I do not 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 is no such section as 158.

13 **MS BALOYI:** Yes.

14 **CHAIRPERSON:** That is my problem. So in  
15 other words I am not saying I do not have the power; all I am  
16 saying is, it does not help me –

17 **MS BALOYI:** Yes.

18 **CHAIRPERSON:** - to say that I have  
19 the power because in other circumstances courts have the  
20 power because of a statutory provisions. That is the point  
21 I am putting to you.

22 **MS BALOYI:** Yes.

23 **CHAIRPERSON:** You understand that?

24 **MS BALOYI:** Chairperson, the point really  
25 that I wanted to make, or the reference that I would make

1 to 158 was to the factors that are 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.

5 **CHAIRPERSON:** They are relevant surely on  
6 the exercise of the power where the power exists.

7 **MS BALOYI:** Yes.

8 **CHAIRPERSON:** The question I asked you  
9 was have I got the power, and I said there is a lot to be  
10 said for the proposition that if I had the power, I  
11 obviously have not heard the argument of the other side yet,  
12 but there is 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.

15 **MS BALOYI:** Yes.

16 **CHAIRPERSON:** And it does not 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.

20 **MS BALOYI:** Yes.

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

1 does not help me on the first question. If I haven't got

2 the power, I cannot exercise it.

3 **MS BALOYI:** Yes.

4 **CHAIRPERSON:** However appropriate it

5 might be for me to exercise it if I had it. You understand

6 the point?

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 is 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 Chairperson, and we submit that acting under regulation 19 the

18 Commission does have the power. Chairperson, you asked the

19 question –

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

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 is correct, is it not?

5 **MS BALOYI:** It is correct, Chairperson.

6 **CHAIRPERSON:** Yes.

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 have asked the  
10 question what the reasons are 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 is 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.

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 are

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 is 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 have 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 is nothing else.

24 **CHAIRPERSON:** Nothing else that you wish  
25 to say? You stand by what is in your written –

1 **MS BALOYI:** Not at this stage, Chairperson.

2 We will deal with some of the issues that, Chairperson, you  
3 have raised, we will address them in reply once we have had  
4 sufficient time to consider them.

5 **CHAIRPERSON:** Well, with respect, that is  
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 have 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 is going to present the argument on  
22 behalf of the evidence leaders, argue and then perhaps  
23 after that, I do not know about what stage we will 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

1 to which the opponents would wish to answer. I do not think  
2 it is satisfactory to have answers on as it were new points  
3 at the end because that is 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, Chairperson.

9 **MS BALOYI:** Chairperson –

10 **CHAIRPERSON:** Yes, sorry, Ms Baloyi.

11 **MS BALOYI:** Yes, 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 is nothing else,  
16 there is nothing new to address.

17 **CHAIRPERSON:** I see. Alright, thank you,  
18 then there is 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

1 be three people who are going to argue, but they will be

2 covering different sections, so effectively it will not –

3 **CHAIRPERSON:** I do not think we should

4 have any repetition.

5 **MR MPOFU:** Yes.

6 **CHAIRPERSON:** So who are the three?

7 **MR MPOFU:** It is 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 will be covering mainly

12 the issue of the powers.

13 **CHAIRPERSON:** You have got written heads,

14 have you?

15 **MR MPOFU:** We have given you the heads,

16 Chairperson.

17 **CHAIRPERSON:** I see.

18 **MR MPOFU:** In the morning.

19 **CHAIRPERSON:** Yes, you are quite right.

20 **MR MPOFU:** Yes.

21 **CHAIRPERSON:** I got them. I have not had

22 a chance to read them.

23 **MR MPOFU:** Yes, we will –

24 **CHAIRPERSON:** You are quite right.

25 **MR MPOFU:** I am dealing mainly with the

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 should not exercise it on the facts of this case in

17 my discretion. That is going to be the argument?

18 **MR MPOFU:** Yes, because if you do not have

19 the power, the discretion does not arise.

20 **CHAIRPERSON:** Yes, I understand. Alright,

21 no that seems satisfactory division of labour. Ms Pillay,

22 you have to deal with all the matters yourself, of

23 course.

24 **MS PILLAY:** Yes, I am, Chairperson. If I may

25 kick off, Chairperson, with the question of the application of

1 the Witness Protection Act, the submissions that we make,  
2 Chairperson, 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 am  
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 have wasted the whole time listening to  
11 argument in respect of orders that I am 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 Semanya?

15 **MR SEMENYA SC:** Chairperson, 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 is either going to testify  
19 voluntarily, or we will *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, Chairperson. We anticipate the answer will be a  
23 yes though.

24 **CHAIRPERSON:** I do not think that is right.  
25 Section 18 deals with orders relating to the identity,

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 will 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 is 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 has 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

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:** Chairperson, our reading of  
6 section 18 is the following; that that the Chairperson 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 is not  
11 a power, it is an obligation. "Notwithstanding any other  
12 law the presiding officer must make an order prohibiting"  
13 certain things. So it is not, I haven't got a power to do  
14 it, I have to do it. If I do not 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 Chairperson 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 Chairperson

1 should not exercise that power, then he must say so, but I

2 thought we are answering to a different enquiry.

3 **CHAIRPERSON:** Yes. No, the only reason I

4 raise it was in the replying affidavit there is 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 is

7 really where it comes from.

