CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 188/14

In the matter between:

LEGAL AID SOUTH AFRICA	Applicant
and	
MZOXOLO MAGIDIWANA	First Respondent
INJURED AND ARRESTED PERSONS	Second and Further Respondents
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
MARIKANA COMMISSION OF INQUIRY	Fifth Respondent
PARTIES TO THE MARIKANA COMMISSION OF INQUIRY	Sixth to Nineteenth Respondent

Neutral citation:	*Legal Aid South Africa v Magidiwana and Others* [2015] ZACC 28
Coram:	Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ.
Judgments:	Theron AJ (main): [1] to [30] Nkabinde J (dissenting): [31] to [123]
Heard on:	14 May 2015

Decided on: 22 September 2015

Summary: Mootness — no practical effect — not in the interests of justice — context specific

Interpretation — section 34 of the Constitution — right of access to courts or another independent and impartial tribunal or forum — right to legal representation at state expense before commissions of inquiry — no obligation on Legal Aid South Africa to fund legal representation

---

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Gauteng Division of the High Court, Pretoria per Makgoka J):

1. Leave to file a replying affidavit is granted.
2. Application for leave to appeal is dismissed.
3. The applicant must pay the costs of the first, second and further respondents.

JUDGMENT

THERON AJ (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Molemela AJ and Tshiqi AJ concurring):

Introduction

[1] The applicant, Legal Aid South Africa (Legal Aid),[1] seeks leave to appeal against an order of the Supreme Court of Appeal which dismissed an appeal against a decision of the Gauteng Division of the High Court, Pretoria (High Court). The High Court ordered that it "take steps" to provide funding to enable the first, second and further respondents (miners) to be legally represented at the Marikana Commission of Inquiry (Marikana Commission or Commission). They are people arrested or injured during or after the tragic events that occurred at the Lonmin Plc Mine in Marikana during August 2012. The Supreme Court of Appeal dismissed Legal Aid's appeal on the basis that it was moot.

[2] The miners oppose the application, contending that the determination of the appeal will have no practical effect. The eighth respondent, the families of persons who were killed during the shootings at Marikana (families), and the ninth respondent, the Association of Mineworkers and Construction Union (AMCU), as well as the eighteenth respondent, the family of John Kutlwano Ledingoane, a miner killed at Marikana (Ledingoane family), also oppose the application.

[3] The President of the Republic of South Africa (President), the Minister of Justice and Constitutional Development (Minister), and the Commission, the third, fourth and fifth respondents, respectively, did not participate in the proceedings in this Court.

[1] Legal Aid is an autonomous statutory body established pursuant to section 2 of the Legal Aid Act 22 of 1969 (1969 Act). When the proceedings were instituted in the High Court, Legal Aid was governed by that statute, which established the Legal Aid Board (Board). This statute was repealed by the Legal Aid South Africa Act 39 of 2014 (Legal Aid Act).

The objects of Legal Aid, as provided in section 3 of the Legal Aid Act, are to "render or make available legal aid and legal advice"; to "provide legal representation to persons at state expense"; and to "provide education and information concerning legal rights and obligations, as envisaged in the Constitution and this Act".

Factual background

[4] On 26 August 2012, the President established the Commission with the mandate "to investigate matters of public, national and international concern arising out of the events at the area commonly known as the Marikana Mine". The events were prompted by a strike for wage increases by employees of Lonmin Plc Mine in Marikana, located near Rustenburg, from 9 to 18 August 2012. The events "led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to property".[2]

[5] The Commission was mandated to inquire into and make findings and recommendations on, amongst others: (a) the conduct of Lonmin, the South African Police Services (SAPS), AMCU and the National Union of Mineworkers (NUM); (b) the role of the Department of Mineral Resources or any other government departments or agencies; and (c) the conduct of individuals and loose groupings in promoting a situation of conflict and confrontation which may have given rise to the tragic incident.

[6] The nature of the miners' involvement in the incident was an object of inquiry before the Commission. On 15 October 2012, the miners requested that Legal Aid fund their legal representation before the Commission.[3] By the time of the miners' request, the CEO of Legal Aid, in the exercise of her discretion, had already committed to funding legal representation for the families. She declined to grant the subsequent request.

---

[2] Establishment of a Commission of Inquiry into the Tragic Incident at or near the area commonly known as the Marikana Mine in Rustenburg, North West Province, South Africa GN 35680 *GG* 50, 26 August 2012 (Terms of Reference), second pre-ambular paragraph.

[3] Prior to their request to Legal Aid, the miners made a similar request to the Minister which was refused on the basis that there was no legal framework under which the Minister could provide the funding sought. The President was copied in the request to the Minister. Regulation 8 of the Regulations issued by the Commission concerned the rights of persons appearing before the Commission to be assisted by a legal representative. According to that provision, "[a]ny person appearing before the Commission may be assisted by an advocate or an attorney".

[7] Legal Aid supported its CEO's decision to fund the families and not the miners on various bases. It cited severe budgetary constraints; that the families had a substantial and material interest in the outcome of the inquiry, while there would be no substantial and identifiable benefit for the miners to be separately represented. Moreover, the families consisted of women, children and elderly persons who are all recognised as vulnerable groups. Legal Aid was also of the view that the miners' interests would be protected at the Commission by their respective unions. In addition, Legal Aid contended that the families' representation at the Commission was essential as they, unlike the miners themselves, were not present during the events at Marikana, and thus could not brief legal representatives to further any legal claims.

[8] The miners received interim private funding from the Raith Foundation for legal representation before the Commission from October 2012 to March 2013. After this period, the miners were unable to secure further private funding.

Litigation history

[9] The miners filed an application in the High Court, comprising two parts. Part A was brought on an urgent basis and sought interim funding for the miners' legal representation before the Commission. The High Court dismissed Part A on 30 July 2013. This Court dismissed the application for leave to appeal that decision on 19 August 2013.[4] Part B, the subject of this application, challenged the failure or refusal of the President, the Minister and Legal Aid to provide the miners with state-funded legal representation.

[10] The High Court concluded that "no legal framework exists within which the President and the Minister can lawfully, or are authorised to, fund the legal

[4] *Magidiwana and Others v President of the Republic of South Africa and Others* [2013] ZACC 27; 2013 (11) BCLR 1251 (CC) (*Magidiwana I*).

representation" of the miners.[5] But the Court found that Legal Aid's decision to refuse legal assistance was irrational and inconsistent with sections 9 and 34 of the Constitution.[6] It found that the decision to fund the families' representation, and not the miners', irrationally and unfairly distinguished between the two groups. Legal Aid was therefore obliged to fund the miners' legal representation.[7] Legal Aid appealed to the Supreme Court of Appeal. Before the hearing of the appeal, Legal Aid reached an agreement with the miners to provide funding for the remainder of the Commission.[8]

[11] The Supreme Court of Appeal dismissed the appeal on the basis that, under section 16(2)(a)(i) of the Superior Courts Act,[9] the appeal and any order granted would not have any practical effect or result because "however the appeal turns out, the position of the respondents will remain unaltered and the outcome, certainly as far as this case is concerned, will be a matter of complete indifference to Legal Aid".[10] The Court concluded that no discrete legal issue of public importance arose which, despite the mootness, justified a consideration of the merits.[11] The Court split on whether it did have a

[5] *Magidiwana and other injured and arrested persons v President of the Republic of South Africa and Others (No 2)* [2013] ZAGPPHC 292; [2014] 1 All SA 76 (GNP) (High Court judgment) at para 78.

[6] Section 9(1) of the Constitution provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[7] High Court judgment above n 5 at paras 93-5.

[8] Legal Aid claims that this agreement was not final by the time of the hearing before the Supreme Court of Appeal and was only finalised after the Court dismissed the appeal. Regardless of the timing of these events, by the time the matter came before this Court, funding had been irrevocably advanced to the miners.

[9] 10 of 2013. This section provides that "[w]hen at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone".

[10] *Legal Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA) (Supreme Court of Appeal judgment) at para 18.

[11] Id at para 15.

discretion to enter into the merits of the appeal.[12] But it unanimously found that, if it had a discretion, it would exercise it against Legal Aid.

Leave to file a replying affidavit

[12] Legal Aid sought to file a replying affidavit, in response to allegations raised by the participating respondents in their answering affidavits, regarding the developments in the legislative framework governing Legal Aid's funding decisions since the High Court's decision. The changes in the legislative framework speak to the mootness of the application. Legal Aid ought to be granted an opportunity to respond. It is therefore in the interests of justice to grant leave to file the replying affidavit.

Leave to appeal

[13] Legal Aid submits that this application raises constitutional issues as well as arguable points of law of general public importance, and that it is in the interests of justice for this Court to hear the appeal. It contends that the High Court judgment lays down incorrect principles of law – in particular, that the right embodied in section 34 of the Constitution applies to commissions of inquiry,[13] and that the content of the right includes state-funded legal representation to parties before a commission. Legal Aid argues that this principle will be of general application to future analogous cases. It contends that the principle will impact the work of Legal Aid and its CEO's exercise of discretion in funding decisions related to other commissions and investigative tribunals, like a request for funding of an inquest.

[12] The majority found that in light of the funding agreement, there was no *lis* (dispute) between the parties and, at para 22, concluded that "where the parties have by agreement settled all disputes between them, as a matter of principle there is no discretion for this court to exercise under section 16(2)(a)(i)". The minority disputed this finding, holding, at para 30, that "courts have the discretion, which must be applied sparingly, to hear disputes in appeals which are academic between the parties if there is a good reason in the public interest for doing so".

[13] See n 6 above.

[14] The respondents[14] concede that the matter raises constitutional issues but argue that it is not in the interests of justice for this Court to hear the case as it is moot. They point to the following developments after the Supreme Court of Appeal heard the appeal: first, that the Commission completed its work on 14 November 2014; second, that in December 2014, Legal Aid and the miners concluded a written agreement in accordance with their earlier agreement, which finally determined the funding issue; and third, that in December 2014, Legal Aid paid the miners' legal fees in full, as agreed, and disavowed any right to claim the money back if this appeal is successful.

Is the matter moot?

[15] This Court has exercised its appellate jurisdiction in cases that were moot between the parties but where the interests of justice nevertheless justified deciding an appeal.[15]

[16] It is common cause that the legislative scheme governing Legal Aid's funding decisions has changed since the proceedings in the High Court. Section 3A(1)(a) of the 1969 Act required the board of Legal Aid, in consultation with the Minister, to publish a Legal Aid Guide which includes the particulars of the scheme under which legal aid is made available and the procedure for its administration. The decision of the CEO of Legal Aid, which was considered by the High Court, was made pursuant to item 10.2.3(a) of the Legal Aid Guide 2012 (Guide).[16]

---

[14] The respondents participating in these proceedings, namely the miners, families, AMCU and the Ledingoane Family.

