

**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**

27 NOVEMBER 2025

DAY 9



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

PROCEEDINGS ON 27 NOVEMBER 2025

CHAIRPERSON: Good morning, everyone. We seem to be having a bit of a problem with fixing the aircon on the extreme right. May I find out from counsel or everybody on the right side, is this aircon on your side working? Is it working?

FEMALE SPEAKER: So it is only us here.

CHAIRPERSON: Is it effective? You are able to – if it is not too cold for you, you can just make it a little bit colder because we are burning where we are. There is nothing
10 cooling our area. Given the advanced age, we are struggling. So you can increase it a little bit. Just make it a little bit cooler. If it gets colder for you, you can just adjust it from time to time. Thank you, Advocate Mtsweni. I know Advocate Hulley was complaining of the heat.

ADV HULLEY SC: I was. What happened with that particular aircon is that those...

CHAIRPERSON: We will try to attend to it during the adjournment. Good morning, everyone. Good morning, Advocate Batohi.

20 **ADV BATOHI:** Good morning, Chairperson, the Panel, and good morning to Advocate Chauke and his team.

CHAIRPERSON: Good morning, Advocate Chauke. Counsel, Advocate Mohlamonyane, maybe before we start, let me just remind you that your team committed to preparing the bundle of exhibits. Just remind them, Advocate Hulley

and team. Remember to prepare that bundle so that at the end of Advocate Batohi's testimony, we should be having that bundle ready.

Secondly, the copies of the dockets, have they been prepared or the preparation is underway? The dockets, copies of a bundle of dockets. I see the lady in the extreme end is nodding. I suppose it is underway. The preparation is underway.

ADV HULLEY SC: [Indistinct]... it is just a matter of actually
10 paginating ...[indistinct].

CHAIRPERSON: Yes.

ADV HULLEY SC: [Indistinct].

CHAIRPERSON: That is why I am reminding you that I hope it is underway. Hopefully, by the end of business, I mean, end of business of Advocate Batohi's testimony, we should have those bundles.

ADV NGCUKAITOBI SC: Chair, I think on that topic, there is a missing docket, and in between the dockets, there are also missing documents. The docket we specifically are
20 concerned about is the docket of Kwazi Ndlovu, the 16-year-old that was executed at night at home. The NPA has not disclosed it.

CHAIRPERSON: I suppose it is easy for the teams to confer with one another and make sure that you obtain those documents. They should be somewhere. I think it is just a

question of collaborating with one another and then getting those documents. Mine was just to remind you, as we are heading towards the end of Advocate Batohi's evidence-in-chief, the third aspect that I thought I should remind you, Advocate Mohlamonyane, is to, as you proceed, to remember that aspect that I mentioned, to ascertain or to check from the policy whether it gives, it requires certain aspects to be complied with before a DPP enters the jurisdictional area of another DPP.

10 That might be provided in the policy. I have not seen that. If it is not in the policy, let us know whether it is a matter of practice or not. Let me just check if there is anything that should be brought to your attention. I beg your pardon. I thought that as we begin, I should just remind you of those matters that remain outstanding. Advocate Batohi, remember you are still under oath.

ADV BATOHI: I do. Thank you, Chair.

CHAIRPERSON: Thank you, Madam. Advocate Mohlamonyane, you may proceed.

20 **SHAMILA BATOHI:** (still under oath)

EXAMINATION BY ADV MOHLAMONYANE SC

(CONTINUES): Thank you, Madam Chair.

ADV BATOHI: Chairperson, if I may, before Counsel begins to lead me on the questions that the issue of the one docket that has been raised by Counsel Ngcukaitobi, that of Kwazi

Ndlovu, I would like to mention that in respect of that case, I had testified that there was one docket where, in respect of all the dockets that I sent back to KZN and asked the DPP to look at them and take a decision whether there is evidence to prosecute.

This was the one docket that actually, initially, it came back declining all dockets. I queried this particular docket and I said, please look at this, look at this evidence and carefully consider these issues. A decision was taken to
10 prosecute in this particular matter. It could be that is the reason why this docket is not with the others, but we will certainly get that docket as soon as possible and make sure that that is disclosed as well. That matter did proceed to trial and the accused were acquitted. That is my recollection of that matter. Thank you, Chairperson.

CHAIRPERSON: Thank you, Advocate Batohi. Advocate Mohlamonyane.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. As I indicated in chambers, Advocate Batohi would like to explain
20 certain aspects arising from the questions from the Panel yesterday and she is requesting that she be given an opportunity, maybe on Monday, to deal with them. As for today, we are ready to commence with the evidence relating to the Mdluli matter.

CHAIRPERSON: Thank you, Counsel. Let us see how far

we go and I am sure Advocate Batohi will be given that opportunity.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Now, the Mdluli matter, before we lead evidence, pertains to paragraphs 3, 3.1, 3.1.1, I beg your pardon, 3.1.1 ...[intervenes].

CHAIRPERSON: I beg your pardon, Counsel. It is 3, 3.2, et cetera, not 3.1.

ADV MOHLAMONYANE SC: Yes, let me begin, let me
10 correct myself. They pertain to 3, 3.1.2.

CHAIRPERSON: 3.2, rather. Look at page 7 of the gazetted terms of reference. Do you have that?

ADV MOHLAMONYANE SC: I have it in front of me. 3.1 ...[intervenes].

CHAIRPERSON: Okay, let us look at that.

ADV MOHLAMONYANE SC: 3.1.2 relates to ...[intervenes].

CHAIRPERSON: The main heading is 3 and then it goes to 3.1. I suppose you will then read 3 and go to 3.2 with regard to Mdluli. Am I right?

20 **ADV MOHLAMONYANE SC:** Before I go to 3.2, Madam Chair, a particular reference is made to the issue of Richard Mdluli in 3.1.2 on page 7 of the terms of reference.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: As well as 3.2, 3.2.1, 3.2.2. 3.2.2.1, 3.2.2.2, 3.2.2.3, 3.2.3, 3.2.4, 3.2.5, 3.2.6, and 3.2.7.

CHAIRPERSON: Thank you, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, let me direct your attention to page 67 of your affidavit from paragraph 158 where the Mdluli matter begins. May you start?

ADV BATOHI: Thank you, Counsel. Chairperson, if I could say again that this matter, again, I have no personal knowledge of it, but I have extracted from information, documents, affidavits, et cetera, that has been – that I have
10 had access to. And I also, I must say that this part of it, dealing with Mdluli, is not comprehensive enough. It was due to the very, very tight time constraints that we had in trying to put my affidavit together. I will deal with some of the detail today.

If I may proceed then, Chairperson. From paragraph 158 through to 159.7, it is just a very brief summary of the facts in this matter, which I will go through now. Richard Mdluli was a General in the South African Police Service and had been charged with, amongst others, the murder of Mr
20 Tefo Oupa Ramogibe. He was also charged with two counts of attempted murder of Mr Ramogibe and Ms Alice Manana. He was also charged with three counts of kidnapping in relation to Ms Manana, Mr Ramogibe, and Ms Tshidi Buthelezi, two counts of common assault relating to Ms Manana, two counts of assault with intent to do grievous

bodily harm in respect of Ms Manana and Mr Ramogibe, four counts of contravening the Intimidation Act 72 of 82, as well as defeating the ends of justice.

From page 59, in paragraph 159, I briefly set out the evidence, a summary of some of the evidence in the affidavit of the Investigating Officer, Colonel Kobus D Meyer Roelofse, which is dated 5 April 2012. And the evidence, critical evidence in the docket showed that Mr Mdluli had been betrothed to Ms Buthelezi in a customary union. They
10 became estranged. Ms Buthelezi then entered into a relationship with Mr Ramogibe.

Mr Mdluli was unhappy with this relationship and threatened to kill Mr Ramogibe if he persisted with the relationship. The relationship nevertheless continued and they eventually married on the 22nd of July 1998, but kept it a secret, including from immediate family because of the threats and them being extremely scared of in particular Mr Mdluli, and the couple went into hiding.

Ms Manana had been, who is the complainant in the
20 number of the charges that I read out, including the attempted murder charge, had been a witness at the marriage ceremony, a civil ceremony. On 17 October 1998, she was attacked in her home and seriously wounded, shot twice when she opened the door to her assailant. She stated that she had identified Mr Mdluli's vehicle at the scene. This is just one

bit of evidence. There is lots of other evidence.

On the 23rd of December 1998, an attempt was made on the life of Mr Ramogibe, eventually the gentleman who was killed and the deceased in the murder case. He reported the attempted murder at the Vosloorus Police Station. A docket was opened but later closed. At some point later, this attempted murder docket was reopened and a Constable Dlomo, was assigned to investigate the matter. Mr Ramogibe was convinced to come out of hiding to assist in this
10 investigation. And paragraph 115 ...[intervenes].

ADV MOHLAMONYANE SC: Allow me to interpose there. I must mention, Madam Chair and your sisters, that Colonel Kobus D Meyer Roelofse will be called as a witness. Now, most of the facts in the Mdluli issue are detailed in the judgment of Murphy.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Murphy J, in the High Court of Pretoria.

ADV BATOHI: That is correct.

20 **ADV MOHLAMONYANE SC:** And we will deal with that in a moment.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: You may proceed.

ADV BATOHI: So, just to wrap up the last part, after Mr Ramogibe came out of hiding to assist in the investigation

into his attempted murder, the investigating officer in that matter, one Constable Dlomo, drove Mr Ramogibe to the scene of the previous shooting where the attempted murder took place, apparently to do a pointing out, where Mr Ramogibe was shot and killed in an apparent robbery.

Constable Dlomo made a statement in which he claimed that he was robbed of his service pistol and the vehicle he was driving. Mr Ramogibe himself was wearing a gold chain which was not taken. So, the essence
10 ...[intervenes].

ADV MOHLAMONYANE SC: Now...

ADV BATOHI: Pardon me.

ADV MOHLAMONYANE SC: Excuse me. Now, there was a stage when Lieutenant Colonel Mdluli made representations to Advocate Chauke.

ADV BATOHI: That is correct. He did make representations after he had been charged with all of these, those charges that I mentioned. He made representations to Advocate Chauke and I will deal with a brief timeline and that will fit
20 into that timeline. Upon receipt of the recommendations, Advocate Chauke asked the team, the prosecution team who was dealing with this matter. The team was led by Advocate Zais Van Zyl. The current Public Protector was also a member of that team at the time, Advocate Kholeka Gcaleka, and there was another prosecutor, I cannot recall the name,

who is actually currently working in the office of the Public Protector.

The team looked at the representations and recommended that the prosecution continue. They were of the view that there was strong circumstantial evidence and that the representations of Lieutenant General Mdluli were essentially that the case was fabricated against him in the context of a conspiracy against him by the then General Phele ...[intervenes].

10 **ADV BALOYI-MERE SC:** Sorry to interrupt. Where is the witness in the affidavit or she is narrating from memory?

ADV MOHLAMONYANE SC: Madam Baloyi-Mere, she is on paragraph 159.7, but she is narrating from memory to explain that there was a stage when representations were made to Advocate Chauke after Mdluli was charged.

ADV BALOYI-MERE SC: In that case, I will ask her to go a little bit slower because we do not have it on the affidavit and so we are making notes.

ADV MOHLAMONYANE SC: Yes, indeed.

20 **ADV BATOHI:** Thank you, I appreciate that. I do have some notes which perhaps we should make available to the Panel so it might be a bit easier to follow. I am not sure, I have scribbled on my copy, but maybe that might be helpful to the Panel.

CHAIRPERSON: I suggest that you keep your notes. I think

that part of evidence appears in the other bundle, the referral bundle. So we can capture that from the other bundles that we have, the initial referral bundle.

ADV BATOHI: Yes, thank you, Chairperson. I will go slower.

CHAIRPERSON: But do go slower. Thank you.

ADV BATOHI: Thank you. So after receiving the representations and receiving the team's recommendation that the prosecution continue, Advocate Chauke nevertheless withdrew the charges against Mr Mdluli, Lieutenant General
10 at the time, and recommended the matter proceed to an inquest.

ADV MOHLAMONYANE SC: You may proceed.

ADV BATOHI: Perhaps we could deal with the timeline at this point.

ADV MOHLAMONYANE SC: Yes, go to – there is a certain chronology that you have to deal with.

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: You may deal with it.

ADV BATOHI: Thank you, Counsel. Chairperson, briefly the
20 chronology of this matter, which will assist, hopefully, the Panel ...[intervenes].

ADV MOHLAMONYANE SC: Chronology of events, not so?

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: Okay.

ADV BATOHI: Relating to this matter. Mr Mdluli's arrest on

the charges of murder, the charges I mentioned earlier, kidnapping, assault, et cetera, took place on the 31st of March 2011. On the ...[intervenes].

ADV MOHLAMONYANE SC: Just a minute. Give the Panel a chance to make notes.

ADV BATOHI: On the 17th of November 2011, some eight months or so later, Mr Mdluli's attorneys made the written representations to Advocate Chauke that I mentioned, alleging a fabricated case against him in the context of a
10 conspiracy against him by the then General Cele, that would be subsequent Minister Cele, who was at the time, if I recall correctly, the National Commissioner of the Police, General Petros, General Lebeya, who subsequently became the Head of the DPCI or the Hawks in 2019, and General Dramat. On the 2nd of February 2012, Advocate Chauke withdrew all charges against Mr Mdluli.

CHAIRPERSON: The date is ...[intervenes].

ADV BATOHI: 2nd February 2012.

CHAIRPERSON: February?

20 **ADV BATOHI:** That is correct, Chairperson. He withdrew all charges and referred the murder matter to an inquest, as I mentioned, against the opinion of the prosecution team to continue with the prosecution.

On the 13th of May 2012, Freedom Under Law launched an application, and I will contextualise that in a

moment, for the review of various decisions including this one that Advocate Chauke took. On the 9th of October 2012, Freedom Under Law, which I will mention as FUL in short, filed a supplementary affidavit.

CHAIRPERSON: What is the date?

ADV BATOHI: 9th of October 2012.

CHAIRPERSON: 9 October.

ADV BATOHI: A supplementary affidavit was filed by FUL. On the 2nd of November 2012, the findings of the Inquest
10 Magistrate were published. Thereafter, on the 14th of March 2013, Freedom Under Law filed a further supplementary affidavit. On the 23rd of September 2013, the judgment of the High Court was handed down in this matter, *FUL v the NDPP*, and it is the judgment of Judge Murphy. On the 17th of April 2014, the SCA judgment was handed down, and we will deal with the judgment of Brand J. So that is just briefly the chronology of the key events in this matter, or moments.

ADV MOHLAMONYANE SC: Advocate Batohi, what happened after Advocate Chauke takes the murder charge for
20 an inquest?

ADV BATOHI: So perhaps, Chairperson, before I deal with that, just to briefly contextualise the Freedom Under Law application, but perhaps to answer Counsel's question first, after the matter was taken for and referred for an inquest, the charges against Mr Mdluli would have been withdrawn. Well,

they would have been withdrawn. They were withdrawn, and the matter referred for an inquest. And after that, Freedom Under Law brought the application that I mentioned.

ADV BALOYI-MERE SC: Sorry, for clarity, is it after the murder charges were withdrawn, the matter was referred for inquest, or the matter was referred for inquest and the murder charges were withdrawn? Because you said something like, after the murder charges.

ADV BATOHI: Yes.

10 **ADV BALOYI-MERE SC:** So you said something that was confusing. I want to know whether the charges were withdrawn and the matter was referred for an inquest, or the matter was referred for inquest and the charges were withdrawn.

ADV BATOHI: Thank you. Sorry for that confusion. I realise I did say things slightly different. The normal procedure is that charges would first be withdrawn, and then the matter would be referred for an inquest. I assume that that would have been done in this case as well.

20 **ADV MOHLAMONYANE SC:** Now, Advocate Batohi, the Mdluli matter arose out of two decisions to withdraw criminal charges, and one decision to withdraw disciplinary charges against Richard Mdluli. Would you be in a position to contextualise that in a summary form?

ADV BATOHI: Yes, the full application that I mentioned was

because of two decisions, two criminal charges that had been withdrawn against Mr Mdluli, who was the Head of Crime Intelligence at the time. I am not sure if I mentioned that. As well as one disciplinary charges that he was facing at the time in the South African Police. Within a space of, I am not sure how long, but all of these matters were withdrawn.

ADV BALOYI-MERE SC: Which application are you referring to? The Freedom Under Law application.

ADV BALOYI-MERE SC: The Freedom Under Law?

10 **ADV BATOHI:** That is correct. I dealt with all three of these matters. The first decision that I referred to, I said there were two criminal charges. The first criminal charge was one where Advocate Lawrence Mrwebi, who was at the time the Special Director of Public Prosecutions and the head of the Specialised Commercial Crime Unit in the NPA, he withdrew the fraud and corruption charges relating in most part to fraud relating to the Crime Intelligence Secret Service account.

CHAIRPERSON: Advocate Mrwebi?

ADV BATOHI: That is correct, Chairperson.

20 **CHAIRPERSON:** And I am not certain of what relevance is the Mrwebi matter to this one, but if you are referring to it just as a matter of background, I would understand.

ADV BATOHI: I am contextualising, Chairperson, and as a matter of background because it makes – it better understood. The second criminal charge that was withdrawn

is the one that forms the subject of this enquiry, that is Advocate Chauke's decision to withdraw the murder charges and other charges. And the third decision was withdrawal of disciplinary proceedings which arose from the acts of misconduct in relation to these two criminal charges.

CHAIRPERSON: The third decision is a matter within the jurisdiction of SAPS?

ADV BATOHI: That is correct, Chairperson. Disciplinary matters.

10 **CHAIRPERSON:** Yes.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: It has nothing to do with Advocate Chauke?

ADV BATOHI: It has nothing to do with Advocate Chauke. In that disciplinary matter, it was Lieutenant General Mkhwanazi who was at the time the Acting National Commissioner of SAPS who withdrew the charges, the disciplinary charges.

CHAIRPERSON: Lieutenant Mkhwanazi?

20 **ADV BATOHI:** That is correct, Chairperson. Lieutenant General.

CHAIRPERSON: Lieutenant General.

MS RAMAGAGA: You say what position was he holding?

ADV BATOHI: At the time, my understanding is that he was Acting National Commissioner of SAPS.

MS RAMAGAGA: Thank you.

ADV BATOHI: So, FUL brings an application to have all of these matters reviewed and the decisions set aside. In those proceedings, in Advocate Chauke's affidavit, the Court noted this, in fact. It is part of the judgment:

“Advocate Chauke stated that given the seriousness of the charges...”

The murder charges:

“...and the lack of direct evidence...”

I emphasise direct:

10 “...to sustain the charge of murder, he decided to withdraw the charges provisionally and an inquest to be held to determine the cause of death of Mr Ramogibe.”

CHAIRPERSON: You are referring to the court. Is that the Murphy J Court or the SCA Brand Court?

ADV BATOHI: Chairperson, my understanding is the Murphy J matter. We will refer to that in a moment. The outcome, Chairperson, of this ...[intervenes].

20 **CHAIRPERSON**: May I? This was brought to our attention. Thank you, sir. As was brought to our attention by Advocate Ngcukaitobi, that decision, I would understand if you refer to the facts, but if you refer to the findings, those findings were subsequently, if I understood correctly, and my reading of the judgment is correct, were upset by the SCA.

ADV BATOHI: Chairperson, I will deal with that in a moment.

CHAIRPERSON: Okay.

ADV BATOHI: That is an important aspect of this matter.
Chairperson ...[intervenes].

CHAIRPERSON: Maybe you can refer us to the relevant part
then of Murphy J's judgment.

ADV BATOHI: Yes, I will do that now, Chairperson. If we
go to the judgment of Murphy J, I firstly want to deal with his,
paragraph 72 of his judgment, where Murphy J sets out the
10 legal nature and purpose of an inquest. Chairperson, I
understand that the decision is in the bundle, if Counsel can
assist.

ADV MOHLAMONYANE SC: Madam Chair, you will find the
Murphy judgment in bundle CL2, Case Law 2, meaning Case
Law 2, on page CL00295, where it starts. Advocate Batohi, I
understand that you are now referring to paragraph 72.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Advocate Batohi is now
referring to paragraph 72 of Murphy J's judgment, which will
20 be found on page CL00311.

ADV BATOHI: If I may proceed, Chairperson.

CHAIRPERSON: CL00391?

ADV MOHLAMONYANE SC: 311. 311, Madam Chair.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: May she proceed?

CHAIRPERSON: Yes.

ADV MOHLAMONYANE SC: Proceed.

ADV BATOHI: Thank you. Chairperson, at paragraph 72, Murphy J states:

10 “An inquest is an investigatory process held in terms of the Inquests Act, which is directed primarily at establishing a cause of death, where a person is suspected to have died of other than natural causes. Section 16(2) of the Inquests Act requires a Magistrate conducting an inquest to investigate and record his findings as to the identity of the deceased person, the date and cause or likely cause of his death, and whether death was brought about by any act or omission that *prima facie* amounts to an offence on the part of any person. The important part is the presiding officer is not called on to make any

20 determinative finding as to culpability.”