8 **MR SEMENYA SC:** We expect the Director to

9 say yes, Chairperson. Can we argue on that provisional basis?

10 **CHAIRPERSON:** Alright, you –

11 **MR SEMENYA SC:** I am told he says yes.

12 We will just have to put it on paper.

13 **CHAIRPERSON:** I see. No, if you give me

14 the assurance that it is 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, Chairperson. If I may pick

21 up from paragraph 2.1 of our heads of argument, Chairperson, 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

1 or not this Commission has the power to grant the  
2 individual orders sought by SAPS.  
3 We intend also, Chairperson, 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, Chairperson, we intend to make submissions on the  
7 question of appropriate relief.

8 **[12:27]** To begin then, Chairperson, 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, Chairperson, 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, Chairperson, and which in a sense is

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, Chairperson, 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 had 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 paragraph 3, it is 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 are not given any special  
17 rights as parties. That is correct, is it?

18 **MS PILLAY:** That is our understanding as  
19 well, Chairperson.

20 **CHAIRPERSON:** Yes.

21 **MS PILLAY:** To begin, Chairperson, then with  
22 the first question, and that is whether this Commission has  
23 the authority to order that the testimony of Mr X be in  
24 camera, the starting point obviously is, Chairperson, as has  
25 already been argued, section 4 of the Commissions Act which

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, Chairperson, that – and just picking up on  
10 a debate that was had earlier, that it is important that  
11 this Commission adjudicate this application on the  
12 assumption that section 4 is constitutional and valid –

13 **CHAIRPERSON:** I would not have power to  
14 make any contrary assumption, would I?

15 **MS PILLAY:** No, you would not, Chairperson.

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 am 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 am  
25 not even sure what my powers are in relation to the

1 regulations. You know judges and magistrates even –  
2 except, no, a magistrate wouldn't be able to deal with a  
3 regulation that is 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 am not sitting  
6 here as a judge, I am 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 Chairperson. The question therefore, Chairperson, and having regard to  
11 that point the question really is whether on the facts it is  
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 am 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

1 the legislation.

2 The second issue then, Chairperson, 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 is in  
6 regulation 10 which expressly states that the Chairperson in  
7 instances where the Commission, the Chairperson has allowed an  
8 in-camera hearing the Chairperson 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 is  
12 at paragraph 10 of the heads of argument. So clearly,  
13 Chairperson, in relation to those two orders there is 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, Chairperson, that picking up from  
25 section 1(b)(1) of the Commissions Act, which permits the

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 is an  
6 additional source of power, and in that context, Chairperson,  
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, Chairperson, is not defined  
13 in the regulations. It is not circumscribed in the  
14 regulations. So we will submit that it is 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, Chairperson, 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 is also got the power to adopt its own  
25 procedures, given those two express powers this Commission

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 do not cite, though, what I  
16 think is the leading case that is been followed by the SAC  
17 many times, Middelburg Municipality versus Gertzen, 1914  
18 AD, where Sir James Rose Innes said that "An authority  
19 granted to a functionary concerning 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 –

1 **MS PILLAY:** Yes.

2 **CHAIRPERSON:** - 2009. So that is - I

3 mean I prefer, with respect, the formulation by Sir James

4 Rose Innes rather than a paraphrase by an academic, but

5 there does not appear to be a material difference between

6 what Professor Baxter said and what Sir James Rose Innes

7 said.

8 **MS PILLAY:** It is in fact a trite

9 proposition, Chairperson -

10 **CHAIRPERSON:** Yes.

11 **MS PILLAY:** - but it is the powers which

12 are reasonably necessary to carry out the express powers.

13 Now, we would again -

14 **CHAIRPERSON:** [Microphone off, inaudible]

15 **MS PILLAY:** We would submit that in the

16 context where you have an express power to compel a witness

17 to appear before the Commission, and given the fact that

18 you have the power to determine your own procedure, there

19 must be -

20 **CHAIRPERSON:** [Microphone off, inaudible]

21 Sir James Rose Innes said it was "the powers reasonably

22 required to carry out the object of the enactment that is

23 to deal fully and effectively with the subject assigned."

24 **MS PILLAY:** Yes.

25 **CHAIRPERSON:** Now the point would be, I

1 suppose, that it could be contended anyway, and I take it  
2 you are contending that in order to deal fully and  
3 effectively with the matter in hand, to get evidence from a  
4 witness whom we have compelled to come, may be reluctant to  
5 testify because of the fear of fatal consequences if he  
6 does, that that power must be included. I take it that is  
7 the contention.

8 **MS PILLAY:** That is our submission,  
9 Chairperson. We tie this argument, Chairperson, or this interpretation  
10 to section 39(2) of the Constitution to the extent that we  
11 are bound to adopt an interpretation of both the act and  
12 the regulations, an interpretation that will further the  
13 spirit, purport and objects of the Bill of Rights,  
14 including, Chairperson, the right to life, the right to dignity,  
15 the right to freedom and security of the person.  
16 So we would urge the Commission to adopt an  
17 interpretation to the question of whether it has the  
18 procedural power under regulation 19 or an implied power  
19 derived from regulation 19, read with section 3(1) of the  
20 act, in a manner to promote and protect the rights of  
21 witnesses who appear before it, and enable the Commission  
22 to order that witnesses testify via alternative means in  
23 circumstances where it has been shown to be necessary to do  
24 so.