[15] In *MEC for Education: KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*), this Court was faced with an issue that was not only moot between the parties, but the impugned guidelines also changed. However, a major factor that influenced the Court's decision to hear the matter, at para 34, was that the guidelines in that case did not have the force of law and were not binding on schools. Thus there was a danger of schools in the future implementing these potentially constitutionally invalid policies. Since the Legal Aid guidelines do have the force of law and have been changed, this danger does not arise.

[16] Item 10.2.3(a) of the Guide provided:

"The CEO may exercise a general discretion to:

[17] In 2014, and after the decision in the High Court, the Guide was amended to include item 4.20 (2014 Guide).[17] This specifically made provision for funding legal representation at commissions in two scenarios. These were where funding was made available by the establishing authority; and, where not, for Legal Aid to provide funding in certain circumstances set out in the Guide. Decisions on funding commissions of inquiry were no longer to be dealt with in terms of the CEO's discretion but rather under a comprehensive amendment to the Guide. The 2014 Guide has again been amended, this time, by the deletion of those provisions relating to the scenario where funding is not provided by the establishing authority.[18]

- Waive any condition, procedure or policy set out in this Guide as long as this is within the overall authority of the Legal Aid Act.
- Provide for any issue not covered in this Guide.

However, when the CEO exercises this discretion, he/she must report on it to the Board or Board Executive Committee at the next regular meeting."

[17] Item 4.20 of the 2014 Guide provided, in relevant part:

"Where funds are made available by the establishing authority of the commission, legal aid should be provided for the purpose of legal representation at commissions for persons appearing before a commission of inquiry where the commission has certified that they have standing before the commission. Where such funding is not made available, then legal aid will only be made available in exceptional circumstances such as where a person has a substantial and material interest in the outcome of the commission and which could materially influence the outcome of any potential civil claim, provided that:

(a) such person/s are indigent and qualify in terms of the means test;

(b) such person/s has/have been certified by the Commissioner that they have a proper standing before the commission;

(c) the prospect of hardship to the person/s if assistance is declined;

(d) the nature and significance of the evidence that the person/s is/are giving or appears likely to give;

(e) the extent to which representation is required to enable the inquiry to fulfil its purpose;

(f) whether the interests of a person will be advanced by any other person/association certified to appear before the commission;

(g) any other matter relating to the public interest."

[18] Item 4.20 of the Legal Aid Guide, February 2015, now reads:

"Where funds are made available by the establishing authority of the commission, legal aid should be provided for the purpose of legal representation at commissions for person/s appearing before a commission of inquiry where such persons have been certified by the Commissioner as having proper standing before the commission.

[18] Save for requests pending under the old statute, any funding requests similar to that of the miners will be dealt with in terms of the new legislative framework. This may render the High Court judgment irrelevant.[19] In any event, it is not for this Court to speculate on the practical impact of the legislative amendments on Legal Aid. It is also unnecessary to decide this point for the purposes of this matter.

[19] The Supreme Court of Appeal recorded the argument advanced by Legal Aid on why the matter was not moot:

> "[*Legal Aid*] *accepts that the decision of the High Court was made in the context of the specific circumstances of this case and that, as the High Court made plain, its judgment was not to be construed as 'authority for the proposition that in all commissions of inquiry, there is a right* [*to*] *state-funded legal representation*'. [Legal Aid] contended, however, that in ordering it to provide legal funding to the applicants for their participation in the Commission, the High Court had usurped the discretion of the CEO in what is essentially a complex polycentric enquiry, and supplanted its decision for that of [Legal Aid]. That decision, so the contention proceeded, potentially opens the floodgates to claims on [Legal Aid's] scarce resources and leaves its decision to refuse applications for funding vulnerable to judicial scrutiny in the future. Accordingly, so we were urged, this is an appropriate matter for the exercise of this court`s discretion to allow the appeal to proceed."[20] (Emphasis added.)

> Subject further that where such funding is made available, such funding shall be provided subject to compliance with unsolicited proposals dealt with under National Treasury Practice Note 11 of 2008/2009, where such persons seek to use/appoint practitioners of their own choice. Judicare tariffs as set out in Annexure F will apply where a legal practitioner in private practice is instructed".

[19] While the latest version of item 4.20 does not provide a framework in which to guide funding decisions in the scenario where the establishing authority does not provide funding, the amendment may still affect the nature of the CEO's decision to fund. It could, for example, affect whether the discretion exercised is to "waive a condition" in the Guide or to "provide for any issue not covered in the Guide". It may influence how Legal Aid's role in funding legal representation at commissions is understood, possibly clarifying that the duty is primarily on the establishing authority and should be determined in conjunction with the particular inquiry's terms of reference. It is unnecessary to definitively decide these points but they indicate a shift in emphasis for these types of funding decisions.

[20] Supreme Court of Appeal judgment above n 10 at para 13.

[20] At the hearing, Legal Aid contended somewhat differently. It now argued that the High Court judgment is indeed authority that section 34 includes the right to state-funded legal representation in commissions of inquiry in certain instances. However, it did not suggest that the Supreme Court of Appeal was inaccurate in capturing its original argument. This represents a distinct change of tack.

[21] The argument that the High Court judgment lays down principles applicable not only to the Marikana Commission but also to other inquiries and investigative tribunals is unpersuasive. The High Court was careful to circumscribe the application of the judgment to the singular circumstances surrounding the Marikana Commission.[21] Thus the extent to which the findings could bind Legal Aid in future cases would be very narrow and indeed so rare as to be negligible.

[22] The High Court stated that the possibility of constitutional rights being adversely affected by the outcome of the Commission means that section 34 *could* apply. The Court concluded that the preferable view is that *the right to legal representation at commissions is not absolute but depends on context*:

> "*In the context of the present application*, it is of no consequence that the Commission is not of a judicial or quasi-judicial nature. That does not, in my view, place the Commission outside the scope of section 34 of the Constitution. At [a] conceptual level, the general proposition that the proceedings of commissions of inquiry fall outside the scope of section 34 at the outset, is, to my mind, an over-simplification of a complex situation involving constitutional rights and a distinct possibility of those rights being adversely affected by the outcome of the

[21] High Court judgment above n 5 at para 38, the Court held:

> "I find the above proposition both attractive and persuasive as a basis for a general framework, in each commission regard would be had to the *context-specific factors* of the commission to determine whether section 34 finds application. *It is therefore not feasible, nor desirable, to lay down an inflexible list* of such considerations. *For the present purposes* I take the following into consideration". (Emphasis added.)

> Commission. *A preferable view is that the right to legal representation at commissions is not an absolute one, but depends on the context*. Counsel for the Ledingoane family asserted that the right arises in the following circumstances:
>
> (a) when the nature and type of inquiry demands that some or all interested parties be legally represented;
>
> (b) when the interests of justice and the rule of law would be undermined by a failure to uphold the right;
>
> (c) when the constitutional rights of parties or witnesses appearing before a commission are implicated or potentially threatened.
>
> . . . in each commission regard would be had to the context-specific factors of the commission to determine whether section 34 finds application."[22] (Emphasis added.)

It is clear from the judgment that whether the right to representation arises will depend on the context of each commission and would only be granted in exceptional and rare circumstances.

[23] The High Court was at pains to confine the effect of the judgment to the Marikana Commission and the particular set of circumstances with which it was confronted:

> "To state the obvious, this finding is no authority for the proposition that in all commissions of inquiry, there is a right for state-funded legal representation. It depends on the context, having regard to nature of the issues under investigation before a particular commission."[23]

[24] The High Court emphasised that its decision was based on the facts of this solitary matter. It carefully spelled out that the decision found only that the miners involved in the Marikana Commission ought to be provided with

[22] Id at paras 37-8.

[23] Id at para 69.

state-funded legal representation under section 34. Previous cases have already delineated where this section does apply to commissions.[24]

[25] Significantly, the High Court's decision on legal representation funded by Legal Aid was not based solely on the conclusion that section 34 applies to the Commission. The conclusion on the reach of the section was one of the building blocks towards the outcome at which that Court arrived. Having found that section 34 applies and that parties that appeared before the Commission were entitled to be represented by lawyers, the High Court proceeded to determine whether the miners should be granted legal representation at state expense.[25] The High Court made a decision based on

---

[24] In *Mbebe and Others v Chairman, White Commission and Others* 2000 (7) BCLR 754 (Tk) (*Mbebe*), the Court had to determine whether section 236(6) of the Interim Constitution – which empowered the President to appoint a Commission, presided over by a judge, to, amongst others, review the conclusion or amendment of a contract in respect of the appointment or promotion of certain civil servants – was inconsistent with section 34 of the Constitution. The Court found, at 773H-I, that a commission established in terms of section 236(6), while not a court of law, was a *sui generis* (in a class by itself) entity with the characteristics of a commission, but with the power to make final decisions affecting the rights of persons. The Court considered it relevant that—

> "[i]n the instant matter the procedures that were adopted by the [Commission] were largely consistent with those employed in an ordinary court of law. The applicants were given the right to legal representation, the right to cross-examine the witnesses who were called by the official appointed by the commission to perform such function and the right to give evidence and to call witnesses. In practice therefore the applicants were afforded the same rights as those enjoyed by a litigant in ordinary civil proceedings."

The Court concluded, at 775J-776D, that the Commission was an independent and impartial tribunal as envisaged in section 34. In *Bongoza v Minister of Correctional Services and Others* 2002 (6) SA 330 (TkHC) (*Bongoza*), the Court stated, at para 23, that the "provisions of section 34 plainly show that the Constitution does not regard courts of law as having an exclusive competence to act fairly. Nor are they considered as having an exclusive entitlement to independence and impartiality". In *Sidumo v Rustenberg Platinum Mines* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) (*Sidumo*), the concurrence of O'Regan J concluded, at para 124, that the functions performed by the Commission for Conciliation, Mediation and Arbitration (CCMA) fell within the terms of section 34. In the dissent, Ngcobo J held, at para 207, that a dispute before the CCMA could have been litigated in a Labour Court but for the Legislature's desire for a speedy and less costly dispute resolution process. Ngcobo J held, at para 208, that the function of the CCMA was judicial in nature and not administrative. He further held, at para 209, that arbitrations provide independent and impartial tribunals as contemplated in section 34.

It is true that in *Mbebe* and *Sidumo* the adjudicative nature of the Commissioner's powers was important to the finding that section 34 applied, while in this case, the High Court found that whether the Commission was judicial or quasi-judicial was not relevant. However, the label "quasi-judicial" is of little significance if read in the context of the judgment as a whole because in *Mbebe* and *Sidumo*, the meaning of "adjudicative" or "judicial" indicated the extent to which rights were determined or affected by the Commissioner's decision. This too was part of the test employed by the High Court in this case.

