

**ENQUIRY INTO THE SOUTH GAUTENG DIRECTOR OF
PUBLIC PROSECUTIONS' FITNESS TO HOLD OFFICE**

HELD AT

**SALU BUILDING, 316 THABO SEHUME STREET,
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

26 NOVEMBER 2025

DAY 8



**ENQUIRY INTO THE
SOUTH GAUTENG
DIRECTOR OF PUBLIC
PROSECUTIONS'
FITNESS TO HOLD OFFICE**

PROCEEDINGS ON 26 NOVEMBER 2025

CHAIRPERSON: Good morning, everyone. We delayed a little bit, Counsel, to address some of the issues that you raised with us this morning. Advocate Ngcukaitobi, the matter that you raised with us is receiving attention.

ADV NGCUKAITOBI SC: Thank you, I am indebted to the panel.

CHAIRPERSON: Thank you. Advocate Batohi ...[intervenes].

ADV NGCUKAITOBI SC: Can I increase the number?

10 **CHAIRPERSON:** I did not hear your Counsel. Advocate Batohi, please pardon us for keeping you here waiting. There is just some few housekeeping matters that we needed to deal with this morning and for this delay, we apologize to you. Ntate Chauke, please bear with us for starting late. It was us yesterday cautioning you to come early, and it cannot be that we also delay and keep you waiting. Tomorrow you must arrive here at seven. Thank you, Counsel. Re Mohlamonyane, you may begin, Counsel.

20 **ADV MOHLAMONYANE SC:** Before I begin, may she be reminded, Madam Chair, that she is still on oath.

CHAIRPERSON: Yes, thank you. Advocate Batohi, remember that you are still on the oath.

ADV BATOHI: I do, thank you, Chair.

SHAMILA BATOHI (still under oath)

CHAIRPERSON: Thank you.

EXAMINATION BY ADV MOHLAMONYANE SC

(CONTINUED): Advocate Batohi, you will be reminded that, you are reminded that yesterday when we adjourned, you had just read into the record paragraph 151 on page 64 of your affidavit.

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: Which dealt with the judgment of Gorven J in the review application.

ADV BATOHI: Yes, I did read that into the record.

10 **ADV MOHLAMONYANE SC**: Brought by General Booysen against the ANDPP on racketeering.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: He wanted, or he approached the court to have the decision to issue out the racketeering certificates to be reviewed and set aside.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Now, let me take you back to the internal memorandum that we dealt with yesterday, which is contained in your Annexure SB2111, and I specifically refer
20 you to page 114, SB 2114. Are you there?

ADV BATOHI: I am.

ADV MOHLAMONYANE SC: In the middle of the page, you will see a sentence that starts with NJ4.

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: For purposes of completeness,

regarding what you would be saying about this paragraph, just read it again into the record.

ADV BATOHI: So it starts, it states:

“NJ4 is a statement of Aiyer taken on 31 August, 2012, following a consultation with the prosecution team. Whatever is contained in this statement was already information related to the prosecution team by the deponent during the consultation with the prosecution team.

10

Therefore, the applicant's averments are unfortunate, unfounded, and misleading. This seems to suggest that the information that was contained in the 31st of August statement was what was what was already related to the prosecution team before that date.”

ADV MOHLAMONYANE SC: Do you want, therefore, to go to ...[intervenes].

20 **ADV BATOHI**: If we could remind ourselves, sorry, sorry, Counsel, if we could remind ourselves that the document I am quoting from now is the internal memorandum as per 111 of the Cato Manor team to Laurence Hodes, SC, with regard to the replying affidavit of Booysen.

ADV MOHLAMONYANE SC: Whilst you are still on the

replying affidavit of Booyesen, I want to refer you in a moment to the replying affidavit of Booyesen, which I am told, I am instructed that it is not part of the record. Madam Chair and your two sisters, at this point in time, may I ask for leave to hand up a copy of General Booyesen's replying affidavit in the review application brought in the High Court in Durban in KwaZulu-Natal. It will later be marked as an exhibit. We have prepared three copies for the panel, and I apply to hand them up as exhibits, as an exhibit, with your leave, Madam

10 Chair

CHAIRPERSON: Thank you, Counsel. Have you made an additional copy for Advocate Chauke's team?

ADV MOHLAMONYANE SC: Additional copies have been made for Advocate Chauke's team and we handed two copies to them, and a copy has been made available to the witness.

CHAIRPERSON: Yes, thank you, Counsel. This document, as you indicate, will be marked accordingly at the later stage as an exhibit.

ADV MOHLAMONYANE SC: That is so, Madam Chair.

20 **CHAIRPERSON:** The replying affidavit of Colonel, Major General Booyesen.

ADV BATOHI: Counsel, if I may, for completeness, perhaps read the entire, not just the one paragraph that I have, but from page SB2113, it says, ad paragraphs 19 to 21, perhaps for completeness and clarity, I should read from there, if I

may.

ADV MOHLAMONYANE SC: Ad paragraph, which ad paragraph?

ADV BATOHI: It is on page SB2113, at the bottom, the statement of Aiyer, ad paragraph 19 to 21, referring to the paragraphs in Booysen's replying affidavit.

ADV MOHLAMONYANE SC: Let me remind you that yesterday, Madam Chair proposed that we use the even numbers.

10 **ADV BATOHI:** Oh, it is a duplicate.

ADV MOHLAMONYANE SC: It is a duplication of 112.

ADV BATOHI: Oh, okay, certainly.

ADV MOHLAMONYANE SC: Ja, just stick to 112.

ADV BATOHI: Thank you.

ADV MOHLAMONYANE SC: It is the same statement.

ADV BATOHI: So on page 112 at the bottom, it says, ad paragraph 19 to 21, referring to Booysen's replying affidavit.

20 “NJ2 is a statement of Aiyer taken on 3 August, 2012, stating the managerial responsibilities, participation, and interferences in activities of a section of the Durban Organized ...”

And I go to page 114:

“Crime based in Cato Manor. This section under management and

supervision of the applicant committed horrendous pattern of criminal activities. This statement ...”

That is now referring to NJ2.

“Was obtained before 17 August, 2012, being the date on which the certificate was authorized. Clearly, they are dealing with what information was before the National Director at the time the authorization was made on the 17th of August.”

10

The document then continues.

“NJ4 is a statement of Aiyer taken on 31 August, 2012, following a consultation with the prosecution team. Whatever is contained in this statement was already information related to the prosecution team by the deponent during the consultation with the prosecution team, and this seems to suggest that this information, although not in an affidavit, was before the Acting National Director at the time of the authorization of the racketeering certificate.”

20

ADV MOHLAMONYANE SC: Is that all that you want to

comment on?

ADV BATOHI: On this part, that is correct.

ADV MOHLAMONYANE SC: This part?

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Then let me take you to page SB2118, and your attention is directed to ad paragraph 29. But maybe before you deal with the paragraph itself, let me refer you to the replying affidavit of Johan Wessel Booysen, and go to paragraph 29 thereof, and read it into the record, 10 because this had to, this was dealing with paragraph 29 ...[intervenes].

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: The memorandum.

ADV BATOHI: Paragraph 29 of Booysen's replying affidavit states the follows.

20 "I submit that the only reasonable inference to be drawn from the foregoing is that none of the statements were in the possession of the first and second respondents when the impugned decisions were made. The statements of Aiyer certainly could never have been in their possession by 17 August 2012, considering that by 11 August 2013, the statements were still awaited by the

second respondent. NJ4 is in any event dated 31 August 2012. The same applies in respect of Danikas and Ndlondlo.”

ADV MOHLAMONYANE SC: Now go back to SB2118 in your bundle.

ADV BALOYI-MERE SC: Advocate Mohlamonyane, sorry, I think you lost us a bit. In the replying affidavit, which paragraph did you refer the witness to?

10 **ADV MOHLAMONYANE SC:** It was 29, I said.

ADV BALOYI-MERE SC: Paragraph 29.

ADV MOHLAMONYANE SC: Indeed, Madam Baloyi-Mere.

ADV BALOYI-MERE SC: Thank you.

CHAIRPERSON: Is that the portion that she has just read into the record, because apparently before you went to 29, she was dealing with something else.

ADV MOHLAMONYANE SC: Before we went to 29, she was dealing with ad paragraph 112 which goes over to 114. And then I referred her to the replying affidavit, paragraph 29 of
20 this affidavit, the replying affidavit of Johan Wessel Booysen, General Johan Wessel Booysen.

CHAIRPERSON: SB2118?

ADV MOHLAMONYANE SC: Yes, I, in SB2118, Madam Chair, that is where the Kato Manor team were ...[intervenes].

CHAIRPERSON: No, I just want to know whether you are now

referring her ...[intervenes].

ADV MOHLAMONYANE SC: Responding.

CHAIRPERSON: To SB2118, paragraph 29.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: And before this, you were dealing with the SB2114?

ADV MOHLAMONYANE SC: That is correct, Madam Chair.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: Go back to SB2118, Advocate
10 Batohi.

ADV BATOHI: I am there.

ADV MOHLAMONYANE SC: Proceed to read that paragraph.

ADV BATOHI: Ad paragraph 29.

“The first and second respondent were
in possession ...”

I emphasize that.

“Were in possession of the statements
of witnesses herein referred to before
17 August, 2012. NJ4 is a further
20 statement obtained after NJ2, which
was obtained on the 4th of August,
2013.”

ADV MOHLAMONYANE SC: Do you want to give a comment?

ADV BATOHI: Not just to this particular paragraph. If we
could go to the next one, perhaps I can comment after that.

ADV MOHLAMONYANE SC: And ...[intervenes].

MS RAMAGAGA: May I just come in here just to check, because I think when this paragraph was read into the record yesterday, a question arose as to who are the first and second respondents. And what I have on record is that it would be the Acting NDPP, Jiba, Advocate Jiba, and then the second one would be who, the Public Prosecutor?

ADV BATOHI: That was yesterday, the Evidence Leader clarified that was Advocate Maema.

10 **MS RAMAGAGA:** Okay, right, thank you.

CHAIRPERSON: You may proceed, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. You may now go to SB1D097, which is a statement of ...[intervenes].

CHAIRPERSON: I beg your pardon, Counsel. Advocate Batohi has just asked you to move to the next paragraph because she had no comment with regard to paragraph 29. Did you want to comment on paragraph 30?

20 **ADV BATOHI:** No, Chairperson, I meant the next step in leading of the evidence.

CHAIRPERSON: The next step.

ADV BATOHI: Yes, I may not have been clear.

CHAIRPERSON: Thank you. You may, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Move over to SB1D097, which is the statement of Colonel Aiyer,

previously marked NJ4. You can read the first sentence. Start with the names of Aiyer and read the first sentence contained therein.

CHAIRPERSON: Excuse me, just give me a moment to go to the document.

ADV MOHLAMONYANE SC: SB1D, Madam Chair, 097, previously referred to as NJ4.

CHAIRPERSON: SB1D?

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

10 **CHAIRPERSON**: What page?

ADV MOHLAMONYANE SC: 097.

CHAIRPERSON: Yes. Yes, thank you.

ADV MOHLAMONYANE SC: You may proceed to read the first sentence, but before you do that, you can read the names of the deponent there.

ADV BATOHI: Certainly. Chairperson, this is the statement that we have been referring to previously, the statement of RS Aiyer. It is the one dated 31st, August, 2012, also marked NJ4 or referred to as NJ4. The first paragraph states:

20 “I am a Colonel in the SAPS. On
 Thursday, 2012-08-30 ...”

So that would be the day before the statement was signed.

 “I was approached by investigation
 team. I want to make additional

statement as follows.”

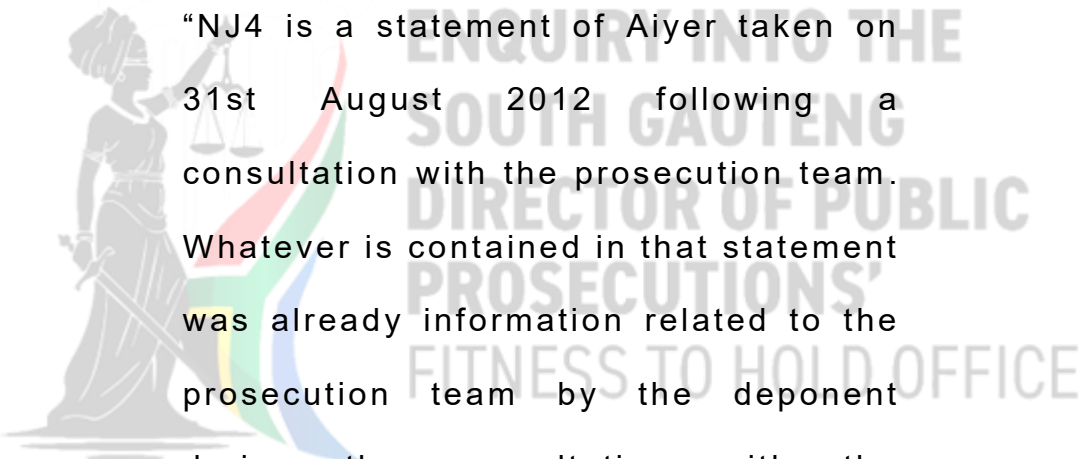
I can now comment on that, Counsel.

ADV MOHLAMONYANE SC: This is an opportune moment for you to comment.

ADV BATOHI: So if one looks, Chairperson, at the previous reference that I made to the, let us call it the Hodes memorandum at SB2114, page 114. May I proceed, Chairperson?

CHAIRPERSON: Proceed, mam.

10 **ADV BATOHI:** At that point, it states there that:



“NJ4 is a statement of Aiyer taken on 31st August 2012 following a consultation with the prosecution team. Whatever is contained in that statement was already information related to the prosecution team by the deponent during the consultation with the prosecution team.”

As I said, the suggestion here is that this information
20 was available to the team and therefore to Advocate Jiba at the time she signed the racketeering authorization on the 17th. However, if one looks at the document we just referred to, and that is SB1D at page 97, the affidavit of Colonel Aiyer, he states that he was approached the previous day, that is on the 30th of August, 2012. That being the case, this

information could not have been in the possession of the team as at the 17th of August, 2012. Thank you, Chairperson.

ADV BALOYI-MERE SC: Advocate Batohi, is it not that this statement that we are looking at, SB1D at 097, the opening tells us that he was, the deponent was approached by the team and now he wants to make an additional statement, meaning he had made a statement, but now he is making an additional statement. And it is that statement that maybe was before, it is that statement that maybe its content was already
10 related to the team.

ADV BATOHI: Chairperson, there is a previous statement, that is correct, the previous statement of Colonel Aiyer, which he signed and which was before Advocate Jiba when she made the, when she authorized the racketeering certificate. So I do not understand your question relating to this particular statement.

ADV BALOYI-MERE SC: Through you, I do not want to create a dialogue, if you allow me.

CHAIRPERSON: [Indistinct]... [microphone off] just ask her
20 the question.

ADV BALOYI-MERE SC: After reading the opening of the statement, you made a comment to say, given that this was on the 30th of August, a day before the authorization was signed, it would certainly not, it would mean that Aiyer's statement was not before the Acting NDPP when she made

the authorization. But from the reading just of the opening statement, Aiyer tells us that I was approached on the 30th to make maybe another statement because he then goes on to say, I want to make an additional statement, an additional statement meaning there was previously another statement.

ADV BATOHI: We are in agreement, Chairperson, through you ...[intervenes].

ADV BALOYI-MERE SC: Okay.

ADV BATOHI: That there was indeed another statement. The
10 point I want to make, though, is that if one looks at SB2114, it relates to the NJ4 statement that is dated 31 August. And it states that whatever is contained in this statement was already information related to the prosecution team by the deponent during a consultation.

And my point being that he was only approached the day before to make this additional statement and therefore, the impression is that this information was not before, not with, something that the prosecution team had as at the 17th of August, 2012.

20 **ADV BALOYI-MERE SC**: Thank you.

ADV MOHLAMONYANE SC: Maybe to take it further, go to SB2118 and tie what you are saying with what is contained under paragraph 29, under subheading at paragraph 29, maybe that could assist.

ADV BATOHI: I am hoping. Just let me read it again.

“The first and second respondent were in possession of the statements of the witnesses herein referred to before the 17th of August, 2012. NJ4 is a further statement of Aiyer obtained after NJ2, which was obtained on the 4th of August 2013.”

ADV MOHLAMONYANE SC: Just a minute. Sorry to interpose, but maybe we need to reiterate first, who is the
10 first and who is the second respondent.

ADV BATOHI: First is the Acting National Director, Advocate Jiba, and the second is Advocate Maema, the Prosecutor.

ADV MOHLAMONYANE SC: Proceed.

ADV BATOHI: I am reading it in the context of paragraph 29 again of Booyesen's answering, sorry, replying affidavit so that I am clear. It appears from what is in, on SB2118 that the first and second respondents were in possession of the statements of the witnesses referred to before the 17th of August, 2012 and that is as far as I can take that.

20 **ADV MOHLAMONYANE SC:** Then let us move on.

CHAIRPERSON: Before you do that, Counsel, to get the sequence correct, because we seem to be getting confused, but I understand what you are saying.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: And this paragraph, SB2118, paragraph 29,

seems to clarify the position. The only aspect that I want clarity on, Counsel, Advocate Batohi rather, is that the statement, NJ4, which is dated, that is the additional statement ...[intervenes].

ADV BATOHI: That is correct.

CHAIRPERSON: Dated 30th August, 2012.

ADV BATOHI: I think it is 31st of August, 2012.

CHAIRPERSON: 31st of August, 2012.

ADV BATOHI: That is correct, Chairperson.

10 **CHAIRPERSON**: Was the added statement to the earlier one of 3rd, the first one?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And in paragraph 29, the team says they obtained that additional statement on the 4th of August, 2013, which is a year later, correct?