25 The argument we make at paragraph 21, Chairperson, of

1 the heads of argument is that we have been unable to locate  
2 any specific South African cases dealing, which expressly  
3 recognise the implied power of a commission like this one  
4 to order that witnesses testify via alternative means. It  
5 might be, Chairperson, that one of the reasons for that is that  
6 the Criminal Procedure Act has got an express power and  
7 that the cases which had emerged from that had been based  
8 on the section 158 express power rather than an implied  
9 power to protect a witness.

10 We do, however, point out that we have found case  
11 law in Australia where the Courts have recognised an  
12 implied power to allow witnesses to testify –

13 **CHAIRPERSON:** Do you have copies of those  
14 judgments?

15 **MS PILLAY:** We do, Chairperson. We can make  
16 those available.

17 **CHAIRPERSON:** The New South Wales case,  
18 the John Fairfax case –

19 **MS PILLAY:** Yes.

20 **CHAIRPERSON:** - that presumably is the  
21 publication case that deals with –

22 **MS PILLAY:** Yes, that is so.

23 **CHAIRPERSON:** Press publication case, I  
24 imagine.

25 **MS PILLAY:** That is so, Chairperson.

1 **CHAIRPERSON:** John Fairfax & Sons is a –

2 **MS PILLAY:** Yes.

3 **CHAIRPERSON:** - media house, I think, in

4 Australia.

5 **MS PILLAY:** Yes.

6 **CHAIRPERSON:** Is that a single judge

7 sitting in New South Wales, or the New South Wales Court of

8 Appeal? Do you know?

9 **MS PILLAY:** I think, Chairperson, if I am just –

10 that was the one case which we struggled to find, so we have

11 had to rely on writings on that case. I think it is not a

12 single-judge case, if I am not mistaken.

13 **CHAIRPERSON:** Is it not available

14 through –

15 **MS PILLAY:** We have struggled to find that

16 particular –

17 **CHAIRPERSON:** Oh, of course –

18 **MS PILLAY:** We have the others.

19 **CHAIRPERSON:** It is 1986. I think a lot

20 of the websites in this case were only established after

21 that.

22 **MS PILLAY:** Yes, but we have managed to

23 find substantial academic writing on the case.

24 Essentially, Chairperson –

25 **CHAIRPERSON:** The University of Cape Town

1 has 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 will look into it,

5 Chairperson.

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 Chairperson, and can make –

12 **CHAIRPERSON:** Which court is that?

13 **MS PILLAY:** I am just looking, Chairperson.

14 I have got my copies of the cases.

15 **CHAIRPERSON:** Well, you do not 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, Chairperson, 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

1 Court's jurisdiction to serve the administration of  
2 justice.  
3 Similarly, Chairperson, 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 have not  
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 is, appropriate to do that - obviously it is  
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 is far  
21 less difficulty, shall we say, in implying that power if  
22 there is power to grant the other order, but although there  
23 will still be argument whether it is appropriate, but  
24 that is, we in a field of *vires* at the moment, are we not?

25 **MS PILLAY:** But we would submit the legal

1 basis for the audio feed power is exactly the same as the  
2 one for the video link power.

3 Coming then, Chairperson, to the third issue which we  
4 wanted to address, and that is 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 have dealt with already, Chairperson, 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 is not necessary or desirable.

12 We say in paragraph 20, Chairperson, and it is 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

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 are public and that witnesses are 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 is important, Chairperson, 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 have been shown that it is  
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 Chairperson, 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, Chairperson, that in the  
22 exercise of this Commission's discretion on whether or not  
23 to grant the application it is important that the  
24 constitutional principles and the constitutional – that the  
25 discretion be exercised to the prisms of the Constitution,

1 having regard to the rights, the competing rights of both  
2 parties.

3 **[12:46]** The one we have already dealt with, which is in a  
4 sense a corollary of the principle of open justice and why  
5 it is necessary for the hearing to be public.

6 But the others, Chairperson, 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 is the case of Madlavu. Now an important  
20 aspect of that decision, Chairperson, 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

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 is 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 is an important feature which

11 ought to factor into the exercise of the discretion.

12 Now crucially, Chairperson –

13 **CHAIRPERSON:** Those are summarised in Mr

14 Pretorius's replying affidavit.

15 **MS PILLAY:** That is so, Chairperson, 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, Chairperson.

21 **CHAIRPERSON:** That is a factor which

22 obviously must weigh very heavily.

23 **MS PILLAY:** Yes. We say, Chairperson, that

24 having regard to what we understand to be Mr X's version

25 and the extent to which he implicates, and directly

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, Chairperson, and we have gone quite carefully  
7 through the opposing affidavit filed by the respondents to  
8 this application, and we do not 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 is  
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, Chairperson, 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 is a risk that by Mr X travelling

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 is a risk, where there is 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

1 would be an appropriate test. It would be akin –

2 **CHAIRPERSON:** That was dealt with in the

3 Leepile cases by Judge –

4 **MS PILLAY:** And that is the akin of what

5 we have thus far put the test as reasonably necessary for

6 the protection of his life.

7 **CHAIRPERSON:** In Mr du Toit's textbook at

8 page 22-32 he summaries the Madlavu case, says you do not

9 need a probability, and he makes the point that you have just

10 made, that the Court can use its own experience, and then

11 he goes on to refer to Leepile's case where it was held

12 that the requirement is not probability, but reasonable

13 possibility, and I remember in that case the word "risk"

14 was used at one stage as well, so that on your argument

15 what is required would be the reasonable possibility, or

16 the risk - not a remote risk of course, or remote

17 possibility – of harm. That is what would have to be shown.