[25] High Court judgment above n 5 at para 67 stated:

> "For all of the above considerations, I conclude therefore that section 34 finds application to the Marikana Commission of Inquiry, and therefore a constitutional right to legal representation before the Marikana Commission. Having reached that conclusion, it remains

the unique circumstances of the Marikana Commission, in the context of the reasons advanced by Legal Aid not to fund the miners, on the one hand, and to fund the families, on the other.[26] It must be emphasised that the entitlement to legal representation for parties appearing before the Commission was not in dispute before the High Court. All other parties, except the miners, had legal representation including representation that was funded by Legal Aid.

[26] Therefore, the construction the High Court assigned to section 34 to the effect that the section applies to commissions like the Marikana Commission, imposes no obligation on Legal Aid to fund legal representation. The decision and the discretion remain with Legal Aid. The decision of the High Court will have no practical effect on any of the parties – in particular on Legal Aid and its future decisions in respect of funding.[27] If in future parties that appear before a similar commission require legal representation at state expense, they will have to apply to Legal Aid which will consider the application in terms of the relevant law and regulations. If the application does not meet the requirements for funding, Legal Aid will be free to decline it, regardless of the fact that section 34 applies to the matter before the commission. This is so because even in criminal cases, the Constitution does not guarantee legal representation at state expense in all matters. The right to claim legal representation at state expense is limited to cases where substantial injustice would occur.[28] Even where this right is available to an applicant, Legal Aid

---

to be determined whether that right translates into a right for state-funded legal representation. Differently stated, does the state bear an obligation to fund the applicants' legal representation?"

[26] This Court has not considered the merits of the decision of the High Court and makes no pronouncement in that regard. The only inquiry presently before the Court is the future impact, if any, of the judgment.

[27] In *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg*) at para 11, this Court held that it may be in the interests of justice to hear a matter even if it is moot if any order it "may make will have some practical effect on the parties or on others".

[28] Section 35(3)(g) provides:

"Every accused person has a right to a fair trial, which includes the right-

to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly".

may still refuse to fund legal representation, if for example the applicant is a person who indisputably can afford to pay for legal representation.

[27] That similar dramatic facts will be replicated in a future analogous case is unlikely and would, in any event, provide a live factual matrix for this or another court to properly determine the application and scope of section 34. The present case is not the appropriate vehicle for engaging in this exercise.

[28] There ought to be compelling public interest considerations to cause this Court to entertain a matter that is moot between the parties. There are none in this matter. Legal Aid has not advanced any exceptional circumstances why this Court should exercise its discretion to hear the matter anyway.[29]

Costs

[29] There are no exceptional circumstances that justify a departure from the ordinary position that costs follow the result. The families, AMCU and the Ledingoane family do not seek to recover their costs. Thus Legal Aid is ordered to pay the costs of the miners only.

[29] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) (*AAA Investments*) at para 27.

Order

[30] The following order is made:

1. Leave to file a replying affidavit is granted.
2. Application for leave to appeal is dismissed.
3. The applicant must pay the costs of the first, second and further respondents.

NKABINDE J:

Introduction

[31] I have read the judgment by my sister Theron AJ (main judgment). I agree that leave to file a replying affidavit should be granted and that the dispute between the parties is moot.[30] However, I am of the view that it is in the public interest for this Court to decide the matter. As a result, I am unable to agree with the conclusion the main judgment reaches. I would grant leave to appeal, uphold the appeal, set aside the order of the Supreme Court of Appeal and substitute its order with an order dismissing the application in the High Court.

[32] The High Court judgment stands for the proposition that section 34 of the Constitution provides in at least certain cases for the right, to which Legal Aid is obliged to give effect, to legal representation before commissions of inquiry, and delineates the considerations according to which that right and corresponding obligation will arise. To the extent I could ascertain, that proposition has no direct support in our jurisprudence. It may well be that the decision of the High Court pertains to a particular set of facts. However, its

[30] The Commission's proceedings have been concluded and Legal Aid has agreed that it will not seek repayment should it be successful on appeal.

implications for Legal Aid and those who seek to benefit from its assistance are, in my view, potentially of great significance.

[33] Under the rubric of leave to appeal I address various topics. I set out in detail how the High Court judgment sets a legal precedent, demonstrating in particular that, contrary to the main judgment, the High Court judgment rested on a novel and expansive interpretation of section 34. I then describe why that Court's findings, regarding the scope and meaning of section 34, cannot be confined to this particular case but will have important future implications for Legal Aid's statutory mandate as well as indigent and vulnerable people who would otherwise benefit from the fulfilment of that mandate. After determining that it is in the interests of justice to decide the matter, I consider the merits.

Factual background and relevant legislative provisions

[34] As my analysis will benefit from a greater exposition of the facts than is provided by the main judgment, it is necessary to describe the background to this application in some detail. The miners launched an application in the High Court. They are members of a class of approximately 300 people some of whom were arrested and injured during an unprotected wage strike by employees of Lonmin Plc (Lonmin), while working at its Platinum Mine in Marikana, North West Province in August 2012. The events surrounding the miners' strike resulted in the deaths of 44 people including 34 miners, injuries to more than 78 people and the arrests of 259 people.

[35] On 12 September 2012, the President appointed a commission to investigate matters of public, national and international concern arising out of the events, and to inquire into and make recommendations on them (Commission).[31] Regulation 8 of the regulations adopted pursuant to the

[31] The Commission's Terms of Reference, above n 2, stated:

Terms of Reference provided that "[a]ny person appearing before the Commission may be assisted by an advocate or an attorney". However, the President did not make specific funds available to the participants for the purpose of obtaining legal representation.

[36] In light of their indigent status, the miners sought funding for their legal representatives from the Minister. The request was refused on the basis that there was no legal framework through which government could contribute to the legal expenses of any of the parties who participated in the Commission. In his response, the Minister said that Legal Aid is the only existing framework through which the State can provide legal assistance to those who meet the requirements for the assistance. He specifically said that Legal Aid is not intended to provide funding for representation before commissions of inquiry.[32] The miners made a similar request for funding to Legal Aid.

[37] On 18 October 2012, Legal Aid informed the miners that although the Guide[33] made no provision for the funding of commissions of inquiry, "mindful of the tragic loss of life arising out of the incident at Marikana" and through the exercise of the CEO's discretion, it had—

> "The Commission is appointed to investigate matters of public, national and international concern arising out of the events at the area commonly known as the Marikana Mine in Rustenburg, North West Province from Saturday 09 August – Thursday 18 August, 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to property."

Further, the Terms of Reference provided that the Commission had to "inquire into, make findings, report on and make recommendations concerning" the conduct of Lonmin, the SAPS, AMCU, NUM, the role of the Department of Mineral Resources or any other government entity implicated in the events, and "[t]he conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident".

[32] The Minister's letter, in relevant part, stated:

> "The Legal Aid Board of South Africa is the only existing framework through which the State can provide legal assistance in legal proceedings to persons who meet the requirement for such . . . assistance. As you are aware, the Legal Aid system is intended for criminal proceedings and certain civil proceedings before court[s] of law and do not include representation before commission[s] of inquiry."

[33] In the Legal Aid Act (2014), n 1 above, reference is made to the Legal Aid "Manual" instead of the Legal Aid "Guide". For our purpose, we refer to the latter because the Act was in force at the relevant time. However, the provisions of the guide relating to the manual are substantially consistent.

> "already taken the decision to fund the legal representation for the families of the deceased who have a substantial, proximate and material interest in the outcome of the inquiry. We are therefore already committed to funding the legal team for the families of the deceased who have lost a breadwinner.
>
> We are not able to determine from your funding request that there will be a substantial and identifiable benefit to your clients from being separately represented at the Commission especially as the interests of all the miners will be protected at the Commission of Inquiry by their respective unions . . . .
>
> In light of the above and severe budget constraints, we regret to inform you that we are not in a position to provide your clients with legal aid funding at the Marikana Commission of Inquiry."

[38] The miners wrote to Legal Aid that they did not seek to alter Legal Aid's decision which, they said, was Legal Aid's privilege and entitlement, but to correct its "glaring misconceptions" that there was no legal or logical basis for Legal Aid to disqualify and question the interest of the miners in the outcome of the Commission. They maintained that contrary to Legal Aid's assumption, the interests of the miners and the unions involved in the Commission did not align and in certain respects were in fact opposed. Legal Aid replied and reiterated its refusal of the request.[34]

[39] From 1 October 2012 to 31 December 2012, the miners secured funding from a private source, the Raith Foundation. On 16 March 2013 the Foundation approved, in principle, additional funding to cover the miners' legal costs from 17 March 2012 until 31 May 2012. However, certain complications prevented a final agreement being reached.

---

[34] Legal Aid said:

> "The decision was taken in the context of making an exception to the general rule to fund the 23 bereaved families represented by [the Socio-Economic Rights Institute] due to our shared concern over the tragic events of Marikana that have shocked the nation. The decision was also taken in the context of our funding constraints. As was previously communicated to you in our letter of 18 October 2012 . . . the reality is that our funding constraints do not permit us to consider your request for funding."

[40] Section 3 of the Act[35] provided that the objects of the Board "shall be to render or make available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution".[36] Section 3A(1)(a) of the Act further provided that the Board, in consultation with the Minister, shall "include particulars of the scheme under which legal aid is rendered or made available and the procedure for its administration in a guide called the Legal Aid Guide." Section 3A(1)(b) provided that the Guide is binding upon the Board. The Guide is designed to regulate funding for criminal and civil litigation. However, pursuant to item 10.2, the CEO has discretion in respect of certain matters. Important for our purposes is item 10.2.3, which provides:

"The CEO may exercise a general discretion to:

- Waive any condition, procedure or policy set out in this Guide as long as this is within the overall authority of the Legal Aid Act.
- Provide for any issue not covered in this Guide."

[35] See 1969 Act above n 1.

[36] The Constitution expressly provides for legal representation at State expense in only three instances as provided in section 28(1)(h), section 35(2)(c) and section 35(2)(g). The Constitution provides in section 28(1)(h):

> "Every child has the right—
>
> > to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result".

The Constitution provides in section 35(2)(c):

> "Everyone who is detained, including every sentenced prisoner, has the right—
>
> > to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of the right promptly".

The Constitution provides in section 35(3)(g):

> "Every accused person has a right to a fair trial, which includes the right—
>
> > to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly".

High Court

[41] Unable to secure further funding from private sources, the miners launched an application in the High Court, challenging the President, the Minister and Legal Aid in respect of the refusal of funding. They said that the refusal infringed their rights under sections 9 and 34 of the Constitution. The application was in two parts. Part A was brought on urgency and sought interim funding of the miners' legal representation before the Commission; Part B sought an order declaring the conduct of the President, the Minister and Legal Aid unlawful, unconstitutional and accordingly invalid, and an order that they "take all reasonable steps to provide adequate legal and equitable aid to the applicants". Part A was dismissed. The miners sought leave to appeal to this Court. On 19 August 2013, this Court dismissed that application.[37] The miners then pursued Part B. That application is the subject of this application.