ADV BATOHI: The reading of that, Chairperson, is that NJ4 is obtained after NJ2, which was obtained on the 4th of August, 2013. So NJ2 was obtained on the 4th of August. That is the way I read it. I am not sure if there is a mistake, because the evidence that we have presented thus far is that
20 the statements were both obtained in 2012, one on the 3rd of August, that is my understanding, I stand to be corrected, and one on the 31st of August, but both in 2012.

CHAIRPERSON: Which one says it was obtained on the 3rd of August? Where does it say that?

ADV BATOHI: It is 3rd or 4th of August, Chairperson. The first one of Aiyer, we can check that statement.

CHAIRPERSON: It is dated 3rd of August, 2012.

ADV BATOHI: Yes, that is my understanding, Chairperson.

CHAIRPERSON: Yes.

ADV BATOHI: I think there is an error in this memorandum.

CHAIRPERSON: Now, the memorandum says that NJ12 ...[intervenes].

ADV BATOHI: NJ2.

10 **CHAIRPERSON**: 2, rather, dated 3rd August, 2012, was obtained a year later, 4th August, 2013 when you look at paragraph 29.

ADV BATOHI: This is what it says in this paragraph.

CHAIRPERSON: Yes.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Yes, that is what I wanted to ascertain with you, is that how you understood it. In other words, the statements were then obtained by the team a year later, after it was prepared, the NJ2.

20 **ADV BATOHI**: Chairperson, that is not my understanding of what the evidence is. My understanding is that the authorization of Advocate Jiba is on the 17th of August, 2012 and the statement of Aiyer is dated, the first one, 3rd of August, 2012.

CHAIRPERSON: Yes.

ADV BATOHI: So, and the second statement is the 31st of August, 2012. So, I am not sure, I cannot understand ...[intervenes].

CHAIRPERSON: NJ4.

ADV BATOHI: Perhaps the team can explain.

CHAIRPERSON: NJ4.

ADV BATOHI: Yes, the team can explain what the 4th of August, 2013 is intended to mean, but my understanding was that these statements were obtained in 2012, 3rd of August,
10 and then 31st of August.

CHAIRPERSON: Yes, we will accept it for what it is.

ADV BATOHI: Yes.

CHAIRPERSON: It is the latter part of that statement, recordal ...[intervenes].

ADV BATOHI: That is correct.

CHAIRPERSON: That NJ2, I beg your pardon, that NJ2 was obtained, supposedly by the team, on the 4th of August, 2013.

ADV BATOHI: That is what the team has written. I cannot comment further on that, Chairperson.

20 **CHAIRPERSON**: That is what they are saying. And if the recordal is correct, it means that as at 17 August, 2012, the team had not had a sight of NJ4, which was an additional statement of Colonel Aiyer.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Thank you.

ADV BATOHI: Dated 31st August, 2012.

CHAIRPERSON: Yes, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Let us then leap over and go back to page 64 of your affidavit. Are you there?

ADV BATOHI: I am, Counsel.

ADV MOHLAMONYANE SC: Paragraph 151 has already been read into the record. You do not necessarily have to read it again.

10 **ADV BATOHI**: Thank you.

ADV MOHLAMONYANE SC: But you can then deal ...[intervenes].

CHAIRPERSON: I beg your pardon, paragraph?

ADV MOHLAMONYANE SC: 151, Madam Chair, at the bottom of page 64.

CHAIRPERSON: Are you back to her statement?

ADV MOHLAMONYANE SC: I am back to her statement, Madam Chair.

CHAIRPERSON: Paragraph 15?

20 **ADV MOHLAMONYANE SC**: 151.

CHAIRPERSON: 151?

ADV MOHLAMONYANE SC: Yes, 151.

CHAIRPERSON: We had gone back to those paragraphs. I thought that we were at 154, but it is fine, you may proceed.

ADV MOHLAMONYANE SC: I just wanted to draw her

attention, Madam Chair, that she has already read into the record paragraph 151, where you refer to the Govern J judgment.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: When was the judgment delivered?

ADV BATOHI: My understanding is that it is in February. I need to refer to the judgment to get the date.

ADV MOHLAMONYANE SC: Maybe let me assist you.

10 **ADV BATOHI**: You can help me, I will appreciate it.

ADV MOHLAMONYANE SC: Yes, I do not have in my possession the bundle itself, but my instructions are it is contained in CL1, Madam Chair, on page 000352.

CHAIRPERSON: Please repeat that, C1?

ADV MOHLAMONYANE SC: CL1 bundle, which is case law bundle. 1000352, in which you will find, Advocate Batohi, the date on which the Govern J judgment was delivered.

ADV BATOHI: Yes, I see, it is the 26th of February, 2014.

ADV BALOYI-MERE SC: What is the page number, sorry?

20 **ADV MOHLAMONYANE SC**: 000352, CL1. My apologies. I am told it is not 1, it is CL2.

CHAIRPERSON: Yes, thank you. Proceed.

ADV MOHLAMONYANE SC: You would want to deal with the Govern J judgment, you want to comment there on?

ADV BATOHI: No, not at the moment, save for what is

contained in paragraph 151 of my affidavit.

CHAIRPERSON: It would also be helpful to direct the witness because the judgment, where do you start? Where do you end? What do you have in mind, Counsel?

ADV MOHLAMONYANE SC: Madam Chair, during, before we ...[intervenes].

CHAIRPERSON: I think it is permissible to lead her on those aspects.

ADV MOHLAMONYANE SC: Yes, I agree with that. I take it.

10 But I have been informed that she is asking for some time to deal with certain aspects and that she requests a few minutes, I am not sure how long, maybe half an hour or so.

ADV BATOHI: If I may clarify, Chairperson.

CHAIRPERSON: Before you clarify, Advocate Batohi, is that in relation to this judgment?

ADV MOHLAMONYANE SC: Ja, in relation to, I believe, the judgment and other aspects that she needs to clarify. I was asked to extend this request to the panel.

CHAIRPERSON: So that you can also speak to her to enable
20 you to know precisely what it is that she wants to clarify.

ADV MOHLAMONYANE SC: That she, indeed. Indeed, Madam Chair.

ADV BATOHI: Chairperson ...[intervenes].

CHAIRPERSON: Is that the aspect that you related to us in the morning that pertains to that?

ADV MOHLAMONYANE SC: Yes, it pertains to that.

CHAIRPERSON: And in respect of which we said we will afford you additional time when we adjourn for tea.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: It is quarter past 10. We have an hour to proceed to tea. Might I suggest that you park this aspect and probably proceed to another aspect if there is any, and revisit this very aspect that you wanted to address in relation to 151.

ADV MOHLAMONYANE SC: I will not be able, Madam Chair,
10 with respect, proceed with another aspect because the other aspect is the one that she wants to get clarity on and which she wants to consult with. And I would propose that perhaps we should take an early tea recess.

CHAIRPERSON: Let me understand you clearly. Are you suggesting that any other matter that might follow is closely linked to 151 to the extent that you cannot proceed outside
151?

ADV MOHLAMONYANE SC: And whatever, indeed, Madam Chair, because I am constrained at the moment. She wants
20 to clarify certain issues. I need to know what issues they are. She wants to refer back to Dr Broughton's bundle and in dealing with those issues.

CHAIRPERSON: Yes, I understand that.

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: I just want to make sure that you know,

adjourning is not there for the taking. We need to understand that we cannot proceed with any other matter if we decide to park this aspect for a later discussion.

ADV MOHLAMONYANE SC: That is so, Madam Chair.

CHAIRPERSON: Yes, thank you. In that event, we will take an adjournment. How much time would we need to clarify those aspects with the witness?

ADV MOHLAMONYANE SC: May I find out from the witness how long would you like to have?

- 10 **ADV BATOHI:** Chairperson, perhaps let me clarify that between paragraph 151 and then when we move on to paragraph 152, 152 deals with when Advocate Abrahams was appointed. There is, because of the fact that we dealt with this at very short notice, there is a gap between the Gorven judgment and paragraph 152. So we need to look at the evidence there so that it flows and then come to what happened after Advocate Abrahams' appointment. I am thinking to answer your question specifically in terms of time. I am hoping that we could do it within an hour at least.
- 20 Hopefully it will not take longer than that.

CHAIRPERSON: Yes, thank you. Yes, thank you, Counsel, we will adjourn for tea, which will be, means that we will adjourn an hour later. Hopefully you would have finished with this consultation, Counsel. If not, please send a message through our, my researcher to alert us that you are not done.

ADV MOHLAMONYANE SC: I will, Madam Chair.

CHAIRPERSON: We will take an adjournment for an hour.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

ENQUIRY RESUMES

CHAIRPERSON: Good afternoon, counsel.

ADV MOHLAMONYANE SC: Good afternoon, Madam Chair,

CHAIRPERSON: You may proceed. Counsel, remember, you are still under oath.

10 **ADV BATOHI:** Yes, thank you, Chair.

ADV MOHLAMONYANE SC: Madam Chair, we thank the panel for affording us the opportunity to engage further on the issues that we will be presenting to you. And Advocate Batohi is grateful for the opportunity and says thank you too. We will begin by referring the panel to the supplementary opinion of Dr Broughton which is contained in LO1.

CHAIRPERSON: Will you please indicate, counsel, whether we should disregard where we left. We left at paragraph 151. Should we disregard that?

20 **ADV MOHLAMONYANE SC:** Yes, if necessary we will revert to it but for the moment disregard it. Then may I point out that the whole of Dr Broughton's supplementary opinion contained in LO1...

CHAIRPERSON: LO1, please. Page?

ADV MOHLAMONYANE SC: It starts from 205 and ends at...

CHAIRPERSON: Is that 0024?

ADV MOHLAMONYANE SC: 00205.

ADV BATOHI: If I may help, it starts at 171, counsel.

ADV MOHLAMONYANE SC: Ja, ja, I am sorry. 205 is what we are dealing with here. Which page, Advocate Batohi?

ADV BATOHI: 00171, counsel. It starts on that page.

ADV MOHLAMONYANE SC: My apologies, 205 was the one that we will be dealing with. It starts at LO00171 and together with its Annexures it ends on page LO00296.

10 **CHAIRPERSON:** I beg your pardon?

ADV MOHLAMONYANE SC: It ends at...

CHAIRPERSON: 00?

ADV MOHLAMONYANE SC: 1038. In other words, it includes all the Annexures, all its Annexures from page LO00171 up to LO01038. It will later be ...[intervenes]

CHAIRPERSON: Up to LO4.

ADV MOHLAMONYANE SC: Yes, up to LO01038.

ADV BALOYI-MERE SC: 10-038?

ADV MOHLAMONYANE SC: 0-1038.

20 **CHAIRPERSON:** Yes, thank you.

ADV MOHLAMONYANE SC: Advocate Batohi, go to Dr Broughton's supplementary opinion, LO1 bundle on page LO00205. Are you at 00205?

ADV BATOHI: I am.

ADV MOHLAMONYANE SC: Go to paragraph 102 and read

102 into the record.

ADV BATOHI: Thank you. For the purpose of context, Chairperson, if I can just indicate, as you earlier mentioned, in paragraph 151 of my affidavit, we ended with the judgment of Gorven J on the 26th of February, 2014. So we are now at 102, paragraph 102, where counsel has referred me, LO00205. It is subsequent to that, in a memorandum of 5th of March, 2014, the Booyesen and Prosecution team did not recommend the lodging of an appeal against Gorven J's
10 judgment in light of a concession that counsel had made during that review application. That memorandum, counsel, is an Annexure.

ADV MOHLAMONYANE SC: Do you want to go to it first or do you want to read?

ADV BATOHI: I will read the whole, should I read the entire 102? Okay, I will do that. It would seem that, I did not read it verbatim, let me do that.

20 “While in the memorandum of 5th of March, 2014, which is Annexure T, the Booyesen prosecution team did not recommend the lodging of an appeal against Gorven J’s judgment in light of the concession made in the matter that there were no statements in the dockets which implicated Booyesen in any of the offences with which he had been

charged. It would seem that the memorandum which Advocate Chauke gave forward to Advocate Noko, as well as Dr Ramaite and Advocate Jiba, as per his email of 7th of March, 2014, must have been the memorandum of 5th of March, 2014, Annexure T.”

I am not sure that we want to go further in that paragraph.

ADV MOHLAMONYANE SC: Leave it at that and let us go
10 to LO4.

CHAIRPERSON: For completeness, why do we not have that entire paragraph, so that we can understand the entire context? Should we not read the entire paragraph?

ADV MOHLAMONYANE SC: Maybe you should.

ADV BATOHI: Certainly, Chairperson. The entire document will be handed in as an exhibit at some point. I continue.

“I say this because the email was dated two days after the date of the memorandum, Annexure T, and the purpose of this memorandum, entitled Judgment Booyen v. National Director of Public Prosecutions, was reflected as updating the NDPP and the head of the NPS on the matter following the judgment of Gorven. J The purpose of the
20 memorandum, which is Annexure T to

Advocate Broughton's opinion, was also reflected as informing the NDPP on the prosecution team's intended course of action in light of Gorven J's judgment. The memorandum was also prepared on the same day of the EXCO meeting referred to above, where it was resolved that Advocate Chauke would report to Mr Nxasana on the developments in the Booyesen case."

10 **ADV MOHLAMONYANE SC:** Now, go to LO4 bundle, page LO00882, where you will find a memorandum.

CHAIRPERSON: Page?

ADV MOHLAMONYANE SC: LO0082, Madam Chair.

CHAIRPERSON: 882.

ADV MOHLAMONYANE SC: 882.

CHAIRPERSON: LO100882.

ADV MOHLAMONYANE SC: LO4.

ADV MOHLAMONYANE SC: Yes, Madam Chair. Are you there, Advocate Batohi?

20 **ADV BATOHI:** I am.

ADV MOHLAMONYANE SC: You will see there in that ...[intervenes]

ADV BATOHI: Perhaps we should wait...

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. On

that page appears a memorandum, which was addressed to Advocate Chauke from the Cato Manor prosecution team and is dated 5 March 2014. Do you confirm that?

ADV BATOHI: That is correct.

CHAIRPERSON: Counsel, if I may, you referred us earlier to 102 of one LO001038 and then 00205. Is there a link between that and this next part that you are referring us to?

ADV MOHLAMONYANE SC: There must have been a misunderstanding about 1038. 1038 is where...

10 **CHAIRPERSON:** Yes, it is the part of that opinion.

ADV MOHLAMONYANE SC: Yes, where it ends.

CHAIRPERSON: Where it ends?

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: And then you referred us specifically to LO100205.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: And you are now, after reading that paragraph 102, referring us to LO400882.

ADV MOHLAMONYANE SC: Indeed.

20 **CHAIRPERSON:** Is there a link between these two?

ADV MOHLAMONYANE SC: There is a link because in paragraph 102 ...[intervenes]

CHAIRPERSON: You do not need to explain.

ADV MOHLAMONYANE SC: Yes, there is a link concerning the memorandum.

CHAIRPERSON: We are at LO400882.

ADV MOHLAMONYANE SC: Maybe before we proceed, I need to mention that the evidence that is being led currently seeks to address paragraphs 3, 3.1 – I just want to have my terms of reference. It seeks to address paragraphs 3, 3.1, 3.1.1, 3.1.1.3, and 3.1.1.4 of the terms of reference.

CHAIRPERSON: Just give me a second. Thank you.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. There is subparagraph A in that memorandum which deals
10 with purpose. Can you read that into the record?

ADV BATOHI: Thank you. And Chairperson, just to connect it, 102 at LO00205 refers to this particular memorandum. It says, in the memorandum of 5 March 2014. So this is the memorandum that is being referred to in paragraph 102, LO00205.

CHAIRPERSON: Thank you very much.

ADV BATOHI: . Thank you, Chairperson. Chairperson, the purpose is set out. Paragraph 1:

20 “The purpose of this memorandum is to update the National Director of Public Prosecutions, NDPP, and the head of NPS.”

Chairperson, if I may pause to explain at this point, just so that the panel understands. The head of the NPS, as I explained earlier in the structure, would be the head of the business unit NPS. And DPPs like Advocate Chauke would

report, the immediate report would be the head of the NPS and then the National Director of Public Prosecutions. So the report to the NDPP through the head of the NPS, just for clarity, Chairperson. So:

10 “The purpose of this memorandum is to update the National Director of Public Prosecutions and the head of NPS, following the judgment delivered by Gorven J of the KwaZulu-Natal High Court on 26 February 2014. The judgment is attached hereto as Annexure A and the indictment as Annexure B.”

And paragraph 2 says:

“The prosecution team also seeks to inform the NDPP of our intended cause of action in the light of this judgment.”

Chairperson, I do not intend to read the entire memo unless I am required to, but it sets out in page 00883. It summarises the judgment, it summarises the prosecution team's view of the judgment. Which I am happy to read, but I do want to focus, well ...[intervenes]

20

ADV MOHLAMONYANE SC: You do not have to, sorry to interpose.

ADV BATOHI: Thank you.

ADV MOHLAMONYANE SC: You do not have to.

ADV BATOHI: Thank you, counsel.

ADV MOHLAMONYANE SC: Leap over to the next page, 883, LO00884 rather.

CHAIRPERSON: And counsel, in that page, on that page, under purpose, paragraph 2, and of course the heading. The prosecution team also seeks to inform the NDPP. And the memo is directed to the DPP, Advocate Chauke. Should we make anything of that?

ADV MOHLAMONYANE SC: You should, Madam Chair.

10 **CHAIRPERSON:** I think you must let the witness answer the question.

ADV MOHLAMONYANE SC: I thought it was directed to me, my apologies, my apologies.

CHAIRPERSON: I speak to the witness through you.

ADV MOHLAMONYANE SC: My apologies.

CHAIRPERSON: Would you please just clear my mind, counsel, Advocate Batohi. The memo of the one that you have just referred to is directed to Advocate KM Chauke, the Director of Public Prosecution, South Gauteng, from the Cato
20 Manor prosecution team. Director of Public Prosecution, South Gauteng, Johannesburg. In paragraph 2 of this memo, under purpose, it reads:

“The prosecution team also seeks to inform the NDPP of our intended course of action in the light of this judgment.”