Murphy J then considered the findings of the Inquest Magistrate, and at paragraph 74, had the following to say.

CHAIRPERSON: I beg your pardon, Advocate Batohi. There seems to be a bit of a crisis with regard to this aircon. It is

dropping water on the computer of the State Attorney. Please just give us a second. Is it possible to move to that mic, that space over there? I see you are struggling with this water that is disturbing you. You may take the extreme right seat and move away from that water. It is going to damage your computer. You may proceed, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi.

ADV BATOHI: I may proceed?

10 **ADV MOHLAMONYANE SC:** You may proceed.

ADV BATOHI: Thank you, Counsel. Chairperson, at paragraph 74 in Murphy's judgment, he considers the findings of the Inquest Magistrate and states the following:

20 “The reasons suffer a measure of incoherence and the ultimate findings are contradictory. He found first that an inference of Mdluli's involvement would be consistent with the facts but not the only inference. He then concluded later that the death was brought about by an act *prima facie* amounting to an offence on the part of unknown persons. There is no evidence on a balance of probabilities implicating Richard Mdluli.”

I pause here, Chairperson, to recall what Judge Murphy states in paragraph, at the end of paragraph 72:

“The presiding officer is not called on to make any determinative finding as to culpability.”

Chairperson, at paragraph 78, Judge Murphy states ...[intervenes].

CHAIRPERSON: You are drawing our attention to that last sentence, understood in conjunction with what the Magistrate
10 is alleged, is said to have done.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: To say that there was a misdirection there.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: You may proceed.

ADV BATOHI: Chairperson, at paragraph 78, Judge Murphy states the following:

“The affidavits before the inquest...”

...[intervenes].

ADV MOHLAMONYANE SC: Just a minute. Which will
20 appear, or appears on page CL00312, Madam Chair and your sisters.

CHAIRPERSON: Paragraph 78?

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: Paragraph 78.

ADV BATOHI: That is correct, Chairperson.

ADV MOHLAMONYANE SC: Proceed.

ADV BATOHI: Judge Murphy states the following:

“The affidavits before the inquest and the evidence as summarised by the Magistrate in his written reasons do indeed support a conclusion that there is a *prima facie* case against Mdluli on the murder and related charges.”

At paragraph 79, the Learned Judge states:

10 “In its supplementary founding affidavit, FUL highlighted the following key attributes of the evidence demonstrating a *prima facie* case against Mdluli and upon which the Magistrate's inference of Mdluli's involvement is soundly based.”

And I pause here, Chairperson, to state that the Magistrate in fact draws an inference that there is sufficient evidence to support a *prima facie* case against Mdluli, and Judge Murphy states that this conclusion is soundly based. He then goes
20 on to set out in detail this evidence, and it is detailed from paragraphs 80 to 85 of the judgment. It is quite a long section, Chairperson, and I think it would be important to read that. I do not think it is necessary for me to read it into the record for current purposes unless directed otherwise.

ADV MOHLAMONYANE SC: May I interpose? The

paragraphs that you are referring to being 80, 81, 82, 83, 84, and 85 are on pages, it starts on page CL00312, Madam Chair and your sisters. 81 starts on page CL00312 and goes on to page CL00313 where you will find paragraphs 82, 83, 84, and 85, which the witness refers to.

ADV BATOHI: If I may proceed, Chairperson, at paragraph 86 ...[intervenes].

ADV MOHLAMONYANE SC: Just a minute. Before you proceed, go back to paragraph 80.

10 **ADV BATOHI:** Yes, I am reading. I do not have the CaseLines in front of me. If I need to read something from there, I will need the – there it is. I do have it. Is it CL001 or CL002?

ADV MOHLAMONYANE SC: Ja. It is preferable that you should read them into the record.

ADV BATOHI: What page is that if you could direct me?

CHAIRPERSON: CL2.

ADV BATOHI: Thank you.

20 **ADV MOHLAMONYANE SC:** On page CL00312. Read all of the paragraphs.

ADV BATOHI: Starting from paragraph?

ADV MOHLAMONYANE SC: 80.

ADV BATOHI: 80?

ADV MOHLAMONYANE SC: Yes.

ADV BATOHI:

“The deceased’s mother, Ms Maletsatsi Sophia Ramogibe, testified that during 1998, Mdluli came to her home looking for the deceased.”

That is her son:

10 “A few days later, Mdluli came and fetched her and took her to the police station. There she found her son bleeding with his shirt covered in blood. Mdluli insulted her son in his presence and warned him to keep away from Buthelezi. Her son was killed a few days later. After his death, Ms Ramogibe's daughter, Justina, was kidnapped and raped, confirmed by her in a confirmatory affidavit. She later received a call from an unknown caller who warned her that if she proceeded to press the case of her son's murder, all her daughters would be killed.”

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At 81:

“Ms Alice Manana, an acquaintance of the deceased and Buthelezi, described how in 1998 she was allegedly kidnapped, intimidated, and assaulted

by Mdluli and two fellow officers of the Vosloorus SAPS and forced to disclose the whereabouts of the couple and to take the police to them at Orange Farm. The deceased and Buthelezi were then taken to Vosloorus Police Station where they were assaulted for 30 minutes before being discharged. On 17 October 1998, Ms Manana was repeatedly shot by an assailant who shot her at the front door of her home. During the shooting, she saw Mdluli sitting in the driver's seat of a green Volkswagen Golf, which she knew belonged to him, parked outside her house.”

10

82:

“Buthelezi, now deceased, stated in an affidavit deposed to before her death that she and the deceased had been kidnapped and assaulted by Mdluli and his colleagues. Five other witnesses, including the deceased's father, testified that Mdluli had visited them repeatedly looking for the deceased and

20

informed them that he would kill Ramogibe if he did not end his relationship with Buthelezi. Mr Steven Buti Jiyane testified that Ramogibe had periodically stayed at his family home because Mdluli was threatening to kill him. Mary Lokaje, in her affidavit, heard the shooting of Ramogibe outside her house and saw three uniformed policemen running away from the scene and saw the Golf being driven away.

10

Various affidavits by police officers...”

At 85, paragraph 85:

“Various affidavits by police officers who investigated the murder were filed confirming that Mdluli was the main suspect in the case although there was no evidence of direct involvement in the murder and dealing with the loss of the dockets and evidence linked to some of the charges.”

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ADV MOHLAMONYANE SC: You may then proceed to paragraph 86.

ADV BATOHI: Paragraph 86, Judge Murphy states:

“The Magistrate did not reject any of this

evidence. He in fact accepted it all. In conclusion to his reasons the Magistrate stated: “But be this as it may, their evidence of Mdluli being to such a degree upset with Oupa’s (Ramogibe) relationship with an estranged Tshidi (Buthelezi) that they deemed it necessary to have reported it and mentioned it in their affidavits shortly after Oupa’s death, runs like a golden thread through the murky waters of their evidence. Evidence that he passed threats to kill Oupa, whether made repeatedly or not, against the background of the strong current of Mdluli’s emotions at the time, is in my opinion overwhelmingly probable” (emphasis supplied). His ultimate conclusion...”

20 Sorry, I must finish paragraph 86. My apologies:
“He then found that it had been proved on a balance of probabilities that Mdluli was “highly upset and humiliated” by Ramogibe’s relationship with his former lover, had not come to terms with the

fact that Buthelezi had ended their relationship, had made threats to kill Ramogibe and that his family would mourn him and had wanted Ramogibe out of Buthelezi's life in the hope that he could rescue his relationship with her. He, however, went on to point out that it might be difficult to link the threats, intimidation and alleged kidnapping to the ultimate fatal shooting of Ramogibe. The inability to call Buthelezi, now deceased, was in his opinion a complicating factor. These weaknesses (and others) in the evidence led the Magistrate to conclude that an inference of Mdluli's involvement was permissible but not conclusive. His ultimate conclusion that there was no evidence on a balance of probabilities "implicating" Mdluli is wrong and inconsistent with his otherwise correct assessment and evaluation of the evidence."

ADV MOHLAMONYANE SC: Now, can you deal with Advocate Chauke's decision to withdraw the charges? What

did Judge Murphy say about that?

ADV BATOHI: At paragraph 87 Judge Murphy had the following to say:

10 “Neither the Acting NDPP nor Chauke dealt meaningfully in their answering affidavits with the incriminating evidence against Mdluli, FUL’s submissions regarding the evidence, or the finding of the Magistrate that an inference of Mdluli’s involvement was consistent with the facts.”

Sorry, I should have read it as:

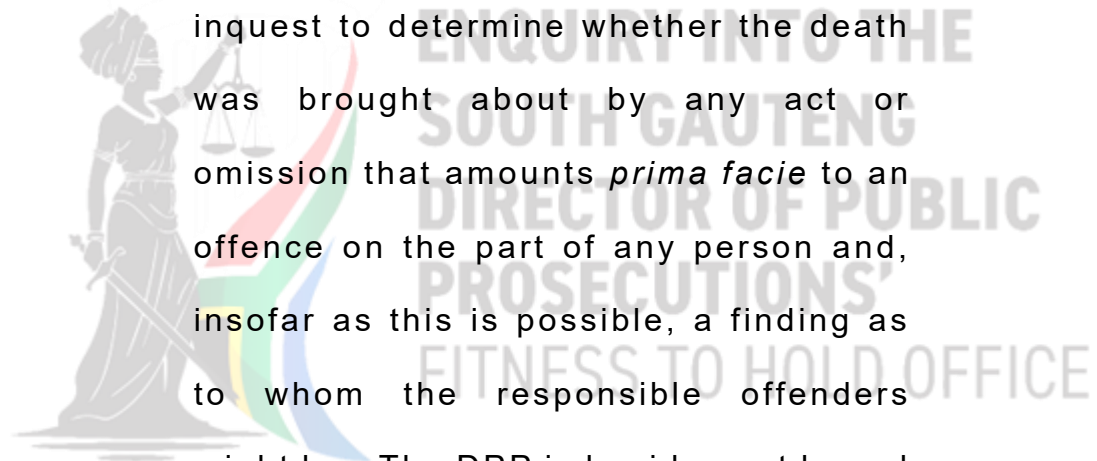
“They did not deal meaningfully in their answering affidavits with the incriminating evidence against Mdluli with full submissions regarding the evidence or the finding of the Magistrate that an inference of Mdluli's involvement was consistent with the facts.”

20 **ADV MOHLAMONYANE SC:** Continue to paragraph 89, which appears on page CL00314, Madam Chair.

ADV BATOHI: At paragraph 89 Murphy states the following. Judge Murphy states the following:

“Chauke in his answering affidavit similarly ignored some of the inquest

findings, saying simply that the Magistrate had found there was no evidence implicating Mdluli. Clearly there is evidence implicating Mdluli. The Magistrate's conclusion is anyhow not decisive. Guilt or innocence is a matter for the trial court tasked with the responsibility of determining culpability. Section 16(2) of the Inquests Act only requires a Magistrate conducting an inquest to determine whether the death was brought about by any act or omission that amounts *prima facie* to an offence on the part of any person and, insofar as this is possible, a finding as to whom the responsible offenders might be. The DPP is besides not bound by the findings of the inquest."



ADV MOHLAMONYANE SC: You may continue and...

20 **ADV BATOHI:** Sorry, continue with?

ADV MOHLAMONYANE SC: With the decision of Murphy.

ADV BATOHI: Okay, thank you. So...

ADV MOHLAMONYANE SC: Murphy J. Sorry, my apologies.

ADV BATOHI: Yes, thank you. Thank you, Counsel. At the conclusion of this, Murphy J reviewed this matter and set

aside each of the decisions and directed that Mrwebi and Chauke reinstate the prosecutions and the National Commissioner to reinstate the disciplinary inquiry. At this point, Chairperson, what would one expect a reasonable DPP in these circumstances to do after a decision that indicated that the Inquest Magistrate got it wrong. Also, bearing in mind that experienced prosecutors had recommended and supported a prosecution prosecutors in Advocate Chauke's office.

10 One would have expected that upon receipt of the Murphy judgment, a DPP, in compliance with constitutional obligation to prosecute, as well as the policy directives that I will deal with later deal with withdrawal of matters once a matter is enrolled. Sorry, I have been going a bit fast now. I realise I am not quoting from the judgment. My apologies.

ADV MOHLAMONYANE SC: Yes.

ADV BATOHI: One would have expected that the DPP would have reconsidered the matter, taken the views of the Inquest Magistrate regarding the fact that there was evidence to
20 support Mdluli's involvement in the matter. I paraphrase now. Taken his team's view into account and given instructions to continue with the prosecution of Mdluli on murder and attempted murder and a whole range of other charges.

Even if one assumes that Advocate Chauke had either misread the Inquest Magistrate's findings or had not

read them fully, one would have expected him to have reassessed the matter. Instead, what is the decision he takes in these circumstances?

ADV MOHLAMONYANE SC: Maybe before you do that, allow me to interpose you. It is perhaps appropriate to read into the record before you finally deal with what you are dealing with now, to read into the record the orders that Murphy J gave, so that when you deal with it ...[intervenes].

ADV BATOHI: If you could direct me to the page?

10 **ADV MOHLAMONYANE SC:** It is on – the orders of Murphy J appear on page CL00350, Madam Chair and your sisters. And they go up to page CL00351. They are contained in paragraph 241. You may proceed to read them into the record.

ADV BATOHI: Thank you, Counsel:

“The following orders are made:

(a) The decision made on or about 5 or
6 December 2001, as the case may be,
by the third respondent, in terms where
20 of the criminal char...”

I am not sure who the third respondent is, and perhaps counsel can check and follow.

ADV MOHLAMONYANE SC: Okay.

ADV BATOHI: I will continue.

ADV MOHLAMONYANE SC: Ja, continue. We will do that

after you have read it into the record.

ADV BATOHI: Thank you, Counsel:

10 “(a) The decision made on or about 5 or
6 December 2011, as the case may be,
by the third respondent in terms whereof
the criminal charges of fraud, corruption
and money laundering instituted against
the fifth respondent under case number
CAS 155/07/2011 were withdrawn, is
hereby reviewed and set aside.

20 (b) The decision made on 2 February
2012 by or on behalf of the first
respondent in terms whereof the
criminal charges of murder, kidnapping,
intimidation and assault with intent to
cause grievous bodily harm and
defeating the ends of justice under case
number CAS 340/02/99 were withdrawn,
is hereby reviewed and set aside.

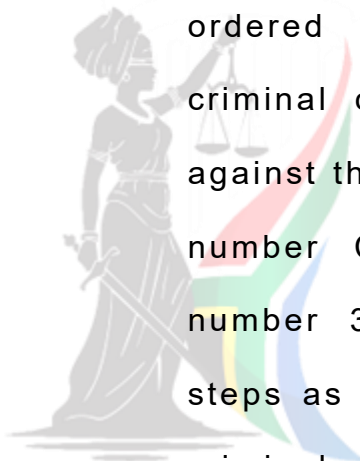
(c) The decision made on 29 February
2012 by or on behalf of the second
respondent in terms whereof the
disciplinary proceedings instituted by
the second respondent against the fifth
respondent were withdrawn, is hereby

reviewed and set aside.

(d) The decision made on 31 March 2013 by or on behalf of the second respondent in terms whereof the fifth respondent was reinstated as Head of Criminal Intelligence in the South African Police Services with effect from 31 March 2012, is hereby reviewed and set aside.

10

(e) The first and third respondents are ordered to reinstate forthwith the criminal charges which were instated against the fifth respondent under case number CAS 155/07/2011 and case number 340/02/99 and to take such steps as are necessary to ensure that criminal proceedings for the prosecution



of the criminal charges under the aforesaid cases are re-enrolled and prosecuted diligently and without delay.

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(f) The second respondent is ordered to reinstate disciplinary charges which had been instituted against the fifth respondent but were subsequently withdrawn on 29 February 2012, and to

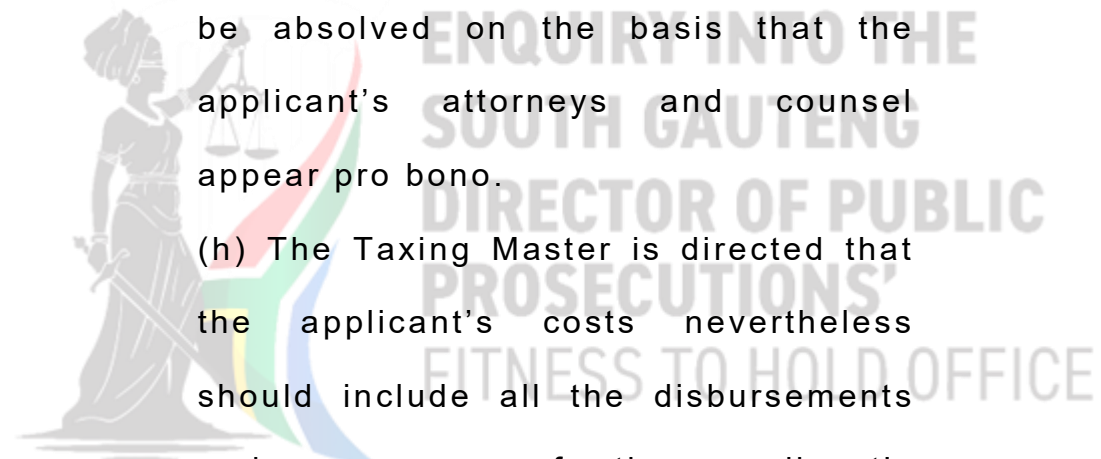
take such steps as are necessary to institute or reinstate disciplinary proceedings that are necessary for the prosecution and finalisation of the aforesaid disciplinary charges, diligently and without delay.

(g) The first, second, third and sixth respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to

10

be absolved on the basis that the applicant's attorneys and counsel appear pro bono.

(h) The Taxing Master is directed that the applicant's costs nevertheless should include all the disbursements and expenses of the applicant's attorneys of record."



ADV MOHLAMONYANE SC: To clarify who the respondents are, go to page CL00295. You will see that the National Director of Public Prosecutions is the first respondent. The second respondent is the National Commissioner South African Police Service. Do you confirm that?

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: The third respondent is the

Head Specialised Commercial Crime Unit, with the acronym SCCU. You will see in some instances they refer to it as SCCU. The fourth respondent is the Inspector General of Intelligence. The fifth respondent is Richard Naggie Mdluli. The sixth and last respondent is the Minister of Safety and Security.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: You may proceed to deal with what Advocate Chauke ought to have done after receipt of
10 this judgment of Murphy J.

ADV BATOHI: So, here we have a really strong judgment that supports the prosecutors who recommended a prosecution. The reinstatement of the matter is ordered. However, in these circumstances, Advocate Chauke does not do that. Instead, he decides to appeal the Murphy decision. The question is why, given everything that had preceded in the inquest and in the Murphy review application and the decision.

So, the NPA appeals the matter, and we now turn to
20 the Supreme Court of Appeal judgment. In this regard, Chairperson, I mentioned that Advocate Chauke has often mentioned, and I think it was mentioned by Counsel at the opening, that the Supreme Court of Appeal decision vindicated him.

CHAIRPERSON: After you.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. May I interpose Advocate Chauke? Who took the decision? Advocate Batohi, my apologies. The mind works in its own way. Who took the decision, Advocate Batohi, to appeal the decision? If you know the answer.

ADV BATOHI: I do not know. I would imagine it is the National Director of Public Prosecutions or Advocate Chauke recommending to the NDPP. But I would imagine given the way the NPA operates, Advocate Chauke would have been
10 involved in that decision-making process. So, as I said, why was ...[intervenes].

ADV MOHLAMONYANE SC: Just a minute. Madam Chair wanted to interpose and ask you a question.

CHAIRPERSON: Advocate Batohi, you mentioned earlier on that despite Judge Murphy's decisions and findings, Advocate Chauke proceeded to appeal the decision, appeal against the decision, or the NPA through Advocate Chauke, I suppose, nonetheless appealed the decision.

ADV BATOHI: That is correct, Chairperson.

20 **CHAIRPERSON:** This sounds like you are saying he ought not to have done so. Am I correct?

ADV BATOHI: I did in fact say that, Chairperson. I think I may have.

CHAIRPERSON: Yes. Now, given the constitutional imperatives, the right of access to court, and I am saying this

in the context of Advocate Chauke representing the public interest in the work he does. Not necessarily him alone, the NPA by nature of its standing, and the officers, the officials, the prosecutors, they serve public interest.

Now, within the context of section 34 of the Constitution, will the NPA not be entitled, like any other person who has a right of appeal, to take a matter on appeal if they believe that the decision of the Court a *quo* is appealable because of particular mis-directions that might be
10 pointed out in the appeal or the notice of appeal?

In other words, let me put it differently and simply. Will the NPA not be entitled as of right like any institution that represent the public interest to appeal a decision if it believes through its officials that the decision of the High Court is incorrect?