[42] The "primary" issue for determination was whether the applicants were "entitled to state-funded legal representation for their participation in the proceedings of the commission".[38] The High Court determined whether section 34 applied to the Commission. It noted, in this respect, the contention of the state parties that the Commission is only investigative in nature, with a view to making recommendations to the President and lacking the power to determine legal rights or impose liability on any participants.[39]

[43] The High Court considered both domestic and foreign case law in determining the ambit of the application of section 34 to non-court forums like commissions. It held that these cases, which were in the context of procedural fairness, shared a common denominator with this case, namely that the interests protected by section 34 are engaged in respect of—

[37] *Magidiwana I* above n 4 at paras 14-6.

[38] High Court judgment above n 5 at para 22.

[39] Id at para 27.

> "committees and commissions like the Marikana Commission, have the power to make far-reaching findings and recommendations, which carry potential prejudice to rights of individuals and corporations, the bearers of which are entitled to protect[ion], even at that investigative stage."[40]

[44] In light of this conclusion, the Court held that for the purposes of the application of section 34, "it is of no consequence that the Commission is not of a judicial or quasi-judicial nature".[41] In determining the application of the section to commissions of inquiry, the Court held that regard must be had to certain contextual factors, which included: (a) substantial and direct interest of the applicants in the outcome of the Commission; (b) the vulnerability of the applicants as participants in the proceedings of the Commission; (c) the complexity of the proceedings and the capacity of the applicants to represent themselves; (d) the procedures adopted by the Commission; (e) equality of arms; and (f) the potential consequences of the findings and recommendations of the Commission for the applicants.[42]

[45] The High Court considered each of these factors in some detail. It found that the possibility that criminal charges may be proceeded with against the miners and their interest in safeguarding potential claims of damages against the police gave them a substantial and direct interest in the Commission's outcome;[43] the miners' indigence meant that they were the most vulnerable of the participants before the Commission, particularly as they were the specific focus of the Commission;[44] the length of witness testimony and technicality of some of the evidence made the proceedings sufficiently complex to require the help of legal representation;[45] the proceedings were "quasi-adversarial", with

[40] Id at para 36.

[41] Id at para 37.

[42] Id at para 38.

[43] Id at paras 40-3.

[44] Id at para 44.

[45] Id at para 45.

procedures similar to those applied in ordinary courts of law;[46] the fact that the state participants and Lonmin were legally represented was inconsistent with the equality of arms principle;[47] and that although the President is not obliged to act on the recommendations (if any) of the Commission, there would be reputational, moral, criminal and civil repercussions on those in respect of whom adverse findings were made.[48]

[46] The application of these factors to the context of the Commission, the High Court concluded, called for fairness and equality of arms, which in turn "locate[d] the Commission squarely within the purview of section 34 of the Constitution".[49] The High Court then, relying on the factors it considered in determining the ambit of the application of the section, held that it provided the miners with the right to legal representation before the Commission[50] and that the State is constitutionally obliged to fund that legal assistance.[51] It said that Legal Aid, being the only state agency charged with the responsibility to provide legal aid to the indigent, was the organ of state on which that responsibility rested.[52] Having determined that Legal Aid was constitutionally obliged to fund the miners' legal representation before the Commission, the Court considered whether its refusal to do so was rational and fair; whether, in funding the families but not the miners, Legal Aid had infringed the latter's right not to be discriminated against pursuant to section 9(3) of the Constitution; and finally whether Legal Aid's refusal to fund the miners' legal representation could be justified under section 36 of the Constitution.

[46] Id at paras 46-7.

[47] Id at paras 48-9.

[48] Id at paras 50-4.

[49] Id at para 66.

[50] Id at para 67.

[51] Id at para 68.

[52] Id at para 74.

[47] The High Court said that Legal Aid's decision "would not pass a general rationality requirement, stemming from the rule of law in section 1 of the Constitution".[53] Regarding section 9(3), the Court held that the basis of differentiation between the families and the miners was the survival of a shooting.[54] It further held that although survival of a shooting is not a specified ground in that section, it is an analogous ground, having regard to the disadvantages brought upon the miners by the differentiation.[55] Thus, the Court said, there was discrimination, and because the discrimination affected the miners' rights to dignity, justice and fair compensation, that discrimination was unfair.[56] The Court held that because Legal Aid's refusal to fund the miners was a decision taken pursuant to the CEO's discretion and not a law of general application, it could not be justified under section 36.

[48] Finally, having determined the case in the miners' favour, the High Court found that a substitution order requiring that Legal Aid take steps to fund the miners' legal representation in the Commission's proceedings was appropriate. The Court remarked that "it would be commendable for [the miners' current] legal team to be maintained."[57] In doing so, it dismissed Legal Aid's submission that deference ought to be afforded it due to its budgetary constraints as no bar to what it considered an effective remedy. It also awarded costs against Legal Aid.

[49] Legal Aid sought and was granted leave to appeal to the Supreme Court of Appeal. The grounds of appeal included that the High Court erred in holding: that section 34 applied to the Commission and provided the miners with the constitutional right to funding; that Legal Aid was obliged to give

[53] Id at para 97. However, the Court did not draw any ultimate conclusion regarding the rationality of the refusal, nor did it consider all of the reasons proffered by Legal Aid.

[54] Id at para 91.

[55] Id at para 95.

[56] Id at para 96.

[57] Id at para 102.

effect to that right; and that its refusal to do so was irrational or contrary to section 9(3). Legal Aid contended, in particular, that should the High Court order be permitted to stand, its findings regarding Legal Aid's obligations to fund participants in commissions of inquiry would have a significant impact on the fulfilment of its statutory mandate and the interests of indigent litigants whose rights would be subject to final determination.

Supreme Court of Appeal

[50] The Supreme Court of Appeal held that in terms of section 16(2)(a)(i) of the Superior Courts Act[58] there would be no practical effect or result in deciding the appeal. The Court held that the High Court judgment did not give rise to any discrete legal issues of public importance. The Marikana incident was a "highly unusual occurrence, the likes of which, hopefully, will not recur in our lifetime".[59] It said that "it was primarily the differential treatment between the 23 families who had lost breadwinners on the one hand, and the respondents on the other, that prompted the High Court application in the first place and provoked the rationality enquiry undertaken by that Court". The Court added that it was unlikely that decisions by Legal Aid in the future would be reviewed.

[51] The Supreme Court of Appeal further found that, should it have a discretion, it would not exercise its discretion to hear the appeal. It found that there was no longer a dispute between the parties as Legal Aid had agreed to fund the miners' legal representation for the duration of the unfunded period of the Commission, and that this, in fact, removed the discretion it would otherwise have had to hear the appeal.[60] Accordingly, it dismissed the appeal without considering the merits, but ordered each party to bear its own costs. It

[58] Above n 9.

[59] Supreme Court of Appeal judgment above n 10 at para 1.

[60] Although the Supreme Court of Appeal was unanimous that deciding the appeal would have no practical effect, the Court was divided on the question of whether it retained discretion even where there was no *lis* (dispute) between the parties. The majority held that it did not.

is worthy to mention that in the Supreme Court of Appeal, Legal Aid challenged the High Court's decision on the same grounds it does before this Court. The Supreme Court of Appeal considered none of those grounds.

In this Court

[52] Legal Aid submitted that it is in the interests of justice for this Court to decide the appeal to clarify the correct position regarding its legal duties. It argued that the High Court judgment will impact on its future operations.[61] In particular, it submitted that the High Court's findings regarding section 34 will necessarily impact Legal Aid's "polycentric budget-allocation decisions" because of the applicability of those findings to other inquiries and investigatory tribunals as well. It emphasised the importance of this for its future operations and contended that the judgment will "fundamentally alter the manner in which Legal Aid operates" by directing that its limited resources, which would otherwise be allocated to fund legal representation for indigent people whose rights will be finally determined as a matter of law, be used before commissions where no rights will be finally determined.

[53] The miners, the families, and AMCU made common cause in opposing the application. I refer to them collectively as respondents. They contended that the High Court judgment rested principally on the finding that Legal Aid's decision was irrational. The respondents argued that the judgment is context-specific and that it will have no impact on future decisions of Legal Aid, which must be analysed in light of their own particular facts. In this respect, the families and AMCU urged this Court not to overestimate the importance of the High Court judgment, in that it amounted to no more than requiring that an administrative decision be made rationally.

[61] Legal Aid explained that it is allocated a finite amount of money from the National Revenue Fund, which it must allocate in pursuit of the objects of the Act and in accordance with the Constitution. In addition to the recipients whose legal representation Legal Aid is constitutionally obliged to fund, the budget is committed in accordance with Legal Aid's policy on all programmes.

[54] Regarding section 34, the respondents argued that the findings were made in the unique factual circumstances of the events at Marikana and the Commission, and are of no material relevance to future cases. The Ledingoane family, in addition, provided extensive submissions to the effect that the High Court's judgment regarding section 34 was correct, both in terms of its application and its finding that, in certain circumstances, it can give rise to the right to state-funded legal representation.

[55] The respondents submitted that amendments to the Guide have altered the "legal matrix" from what existed at the time of Legal Aid's decision and the High Court judgment. Before oral hearing, certain amendments that had been made earlier were removed. The result of the amendment is that the only material change to the Guide is the inclusion of a provision that reads:

> "4.20 COMMISSION OF INQUIRIES
> Where funds are made available by the establishing authority of the commission, legal aid should be provided for the purpose of legal representation at commissions for persons appearing before a commission of inquiry where such person/s have been certified by the Commissioner as having proper standing before the Commission."

[56] The families and AMCU argued that this amendment was material because the Guide now caters specifically for commissions and because, where money is not provided by the establishing authority, the CEO's discretion is no longer engaged to determine whether to provide funding for something not covered by the Guide, but rather whether to waive a policy set out in the Guide.

Leave to appeal

Jurisdiction

[57] There is no doubt that this is a constitutional matter. In addition, the High Court judgment raises an arguable point of law which, in my view, ought

to be considered by this Court. The question remains whether the interests of justice warrant granting leave to appeal.

Interests of justice

[58] Mootness is no bar to deciding an appeal if it is in the interests of justice to do so.[62] As this Court said in *Van Wyk*,[63] relevant considerations are whether the order that the Court may make will have any practical effect either on the parties or on others, whether it is in the public interest for the Court to exercise its discretion to resolve the issues and whether the decision will benefit the larger public or achieve legal certainty.