Now my question is, should we make anything of the fact that the memo, although it seeks to be directed to the NDPP in the heading, it is directed to Advocate Chauke, who is the DPP, South Gauteng.

ADV BATOHI: Chairperson, reading this memo, it would appear that what is happening here is that the team is briefing, is letting Advocate Chauke, informing him, I should say, about the intention, it is sort of preparation for reporting to the head of NPS and the National Director. So this is the
10 first step in that process. This is the way I see it, as them informing their immediate report, who is the DPP of South Gauteng, about the intention to brief the National Director and the head of the NPS, and therefore they summarise this. That is my understanding, Chairperson.

CHAIRPERSON: Yes, I ask this in the context that we have been informed that Advocate Chauke was a liaison, or rather a coordinator, and the case that you have presented to us is that he was part of the prosecution team. That seems to beg the question, if that is the case, why should this memo not be
20 directed to the NDPP as paragraph 2 suggests?

ADV BATOHI: Chairperson, just to say that my understanding is that shortly after the judgment, the team is summarising their view of the judgment and what they think the next step should be. This is my assumption. I am being asked to make an assumption because I had nothing to do

with this, but on the basis of the way I understand process, I assume that is what the Chair would like me to surmise on?

CHAIRPERSON: I do not want you to, if you are not sure of what is contained in this memorandum, because this is not your writing, and somebody else might be able to explain to us, given the background that has been placed before us ...[intervenes]

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: ...regarding the role that Advocate Chauke
10 played, whether as a decision-maker or as a coordinator. And this paragraph 2 is causing that difficulty to me, because if you seek to direct something to the NDPP, but you do so through or via the DPP of South Gauteng, it may well support the proposition that Advocate Chauke was a coordinator.

ADV BATOHI: Chairperson, if I may, it would also support the proposition, which we say is that he was a *de facto* DPP in charge of this matter.

CHAIRPERSON: Yes, I will leave it there.

ADV BATOHI: Thank you, Chairperson. If I may proceed.

20 **CHAIRPERSON:** Advocate Mohlamonyane, I suppose this aspect will be flat, and maybe the people who prepared this, or the head of the prosecution team, Advocate Maema, will clarify this aspect.

ADV MOHLAMONYANE SC: Hopefully.

CHAIRPERSON: Hopefully, because Advocate Batohi is

answering the question not directly, she is just trying to assist us. She was not necessarily part of the team that prepared this memo.

ADV BATOHI: Chairperson, if I may clarify, I am trying to assist the panel with regard to most of my evidence, because it relates to evidence in documents, and presenting it in a way that the panel would perhaps be able to sift through it. So to clarify that that is what I am attempting to do, is to sift out important aspects of the evidence and present it to the

10 panel.

CHAIRPERSON: Yes, but I do also appreciate the fact that you are speaking to the document that you did not prepare.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: It may well be that the scribe will come here and say something contradicting what you are saying.

ADV BATOHI: Understood, Chairperson.

CHAIRPERSON: That is why I earlier said, if you are not in a position to answer the question that I am asking, do say so.

ADV BATOHI: Certainly, Chairperson.

20 **CHAIRPERSON**: You may proceed, counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Go to page LO00884 of the same bundle. And look at paragraph 11, which you can read into the record.

ADV BATOHI: It is paragraph 11 of the same memorandum.

ADV MOHLAMONYANE SC: Of the same memorandum.

ADV BATOHI:

“In terms of process, since we do not intend to appeal the judgment, we are of the view that we should call upon the applicant...”

In this case it would be Booysen;

“...to appear before the High Court to formally withdraw the charges. In the meantime, pending an intended application to you, sir, for a new authorisation.”

10 And given that this is addressed to Advocate Chauke, I would assume that that reference is to him, as sir, in paragraph 11. If I may read paragraph 12.

CHAIRPERSON: Before you do so. The terms of reference, and it may well be helpful, Advocate Mohlamonyane, to, as you indicated earlier, about the relevance of this evidence to the terms. perhaps we can just capture that paragraph that is relevant to this evidence regarding the appeal. I think it is paragraph 3.1.1.4.

ADV MOHLAMONYANE SC: Yes, it is, Madam Chair. You
20 may cause it to be read into the record, or I may just do so.

“This subparagraph relates to the allegation, in the terms of reference that suggests that Advocate Chauke instituted an appeal against the judgment of Judge Gorven, in the review case of Booysen v. Acting

National Director of Public Prosecution 2014
(2) SACR 55 (KZN), without the approval of
the National Director of Public Prosecution,
Mr Mxolisi Nxasana, notwithstanding that
there was no evidence justifying the
institution of racketeering charges against
the accused, and thus no justification for
lodging an appeal against the judgment.”

Am I correct?

10 **ADV MOHLAMONYANE SC:** You are, Madam Chair, and
maybe to assist the panel further, Mr Nxasana, Mxolisi
Nxasana’s appointment was effective from 1 October 2013,
and he vacated office on 14 May 2015, which suggests that
during this period, when this memorandum was prepared, it
was Mr Nxasana who was in office. It is at the 5th of March,
2014.

CHAIRPERSON: Yes. That may well be the case, but the
point that I am making is more directed to the portion that
Advocate Batohi has just read to us in paragraph 11, insofar
20 as it impacts on the terms of reference that I have just
mentioned. And I want to know whether I am correct in
understanding paragraph 11 in that way, its relevance to the
terms of reference.

ADV MOHLAMONYANE SC: Is it directed to me, or to
Advocate Batohi through me, Madam Chair?

CHAIRPERSON: I do not know whether you understand it that way as well, counsel, but I am speaking to the witness through you.

ADV MOHLAMONYANE SC: Advocate Batohi, can you respond?

ADV BATOHI: Okay, so I need to get the dates in my head correct.

CHAIRPERSON: Maybe if I can make it, through you, counsel, if I can make it easier. If you look at paragraph 11,
10 LO00884, the one that you read into the record.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Simply put, to what extent is this paragraph, or the contents of paragraph 11, relevant to the terms of reference?

ADV BATOHI: Chairperson, it would be relevant because in this case it is a decision not to appeal a matter, which is also a prosecutorial decision. And I think it would go further than that because it also refers to an application for a new authorisation, which I think would speak to some of the other
20 paragraphs of the terms of reference, which is also a prosecutorial decision.

CHAIRPERSON: Thank you, Advocate Batohi.

ADV BATOHI: Thank you, Chairperson.

ADV BALOYI-MERE SC: I have a follow-up question. At paragraph 11, the last line, ja, where you say:

“In the meantime, pending an intended application to you, sir, for a new authorisation...”

Would this, sir, mean Advocate Chauke or the new NDPP?

ADV BATOHI: Chairperson, if we look at the fact that, through you, Chairperson, that the memo is addressed to Advocate Chauke, it appears that this refers to him speaking about an intended, because the application would go through him to the National Director for authorisation.

10 **ADV BALOYI-MERE SC:** But then it says an application to you, sir, for a new authorisation, and we know, we now know that the application for authorisation goes to the NDPP, not to the DPP.

ADV BATOHI: That is correct, Chairperson, but it goes through the DPP. If you recall, the one document that Advocate Chauke signed on behalf of Advocate Noko, it was referring the application for racketeering to the National Director. So the way I see this is that, precisely that, the application would go to Advocate Chauke to be submitted to
20 the National Director for a new authorisation.

ADV BALOYI-MERE SC: Thank you.

ADV BATOHI: Paragraph 12, if I may proceed, counsel.

ADV MOHLAMONYANE SC: Yes, read subheading C, capital C first.

ADV BATOHI: It is headed Reapplication for Authorisation

Certificate, paragraph 12:

“The prosecution team intends to apply to the NDPP for the reissuing of certificates. We shall prepare a new memorandum which outlines in detail the evidence against the applicant.”

Paragraph 13:

10 “We are still firmly of a strong view that there are sufficient facts which justify the reissuing of racketeering authorisations.”

ADV MOHLAMONYANE SC: Let me take you back then to Dr Broughton's supplementary opinion, rather, in LO1 bundle, page LO00205. LO1, Madam Ramagaga, page LO00205. Now, have a look at paragraph 102, which you may read into the record.

CHAIRPERSON: Input shaft bearing, was this paragraph not read into the record earlier?

ADV BATOHI: It was, Chairperson.

20 **CHAIRPERSON:** This paragraph was read in earlier, counsel.

ADV MOHLAMONYANE SC: Ja, indeed. I am reminded now. Thanks.

CHAIRPERSON: You remember I even asked Advocate Batohi for completeness to read all the contents into the record?

ADV MOHLAMONYANE SC: Yes, my apologies. I remember now. 104, actually. It should be 104 on page 206. Can you read it into the record?

ADV BATOHI: 104 on page 206.

“As such, it is submitted that Advocate Chauke exercised decision-making power on a prosecutorial matter.”

It is evident from paragraph 11 of the memorandum, which we just looked at, that the new application for racketeering authorisations would be submitted through Advocate Chauke, where reference was made to an intended application for you, sir, for a new authorisation. In this respect, Advocate Mosing has something to say about it. Counsel, I will be guided by you.

ADV MOHLAMONYANE SC: Go to LO3.

CHAIRPERSON: Pardon?

ADV MOHLAMONYANE SC: LO3, Madam Chair. LO3.

MS RAMAGAGA: Through you, Chair. Counsel, would not it make more sense to read 104, paragraph 104 in its entirety, into the record? Because, you see, if we are going to end the reading at, wrote as follows, then one would be interested in what is it that is written, what is it that would follow, just for completeness and a better understanding.

ADV MOHLAMONYANE SC: Yes, I agree, Madam Ramagaga, for completeness sake, Advocate.

CHAIRPERSON: It might also prevail over you, counsel. It might also create an impression that we are selective in presenting evidence to this panel, and we should not be understood to be doing that as evidence leaders. I caution that whatever you do, let us not be seen to be selective, because your role is to present all evidence to us.

ADV MOHLAMONYANE SC: Proceed, Advocate Batohi.

ADV BATOHI: Thank you, Chairperson. Chairperson, to deal with the last aspect, my understanding was that we were
10 actually intending to read Advocate Mosing's and not leave it hanging, but my understanding is that counsel was, in fact, referring us to Advocate Mosing's affidavit so that we actually read exactly what follows, but from his affidavit and not from Dr Broughton's opinion. So that would explain it. We were actually going there to read it, but not through the opinion from the affidavit itself. So, counsel, should I read it from
LO00 ...[intervenes]

CHAIRPERSON: Advocate Batohi, we are referred to a page and a paragraph, and what you read is left hanging. Now we
20 are jumping from that paragraph to another document when the contents of that very document is right in front of you.

ADV BATOHI: That is correct.

CHAIRPERSON: So we are made to jump from one document to another. And as my Sister Ramagaga has thus pointed out, that sentence is hanging. It says, who wrote as follows.

And that paragraph is there. Why do not you read it from the same document? If need be, then after 104, you can then say, this extract comes from Advocate Mosing's affidavit, which is at whatever document.

MS RAMAGAGA: Moreover, that sentence says it is an extract from Advocate Mosing's affidavit. So it is clear that what is being quoted here is from the affidavit of Mosing. Thank you.

ADV BATOHI: Thank you, Chairperson. That does make it
10 easier. I proceed. I continue.

“In these respects, Advocate Mosing, in his affidavit, wrote as follows:

After judgment was delivered on 26 February 2014, we all acquired a copy thereof and perused it. I requested a meeting with the prosecuting team and Advocate Chauke to discuss the judgment, and it was agreed to meet on 3 March 2014 at the DPP offices in Johannesburg.

20 During the meeting, we discussed the judgment in detail, and we came to the conclusion that the Court arrived at the judgment mainly on the basis of the concession attributed to our counsel, and that there was no evidence that implicated

Booyesen with the predicate offences, coupled with the problems regarding the Annexures to Jiba's answering affidavit and the corresponding silence to address the shortcomings thereof.

Advocate Chauke, who was present during the hearing in court, explained to us what transpired when this concession was made and indicated that it was during counsel's address to Court. It was apparent to us that

10

there may have been some misunderstanding between counsel and the Court.

The entire team felt that it was in any event an incorrect concession, if it was indeed made consciously, and we could not understand how counsel could have made it in the light of all the evidence presented to him by the prosecution team.”

20 Advocate Mosing goes on to say:

“We concluded by agreeing as a team that though not satisfied with the outcome of the matter, at least the door was still open to bring a new application racketeering application, as indicated in the judgment,

and it would therefore not be necessary to appeal the judgment. The team would accordingly prepare a memorandum for the NDPP accordingly.

At 105 Advocate Chauke clearly therefore endorsed the lodging of a new application for racketeering to be issued against Booyesen. This action on the part of Advocate Chauke was then more than simply putting together and coordinating a prosecuting team to conduct a prosecution in another DPP's division.”

10

In fact, what happened in this meeting was that a prosecutorial decision was taken to apply for fresh racketeering certificates. That is the last part is my comment, Chairperson, and not in the document.

CHAIRPERSON: Which last part?

ADV BATOHI: The part that I mentioned, Chairperson, what happened during this meeting was that there was a prosecutorial decision taken, including by Advocate Chauke, to make a fresh application for racketeering authorisations or to bring a new application for a racketeering authorisation.

20

CHAIRPERSON: Is that not reflected in 105?

ADV BATOHI: Yes, that is correct, Chairperson.

CHAIRPERSON: So it is not you saying that, it is the author

of the memo.

ADV BATOHI: I agree with that proposition, Chairperson.

CHAIRPERSON: Proceed, counsel.

MS RAMAGAGA: Just one second.

CHAIRPERSON: I beg your pardon.

MS RAMAGAGA: Is that your understanding, that this extract that you have read into the record is an extract of an affidavit deposed to by Advocate Mosing in his capacity as the leader of the prosecution team?

10 **ADV BATOHI**: Chairperson, it is an extract of Advocate Mosing's affidavit. That is the quoted part. He was not, Advocate Maema was the leader of the prosecution team, not Advocate Mosing. This is by Advocate Mosing.

MS RAMAGAGA: Right. Thank you. But nevertheless, let me put it otherwise. In what capacity would you say Advocate Mosing wrote this affidavit, this extract in particular?

ADV BATOHI: Chairperson, we dealt with this at some point. He was at that point, I think it was the head of the special projects team at the VGM head office and dealt with the
20 coordination of racketeering applications.

MS RAMAGAGA: So it is in that capacity that you believe he wrote this affidavit, this extract in particular. Our focal point, until I indicate otherwise, is this extract in particular.

ADV BATOHI: Yes, it would have been in that capacity that he wrote that.

MS RAMAGAGA: And is it correct that Advocate Chauke was not part of the prosecution team?

ADV BATOHI: He was not. I was trying to explain it yesterday that Advocate Chauke was the DPP and there is a team of prosecutors that would actually go into court and prosecute the matter. And that team was led by Advocate Maema, and Advocate Chauke was the DPP in charge of this team at a higher level.

MS RAMAGAGA: Yes, the question that I am asking is about
10 him being part of the prosecution team.

ADV BATOHI: Well, he would not have been part of the team that would have been prosecuting it in Court.

MS RAMAGAGA: Yes, thank you.

ADV BATOHI: That is correct. Thank you, Chairperson.

ADV BALOYI-MERE SC: I do have a follow-up. What do you understand or what is your understanding of the last five sentences of that quoted paragraph that starts with we? Maybe I should read it for you.

20 “We concluded by agreeing as a team that, though not satisfied with the outcome of the matter, at least the door was still open to bring a new racketeering application as indicated in the judgment, and it would therefore not be necessary to appeal the judgment. The team would prepare a

memorandum for the NDPP, informing him accordingly.”

And I am asking your view, given your comments after you read paragraph 105.

ADV BATOHI: It appears from that extract that has been read out now that the team had decided to apply for new racketeering applications and that a memorandum was going to be prepared to be submitted to the National Director.

ADV BALOYI-MERE SC: Would then that decision be
10 attributed to Advocate Chauke or to the team?

ADV BATOHI: To all of them, because Advocate Chauke was the DPP in charge and they were all in this meeting. Well, I do not know exactly whom, but it appears it was a meeting with the team. The names are not set out, but Advocate Chauke was part of this meeting.

ADV BALOYI-MERE SC: Thank you.

CHAIRPERSON: I beg your pardon. To that end, given paragraph 105, which is actually the opinion of Dr Broughton, saying Advocate Chauke was more than simply putting
20 together and coordinating a team. He acted as part of the prosecutorial decision-making. This is basically what he is saying there. Do you repeat that in your affidavit, if you recall?

ADV BATOHI: I am not sure if I repeat it, but I agree with that.

CHAIRPERSON: You endorse that?

ADV BATOHI: I do.

CHAIRPERSON: And this aspect, or rather this evidence, seeks to support the allegations in the terms of reference at paragraph 3.1.1.1. Am I correct?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Thank you. You may proceed, counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Maybe to put the affidavit of Advocate Mosing into context in
10 order to assist in answering the question that was posed to you by Madam Ramagaga, I should refer you to bundle LO3, page LO00704, which contains Advocate Anthony Mosing's affidavit. That is where it starts.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: The circumstances under which this affidavit was made was that it was made with a view to a criminal case. It appears here as Silverton CAS, although it is not clear as to the number there, but we were informed during the break that it is 622/10/2014. Is that correct?

20 **ADV BATOHI:** That appears to be the case, although it is not photocopied very well.

ADV MOHLAMONYANE SC: Ja. What criminal case, if you know, was he deposing to this affidavit for?

ADV BATOHI: I think it was the perjury case against Advocate Jiba, if I am not mistaken.

ADV MOHLAMONYANE SC: It is marked A12. We know that the As are in the docket.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: These are witness statements in dockets. Can you confirm that?