18 **MS PILLAY:** We would submit –

19 **CHAIRPERSON:** And whether it has been

20 shown of course is a matter you will be dealing with in due

21 course.

22 **MS PILLAY:** And in assessing whether

23 what's reasonable, the Court can have regard to the

24 experience of the Commission thus far and the treatment of

25 witnesses.

1 We summarise in paragraph 31 –

2 **CHAIRPERSON:** You are now moving to

3 paragraph 31. Is that right?

4 **MS PILLAY:** That is so, Chairperson. We

5 summarise in paragraph 31 the rights that have been relied

6 upon by the respondents and the right, we say the rights

7 that are being relied on, we say, Chairperson, does not take the

8 matter much further than what we have referred to as the

9 Constitutional Court dicta that require as a default

10 position to the hearings be public. But ultimately the

11 rights are not absolute and the rights are subject to

12 limitation, especially in the context of then what the

13 Court is called upon to do is to conduct a balancing

14 exercise.

15 So the real enquiry – and this is where we would

16 ask the Commission to locate the debate amongst the parties

17 – the real enquiry is around balancing all the competing

18 interests.

19 **CHAIRPERSON:** Yes, I was really concerned

20 when Ms Baloyi was arguing to make sure that we had all the

21 competing interests. As I said, if you are going to perform

22 a balancing exercise correctly you have got to make sure that

23 everything that is appropriate goes into each of the two

24 pans of the scale, otherwise your balancing exercise will

25 be inappropriately done.

1 **MS PILLAY:** We accept that that is  
2 correct, Chairperson. Now we would say, Chairperson, that the primary  
3 issue which weighs heavily in tipping the balance in favour  
4 of the order sought by SAPS is this acceptance that there  
5 is a threat to the life of Mr X and –

6 **CHAIRPERSON:** Do not we need – is that not  
7 putting it perhaps too high? Do we not need a reasonable  
8 possibility or a substantial risk as opposed to – does it  
9 have to go higher than that? It may well be of course that  
10 they may argue that they have gone higher, they succeeded  
11 in showing more than they have to show, but for purposes of  
12 determining the test have I stated it correctly, prima  
13 facie obviously subject to argument we are going to hear  
14 later, we do not need a probability, we need a reasonable  
15 possibility, or what one can perhaps paraphrase by calling  
16 a real risk.

17 **MS PILLAY:** Yes. Chairperson, we are happy to  
18 accept the test that what is required is a reasonable  
19 possibility of harm, but what's telling is that none of the  
20 parties argue that that possibility does not exist and if  
21 you move from that basis, Chairperson, we say that the orders  
22 that have been sought by SAPS have built into them  
23 sufficient mechanisms and safeguards in order to ensure  
24 that the balancing exercise ultimately is in favour of  
25 granting the orders firstly for the testimony to be

1 admitted in camera, and secondly via video link.  
2 The first special feature, which we want to draw  
3 the Court's attention to is the fact, as we have already  
4 stated, that the in-camera order is a watered-down one in  
5 the sense that members of the media will be present while  
6 Mr X is testifying, and secondly that there will be a live  
7 audio feed of his testimony to an adjoining room.  
8 Now this mechanism, this special feature we would  
9 submit, Chairperson, in a sense addresses some of the concerns  
10 which have been identified by Wigmore around inclination to  
11 falsify evidence, etcetera, if Mr X is aware that while he  
12 is testifying that the members of the public will be  
13 following his testimony via live audio feed. It is not an  
14 ideal solution to that concern raised by Wigmore, but it  
15 certainly goes a long way to answering some of the  
16 concerns.

17 **CHAIRPERSON:** When you have reached an  
18 appropriate stage in the argument will you tell me so we  
19 can take the lunch adjournment? I am not cutting you off  
20 immediately now, but when you consider it appropriate, let  
21 me know.

22 **MS PILLAY:** Chairperson, I have a number of  
23 factors to go through, so I think if it is okay with the  
24 Chairperson we can take the break now.

25 **CHAIRPERSON:** We will take the lunch

1 adjournment. Let us try to be back at quarter to 2. I know  
2 it is 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, Chairperson.

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 will be referring to  
12 that later, but thank you very much for sending these to  
13 me.

14 **MS PILLAY:** Thank you, Chairperson. Chairperson, we  
15 pickup 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, Chairperson, 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, Chairperson, to the case of S v Staggie where in  
25 the context of section 158 of the Criminal Procedure Act

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, Chairperson, 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 does not make any sense that they would not then –  
23 **CHAIRPERSON:** Before you carry on, let me  
24 ask Mr Semenza a question. I do not want you to tell me  
25 where the witness will be but if I were to grant the order

1 that Ms Pillay suggests, that is in 35.1, would there be  
2 practical problems? Do you understand the point?  
3 Theoretically, I put this up, obviously it is 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, Chairperson.

13 **CHAIRPERSON:** Thank you.

14 **MS PILLAY:** Thank you, Chairperson. 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, Chairperson that  
21 having regard to these three additional factors and there  
22 safety mesh – 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

1 Chairperson, what we have 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, Chairperson, just a  
6 correction. We have 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 does not, there might well be practical  
13 problems if people arrived and said, we are 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 is if we are 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

1 think from a practical point of view it is probably  
2 necessary, if we are going to go that route. If we're not  
3 going to grant the order at all then this problem will fall  
4 away.