[59] In *Pillay*, this Court summarised certain factors a court ought to consider when determining whether it is in the interests of justice to decide a matter that is moot:

(a) the nature and extent of the practical effect that any possible order might have;

(b) the importance of the issue;

(c) the complexity of the issue;

(d) the fullness or otherwise of the argument advanced; and

(e) resolving disputes between different courts.[64]

[60] As I demonstrate later, all of these factors support deciding the appeal on its merits. It is important to undertake the interests of justice analysis aware of the context of the application. Legal Aid is an organ of state charged with making legal representation available to indigent people whose rights are at

[62] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (*Van Wyk*) at para 29. See also *AAA Investments* above n 29 at para 27; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22; *Langeberg* above n 27 at para 9; and *President, Ordinary Court-Martial and Others v Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 13.

[63] Id *Van Wyk*.

[64] Above n 15 at para 32.

stake. It accepted that it has nothing to gain directly from the matter being decided on its merits, in that it would not seek repayment from the miners, but has consistently asserted that the High Court judgment sets a precedent that will impact its ability to fulfil its statutory mandate of providing legal assistance to those in need as contemplated or envisaged by the Constitution. There is nothing to suggest that Legal Aid is before us now in anything other than what it considers the public interest.

[61] The evidence shows the financial resources available for the achievement of Legal Aid's objectives are "stretched to the limits of their capacity", strained further by recent budgetary cuts. Where it is obliged, as it was by virtue of the High Court judgment, to direct funds to a recipient to which it had not allocated them, those limits mean that the impact of that obligation will be felt by indigent and vulnerable people in criminal and civil proceedings.

[62] Put in statistical terms, the implications are stark. Legal Aid averred that for every R1 000 000 expended on the provision of funding in relation to commissions of inquiry, it will be obliged to refuse to provide legal assistance to approximately 200 applicants who would otherwise be entitled to that assistance and whose rights would be finally determined. Thus in this case, in which Legal Aid projected that it would be required to re-direct R19 530 800 to fund legal representation before the Commission, approximately 3 800 applicants involved in civil and criminal proceedings would be denied state-funded legal representation as a direct result of the High Court judgment.

Practical effect

[63] Legal Aid's primary concern lies in the High Court's findings regarding section 34 and what they mean for its future operations. It acknowledged that the Act is legislation that gives effect to that provision and contended, in particular, that the High Court has interpreted it in a manner that will

necessarily impact its ability to discharge its mandate under the Act. It is in this impact that the practical effect must therefore be grounded.

[64] The main judgment dismisses the contention that there will be any impact, finding that "[t]he argument that the High Court judgment lays down principles applicable not only to the Marikana Commission but also to other inquiries and investigative tribunals, is unpersuasive."[65] It is necessary, therefore, in deciding the extent, if any, of the practical effect to determine what principles the High Court does in fact set out. In my view, contrary to the position taken by the main judgment, the principles are extensive and by no means apply to the Commission alone.

[65] Before addressing the substance of the principles set out in the High Court judgment, two points need to be disposed of speedily. The contention by the families and AMCU that instead of exercising discretion to depart from the Guide, the CEO is now, by virtue of the amendment, exercising discretion to waive a policy covered by the Guide surely misses the point. Firstly, the distinction does not appear accurate: there is no policy for funding unfunded commissions and thus no policy to waive. Secondly, for the purposes of an issue that entails consideration of whether section 34 obliges Legal Aid to fund legal representation before a Commission, whether the CEO is exercising discretion to depart from the Guide or waive a policy in the Guide is immaterial, as in either case it would be an exercise of discretion that is, in my view, subject to the Constitution.

[66] Does Legal Aid's argument regarding section 34 represent a "distinct change of tack"?[66] The main judgment relies, in particular, on the statement to the effect that Legal Aid—

[65] Main judgment at [21].

[66] Main judgment at [20].

> "accepts that the decision of the High Court was made in the context of the specific circumstances of this case and that, as the High Court made plain, its judgment was not to be construed as 'authority for the proposition that in all commissions of inquiry, there is a right [to] state-funded legal representation.'"[67]

[67] The main judgment finds that this reflects a material difference in Legal Aid's submissions before this Court that the High Court judgment is authority that section 34 provides the right to legal representation at state expense before commissions of inquiry in certain circumstances. I do not agree. There is nothing inconsistent about a position that accepts that the High Court judgment is not an authority for the proposition that the right exists in respect of all commissions of inquiry, but still maintains that it is an authority for the proposition that it will do so in respect of some similar commissions. Legal Aid did not contend that the High Court judgment will oblige it to fund the legal representation of indigent people before all commissions of inquiry. Its contention is that it will do so where the applicants can show that the legal principles articulated in the High Court judgment apply with similar force to a particular commission of inquiry or similar body.

[68] In the Supreme Court of Appeal Legal Aid challenged the High Court's findings regarding section 34, contending that they are "likely to have far-reaching implications for [Legal Aid], not only in this case, but in future cases". It emphasised "the practical difficulty of the provision of funding for legal representation before commissions of inquiry on the broad basis that is required by the [High Court judgment]". These are precisely the grounds on which Legal Aid's submissions rest in respect of section 34 before this Court. Therefore, a change of tack does not, in my view, arise.

[67] Supreme Court of Appeal judgment above n 10 at para 13.

[69] As shown below, the High Court lays down legal principles that are not only novel but also find no direct support in our jurisprudence. To this end, there is a practical effect to deciding the matter.

First principle

[70] The High Court held that "it is of no consequence that the commission is not of a judicial or even quasi-judicial nature" as this "does not . . . place the Commission outside the scope of section 34".[68] None of the previous cases the Court relied upon held that section 34 applies in respect of a commission that was not performing at least a quasi-judicial function. Those that considered the issue most extensively expressly tied the application of the provision to the judicial nature of the commission.[69]

Second principle

[71] The High Court held that it is not necessary that a commission have the power to determine legal rights to fall within the scope of section 34.[70] Although related to the finding that not even a quasi-judicial function is necessary, it is nevertheless distinct in that it is often a factor that is considered separately, and there is no uniform manner to the way in which courts have

[68] High Court judgment above n 5 at para 37.

[69] The High Court in *Mbebe* above n 24 at 775-6, in finding that section 34 applied to the White Commission, which had been established to review the promotions given to members of the Transkeian police force, held that it was accepted "for the purposes of this judgment that the decision of the [White Commission] to reverse the applicants' promotions was judicial in nature". In *Bongoza* above n 24, the High Court again considered section 34's application to the White Commission. It provided, however, no independent analysis as to whether section 34 applied to the White Commission, but appears to have proceeded from the assumption that it did (see paras 22-3). It certainly did not expressly differ from the finding in *Mbebe* as to the White Commission's nature. In *Sidumo* above n 24, at paras 208-9, Ngcobo J, who in his dissenting judgment, but concurring on this point, considered the application of section 34 to the CCMA at the greatest length, grounded his finding that it did apply in the fact that "CCMA arbitrations bear all the hallmarks of a judicial function". Similarly, in the concurring judgment by O'Regan J, at paras 124-5, she held that the CCMA's task is "adjudicative in character" and therefore falls within the scope of section 34. The majority judgment, which considered section 34 only briefly, referred to the CCMA as exercising a "quasi-judicial" function (at paras 84, 88 and 111-2).

[70] High Court judgment above n 5 at para 36.

determined the function of a commission.[71] Similarly, no previous case has found section 34 to apply to a commission that lacks the power to determine legal rights.[72]

Third principle

[72] The High Court said that in determining whether section 34 applies to a commission of inquiry, regard ought to be had to a number of contextual factors.[73] It developed what is necessary to establish the presence of those factors in a given case.[74] Needless to say, earlier cases reflect a variety of approaches to the issue of how one ought to determine whether section 34 applies to a particular commission.[75] None of them set out the same factors, or developed the factors in the same manner, as did the Court.

Fourth principle

[73] The Court held "that section 34 finds application to the Marikana Commission of [I]nquiry, and therefore a constitutional right to legal representation".[76] To the extent I could ascertain, no previous decisions have held that section 34 provides the right to legal representation before commissions of inquiry: where it has been found to provide a right to legal representation, that right has been expressly tied to the nature of civil proceedings before courts.[77]

---

[71] The judgments of Ngcobo J, O'Regan J and Navsa AJ in *Sidumo*, above n 24, for example, all adopted different approaches to the question of how to characterise the function of the CCMA (see paras 111-2, 124-5 and 208-18).

[72] See *Mbebe* above n 24 at 775-6; *Bongoza* above n 24 at para 25; *Sidumo* above n 24 at paras 84, 124, 139 and 208.

[73] High Court judgment above n 5 at para 38.

[74] Id at paras 40-54.

[75] See *Mbebe* above n 24 at 774-6; *Bongoza* above n 24 at paras 23-5; *Sidumo* above n 24 at paras 111-2, 124-5 and 208-18.

[76] High Court judgment above n 5 at para 67.

[77] See for example, *Bangindawo v Head of the Nyanda Regional Authority* 1998 (3) SA 262 (Tk) at 277E. There the High Court held that—

Fifth principle

[74] The High Court found that section 34 may provide a right to legal representation at state expense.[78] The Ledingoane family argues that this proposition is supported by the case of *Nkuzi*.[79] However *Nkuzi* does not assist the respondents. In that case, the Land Claims Court found that the labour tenants in that case had a right to legal representation at state expense. However, although that Court made reference to section 34, the decision was based on the right under section 25(6) of the Constitution, and not section 34.[80]

[75] The legal basis relied on by the High Court for the holding that section 34 may provide a right to legal representation at state expense before commissions of inquiry is where the factors that bring the commission within the scope of the provision are established and its proceedings implicate the rights of indigent and vulnerable people.[81] This too is novel and, to the extent I could establish, finds no support in our jurisprudence. Our courts have consistently denied any entitlement to legal representation as of right in fora other than courts of law.[82] Even in *Nkuzi*, the right to legal representation at state expense was based on the fact that the litigants were involved in proceedings in a court.[83]

> "I accept Mr Trengove's submission that, even though there be no specific mention of the right to legal representation in civil cases, the right of access to court and of having justiciable disputes settled by courts would be rendered entirely nugatory if, *in respect of civil proceedings*, it were to be held that there is no constitutional right to legal representation." (Emphasis added.)

[78] High Court judgment above n 5 at para 68.

[79] *Nkuzi Development Association v Government of the RSA* 2002 (2) SA 733 (LCC) (*Nkuzi*).

[80] Id at para 6.

[81] High Court judgment above n 5 at para 68.

[82] See *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* [2014] ZASCA 151; 2015 (1) SA 106 (SCA) at para 26; *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* [2013] ZASCA 118; 2014 (2) SA 321 (SCA) at para 19; and *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* [2002] ZASCA 44; 2002 (5) SA 449 (SCA) at para 5.

[83] *Nkuzi* above n 79 at para 6.