ADV BATOHI: Chairperson, I have a document that I would like to refer to. My short answer, but I do want to find the document, it refers to the NPA Prosecution Policy Code of Conduct, et cetera. A short answer to your question,
20 Chairperson, is certainly the NPA has that right and is entitled to do that. But that is not something that can be considered in a vacuum.

Equally, the NPA has a constitutional obligation to prosecute cases without fear, favour, or prejudice. And that is the mandate of the National Prosecuting Authority. And

so, in dealing with this particular matter, the Chairperson also mentioned the public interest. And this matter was actually screaming out, in my view, and also in the view of Advocate Nalane, who provided an opinion on this, that we can refer to in a moment.

To be prosecuted in the public interest, given in our policy we refer to certain criteria that should be considered when determining whether something is in the public interest or not. In Advocate Nalane's opinion, I do not have it in front
10 of me now, but we can refer to it, he breaks down the public interest issue and deals with each one of the criteria, the seriousness of the offence, and actually concludes, and I support the conclusion that given all of the facts of this matter, the public interest demanded at this stage that Advocate Chauke reassess the matter after the Murphy decision, given the inconsistencies in the Inquest Magistrate's findings and given the fact that his team is saying prosecute. That he ought to have considered all of that and prosecuted in this matter, as opposed to taking the
20 matter on a further appeal, and I should say at considerable cost to the NPA as well.

ADV BALOYI-MERE SC: Advocate Batohi, it is a follow-up. I think as you speak now, you do not have a definite answer whether it is Advocate Chauke who took the decision to appeal or not. And I am saying this because the Minister of

Safety and Security is involved in this matter and had a cost order against him. I do not remember us having a Minister of Safety and Security as a woman, so I will say him safely. We have the National Commissioner of the South African Police Service.

So we have the higher echelons of the South African Police Services as respondents who have had, and we have the IGI, who have had adverse orders against them in order to pay costs. It could be anyone of them, and I take it they also enjoy that right to go on appeal. So, the way that you are imputing the decision on Advocate Chauke alone without concrete evidence is a bit worrying.

ADV BATOHI: Chairperson, I am sorry that the Panel Member finds it worrying. It is a matter of how we deal with things in the NPA. If there is a matter such as this, where it is in a DPP division and a decision is taken to prosecute an appeal, it would be highly unusual for a National Director to take that decision without a DPP supporting the decision, and given that the DPP of the jurisdiction, it would be highly unlikely. But of course, Advocate Chauke can perhaps explain later what exactly happened in these circumstances.

ADV BALOYI-MERE SC: Thank you.

ADV BATOHI: Chairperson, if I may, in response to the Chairperson's question, I did say that we need to look at the policy of the NPA with regard to institutional prosecutions as

well as withdrawal of charges. Chairperson, the NPA Code of Conduct states at Item D, and these documents are in bundles. I do not have it referred to now here, but in part, Item D of the Code of Conduct states the following at subparagraph C, that:

“Prosecutors should perform their duties
fairly, consistently, and expeditiously...”
...[intervenes].

ADV MOHLAMONYANE SC: Just a minute, Advocate Batohi.

10 We are still trying to locate the page.

ADV BATOHI: Sure.

ADV MOHLAMONYANE SC: You probably have the page there.

ADV BATOHI: No, unfortunately my note does not have the page.

CHAIRPERSON: My sister is drawing my attention to PD00013.

ADV BATOHI: Thank you, Chairperson.

20 **CHAIRPERSON:** And then D will be on the next page, PD00014.

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

CHAIRPERSON: You may proceed, ma'am.

ADV BATOHI: Thank you, Chairperson. Item D:

“Prosecutors should perform their duties

fairly, consistently, and expeditiously,
and:

10 “(c) give due consideration to declining
to prosecute, discontinuing criminal
proceedings, conditionally or
unconditionally, or diverting criminal
cases from the formal justice system,
particularly those involving young
persons, with due respect for the rights
of suspects and victims where such
action is appropriate.”

At paragraph D, it states:

“Prosecutors should, in the institution of
criminal proceedings, proceed when a
case is well founded upon evidence
reasonably believed to be reliable and
admissible and not continue a
prosecution in the absence of such
evidence.”

20 And in this case, I would add that there was no indication that
the evidence that was in the docket was not reliable or
admissible. Dealing with the prosecution policy
...[intervenes].

CHAIRPERSON: Please give me a second.

ADV BATOHI: My apologies, Chairperson. The words in the

policy, if you can just clarify them to me under (c), prosecutors should give due consideration to declining to prosecute. And the words that I am focussing on is discontinuing criminal proceedings. Those words. Discontinuing criminal proceedings.

Now, my question is, yesterday we spoke, or the other day we spoke of withdrawal of charges as against or versus stopping proceedings. My understanding of this charge, as per the terms of reference, is that Advocate
10 Chauke, or the NPA if you like, withdrew the two charges, the murder charge against Mr Mdluli and referred the case or the murder charge for an inquest.

The withdrawal, as you explained in your earlier evidence, normally happens before the pleading. In other words, before the matter is at trial. Now, you are referring us to the role of prosecutors in the administration of justice. That paragraph, that seems to suggest that it is speaking here of a discontinuation of criminal proceedings.

Now, criminal proceedings here, does it refer to a
20 matter that is already on trial, or it refers also to a case where an accused person has been charged, but the matter is not set down for hearing for the criminal case to be started, in which event the accused will then plead? It is a long question, but I thought I must give a context to it. What does discontinuation of criminal proceedings in this context mean?

ADV BATOHI: Yes, thank you, Chairperson. Discontinuing of criminal proceedings in this instance would be criminal cases that are enrolled, because we deal with, if you look at the context, declining to prosecute before that is something, a decision taken before a case is enrolled. Discontinuing criminal proceedings is a process after an accused has been arrested and the matter is before Court, and it could either be a withdrawal or it could be a stopping of a prosecution.

CHAIRPERSON: Pardon. Criminal proceedings, as referred
10 to under (c), according to you, will also include an instance where the matter has not begun at court.

ADV BATOHI: That is correct, Chairperson, in the sense that the trial has not started, but there are proceedings in court. An accused person has been arrested.

CHAIRPERSON: I beg your pardon?

ADV BATOHI: I said, I agreed with you, Chairperson, and explained that it would be an instance where an accused person is before Court. Ja.

CHAIRPERSON: An accused person before Court. When
20 the accused person is before Court, it means the trial has begun, as I understand it.

ADV BATOHI: That is an interesting ...[intervenes].

CHAIRPERSON: Or am I missing the point?

ADV BATOHI: Not at all, Chairperson. That is an interesting – well, at what point does a trial commence? Certainly,

criminal proceedings have commenced. Does a trial commence after a person has pleaded and evidence is being led? One could say that the trial commences at that point, but the criminal proceedings are in process from the time of arrest.

CHAIRPERSON: From the time of arrest.

ADV BATOHI: And appearance in court.

CHAIRPERSON: And it then follows that the withdrawal of the charge will also fall within the ambit of (c).

10 **ADV BATOHI:** Yes, that is correct, Chairperson. Chairperson, and just for sake of the record, this is referring to not the policy, but the NPA Code of Conduct that we have been dealing with, that section. Chairperson, dealing with the prosecution policy ...[intervenes].

CHAIRPERSON: Sorry, please repeat that. I have in front of me policies and directions, and PD00014 is that gazetted document, the policies. Is it different from your Code of Conduct?

20 **ADV BATOHI:** Chairperson, it might be that my note is incorrect, but my note states the NPA – what we just dealt with now was from the NPA Code of Conduct at Item D, which you correctly stated, Chairperson, deals with the role of prosecutors in the administration of justice.

CHAIRPERSON: Yes.

ADV BATOHI: But I am not sure, I am not looking at the

document itself. I could be – I think there is another document that I have been handed. Let me have a look at this. Yes, I think my notes are incorrect and Chairperson is correct, that it is from the prosecution policy which I have in front of me now.

ADV MOHLAMONYANE SC: May I help?

ADV BATOHI: Yes, please.

ADV MOHLAMONYANE SC: In that regard, Madam Chair ...[intervenes].

10 **CHAIRPERSON:** I am reading from the gazetted.

ADV MOHLAMONYANE SC: Yes, that is a Code of Conduct.

CHAIRPERSON: Code of conduct.

ADV MOHLAMONYANE SC: That is a Code of Conduct which starts on page PD11.

ADV BALOYI-MERE SC: The prosecution policy does not have an Item D.

ADV MOHLAMONYANE SC: Ja, the prosecution policy starts on page 56, where there are the table of contents. It does not appear that it is Item D from the table of contents, Madam

20 Baloyi-Mere.

CHAIRPERSON: I think you can focus on the gazette document that deals with the Code of Conduct of members of the NPA at PDE001, that is the document. Your junior is conferring with you.

ADV MOHLAMONYANE SC: She was indicating the page

where the Code of Conduct appears, where the Code of Conduct appears, which has been gazette. It starts on page 11, as I indicated earlier, and proceed to page 0012. And then where it says Code of Conduct, ABC, it is on page PD00013.

CHAIRPERSON: Do you have the document, Madam?

ADV BATOHI: I do now, Chairperson.

CHAIRPERSON: Yes, thank you.

ADV BATOHI: If I may proceed, Chairperson. If we go to
10 the prosecution policy, and this is also, it is on ...[intervenes].

ADV MOHLAMONYANE SC: For comfort, prosecution policy has its contents, table of contents on page PD00056. That is where it starts.

ADV BATOHI: If you will bear with me, Chairperson, I just need to get to the relevant part of this.

ADV MOHLAMONYANE SC: You might perhaps want to deal with the role of prosecutor, which appears on PD00059.

ADV BATOHI: It starts off by saying:

20 “Prosecutors must at all times act in the interests of the community, and not necessarily in accordance with the wishes of the community.”

CHAIRPERSON: Where are you reading, Madam? Because the iii

ADV BATOHI: It is PD ...[intervenes].

CHAIRPERSON: The prosecution policy, PD00056.

ADV BATOHI: That is correct, Chairperson. I am reading from 0059.

CHAIRPERSON: 59?

ADV BATOHI: That is correct. My apologies, Chairperson. Chairperson, I also want to refer the Panel to PD ...[intervenes].

CHAIRPERSON: Before you do that, you were reading something.

10 **ADV BATOHI:** Yes, I had read it, Chairperson. I can read it out again. It was just the one line from the top of 0059, the first paragraph.

ADV MOHLAMONYANE SC: May I interpose with respect, Advocate Batohi? Kindly just read the role of prosecutor.

ADV BATOHI: The entire section?

ADV MOHLAMONYANE SC: Yes, up to where the bullet ends, up to the last bullet for clarification purposes and for completeness.

ADV BATOHI: Sure. This is the role of the prosecutor, and
20 we are now at page 59, PD0059:

“Prosecutors must at all times act in the interests of the community, and not necessarily in accordance with the wishes of the community. A prosecutor's primary function is to

assist the Court in arriving at a just verdict, and in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of the victims and witnesses are promoted without negating their obligation to act in a balanced and honest way. The

10

prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process.”

And this unpacks the issue of prosecutorial decision making.

First bullet:

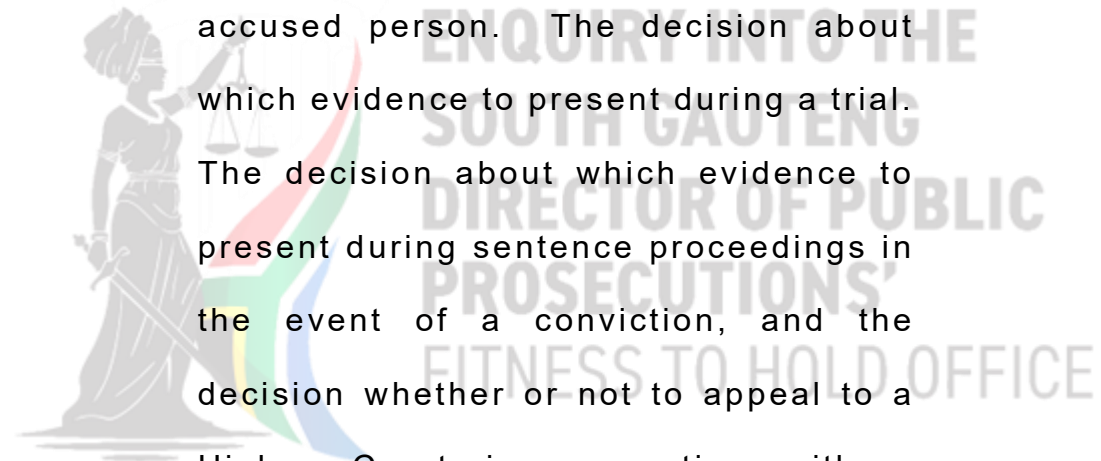
“The decision whether or not to institute criminal proceedings against an accused person...”

20

And these are examples, it is not an exhaustive list:

“The decision whether or not to withdraw charges or stop a prosecution. The decision whether or not to oppose an application for bail or release by an

accused person who is in the custody following arrest. A decision about which crimes to charge an accused person with, and in which court the prosecution should be instituted. The decision whether or not to enter a plea or sentence agreement. The decision whether or not the case should be diverted. A decision whether or not to accept a plea of guilty tendered by an accused person. The decision about which evidence to present during a trial. The decision about which evidence to present during sentence proceedings in the event of a conviction, and the decision whether or not to appeal to a Higher Court in connection with a question of law in an inappropriate sentence, or the improper granting of bail, or to seek review of proceedings.”



Should I stop there, Counsel?

ADV MOHLAMONYANE SC: You may stop there.

ADV BATOHI: I had wanted to proceed, if the Chairperson will bear with me, to the next page, PD00060, which is under section A, general. The paragraph, they are not numbered,

so it is after the bullet points, the first, second, third paragraph, starting with in deciding.

CHAIRPERSON: Thank you.

ADV BATOHI:

10 “In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.”

Chairperson, I want to also refer to the section that deals with the withdrawal of charges under section C. I will get the page number in a moment. Section C on page 00061 at the bottom is headed prosecution in the public interest. May I continue, Chairperson?

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

ADV BATOHI:

“Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow,

unless public interest demands
otherwise.”

And I want to pause here to state that in the case of the Mdluli murder case, the prosecutors were satisfied that there was sufficient evidence to provide a reasonable prospect of a conviction because he had been arrested and charged with a number of offences, including murder. In the next page, Chairperson 00062, it continues:

10 “There is no rule in law stating that all
provable cases should be brought to the
attention of...”

I will rephrase, I will repeat that:

20 “There is no rule in law stating that all
the provable cases brought to the
attention of the NPA must be
prosecuted. On the contrary, any such
rule would be too harsh and impose an
impossible burden on the prosecutor
and on a society interested in the fair
administration of justice.”

The next paragraph would be particularly helpful in my view:

“When considering whether or not it will
be in the public interest to prosecute,
prosecutors must consider all the
relevant factors, including, firstly, the

nature of the offence.”

And then it goes on to set out what this – it unpacks what would be taken into account in determining this particular aspect. I am not sure I need to read it all out, but they would be important for this in the context that we are dealing with this matter.

ADV MOHLAMONYANE SC: You do not have to read the whole of it.

ADV BATOHI: Thank you.

10 **ADV MOHLAMONYANE SC:** Read the subheadings.

ADV BATOHI: Thank you very much, Counsel. So it is:

“The factors, including the nature and seriousness of the offence, the interests of the victim and the broader community, the circumstances of the offender.”

Yes, those are the – it is not an exhaustive list, but it includes these factors.

ADV MOHLAMONYANE SC: Advocate Batohi, it is also
20 important and necessary, perhaps, to deal with the role of prosecutors in the administration of justice. And that you will find ...[intervenes].

ADV BALOYI-MERE SC: Advocate Mohlamonyane, I am sorry to interpose before you move on. Advocate Batohi, if you can unpack at PD00062, that first paragraph that starts

with there is no rule in law.

CHAIRPERSON: If you can unpack for us that statement?

ADV BATOHI: Certainly, Chairperson. What this is saying is that there is no rule stating that all, meaning every single provable case brought to the attention of the NPA must be prosecuted. With the amount of crime that we have in our country, this would be almost impossible to deal with every single provable case.

It goes on to say that any such rule would be too
10 harsh and, as I mentioned now, impose an impossible burden
on the prosecutor and society interested in the fair
administration of justice. So there may well be prosecutable
cases that we may, for example, divert the matters to an
alternate dispute resolution mechanism might be employed to
deal with the matter, and this is what this paragraph seeks to
deal with.

ADV BALOYI-MERE SC: So you may have a case where you
have all the evidence. It is provable, but for one reason or
the other, you do not prosecute that case or you divert it to
20 another forum?

ADV BATOHI: That is correct, but they would generally be,
this is important, they would generally be the less serious
matters.

ADV BALOYI-MERE SC: Are you reading into the words of
the act?

ADV BATOHI: No, this is the way we do it in practice in the NPA. The less serious, and there are guidelines on diversions, et cetera. If they are serious matters, we would generally prosecute them and not divert them.

CHAIRPERSON: Do we have such guidelines? I am sorry to just piggyback on my sister's question. Are you done?

ADV BALOYI-MERE SC: I am done.

CHAIRPERSON: Thank you. Do you have such guidelines?

ADV BATOHI: We can, I think the alternate dispute resolution restorative justice matters, we can certainly get those documents and make them available, Chairperson. But I do want to emphasise that in serious matters, this is very rarely the case that we would divert a matter to deal with it in a different way, by way of alternate dispute resolution mechanism.

CHAIRPERSON: But I suggest that we be provided with those guidelines, Advocate Mohlamonyane.

ADV MOHLAMONYANE SC: We will see to it that they are provided, Madam Chair.

CHAIRPERSON: And our attention should be drawn to the relevant part of those guidelines.

ADV MOHLAMONYANE SC: We will do so, thanks.

CHAIRPERSON: You may proceed, Madam.

ADV BATOHI: Thank you, Chairperson.

ADV MOHLAMONYANE SC: I was directing your attention

to the Code of Conduct, which is gazetted on page PD00051 and implore you to deal with the role of prosecutors in the broader administration of justice.

CHAIRPERSON: It is PD?

ADV MOHLAMONYANE SC: PD000051.

ADV BALOYI-MERE SC: The Code of Ethics?

ADV MOHLAMONYANE SC: Code of Conduct. It is the Code of Conduct, Madam Baloyi-Mere.

CHAIRPERSON: Before you proceed, let me find out. Are
10 you having a problem over there? Thank you. He says all things are in order.

ADV MOHLAMONYANE SC: Advocate Batohi, you may proceed to read PD00051, 00051.

CHAIRPERSON: 51?

ADV MOHLAMONYANE SC: 51 contains the Code of Conduct. It deals with the role in administration of justice, which is the role of prosecutors in administration of justice.

ADV BALOYI-MERE SC: Is the Code of Conduct and the Code of Ethics the same thing?

20 **ADV MOHLAMONYANE SC:** No, Madam. No, Madam Baloyi-Mere.

ADV BALOYI-MERE SC: So, the document that you are referring us to, if you look at PD00017.

ADV MOHLAMONYANE SC: 1-7?

ADV BALOYI-MERE SC: 1-7.

ADV MOHLAMONYANE SC: Just a minute.

ADV BALOYI-MERE SC: It says it is a Code of Ethics.

ADV MOHLAMONYANE SC: It is a different document.

ADV BALOYI-MERE SC: Okay.

ADV MOHLAMONYANE SC: It is a different document.

ADV BALOYI-MERE SC: It is my mistake. I did not mark it correctly. Thank you.

CHAIRPERSON: PD00051 is what?

ADV MOHLAMONYANE SC: It is contained in the Code of
10 Conduct.

CHAIRPERSON: Code of Conduct?

ADV MOHLAMONYANE SC: Yes. Code of Conduct that starts on page PD00048 in a Government Gazette, number R1257, dated 29 December 2010.

ADV BALOYI-MERE SC: You said page 0051?

ADV MOHLAMONYANE SC: PD00051, 0051. The Code of ...[intervenes].

CHAIRPERSON: D?

ADV MOHLAMONYANE SC: Under subparagraph D.

20 **ADV BALOYI-MERE SC:** But is it not the same as PD00011, and at 00011 the font is much bigger than where you are taking us because that one is very small.

ADV MOHLAMONYANE SC: Ja, maybe because of, I agree.

ADV BALOYI-MERE SC: I think it is better to go to the gazetted document that we dealt with earlier.

ADV MOHLAMONYANE SC: Earlier.

CHAIRPERSON: There is a duplication of documents in this bundles. So, let us focus on the gazetted document, PD00011. Do you see the Government Gazette there?

ADV MOHLAMONYANE SC: Yes, the Government Gazette then, it is on PD0014, Advocate Batohi.

ADV BATOHI: Thank you. Should I read?

ADV MOHLAMONYANE SC: Yes.