ADV BATOHI: That is correct. The witness statements are marked with an A, and they refer to as being in the A clip of a docket, which has the witness statements.

ADV MOHLAMONYANE SC: Now, this statement stretches
10 up to page LO00737. Am I correct?

ADV BATOHI: Yes, that is correct, this affidavit.

ADV MOHLAMONYANE SC: LO00737, Madam Ramagaga. That is where it ends. Let me take you back to...

ADV BATOHI: If I may, correction, I am not sure. My bundle seems to have a signature at 00720. I am not sure if it is a duplication or whether it is another affidavit. There is another affidavit that starts at 00721. So it might be the same or it might be different affidavits. I am not sure if it is a duplication, counsel.

20 **ADV MOHLAMONYANE SC:** It appears to be a duplication.

CHAIRPERSON: I beg your pardon?

ADV MOHLAMONYANE SC: It appears to be a duplication, Madam Chair, a duplication of the statement or the affidavit of Advocate Anthony Mosing.

CHAIRPERSON: Would you please ask your team to help

you to ascertain whether we are dealing with repeated documents here?

ADV MOHLAMONYANE SC: Thank you, Madam Chair, for the indulgence. I am informed that it is a duplication of the same statement of Anthony Mosing, Advocate Anthony Mosing. That starts on page ...[intervenes]

CHAIRPERSON: Should we not then discard the second affidavit that starts at LO00721 and focus on the one that starts at LO00704?

10 **ADV MOHLAMONYANE SC:** That would be prudent to do so.

CHAIRPERSON: We will strike through the second affidavit.

ADV MOHLAMONYANE SC: And I may mention that it appears at the end of both statements that they were deposed to before one Major General Tahiwe [?]. Both of them have the same names, name of the Commissioner of Oaths.

CHAIRPERSON: I suppose that is the reason why you say they are a repetition. The second one is a repeat of the first.

ADV MOHLAMONYANE SC: Yes, Madam Chair. Now, I am taking you back to Dr Broughton's document. And we are on
20 page LO00206. Go to page 106, rather paragraph 106. LO01, LO01, LO00206.

CHAIRPERSON: Sorry, counsel, you just referred us to LO03, LO00704, the one that is repeated in the next batch. So are you moving from that one, this affidavit, or are you just drawing it to our attention as referred to in paragraph

104?

ADV MOHLAMONYANE SC: I will refer to it, Madam Chair.

I just wanted her to read into the record paragraph 106.

CHAIRPERSON: Please speak up, counsel. Please speak up.

ADV MOHLAMONYANE SC: I wanted the witness to read into the record paragraph 106 in LO01, LO00206 in its totality before we revert to LO03, the statement of Advocate Mosing.

CHAIRPERSON: Yes, thank you. So we are going back to
10 LO02, LO00206, paragraph 106.

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: Paragraph 106.

ADV MOHLAMONYANE SC: Paragraph 106.

CHAIRPERSON: Thank you. It is LO01, not LO02. Thank you, my sister. You may proceed.

ADV MOHLAMONYANE SC: Proceed and read it into the record, Advocate Batohi. Paragraph 106.

ADV BATOHI: Nonetheless, Advocate Mosing proceeded in his affidavit to indicate as follows:

20 “A few days after the meeting, I received an email from Chauke informing that a consultation with counsel had been secured to hear from counsel first-hand what his opinion on the judgment was and to get some explanation for the unfavourable

outcome. I naturally attended this meeting on 13 March 2014 and so did the entire prosecuting team, including Advocate Chauke.

Counsel raised a number of issues with us that he felt the Court had erred, including interpretation of case law. He took us through the entire judgment, pointing out instances where he disagreed with the judgment. Also, that Court erred in setting aside the decision to prosecute on counts 8 to 12, as that was not taken by the acting NDPP, but the DPP.

Counsel also indicated that he did not believe that he made a concession regarding the lack of evidence implicating Booyesen, as stated at paragraph 29 of the Gorven

judgment. The result was that we were satisfied as a team that there were merits to appeal, as advised by counsel. It was agreed that counsel should therefore, in the meantime, prepare the application for leave to appeal, while Chauke would brief the NDPP, Mr Nxasana, who in the meantime had been appointed the NDPP, about the

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need to appeal the judgment and to obtain his consent.

After the meeting with counsel, Chauke again reiterated to us that he will call Dr Ramaite, the head of NPS, and his direct supervisor, and also brief the NDPP accordingly. I was not made aware of further developments thereafter concerning the appeal process.

10 Here again, I continue on 107, Advocate Chauke exercised a decision-making power on a prosecutorial matter, namely relating to the decision to appeal the Gorven J judgment, and accordingly approached the NDPP on the matter. Also, the observation by counsel that it was the DPP who took the decision to prosecute on counts 8 to 12, those would be the predicate offences, against Booysen is of significance.

20 It is submitted that counsel must have been referring to Advocate Chauke, as it was not Advocate Noko who signed the recommendation. And prior to the signing of this recommendation, she had not studied the case dockets as indicated above. She

did not know anything regarding the merits of the Booysen (Cato Manor case) as per the case dockets.”

So here again, the decision to appeal is a prosecutorial decision that is being taken by Advocate Chauke and the rest of the team with him.

ADV MOHLAMONYANE SC: Advocate Batohi, let me take you back to LO3, which contains the affidavit of Advocate Mosing. You remember...

10 **ADV BATOHI:** Page number?

ADV MOHLAMONYANE SC: Page number is...

ADV BATOHI: I think I have it, it is at 704. Is that the one?

ADV MOHLAMONYANE SC: It starts there. But I refer you to paragraph 16. I am reminded that you read paragraph 16.

ADV BATOHI: Yes, that was what I read from Dr Broughton's opinion. It was a quotation of this part.

ADV MOHLAMONYANE SC: It is an extract from this...

ADV BATOHI: An extract, correct.

ADV MOHLAMONYANE SC: Now, go to 17. Paragraph 17.

20 **CHAIRPERSON:** Which paragraph? 17?

ADV MOHLAMONYANE SC: Paragraph 17.

CHAIRPERSON: Of Advocate Mosing's affidavit.

ADV MOHLAMONYANE SC: Which appears on page LO00714 of LO3. Bundle LO3.

CHAIRPERSON: Proceed, counsel.

ADV MOHLAMONYANE SC: Proceed to read paragraph 17 into the record.

ADV BATOHI: I did read, I stand to be corrected, paragraph 17, until, if we turn over the page, until about halfway down that page, ‘I was not made aware of further developments concerning the appeal process’. I can continue from there.

ADV MOHLAMONYANE SC: You may continue from where you left off.

ADV BATOHI:

10 “On 7 March 2014, Advocate Chauke
apparently forwarded to Noko a copy of the
memorandum that he was going to present
to the NDPP and Ramaite regarding the
appeal. I was not copied on this mail and
have not seen this memorandum, but merely
received an email in this regard from Maema
on 11 March 2014.”

And that is attached as an Annexure to his affidavit.

20 “In the meantime, the prosecution team and
the investigation team met on 14 March 2014
in order to further discuss the implications
of the judgment on the entire case. I also
attended this meeting, but Chauke was not
part thereof.”

ADV MOHLAMONYANE SC: Go to... May I confer with my

colleagues, Madam Chair? Ja, I am going to refer you, thanks, Madam Chair, I managed to locate it. I want to refer you to the same bundle that we are at, LO3, page LO00765, wherein you will find an email there, email...

CHAIRPERSON: LO00?

ADV MOHLAMONYANE SC: LO00765.

CHAIRPERSON: 765.

ADV MOHLAMONYANE SC: Are you there?

ADV BATOHI: I am.

10 **ADV MOHLAMONYANE SC:** Can you read the email into the record?

ADV BATOHI: This is an email from Advocate Chauke dated 26 March 2014 at 1.13pm to it is Estelle and then a NE Governor and also Moipone Noko, who would have been the DPP acting or appointed, I am not sure, as well as to counsel Hodes and others, including Mr Nxasana and members of the team, prosecution team. It states:

“Good day, State Attorney Governor...”

So it is an email to the State Attorney.

20 “On Tuesday, 25 March 2014, the NDPP has decided not to appeal the judgment in the Booyesen matter. Accordingly, the notice of application for leave to appeal must be withdrawn.”

So this indicates that the National Director, Mr Nxasana at

this point, had decided not to appeal that matter.

ADV MOHLAMONYANE SC: Which then takes us to paragraph 109 of bundle LO01 on page 207. LO00207.

CHAIRPERSON: LO00?

ADV MOHLAMONYANE SC: 207.

CHAIRPERSON: 207.

ADV MOHLAMONYANE SC: Indeed, Madam Chair. Paragraph 109, are you there?

ADV BATOHI: I am, counsel.

10 **ADV MOHLAMONYANE SC:** And you read it into the record.

ADV BATOHI:

“Advocate Mosing in his affidavit notes that on ...[intervenes]”

CHAIRPERSON: Wait a minute.

ADV MOHLAMONYANE SC: It is LO01 bundle. The page is LO00207.

CHAIRPERSON: This is Dr Broughton's ...[intervenes]

ADV MOHLAMONYANE SC: Dr Broughton's opinion, supplemental opinion.

20 **CHAIRPERSON:** [Indistinct – 1:10:05]

ADV MOHLAMONYANE SC: Dr Broughton's opinion, are you there?

ADV BATOHI: I am, counsel.

ADV MOHLAMONYANE SC: Be kind enough to read paragraph 109 into the record. Read it in its entirety.

ADV BATOHI: Sure. If I may proceed, Chairperson.

CHAIRPERSON: You may.

ADV BATOHI:

“Advocate Mosing in his affidavit notes that on the following day, 25 March 2014, he was again called to Mr Nxasana's office before a meeting was to take place later that day between Mr Nxasana, Advocate Chauke, and the Booyesen prosecution team, at which meeting Mr Nxasana would inform Advocate Chauke and the prosecution team that the appeal in the Booyesen review matter was to be withdrawn.

Mr Nxasana stressed that he did not receive any memorandum on the Booyesen matter and was not briefed and only received a media query about the appeal. When Advocate Chauke and the prosecution team arrived, the meeting between them, Mr Nxasana, Advocate Mosing, and Dr Ramaite proceeded. At the meeting, Mr Nxasana referred to an email he sent to Advocate Chauke requesting a written brief or explanation as to why the Booyesen matter was being dealt with by the DPP South

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Gauteng, Advocate Chauke, whereas the matter arose in KZN.

This, with respect, is the first time we have it on evidence and information gathered that the top leadership of the NPA questioned how it was that the Booysen case was being handled by Advocate Chauke, whereas Advocate Noko was the DPP of KZN. Advocate Mosing states that Advocate

10 Chauke explained that he attended a meeting in 2012 and the then acting NDPP, Jiba, and the former acting DPP of KZN, Advocate Mlotshwa, and that he was requested to assist with a team to prosecute the matter.

However, on evidence and information gathered as dealt with in the supplementary legal opinion, Advocate Chauke closely misrepresented to Mr Nxasana what his role
20 was with the Booysen case.”

ADV MOHLAMONYANE SC: Go to LO4.

ADV BALOYI-MERE SC: Sorry. Help me understand here so that we do not, I am not confused. At the beginning, it is a quotation from Advocate Mosing. Up until the last footnote, 90. And I take it that from ‘however on the evidence’, that is

Dr Broughton's opinion.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: Thank you.

ADV BATOHI: Actually, I did not realise the quotation ends at footnote 90.

CHAIRPERSON: Perhaps counsel, if I may, just to guide ourselves as to where we come from. All these extracts or portions that you are referring to seeks to address the purpose of the memo as captured in paragraph 11 of Dr
10 Broughton's memorandum.

ADV MOHLAMONYANE SC: Opinion.

CHAIRPERSON: I beg your pardon?

ADV MOHLAMONYANE SC: Dr Broughton's opinion. Is that what Madam Chair is referring to?

CHAIRPERSON: Yes. That seeks to address the aspect dealing with the decision or rather the alleged decision to prosecute the appeal by Advocate Chauke. Correct?

ADV MOHLAMONYANE SC: That is correct.

CHAIRPERSON: And you are referring us to all these
20 paragraphs or portions that supports that allegation in the terms of reference. Supposedly paragraphs 3.1.1.1 regarding the decision to prosecute and 3.1.1.4 regarding the institution of the appeal by Advocate Chauke.

ADV MOHLAMONYANE SC: That is correct, Madam Chair.

CHAIRPERSON: I want to make sure that we do not lose the

thread as to where we are and why we are there. You were drawing our attention to something else in the memo after 109. [Indistinct – 1:16:11]... I am sorry to interrupt you. We were at paragraph 109 or had just finished reading that paragraph into the record.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: Proceed, sir.

ADV MOHLAMONYANE SC: Advocate Batohi, go to paragraph 3.1.1.1 on the same page LO1, LO00208.

10 **CHAIRPERSON:** What paragraph is that?

ADV MOHLAMONYANE SC: 111.

CHAIRPERSON: 111.

ADV MOHLAMONYANE SC: Proceed to read the paragraph, paragraph 111, into the record.

ADV BATOHI: Advocate Mosing ...[intervenes]

CHAIRPERSON: I beg your pardon, are you jumping 110 deliberately?

ADV MOHLAMONYANE SC: Deliberately so. In fact, it has been dealt with in a sense because what is being set out there
20 has been referred to in Advocate Mosing's affidavit. And the concerns that Mr Nxasana said to have raised have been dealt with in the previous paragraph.

CHAIRPERSON: You may proceed, counsel.

ADV MOHLAMONYANE SC: Proceed.

ADV BATOHI: Thank you. Paragraph 111 reads:

“Advocate Mosing then points out in his affidavit that on the following day, 26 March 2014, it was Advocate Chauke who wrote an email to the State Attorney conveying the decision of the NDPP to withdraw the appeal in the Booyesen review matter.”

And that is the email that we had just referred to. Advocate Mosing sorry, the memo opinion continues.

10 “This email communication was attached to Advocate Mosing's affidavit as Annexure M and is appended to Annexure F hereto. It is striking that Advocate Chauke notified the State Attorney of the withdrawal of the appeal thereby underscoring that he played a leadership role with regard to the review case as with the Booyesen prosecution and this after the trailing email of 26 May 2014 shows that Advocate Hodes submitted a copy of the leave to appeal to Advocate
20 Chauke on 17 March 2014 notifying that it would be served on 18 March 2014.”

CHAIRPERSON: Counsel, if I may, the reason why I asked you about paragraph 110 was to tie it to the paragraph 109 especially the last sentence which speaks of that meeting referred to in 109. The last sentence then tells us what then

happened at the end of that meeting. Am I right?

ADV MOHLAMONYANE SC: That is so, Madam Chair.

CHAIRPERSON: Because 109 tells us what happened at that meeting and the last sentence tells us then the way forward as was decided at that meeting.

10 “The meeting was then adjourned with the understanding that the team will prepare a detailed briefing for Mr Nxasana of the entire Booyesen's case that will take place on 7 April 2014.”

Subject to correction, I thought that that part is important or maybe important as to what then happened regarding this very issue that we were dealing with. If I am wrong, you will correct me.

ADV MOHLAMONYANE SC: Advocate Batohi, do you have any knowledge about what happened, whether Mr Nxasana was briefed subsequent thereto, or?

ADV BATOHI: It appears from paragraph 110 is that there was a meeting on the 25th of March 2014 between Mr Nxasana and this is according to Advocate Mosing in his affidavit, 20 between Mr Nxasana himself, himself meaning, I assume, Advocate Mosing, Doctor Ramaite, Advocate Chauke and the prosecution team:

“Mr Nxasana raised concerns over him not having been briefed as to the

question of appealing the Gorven judgment. He therefore felt that he was being undermined. Advocate Chauke stated that he had briefed Doctor Ramaite about the appeal whom he expected in turn would brief the NDPP on the matter. Mr Nxasana stressed that he was angry on learning about the notice of appeal and that he had taken
10 the decision to withdraw the notice of appeal. Doctor Ramaite confessed that he had received the documents from Advocate Chauke, but he said that it was detailed and he did not look at the document.”

And this is in quotation marks:

“It was detailed and he did look at the documents, though he said he raised his view with the NDPP not to go ahead with
20 the appeal process.”

That is the end of the quote in that regard. The meeting was then adjourned with the understanding that the team would prepare a detailed briefing for Mr Nxasana of the entire Booyesen case that would take place before 7 April 2014.

CHAIRPERSON: I just mentioned this part because you will

recall that the very meeting that is mentioned at 110 is the very meeting in relation to 109. So what is stated in 110 is a continuation of what transpired at that very meeting of 109 of the 25th of March 2014. That is why I concede that the contents of 109 may be of relevance. Should I ask Counsel, through you, Advocate Mohlamonyane, it then follows, if I am correct, that the contents of that paragraph should also be placed on record?

ADV BATOHI: Chairperson, it is indeed a continuation
10 because it does refer to the 25th of March 2014.

CHAIRPERSON: You have read that into the record and you confirm that it is relevant?

ADV BATOHI: Yes, that is correct, Chairperson.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. I am made aware ...[intervenes].

ADV BALOYI-MERE SC: Chair, I have a follow-up on what
Chair had raised in relation to paragraph 10. Does paragraph
10 then not tell us who took the decision to withdraw the
20 notice of appeal?

ADV BATOHI: Chairperson is at paragraph 110, I assume. Yes, it is the National Director, Advocate Nxasana, who took the decision to withdraw the notice of appeal. That is the withdrawal.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. I am

alerted to the fact that it could be lunch break already. It is half past one.

CHAIRPERSON: Yes, thank you, Counsel. Quarter to one. Our lunch time will be quarter past two. I thought that we had been having lunch at quarter past two. Might I suggest that you finish this aspect in relation to the prosecutorial decision to note an appeal in relation to terms of reference 3.1.1.4.

ADV MOHLAMONYANE SC: Let me then proceed. Advocate Batohi, go to paragraph 1.1.2.