5 **MS PILLAY:** Chairperson, 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, Chairperson,  
13 and there is also an additional insertion and I think that  
14 the rest of the orders are exactly as sought by SAPS.  
15 Chairperson, those are our submissions.

16 **CHAIRPERSON:** Thank you, Ms Pillay. Mr  
17 Mpofu?

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 do not 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

1 eyewitness. 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.  
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 will come  
14 back to the question, the issue of interpretation.  
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 are  
21 talking about a likelihood which we will argue is something  
22 higher than a mere possibility.

23 **CHAIRPERSON:** You say a likelihood is  
24 required?

25 **MR MPOFU:** A likelihood, yes. We will say

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.

9 **CHAIRPERSON:** Let us just finish your  
10 recital of what your argument is not about.

11 **MR MPOFU:** Is not about, yes.

12 **CHAIRPERSON:** Are those the three points?

13 The first is that you do not say that X's evidence is not  
14 relevant or necessary, you do not say the Act or the  
15 regulations are unconstitutional but you say they must be  
16 interpreted through the prism of the Constitution.

17 **MR MPOFU:** Correct?

18 **CHAIRPERSON:** And you say, you do not say

19 there is no possibility of harm but you say –

20 **MR MPOFU:** That is not sufficient –

21 **CHAIRPERSON:** - that a likelihood is

22 required and you will submit in due course that the

23 likelihood is –

24 **MR MPOFU:** Is required, yes. Well, maybe

25 I might as well say two things in that regard, Chairperson.

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.

9 **CHAIRPERSON:** Thank you, I have it.

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.

13 **CHAIRPERSON:** When you are referring to  
14 things that are in your heads I would be grateful if you would tell  
15 me.

16 **MR MPOFU:** Yes, yes.

17 **CHAIRPERSON:** It means I do not have to  
18 write it.

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.

25 **CHAIRPERSON:** The passage in – which

1 Leepile judgment you are 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 am 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, yes.

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

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:** Yes, that –

18 **CHAIRPERSON:** So there is that.

19 **MR MPOFU:** True, but that does not 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

1 unrelated and that is exactly why he is 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, yes, 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

1 of the imagination nor has it been shown to exist.

2 So that is the canvas, as it were, Chairperson,

3 but let us 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 are 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 is 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 were

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 are 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 am just going to spend a few minutes demonstrating

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 do not 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 is 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

1 desirable.

2 So let us 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 us 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 is a

14 crucial thing. You cannot 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 cannot 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

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 could not simply say, oh well, there is regulation 19 which  
5 says you can dictate your own procedures and you know we'll  
6 just relocate 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 is simply no power for that to be  
13 done under either some implied power which I will 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 does not even need

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

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,

1 went further and made attempts to obtain such funding but  
2 the Commission emphasised time and again and it is 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 is 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 am afraid are what my  
21 learned colleagues have misconstrued about section 4.  
22 So let us 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 do not

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 us 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 is 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 is  
19 the end of the matter. You cannot 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

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 is 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 does not 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 have 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

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 is 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 is really what is happening. It is  
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 am 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 us deal with the issue of –

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 is  
4 paragraph 17 of Mr Brickhill’s heads – no, it is not  
5 paragraph 17, probably page 17. Yes, it is paragraph 19,  
6 I am sorry, Chairperson – rather page 19, paragraph 50,  
7 five-zero, of the LRC heads. It is just a convenient way  
8 of, I am actually just looking for section 18 of the Witness  
9 Protection Act. I am just using that because it is 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 does not just call them a class of persons  
16 and lump them in the manner that section 4 is being  
17 squeezed to mean. —communications—  
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 is 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 is quite clear that the power simply does not  
25 exist.

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 have explained now is something I will address in  
12 another context. But let us 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 have 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

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 us 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 am 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 will  
13 remember, Chairperson, during his testimony, it is 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 is 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 do not argue with

1 the issue of the possibility. But that does not mean that  
2 we concede that there is 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.

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 will 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.

16 So from the point of view of the people we  
17 represent Mr X is a liar and he is 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.

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

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 is the only person out of those  
9 hundred people who were on the 13<sup>th</sup> involved in the incident  
10 of the 13<sup>th</sup>, he is the only person who has suddenly  
11 disappeared in the last 18 months, then clearly the other  
12 99 people know who he is.  
13 Now that is the one issue. The second issue is  
14 that it - so it would be impractical - and it is 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.  
21 But let us even be kind and say they do not know  
22 who he is. If they do not know who he is, well as soon as  
23 Mr Semenya gives me the photo I am going to give it to them,  
24 all 300 of them, and Mr X implicates 3 000 people, so it  
25 will not just be confined to the 300 who happened to be

1 arrested or injured. It is 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 is not even the version of  
4 SAPS. It is 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 hill, 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.

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 is  
22 impractical and ineffective.

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

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.

5 I have 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 is a clear  
8 hierarchy of statutes. Just like legislation cannot  
9 supersede the Constitution, regulations also cannot  
10 supersede a statute, particularly the statutes that gave  
11 birth to those regulations.

12 Now the next issue that I want to deal with,  
13 Chairperson, is the evidence leaders' assertions. I have  
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 is 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.