ADV BATOHI: Ja, it is a duplication. This is a better font,
10 and they both gazetted. D is – D of this document, the Code of Conduct, part D is headed role of administration of justice. Paragraph ...[intervenes].

CHAIRPERSON: I think it is a part that you, I beg your pardon, you read it earlier on.

ADV BATOHI: I did read, but only two subparagraphs. Perhaps for completeness, I could read the entire paragraph 1, if that is in order, Chairperson.

CHAIRPERSON: Counsel, no, your counsel must tell us what he wants you to do here.

20 **ADV MOHLAMONYANE SC:** I would like her to read the rest of the paragraph, Madam Chair.

ADV BATOHI: Thank you, Counsel. D, role in administration of justice. Prosecutors, paragraph 1:

“Prosecutors should perform their duties fairly, consistently, and expeditiously,

and perform their duties fearlessly and vigorously in accordance with the highest standards of the legal profession.

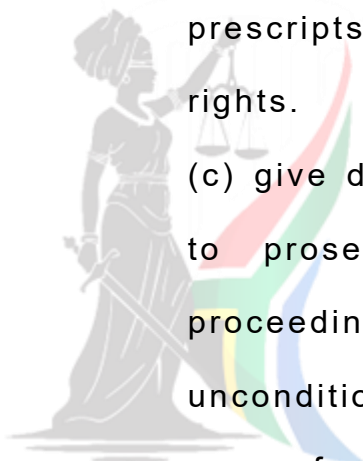
(b) Where legally authorised to participate or assist in the investigation of a crime, they should do so objectively, impartially, and professionally, also insisting that the investigating agencies respect legal prescripts and fundamental human rights.

10

(c) give due consideration to declining to prosecute discontinuing criminal proceedings, conditionally or unconditionally, or diverting criminal cases from the formal justice system, particularly those involving young persons with due respect for the rights of suspects and victims where such action is appropriate.

20

(d) in the institution of criminal proceedings, proceed where a case is well-founded upon evidence reasonably believed to be reliable and admissible,



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and not continue a prosecution in the absence of such evidence.

(e) throughout the course of proceedings, the case should be firmly but fairly and objectively prosecuted.”

ADV MOHLAMONYANE SC: You may leave it at that. Advocate Batohi, if you can at this stage, you may at this stage then turn to the SCA judgment.

ADV BATOHI: Certainly.

10 **ADV MOHLAMONYANE SC:** The appeal judgment.

ADV BATOHI: Thank you, Counsel. Turning now to the SCA judgment, Advocate Chauke has mentioned that this decision vindicates him. Chairperson, a careful reading of the judgment will be clear that this is far from the case.

ADV BALOYI-MERE SC: Can we be directed to the correct one?

ADV MOHLAMONYANE SC: Let me do so, Madam Baloyi-Mere. Advocate Batohi, we are referring here to the Brand JA judgment.

20 **ADV BATOHI:** That is correct.

ADV MOHLAMONYANE SC: It is on page CL00362, Madam Baloyi-Mere. CL Bundle, CL2 in my bundle. On page CL.

CHAIRPERSON: You may proceed, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Proceed to deal with ...[intervenes].

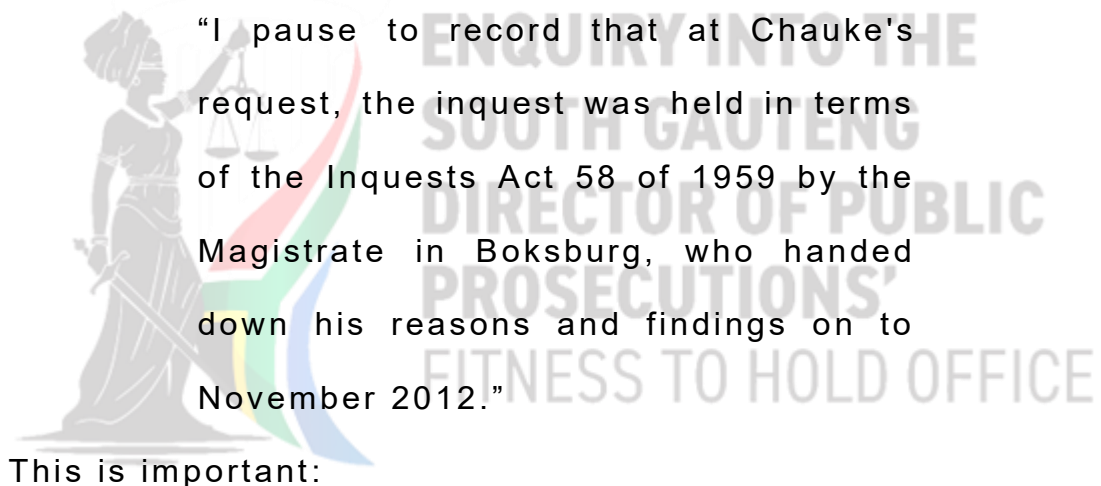
ADV BATOHI: Thank you, Counsel.

ADV MOHLAMONYANE SC: The SCA judgment.

ADV BATOHI: Brand JA, writing on behalf of a unanimous court decision, made various important findings. He also considered the findings of the Inquest Magistrate. And I refer the Panel to paragraph 13 of the judgment.

ADV MOHLAMONYANE SC: Paragraph 13 will be found, Madam Chair, on page CL00364.

ADV BATOHI: If I may proceed, Chairperson. He states the
10 following:



“I pause to record that at Chauke's request, the inquest was held in terms of the Inquests Act 58 of 1959 by the Magistrate in Boksburg, who handed down his reasons and findings on to November 2012.”

This is important:

“His ultimate conclusions make somewhat peculiar reading. Namely
20 that...”

He then quotes from the Magistrate:

“Firstly, the theory of Mdluli being one who had orchestrated the death of (the deceased) is consistent with the facts.”

Brand then goes on and says:

“And that...”

And then quoting from the Inquest Magistrate again:

“The death of the deceased was brought about by an act *prima facie* amounting to an offence on the part of unknown persons, which is his emphasis.”

And he goes on to say:

10 “There is no evidence on a balance of probabilities implicating Richard Mdluli and his co-accused in the death of the deceased.”

Chairperson, I pause here before I continue. It is important to note that the inconsistencies that the judge refers to between the first quotation and the second quotation from the Inquest Magistrate's finding. I continue on paragraph 14 of Brandt J's, the SCA judgment.

ADV MOHLAMONYANE SC: On page CL00365.

ADV BATOHI: The judge states the following:

“I stay peculiar because section...” ...[intervenes].

20 **CHAIRPERSON:** I beg your pardon. Which paragraph now?

ADV BATOHI: 14, Chairperson, the next one.

CHAIRPERSON: Thank you.

ADV BATOHI: 00365.

CHAIRPERSON: Thank you, proceed.

ADV BATOHI: Thank you, Chairperson:

“I say peculiar because section 16(2) of the inquest Act required the Magistrate to determine whether the death of the deceased was brought about by any act or omission amounting to an offence on the part of persons, on the part of any person.”

I am sorry, the stamp of the numbering is making it difficult to read that. I think it says the evidence before him:

10 “The evidence before him clearly established a *prima facie* case against Mdluli. That appears to be borne out by the first conclusion...”

And that is the first conclusion in paragraph 13, conclusion of the Magistrate, Inquest Magistrate:

20 “That appears to be borne out by the first conclusion. The second conclusion, which is also quoted in paragraph 13, which appears to contradict the first, seems to be both unhelpful and superfluous. It was not for the Magistrate to determine Mdluli's guilt on a murder charge, either beyond reasonable doubt or on a balance of probabilities. But if Chauke had any

uncertainty about the import of the Magistrate's findings, he could have asked for clarification or even requested that the inquest be reopened in terms of section 17(2) of the Inquest Act. Furthermore, it is clear that the Magistrate's findings were wholly irrelevant to the 17 related charges. Nonetheless, it is common cause that no further steps have been taken by the Prosecuting Authorities to reinstitute any of the 18 charges.”

ADV MOHLAMONYANE SC: Then Brand JA went on and considered the Freedom Under Law's argument. Can you deal with it?

ADV BATOHI: Yes, he does that at paragraph 44.

ADV MOHLAMONYANE SC: Just a minute. Let us locate the page. It is page CL00369.

CHAIRPERSON: CL0069?

20 **ADV MOHLAMONYANE SC:** 369, Madam Chair.

CHAIRPERSON: Thank you.

ADV BATOHI: Chairperson, at this point it is important to note that Brand JA is now considering Freedom Under Law's argument in their further supplementary affidavit.

CHAIRPERSON: I beg your pardon. Which paragraph here?

ADV BATOHI: Pardon, Chairperson, I am not quoting yet. We will be referring to paragraph 44. But just as a context to that, Chairperson, Brand JA is considering Freedom Under Law's argument in their further supplementary affidavit that was filed post the inquest findings. And there, in that supplementary affidavit, they stated that Chauke should have continued with the murder and attempted murder charges after the inquest findings.

Chairperson, to contextualise, Freedom Under Law
10 had brought this application before the inquest had concluded, the Inquest Magistrate had concluded. And whilst these proceedings were continuing, the Magistrate released the findings which caused Freedom Under Law to submit a further supplementary affidavit where they said that Chauke should have continued with the murder and attempted murder charges after the inquest findings. In that regard, Chairperson, we go to paragraph 44 of the SCA judgment of Brand.

CHAIRPERSON: Please give me a second.

20 **ADV BATOHI**: Certainly, Chairperson.

CHAIRPERSON: I do not know whether we will be interrupting your line of thinking if we were to adjourn now for tea or whether we should allow Advocate Batohi to finish her testimony regarding the SCA judgment.

ADV BATOHI: Chairperson, I am happy with either.

ADV MOHLAMONYANE SC: Maybe we should adjourn to stretch our legs.

CHAIRPERSON: Yes, thank you. We will take an adjournment. We are minded to adjourn for a little longer so that the technicians can come and look at this air conditioning that is leaking. Let us adjourn for 30 minutes. And if they take longer than 30 minutes, we will let you know. We adjourn.

ENQUIRY ADJOURNS

10 **ENQUIRY RESUMES**

CHAIRPERSON: Good afternoon, everyone. Advocate Mohlamonyane and your colleagues. Advocate Batohi, we are told that this air conditioner can only be fixed later. It will require three hours. We have nonetheless decided we should proceed and possibly enable them to attend to it first thing in the morning. It may well be that we have to start instead of 9.00, maybe 10 o'clock to make sure that they fix this air conditioner. We will confirm that after lunch, the start date tomorrow. Thank you, Advocate Batohi, you are still
20 under oath.

ADV BATOHI: Yes, thank you.

CHAIRPERSON: You may proceed, counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, you are still dealing with the Brandt JA judgment when we are adjourned for tea recess.

ADV BATOHI: That is correct, counsel.

ADV MOHLAMONYANE SC: And you dealt with his paragraph 14. May you proceed?

ADV BATOHI: We were at 44. If I can be helped with the page number and panel as well.

CHAIRPERSON: Counsel, as you are looking at the page, something strikes me that in relation to the Booyesen's matter, the prosecutorial team had given advice that the prosecution of Mr Booyesen should be withdrawn. Correct?

10 **ADV MOHLAMONYANE SC:** Correct, Madam Chair.

CHAIRPERSON: I beg your pardon. Should be proceeded with.

ADV BATOHI: That is correct.

CHAIRPERSON: Should be proceeded with. If. The prosecution team of Mr Malema et al had recommended or advised that the prosecution of mister, General, Major General Booyesen should be withdrawn or proceeded with.

ADV MOHLAMONYANE SC: My memory serves me well, there was a stage when it was recommended that it should
20 be withdrawn.

CHAIRPERSON: At what stage was it recommended that it should be proceeded with?

ADV MOHLAMONYANE SC: At the beginning, before he was charged, when application for racketeering certificate were made to Advocate Jiba.

CHAIRPERSON: It may take a very long time to look at that page in the record. The point that I am trying to make is that there seem to be some inconsistency in relation to, and I am mentioning this because Advocate Batohi is saying what Advocate Chauke did in the Mdluli's matter, happened despite the fact that the prosecution team had advised him not to proceed with the Mdluli's matter.

ADV BATOHI: To proceed with the Mdluli's matter.

CHAIRPERSON: To proceed with the Mdluli's matter, I am
10 confusing the matters. So the converse will be, will happen in relation to the Booysen's matter.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: That being the case, it is weird to me that when a decision, an advice is given in respect of one matter, is proceeded against, you seem, the NPA seem not to have a problem. When it happens in relation to another matter, in this instance the Mdluli's matter, and Advocate Chauke allegedly goes against the decision of the team, then there seem to be an issue about that. There seem to be some
20 inconsistencies in relation to the way the NPA is treating these matters. Am I correct?

ADV BATOHI: Chairperson, that is a very important observation. And I would say that the inconsistency is not the way in which it is being dealt with now, but it is the way in which Advocate Chauke approached these two matters.

That is where the inconsistency lies. And I will address that later, further.

CHAIRPERSON: Yes, thank you.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: Please do not forget to address ...[intervenes]

ADV BATOHI: Certainly will not, because it is part of my notes.

CHAIRPERSON: Yes.

10 **ADV BATOHI**: I will deal with that.

CHAIRPERSON: Thank you very much. You may proceed, counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. You say you were dealing with paragraph 44 of...

ADV BATOHI: Brandt J.

ADV MOHLAMONYANE SC: Brandt judgment.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: You may proceed.

20 **ADV BATOHI**: If we could just be guided to the page, I am trying to find it.

ADV MOHLAMONYANE SC: The page is CL00369.

CHAIRPERSON: I think the witness was at paragraph 44.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: That is correct.

ADV BATOHI: If I may proceed, Chairperson.

CHAIRPERSON: You may.

ADV BATOHI: Chairperson, as I had contextualised this paragraph just before the tea adjournment, that at this paragraph, Brandt then considers Freedom Under Law's argument that they made in their further supplementary affidavit that was filed subsequent to the inquest findings being made by the Magistrate. And in their affidavit, they had stated that post the inquest, Advocate Chauke should have continued with the murder and attempted murder charges, and that is the context within which paragraph 44. He deals with it at that point. If I could then read into the record, at paragraph 44:

“FUL’s real argument, which found favour with the Court quo at paragraph 183, is that Chauke's failure to proceed with the murder and related charges after the findings of the inquest became available was irrational.”

He goes on to say:

“But that decision or really his failure to apply his mind afresh to the matter after the conclusion of the inquest was not the subject of the review application.”

And that is important.

“It will be remembered that the review

application started in May 2012, while the results of the inquest only became available in November of that year. Stated somewhat more concisely, I do not believe that the earlier decision to withdraw the charges, which is the impugned decision, can be set aside on the basis that a subsequent decision taken in different circumstances not to reinstate all or some of the charges was not justified. To that extent, and I emphasise to that extent, the appeal must therefore succeed.”

10

Chairperson, the point I want to make here ...[intervenes]

CHAIRPERSON: In simple terms, what is the Judge of Appeal saying there?

20

ADV BATOHI: Chairperson, in simple terms, what he is saying is that the decision of Chauke, that is his failure to apply his mind afresh after the conclusion of the inquest, was not the subject of the review. And as I said, FUL actually made that argument in their further supplementary affidavit that was filed subsequent to the inquest findings being made. And so Judge Brandt says that that aspect, his failure to apply his mind after the inquest, was not the subject of the review application.

He in fact states that the inquest only became

available in November and stated somewhat more concisely, hopefully this is more concise, I do not believe the earlier decision to withdraw, I am just repeating what he says, I do not believe that the earlier decision to withdraw the charges, which is the impugned decision, that is the first decision of Advocate Chauke, can be set aside, that decision, on the basis that a later decision taken in different circumstances, that is after the inquest proceedings had been finalised, that decision not to reinstate charges at that state was not
10 justified. So to that extent, it must succeed.

Chairperson, the point that the, my understanding of the decision is that the point that the SCA agreed with Advocate Chauke, and I think Brandt got it spot on, because I would agree, Advocate Chauke's original decision ...[intervenes]

CHAIRPERSON: Would you please refer him to Judge Brandt or Brandt JA?

ADV BATOHI: I beg your pardon, Chairperson, Brandt JA. Sorry, where was I? Let me gather my thoughts. The, sorry,
20 I have just gone blank. Let me, he is... yes. I was saying that I, Brandt JA, got it right, because to the extent that Advocate Chauke's decision at the outset to not proceed with the other charges besides the murder matter, whether he, I am not going into whether his decision to submit to an inquest was the right one or the wrong one, in our view it was the

wrong one, but let us assume it was the correct decision.

Then Advocate Chauke's decision at that point not to proceed with the balance of the charges, the attempted murder, the intimidation, the kidnapping, the assaults, all of that, it actually made sense, because those charges and the murder charges, they were so intricately entwined that each one, the evidence in each one would have strengthened the evidence in the other cases. So the correct way would have been to keep all of those charges together.

10 And so therefore, I would agree that Advocate Chauke's decision, because he was now on his version, he was going to await the outcome of the inquest Magistrate and then decide what he was going to do with the murder charges. And then of course, in the event that he decided to proceed with the murder charges, it would have made sense to add all the other charges to it. So to that extent, I agree that Brandt JA was correct in saying that Advocate Chauke's decision in that regard was the correct one. So, ja, that is where I will leave it.

20 But it did not, perhaps I should add, the decision of the SCA does not vindicate Advocate Chauke's decision not to proceed at the outset, one, with the murder charges, and then two, after the inquest findings, to have Brandt, I quoted from Brandt, JA's decision where he says that after the inquest findings, Advocate Chauke, because he quotes the

inconsistency, and he refers to the peculiar nature of the Magistrate's findings, where he says one thing, where he says there is *prima facie* evidence against Mdluli, and then he says after that, there is no evidence.

And he says that at that point, Advocate Chauke's decision then to have, he criticises Advocate Chauke for not having reconsidered the matter, or even perhaps sought clarity from the Magistrate in the event that there was a lack, to the extent that there was a lack of clarity in the inquest
10 Magistrate's findings.

CHAIRPERSON: The terms of reference in relation to the Mdluli's matter, if my understanding is correct, is confined to the act of withdrawal, correct? No, no, no. I think I must rephrase my question. I think 3.1.2 does relate to the failure to continue with the charges. Yes.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: In other words, we have to read the terms of reference holistically, to refer to withdrawal, and then the failure to reinstate.

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

CHAIRPERSON: In the light of 3.1.2.

ADV BATOHI: That is correct, Chairperson.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, in my view, in the converse, we should also deal with what Brandt JA found as being rational, on the part

of Chauke, concerning the withdrawal of the charges. In that regard, go to paragraph 43, which you can read into the record.

ADV BATOHI: Page number, please.

ADV MOHLAMONYANE SC: The same page number that you are at, CL00369.

CHAIRPERSON: I beg your pardon, counsel, please repeat your question.

ADV MOHLAMONYANE SC: My question is, whilst Brandt
10 JA, in paragraph 44, deals with whether Advocate Chauke should have reinstated the charges, in the converse, it is imperative, in my view, that we should also hear what Brandt JA says about the withdrawal of the charges. In 44, it is reinstatement, and in paragraph 43, it is the withdrawal of the charges.

ADV BATOHI: Thank you, counsel. At paragraph 43, Brandt JA states:

20 “This brings me to the decision by Chauke to withdraw the murder and related charges. It will be remembered that on Chauke's version, he withdrew the murder charge pending the outcome of the inquest that he had requested, and that he withdrew the 17 other related charges to avoid a fragmented trial. The contention

by FUL was, in essence, that this decision was irrational.

However, as I see it, the contention has not been substantiated in argument. On the face of it, the decision that the findings of the inquest could perhaps enable him to make a more informed view of the prospects of the state's case with regard to the murder charge was not irrational.

10 It is true that the outcome of the inquest could have no impact on the 17 related charges, but Chauke never thought it would. As I understand his reasoning, he always intended to reinstate at least some of the charges after the inquest, with or without the murder charge. What he tried to avoid, so he said, was a fragmentation of trials.

20 The line of reasoning I do not find irrational either, particularly since the evidence supporting the related charges would also impact on the murder charge. It is true he could not have asked for a postponement of the 17 related charges pending the inquest, but we know that a postponement

is not merely for the asking. It could be successfully opposed by Mdluli, in which event the fragmentation, which Chauke sought to avoid for understandable reasons, may have become a reality.”

That is precisely what I was saying before I read that, that I agree with that approach.

ADV MOHLAMONYANE SC: You therefore have no quarrel with the finding by Branch JA here, as the NPA?

10 **ADV BATOHI:** Absolutely none.

ADV MOHLAMONYANE SC: Now, proceed to deal with ...[intervenes]

MS RAMAGAGA: Just one thing, looking at the term of reference 3.1.2, 3.1.2, it goes on towards the end to describe what may be meant by the failure to continue with charges against Lieutenant General Mdluli for his involvement in the murder, caused the charge of murder leading to the killing of Abel Ramogibe and needed to be withdrawn. So is my understanding correct, that this failure to continue is linked
20 with Advocate Chauke's causing the charges to be withdrawn?