10 **CHAIRPERSON:** I must also just remind myself and you perhaps that paragraph 1.1.1 was earlier read into the record when I interrupted you.

ADV MOHLAMONYANE SC: Indeed, it was read into the record.

CHAIRPERSON: Thank you, Counsel.

ADV MOHLAMONYANE SC: Proceed to read into the record paragraph 1.1.2 of Doctor Broughton's supplementary opinion on page LO00209 in Bundle LO1.

20 **ADV BATOHI:** Chairperson, for the sake of clarity and so that there isn't confusion, I should say that the way this opinion flows, we have dealt with the decision to prosecute the appeal, then Mr Nxasana deciding to withdraw the appeal. And now when we go to 1.1.2, it takes us back because Doctor Broughton is now referring to some communications that he received. And you will note that it actually relates to

a communication between Advocate Chauke and Advocate Hodes on 16th and 17th of March. And it is still relating to the application for leave to appeal. So I just want to be clear about that so that we are not confused about the sequence of events. If I may then proceed, Chairperson.

CHAIRPERSON: Thank you. It is helpful.

ADV BATOHI: So in paragraph 1.1.2, Doctor Broughton states as follows:

10 “On the last mentioned aspects,
evidence has been provided to me by
Advocate Macadam attached hereto in
the evidence bundle as Annexure U.”

And annex to you would be, we do not need to go there now, Chairperson, but for reference, it would be at LO885. I will continue reading from in paragraph 1.1.2:

20 “He received an evidence bundle, which
is comprised of email exchange between
Advocate Chauke and Advocate Hodes
on 16 and 17 March 2014 relating to
finalising the application for leave to
appeal in the Booyesen matter. In the
email of 17 March 2014 from Advocate
Chauke to Advocate Hodes, the former
stated as follows appertaining what had
to be included in the application for

leave to appeal: “I suggest that Counsel should also place more emphasis on the fact that Booysen made a memo of the rewards indicating his direct involvement. Maybe this must also be canvassed during the argument at the application for leave hearing.”

10 Advocate Chauke hereby made a prosecutorial decision as to how the application for leave to appeal was to be dealt upon receiving from Advocate Hodes on 16 March 2014, and perusing a first draft of the application for leave to appeal. It is to be noted that the NDPP would had to...”

I think this is a technical error:

20 “...would have had to be incited as the applicant in the application for leave to appeal, but by the submission of the draft of the notice of appeal, Mr Nxasana had not been briefed thereon and had not approved the filing of the leave to appeal.”

ADV MOHLAMONYANE SC: Now, go to LO00885 in Bundle LO4, page LO0085, where you will find an email from

Advocate Chauke dated 17 March 2014.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Please read it into the record.

ADV BATOHI: It is an email from Advocate Chauke to other persons, including Lawrence Hodes, and the subject line is application, it appears it is A-P-P-L-I for leave to appeal, Booyesen v the Acting National Director of Public Prosecutions. It states:

10 “Good day. I suggest that Counsel
 should also place more emphasis on the
 fact that Booyesen made a memo of the
 rewards indicating his direct
 involvement. Maybe this must also be
 canvassed during the argument at the
 application for leave hearing.”

CHAIRPERSON: Counsel, that email, is it at LO4?

ADV MOHLAMONYANE SC: That email, this email is in LO4,
Madam Chair.

CHAIRPERSON: Page?

20 **ADV MOHLAMONYANE SC**: Page LO00885.

CHAIRPERSON: LO00?

ADV MOHLAMONYANE SC: 885.

CHAIRPERSON: 885.

ADV BATOHI: Perhaps for completeness, the email before that is from Estelle to Advocate Chauke, also copying

Lawrence Hodes, application for leave to appeal in the Booyesen v Acting National Director of Public Prosecutions:

“Herewith please find first draft to enable you to compile the memorandum. Please excuse formatting as we are experiencing problems on computer.”

So this speaks to Doctor Broughton's opinion where he refers to the draft of the application for leave to appeal, which would have been sent to Advocate Chauke.

10 **ADV MOHLAMONYANE SC:** Are you reading the email trailing?

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: Let us be clear so I should not get confused. On what page are you?

ADV BATOHI: Yes, on the same page 885 that we were on, LO885. It is just below the one that I read. So it is an earlier email.

ADV MOHLAMONYANE SC: Now, who is Estelle, the one from whom this email emanated?

20 **ADV BATOHI:** I have no idea, but I would think she is from Advocate Hodes' office, but I do not know for sure. It appears from the context that that would be the case.

ADV MOHLAMONYANE SC: It was addressed to Advocate Chauke.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Dated 16 March 2014.

ADV BATOHI: That is right, at 01:23pm.

ADV MOHLAMONYANE SC: Go to the next page on 886, LO00886 in Bundle LO4. There is an email there. Do you see that?

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: It has not yet been read into the record. Not so?

ADV BATOHI: I will do so. It is an email dated for, is it 11
10 April or is it 4 November? I never know what the sequence is here. I think it is 11 April because the emails below are in full 8 April, and that seems to be the chain. On the top, it is 11 April 2014 at 03:20pm, from Mr Nxasana to Advocate Chauke. That simply says noted. I think the email chain is going from the bottom to the top, so perhaps I should start from the email ...[intervenes].

ADV MOHLAMONYANE SC: Sent from my iPhone.

ADV BATOHI: Yes, I am trying to get the sequence correct, because in the top email all that Mr Nxasana says is noted,
20 sent from my iPhone. So below that, there is an email of 11 April, the same day, earlier, 02:51pm, from Advocate Chauke. It is not clear who it is sent to from this document, but it says:

“Good day, Doctor Ramaite.”

And that would have been his immediate report, line of reporting, the Acting Head of NPS or Head of NPS at the

time.:

“I refer you to the comments and reservations of both the NDPP and yourself regarding my involvement in the Cato Manor matter. I also refer to a subsequent meeting that I held with the NDPP on 8 April 2014. I hereby confirm that I will no longer take part in any way regarding the management and prosecution of this matter. I have accordingly informed the team leader, Advocate Maema, and the DPP KZN, Advocate Noko.”

Again, this email refers to the management and prosecution of this matter. And then the email at the top from Mr Nxasana, who states noted. The response.

CHAIRPERSON: Counsel, if I may, regarding this email, LO00885, the subject in the first email is application for leave to appeal. In the subsequent email by the lady, Madam Estelle, the subject is also application for leave to appeal. In the subsequent email at page 100886, the top one, the subject is the Cato Manor prosecution presentation. Should we make note of that, of the differences in the subjects of this matter, particularly the one at LO00886, the one that has been noted by Mr Nxasana? Is it Mr Nxasana or – the noted?

Who is noting that email?

ADV BATOHI: It is from Mr Nxasana, Chairperson.

CHAIRPERSON: It is from Mr Nxasana?

ADV BATOHI: That is correct.

CHAIRPERSON: And it is addressed to Advocate Chauke and a number of people there.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And that email is headed Cato Manor prosecution presentation. Should we understand that to
10 include the earlier subjects, application for leave to appeal in the previous email?

ADV MOHLAMONYANE SC: Lest I be seen to be answering from the bar, giving evidence from the bar ...[intervenes].

CHAIRPERSON: You may ask the witness. It is the subjects that I am being concerned about.

ADV MOHLAMONYANE SC: Can you clarify that, Advocate Batohi?

ADV BATOHI: Yes, certainly.

ADV MOHLAMONYANE SC: Because we will still go to the
20 PowerPoint issue.

ADV BATOHI: Yes. So, Chairperson, in the first emails on LO00885 between Advocate Chauke and Advocate Hodes, it deals with Advocate Chauke making suggestions to Advocate Hodes about the application for leave to appeal. So that is a separate issue from the subject matter relating to the

prosecution presentation, which happens much later.

CHAIRPERSON: The next page.

ADV BATOHI: On 886, yes. That is correct.

CHAIRPERSON: It is a separate issue?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And my understanding, Counsel, is that you are addressing a specific aspect with all these extracts relating to the power or the decision to prosecute or note the appeal.

10 **ADV MOHLAMONYANE SC:** That is so, Madam Chair.

CHAIRPERSON: I see now at LO008 ...[indistinct] we are now ...[indistinct].

ADV MOHLAMONYANE SC: That is so, Madam Chair, which we will go into ...[intervenes].

CHAIRPERSON: Is it of relevance? I beg your pardon, sir. Is it of relevance that is the Cato Manor prosecution presentation subject?

ADV MOHLAMONYANE SC: It is of relevance and we will go over to it in a moment.

20 **CHAIRPERSON:** Yes, thank you.

ADV MOHLAMONYANE SC: Go to paragraph 115 of Doctor Broughton's opinion on page – Doctor Broughton's opinion is LO1, by the way, Bundle LO1, page LO00209. At the bottom of the page, towards the bottom of the page, rather, you will see paragraph 115 where the PowerPoint presentation is

referred to. Can you read it into the record?

ADV BATOHI: Yes, thank you. Chairperson, for context, I am not going to read paragraph 114, but Doctor Broughton received this PowerPoint presentation from Advocate Macadam, and then he deals with it in paragraph 115. He received it together with other documents.

In 115, he deals with the PowerPoint presentation, and it was sent by Advocate Maema to Advocate Chauke and fellow members of the Booyesen prosecution team in the email
10 of 8 April 2014. The subject of this email was noted as Cato Manor Prosecution Presentation, 7 April 2014. In this presentation, entitled Cato Manor Prosecution Presentation 7 April 2014, the prosecution team and Advocate Chauke were requesting the reissuing of racketeering authorisations in the Booyesen Cato Manor case.

On the covering page of the presentation, the names of the Booyesen prosecution team were reflected as well as the name of Advocate Chauke as the supervisor, in inverted commas, of the case. I am not sure if we want to go into what
20 Advocate Macadam has informed Doctor Broughton about it. Should I continue or stop at that point, Counsel?

ADV MOHLAMONYANE SC: Please continue.

ADV BATOHI:

“Advocate Macadam informs me that misrepresentations were made in this

PowerPoint presentation as to the alleged evidence of the facts of the case, and that accordingly, attempts were being made to mislead Mr Nxasana into reauthorising the racketeering charges in *casu*. This aspect, with respect, would need to be fully explored and ventilated in a section 126(a) enquiry. The aspect has nevertheless
10 been discussed in emails from Advocate Macadam to Advocate Hulley as aforesaid, dated 11 August 2022 and 29 December 2022. This email is attached hereto in the evidence bundle as Annexure W.”

ADV MOHLAMONYANE SC: Advocate Batohi, can you explain what a PowerPoint presentation is? For some of us, we do not know what that entails. What does it mean?

ADV BATOHI: It is a presentation that a presenter would
20 prepare to, when briefing someone or presenting to an audience, it is a presentation that would set out key aspects of your presentation in a PowerPoint form.

ADV MOHLAMONYANE SC: Is it used to present specific aspects of one's responsibilities to a senior or to seniors?

ADV BATOHI: It depends what the purpose of the

PowerPoint presentation is.

ADV MOHLAMONYANE SC: At that particular moment.

ADV BATOHI: In this one, if we perhaps go to the PowerPoint presentation.

ADV MOHLAMONYANE SC: Yes, we will go there. I just wanted you, in general terms, to explain it. But let us go there, maybe it might be ...[intervenes].

ADV BATOHI: Yes, I think it might be ...[intervenes].

ADV MOHLAMONYANE SC: Advisable that you would be
10 able to fully explain it so that it be clear to everyone else.

ADV BATOHI: It might be, Counsel.

ADV MOHLAMONYANE SC: Go to it.

MS RAMAGAGA: Counsel, before you go there, just for my clarification, who is Advocate Macadam? And what role did he play in this whole scheme of things?

ADV BATOHI: If I may explain? Advocate Macadam is, was
a Deputy Director of Public Prosecutions in the National
Prosecuting Authority and he was attached to the Priority
Crimes Litigation Unit. And then he – sorry, the Priority
20 Crimes Litigation Unit, a unit that deals with certain priority
crimes like terrorism and international crimes, et cetera. And
then he was, if I recall correctly, and I am speaking from
memory, he was the liaison person between the Zondo
Commission and the NPA at some point, but I stand to be
corrected. But he was involved in, to some extent, in these

matters as well.

ADV BALOYI-MERE SC: Just as a follow-up, during the Cato Manor case, what role did he play?

ADV BATOHI: During the Cato Manor case, that would be around 20 – he would, 2012, 2013, 2014. At that point, Chairperson, through you, I stand to be corrected, but my understanding is at that time he would have been the – he would have been playing the same role that I explained a few minutes ago, being a Deputy Director of Public Prosecutions
10 in the PCLU, that is the Priority Crimes Litigation Unit in the NPA.

ADV MOHLAMONYANE SC: Let us then go to ...[intervenes].

CHAIRPERSON: Advocate Mohlamonyane, this presentation which is referred to in that email that I asked you about, is being referred to in these paragraphs that have been read into the record. Are we at any stage going to be given the presentation, the PowerPoint presentation?

ADV MOHLAMONYANE SC: In a moment the Panel will be referred to the documents that deal with the PowerPoint
20 presentation. Should I proceed and do so?

CHAIRPERSON: No, no, no. I am just asking. I do not know how you want to proceed with your evidence, but I just thought that it seems to me that much is made of this PowerPoint presentation and it may be important that we have a look at it.

ADV MOHLAMONYANE SC: I was in fact going to it as my next point.

CHAIRPERSON: I do not want to derail you in any way, but you can just flag that point so that you come back to it at a later stage, if you so wish, at this point.

ADV MOHLAMONYANE SC: Madam Chair, I am actually getting to it, right into it, so that Advocate Batohi should be in a position to fully explain what it entails. It is on the next page actually, LO4. This page on LO4, LO00886, where the
10 subject matter is the Cato Manor prosecution presentation, is actually followed by the presentation itself on the next page. Unfortunately, these pages are not numbered, but I would accept they are parked on the side.

I do not see numbering here. My apologies. They are numbered. The next page is LO00887, Madam Chair and your sisters, which contains the Cato Manor prosecution presentation with a date there appearing as 7 April 2014. My eyes missed this numbering because it is now put on the left-hand side and my concentration was on the top right corner.

20 **CHAIRPERSON:** The last paragraph that you referred us to in LO00210 was 116. Do you intend to go to that PowerPoint, or you want to first deal with those – the further paragraphs before you go there?

ADV MOHLAMONYANE SC: It was 115, paragraph 115, Madam Chair. I wanted to tie it with the presentation itself

before I go to 116.

CHAIRPERSON: Yes, thank you. Thank you.

ADV MOHLAMONYANE SC: Are you there, Advocate Batohi?

ADV BATOHI: I am.

ADV MOHLAMONYANE SC: It is LO4 on page LO00887, wherein you will see Cato Manor prosecution presentation. Just explain what exactly was happening here.

ADV BATOHI: Well, if one looks at page 1, the page before
10 that, the presentation, where the emails are, the email at the bottom from Sello Maema to Advocate Chauke and other members of the team, its subject is emailing Cato Manor presentation, 7 April 2014:

“Dear colleagues, I enclosed herewith the slide preparation by the team for your attention.”

and then it appears that that is the presentation that follows that was attached to that email, because it is dated on the first page 7 April 2014. It is Cato Manor prosecution
20 presentation is the heading on page 887. It lists the names of all the team members, and on the right-hand side it lists Advocate MA Chauke as the DPP South Gauteng (supervisor).

ADV MOHLAMONYANE SC: Before you leave that topic, what is a supervisor? What do you understand by a

supervisor?

ADV BATOHI: Well, ordinarily, it is one who supervises other persons, but the NPA Act does define the supervisory function in terms of one of the powers of the DPP, and I think it is section 22.

ADV MOHLAMONYANE SC: It is 24(1)(c), I believe. Let us go to it immediately when you – so that when you explain it, you should be...

ADV BATOHI: Section 24(1)(c) of the NPA Act.

10 **ADV MOHLAMONYANE SC:** Ja, read the whole of 24(1). Maybe that can help. Are you having a copy in front of you?

ADV BATOHI: I do. I am waiting for the Panel to continue.

ADV MOHLAMONYANE SC: Section 24, Madam Chair.

ADV BATOHI: May I proceed, Chairperson?

CHAIRPERSON: Proceed, Madam.

ADV BATOHI: Thank you. Section 24:

“Powers, duties, and functions of directors and deputy directors:

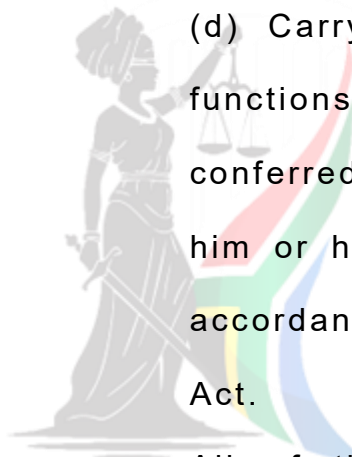
20 (1) Subject to the provisions of section 179 and any other relevant section of the Constitution, this Act, or any other law, a director referred to in section 13(1)(a) has, in respect of the area for which he or she has been appointed, the power to:

(a) Institute and conduct criminal proceedings and to carry out functions incidental thereto, as contemplated in section 23;

(b) Supervise, direct, and coordinate the work and activities of all deputy directors and prosecutors in the office of which he or she is the head;

10 (c) Supervise, direct, and coordinate specific investigations; and

(d) Carry out all duties and perform all functions and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of this Act.



All of these powers are powers of directors in respect of the area for which he or she has been appointed, as per subsection 1.”

20

CHAIRPERSON: Will subsection 2 be of relevance?

ADV MOHLAMONYANE SC: Advocate Batohi?

ADV BATOHI: I can read that into the record. In addition ...[intervenes].

ADV MOHLAMONYANE SC: Just a minute. You do not have

to ...[intervenes].

CHAIRPERSON: The question is whether it is of any relevance.