25 But in any event, a power such as this is not one

1 that could be implied easily, and Mr Brickhill will show  
2 why if anything, if there is any doubt, the interpretation  
3 should be in favour of the constitutional provisions that  
4 he will cite. So there is 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 does not 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 is 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 have  
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 do not think, who think that these  
11 people's rights must be ignored, as it were,  
12 **[14:51]** Then I do not think that we can say to them no,  
13 now relax because a member of, someone who does not 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 am afraid that it is 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 will 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 will not 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 is 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 is 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 does not. 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 did not 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 will

1 take the tea adjournment.

2 **[COMMISSION ADJOURNS/ COMMISSION RESUMES]**

3 **[15:14] CHAIRPERSON:** The Commission resumes. Mr

4 Brickhill, we have your heads.

5 **MR BRICKHILL:** Thank you, Chairperson, I

6 suppose –

7 **CHAIRPERSON:** I am sorry, I understood the

8 order to be Mr Mpofu first, Mr Brickhill second, Mr

9 Ntsebeza third, but if I am wrong, perhaps you will correct

10 me?

11 **MR NTSEBEZA SC:** No, that is the order.

12 I have reconciled myself with that kind of order. There's a

13 natural flow from what Mr Mpofu submitted to be followed by

14 him.

15 **CHAIRPERSON:** Alright, so I was right for

16 once. For once. Mr Brickhill?

17 **MR BRICKHILL:** Chairperson, that is

18 indeed the batting order. I propose to make this a

19 relatively short innings and deal principally with two

20 issues.

21 **CHAIRPERSON:** Are you going to retire or

22 are you going to be dismissed?

23 **MR BRICKHILL:** I will leave Mr Ntsebeza to

24 score the winning runs, Chairperson, but Chairperson, I propose to deal

25 with two issues principally, the first is the principle of

1 open justice rooted primarily in the right of access to  
2 courts and section 34, that is the first issue, principle of  
3 open justice, and the second is the application of the  
4 Witness Protection Act in the present context.

5 But before I approach those two issues, I have  
6 two brief submissions to make by way of Gloss on the issue  
7 of powers.

8 We endorse –

9 **CHAIRPERSON:** Are these in your heads or  
10 must I write them down?

11 **MR BRICKHILL:** Chairperson, the first  
12 point is in our heads at paragraph 10, on page 4 of our  
13 heads of argument, and the second is not but it arises from  
14 the debate earlier in the day and was foreshadowed by Mr  
15 Mpofu.

16 Chairperson, both points relate primarily to the  
17 question of the power to make the video link order.

18 Reliance has been placed on regulation 19 in that context,  
19 which provides generally for the power of the Commission to  
20 determine its own procedures.

21 The first point we make in paragraph 10 of our  
22 heads of argument is by way of analogy to section 173 of  
23 the Constitution, which is the inherent power of the Courts  
24 to determine their own process, and we simply point to some  
25 of the authorities on the limits of that power, which we

1 would submit is in any event a broader power, the inherent  
2 power of the Courts to determine their own process, to  
3 regulate their process, but that power has important  
4 limitations which we say would be relevant also to an  
5 interpretation of regulation 19.

6 We say at paragraph 10 of our heads of argument  
7 that the Constitutional Court in Phillips has emphasised  
8 that the section 173 power to regulate the process of the  
9 Courts is designed to meet extraordinary procedural  
10 situations and cautioned subsequently that the power itself  
11 must be exercised with caution. That is in State versus  
12 Pennington. And in Phillips the Constitutional Court held  
13 further that this power, the section 173 power may not be  
14 used to ignore or circumvent legislation that already  
15 provides for a procedural issue, and in this regard we link  
16 to the submissions made by my learned friend Mr Mpofo in  
17 respect of section 4 of the Commissions Act, but also  
18 section 18 of the Witness Protection Act, both provisions  
19 contemplating in sum that evidence will be presented  
20 physically in the auditorium and that witnesses will be  
21 physically present, in particular in relation to section 4  
22 of the Commissions Act.

23 So we make the point that the interpretation  
24 sought to be attached to regulation 19 would in our  
25 submission circumvent section 4 of the Commissions Act and

1 for that reason we would argue against such an  
2 interpretation.  
3 Chairperson, I then move to the first of the broader  
4 issues – excuse me; there is one further interpretive point  
5 that goes to the powers -

6 **CHAIRPERSON:** [*Microphone off, inaudible*]

7 second point now that is not in your heads.

8 **MR BRICKHILL:** This is our second point  
9 that is not in the heads, Chairperson. Chairperson, the submission  
10 simply is that the right of access to courts and section 34  
11 indeed applies to proceedings of commissions of inquiry and  
12 I'll provide those authorities shortly in dealing with the  
13 content of the right, but section 34 applies to commissions  
14 of inquiry. The orders sought would constitute a  
15 limitation of that right and that has two consequences,  
16 Chairperson. The first is the section 39(2) consequence that the  
17 legislation must be narrowly construed to bring it within  
18 the bounds of the Constitution. So where there is reliance  
19 on regulation 19, section 4, or any other provision to  
20 assert a power it must be interpreted narrowly as required  
21 by section 39(2) of the Constitution.  
22 The second consequence is the point that is  
23 already been made; it is simply that the legislation must  
24 exist. There must be a law of general application that  
25 justifies the limitation of section 34 of the Constitution.