ADV BATOHI: Sorry, if you could just, the last part of your question. This failure?

MS RAMAGAGA: Ja. At the beginning of the sentence, the terms of reference speaks to failure to continue with charges

against Mdluli.

ADV BATOHI: Mmm-mmm.

MS RAMAGAGA: And then right towards the end, it then describes as to what is meant by this stoppage. I am saying that that failure to continue with charges is linked with the withdrawal of the charges. Maybe just read that 3.1.2 ...[intervenes]

ADV BATOHI: Yes, I will do that now.

MS RAMAGAGA: ...in full, and then I think we can have a
10 better interpretation.

ADV BATOHI: Sure.

MS RAMAGAGA: Especially if you look at 'in that', you see, just after Abel Ramogibe, you find... to show that that there is a connection and actually there is continuation. But please read it out loud. I will not interrupt you again before you start reading. Go ahead.

ADV BATOHI: I should read it out loud. I will do that now.

The failure, 3.1.2:

20 "The failure to continue with charges against Lieutenant General Mdluli for his involvement in the murder of Mr Tefo Abel Ramogibe, in that he, Advocate Chauke, caused the charge of murder relating to the killing of Mr Tefo Abel Ramogibe and related charges to be withdrawn,

notwithstanding that there was strong evidence justifying the institution of the prosecution in the matter, which decision caused a significant delay in proceeding with the charges.”

Chairperson, I would say that on a narrow interpretation, one could say that the failure to continue with charges in that, as Madam Ramogibe has mentioned, Ramagaga, my apologies. Ramagaga, my apologies. My apologies, Madam Ramagaga.

10 **CHAIRPERSON:** Counsel, we do not want litigation here against you. [Laughter]

ADV BATOHI: I apologise sincerely. Hopefully my apology is accepted. Chairperson, on a narrow interpretation, one could say that in that he caused the murder charges to be withdrawn and related to be withdrawn, means that it only relates to the withdrawal, but I would say that the withdrawal and the subsequent impact of that withdrawal and the failure to, at various stages, reassess and re-enrol the matter, in fact, is the broad interpretation, but we will have to look at
20 this closely and decide whether there might be a need for an amendment, I do not know, but my view is that the narrow interpretation would support what you are saying, but the broader interpretation would include his decisions a later stage, at later stages in the process.

MS RAMAGAGA: Ja, so the understanding now is that it is

a matter of interpretation. I have pointed out as to why does one see the link, but I think you are correct. At the end of the day, those will be arguments about interpretation. Thank you.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: My last piece on that, on the earlier answer you gave me in relation to 3.1.2, on which my sister followed, the paragraph speaks of both, correct? The failure to continue with the charges, same having been withdrawn.

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

CHAIRPERSON: I am just putting it in a simple language.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Now, let us go to 3.2 of the terms of reference. You can highlight 3.2, 3.2.2, and 3.2.2.3. I will just quickly read it:

“Whether in fulfilling his responsibilities as
the Director of Public Prosecution,
Advocate Chauke:

3.2.2 Properly exercised his discretion
in relation to:

20

3.2.2.2 Discontinuing criminal
proceedings.”

Did he discontinue criminal proceedings?

ADV BATOHI: Yes, Chairperson. As we discussed when we were interpreting the, looking at the Code of Conduct, I think

it was, or the policy, that discontinuing of the proceedings could be a withdrawal prior to plea, or it could be a stopping of a prosecution post plea.

CHAIRPERSON: In this context, does discontinuing, you have to read that with 3.1.2, the opening words there, the failure to continue with the charges. 3.1.2.

ADV BATOHI: I see it. I do see that.

CHAIRPERSON: 3.1.2 talks about failure to continue with the charges after withdrawal. This is what 3.1.2 says, and
10 we agreed on that.

ADV BATOHI: Both, Chairperson.

CHAIRPERSON: No, no, no, counsel. You just agreed with me that the failure to continue with the charges will follow. That charge follows after the withdrawal.

ADV BATOHI: That is correct.

CHAIRPERSON: His act of withdrawing.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And also in line with the reasoning of Brandt JA. Now let us go to 3.2.3. As you read, 3.1.2 in
20 conjunction with 3.2, 3.2.2 says:

“Whether he properly exercised his discretion in relation to discontinuing criminal proceedings, the charge being he failed to continue.”

In other words, if you put it in the language of Brandt, JA, to

reinstate, you withdraw the charges for whatever reason, in this instance, to refer the matter for an inquest. The matter is finalised. What then happens thereafter? My brother Brandt, JA, says, then thereafter he should have reinstated the charges or proceeded. That is where the reinstatement happens. You have withdrawn. Now you reinstate. Am I correct?

ADV BATOHI: Chairperson, there is a number of things that you mentioned, so I am trying to...

10 **CHAIRPERSON**: No, no, no, let us just focus on the terminologies because we need, I want to see whether I understand correctly. You are withdrawing the charges. The withdrawal, as I understand it, does not mean an end to the matter. You are putting a comma there with a view to doing other things, maybe further investigation, referral to inquest, et cetera. Now, when this further thing is completed, when the investigation is completed or the inquest is finalised, then it is upon you then to reinstate that which was withdrawn. Am I correct?

20 **ADV BATOHI**: You are correct, Chairperson, in terms of... I am not sure whether you said to reinstate or to reconsider reinstating, but you are correct in terms of the process.

CHAIRPERSON: Let us speak the language of the SCA.

ADV BATOHI: Sure.

CHAIRPERSON: So having withdrawn that which needed to

be proceeded with because you believe that you needed to take certain intervening actions, be it further investigation, be it referral for inquest, et cetera, then that further action is completed, meaning that you go back to where you paused. Then you reinstate to continue. In this event, my question is 3.2.2.3, whether he properly exercised his discretion in relation to discontinuing criminal proceedings.

ADV BATOHI: Chairperson, in my view, the discontinuing referred to in 3.2.2.3 refers to the withdrawal of the matters
10 prior to submitting it to inquest.

CHAIRPERSON: The withdrawal?

ADV BATOHI: That is correct, Chairperson.

ADV BALOYI-MERE SC: Follow up question? Does withdrawing criminal proceedings and discontinuing criminal proceedings or maybe give us the difference between withdrawing, discontinuing, and stopping?
ENQUIRY INTO THE SOUTH AFRICAN DIRECTOR OF PUBLIC PROSECUTIONS' FITNESS TO HOLD OFFICE

ADV BATOHI: Thank you, Chairperson. I thought I dealt with this twice before, but I will do it again. When we were dealing with the Code of Conduct, I think, the term
20 discontinuing is also referred to there, and I stated that discontinuing of proceedings would mean either withdrawing proceedings prior to a plea or stopping of a prosecution subsequent to a plea. So discontinuing is sort of the umbrella term that would mean either withdrawal before a plea or stopping of prosecutions which happens after plea. I hope I

have clarified.

ADV BALOYI-MERE SC: So one can assume that these two terms are used interchangeably?

ADV BATOHI: Not withdrawal and stopping. They cannot be used interchangeably because withdrawal will happen before plea and stopping will happen after plea. But the term discontinuance can be used to either mean a withdrawal or a stopping. Thank you, Chairperson.

CHAIRPERSON: Under sub 3.2.2, as you said earlier,
10 relates to the act of withdrawal, 3.2.2.3. Do you confirm that that part of the charge which is formulated under a question amounts to a withdrawal? That word, discontinuing criminal proceedings.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Withdrawal of ...[intervenes]

Withdrawal of charges.

CHAIRPERSON: ...criminal proceedings.

ADV BATOHI: Withdrawal of charges.

CHAIRPERSON: Withdrawal of charges?

20 **ADV BATOHI:** That is correct, Chairperson, which has the impact of discontinuing criminal proceedings.

CHAIRPERSON: But how can it have the impact of... How can the withdrawal per se have the impact of discontinuation of criminal proceedings, when the withdrawal in itself happens before the plea and happens for a conditional

reason, in which event you will then have an opportunity to decide whether to reinstate or not, especially when you consider this in the context of paragraph 44 of Brandt JA's judgment?

ADV BATOHI: I need to look at the paragraph. But, Chairperson, maybe before I go there, when this happens, the withdrawal, it has the impact, even though there may be an intention to re-enrol at a later stage. At that point, proceedings are discontinued, when the withdrawal happens.

10 Thereafter, it could be restarted, but it ends at that point. The criminal proceedings are discontinued at the point of a withdrawal. Your second part of it, Chairperson, said in relation to the Brandt judgment, paragraph 44. I need to look at that to understand that.

CHAIRPERSON: He speaks of that act of withdrawal having happened, and he, in paragraph 43, favourably says there is nothing irrational about that conduct of Advocate Chauke as FUL had suggested. He says there is nothing wrong with that. In paragraph 44, then, he says, post the events, it was then
20 for him to reinstate that which he had withdrawn. That is how I understand the two paragraphs read together, 43 and 44. That is why I am asking you this question in relation to the terms of reference clauses that I have referred to. And you seem to suggest, probably correctly so, I do not know, that the discontinuing criminal proceedings in 3.2.3 amounts to or

is similar to a withdrawal.

ADV BATOHI: That is what I am saying, Chairperson.

CHAIRPERSON: Well, yes, probably this could be a matter of argument. I just wanted clarity there because I was getting confused with what the judgment says and what you say and what the terms of reference seems to be saying. I thought that that referral to discontinuing criminal proceedings, and I may be wrong there, is equivalent to failing to reinstate that which was withdrawn. But I will pause there unless if you
10 want to comment.

ADV BATOHI: Chairperson, I did explain previously that upon withdrawal, proceedings end. And so it will need to be restarted after that, so ja...

CHAIRPERSON: Maybe it is fair to leave it there because you have given us your answer. My sister would like to follow up.

MS RAMAGAGA: Thank you, thank you, Chair. Yes, maybe let us try to look at the judgment of Judge Brandt in relation to the issues of withdrawal as against the issue of failure to
20 reconsider afresh. Right? Will I be correct to say, I think it has even now become settled, that Judge Brandt seems to be finding fault with Advocate Chauke's failure to reconsider the matter afresh after the inquest had been concluded and communicated to the prosecution.

ADV BATOHI: That is correct.

MS RAMAGAGA: Finds fault with it.

ADV BATOHI: That is correct.

MS RAMAGAGA: And in paragraph 43, Judge Brandt states and indicates that he does not find fault with Advocate Chauke's decision to withdraw the charges before he sent, or ja, ordinarily it would be before he sent the matter for inquest, before he sent the matter for inquest. So there are two contrasting views. It would be a view, his judgment, on whether it was rational or reasonable for Advocate Chauke to
10 withdraw the charges before sending the matter, the docket for inquest. That deals with the withdrawal. We are dealing with two scenarios. 43 deals was withdrawal. 44 deals was failure to apply one's mind afresh and reconsider the matter afresh.

ADV BATOHI: Give me a moment to consider that before I respond. I just want to look at the relevant paragraph so that we get it right. I am not sure that Brandt actually says anything ...[intervenes]

CHAIRPERSON: Please refer to the Judge properly.

20 **ADV BATOHI:** Brandt JA, my sincere apologies, Chairperson. I am not sure if Brandt JA, specifically deals with whether he had an issue with the withdrawal of the charges at the original stage and the referral to the inquest. I will have to look at the judgment carefully to see whether that aspect is dealt with. Certainly he deals with Chauke's

conduct after the inquest Magistrate's findings, and he's quite critical of that. But I will have to read carefully to see whether he says anything about his conduct in withdrawing at the initial stages and referring to inquest. So if we could hold that to some later stage, I would be happy to deal with it after I have looked at the decision more carefully.

MS RAMAGAGA: Yes, thank you, Chair. I think the point is exhausted, and it will receive better attention at a later stage when lawyers who are representing others speak to us about
10 that. Thank you.

ADV BATOHI: Thank you.

CHAIRPERSON: You may proceed, Advocate Mohlamonyane.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Now in summary, deal with the two cases insofar as it relates to Advocate Chauke.

ADV BATOHI: In summary, what we say is that the Supreme Court of Appeal did not absolve Advocate Chauke of wrongdoing. On the contrary, there are several remarks that
20 contain admonitions of his dealing with the matter. First, Brandt JA criticises the Magistrate's finding as peculiar. I am summarising what I had said before, and suggests that Chauke should have appreciated these peculiarities. He did not. Instead, he relied upon the Magistrate's findings as the basis for not pursuing criminal charges.

CHAIRPERSON: And as you summarise, and I beg your pardon for interrupting, but of course it takes us back to the point my sister made earlier that that could be a matter for argument, when you read Brandt JA's subpoena on reasoning at 44, where he says, FUL suggested that the conduct of Advocate Chauke was irrational. And he says, it cannot be because FUL wanted the *ex facto* circumstances to be taken into consideration. And he says, you cannot do that. And it was on that basis that he says, Advocate Chauke then cannot
10 be faulted for the way he conducted himself or the way he proceeded. To that extent, the appeal must succeed.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: So when you say that the SCA absolved, did not absolve Advocate Chauke, I am getting confused because this is not what 44 of the SCA is saying.

ADV BATOHI: Chairperson, the point I am making is that, let us go back, I think we have to go back to paragraph 44. In paragraph 44, which I dealt with earlier on, and I think this is important, it will, of course, be dealt with in argument no
20 doubt later. In paragraph 44, what Brandt is really saying, is that ...[intervenes]

CHAIRPERSON: Madam ...[intervenes]

ADV BATOHI: JA.

CHAIRPERSON: We need to treat, as we treat you with respect, you must treat others with the same respect.

ADV BATOHI: Chairperson, it is not intentional. I seriously apologise to Judge Brandt publicly for referring to you as Brandt as I have. I do not mean any offence. Please forgive me. I will try my best.

CHAIRPERSON: It should be easy to you as a lawyer. To the layperson, it will probably be difficult.

ADV BATOHI: Thank you, Chairperson. I have not been in court very much recently, but no excuses. My apologies. Brandt JA. What he is saying in paragraph 44 is that, let me
10 look at paragraph 44. He talks about Chauke's failure to proceed with the murder and related charges after the finding of the inquest became available. And he said that this was, in fact, he talks about FUL's argument that this was irrational. And he says, but that decision, or his failure to apply his mind to the matter at the conclusion of the inquest, was not the subject of the review process. And so he says, to that extent, you know, he goes on to explain.

He says, I do not believe that the earlier decision to withdraw the charges, which is the impugn decision, can be
20 set aside, which was before the Court, that was the issue before the Court, can be set aside on the basis that a subsequent decision taken in different circumstances not to reinstate some or all of them was not justified. So he says, to that extent, it must succeed. And the point being, Chairperson, that the point I was trying to make is that the

Court did not deal with that matter because it was not part of the review and to that extent, the matter had succeeded because that was not before the Court.

But with regard to Chauke's conduct regarding what happened after the inquest, Brandt JA is critical of his conduct, and that is what I was dealing with at this point. I hope that clarifies, Chairperson.

CHAIRPERSON: Paragraph 44, or elsewhere?

ADV BATOHI: Elsewhere, Chairperson. Elsewhere, which I
10 did read into the record previously. Particular paragraph 14,
14, 1-4, that is correct. I did read that into the record,
Chairperson, of Brandt JA's judgment.

CHAIRPERSON: And if my reading is correct, that is where
Brandt JA seems to be criticising the Magistrate.

ADV BATOHI: Yes. As well as he continues, he criticises
the Magistrate for making contradictory findings. And then
he goes on to say, but if Chauke had any uncertainty about
the import of the Magistrate's findings, he could have asked
for clarification or even requested the inquest be reopened in
20 terms of Section 17.2 of the Inquest Act. I will stop at that
point, Chairperson.

ADV BALOYI-MERE SC: But is that criticism?

ADV BATOHI: It certainly seems to be suggesting that at
that point, Advocate Chauke ought to have carefully
considered precisely what the Magistrate was saying because

it was very confusing. He was on the one hand saying there was a *prima facie* case against Richard Mdluli, and on the other hand, he was saying that he could not be held accountable. So in that regard, he was saying that Advocate Chauke, because of this conflicting views or findings of the Magistrate, ought to have at least queried it and tried to understand or referred it for reopen the inquest or tried to understand this lack of certainty at that point, which is what one would have expected given the circumstances that I

10 sketched out earlier where even Brandt JA, he talks, he mentions the fact that there is strong evidence in this matter. And in that context, Advocate Chauke should have sought clarity at the very least.

ADV BALOYI-MERE SC: But taking a matter on appeal where there is contradictory pronouncements by a Court a quo, would that not resolve those contradictions or the confusion caused by, in this instance, by the Magistrate's finding? And as can be seen at paragraph 14 that Brandt JA is addressing those.

20 **ADV BATOHI:** It would have been more easily resolved if one sought clarity from the Magistrate him or herself. I think it was a man. That would have been an easier way of resolving it rather than taking the matter further in the legal process.

CHAIRPERSON: What is unlawful about that?

ADV BATOHI: I did not say anything was unlawful about that, Chairperson.

CHAIRPERSON: Now remember in your statement, in your affidavit, when we began, if I may take you to your affidavit. Let me just, I beg your pardon. Let me just check the page which I thought I flagged. Let us just put a comma there so that I do not delay the proceedings.

ADV BATOHI: Sure.

CHAIRPERSON: I am going to come back to this question
10 after checking my record.

ADV BATOHI: Sure.

CHAIRPERSON: Advocate Mohlamonyane, you may proceed.

ADV MOHLAMONYANE SC: Advocate Batohi, you are done with the summary, not so?

ADV BATOHI: Mmm-mmm.

ADV MOHLAMONYANE SC: Let us go on to the representations of Advocate Chauke that he made to you.

ADV BALOYI-MERE SC: Sorry to interrupt. Is Advocate
20 Batohi done with her summary on the judgment of Brandt JA? Because I have a question.

ADV MOHLAMONYANE SC: You may proceed with the question.

ADV BALOYI-MERE SC: Advocate Batohi, you took us through two judgments, the FUL before Gorven JA and now

Brandt JA. Can we go to...

ADV MOHLAMONYANE SC: I beg your pardon. Pardon me for Murphy J.

ADV BALOYI-MERE SC: Oh, Murphy.

ADV MOHLAMONYANE SC: Gorven had to do...

ADV BALOYI-MERE SC: Murphy, ja. Murphy, Murphy J. Can we go to the order by Brandt JA? To make things easy, maybe go to page CL00350 where there is the order of Murphy JA, Murphy J. That is orders A, B, C, D, E, F, G up
10 to H. Brandt JA in paragraph 54 says the appeal succeeds only to the extent that paragraphs B, E, and F of the order of the Court a quo. Now, paragraph B is a decision made on behalf of the NPA whereof the criminal charges of murder, kidnapping, intimidation, and assault and defeating the ends of justice under CAS number 340/02/99 were withdrawn. That was... The appeal succeeded on that one. And that would refer to the Mdluli issue. Correct me if I am wrong.

ADV BATOHI: That is correct, Chairperson.

ADV BALOYI-MERE SC: Now, your interpretation of Brandt
20 JA's judgment is that it was critical of Chauke, yes, there are points where the judgment is critical of Chauke. But at the end, the appeal in relation to the Mdluli issue succeeded.

ADV BATOHI: Chairperson, it succeeded. I think it is important that we read all the orders. And if you look at number 3, it is recording that:

“The following undertaking has been furnished on behalf of the first appellant:

To decide which of the criminal charges of murder and related crimes, that were withdrawn on 2 February 2012, are to be reinstated and to make his decision known to the respondent within two months of the order, to provide reasons to the respondent within the same period as to why he has decided not to reinstitute some, if any, of those charges.”

10

So I think it has to be read together. And it was on the basis of that undertaking, is my reading of it, that the appeal succeeded in respect of those subparagraphs mentioned.

ADV BALOYI-MERE SC: I am reading a Court order, an order in a judgment. The Judge says:

“The appeal, in the premises it is ordered that:

1. The appeal succeeds only to the extent that paragraphs B, E, and F of the order of the Court a quo are set aside.”

20

That is the first order.

ADV BATOHI: Mmm-mmm.

ADV BALOYI-MERE SC: And I am saying let us look at that order. And let us look at paragraph B.

ADV BATOHI: Yes, I have seen that.

ADV BALOYI-MERE SC: That has been set aside now.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: And paragraph E has been set aside.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: Paragraph F has been set aside.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: What remains now is the order by
10 Brandt JA. The remainder of, say, A, C, D, G, and H are confirmed.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: By Brandt JA.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: So what I am trying to put to you is that B, E, and F have been set aside.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: I do not want to put any conditions to the setting aside because it is a clear order. And the Court
20 proceeded to give directions and order directions on what to be done. But those do not have a bearing, a direct bearing on the fact that in this judgment, orders B, E, and F of the Court of appeal have been set aside.