ADV BATOHI: If I could read it first, Chairperson? Chairperson, it would not be of relevance because it appears to an investigating director and not to a DPP, a section 13(1)(a) DPP. So it would not be of relevance, Chairperson.

CHAIRPERSON: A section 6 DPP would not be an investigator – cannot be an investigating director.

10 **ADV BATOHI:** That is correct, Chairperson.

CHAIRPERSON: I see in subsection 2(b) it refers to the prosecution of an appeal in any court in the Republic emanating from criminal proceedings instituted by the investigating director or the persons authorised thereto by him or her.

ADV BATOHI: I see that, Chairperson.

CHAIRPERSON: You maintain that it is of no relevance for our purpose?

ADV BATOHI: No, because it refers specifically to the
20 investigating director in that section.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: If we may take it further, maybe to assist and to put it within context ...[intervenes].

CHAIRPERSON: I do understand to my question.

ADV MOHLAMONYANE SC: I wanted to go to 8 so that it

should be read with and be contrasted and compared with ...[intervenes].

CHAIRPERSON: With (2).

ADV MOHLAMONYANE SC: Ja, with (2).

CHAIRPERSON: I think the answer ...[intervenes].

ADV MOHLAMONYANE SC: Because it relates to ...[intervenes].

CHAIRPERSON: The answer by Advocate Batohi is ...[intervenes].

10 **ADV MOHLAMONYANE SC:** Suffices.

CHAIRPERSON: I am satisfied.

ADV MOHLAMONYANE SC: Advocate Batohi, I want to take you to paragraph 118 in L01, Doctor Broughton's supplementary opinion. But before I do that, maybe for completeness sake, start from 116 and read it into the record, including 117.

ADV BATOHI: It is on page L000210?

ADV MOHLAMONYANE SC: Yes.

20 **CHAIRPERSON:** Just give me a second. Let me go back to that opinion. Yes, thank you. It is L00?

ADV BATOHI: 210, Chairperson.

CHAIRPERSON: 210, it is Volume 1. It is volume 1.

ADV MOHLAMONYANE SC: L01.

CHAIRPERSON: L00210.

ADV MOHLAMONYANE SC: That is correct, Madam Chair.

CHAIRPERSON: Thank you, Counsel. Paragraph?

ADV MOHLAMONYANE SC: Paragraph 116. From paragraph 116 up to and including paragraph 118.

CHAIRPERSON: Thank you, Counsel. Proceed.

ADV BATOHI: Thank you, Chairperson. 116:

10 “The fact of the matter is that Advocate Chauke, along with the prosecution team, took a prosecutorial decision in reapplying for racketeering authorisations to be issued against Booyesen and other accused in the Cato Manor case.”

That is on the basis of the PowerPoint presentation we dealt with. Paragraph 117:

“Evidence has been provided to me by Advocate Macadam, see attached hereto an evidence bundle Annexure X...”

And that is an annexure, I will continue:

20 “...which is comprised of email exchanged between Advocate Maema and Advocate Chauke on 28 and 31 March 2014. This email was also sent to Advocate Noko and pertained to mutual legal assistance with Greece in

respect of a witness in the Booyesen Cato Manor case. What is relevant for present purposes is that in the email of 28 March 2014 from Advocate Maema to Advocate Chauke and Advocate Noko, Advocate Maema proposed that Advocate Noko also had to be a part of the briefing session on Monday, 7 April 2014. Advocate Maema noted that Advocate Noko would benefit from the presentation or any of the issues which were raised there when he stated that...

10

Sorry:

“...or any of the issues which were raised there. He then stated that he was, however, unsure whether he had the authority to invite Advocate Noko to the briefing session. Advocate Chauke then replied to Advocate Maema per the email of 31 March 2014, forwarding the response email to Advocate Noko that the latter was to be present at the briefing session of 7 April 2014. It would seem, therefore, given that Advocate Noko indicated in her

20

affidavit, which is Annexure A to Advocate Broughton's bundle opinion, that Ms Nxasana instructed her during a briefing session with the prosecution team to directly deal with the Booyesen case as the DPP of KZN, that the briefing session referred to in the aforesaid email, Annexure X Broughton's opinion, and the

10 PowerPoint presentation dated 7 April 2014, which is Annexure V to his opinion, indeed took place with the NDPP on such date. It is striking that even though Advocate Noko was included in the briefing meeting with the NDPP, her name did not feature in the

20 PowerPoint presentation. This is further evidence that the Booyesen prosecution up to that point was being controlled and directed by Advocate Chauke. It is also striking that Advocate Maema had to request from Chauke authority to invite Advocate Noko to a briefing session with the NDPP on the case, whereas all along he was *de jure* required to report

to Advocate Noko on the case, since she was the DPP who had jurisdiction on the matter.”

Should I proceed, Counsel?

CHAIRPERSON: Who was the *de jure* person referred to?

ADV BATOHI: Chairperson, as I read this, the *de jure* person with authority would have been Advocate Noko because she was the DPP in KwaZulu-Natal. And what Doctor Broughton is saying there is that, according to the law, he would have
10 been required to report to Advocate Noko, whereas all along he was *de jure* required to report to Advocate Noko on the case since she was the DPP, and that was not the case.

CHAIRPERSON: [Indistinct]... if my understanding is correct, that, legally speaking, Advocate Chauke would then have been expected to report to Advocate Noko?

ADV BATOHI: No, chairperson, not Advocate Chauke, but it is Advocate Maema, if one reads from four lines from the bottom:

20 “It is also striking that Advocate Maema had to request from Advocate Chauke authority to invite Advocate Noko to a briefing session with the NDPP on the case, whereas all along, in terms of the law, he should have been reporting to Advocate Noko, which he was not

doing.”

That was the point he was trying to make.

CHAIRPERSON: Advocate Maema?

ADV BATOHI: That is correct, chairperson. Advocate Chauke and Advocate Noko would be the same level as DPPs, and they would not be reporting to each other, Chairperson.

CHAIRPERSON: I understand. Thank you. Thank you for the clarity.

ADV MOHLAMONYANE SC: Let us then go back to the
10 PowerPoint presentation. There are several documents there attached from page L04, LO0087. Are they of any significance?

CHAIRPERSON: Before you do that, Counsel, we have exhausted 117, paragraph 117, and which document are you going to now?

ADV MOHLAMONYANE SC: I am referring her back to the prosecution presentation, the PowerPoint – the document dealing with the PowerPoint prosecution presentation of 7 April 2014.

20 **ADV BATOHI:** Just paging through this PowerPoint presentation, it seems to summarise all of the dockets in this matter, and the dockets, a number of pages refer to the dockets, and then it continues. And then from paragraph – sorry, page 936, it deals with the enterprise, and that would be a requirement in terms of the racketeering charges. One

is required to prove that there was an enterprise, and that is defined there, which I will not go into unless required to. And they say who the enterprise is. And then from page 939, they deal with the evidence linking Accused 1, and that is the end of the presentation.

CHAIRPERSON: I am lost.

ADV BATOHI: Apologies, Chairperson.

CHAIRPERSON: PowerPoint bundle?

ADV MOHLAMONYANE SC: Bundle L04, Madam Chair.

10 **CHAIRPERSON**: L04.

ADV MOHLAMONYANE SC: L00887, where the Cato Manor prosecution presentation document appears.

CHAIRPERSON: 887?

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: Yes, thank you. And Advocate Batohi was reading from which page?

ADV BATOHI: Chairperson, from 887 and then through to 935, seems to be a summary of the dockets at a high level, and then from 936 it is dealing with the elements to prove a racketeering charge, which you have to have an enterprise, and then it goes on to the evidence.

20

One would have expected this, such a presentation, to also include the pattern of racketeering activity, which is also required in terms of racketeering, but this presentation does not have that. It deals with the evidence in brief, and

that is the end of the presentation, Chairperson. It appears that this was a presentation that was being prepared for the National Director to recommend another racketeering, the authorisation of another racketeering certificate.

CHAIRPERSON: From 00936?

ADV BATOHI: The PowerPoint is from 00887.

CHAIRPERSON: No, the point you are making now that it seems that that part was intended, seemed to have been intended for the purpose of authorisation of a racketeering
10 certificate.

ADV BATOHI: No. To be clear, Chairperson, I said the entire presentation was intended to support a recommendation for the certificate.

CHAIRPERSON: The whole portion?

ADV BATOHI: That is correct, the entire presentation, but from 936 it deals specifically with certain elements of the ...[intervenes].

CHAIRPERSON: The enterprise.

ADV BATOHI: Exactly, of a racketeering charge.

20 **CHAIRPERSON:** You may proceed, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Let me then hasten to take you to paragraph 148 of Doctor Broughton's supplemental opinion, and the page is L000228.

CHAIRPERSON: I suppose we are still on the point that you started at, the prosecutorial decision making.

ADV MOHLAMONYANE SC: We are still there, Madam Chair.

CHAIRPERSON: Are we still there?

ADV MOHLAMONYANE SC: Yes, we are still there.

CHAIRPERSON: Are you going to finish on that point, or is it still going to take us long? Otherwise, we have to adjourn for lunch.

ADV MOHLAMONYANE SC: I am wrapping up. It is not going to take long. It will take about two to three minutes
10 because I am going to refer her to her affidavit, and then we close it.

CHAIRPERSON: Yes, thank you. You may proceed.

ADV MOHLAMONYANE SC: Can you read that paragraph into the record?

CHAIRPERSON: Which paragraph?

ADV MOHLAMONYANE SC: 148 in L01, supplementary opinion of Doctor Broughton.

CHAIRPERSON: LO?

ADV MOHLAMONYANE SC: L01 Bundle, page L000220.

20 **CHAIRPERSON:** It will be helpful if you can speak louder. Speak to that mic.

ADV MOHLAMONYANE SC: L01, page L000220.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: Can you read it into the record?

CHAIRPERSON: What is this document? It comes from

paragraph ...[intervenes].

ADV MOHLAMONYANE SC: It still forms part of Doctor Broughton's ...[intervenes].

CHAIRPERSON: It is part of paragraph 147, yes. I beg your pardon, 220, yes. Paragraph 147 of Doctor Broughton's opinion, yes.

ADV MOHLAMONYANE SC: 147, Madam Chair, deals with date of meetings document.

CHAIRPERSON: I am saying this paragraph, this portion
10 that you are referring us to, flows from the previous page, paragraph 147.

ADV MOHLAMONYANE SC: Yes, the previous page contains paragraph 147.

CHAIRPERSON: Counsel, I am asking you a very simple question. This part is part of paragraph 147?

ADV MOHLAMONYANE SC: The part on page 220. Yes, it is, before paragraph 148.

ADV BALOYI-MERE SC: So you are referring the witness to paragraph 148?

20 **ADV MOHLAMONYANE SC:** Indeed.

ADV BALOYI-MERE SC: Okay.

CHAIRPERSON: Yes, that is why I am confused because that top part, quoted 19 June 2012 in quotation marks, is part of 147. So we are going to paragraph 148.

ADV MOHLAMONYANE SC: That is correct, Madam Chair.

CHAIRPERSON: Thank you. Proceed, Counsel.

ADV MOHLAMONYANE SC: I ask that you read into the record paragraph 147. 147.

ADV BATOHI: Paragraph 147?

ADV MOHLAMONYANE SC: 148, rather.

ADV BATOHI: Chairperson, paragraph 148 falls under a heading at L0218, which says Advocate Chauke immersed himself in the investigations of the Booysen case. It appears to be where Doctor Broughton is pulling out certain conduct
10 and to support that. I am trying to contextualise 148, Chairperson. And then at 147, he lists various meetings that he attended to, and my recollection is that that was dealt with in evidence earlier. And then at 148, he says:

“It is submitted that the above conduct
by Advocate Chauke vis-à-vis the
investigation of the Booysen Cato
Manor case is not consistent with the
DPP, who claims to merely put together
and coordinated a prosecuting team to
20 conduct a prosecution in another DPP's
jurisdiction. This is besides the fact
that Annexure B and J of Broughton's
opinion reflect that Advocate Chauke
attended court appearance in the
Booyesen case in Durban, including at

the bail application. Indeed, even though he is the DPP of South Gauteng, Johannesburg, Advocate Chauke on 19 June 2012 had a meeting with the KZN Regional Court President, Mr Ndimande, to discuss availability of Regional Court Magistrate to hear the bail application, and that is footnoted. The question arises with respect how this could have happened where Advocate Chauke was not the DPP of KZN having jurisdiction over the case.”

ADV MOHLAMONYANE SC: Thank you, Madam Chair. I will then refer the witness to her affidavit, her bundle, and then wrap it up before we adjourn for lunch recess, whereafter we will proceed with the process that she took when she referred the matter to the Office of the President.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: Go to Paragraph 152, Advocate Batohi, of your affidavit on page 65.

ADV BATOHI: I am there.

ADV MOHLAMONYANE SC: Ja, you may proceed and read it into the record.

ADV BATOHI: Yes. So just for context, Chairperson, so Advocate Nxasana, Mr Nxasana, during his term did not

authorise any racketeering certificates, and as per paragraph 152 on page 65, subsequently Advocate Shaun Abrahams, who had been appointed as the NDPP on 18 June 2015, issued fresh racketeering certificates for the prosecution of Booyesen and members of the Serious and Violent Crimes Unit on 13 February 2016.

CHAIRPERSON: What we have been dealing with before paragraph 152, you were explaining the circumstances pertaining to that gap that you spoke about.

10 **ADV BATOHI:** That is correct, Chairperson.

CHAIRPERSON: Not covered in your affidavit.

ADV BATOHI: That is correct, Chairperson.

ADV BALOYI-MERE SC: Advocate Batohi, you said Mr Nxasana did not reinstate the racketeering charges, and subsequent to that, Advocate Shaun Abrahams was appointed. Should one understand that you are saying because Mr Nxasana did not reinstate the racketeering

charges, he was then removed so that Mr Abrahams should be appointed? Because when you say subsequent to this, it
20 creates a chain. Can I understand it to be linked to the non-reinstatement of the racketeering charges, or it is just the use of the word subsequent?

ADV BATOHI: No, it is the use of the word because when I dealt with 152, I had not even dealt with the gap. So I am reading as is, but there was a lot of publicity around Mr

Nxasana's appointment and removal from office. That is all I can say about that.

ADV BALOYI-MERE SC: Thank you, Advocate Batohi.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: Advocate Mohlamonyane, are you wrapping up, or should we assume that you are going to then proceed from 153?

ADV MOHLAMONYANE SC: To now deal with the process.

CHAIRPERSON: I beg your pardon?

10 **ADV MOHLAMONYANE SC:** No, I am mistaken. I will take instructions because the next matter is the Mdluli matter, and the process deals with both the Mdluli and Booyesen matters. I will take instructions on that.

CHAIRPERSON: Yes, I want to know, on this aspect, have you wrapped up on this aspect?

ADV MOHLAMONYANE SC: It has been wrapped up, Madam Chair. The aspect that troubled Advocate Batohi together with me on the gap.

CHAIRPERSON: Yes, before you go to Mdluli, and I am just
20 mentioning it now, we may have some few questions to clarify aspects in relation to this Booyesen matter before you go to the Mdluli matter. Thank you, Counsel. It is 14:30 now on that watch. Let us take an adjournment for 45 minutes to have lunch. We will reconvene at quarter past three. We adjourn.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

ADV SKOSANA SC: Madam Chair? Madam Chair?

CHAIRPERSON: Good afternoon, everyone. Yes, Counsel?

ADV SKOSANA SC: Yes. Sorry, Madama Chair. I just needed to ask, to be excused. I understand that the proceedings might go a little bit later than usual today, in view of my preparations that I have to do still for my appearance tomorrow.

10 **CHAIRPERSON:** Perhaps this is then an appropriate moment to place yourself properly on the record yourself. Did you earlier?

ADV SKOSANA SC: We did yesterday. We did place ourselves on the record, yes.

CHAIRPERSON: You did?

ADV SKOSANA SC: Yes.

CHAIRPERSON: Yes. I think we will have no objection in light of what you mentioned this morning in Chambers. We understand that because of the division of labour, you might
20 have to go and continue with other preparations elsewhere.

ADV SKOSANA SC: Thank you so much. Thank you, Madam Chair.

CHAIRPERSON: Thank you, Advocate Skosana. You are excused.

ADV SKOSANA SC: Thank you. Counsel and Advocate

Batohi, Advocate Skosana, Chauke rather, we intend to start and adjourn at 16:30. Madam, you are still under oath.

ADV BATOHI: Noted, Chairperson.

CHAIRPERSON: Advocate Mohlamonyane?

SHAMILA BATOHI: (still under oath)

EXAMINATION BY ADV MOHLAMONYANE SC (Continues):

When we adjourned, Madam Chair, you indicated that you were having a few questions that you would like to pose to the witness, Advocate Batohi.

10 **CHAIRPERSON:** Yes, thank you, Counsel. Paragraph 156 of Advocate Batohi's affidavit summarises, I suppose, the essence of the allegations against Advocate Chauke. Will it be correct to then have regard to this paragraph conceded in line with the terms of reference and the 3.1 and the subparagraphs there?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: When you look at the terms of reference, and I ask this question bearing in mind that the answer could probably entail illegal principles regarding what constitutes
20 evidence and what does not constitute evidence, the common thread that runs through the terms of reference from paragraph 3, at least 3.1.1 up to the end, in relation to the Cato Manor matter, the Booyesen matter, until 3.1.1.5, is that Advocate Chauke misconducted himself in the manners described in those paragraphs, to summarise, by instituting

the racketeering charges, I am just paraphrasing that, supporting a decision to prosecute the accused, notwithstanding that there was no evidence, recommended to the Acting National Director of Public Prosecutions to issue a racketeering authorisation certificate, whereas there was no evidence, sought to defend the institution of the racketeering charges in the review proceedings, when there was no evidence to justify the institution of such review proceedings, instituted an appeal against the judgment of

10 Judge Gorven in the review case, whereas there was no evidence justifying the institution of the racketeering charges. And lastly, attempted to have the racketeering charges against Major General Booysen and members of the Cato Manor unit by reinstating the prosecution, notwithstanding that there was no evidence. I am just paraphrasing those paragraphs.