[76] At risk of repetition, the legal principles espoused by the judgment of the High Court rested on a novel and expansive interpretation of the right in section 34. They pertain to a right to which Legal Aid is statutorily mandated to give effect by providing legal assistance as contemplated by the Constitution. The principles impact directly on Legal Aid's ability to fulfil that mandate. The decision of this Court, as the guardian and final arbiter of the Constitution, confirming or setting aside the decision of the High Court, will have a practical effect. In my view, that effect will not be limited to Legal Aid alone, but will extend also to those whose interests it is mandated to protect.

Narrow impact

[77] The main judgment holds that the High Court judgment will have a "very narrow and . . . so rare" an impact on Legal Aid's mandate "as to be negligible".[84] In support of this finding, the main judgment relies in particular on paragraphs 38 and 69 of the High Court judgment,[85] respectively: that the right to legal representation is not an absolute one, but depends on the context,[86] and that section 34 provided the miners with the right to state-funded legal representation—

> "is no authority for the proposition that in all commissions of inquiry, there is a right for state-funded legal representation. It depends on the context, having regard to the nature of the issues under investigation before a particular commission."[87]

[78] In my view, the error in the main judgment's holding that the High Court's findings regarding section 34 are confined to the Commission lies in

[84] Main judgment at [21].

[85] Id at [22] and [23].

[86] High Court judgment above n 5 at para 38.

[87] Id at para 69.

its conflation of the interpretation of the provision with its application. It is true that the High Court judgment's conclusion that Legal Aid was constitutionally obliged to fund the miners' legal representation before the Commission required the High Court to apply law to their particular factual context. Its statements at paragraphs 38 and 69 acknowledge this fact. In fact, that is true of all rights litigation: whether a claimant will benefit from the protection of a particular right will depend on the context, and thus whether that right applies in any specific case will depend on the facts of a particular case.

[79] What does not depend on the facts is the scope and meaning of the right and the conditions of its application. The factual context may have determined whether section 34 applied but the law that was applied to that context rested not on the particular set of facts, but on an interpretation of the right. That interpretation constitutes findings of law and stands alone from the particular context in which they have been applied.

[80] Contrary to the main judgment's view, the High Court in fact acknowledged that the legal principles on which its decision rested could find application in future cases. Indeed, that is the import of its statement in paragraph 69: that whether there will be a right to state-funded legal representation in respect of other commissions of inquiry "depends on the context, having regard to the nature of the issues under investigation before a particular commission". That holding, that there are contexts in which section 34 can provide a right to state-funded legal representation before a commission of inquiry, is precisely the practical effect on Legal Aid's operations.

[81] If left standing, the principles set out in the High Court judgment will have a bearing on future decision-makers. The main judgment posits that we need not be concerned that such a result will occur because the High Court judgment was based on the "unique circumstances" of the Commission. We

may indeed hope that these circumstances are unique. However, I doubt that it is correct to proceed on that basis when dealing with legal principles. Moreover, there is no reason to speculate that those circumstances are indeed so unique as to have no relevance to future cases. We need only consider commissions of the past to see that this is not so: the Ledingoane family's submissions on the role of commissions in apartheid South Africa are apposite in this respect. As noted in its submissions, the history of commissions in South Africa is "replete with examples of the systematic silencing of the voices of victims".[88] And although the nature of commissions in South Africa may have changed since the end of apartheid, challenges persist, in that "[t]he poor and the vulnerable continue to be left to their own devices", while "[s]tate organs still wield enormous influence in such mechanisms through overwhelming legal 'firepower' provided at taxpayer's expense".

[82] The notion that the context of this Commission is so unusual as to have no relevance to future cases is further belied by the extent to which the High Court relied on earlier decisions, in particular those of *Mbebe* and *Bongoza* (both of which are contextually distinguishable), to support its reasoning.[89] It is difficult to understand why, if the context of this case was sufficiently similar as to make relevant the application of prior cases, it will not be similarly applicable in respect of future cases.[90]

[83] Attempts to confine the judgment to this "solitary" matter not only appear to be incorrect in law in so far as they ignore the legal principles that

[88] To illustrate the point, the Ledingoane family points to the transcripts of various commissions of inquiry in South Africa stored on JStor "Struggles for Freedom: South Africa" *Commissions of Inquiry, South Africa online digital library of scholarly resources*, available at https://www.aluka.org/struggles/collection/COMENQ.

[89] High Court judgment above n 5 at paras 30-4.

[90] Interestingly, the main judgment at [24] endorses the delineation of the right in section 34 as adopted in *Mbebe* and *Bongaza* without properly considering whether those High Court decisions were correct in law and dealing with the scope of that right as outlined by the High Court in this matter. In view of what this Court said in *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at paras 58-62 regarding the sound jurisprudential basis for the doctrine of precedent – to stand by decisions and not disturb settled matters (*stare decisis et non quieta movere*), the endorsement by this Court may, in future, frustrate legal certainty.

the High Court judgment sets out but result in further confusion of an important issue, especially where the Constitution itself expressly stipulates instances where legal representation at state expense would be provided.[91] If the approach adopted by the main judgment is correct, one wonders: how, in light of that judgment's finding that the High Court judgment will have no practical effect and only bind Legal Aid in cases so rare as to be "negligible", are future applicants, Legal Aid or even courts to understand the import of those legal principles? Is it the case, for example, that the judgment of the High Court cannot be relied upon for the proposition that section 34 can apply to bodies that do not determine legal rights or perform a quasi-judicial function? Nor for the principle that section 34 will oblige Legal Aid to fund the legal representation of participants before commissions of inquiry when the same factors are established?

[84] Our system of precedent and the principle of equality before the law would suggest that this cannot be so. These principles will remain intact if not dealt with because future decision-makers and litigants are likely to rely upon them. Casting them in doubt without resolving any of the important issues they raise is likely to be a source of uncertainty and confusion about the content and meaning of the section 34 right.

[85] For the same reasons advanced above, I find that the Supreme Court of Appeal erred in dismissing the appeal without dealing with the discrete legal issues. Before I deal with the merits, I dispose of further points on rationality, the CEO's discretion and factors in *Pillay*.

Rationality

[86] According to the main judgment, the High Court judgment will have no practical effect because it was decided in the context of the reasons advanced

[91] See above n 36.

by Legal Aid not to fund the miners while having already decided to fund the families. In my view, that context was not relevant to the High Court's findings regarding section 34 and its application to the Commission,[92] and therefore will not detract from the practical effect of deciding the matter. The High Court said of the issue it had to determine: "the primary and crisp issue for determination is whether the [miners] are entitled to state-funded legal representation for their participation in the proceedings of the commission."[93] It thus did not set out to determine an issue relating to differential treatment.

[87] The High Court held that section 34 applied to the Commission and that the responsibility for giving effect to that right lay with Legal Aid exclusively. The import of these findings is significant. As the High Court rightly noted later in the judgment, Legal Aid could not justify its infringement of the miners' constitutional rights because it was not pursuant to a law of general application but merely the exercise of discretion.[94] Accordingly, having found that section 34 gave the miners the right to state-funded legal representation and that Legal Aid was obliged to give effect to that right, the rationality or otherwise of not doing so was simply irrelevant. Put another way, if Legal Aid's refusal to give effect to the miners' right to funding was rational, could that have excused the infringement notwithstanding that section 36 is inapplicable? The answer must be that it could not. And as it could not, the rationality of the decision was strictly irrelevant to the High Court's determination of the issue, and thus properly obiter.[95]

[92] This follows from the fact that the findings were dispositive of the issues in the High Court and made before any consideration of rationality.

[93] High Court judgment above n 5 at para 22.

[94] Id at para 98. Although this statement was made in the context of section 9 and the rationality enquiry, it is equally applicable to the right to legal representation which the High Court found in section 34.

[95] The rationality basis of the decision is also belied by the manner the Court treated the issue. The only express conclusion drawn by the Court regarding whether Legal Aid's decision met the rationality standard, frames that finding in para 97 in the alternative: "In any event, I am also of the view that Legal Aid's conduct would not pass a general rationality requirement".

Is the CEO's discretion still intact?

[88] The main judgment asserts that the High Court judgment will have no practical effect on Legal Aid's future operations. By inference, this would mean that the CEO would, as was the case before the judgment of the High Court, have a discretion to refuse to fund commissions of inquiry despite the presence of the High Court factors. I do not agree. The High Court held that section 34 obliged Legal Aid to fund the miners, that is to say, Legal Aid has no discretion to exercise. Indeed, this is precisely what is problematic for Legal Aid: the High Court judgment stands for the proposition that, where section 34 applies to commissions of inquiry and provides the right to state-funded legal representation, it has no discretion to exercise.

Factors in Pillay

[89] *Pillay* involved circumstances highly similar to those at issue in this application. It arose out of a challenge by a student to a school's decision to preclude her from wearing a nose ring at the school on the basis, *inter alia*, that it infringed her right to equality under section 9 of the Constitution. By the time the case reached this Court, the student had graduated and thus, as the Court found and the parties agreed, the matter was moot. There were also contentions that the "legal landscape" had been altered in light of amendments to guidelines that related to the issue. Nevertheless, this Court determined that deciding the appeal on the merits was in the interests of justice on the basis of the importance to administrators of clarity on constitutional rights. In certain respects, there was even less reason to decide that appeal than there is reason to decide this application in that in *Pillay* the Department sought to withdraw its application because the matter was moot. Thus, unlike in this case where the administrator is seeking clarity, in *Pillay* this Court determined that such clarity was in the public interest even though the administrator no longer sought it.

[90] *Pillay* is distinguished on the basis that the guidelines that had been amended did not have the force of law and there was therefore a danger of schools in the future implementing constitutionally invalid policies.[96] It is difficult to reconcile this point with the consequential inference that the discretion of the CEO of Legal Aid remains intact. If the issue of whether to fund participants before commissions of inquiry is at the CEO's discretion, surely the situation is the same as it was with the schools in *Pillay*: there is no legal instrument governing the issue. In fact, unlike the schools, the CEO does not even have guidelines to assist her, as the question that she faces is whether to depart from policy in the Guide, with the only condition that it be "within the overall authority of the [Act]".[97] Accordingly, the concern that the CEO will exercise her discretion, if indeed the Constitution permits her any, contrary to section 34 is at least as valid in this case as it was in *Pillay*. Furthermore, unlike in *Pillay*, where granting the individuals the protection of the right did not deprive others of benefits, Legal Aid's limited budget necessarily means that providing a right to its resources will deprive others of the protection that those resources could provide. This lack of protection, given the nature of Legal Aid's constitutional and statutory mandate, could translate into indigent people being unable to enforce other clear constitutional rights.

[91] *Pillay* then, speaks to the importance of providing clarity to administrators on their constitutional obligations, even where the particular issue that engaged those obligations is no longer live. That principle applies all the more in this case where those obligations touch upon the interests of some of our society's most vulnerable.

[92] In considering just how important it is for courts to provide clarity in this context, a comparable foreign jurisprudence also sheds light. The

[96] See above n 15.