ADV BATOHI: I note the comments of the panel member, Madam Baloyi-Mere. I think as the panel members have

suggested, well, certainly Madam Ramagaga, this matter is perhaps best left for argument at a later stage.

ADV BALOYI-MERE SC: Okay, thanks.

ADV BATOHI: Thank you.

MS RAMAGAGA: Just one thing. Just for record purposes, because this is something that is actually what is common cause, that the decision or the judgment of the Judge Brandt would have to be implemented by the respondents that are cited in the judgment, the appeal, nè? And on appeal, will it
10 be correct to say that that judgment would have to be implemented to an extent necessary by the NDPP?

ADV BATOHI: That is correct.

MS RAMAGAGA: Okay, right. Thank you.

CHAIRPERSON: Advocate Mohlamonyane, I just wish to revert to my question about the lawfulness of the conduct of Advocate Chauke. And the answer by Advocate Batohi was she's not aware of the use of the words unlawful. In her affidavit, she is correct, that alleged unlawfulness on the conduct of Mr Chauke is in relation to the Cato Manor matter.

20 **ADV BATOHI**: Yes.

CHAIRPERSON: In relation to the Mdluli matter, go to page 77 of your affidavit, paragraph 181. This could probably be a matter for argument because there you use a different legal concept, irrationality. You say you were satisfied that there was no rational basis for him to withdraw the murder and

attempted murder charges.

ADV BATOHI: Chairperson, I am sorry I am not with you.

Which paragraph are you at?

CHAIRPERSON: Paragraph 77 of the affidavit.

ADV BATOHI: Page 33.

CHAIRPERSON: I beg your pardon.

ADV MOHLAMONYANE SC: 181.

CHAIRPERSON: Page 77. I beg your pardon.

ADV BATOHI: Oh, okay.

10 **CHAIRPERSON**: Page 77, paragraph 181.

ADV BATOHI: Are we still getting to 181?

CHAIRPERSON: Paragraph 181.

CHAIRPERSON: You got it? It is on top of that page.

ADV BATOHI: Yes, I see it now, Chairperson.

CHAIRPERSON: What I am saying is that you are correct that the use of the word unlawfulness relates to the Booyesen's matter. It is evident in the paragraphs earlier. But in relation to the Mdluli matter, and this was my understanding, although the word unlawfulness is not used, but you use the word no
20 rational basis. When you think about the concept of rationality, it is a legality principle. And it was in that context that I mentioned unlawfulness. But this could be a matter for argument. I do not want to overstretch it because you only use the words. You were satisfied that there was no rational basis to withdraw the murder, an attempted murder.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: That takes us back to that initial stage.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Of Advocate Chauke's alleged irrational conduct.

ADV BATOHI: That is correct, Chairperson. But the evidence is that his subsequent conduct was not what one would have expected of a DPP in those circumstances, carefully considering the matter after the inquest, after the
10 judgment of Murphy J.

CHAIRPERSON: I understood you correctly, counsel, to reformulate your understanding. His subsequent conduct post the inquest findings was irrational in the sense that he ought not to have appealed, but ought to have then applied his mind to the inquest findings. Is that what you are saying?

ADV BATOHI: No, Chairperson. I am not saying that. I need to carefully consider it, but I am certainly saying it did not meet the standards that are expected of a prosecutor or DPP in those circumstances, as set out in various of our
20 policy documents that require us to consider evidence in a particular way. So there was noncompliance with policy issues in that process.

CHAIRPERSON: Yes, but my understanding of your quibble is that he decided then, after the findings of Murphy J to appeal.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: This is really the crux of your challenge.

ADV BATOHI: That is correct. One of them.

CHAIRPERSON: You are saying he ought not to have appealed the decision, but should or ought to have done something else?

ADV BATOHI: Ought to have reconsidered the matter in the light of the inquest, in the light of the findings of Murphy J, to have reconsidered in the light of the fact that his team was
10 saying prosecute, to have reconsidered the matter and rather re-enrolled the matter instead of appealing the decision further.

CHAIRPERSON: Now, what appears in 181 does not cover what you are saying. What appears in 181 is consistent with your earlier answers when I asked you about the terms of reference, 3.1.2, read with 3.2, 3.2.2, and the last one, 3.2.2.3, where you persistently say what that means is that the discontinuing of the criminal proceedings referred to that act of withdrawal that you speak about, I suppose, in 181.

20 **ADV BATOHI:** Chairperson, I am not confused. I am not seeing any contradiction. I am not understanding.

CHAIRPERSON: Nobody says you are confused, Madam. Nobody says you are confused. We just need clarity here.

ADV BATOHI: I appreciate that.

CHAIRPERSON: I am saying that which appears there as

you answer those questions in relation to the terms of reference.

ADV BATOHI: In 181?

CHAIRPERSON: No, no, no, the terms of reference. 3.2, I will repeat those terms. You remember we repeated, I repeated this question.

ADV BATOHI: I recall, Chairperson.

CHAIRPERSON: And I just want clarity there. 3.1.2, 3.2, 3.2.2, and the last one, 3.2.2.3. You remember your answer
10 there? That...

ADV BATOHI: My answer with regard to 3.2.2.3, Chairperson.

CHAIRPERSON: Yes.

ADV BATOHI: I do.

CHAIRPERSON: But reading those paragraphs and subparagraphs together and then your answer was that the conduct complained against was the withdrawal.

ADV BATOHI: It is not the only conduct complained against, but certainly it is the withdrawal and the failure to reconsider
20 the matter in line with the policies, et cetera, subsequent to the inquest and the judgment of Murphy J.

CHAIRPERSON: The problem, counsel, you do not answer the question and you make it very difficult for us to understand. That is why we keep on going back and forth. I repeated this question twice or thrice earlier and your answer

was persistently that reading those paragraphs together, it meant the issue was the withdrawal. Now I am referring you to paragraph 181, just as it stands, nothing more, nothing less.

And it speaks to the irrationality of the conduct of Advocate Chauke, as you put it, in withdrawing the murder and attempted murder charges for referral, with a view to refer the matter for an inquest. It stops there. So what I am saying to you is this paragraph 181 seems to support your proposition in relate to the terms of reference that I referred you to earlier.

ADV BATOHI: 181 has got a number of subparagraphs. So are you only, Judge, referring to, Chairperson, referring to 181 or all the subparagraphs as well?

CHAIRPERSON: No, no, no. I am talking about that key paragraph.

ADV BATOHI: 181 at the top, I agree it is consistent with what I said about discontinuance, meaning withdrawal.

CHAIRPERSON: Yes, thank you.

20 **ADV BALOYI-MERE SC:** Advocate Batohi, do we, you keep on using this term to say to reconsider. Do you have any evidence that Advocate Chauke did not reconsider or carefully consider Judge Murphy's judgment or whoever was involved, because the applicant in the appeal is the NPA. So it might be that it is not him per se, it is a team. But is there

any evidence that the team or whoever took a decision to appeal, did not carefully consider the judgment of Judge Murphy before they took it on appeal to the SCA? Contrary to, you keep on referring to your policies and the Act.

ADV BATOHI: I do keep on referring to them because they are important, with due respect.

ADV BALOYI-MERE SC: Yes, they are important, but they do not stop the NPA as an entity from appealing a judgment where they feel, or where after reconsideration they find that
10 there is a need to appeal. Because we appeal for a reason, not just for the sake of whiling away time.

ADV BATOHI: That is what we should be doing, is appealing for a good reason and not whiling away time. I agree with you completely. That is what a responsible NPA prosecutor should do, is appeal when the circumstances fully justify it. What we are saying in this particular case is that given all of the circumstances, and if Advocate Chauke properly applied the requirements in terms of our policies, et cetera, in terms of evaluation of evidence, and carefully considered, one, his
20 team's view that the matter should be proceeded with, two, the fact that the inquest Magistrate had made conflicting findings about it.

But also one of the important ones are saying that there was *prima facie* evidence supporting the case against Mr Mdluli. Then you have, that was the Magistrate's finding.

Then you get the finding of Murphy J, where he again strongly, he criticises the Magistrate for the conflicting versions, but also comes to a conclusion that there is, I am not sure whether he uses the term *prima facie*, but certainly he may even have gone a bit stronger than that in terms of the evidence supporting, in respect of the case against, I think he may have used the terms there was reasonable grounds for a successful prosecution, but I stand to be corrected.

10 So my point being that in these circumstances, there was no justification to take the matter on appeal. The matter ought to have been carefully reconsidered at that point in line with our policies, which we will, I think we need to refer back to, and reinstated at that point.

ADV BALOYI-MERE SC: Now, at the back of your answer and the reasons that you have given, what do you make of the fact that the SCA then overturned that decision of Murphy J?

ADV BATOHI: The SCA may have overturned it, but as I
20 explained earlier, it was critical of Advocate Chauke's conduct in this matter. And in fact, the SCA was also very critical and dealt with the inquest Magistrate's findings and seemed to have suggested that Advocate Chauke should have done things differently at that stage of the proceedings. So it does not exonerate him. It certainly deals with his

conduct in a critical way.

ADV BALOYI-MERE SC: But that is not part of the order.

We as lawyers know that Judges will tell us whatever they tell us, give us guidance, but at the end of the day, it is the order that one has to comply with that matters. We have the order.

ADV BATOHI: The order matters.

ADV BALOYI-MERE SC: That is what I am asking, that at the back of your answer and your response, consider the judgment and the order. What do you make of that? Are you

10 still maintaining that the Murphy J judgment should not have been appealed?

ADV BATOHI: Yes, I am.

ADV BALOYI-MERE SC: Thank you.

CHAIRPERSON: Thank you, Advocate Batohi. Advocate Mohlamonyane, it is quarter past one.

ADV MOHLAMONYANE SC: Is it an opportune moment to adjourn, Madam Chair? I thought half past one, maybe. It

was not canvassed today as to what time we will adjourn for lunch recess, but on previous days we adjourned at half past
20 one, if my memory serves me well.

CHAIRPERSON: In the light of the questioning, I see you have a smile on your face, Advocate Mohlamonyane.

ADV BATOHI: It is cross-examination, Chairperson, that started already.

CHAIRPERSON: I want to make it clear, counsel, Advocate

Batohi, that our questioning, and I would like you to understand it in that light, is intended to give us clarity on certain issues that we do not have answers for, and it is not cross-examination. You will probably be in this precinct when Advocate Chauke resumes, if he is going to do it, that he takes that seat. We will ask him questions also, because our role in this inquisitorial process is to remain objective, to remain as objective as possible as we search for the truth, and we can only do that by probing certain matters without
10 being subjective, and I would like you to understand it in that context.

As you know, coming from litigation world, it is not a very easy terrain, but I would like you to understand that we are not cross-examining you. We want to just get to the bottom of things and understand this record correctly so that when we write the report, we write what is correct. But of course, this line of questioning can be unsettling, and I hope it does not to you. It may be exhausting. A witness box is not easy for anybody. Some of us have been there before,
20 even as Judges, but I would like you to understand that as we ask you questions, we just want clarity, and most of your questions are very helpful for us to understand this prosecutorial functions and just to get clarity for our own writing at a later stage.

I suppose maybe to afford the witness a chance to

pause, we can take an earlier break unless you are minded to close some other chapters that are brief before lunch.

ADV MOHLAMONYANE SC: This is just on only one aspect, and then we will close. Advocate Batohi, in the course of your duties as prosecutors, are you bound by a decision of an inquest Magistrate, a finding of an inquest Magistrate?

ADV BATOHI: No, we are not, and in fact it is either Judge Murphy or Judge Brandt mentions that in the judgment. We are not bound by a decision of a Magistrate in an inquest.

10 **ADV MOHLAMONYANE SC:** Thank you, Madam Chair. We may adjourn for lunch recess.

CHAIRPERSON: Thank you, counsel. I think we should take a lunch adjournment and reconvene at, my sister says 2 o'clock, meaning that we will reconvene at 2 o'clock, 45 minutes, somewhere there. We will reconvene at 2 o'clock, 45 minutes break. We adjourn.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

20 **CHAIRPERSON:** Good afternoon everyone. Good afternoon, Advocate Batohi. Counsel, you may proceed.

EXAMINATION BY ADV MOHLAMONYANE SC

(CONTINUED): Thank you, Madam Chair. Advocate Batohi, before we adjourned for lunch recess, you had wrapped up the summary of the two cases, not so, or is there any other thing that you wish to add?

ADV BATOHI: No, there is nothing further that I wish to add in that regard.

ADV MOHLAMONYANE SC: I am inclined to refer you to the representations that Advocate Chauke made to Lieutenant General Mdluli, but for the moment you can ...[intervenes].

ADV BATOHI: Made to me.

ADV MOHLAMONYANE SC: No, no, no, no, I will get to that.

ADV BATOHI: Sure.

ADV MOHLAMONYANE SC: Made to, the representations
10 that Advocate Chauke made to Lieutenant General Mdluli. I
beg your pardon, Mdluli made, Lieutenant General Mdluli
made to Advocate – no, no, no, no, I am mixed up. Let me,
let me recollect. The representations that Lieutenant General
Mdluli made to Advocate Chauke relating to the charges, I
hope I have corrected myself, but for the moment, I am told
you do not have the bundle thereof. Let us park it for now.
We will come back to it.

May I then take you to your bundle, to the
representations that Advocate Chauke made to you after he
20 had written a letter to her to respond to certain allegations.
And in this regard, go to SB6. I will let you know as to what
page it is, but for now ...[intervenes].

CHAIRPERSON: Please give me a second, Counsel, I am
looking for SB6 in my bundle.

ADV BATOHI: It is page 240, Chairperson.

CHAIRPERSON: Thank you, I found it.

ADV MOHLAMONYANE SC: SB6 on page 240 was a response to yourself, not so?

ADV BATOHI: That is correct, from Advocate Chauke.

ADV MOHLAMONYANE SC: It was a response to your letter dated 13 May 2021, which you can locate in SB5. Maybe that is where we should begin with your letter to Advocate Chauke. Remember that?

ADV BATOHI: I do.

10 **ADV MOHLAMONYANE SC**: SB5, Madam Chair, can be located at page 231, SB5 231.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: Proceed with that letter first before you go to his response.

ADV BATOHI: It is a long letter, so I do not expect that you want me to read it into the record. But it is a letter, I can explain it.

ADV MOHLAMONYANE SC: Yes, not necessarily. Just explain ...[intervenes].

20 **ADV BATOHI**: Sure. It is a letter dated, what is the date of this letter?

ADV MOHLAMONYANE SC: 13 May, 2021.

ADV BATOHI: Thank you, yes. And my signature, 13 May, 2021, to Advocate Chauke, requesting further information relating to decisions that he made as the DPP in Gauteng.

ADV MOHLAMONYANE SC: On the Booyesen prosecution, Cato Manor matter.

ADV BATOHI: That is correct, that is the first one.

ADV MOHLAMONYANE SC: The second one on page SB5 232, under paragraph 2, will be the Mdluli matter, murder charges.

ADV BATOHI: It is correct.

ADV MOHLAMONYANE SC: Now, on SB5 235, that is where your signature appears, and the date can be confirmed to be
10 13 May, 2021.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Now, proceed to SB6, on page 240, Madam Chair. You want to deal with the representations that Chauke, excuse me, Advocate Chauke made to you?

ADV BATOHI: Thank you, Counsel. In the, in SB 241, I wanted to, in the context of the Mdluli matter, refer to one particular aspect, and that is paragraph 9, wherein Advocate Chauke says:

“The SCA found my decision was not irrational, and
20 indicated that such decision, if irrational, should be ...”
[intervenes].

CHAIRPERSON: [Indistinct]... [microphone off].

ADV BATOHI: Pardon me, 243, paragraph 9. May I proceed, Chairperson?

“The SCA found that my decision was

not irrational, and indicated that such decision, if irrational, should be reviewed by the National Director of Public Prosecutions. To this end, a report for consideration memorandum was prepared and submitted to the NDPP. In line with the directive of the SCA, the NDPP, after reviewing my decision, came to the same decision that I earlier made. In this regard, I

10 attach hereto letter addressed to Cliffe Dekker by NDPP, dated 17 June, 2014, marked as AC11.”

ADV MOHLAMONYANE SC: The NDPP referred to by Advocate Chauke in this paragraph refers to which NDPP at the time?

ADV BATOHI: It is Advocate Nxasana, which will become apparent from the next paragraph, 10.

ADV MOHLAMONYANE SC: On page 244?

20 **ADV BATOHI:** That is correct.

ADV MOHLAMONYANE SC: Yes, proceed.

ADV BATOHI: -:

“From the aforesaid, it is clear that anyone who criticizes me and imputes the decision under discussion to me

only is both misplaced and wrong, as the final decision was made by the NDPP, Mr Nxasana. If any person should be criticized, it should also include the then NDPP. It is further clear that the unfounded criticism levelled against me is done so for nefarious reasons or in the service of an unknown agenda by persons invisible to me.”

10 So in this regard, with regard to the role that Advocate Nxasana played, and I understand he might be called to testify, so I do not want to speculate in that regard, but I would like to refer to the affidavit of Advocate Nalane.

ADV MOHLAMONYANE SC: The opinion.

ADV BATOHI: I beg your pardon, the opinion.

ADV MOHLAMONYANE SC: It is contained in Bundle LO1, and the page is, the paragraph, rather, is 124. I will give you the page. The page is LO00212, Madam Chair.

CHAIRPERSON: Page what, LO1 ...[intervenes].

20 **ADV MOHLAMONYANE SC:** LO, Bundle LO1, pages 00212 and the paragraph that Advocate Batohi would like to refer to is paragraph 124.

CHAIRPERSON: And this document or paragraph you are referring us is part of the opinion of Dr Broughton?

ADV MOHLAMONYANE SC: No, Madam Chair, it is Advocate

Nalane's opinion, Advocate Nalane SC opinion, which ...[intervenes].

ADV BALOYI-MERE SC: Advocate Nalane's opinion is at 00030.

ADV BATOHI: That is right.

ADV MOHLAMONYANE SC: Let me locate where it starts. That is where it starts, Madam Baloyi-Mere. It starts at LO00030.

CHAIRPERSON: Because you referred us to page 000212.

10 That is Dr Broughton's document.

ADV MOHLAMONYANE SC: Let me find out from Advocate Batohi. Which paragraph, because in my notes it appears as paragraph 124.

ADV BATOHI: Yes, I think there seems to be a confusion as this document is probably also in Dr Broughton's bundle, but the reference I do have here is LO00072 at paragraph 124.

ADV MOHLAMONYANE SC: 72 being the page?

ADV BATOHI: Yes, that is correct. Let me check if that is the correct one. Yes, that is so.

20 **CHAIRPERSON:** [Indistinct]... [microphone off].

ADV BATOHI: 72.

CHAIRPERSON: 72, that is Advocate Nalane's opinion.

ADV MOHLAMONYANE SC: That is Advocate Nalane's opinion. My apologies, I missed that one. I thought I am on Advocate Nalane's opinion. 00072, that is the page, and

paragraph 24. Do you want to go to it right away?

ADV BATOHI: Yes. Chairperson, in Advocate Nalane's view, he says:

10 “The question is not whether on a reconsideration of the matter by the NDPP, the decision by Chauke to withdraw the murder charges was rational. The critical time period is when he had to take the decision. The question has to be asked whether at that point in time he acted within the prescripts of the law, policies and directives applicable to him as a prosecutor, and in particular as the DPP. In my view, I will elaborate later. Chauke's conduct is against the policies and directives.”

20 What Advocate Nalane was mentioning here is the fact that the decision of Advocate Chauke was taken some time before that the, the consideration of the matter by Advocate Nalane after the Brand JA SCA decision, and that one has to consider what the circumstances were at that time. What will be evident from the evidence is that by that time, Ms Buthelezi had passed away, as well as I think the mother of the deceased, Mrs Ramojibe had also passed away, and

so the point is I do not know what other evidence was not available, but the point being made is the fact that a different decision was taken at a different time.

One needs to consider what exactly the evidence was before Mr Nalane at the time, before one can say that his decision in fact vindicated Advocate Chauke's decision not to prosecute the matter. I am not sure how many, how long before, but it is over a year or so.

CHAIRPERSON: The time Advocate Nalane referred to here
10 is which time?

ADV BATOHI: The time that Advocate, Mr Nxasana reviewed the matter, that would have been after the Supreme Court of Appeal judgment. I do not have the precise date here. Let me check if there is anything on the, no, I do not have the date, Chairperson. We will have to get that date for you, but it would have been subsequent to the Brand JA judgment, and let me just check my, if it is in the chronology that we have.

We do know that the SCA judgment was on the 17th of April, 2014. It would have been after that, and we know
20 that Advocate Chauke withdrew charges on the 2nd of February, 2012, so it is certainly more than two years after Advocate Chauke took the decision to withdraw charges that Mr Nxasana considers the matter.