But the common thread is that in all those aspects, in which he is alleged to have done certain things unlawfully, as you say in your affidavit, their threat is that there was no

20 evidence. I would like you to just take us there. Is it correct that there was no evidence whatsoever? Assuming, let us work on the assumption, that Advocate Chauke took prosecutorial decisions.

Let us even assume that he was authorised to do what he did in KZN in the Cato Manor. Let us work on those

two assumptions. The question then remains, that being the case, can it safely be said, given the evidence that has been presented to us, put aside the legal opinions, but look at the evidence in the form of affidavits themselves, whether one can safely say there was no evidence?

ADV BATOHI: Thank you, Chairperson. Chairperson, I would say that there was, I cannot say there was no evidence, I will say there was insufficient evidence, because if you look at – if I may explain, Chairperson? If you look at the
10 racketeering charges, one would have expected that in that should, let us assume the case proceeded, well, not the case – let me rephrase that, let me start again.

In the assessment of whether the evidence met the standard of a reasonable prospect of a successful prosecution, one would look at what the evidence was, and in that particular case, one would have looked at all of the evidence in all the murder dockets, one would have looked at various pieces of evidence, and some of that would have been admissible as evidence.

20 The question would be whether there was sufficient evidence to prosecute on racketeering charges. I should – so that is my answer, Chairperson. You cannot say there was no evidence, but there was insufficient evidence to prosecute on the racketeering charges. And I hasten to add that all of the dockets, the underlying dockets, the murder dockets,

were submitted to the DPP Kwazulu-Natal to consider each one of those dockets individually and decide whether there is any case, anyone can be charged from this group or anyone else from the group of the accused in the racketeering prosecutions.

The DPP in KZN declined to prosecute all of the dockets except one, where the matter, I did testify about this earlier, where the matter proceeded to court in the one matter, and the accused were acquitted.

10 **CHAIRPERSON:** I am more concerned about the standard of proof of the test, if any, applicable at the stage of a prosecutor deciding that on the facts before me, I am going to prosecute these accused persons. We are not yet at a trial where the standard of proof is beyond reasonable doubt. It is at that preliminary stage when you form a view as a prosecutor, and please advise me if I misunderstand because I never prosecuted, with your experience and your knowledge.

20 At the stage when a prosecutor sits with evidential material in the form of affidavits, that could include, and I am just giving an example, that could include evidence such as the one contained in the affidavit of Colonel Aiyer, among others. Be it admissible or not at that stage, and others, what standard will a prosecutor be obliged to adhere to at that stage?

ADV BATOHI: Chairperson, a prosecutor ...[intervenes].

CHAIRPERSON: The standard of proof, by the way.

ADV BATOHI: Yes, thank you, Chairperson. A prosecutor can enrol, may enrol a matter where there is *prima facie* evidence of the commission of an offence. That is one of the standards. As a matter, when a prosecutor decides to prosecute a matter, it may be for – let me explain. There is *prima facie* evidence and there is reasonable prospects of a successful prosecution, which are two different standards.

10 *Prima facie* is, in my view, at a slightly lower level than reasonable prospects of a successful prosecution. You might have a case where a matter is enrolled and then there is further investigation done, and the matter is reassessed, and then the standard, the amount of evidence increases and you reach the standard of a reasonable prospects of a successful prosecution.

 It does not mean that *prima facie* does not mean there is a reasonable prospects of a successful prosecution. But it is, in my view, is a bit of a lower standard. But when
20 you assess, when you assess what the prospects of a successful prosecution are, which is the standard that we would apply in deciding whether to proceed with a prosecution, our Prosecution Policy guidelines give indications of what are the criteria that one should consider when trying to assess whether the evidence meets the

required standard. And we did go through that earlier in my testimony. If I could be assisted to take the Panel to that, which will assist the Counsel.

CHAIRPERSON: Yes, it will be helpful if you can take us ...[intervenes].

ADV BATOHI: If someone can assist. It is in my affidavit. I was trying to find ...[intervenes].

CHAIRPERSON: The policies are under the folder, policies and directives.

10 **ADV BATOHI:** I do also have it in my affidavit.

CHAIRPERSON: Counsel, if you have a copy or your team has a copy, you may assist Advocate Batohi with your copy. I have made markings in my copy, so I cannot borrow it to you right now.

ADV BATOHI: Chairperson, I have in paragraph 24 of my affidavit.

ADV MOHLAMONYANE SC: On page 14, Madam Chair.

ADV BATOHI: On page 14, I beg your pardon. Yes. Paragraph 24 of my affidavit. We could still try to find the
20 precise place in the policy if the colleagues can try to find that.

CHAIRPERSON: I suppose your team will assist in locating those relevant portions of the policy. You can then proceed with paragraph 24, you said?

ADV BATOHI: Yes. Thank you, Chairperson. It says:

“The decision to prosecute or not to prosecute must be made in accordance with the NPA Prosecution Policy and Prosecution Policy Directives. The Prosecution Policy prescribes various factors that must be considered by a prosecutorial member of the NPA, generally referred to as a prosecutor...”

Et cetera, I will leave that out:

10

“...when deciding whether to prosecute or not to prosecute. In essence, the prosecutor must have regard to the contents of the case docket, that is the *prima facie* evidence and statements contained in the dockets, as well as any version proffered by the accused in what is called a warning statement or a confession, or any other statement made by the accused. The prosecutor must evaluate such evidence, taking into account all relevant factors, including how strong the case is for the State, whether the evidence is admissible, whether the State witnesses are credible, whether the evidence is

20

reliable, whether the evidence is available, and how strong the case is for the accused or the Defence.”

Those are some of the factors to be considered, Chairperson.

CHAIRPERSON: Having regard to those factors that are referred to in paragraph 24, will I be correct to say the prosecutor has a carte blanche to make that determination without interference? He has that freedom, the right freedom.

ADV BATOHI: That is correct, Chairperson.

10 **CHAIRPERSON:** In a matter like this, should you not direct us to those aspects of paragraph 24 that are suggestive of the fact that the prosecutor, Advocate Chauke in this instance, if I may, did not apply his mind, did not take into account the relevant factors, did not look at what was admissible or not admissible, what was likely to be credible or incredible, reliable or unreliable, et cetera?

ADV BATOHI: Chairperson, it would require me to go through the evidence very carefully. I should also indicate that the report of Advocate de Kock, the de Kock report that
20 looked into this matter, sets out all of these issues in a lot of detail. We can certainly go through that. I do not want to miss out anything in trying to think about it as I am sitting here because this is a very complicated issue. So I do want to make sure that it is covered properly. It is covered there. My understanding is that evidence will be tendered as well by

another witness that will go into the details of that matter.

CHAIRPERSON: I am going to park it there. And perhaps my sisters have questions flowing from these questions.

MS RAMAGAGA: Right. Advocate Batohi, the questions that I am going to ask you now will also be confined to an assumption that Advocate Chauke exercised the power that he had. And the focal point is about evidence, lack of evidence that is decried across that clause 3 of the terms of reference.

10 Now, is it correct or not that in the course of exercise of the prosecutorial decision-making within a directorate or the seat of court, as they have the seats, within that there would be teams of prosecutors who fall under the particular directorate?

ADV BATOHI: That is correct.

MS RAMAGAGA: That is correct.

ADV BATOHI: There would be prosecutors and some of them may be organised in teams, in a division.

20 **MS RAMAGAGA:** Yes. Now, is there a time where you find that there is a difference of opinion among the prosecutors about whether or not the matter should be proceeded to prosecution? There are such? I see you are nodding just for the record.

ADV BATOHI: Yes, no, I thought you were going to continue with your question.

MS RAMAGAGA: Okay.

ADV BATOHI: Yes, there are instances where there would be differences of opinion and one would have to consider the issue.

MS RAMAGAGA: And there would also be cases, in such cases, where you find that there is a to-ing and fro-ing between or amongst the prosecutors. One persuading the other and ultimately they reach a point that, well, they will agree to disagree and then someone, maybe senior, may
10 come in to try to give direction.

ADV BATOHI: Yes, certainly.

MS RAMAGAGA: Does it happen?

ADV BATOHI: That does happen.

MS RAMAGAGA: Ja. And out of that type of exercise, the cases would be processed to a point of prosecution and maybe prosecution to finality. Others, they would start with prosecution and halfway, because of the continuous assessment, there would be a recommendation that the prosecution be stopped and so forth. Am I correct?

20 **ADV BATOHI**: On that point, it is quite rare. I do not have the figures, but the DPPs do decide whether to stop prosecutions. But from my understanding, that is quite rare. Once a prosecution starts, of course, there could be charges that may be withdrawn before plea. Before plea, yes, you could withdraw charges for various reasons. But once a plea

is taken, then the charges cannot be withdrawn. The prosecution must be stopped, and that requires a DPP to authorise the stopping of a prosecution.

Before plea, when it is withdrawn, a prosecutor can do that without getting the express authority of the DPP because we deal with hundreds of thousands of cases in the courts. So, just to make the distinction between a withdrawal before plea and a stopping of a prosecution after plea, which requires the DPP's authorisation in the latter case.

10 **MS RAMAGAGA**: Ja, I understand the process quite well. The withdrawal of charges as against the stopping of the proceedings or pursuing a particular charge. So, the question that I had asked you was about the issue of where you will find that even if a recommendation had been made that a matter go for prosecution, because of other developments and also in the spirit of a continual assessment of the case, there are cases where there would be either a withdrawal before plea, of course, or a stoppage through proper processes of the proceedings.

20 **ADV BATOHI**: That is correct. It can happen. Although I said stopping is more rare than withdrawal.

MS RAMAGAGA: I understand that, yes. Now, if there is a decision, a prosecutor takes a decision that the matter be proceeded with, and during the course of continuous assessment that a moment comes where a person is of the

view that continuing with this matter could constitute a miscarriage of justice or undermining the constitution. In such a case, when that happens, is there any judgment that is cast upon the prosecutor who then later comes up? And when I say prosecutor in this case, please understand me. I am talking about the prosecution holistically, be it from the top to, ja, that is right.

ADV BATOHI: If the prosecutor had good reason in the first instance to enrol and charge, then, of course, things can
10 change and charges can be withdrawn and there will be no consequences, as long as the initial decision to prosecute was taken responsibly and there was sufficient evidence that supported that decision. That is very important.

If there is the converse, a prosecutor, there was grossly insufficient evidence or no evidence and the prosecutor enrolled it and then withdrew it, then, of course, there must be consequences, depending on the facts of each matter.

MS RAMAGAGA: But then who would arbitrate on the
20 question of judging the decision of the prosecutor who could have proceeded with the matter? Who becomes the arbiter to say, but in this case, this was actually totally unreasonable and uncalled for, or this was justified even though the case is lost by the State, but there was justification, who becomes the arbiter of that?

ADV BATOHI: You could have experienced prosecutors in the NPA that could look into the matter.

MS RAMAGAGA: And how does that happen? Does it happen just of the prosecutor or the NDPP's volition? Or is it something that would be coming from somewhere where someone says, but we have got to look at this. And when I say that, I am also looking at, you know, there are cases where you find that there is just public outcry about a matter being proceeded with or not being proceeded with.

10 Now, in instances where there are no even representations from the parties to the case but there is a public outcry out there about how the matter went about, does the NDPP or the Director have a standing of his or her own volition to look into the matter and make a judgment call as to whether there was in fact evidence of the threshold of exercise of prosecutorial decisions and not the evidence there that we may talk about during the course of this discussion, which is at court level about 174?

ADV BATOHI: Of course, if that happens, there is an outcry.
20 The DPP would, in fact, look into the matter. Sometimes I find there is, you know, media reports, et cetera. I would ask the DPP for a report to look into it and find out what the position is. So it is not, it would happen if that situation arises that we would definitely look into the matter.

MS RAMAGAGA: Right. Should the DPP's word or the

outcome that is reported to you, because you will want to hear from the concerned DPP before you can come in. Let us suppose it goes against the grain of what is being argued out there. Do you, as the NDPP, then step into the arena and satisfy yourself so that you can then come up with a judgment as to whether there was evidence in this matter or not? And when I say evidence or not, it is in the understanding of sufficient or not sufficient.

ADV BATOHI: Generally, I would ask for a report from the
10 DPP. And depending on what the nature of the issue is, they would sometimes summarise the evidence in the matter. So it would, it could happen that that would be the case, that the DPP would send a report about a matter, summarise the evidence, and I would then decide whether it appears from the report that the correct thing has been done or not.

MS RAMAGAGA: In your assessment of the DPP's report, does it ever happen that you, as the head of the institution, comes in and look into the raw evidence or raw information that is available in order to satisfy yourself as to whether the
20 report should be accepted or not?

ADV BATOHI: Generally, I would accept the DPP's report on this. If it is a matter of a review specifically, which is a different process, then there would be occasions when I would call for the dockets or the raw evidence because that is a review of the National Director. But generally, in the

situation that you mentioned, I would generally accept the recommendation of the DPP with regard to what the position is in the matter.

MS RAMAGAGA: Let us go back to the standard, the standard required of a decision to either prosecute or not. We are in agreement, you and me, and I think it is settled law, that there will be a standard for prosecutorial decision-making and there will be a standard for the court, if the matter is now at court, that would be the normal, even though
10 everybody knows it is a 174, and so forth and so forth. The others, it is about assessment.

Now, I think when my sister here, Sister Justice, was asking about the standards, you indicated, and please correct me if I am wrong, you indicated that the standard required for a decision whether to prosecute or not, the standard is higher in respect of the prosecutors at prosecutorial level as against the proof that we want at court for the matter to proceed to another level that is beyond the 174 level. Is that understanding correct? And if my understanding is not
20 correct, please just correct me so that we discuss on a common base.

ADV BATOHI: No, thanks for that. The 174 level that you mentioned is confusing me a little bit because a 174 is a discharge at the end of the State case, so I am not sure how that fits into the standards as far as decisions to prosecute

are concerned.

MS RAMAGAGA: Yes, I am aware that the 174 is a power that would be exercised by the adjudicating judge or magistrate.

ADV BATOHI: After the State case, that is correct.

MS RAMAGAGA: But then at the time when you asked about the standard, I remember quite well my sister, Justice, asked about the standard of proof that would be required at different levels. Much as when we talk about the standard required,
10 when it has to do with prosecution, it will be the prosecutor. When we talk about 174, it will be the presiding officer. But what we are talking about, about that standard, it is about evidence. Evidence prior to trial and evidence during trial. And there is a common understanding that the two remain evidence, but the only thing is, at that time, who is the judge? Now, when it comes to prosecution, the judge there is the prosecutor. The judge there decides.

ADV BATOHI: Yes.

MS RAMAGAGA: Yes, yes. It is judging, is it not?

20 **ADV BATOHI**: Decision-maker.

MS RAMAGAGA: Exactly. No, no. Ja, I say a judge. It is fine, you still judge. The judge to see if this thing should go for prosecution or not, right? So here the purpose of this discussion is just to address this issue of evidence. So I do not think it is necessary for us to pull hairs and say, but this

is at court, the prosecutor has nothing to do with it, and then in this case the prosecutor has something to do with it. We understand the boundaries of each. But then can you maybe just reiterate as to what is the standard of proof required for a matter to progress to be subjected to prosecution proceedings, to go for prosecution?

ADV BATOHI: So, as I mentioned earlier, when the Chairperson asked the question, a matter may be enrolled if there is *prima facie* evidence. And the standard – you see,
10 *prima facie* evidence, in my view, and there may be others that perhaps hold a slightly different view on this, is a slightly lower standard than the reasonable prospects of a successful prosecution.

Prima facie is if you have, you know, at the simplest level, if somebody says, look, he hit me, that is *prima facie* evidence of the commission of a crime. But when you add to that other evidence, for example, you have a medical report, you have somebody else that actually saw the assault, then it takes it to, you know, you have a better prospects of a
20 successful prosecution because it is not just the say-so of one person. So reasonable prospects of a successful prosecution is what we must be satisfied of when we decide to proceed with a matter to trial. So I hope I am making myself clear.

MS RAMAGAGA: [Indistinct]... Thank you, thank you. I beg

your pardon. Right. Thanks. Let us talk about, because, you know, the issue of deciding whether to prosecute or not really lies in the contents of the case docket. Is it correct that there are times when, or instances where the prosecutor would recommend that a person be charged while the investigation is ongoing? That is correct?

ADV BATOHI: Yes, that happens.

MS RAMAGAGA: Yes, that happens. Now, once the prosecutor has decided that the matter be progressed to court
10 while there is still investigation, then the prosecutor would then identify the gaps in the case docket on evidence while the matter, already someone has been charged.

ADV BATOHI: That is correct.

MS RAMAGAGA: And then they will then write in the, what is it ...[intervenes].

ADV BATOHI: Investigation diaries.

MS RAMAGAGA: Exactly. To the police, to say please do this, get this, and get that. Right?

ADV BATOHI: That is correct.

20 **MS RAMAGAGA**: And there comes a point when the prosecutor says there is enough evidence, the matter can proceed.

ADV BATOHI: That is correct.

MS RAMAGAGA: And there are instances even where even after a person has actually pleaded to the charges, there is

continuous obtaining of statements in order to beef up the case as and when the matter progresses.

ADV BATOHI: That also happens.

ADV MOHLAMONYANE SC: Yes. And ultimately, a case that may have started as if it is not really a good case, with the passing of time and ongoing engagement, that case then gains strength.

ADV BATOHI: That happens.

MS RAMAGAGA: And then, of course, ultimately it will bring
10 results. And results can be acquittal or conviction. It is still results.

ADV BATOHI: That does happen.

MS RAMAGAGA: So in actual fact, out of this discussion, we are agreed that evidence can be obtained or built up as the matter progresses in the fashion that I have just illustrated to you.