1 Chairperson, those are our only additional submissions  
2 in relation to the powers issues. For the rest we endorse  
3 my learned friend Mr Mpofu's submissions.

4 Chairperson, 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 Chairperson, 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 have 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

1 quote continues, but we emphasise that first sentence.

2 The principle of open justice, Chairperson, 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 is

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 & 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 is 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 Chairperson, although the application of the principle

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 is cited in our heads of argument  
6 at footnote 21 as Mail & 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 Chairperson, we do not 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, Chairperson. Just one further  
18 example of the expanded application of the principle of  
19 open justice, beyond simply the courts. But we are here  
20 dealing, Chairperson, 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

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 Chairperson, 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 Chairperson, 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 Chairperson, the aspect of a public hearing is much  
19 less contentious. It is 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 has been set down for the May term?

1 There was speculation at an earlier stage, you will 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 is  
8 no date which has been set down, but I think there is 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 is appealed it is good law at the  
18 moment, yes.

19 **CHAIRPERSON:** That is true, but the fact  
20 it is 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 am not expressing an opinion; I am just  
23 curious to know whether it was going to be dealt with soon.

24 **MR MPOFU:** Fair enough, Chairperson.

25 **CHAIRPERSON:** But it would seem not. Is

1 that right, Mr Mpofu?

2 **MR MPOFU:** That is very correct,

3 **CHAIRPERSON,** yes.

4 **MR BRICKHILL:** Chairperson, 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 is a right to free legal representation. The

9 application question is we submit less contentious, given

10 that there is other authority on that issue, and in the same

11 breath, Chairperson, the Constitutional Court's ambivalence in

12 the part A appeal similarly related to the question whether

13 there is a right to free legal representation rather than

14 these questions of application.

15 Chairperson, 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 is, you say it is unreported. Perhaps

20 if you can perhaps –

21 **MR BRICKHILL:** Chairperson, 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

1 grateful.

2 **MR BRICKHILL:** We will certainly do so,

3 Chairperson.

4 **CHAIRPERSON:** You obviously do not have to

5 do it today, but as soon as you can.

6 **MR BRICKHILL:** Chairperson, 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. Chairperson, 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

1 present matter, Chairperson, 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 Chairperson, 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 Mpofu 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, Chairperson, in paragraph 24 –

15 **CHAIRPERSON:** Sorry, you said the  
16 likelihood of harm and I understood from Mr Mpofu'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 is 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

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:** Chairperson, 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. Chairperson, we submit that  
10 on that threshold too the application fails. It is more  
11 though, Chairperson, than a mere possibility of harm. It is  
12 something higher than that.

13 **CHAIRPERSON:** He held in terms, mere  
14 possibility is not enough. Anything is possible. That is  
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 did not follow what was  
19 held in the appeal there, but wrongly so in my respectful  
20 opinion, but that is an issue that does not arise here.  
21 That is 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:** Chairperson, in any event in the

1 present matter we would submit that there is a second issue  
2 that is more decisive on the question whether this  
3 threshold, whatever it may be, is crossed and that is 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 had not addressed this issue and, Chairperson,  
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, Chairperson, I would take the Commission  
17 to the founding affidavit of the SAPS, Mr Pretorius, at  
18 page 3 paragraph 9. And, Chairperson, 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 would 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

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 Chairperson, 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, Chairperson, it is 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, Chairperson, 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, Chairperson, 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

1 taken with that, it is pointed out that there is no evidence  
2 at all in support of the allegation and in reply, nothing.  
3 So, Chairperson, 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 Chairperson, 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 Chairperson, in relation to the exclusion of the  
15 public, I shall not repeat my learned friend Mr Mpofu's  
16 submissions in relation to necessary, desirable and so on.  
17 What we do point to, Chairperson, 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, Chairperson, that  
25 even assuming for the purposes of the argument that there

1 is a risk to Mr X, the measures proposed do not materially  
2 reduce that risk and accordingly do not justify the  
3 substantial departures from the principle of open justice  
4 that are sought by the SAPS.  
5 Chairperson, 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 audio-visual  
12 link in a room outside the auditorium. We would make the  
13 submission, Chairperson, 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 do not think  
19 it appropriate for – excuse me, excuse me, excuse me – I  
20 do not think it appropriate for camera operators or anybody else to  
21 walk between counsel and the Chairperson. That is not the kind of  
22 behaviour we expect and if it happens again I will have you  
23 excluded from the chamber and if that means we will not sit in  
24 public I will take that on the chin. Carry on, Mr Brickhill.

25 **MR BRICKHILL:** I am indebted to the Chairperson.

1 Chairperson, the point that we make is that the in camera order  
2 sought is not watered down. To the contrary, it is a more  
3 extreme variety. An ordinary in camera order excludes the  
4 true members of the general public from a courtroom, it  
5 does not, it would never exclude the parties in the ordinary  
6 course. And that raises, Chairperson, 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, Chairperson, 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 police officers. There is a broad  
15 category of persons, Chairperson, 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:** Chairperson, 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

1 Application.

2 The second issue that we address, Chairperson, is the

3 testimony by video link in the context of the principal of

4 open justice and we refer, Chairperson, to the ordinary context

5 in which such evidence takes place via video link or

6 intermediary. It is commonly employed in matters involving

7 testimony by children or victims of sexual assault and,

8 Chairperson, 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, Chairperson, that that

15 simply does not apply to Mr X. He does not 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 does not fall within the category of persons on whom the law

23 seeks to confer that more comfortable atmosphere.