CHAIRPERSON: I am not sure whether I understand the answer, but which time was it, if you can just be specific,

because I just want to capture ...[intervenes].

ADV BATOHI: The date, Chairperson.

CHAIRPERSON: Yes, the period that he is referring to in this paragraph.

ADV BATOHI: Chairperson, let me see if Advocate Chauke's response helps us in that way, in that regard.

CHAIRPERSON: I ask the question because this paragraphs, as Advocate Nalane says, the critical time period is the time when certain things happened.

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

CHAIRPERSON: And it is the time in the respect of which his conduct should be conceded, the conduct that he says is against the policies and directions.

ADV BATOHI: That is correct, Chairperson. We will have to, we will get the date, try to get the date of when Mr Nxasana considered the matter and took his decision. What we can say for sure for now, Chairperson, is that it was more than two years after Advocate Chauke took the decision to refer the matter to an inquest on this, well, to withdraw the charges
20 on the 2nd of February, 2012, and the Brand judgment having, Brand JA judgment being on the 17th of April, 2014 is two years later. So at best for now, I can say it was more than two years later, but we will try to get the date if possible, or Mr Nxasana will be able to tell us when, if he, if and when he testifies.

CHAIRPERSON: Now whose - I beg your pardon. Whose decision of the two is said to be relevant to that critical time, is that the decision of the NDPP or the decision of Advocate Chauke?

ADV BATOHI: In my view, Chairperson, the critical period of time is the time when Advocate Chauke took the decision.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: Now, would you explain ...[intervenes].

10 **CHAIRPERSON:** Counsel, would you please assist me then or assist the witness to capture that period that we are looking at? It is not clear in 124 which critical time Advocate Nalane is referring to. Maybe your Counsel behind you can assist.

ADV MOHLAMONYANE SC: If you allow me to confer, Madam Chair. Thank you, Madam Chair. Thank you for allowing us to confer. My colleague says the critical period referred to herein in this paragraph refers to the time when Advocate Chauke withdrew the charges, which will be
20 February 2012. When he withdrew the charges on the 2nd of February, 2012, and when he referred the murder charge for an inquest in March, 2012, up to and including the period when the SCA delivered its judgment on the 14th of April, 2014.

CHAIRPERSON: [Indistinct]... [microphone off] the answers

covers a wide period from 2012 to 2014.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: The first sentence of 124 speaks of a decision by Advocate Chauke to withdraw the murder charges. Is that not confined to only the 2nd of February, 2012?

ADV MOHLAMONYANE SC: My understanding of this sentence, Madam Chair, is that ...[intervenes].

CHAIRPERSON: Perhaps you should let the witness answer.

10 **ADV BATOHI:** Chairperson, I think you are right that it refers to the date on which Advocate Chauke took the decision to withdraw the matter.

CHAIRPERSON: Thank you, Counsel, proceed.

ADV MOHLAMONYANE SC: Can you explain the impact of Advocate Chauke referring the matter to an inquest, if any?

ADV BATOHI: Yes, so Advocate Chauke in his response to me that we looked at a few minutes ago, that is SB6 at 241, paragraph 4.

CHAIRPERSON: SB6 241, paragraph 4?

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

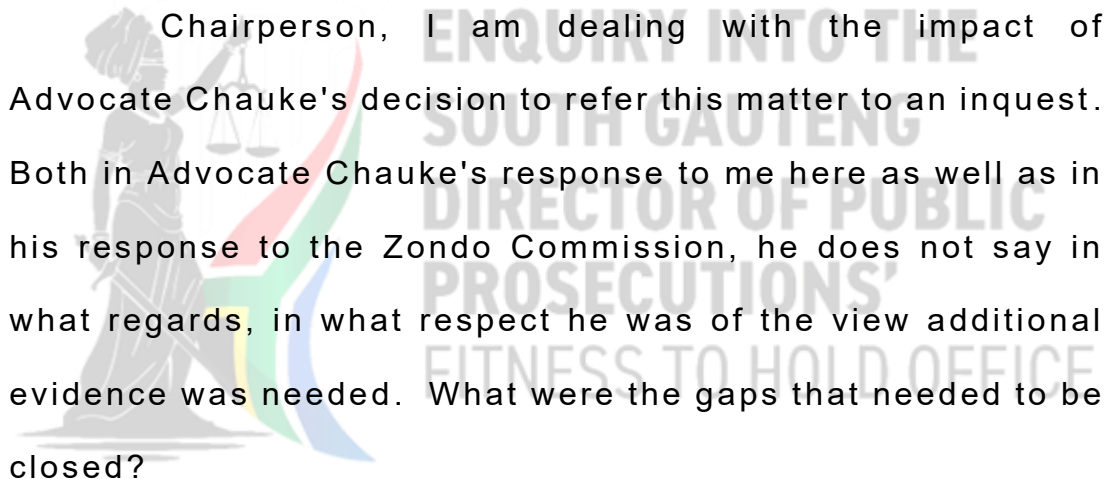
CHAIRPERSON: Thank you.

ADV BATOHI: Chairperson, at paragraph 4, Advocate Chauke states the following.

“In April, 2012, I accordingly decided
that an inquest should be held in respect

of the murder charge. I referred the matter to the Boksburg Magistrate's Court having jurisdiction that with a request that a formal inquest be held. A copy of the request is attached hereto, marked as AC6. My rationale for the inquest was that it might cause inculpatory evidence to surface which could be then used in the criminal trial
10 in respect of the murder charge.”

Chairperson, I am dealing with the impact of Advocate Chauke's decision to refer this matter to an inquest. Both in Advocate Chauke's response to me here as well as in his response to the Zondo Commission, he does not say in what regards, in what respect he was of the view additional evidence was needed. What were the gaps that needed to be closed?



It is in a case like this, Chairperson, where it appears that objectively on the basis of the team itself, the
20 prosecution team, the decisions of Murphy J as well as Brand JA, there is sufficient evidence to prosecute as well as the inquest magistrate. There is sufficient evidence.

Where you refer a case in this case, and I emphasize, when you do have sufficient evidence to prosecute, it poses a serious risk of weakening the case, not

strengthening it. So it is a situation where, given that it is a formal inquest, as mentioned in paragraph 4 of Advocate Chauke's response, the witnesses would be required to testify and in this case, the evidence in the docket will show that the witnesses, including the mother of the deceased, were highly traumatized by the intimidation, the kidnapping, the attacks and to submit or expose traumatized and vulnerable witnesses to inquest proceedings where they will be cross-examined is really difficult to understand where you
10 have a strong case. And it is something that generally Prosecutors would want to avoid, is exposing your witnesses to a process that would, that I have just outlined.

And Chairperson, we should bear in mind that at this stage in 2012, when the charges were withdrawn, the matter was already about 13 years old, the murder having taken place, I stand to be corrected, but around 1999, and Mr Mdluli had escaped any kind of accountability for 13 years. In the event that the Magistrate made a finding that there was evidence to support that Mdluli was responsible, which the
20 magistrate actually did, but in the event that Advocate Chauke decided to prosecute, it is my view, Chairperson, that the case would actually, the witnesses would require to be cross-examined, testify again. The defence will have a record of the proceedings and if anything, in these circumstances, the only advantage would be to the defence.

Chairperson, so the decision to refer the matter for an inquest was, could have these very, very negative risks to any future prosecution.

ADV MOHLAMONYANE SC: So your view is he ought to have taken a decision to reinstate the murder charge, an attempted murder charge?

ADV BATOHI: It would make sense in the circumstances. At any point, either after the matter, the inquest magistrate made those conflicting findings, or after Judge Murphy, 10 having made strong, a strong judgment about why the prosecution should proceed, and the evidence of the team that the case should proceed, that in the circumstances, given what, and the investigating officer will testify about the, in greater detail, about the circumstances surrounding this, and the panel will have a better understanding at that stage about why this case, in the interest of justice, given that you are dealing with a police officer and other police officers, a senior police officer and others, who should be protecting the community, it was in the interest of justice that this matter 20 proceed to trial at one of those stages.

ADV BALOYI-MERE SC: Advocate Batohi, in your view, would the conflicting findings of the magistrate not weaken the state's case, or play a role?

ADV BATOHI: No, Chairperson, that is the, that is the view of the magistrate, and it will be a matter to be dealt with at

the trial, but in my view, it would certainly not weaken the state case.

ADV BALOYI-MERE SC: Thank you.

ADV MOHLAMONYANE SC: Now, here is Advocate Chauke, who is now in possession of the magistrate's finding. You say he ought to have reinstated the charges.

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: And then what happened next?

ADV BATOHI: So, if I could, Advocate Chauke, then, and I
10 do not have in my notes, so I need to just think about this carefully. A decision was taken by Advocate Chauke to prosecute Mr Mdluli on charges of kidnapping, intimidation, assault, not the murder or attempted murder, but the other charges. We can get the full list, but certainly the ones I have mentioned were some of the charges. That matter did proceed to trial, and Mr Mdluli was found guilty, and in this regard, I think the matter is dealt with in L079. I want to check that before I take the panel there, in the Nalane opinion. Let me just confirm that. Yes, Chairperson, it is
20 L079 at paragraph 152.

CHAIRPERSON: [Indistinct]... [microphone off].

ADV BATOHI: Page 79, Chairperson.

ADV MOHLAMONYANE SC: Ja, the page reads, if I may help ...[intervenes].

CHAIRPERSON: [Indistinct]... [microphone off].

ADV MOHLAMONYANE SC: 152, Madam Chair. The page is L000079, paragraph 152, where it deals with the judgment of Mokgoatlheng J.

ADV BATOHI: May I proceed, Chair?

CHAIRPERSON: I want to understand. Let me just look at the page. Whose opinion is this?

ADV BATOHI: Chairperson, this is the opinion of Advocate Nalane, but at 152, he refers to the judgment of Mokgoatlheng J in the criminal case against Mr Mdluli that I just referred to
10 now, where he was charged with the other charges, but not murder and attempted murder.

CHAIRPERSON: Yes, thank you.

ADV BATOHI: Thank you. So, Chairperson, even at this stage, after all the decisions, Advocate Chauke decided not to proceed with the murder or attempted murder charges, but with the other charges, the less serious charges. As I
20 mentioned, I do not have the list here, but I think it is kidnapping, intimidation, assault with intent to cause grievous bodily harm, potentially intimidation, but we can get the list of the charges.

At paragraph 152, Chairperson, Advocate Nalane refers to the judgment in that matter, where the judge said the following, where he, well, he does not quote, but he says:

“The court presided over by
Mokgoatlheng J after many years finally

heard the case against Mdluli and his co-accused. The court dealt with the argument that there were conspiracies against Mdluli and found that the conspiracy had been fabricated, concocted, and was not shown to exist.”

You will recall, Chairperson, that this was the, the representation of Mdluli, this was the allegation that there was a conspiracy against him, and that is why he was charged
10 with these cases.

At paragraph 153, on page LO00080, Advocate Nalane states:

“The court also found that the alleged conspiracy by General Dramat, Petros, Cele, Mkwanazi, Sibiya, Lebeya, and Ministers Radebe, Minister of Justice, Minister of Police, NPA Director, Simelane, the prosecution team, Van Zyl, Advocate Van Zyl, Advocate
20 Barnard and Gcaleka, and Colonel Roelofse, who was the investigating officer in the GPS police investigator, and the alleged allegation of coaching of the state witnesses by the prosecution team to falsely testify

against accused 1, that is Mdluli, when they were under the Witness Protection Evidence Program were false.”

And, Chairperson, I make this point because to accept that there is a possibility of a conspiracy, and that is why people are fabricating evidence against a person, one must look at the totality of the evidence, the strength of the evidence, and consider how possible it is for so many people that are mentioned in 153 to have colluded, and for the
10 witnesses, then, to make false statements to implicate an accused. And those are kinds of things that our prosecution memoranda, sorry, our prosecution policies, code of conduct requires us to consider when we are assessing the strength of a case against any other version, Chairperson.

MS RAMAGAGA: Advocate Batohi, it is correct that the judgment of Judge Mokgoathheng was done on the basis of full evidence that had been presented before the court?

ADV BATOHI: Well, evidence that was presented by the court, I am not sure about the term full, but certainly on the
20 basis of the evidence that was presented to him.

MS RAMAGAGA: The judgment was arrived on, on the basis of evidence before the court.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Now, let me take you ...[intervenes].

ADV BALOYI-MERE SC: Advocate Batohi, I am sorry Mr Mohlamonyane, when was Judge Mokgoathheng's judgment delivered?

ADV BATOHI: Chairperson, I am looking for, I think we will have to get that date, my apologies, but it is not in this bundle. I mean, it is not referred to in, although there is just a reference to the page of the judgment in the footnote, it does not indicate what the date is, but perhaps Counsel can assist in that regard.

10 **ADV MOHLAMONYANE SC:** Ja, I have been told, I can assist in that regard. There is a signature here of Mokgoathheng J, Judge of the High Court, date, 31 July, 2019. It is actually contained in one of the bundles referred to as RM, Richard Mdluli bundle, 01206, at page 01206.

CHAIRPERSON: Please give us the reference?

ADV MOHLAMONYANE SC: RM5, Madam Chair. The page will be RM5 ...[intervenes].

CHAIRPERSON: Page?

ADV MOHLAMONYANE SC: Page RM01206, 011206.

20 Rather, 01206, I beg your pardon.

CHAIRPERSON: RM01?

ADV MOHLAMONYANE SC: 206.

CHAIRPERSON: 206.

ADV MOHLAMONYANE SC: In other words, RM01206.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: Advocate Batohi, I now take you back to your affidavit and go to page 69.

ADV BATOHI: Counsel, I think perhaps 68, with the start of paragraph 160 might be more appropriate at this stage.

ADV MOHLAMONYANE SC: Fine, if it is okay, you can go back to 68.

CHAIRPERSON: We are still at L01, at L01?

ADV MOHLAMONYANE SC: No, Madam Chair, I am referring her back to her affidavit.

10 **CHAIRPERSON**: Affidavit.

ADV BALOYI-MERE SC: Can I take her back to L01? One of the questions that was asked was the reference by Advocate Nalane on the time, critical time, as he termed it. And from what was read into the record and immediately thereafter, there is paragraph 154, where the Judge made some findings in L01, page L000080, where the Judge made the findings that he based his, his findings are based on evidence that he listened attentively for four years, meaning the trial started maybe some four years before, until it ended
20 in 2019.

Now, I want to read this with what Advocate Nalane says at paragraph 156, that is the next page, 00081, paragraph 156, where he says:

“It had to take two judgments in 2014 for the murder and related charges to be

reinstated.”

And my question would be, when were the murder and related charges reinstated, bearing in mind that we were told that the judgment of, that we have just gone through, of Mokgoathheng did not deal with the murder and related charges, it dealt with other charges except this two. So, Nalane says at paragraph 156, that it took two judgments in 2014 for the murder and related charges to be reinstated. When were the other charges reinstated?

10 **ADV BATOHI**: Chairperson, through you, that appears to be an error, a mistake on his opinion, as the murder and attempted charges were, attempted murder charges were never prosecuted.

CHAIRPERSON: Are you saying that as a fact?

ADV BATOHI: I am saying that as a fact, Chairperson.

ADV BALOYI-MERE SC: Thank you.

ADV MOHLAMONYANE SC: Go to page 68, Advocate Batohi, of your affidavit.

20 **ADV BATOHI**: Thank you, Counsel. So, in sum, Chairperson, the essence of the allegations against Advocate Chauke in respect of his decision to withdraw all the charges, and I should add, Chairperson, and a failure to reinstate the charges following either the inquest, the decision of Judge Murphy, the decision of JA Brand, to an inquest that his decisions were not the correct one and not in line with our

policy and prescripts, given that the evidence with regard to the murder matter was strong, given that the State's case in respect of the murder charge could not be strengthened, further strengthened, by referring it to an inquest at paragraph 160.2, and by doing so, in fact, the case, the strong potential to weaken the case was a huge risk, and paragraph 160.3, the decision to withdraw charges was based on weak representations without any substantiation, which was found to be, later, to be totally false.

10 **ADV MOHLAMONYANE SC**: Earlier on, Advocate Batohi, you were subject to correction about the charges. You were unsure as to exactly which charges and how many there would be, there were. These charges appear, Madam Chair, in RM5. They are set out, they are tabled there, yes, RM4, I beg your pardon, RM4 bundle, the page is RM01048.

CHAIRPERSON: Bundle 4, page?

ADV MOHLAMONYANE SC: 1048, 01048. I will ask the witness to read the tabled charges, which Mdluli, which Lieutenant General Mdluli faced, into the record.

20 **ADV BATOHI**: The charge and the date and the complainants is mentioned on this page. 1.1 is intimidation, 1998.

CHAIRPERSON: Before you proceed, mam, what is this document, RM4?

ADV MOHLAMONYANE SC: It is contained in bundle RM4 ...[intervenes].

CHAIRPERSON: Reasons and findings, is that the document? Oh, thank you. RM4 is part of the judgment of Judge Mokgoathheng.

ADV MOHLAMONYANE SC: That is so, Madam Chair, I have been shown the judgment and the charges as set out there appear on page 2 of Mokgoathheng J's judgment. In our bundle it is 1048.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: Proceed to read them into the
10 record, Advocate Batohi.

ADV BATOHI: Thank you.

CHAIRPERSON: The charges?

ADV MOHLAMONYANE SC: The charges only, because she was unsure as to the rest of the charges.

ADV BATOHI: May I proceed, Chairperson?

CHAIRPERSON: You may proceed.

ADV BATOHI: Thank you. Chairperson, this case was heard in the High Court of South Africa, Gauteng Local Division. The charges, 1.1, intimidation, 1997, the complainant is
20 Lerato Sebalu. And then intimidation, 1997, another case where the complainant, no, the complainant is Lerato as well as Sophie, there is no surname.

Intimidation in 1998, Lerato Sebalu. Intimidation in 1990 - it says 3 there, I am not sure if that is a correct date. Justina, Lina, and Sophie. My understanding is Justina and

Lina, I stand to be corrected, were sisters of the deceased. Kidnapping, 1.5, 1998, Alice Manana. She was the witness at the civil ceremony of the wedding and also the lady who was shot at twice, although there is no attempted murder charges that were preferred.

1.6, assault, Alice Manana. 1.7, intimidation, Alice Manana. These are all in 1998. Assault with intent to cause grievous bodily harm against Alice Manana. Kidnapping of Tsidi Buthelezi and Oupa Ramojibe, and Oupa Ramojibe
10 being the deceased. Assault against Alice Manana. Assault with intent to cause grievous bodily harm, Oupa Ramojibe, the deceased in this matter.

Defeating the ends of justice, which is 1997 to December 2000, and that is in respect of accused 2 only, and from the name, it is Mtunzi Mtembeni and another, so I imagine the other would be Richard Mdluli and he would be
accused number 2. Those are the charges.

CHAIRPERSON: Thank you.

ADV BATOHI: For completeness, the accused were
20 convicted, certainly Mr Mdluli was convicted and sentenced to, I think it was 5 years' imprisonment, but I do not have the precise sentence in front of me. We can get that. The trial was completed finally. This would be about 20 years after the incidents had taken place.

CHAIRPERSON: How many years?

ADV BATOHI: 20 years.

CHAIRPERSON: 20.

ADV MOHLAMONYANE SC: Advocate Batohi, you say you are not sure as to which charges he was convicted of.

ADV BATOHI: Yes, which charges precisely, but I did mention the sentence, so perhaps we can get that and it would be ...[intervenes].

ADV MOHLAMONYANE SC: Ja, it appears in the judgment, maybe to ...[intervenes].

10 **ADV BATOHI**: I just have the first page, sorry.

ADV MOHLAMONYANE SC: Ja, I will refer you to the last page. You may not be having it. I will ask that you be given the last page, which you can read into the record, which shows which charges Lieutenant General Mdluli was convicted of.

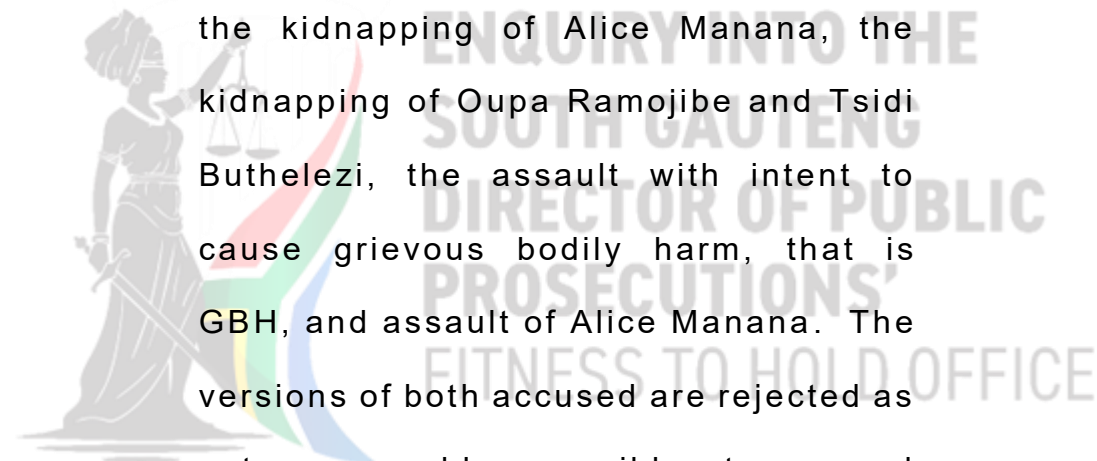
ADV BATOHI: Thank you, Counsel. So you are referring me to page 1216 or 1215?