ADV BATOHI: That is correct, provided you had sufficient evidence to enrol in the first place.

MS RAMAGAGA: Let me put it otherwise. In the scenario
20 that I am painting, a scenario where you start obtaining, you continue to obtain statements, get more information, you write to them to say get a statement of so and so and so and so. If that were not to be done, then that case will almost certainly not be successful in favour of the State.

ADV BATOHI: It is very hard to answer in the abstract

because each case has got to be decided upon on the evidence that you have. And sometimes, even though you do not have all the evidence that you want, you have sufficient that will meet the standard of reasonable prospects. So it really depends on, but you must have sufficient evidence that would meet the standards. And you could, of course, get evidence that will strengthen the case beyond that, which is great for the case, but it depends on the circumstances of each case.

10 **MS RAMAGAGA:** And the power to decide whether to prosecute or not will lie with the prosecutor or even the Director of Public Prosecutions, who then reads the docket and informs a view, reasonable view, that in light of this information that is in this case docket, or a series of them, there is evidence. Much as when you look at it separately, there seems to be no evidence, but when you look at a series, a prosecutor can see, but based on this evidence, I believe, and truly so, exercising independence, exercising good faith, looking at all the tools that are provided through policies, 20 through the guidelines and what have you, and say, I am satisfied that we have a good case here.

ADV BATOHI: So we must look at all the evidence available before we come to that decision. But we certainly should not take the decision if we do not have evidence to prosecute in a case, but we have to look at everything to come to that

conclusion.

MS RAMAGAGA: Maybe just, I think we are seeing the same thing.

ADV BATOHI: I think we are.

MS RAMAGAGA: Ja, because you have outlined in your affidavit as to what is required for an independent decision to be made, a decision that must be made without fear or favour.

ADV BATOHI: That is correct.

10 **MS RAMAGAGA**: Right. Thank you for now.

CHAIRPERSON: Thank you. Might I just follow up on these questions because you mentioned certain concepts which are worrisome to me. You speak of good reasons. You speak of grossly insufficient. And my sister Ramagaga asked you, who is the judge or the arbiter of what constitutes sufficiency or good reason? We earlier on in your evidence spoke about the policies which include, among others, the independence of prosecutors. It is captured in the Constitution. It is captured in the NPA Act and in your policies. You spoke
20 about impartiality of prosecutors.

Now, all these things that you are talking about, as I understand the processes, impacts upon prosecutorial discretion. And when you speak about a prosecutor having a good reason or having looked at entire evidence, and you should, you, and I say you as the Head, the NDPP, having to

look at what this individual prosecutor has done to ascertain whether there were indeed good reasons or sufficient evidence, will that in itself not have a chilling effect on the prosecutorial independence in the exercise of their discretion?

ADV BATOHI: So, Chairperson, the idea of prosecutorial independence, we should not confuse the independence of a Prosecuting Authority from external improper interference. And that is what is guaranteed in the Constitution. It is the
10 independence of the Prosecuting Authority from any kind of external interference.

Independence, a prosecutor within the NPA, is certainly not – you must exercise it independently in the sense that it should be without fear, favour, or prejudice, and we have dealt with those concepts, and then you take a decision. But it is not independent of the supervision and oversight of your superiors within the National Prosecuting Authority. So we need to have a clear distinction between
20 the independence of the NPA vis-à-vis the supervisory role of seniors within the NPA to check on and oversee the work of others.

CHAIRPERSON: Yes, I understand that. I know that we are speaking about prosecutorial decision, an exercise of discretion within. I am not talking about outside interferences. Let us look at the scenario, like here, where

you as a Head obtained opinions within, and you were given varied opinions by the senior prosecutors or the teams, some for, some against, then you proceeded relying on the opinions by some of the prosecutors within who advised. Does it necessarily follow that those who advised you, whose opinions you seem to have accepted, were correct, as against those whose opinions you did not follow?

At what stage do you then say before the trial starts, when you have varied opinions within, do you then say I will
10 disregard the opinions of Prosecutor G, but will take the opinions of Prosecutor A, and then you decide I will not prosecute? Probably, in a matter that is of public interest, and the matter ends up not being seen a day in court.

Let us look, for instance, in the case of a rape of a minor child, and there is no direct witness. You have a word of probably a mother who was not there, as against the word of the accused person, and you have evidence that this child was indeed raped, probably from the mother herself, but not a medical report. The prosecutor then decides, I am
20 prosecuting this case. The matter goes to court without the medical report, as it happens most of the time, and the medical report is obtained while the trial continues.

If this prosecutor, who has initiated the prosecution, decided to prosecute in the absence of the medical report, would you say there was insufficient evidence, so much that

you would say the prosecutor concerned misconducted himself by not obtaining all the evidence, and would you say that prosecution would have been unwarranted?

ADV BATOHI: Chairperson, the facts that you sketched out, it is important because the facts of each case have got to be assessed, and it is very difficult to, and I am trying to answer your question, because on the facts that you gave me, there is no problem with that. If there is evidence that the mother has – you know, there is some evidence to show the child
10 was raped, and there is sufficient evidence to enrol it, and then subsequently you get the medical that you also need, there is absolutely nothing wrong with that. That can happen.

But provided that, at that initial period there was sufficient evidence to enrol in the first place, and that is the point I make, is that the prosecutor must have had sufficient evidence to enrol and to proceed, and then the case can be further strengthened at a later stage.

CHAIRPERSON: What if a prosecutor, an individual prosecutor, decides to prosecute a particular case, and you
20 as a Head decide otherwise, and it turns out later that your decision was wrong in the sense that it could have resulted in a miscarriage of justice by failing to prosecute a matter that ought to have been prosecuted? Because we are all not perfect, we all make mistakes. What if it is you who makes a mistake as the Head?

ADV BATOHI: Of course, Chairperson, that is also possible.

And as I mentioned, I think when I started off my testimony, that there are situations where reasonable minds will differ, and you would have a different view of it. But I said this case is not one of those. So I do not want to come to this particular case again, but I agree with you completely. Reasonable minds can differ. You could have slightly different views. And as I say to prosecutors, that this can happen, and you must never be fearful of taking a decision, as long as you can
10 justify it on the basis of what is in front of you. And there may be a slightly different view. We will understand that. It is not a problem.

But if you take a decision where the evidence is at such a low level that you should never have prosecuted in the first place, then, of course, you need to answer for something. And if I, as the National Director, take a decision where it is a ridiculous decision, there is just no evidence to support my decision, then, of course, I must be held accountable for that. And if necessary, an enquiry into my
20 fitness-to-hold office should be held because I should not make those kinds of decisions.

I, as a National Director, or any prosecutor, must make a decision based on the evidence in front of you, of course, and I keep saying on the understanding that reasonable minds could differ, and we cannot be dogmatic

about this. There are other cases where one prosecutor would have a different view, and you know, I understand that, and I say, look, I can understand and we take a decision and we move on. But as a National Director, I must make sure that when I make a decision, it is based on solid evidence in front of me. And if it is not the case, then I should be held to account.

CHAIRPERSON: My last question, and if you are not able to answer that, do say so. I am going to go to this scenario
10 before us.

ADV BATOHI: Sure.

CHAIRPERSON: Bearing in mind that as at the time of this issue arising, there was a public outcry about the happenings in Cato Manor. It is all there in the record.

ADV BATOHI: Sure.

CHAIRPERSON: So many people were killed. From the record, we are told that a number of police officers were involved. We are told on this record. They were at the scene, or were found at the scene. And those murders resulted in a
20 number of dockets, or cases, or charges. Apparently against a number of police officials, who were allegedly, and I repeat, who were allegedly involved in the shootings, where civilians ended up losing their lives.

Now, in a matter of such public importance, where you have instances of some of the police officers themselves

attesting to affidavits implicating some of these officers, will that not constitute evidence reasonably sufficient to lead somebody to taking a decision that in these circumstances we will prosecute?

I am not sure whether I am putting it the correct way, but you speak of the sufficiency of evidence. But I thought at that level, it would probably be the probability of this evidence being proved to be true. Not the highest standard. Whether you call it *prima facie* or not, but at that stage, the
10 prosecutor exercises a discretion, as you correctly put it, on the evidence before him or her on this matter where there is no doubt that people lost their lives and certain suspects are identified.

Whether correctly or wrongly, but we have a list of suspects, which in this case involves some of the police officers. Given the public outcry in KZN and probably in North West, will this not be a kind of a matter which in the public interest will necessitate enrolment of the matter so that the matter can be ventilated in court?

20 As my sister Ramagaga is saying, normally you will be having all the material at hand when you make a decision. But you have witnessed some witnesses already who in the course of the prosecution will bring more evidence because the investigation continues. My question is, will it not be in the public interest to have such a matter being ventilated in

court?

ADV BATOHI: Chairperson, you have said a lot. I am trying to deal with all aspects of it. I will maybe unpack it.

CHAIRPERSON: Maybe you ...[indistinct] the last aspect.

ADV BATOHI: I think there is some first aspects that were also important. So I think I have to try to deal with most of it because I do not want to leave anything out. I have been making some quick notes, so hopefully I do cover most of it. Chairperson, in most of these cases, and let me again say, I
10 was not in South Africa. I was not here at the time. I am talking about on the basis of what I have been, either evidence in dockets or what I have been told, and the evidence leader can consider it and decide whether to bring other evidence to support or to discount what I am saying.

The police officers were on the scenes because in all of the matters the accused were suspects in murder matters and they were, according to the police officers, shot during the course of an operation to arrest them, suspects in murder matters. I stand to be corrected again, and that is why I say
20 it is better to get the evidence from the dockets, that in one of the cases where one of the suspects were killed, there were five others on the scene that were arrested for the charges.

CHAIRPERSON: Might I, if you allow me, caution, because you do not have first-hand facts. You were not here. You

were told, as we are all told. So we were told in the form of affidavits, as we are now told in the form of affidavits under oath, some of them. And remember, we are not in court yet. We are at that stage where we are making a determination whether a matter warrants prosecution. And you already at that stage have certain evidential material. That may not be conclusive at that stage. It need not be conclusive, I suppose. But you have some evidential material. Say, for instance, if you look at the statement of Colonel Aiyer,

10 Dondlo. All those statements. And you also look at the affidavits of some of your members – I cannot remember their names – which affidavits are evidence, not opinions.

Now, when you assist with such a material, being a prosecutor, who ought to exercise that prosecutorial discretion? And you decide, this is such a matter that I should prosecute, given that scenario that I have presented. Will it then be appropriate for such a prosecutor to be charged with misconduct if he turns out later, maybe at the end of the trial? At 174, probably, where it is found that the evidence

20 is not sufficient?

ADV BATOHI: Chairperson, as long as the prosecutor has correctly assessed and analysed the evidence before him or her, that is critical. And if you look at the factors that I mentioned earlier on that a prosecutor must take into account when deciding whether to prosecute or not. Factors include

whether the state witnesses are credible, whether the evidence is reliable ...[intervenes].

CHAIRPERSON: How do you determine – I beg your pardon. How do you determine credibility at that stage? That is the space for the judge.

ADV BATOHI: Chairperson, there might be issues that you are aware of at the time, or you may consult with a witness. In fact, we often consult with a witness. And if in that process they say things that are different, you have to take that into
10 account. So these are the things that we must consider. Where they have made different statements, for example, that is an issue of credibility that prosecutors must consider.

And if you look at, in this particular case, I understand that there were issues relating to credibility. For example, of Constable Aiyer, Colonel Aiyer at one point, and this was not part of my evidence, but there is evidence that there was an enquiry. And I know you will caution me into saying too much, so I am not sure how much I can say. This is a fact-finding ...[intervenes].

20 **CHAIRPERSON:** Can I still say, I beg your pardon, you say that was not part of your evidence. And I do not want us to go there because you say this is your evidence, and you say that was not part of your evidence. Let us not go there. Let us just try, because I need your assistance here. This issue of prosecutorial discretion is important, because if

prosecutors are not going to be independent, as you said earlier on in your opening address, and I think correctly so, that will have a chilling effect.

So I just want us to understand, as I mentioned earlier, what does it mean when one says there was no evidence, as we see there being a common thread in the terms of reference, and yet we are presented with bulks of documents. Even in your affidavit, you refer to those documents. That seemed to contain evidence suggestive of
10 the fact that there was evidence on which one could decide to prosecute.

ADV BATOHI: Chairperson, I thought I clarified that earlier, the terms of reference we will have to look at. But I was asked the question very specifically, and I said that perhaps no evidence is incorrect, and that there was insufficient evidence to prosecute this matter. And I really want to emphasise, Chairperson, that it is so important that we take into account when we are deciding whether to prosecute or not issues like reliability of evidence, availability of evidence,
20 credibility of evidence, admissibility of evidence.

So the mere fact that you have a statement is a good starting point, but after that you have to make sure that as a responsible prosecutor you apply your mind to every one of these factors to decide whether you can in fact rely on that evidence that is before you.

ADV MOHLAMONYANE SC: Madam Chair, if you will allow me, with due respect.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: In the quest to help the Tribunal in understanding what entails a prosecution or prosecutorial discretion, I would suggest that she refers to the Prosecution Policy as we have it here. We have got a page to which she can go. And I also wish to refer the Panel to page 34 of her affidavit, specifically in paragraphs 80 and 81, where she
10 deals with case law relating to prosecutorial discretion. Maybe that might help in the midst of her bold attempt that she is now embarking upon to try to explain the prosecutorial discretion.

And may I also indicate that page 60 in PD, prosecutorial PD, Policies and Directives, on page 60 thereof might be of help. And if regard is had to what is stated therein, specifically under paragraph A and B on that page. Paragraph B is on page 61, PD00061. Paragraph A is dealt with on page PD00060. What is contained therein might be
20 of assistance. It might, to a very considerable extent in my view, help everyone else to grasp the context within which prosecutors can exercise a prosecutorial discretion. Thank you, Madam Chair, for allowing us.

CHAIRPERSON: Thank you. Thank you, Counsel. Let me just make one aspect very clear. The reason why these

questions arose is because of the terms of reference, which are akin to a charge or a charge sheet in a criminal case. That is why I sought this clarity. If the terms are couched in such a way that they suggest that in this case, on the assumptions that I have mentioned as regard to Advocate Chauke, the evidence that has been presented to us, what does it mean that there was no evidence? That is where we started.

And then the issue of the exercise of prosecutorial
10 discretion then arose emanating from Advocate Batohi's answers. But the concern is about the concepts, no evidence. If you are going to make this a determination of this case on the basis that there was no evidence, what does that mean? And that is where we are. That was my concern. Because somebody out there who reads these bundles and bundles and see the evidence with their eyes, and then they are told that there is no evidence, what does it mean that there is no evidence? That is where I started.

And Counsel, Advocate Batohi said, referred to,
20 there must be good reason, there must be sufficient evidence, all those kind of concepts. But we need to get it clear as to at that stage, what is the standard applicable for a prosecutor to say I am now in a position independently, impartially, to exercise my discretion without fear, favour, or prejudice to prosecute or not to prosecute. That is where I am. The

policies are clear.

I wanted to direct my query to the terms of reference. So we can go back to the policies, but I do not think they address this pertinent point that I need clarity on. And Advocate Batohi has given us the answers that she could, I believe to the best of her ability. And we need not pursue the point.

We should accept her answers for what they are. I do not want us to go around circles and go back to the policies. We have read that. I just wanted her to explain in her own words, in her terms, her understanding as the Head of the NPA, what it means in this case that there was no evidence on which, or rather that warranted the behaviour or conduct complained against.

ADV BATOHI: Chairperson, may I respond briefly to that? Just if I am understanding the Chairperson, the Chairperson said that the terms of reference is something that have to be looked at. It says no evidence. And the Chairperson refers to lots of evidence that has been presented already. Chairperson, as I said, it should be insufficient evidence. But the terms of reference are, and this is my understanding, refers to that which was before Advocate Chauke when he made the various prosecutorial decisions.

And the evidence that we have presented so far is evidence to show why his conduct did not meet with the

standard. So that evidence is different from the evidence referred to in the terms of reference. I just thought there should not be misunderstanding about that. If there was, I could be mistaken about that.

CHAIRPERSON: Misunderstanding about what?

ADV BATOHI: What the no evidence in the terms of reference refers to.

CHAIRPERSON: There is no misunderstanding. We read it for what it is. That is why I need clarity from you as a lawyer.

10 What does no evidence mean in law when you make a decision such as the one that has been taken by Advocate Chauke? And if so, what is the test? What is the standard? That is all that I was saying. I need clarity from you as to whether the test is higher. And you said the test is low. The standard is low in *prima facie*. And you spoke of good reason, grossly insufficient. And we need to get it clear as to what is expected of the prosecutors at that level.

If you speak of no evidence, what does that mean? And that is the clarity that I require from you. And you have
20 tried to explain what the concept means. You say that the use of no evidence is wrong. It should be no sufficient evidence.

ADV BATOHI: Insufficient evidence, yes.

CHAIRPERSON: Insufficient evidence, I beg your pardon. Counsel, we have gone beyond half past four. And these are

some of the issues that I needed clarity on when we adjourned and it follows that you have exhausted the Part A as regards the Cato Manor matter, the Booysen matter.

ADV MOHLAMONYANE SC: I believe so. It has been exhausted.

CHAIRPERSON: But I suppose if anything comes to mind later, it can be revisited.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: All right. Just for the structure of our
10 transcription and evidence, it means then you are ready to proceed on the second aspect, the Mdluli matter.

ADV MOHLAMONYANE SC: Yes, Madam Chair.

CHAIRPERSON: You will confirm that with us tomorrow morning when we resume.

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: Thank you very much, Advocate Batohi, and thank you very much, Counsel. This is the time to adjourn. We will start again tomorrow at 9 o'clock. Thank you. We adjourn.

20 **ENQUIRY ADJOURNS UNTIL 27 NOVEMBER 2025**

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