[97] See above n 16.

Canadian Supreme Court in *New Brunswick*[98] determined whether the refusal by Legal Aid New Brunswick, the Canadian provincial equivalent of Legal Aid, to provide legal assistance to an indigent mother involved in a custody application by the provincial Minister of Health and Community Services infringed the mother's right to equality and security of the person in a manner inconsistent with the principles of fundamental justice. Although relying on different constitutional rights in the Canadian Charter of Rights and Freedoms (Charter), the Court characterised the issue as essentially the same as is now before us: "[a]t issue is whether the Government of New Brunswick was under an obligation to provide state-funded counsel to the appellant in the circumstances of [the] case".[99]

[93] The Court found that this issue was moot because, ultimately, the mother was represented by counsel at the custody hearing, and because the custody order had expired and the mother had regained custody of her children by the time the case reached the Court.[100] Nevertheless, the Court determined that it should exercise its discretion to decide the appeal. It did so on the basis of several factors. In particular, it found that the—

> "question of whether a parent has a right to state-funded counsel at a custody hearing is undoubtedly of national importance. Similar cases may arise in the future, and the Court has an opportunity to clarify the law and provide guidance to the courts below. This is a particularly important factor."[101]

[94] The Court relied on the fact that "[w]hile similar cases may arise in the future, they are by nature evasive of review", in part because—

[98] *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 SCR 46 (*New Brunswick*).

[99] Id at para 42.

[100] Id.

[101] Id at para 46.

"it is unlikely that appellants will be able to retain counsel for an appeal if they were unable to retain counsel at the initial hearing. As a result, few cases will ever be appealed to this Court, since the assistance of counsel is almost invariably required in negotiating the appeal process."[102]

[95] Finally, the Court noted that it—

"is not overstepping its institutional role in deciding this case. . . . the appellant is not requesting a legal opinion on the interpretation of the *Charter* in the absence of legislation or *other governmental action* which would otherwise bring the *Charter* into play. While the issue in this case is moot, it is not abstract".[103] (Emphasis added.)

---

[102] Id at para 47.

[103] Id at para 48. The Court's reasoning is worth setting out in full, as it demonstrates the nature of the similarities in the legal principles on which the Court relied to those of South African law. The Court reasoned as follows at paras 41-8:

> "A moot case is one in which a decision of the court "will not have the effect of resolving some controversy which affects or may affect the rights of the parties". As a general rule, the Court will not decide moot cases. However, the Court may exercise its discretion to decide a moot case in certain circumstances. . . .
>
> There can be little doubt that the present appeal is moot, and that the response to the first question is affirmative. At issue is whether the Government of New Brunswick was under an obligation to provide state-funded counsel to the appellant in the circumstances of this case. The appellant, though, was in fact represented by counsel at the custody hearing, the custody order has expired, and she has since regained custody of her children. Consequently, there is no 'live controversy' in this appeal. The tangible and concrete dispute has disappeared, and the issue has become academic.
>
> Nevertheless, the Court has decided to exercise its discretion to decide this case. In *Borowski*, Sopinka J identified three criteria relevant to the Court's exercise of discretion: the presence of an adversarial context, the concern for judicial economy, and the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.
>
> Applying these criteria to this appeal, I am satisfied that there was an appropriate adversarial context. The appeal was vigorously and fully argued on both sides by the parties and the interveners.
>
> Turning to the second factor, this Court has held on a number of occasions that an expenditure of judicial resources is warranted in cases which raise important issues but are evasive of review.
>
> The present appeal is a case in point. The question of whether a parent has a right to state-funded counsel at a custody hearing is undoubtedly of national importance. Similar cases may arise in the future, and the Court has an opportunity to clarify the law and provide guidance to the courts below. . . .
>
> While similar cases may arise in the future, they are by nature evasive of review. This is so for two reasons. First, the custody order will ordinarily have expired by the time the matter comes to this Court, rendering the controversy moot. The Court will therefore likely have to decide a moot case if it ever wants to address this issue. . . . Second, it is unlikely that appellants will be able to retain counsel for an appeal if they were unable to retain counsel at

[96] It is true that in that case the Court was dealing with the issue of state-funded legal assistance in the context of custody applications rather than commissions of inquiry, which are generally less common and thus can be expected to give rise to the issue less frequently. However, by the same token, commissions of inquiry are typically much larger in scale. This case is evidence of that fact: it involved the funding of 300 individuals, not merely one; and required the deprivation, on Legal Aid's evidence, of thousands of others who would otherwise have received that funding. I do not, therefore, consider the difference in context a basis on which to distinguish the two cases for our purposes.

[97] Given the analysis above, the interests of justice in this case turn primarily on the practical effect of deciding the matter, and the remaining considerations listed in *Pillay*, may therefore be dealt with briefly. All, in my view, similarly support deciding the matter.

The importance of the issue

[98] At issue, properly speaking, are the interests of those in need of legal assistance but are unable to retain it on their own means. They are thus among society's most vulnerable. Whether, as was found in this case, there is a possibility that the Constitution will require, where it does not do so expressly, that some receive that assistance at the expense of others is, in my view, an important issue.

---

the initial hearing. As a result, few cases will ever be appealed to this Court, since the assistance of counsel is almost invariably required in negotiating the appeal process.

Finally, the Court is not overstepping its institutional role in deciding this case. Unlike *Borowski*, the appellant is not requesting a legal opinion on the interpretation of the *Charter* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. While the issue in this case is moot, it is not abstract." (References omitted.)

The complexity of the issue

[99] The issue whether section 34 obliges Legal Aid to fund legal representation is undoubtedly complex. This Court has said that "whether the desirable objective of 'equality of arms' before a commission translates into a right to legal representation that must be provided at state expense is a contestable issue."[104] The issue involves consideration of a host of factors, constitutional and otherwise. These include what the right to a fair hearing means; what demands can be placed on the resources of the State; and how best to balance the competing claims of a range of seemingly worthy recipients of the State's assistance.

The fullness or otherwise of the argument advanced

[100] The issues have been canvassed extensively on the papers and in oral submissions. In addition to Legal Aid's and the miners' submissions, this Court has had the benefit of submissions from the families and AMCU as well as the Ledingoane family. The latter, in particular, provided extensive written submissions regarding section 34.

Resolving disputes between different courts

[101] The principles regarding section 34, enunciated in the High Court judgment, are novel and appear to be incompatible with our jurisprudence regarding the content and meaning of the right under section 34 in that it finds that the right extends in application to commissions of inquiry and, more radically, in content to state-funded legal representation. No other courts have made similar findings, and in that sense, although perhaps not properly a dispute, the import is the same, namely a lack of clarity on a point of law.

[104] *Magidiwana I* above n 4 at para 16.

[102] Another factor may be added to those listed in *Pillay*: the likelihood that this Court will have the opportunity in the future to pronounce on the issues now before it. In my view, the less likely the opportunity to make a future pronouncement, the greater the importance of providing the clarity in the case at hand. Lest confusion as to the scope and meaning of section 34 continue.

[103] As in *New Brunswick*, cases involving legal aid are "by nature evasive of review".[105] Legal Aid cannot challenge the precedent unless a case is brought against Legal Aid's failure to comply with it; and those who might bring such a case are highly unlikely to be able to do so, lacking, as they would, the requisite funding, and having had their application to Legal Aid denied. Perhaps more importantly, those who are denied, should Legal Aid comply with the precedent, are even more unlikely to bring a challenge, in their instance lacking not only resources but a probable case, given that Legal Aid would be acting pursuant to a court ruling.

[104] I conclude that the interests of justice warrant the granting of leave to appeal.

Merits

[105] The High Court made a series of important findings regarding the scope and meaning of section 34. However, in considering the merits of the appeal, we must first address the dispositive issue, which was the finding that section 34 entitled the miners to funding from Legal Aid. Only should we find that the High Court was correct in that finding need we proceed to consider its other findings in respect of section 34.

[106] The starting point in considering whether section 34 is capable of affording the right to legal representation before commissions of inquiry is this

[105] *New Brunswick* above n 98 at para 47.

Court's decision in respect of Part A of the miners' application. The Court said:

"Section 34 deals with disputes 'that can be resolved by the application of law'. The Commission's findings are not necessarily to be equated to a resolution of legal disputes by a court of law.

It may be that it would be commendable and fairer to the applicants that they be afforded legal representation at state expense in circumstances where state organs are given these privileges and where mining corporations are able to afford the huge legal fees involved. The power to appoint a commission of inquiry is mandated by the Constitution. It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too. So ordinarily, a functionary setting up a commission has to ensure an adequate opportunity to all who should be heard by it. Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised.

This means that unfairness may arise when adequate legal representation is not afforded. But this does not mean that courts have the power to order the executive branch of government on how to deploy state resources. And whether the desirable objective of 'equality of arms' before a commission translates into a right to legal representation that must be provided at state expense is a contestable issue. A consideration that comes into play is that it is the object of the Legal Aid Act to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution. Its provisions have not been challenged as constitutionally invalid, nor has the refusal by Legal Aid South Africa to grant the applicants legal aid been challenged on review."[106] (Footnotes omitted.)

[106] *Magidiwana I* above n 4 at paras 14-6.

[107] These remarks capture the considerations that must inform our analysis of this issue. It is true that the failure to provide funding for legal representation to those in need may compromise the capacity of a commission to fulfil its truth-finding function. However, that concern is not one that engages the protection of section 34.

[108] It is important to consider the implications of finding that section 34 affords the right to legal representation at state expense in the first place. There are many indigent and vulnerable people involved in legal proceedings, and it is an unfortunate reality that the funds to finance their legal assistance are not sufficient to provide for them all. While that is hardly an issue that is unique to South Africa,[107] it means that Legal Aid, the only organ of state tasked with the general obligation of ensuring that indigent people are not deprived of legal representation where substantial injustice would otherwise result, operates on a limited budget. Legal Aid thus must strive to give effect to its statutory mandate by implementing policies that identify those most in need of the assistance and directing its available funds to those individuals. The effect of recognising that certain claims are entitled by virtue of the Constitution to the funds that Legal Aid has to allocate ought therefore to be obvious. It deprives not only Legal Aid of the ability to engage in the "polycentric budget-allocation" that is inherent to the task of allocating finite resources amongst many indigent and vulnerable claimants by prioritising the claims of some over others, but it deprives other claimants of the assistance to which they would otherwise be entitled.

[109] It bears repeating that in certain cases, the Constitution does dictate that result. It expressly provides for the right to legal representation at state expense in three instances: Section 28(1)(h) provides a child with the right to have a legal practitioner assigned to him or her by the State at its expense in civil proceedings affecting the child; section 35(2)(c) provides that everyone

[107] See, for example, *British Columbia (Attorney General) v Christie* 2007 SCC 21; [2007] 1 SCR 873.

who is detained has the right to have a legal practitioner assigned to him or her by the State at its expense; and section 35(3)(g) provides every accused the right to have a legal practitioner assigned to him or her by the State at its expense. In each case, that right arises only where "substantial injustice would otherwise result".