24 From the founding affidavit, Chairperson, there appear

25 to be two main purposes behind the video link aspect of the

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 is  
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, Chairperson, 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, Chairperson, the purpose of  
14 protecting the anonymity of Mr X, that is 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 am not sure it is 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 is here, in the  
25 process of doing that it might involve the Commissioners

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 has contended that if Mr X comes it will arise.  
6 So I am not sure it is quite as simple as you make it out in  
7 34. There is surely an increased risk. It may well be  
8 that – there is 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 have  
12 described. So I am 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:** Chairperson, we do not mean to be  
16 glib about the matter of the safety of all of the people  
17 physically in the venue. The submission, Chairperson, 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, do not  
25 mean to be glib or dismissive of the potential increased

1 risk when a particular witness such as Mr X is physically  
2 present.

3 Chairperson, 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, Chairperson, 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, Chairperson, 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 Chairperson, 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

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:** Chairperson, that is – that is  
9 so. The evidence leaders do propose a broader formulation.  
10 In that regard, Chairperson, 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, paragraph  
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 is another one in 4(c). I am not aware of any  
24 parties who are not represented. All the parties, as far  
25 as I know, are represented. Their legal representatives

1 aren't always in the chamber, of course, but as far as I  
2 understand there is no unrepresented party who appears alone  
3 or is, as it were, before us as a nominal party who does not  
4 take part. So every party, to my knowledge, is represented  
5 by a legal representative. So that is 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 would not be acceptable. At the very  
13 least, I am 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:** Chairperson, 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 do not fall within the category of the injured and arrested,  
21 do not 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

1 not permitted to discover his identity that evidence may  
2 not come forward. I accept that that is, it is speculative,  
3 the submission but –  
4 **CHAIRPERSON:** It is 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 is 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 is 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 am 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

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 am not suggesting there are not 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:** Chairperson, 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 is not already known and that is the third factor that we  
11 point to in paragraph 41 of our heads. The second factor,  
12 and it is to this issue that I propose to turn now, is that  
13 Mr X is already a witness under witness protection and I will  
14 deal now with what that, the implications of his protected  
15 status, which is the final section of our heads of  
16 argument, Chairperson.

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 is telling the truth. I  
22 mean if he is talking total nonsense and he was not there at  
23 all then they do not know who he is but if he did the things  
24 he said he did, which you have summarised in your heads and  
25 if that is true then they will know, but of course that

1 does not mean the general public knows. On the contrary,  
2 the general public does not 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 are 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 do not discover who he is because the  
11 more people who know who he is, the greater the danger is.  
12 I take it that is the reasoning. Whether it is 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:** Chairperson, 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 is based on an assumption that this sort  
19 of information will not 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 Mpofo extrapolated those numbers earlier  
23 and how this information will effectively spread. We  
24 submit that that is the likely consequence, Chairperson. The  
25 only possible effect that the order might have would be to

1 delay that spread perhaps to some degree, by a matter of  
2 days perhaps but again we are in the realm of speculation.  
3 The fundamental submission, Chairperson, 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 Chairperson, 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 had better not ask you  
10 anything more, to give you a chance of doing it before the  
11 close.

12 **MR BRICKHILL:** Chairperson, at paragraph 42 we  
13 set out the purpose of the Witness Protection Act and we  
14 emphasise this, Chairperson. 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 is the purpose of the  
18 Act and a witness as defined would obviously include Mr X  
19 and, Chairperson, 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 Chairperson, 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

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 is 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 Chairperson, 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, Chairperson, the purpose of the Witness Protection Act is  
15 indeed to protect on an indefinite bases, witnesses under  
16 protection. And that, we do not deal with this in our heads  
17 of argument, Chairperson, 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 will not 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 are 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

1 the assessment of the witness him or herself or in the  
2 assessment of the director, with the Minister.  
3 Chairperson, 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 is 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, Chairperson, 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, Chairperson, 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

1 regulations, Chairperson, 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, Chairperson, we  
5 submit does not deal with disclosures for the purpose of  
6 judicial proceedings. There is an exclusion in relation to  
7 judicial proceedings. The key provision, Chairperson, we submit  
8 is section 18 to which my learned friend Mr Mpofu referred  
9 earlier and which was debated earlier in the proceedings.  
10 Chairperson, the submission that we would emphasise – I  
11 will not read the provision, it has been referred to earlier –  
12 the submission that we emphasise is that in paragraph 51.2  
13 of our heads of argument. Section 28, Chairperson, 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, Chairperson, 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

1 section 18. Chairperson, 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. Chairperson, 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 Chairperson,  
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 Chairperson, in conclusion we set out the basis on

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, Chairperson, 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, Chairperson, 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, Chairperson, 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, Chairperson, 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. Chairperson,  
24 those are our submissions.

25 **CHAIRPERSON:** Thank you, Mr Brickhill.

1 Mr Ntsebeza, you will be ready to argue tomorrow morning.  
2 Can you give me an indication of how long you are likely to  
3 be? I say that because, as I indicated, I will not be in a  
4 position to give a ruling as soon as the argument is over  
5 and then course there will 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 is very little that I will be dealing with. It is  
12 going to be really – I do not 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]**