[110] That the Constitution expressly provides for the right to legal representation at state expense in a limited number of circumstances, is telling. It was open to the drafters to provide for it in more circumstances, or even in all circumstances if substantial injustice would otherwise result. The fact that they did not do so ought to make us cautious to find that it is implied in other rights. That is not to say that the Constitution, or section 34 specifically, may not provide for the right to legal representation at state expense outside of the circumstances in which it is expressly provided for. It is to say that it will only do so in exceptional circumstances. In my view, those circumstances do not extend to the Commission. As this Court made clear in *Magidiwana I*, "[s]ection 34 deals with disputes that can be resolved by the application of law" and "[t]he Commission's findings are not necessarily to be equated to a resolution of legal disputes by a court of law."[108] This is correct. The Commission was not empowered to finally determine legal rights. Its Terms of Reference limited its powers to making findings of fact and recommendations.

[111] In this regard, it is useful to consider the foreign jurisprudence to which we were referred in support of the respondents' contentions that section 34 may provide the right to legal representation at state expense. None of them found that the right arises in respect of a body that has no power to determine legal rights. On the contrary, they relied on the fact that the applicant's rights were not merely implicated, but subject to determination.[109] Furthermore,

[108] See above n 4.

[109] See *New Brunswick*, above n 98 at paras 57, 61 and 66.

international law similarly ties the right to state-funded legal representation to the determination of legal rights.[110] Thus in *Airey v Ireland*,[111] the European Court of Human Rights found that the right of access to courts, provided for in article 6(1) of the European Convention of Human Rights,[112] may provide the right to legal representation at state expense in certain circumstances in relation to *civil proceedings*. It did so in part on the basis that the outcome of the proceedings at issue was, as is required for article 6(1)'s application, "decisive for private rights and obligations".[113] Subsequent cases have yet to extend the right beyond civil proceedings.[114]

[112] It must be recalled that whether section 34 applies in the first place to tribunals that are not empowered to finally determine legal rights is itself a contestable issue. The provision refers to disputes "that can be resolved by the application of law". That wording does not obviously lend itself to being

---

[110] See article 45(i) of the Charter of Organisation of American States which provides that states must provide "adequate provisions for all persons to have due legal aid in order to secure their rights".

Additionally, article 14 of the International Covenant on Civil and Political Rights (999 UNTS 171) (ICCPR) provides that "in the determination of any criminal charge against him" he has the right "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him".

See finally principle 1 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems that recognises legal aid as an "essential element of a functioning criminal justice system". (UN Doc. A/C.3/67/L.6 (New York, 3 October 2012).)

[111] *Airey v Ireland*, no 6289/73, § 24, ECHR 1979.

[112] Article 6(1) provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[113] See above n 111 at 21.

[114] For example, *Tabor v Poland*, no 12825/02, § 31 and 39, ECHR 2006; *Bertuzzi v France*, no 36378/97, § 21, 24 and 31, ECHR 2003; *McVicar v UK*, no 46311/99, § 33, 40, 47-52, ECHR 2002; *P, C, and S v UK*, no 56547/00, § 89, ECHR 2002; and *Steel and Morris v UK*, no 68416/01, § 53, 55, 59-61 and 63 ECHR 2005.

Similarly, article 14 of the ICCPR, which provides in part that "[a]ll persons shall be equal before the courts and tribunals" has been interpreted to require the provision of legal aid in certain *civil* matters, but is engaged "whenever domestic law entrusts a *judicial* body with a *judicial* task" (Human Rights Committee, General Comment no 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007).) (Emphasis added.)

applied to a body whose purpose and powers are inquisitorial. If section 34 did find application to a commission of inquiry, extending its meaning to include the right to state-funded legal representation would prioritise the interests of participants in inquiries above those whose rights are to be finally determined. This is particularly germane when one considers the scale of commissions and the broad range of individuals whose interests they may engage.

[113] None of this is to downplay the importance of the Commission or its findings regarding the events at Marikana. The High Court was quite right to emphasise the importance of its task, as well as the vital importance of ensuring that the miners' participation was meaningful and that they were not unfairly disadvantaged by their indigence. However, it must be borne in mind that although section 34 may not provide the right to legal representation at state expense before commissions of inquiry, there may be other constitutional provisions and principles that ensure fairness and equality in such circumstances, but that would not come at the expense of those whose rights will be finally determined. In this case, it is notable that the Ledingoane family made persuasive submissions to the effect that the establishment of the Commission without ensuring the miners' legal representation before it infringed the principle of legality under section 1(c) of the Constitution. They argued that the failure to do so bore no rational relationship to the objective of the President in establishing the Commission.

[114] However, those submissions are properly aimed not at Legal Aid's decision but at the President, whose power was being exercised in establishing a commission without providing funding for legal assistance.[115] The Ledingoane family had in fact attempted to direct this contention at the President before the High Court, but had been denied the opportunity on the basis that it was a "new argument". Whether it would have been successful

[115] See in this regard the remarks by this Court in *Magidiwana I* above n 4 at para 15.

against the President does not fall to be determined now. The argument, however, demonstrates that merely because section 34 does not provide the miners with the right to state-funded legal representation, participants before a commission are not necessarily without the protection of our Constitution in this regard. That protection should not however, come at the expense of those who are even more vulnerable.

[115] Section 34 did not, therefore, oblige Legal Aid to fund the miners' legal representation before the Commission. I need not thus consider the issues relating to the application of section 34 to the Commission. Instead, I deal with the other two bases in respect of which the High Court found in favour of the miners, namely section 9(3) and the principle of rationality. Both may be disposed of relatively briefly.

[116] The respondents have not pursued the section 9(3) claim before this Court. That was correct because the argument is unsustainable. It rested on the High Court's finding that survival of a shooting constitutes an analogous ground. That, of course, must be wrong: the appropriate comparator was not the deceased miners, who obviously cannot benefit from funding, but the families, who *also survived the shooting*. More importantly, though, the finding rests on a fundamental misunderstanding of the nature of analogous grounds,[116] which according to the *Harksen* test must *as grounds* be "based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner".[117] Survival of a shooting, in contrast, would typically be regarded as a *benefit*, and certainly cannot be seen to be based on any similar attributes or characteristics as are contemplated by the *Harksen*

[116] The strangeness of the High Court's understanding of this issue is underscored by its statement at para 93 that the miners "are visited with disadvantages, solely because they have survived a police shooting". It is true that had they not survived the shooting they would not have been visited with these disadvantages, but their survival can hardly be said to be the cause of those disadvantages.

[117] *Harksen v Lane and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (*Harksen*) at para 47.

test. Accordingly, I find that the High Court erred in finding that Legal Aid infringed the miners' right not to be unfairly discriminated against under section 9(3).

[117] The final issue to address is that of rationality. The only conclusion made by the High Court on rationality was in respect of section 1(c) of the Constitution and was thus grounded on the principle of legality. However, its analysis focused on the differential treatment afforded to the miners relative to the families, which would seem more properly undertaken in respect of the miners' right to equal protection of the law under section 9(1). Yet that section is never relied upon by the High Court in its analysis. In either case, however, the reasoning was deficient. It both relied on reasons that were not in fact the basis of Legal Aid's decision and, more importantly, failed to consider the primary basis of that decision, which provided the context in which any other bases must be understood.

[118] Firstly, the High Court relied on a misinterpretation of the reasons that Legal Aid provided for treating the miners differently from the families. Specifically, it relied on two reasons that it said Legal Aid had given: that the miners did not have a "substantial, proximate and material interest" in the Commission's outcome; and that their interests would be adequately protected by the labour unions. The first of these, the High Court said, was implied by Legal Aid's statement that it had decided to fund the families of the deceased "who have a substantial, proximate and material interest in the outcome of the inquiry". I do not read that statement as implying any such damaging remark as to the miners' interest, which would be to impute a remarkable degree of ignorance to Legal Aid, but simply as serving the descriptive purpose of identifying the particular families that Legal Aid had decided to fund.

[119] Regarding the second purported reason, Legal Aid's statement was in fact that it was unable to determine a substantial benefit to the miners being

represented separately, particularly as the interests of the miners are protected by their respective unions. Legal Aid's assertion regarding the alignment of interests with the unions was merely made to bolster the general point regarding separate representation, and was not to be dispositive of it. The question that the High Court ought to have considered in relation to this statement was whether there would be a substantial and identifiable benefit from separate representation. It did not.

[120] More importantly – even more than its mischaracterisation of the reasons relied on by Legal Aid for its differential treatment – was the High Court's failure to consider the primary basis for that treatment: Legal Aid's budgetary constraints. Legal Aid explained its decision in both of its letters to the miners as being attributable to budgetary constraints. In the second of those letters, which amounted to only two paragraphs, it referred to those constraints twice. They provide, of course, the context in which Legal Aid's decision must be examined. This is so because it is only those constraints which can explain the refusal. Yet at no point in its rationality analysis did the High Court refer, even indirectly, to these as a basis for the decision. It is a remarkable omission and one that, in my view, stresses the incorrectness of the High Court's conclusion.

[121] It may be true that the presence of bad reasons amongst good may be enough to render an administrative decision irrational. However, for those reasons to do so, they must play an "appreciable or significant role in the outcome".[118] Without having considered the primary basis for the decision, and thus the context in which the other reasons were proffered, there was no basis for the High Court to have determined whether the reasons it did have regard to played an "appreciable or significant role" in the decision not to fund the miners after having decided to fund the families. The High Court was not

[118] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* [2006] ZASCA 175; 2007 (1) SA 576 (SCA) at para 34.

entitled, I consider, to cherry-pick the reasons it would have regard to, without a basis on which to conclude that those it had regard to played an appreciable or significant role and without considering the primary reason put forward as justification.

[122] I conclude that the High Court erred in finding that section 34 provided the miners with the right to legal representation before the Commission, that Legal Aid's differential treatment of the miners compared to the families infringed section 9(3), and that Legal Aid's decision not to fund the miners was irrational.

[123] I would have granted leave to appeal, upheld the appeal, set aside the decision of the Supreme Court of Appeal and replaced the High Court's decision with an order dismissing the application.

For the Applicant:	G Marcus SC, M Stubbs and E Mahlanga instructed by Legal Aid South Africa.
For the First, Second and Further Respondents:	D Mpofu SC and M Qofa instructed by Maluleke Msimang and Associates.
For the Eighth and Ninth Respondents:	S Wilson and F Hobden instructed by Socio-Economic Rights Institute Law Clinic.
For the Eighteenth Respondent:	J Brickhill instructed by the Legal Resources Centre.