ADV MOHLAMONYANE SC: It is RM01206.

20 **ADV BATOHI**: Okay, I will read from the middle of the paragraph. The evidence, or perhaps I will read from just further up. It states from the previous page:

“My findings are based on evidence I have listened to attentively for over 4 years, and I have to make this point that this judgment in my view is not the type

of judgment one writes down in 10 pages. I could have done so in 10 pages, but it is a type of judgment one has to make understandable to everybody, particularly the Ramojibe's family who are the aggrieved party in this case. The evidence of the state is accepted. Consequently, the state has proven its case against both accused beyond a reasonable doubt in respect of the kidnapping of Alice Manana, the kidnapping of Oupa Ramojibe and Tsidi Buthelezi, the assault with intent to cause grievous bodily harm, that is GBH, and assault of Alice Manana. The versions of both accused are rejected as not reasonably possibly true, and consequently, except the two charges on count 12 and count 7, the accused are found guilty as charged.”



And the judgment is dated 31 July 2019 and signed by the Judge.

CHAIRPERSON: And as charged refers to the very charges that you read into the record a while ago?

ADV BATOHI: Yes, I would assume so, Chairperson. That

seems to be the case.

ADV MOHLAMONYANE SC: Advocate Batohi, at this moment, you want to refer briefly, it is an overview, a brief overview to the legal frameworks.

ADV BATOHI: Yes, I do think, I think our Counsel was preparing, junior Counsel, the legal frameworks as it links to the Mdluli matter, linking back in terms of the conduct. I am not sure if we have that at hand. I do not have it before me. I am not sure if we are ready to proceed with this at this point.

10 **ADV MOHLAMONYANE SC:** So ...[intervenes].

ADV BATOHI: I have not looked at the document.

ADV MOHLAMONYANE SC: Do you want to park it and then we will – it appears to be ready.

CHAIRPERSON: If you may recap, Advocate Mohlamonyane, what was the question?

ADV MOHLAMONYANE SC: Madam Chair, she would like, at this juncture, to refer briefly as an overview to the legal frameworks.

ADV BATOHI: Chairperson ...[intervenes].

20 **ADV MOHLAMONYANE SC:** Yes, you may proceed. Maybe you want to clarify something.

ADV BATOHI: Sorry, Counsel. Chairperson, just to clarify, I have only received the document and I need to go through this so that I am satisfied and I present it in a structured, coherent way. So I am not in a position to proceed with this

at this point in time.

CHAIRPERSON: That is why I was asking Counsel to repeat his question so that I understand what he wants you to do. What is it, Counsel?

ADV MOHLAMONYANE SC: I had asked her to refer back to the legal frameworks in a brief overview of how Advocate Chauke's actions were not in compliance with constitutional obligations and various other regulatory frameworks.

ADV BATOHI: Chairperson, I have indicated that I would
10 prefer to have a look at this document and prepare better for this part of the testimony. It is a very important part, Chairperson.

CHAIRPERSON: And the witness is given a document to reflect upon.

ADV MOHLAMONYANE SC: That is correct, Madam Chair.

CHAIRPERSON: What is this document?

ADV MOHLAMONYANE SC: I have not had sight of the document.

CHAIRPERSON: So the witness is to speak to a document
20 that you have not seen and that we may not have seen.

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

CHAIRPERSON: Will we understand what she is reading or talking about? If you do not have it and we do not have it, it will complicate matters.

ADV MOHLAMONYANE SC: I agree, Madam Chair.

CHAIRPERSON: Maybe have a look at the document, Counsel, the document that the junior Counsel has just presented to the witness and tell us what that document is or comprises of. Maybe we can take it from there.

ADV MOHLAMONYANE SC: I will do so, Madam Chair.

CHAIRPERSON: [Indistinct]... [microphone off] junior Counsel, maybe you do that. Take the document back from Advocate Batohi, give it to Counsel to look at so that he can tell us what this document is, because we are going to be told
10 about the document that we do not know what it is. Counsel, in fairness to the witness and also to yourself and to all of us, perhaps you can park that question so that you can reflect properly and also indicate to us later what it is and whether it is necessary for us to have a peek at that document. Outside that, you may proceed. Then you can go back to that question at a later stage.

ADV MOHLAMONYANE SC: Indeed, Madam Chair, I will do so. For the moment, Advocate Batohi, let us proceed and go back to your affidavit. We will go to where the process starts
20 now, the process leading to the referral, which is on page 69.

ADV BATOHI: I am there.

ADV MOHLAMONYANE SC: You may proceed with the process.

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: Some of the aspects you have

already touched ...[intervenes].

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: But it may be important just to touch them a bit and then proceed with the whole process until the matter reached the Office of the President.

ADV BATOHI: Thank you, Counsel. So, Chairperson, at paragraph 161, on 13th of May, 2021, and that is the letter we have already been referred to, I addressed a letter to Advocate Chauke, in which I requested him to explain his
10 actions or his decisions in the Booyesen matter and the Mdluli matter. This letter is marked as SB5. On the 28th of May, 2021, Advocate Chauke responded to my request. I think that ...[intervenes].

ADV MOHLAMONYANE SC: SB5 is on page 150 to 154, not so?

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: It is SB5, page 150 to 154.

ADV BATOHI: I think that is correct. I am checking. I have no reason to doubt you, Counsel.

20 **CHAIRPERSON**: [Indistinct]... [microphone off] page 231?

ADV MOHLAMONYANE SC: Ja, 231, sorry, my apologies. It is on page 231 we earlier referred to.

ADV BATOHI: Yes, that is right. That is correct.

ADV MOHLAMONYANE SC: And it ends on page 235.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Where your signature appears. And the next one is SB5A, which is Advocate Mlotshwa's affidavit that has already been referred to earlier, which was an attachment to your letter.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: You do not have to go to it, but you refer to it in your letter to Advocate Chauke.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Now you may proceed with SB6.

10 **ADV BATOHI:** SB6 is Advocate Chauke's response to my request. It starts on page 240.

ADV MOHLAMONYANE SC: It starts on page 240.

ADV BATOHI: Yes, I am checking to see if my date, if the date of 28th of May is correct. I am trying to find ...[intervenes].

ADV MOHLAMONYANE SC: It has to be correct as it appears on page 240, SB6 240, on the accompanying letter, on the letter from Advocate Chauke.

20 **ADV BATOHI:** Yes, that is correct. That is correct, the date is 26 May, 2021.

ADV MOHLAMONYANE SC: Yes, proceed.

ADV BATOHI: So I received a response. The essence of Advocate Chauke's explanation in respect of the Mdluli matter was that whilst he was satisfied there was a *prima facie* case in respect of some of the charges, he was not

satisfied that there was a *prima facie* case in respect of the murder charge and the attempted murder of, charge that would relate to Alice Manana. He therefore decided to hold an inquest into the death of Mr Ramojibe.

In respect of the Booyesen matter, and these are all in summaries, he explained that he had been requested by Advocate Jiba to assist in putting together a team of Prosecutors to guide members of the Police and IPID on the investigation and prosecution. He agreed, so he said, to act
10 as a coordinator of the prosecution team.

He alleged that his role as coordinator was confined to dealing with logistics and administrative matters of the team and coordinating between stakeholders and providing feedback and briefing on the team to Jiba. He alleged that his role excluded prosecutorial decisions to prosecute.

And at this point, I would pause to add that all of the other roles that Advocate Chauke sets out would be the roles of a DPP. He includes all of that, accepting, but excludes the prosecutorial decision role. And I would say that that is
20 because he was aware that he did not, he knew he did not have jurisdiction to deal, to take prosecutorial decisions regarding a matter that was not in his jurisdiction, as is his constitutional obligation.

On paragraph 165, on the 19th of October ...[intervenes].

CHAIRPERSON: Might I interpose.

ADV BATOHI: Sure.

CHAIRPERSON: So remember the question that we dealt with relating to this aspect, Counsel, that was parked, and we requested that you revert to it regarding the legal requirements when one DPP straddles between two provinces or correctly put, between two jurisdictional areas of prosecutions. And mention was made of the terms of, rather, the policies and directives.

10 Have you been able to find those relevant provisions that prohibits that straddling, and or, what he ought to have done, Advocate Chauke in so, going to KZN and assuming prosecutorial functions, as you, has been put to us, of another DPP outside his jurisdiction?

ADV MOHLAMONYANE SC: Not as yet. I have not as yet managed to find anything, but I am still continuing to, together with the assistance of Advocate Batohi.

ADV BATOHI: Chairperson, I can try to assist in this matter and deal with that question right now.

20 **CHAIRPERSON**: Yes, you remember it was parked.

ADV BATOHI: Yes, I do recall that, Chairperson.

CHAIRPERSON: Because you could not answer it. And I requested that Counsel, with the assistance of his team, should try to assist us.

ADV BATOHI: Chairperson, I certainly would like to deal with

this matter at this point.

CHAIRPERSON: Thank you.

ADV BATOHI: Chairperson, there is nothing in the policy and directives that would permit a DPP of one jurisdiction to exercise any of his or her powers in the jurisdiction of another DPP. This is a very specific constitutional framework that is set out in our Constitution. I do not have a copy of the Constitution here, but section 179, that is very, very clear about the jurisdiction of a DPP and the territorial jurisdiction
10 where one may exercise your powers as conferred by the Constitution. So if we go to paragraph 179 ...[intervenes].

CHAIRPERSON: Section?

ADV BATOHI: I beg your pardon, section 179 of the Constitution, which deals with the prosecuting authority, there is a single national prosecuting authority in the Republic structured in terms of an Act of Parliament and consisting of a National Director of Public Prosecutions who is the Head of the prosecuting authority and is appointed by the President as the Head of the National Executive, and (b)
20 Directors of Public Prosecutions and Prosecutors as determined by an Act of Parliament. This is the provisions in the Constitution.

Subsection (3) states:

“National legislation must ensure that
the Directors of Public Prosecutions are

appropriately qualified.

(b) are responsible in specific jurisdictions.”

That is a constitutional requirement subject to subsection (5). Chairperson, I leave it at that. And then if we go to the NPA Act, I am not sure what section this is, I am just trying to deal with it.

Section 24, Chairperson, deals with the powers, duties and functions of Directors and Deputy Directors.

10 “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 ...”

And the powers are set out in subsections (1)(a) to (d). So, Chairperson, there is no legal requirements. This is a constitutional obligation that DPP’s are appointed and must
20 exercise their powers within a very specific territorial jurisdiction. So there is nothing in the policies or directives that can override this constitutional framework that requires a DPP to exercise your powers within a specific area of territorial jurisdiction.

ADV BALOYI-MERE SC: Advocate Batohi, let us go back to

the Constitution and look at 179(3)(b), that says:

“National legislation must ensure that the Director of Public Prosecutions are responsible for prosecutions in specific jurisdictions subject to subsection (5).”

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: Would you please go to subsection (5).

ADV BATOHI: I am there.

10 **ADV BALOYI-MERE SC**: And read it because I think to complete the picture, it is better to read the ...[intervenes].

ADV BATOHI: Sure, I agree.

ADV BALOYI-MERE SC: Yes.

ADV BATOHI: I will do that now. Subsection 5, sorry, section 5, the national, sorry, 179(5) states:

20 “The National Director of Public Prosecution must determine with the concurrence of the Cabinet Minister responsible for the administration of justice and after consulting with Directors of Public Prosecutions, prosecution policy which must be observed in the prosecution process.

(b) Must issue policy directives which must be observed in the prosecution

process.

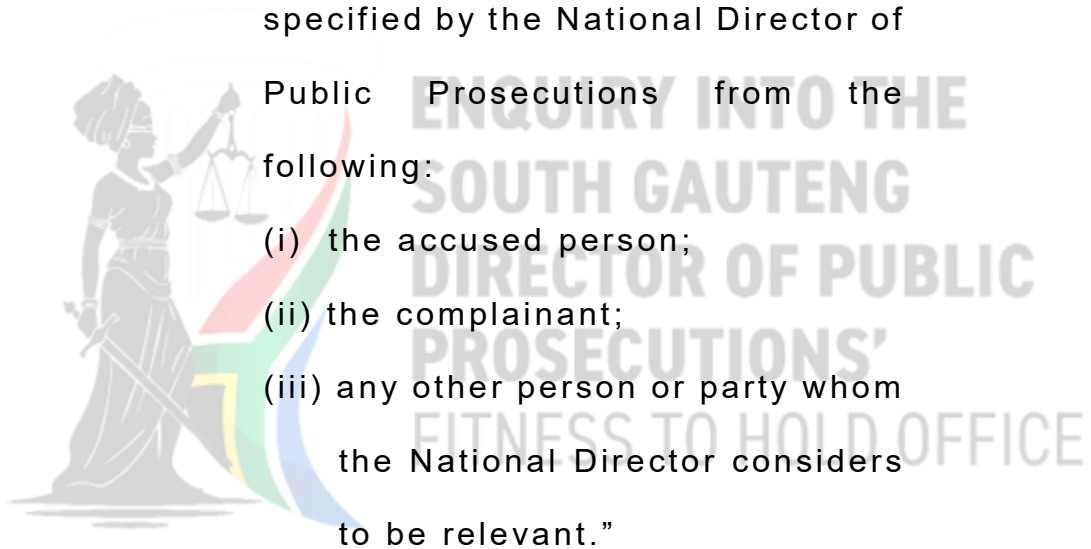
(c) May intervene in the prosecution process when policy directives are not complied with.

(d) May review a decision to prosecute or not to prosecute after consulting the relevant Director of Public Prosecutions and taking representations within a period specified by the National Director of

10

Public Prosecutions from the following:

- (i) the accused person;
- (ii) the complainant;
- (iii) any other person or party whom the National Director considers to be relevant.”



Subsection (6) ...[intervenes].

ADV BALOYI-MERE SC: Thank you. I wanted you to go to those exceptions at (5). And would you agree with me that although the provisions of section 179(1), (2) and (3) are peremptory, there is, I mean, section 5, subsection (5) gives the NDPP some sort of room to manoeuvre and exercise his or her discretion in instances, for example, at (c) where it says they may intervene in the prosecution process when

20

policy directives are not complied with.

The point that I am making is sub (5) gives the NDPP some sort of room within which to move. It is not as straight-jacketed as sub (1) and (2).

ADV BATOHI: It sets out what a National Director should do and I am, when the panel member mentions “room to move”, I need to understand, because it is very specific. It deals with determination of prosecution policy, policy directives, intervention in the prosecution process, review of a decision.

10 So they are very specific issues that a National Director must deal with.

ADV BALOYI-MERE SC: But once it say “may”, it means they may or they may not.

ADV BATOHI: That is correct. May is not peremptory.

ADV BALOYI-MERE SC: Thank you.

ADV BATOHI: It says “may” in (c) and (d).

ADV BALOYI-MERE SC: Yes.

ADV BATOHI: That is correct.

CHAIRPERSON: And what of 179(5)(c)?

20 **ADV BATOHI**: Chairperson, there are instances where, if a National Director is of the view that prosecution policy directives are not being complied with - let me just read this, (c) - sorry, sorry, I am looking at (b).

“Where policy directives are not complied with, the National Director

may intervene in this process in order to ensure that policy directives are complied with.”

So this is a power that the National Director has to intervene if he or she is of the view that policy directives are not being complied with.

CHAIRPERSON: Now, what of in a matter like this where you have indicated earlier that there are no specific policy provisions regarding this aspect, will the NDPP then be
10 entitled to intervene in the absence of such policy directives regarding a matter such as this one?

ADV BATOHI: Chairperson, if I understand your question correctly, it would mean can a National Director intervene to appoint a DPP to exercise jurisdiction outside his or her division? Am I correctly understanding the question?

CHAIRPERSON: Yes, if, you remember the first question was if you can assist us with the relevant prohibitory provisions in the policy directions that say, and the NDPP of one
20 jurisdiction cannot and should not straddle in another province. And I asked, are there requirements or certain aspects, legal requirements that he must satisfy before doing so.

ADV BATOHI: Chairperson, my answer was that it cannot be done, because the Constitution at 179(3)(b) states that:

“National legislation must ensure that

Directors of Public Prosecutions are responsible for prosecutions in specific jurisdictions subject to subsection (5).”

And then if you read that with the NPA Act that appoints DPP’s to very specific jurisdictions, only the President who appoints a DPP to a specific jurisdiction can appoint a DPP to exercise jurisdiction in some other territorial area besides the one to which he or she is appointed.

CHAIRPERSON: Yes, against that background that you are
10 depicting before us, what then if the NDPP in a matter of centralization appoints a DPP to oversee or put up together a team, such as in this case, where a team had been to straddle, for instance, Advocate Maema from North West, being appointed to straddle and the NDPP South Gauteng being appointed to carry out certain functions in KZN.

ADV BATOHI: Chairperson, there is a difference with centralization. And it is important to bear in mind that when that happens, the case is centralized to a particular jurisdiction and then the DPP of that jurisdiction will be the
20 one that will be in control, in charge of the case in his or her jurisdiction.

Before that, a step before that would be that the two DPP’s would consult and they would agree that a case be centralized to a particular jurisdiction. Like in this case, the agreement was the case be centralized in KZN. That being

the case, the KZN DPP will have jurisdiction over that case. If the case was centralized to South Gauteng, then the DPP of South Gauteng will have jurisdiction.

But in this particular case, it was centralized to KZN and the DPP of South Gauteng had no jurisdiction over the matter in KwaZulu-Natal.

CHAIRPERSON: That means if you are correct, the act by the NDPP, or let me refashion the question. That may mean that the action by the NDPP, your office, requesting the South
10 Gauteng Province DPP to put up together the team to oversee and coordinate was wrong?

ADV BATOHI: That is correct. The DPP South Gauteng had no jurisdiction to oversee and coordinate a matter and take prosecutorial decisions in respect of a matter in KwaZulu-Natal.

CHAIRPERSON: And of course, we are not seized with that matter here about the incorrectness of the decision of the NDPP then ...[intervenes].

ADV BATOHI: That is correct.

20 **CHAIRPERSON**: Advocate Jiba.

ADV BATOHI: We are not seized with that.

CHAIRPERSON: We are focusing on the conduct of Advocate Chauke.

ADV BATOHI: That is correct.

CHAIRPERSON: And there is no doubt that, at least so far,

that he was requested to coordinate, wrong or right?

ADV BATOHI: On our case, Chairperson, he was the *de facto* DPP. What Advocate Chauke says, he was requested to coordinate, that is his version.

CHAIRPERSON: Yes, I beg your pardon. I am asking the question on his version that seems not to be challenged, that he was indeed requested by the NDPP to put up the team together, coordinate, etcetera. As to what then he did is besides the point. I just want to get this one clear.

10 **ADV BATOHI**: Yes, to put up a team to coordinate and be the *de facto* DPP, Chairperson, that is important.

CHAIRPERSON: I am not sure, I do not want to take it with that legal concept at this stage. It may come out later in evidence that he was actually a *de facto*, as opposed to *de jure* DPP. But I suppose it is a matter for argument.

ADV BATOHI: Yes, Chairperson, and there is been a lot of evidence that is been presented already in this regard. Chairperson, I was going to the NPA Act, just to complete that.

20 **CHAIRPERSON**: Sorry, before you do that ...[intervenes].

MS RAMAGAGA: [Indistinct]... [cross-talking] I am just waiting for the Chair to finish.

ADV BATOHI: Oh, apologies.

CHAIRPERSON: Before you do that. Thank you.

ADV BATOHI: May I proceed?

CHAIRPERSON: Yes, you may.

MS RAMAGAGA: No, just a minute. Did you see the memo that authorized Advocate Chauke to coordinate the team, the team, the prosecution team?

ADV BATOHI: I do not think I have seen such a memo. So I am just thinking to make sure, because as I sit here, I do not think I have seen such a memo.

MS RAMAGAGA: But then, did you try to search for that memo in the records?

10 **ADV BATOHI**: Chairperson, we tried to search for a lot of memos in this matter in the National Director's Office. There are files that are missing, that we cannot find. So we have searched for a number of documents, but the files in this matter are missing from the DPP, from the National Director's safe, as it is. But I have not found this document.

MS RAMAGAGA: Ja, but then, did you hear my question? I know I have said it again and again, that please answer the asked questions when I ask. I have asked the question, did you search for the memo? I am talking about this particular
20 memo, and I would appreciate if you were to answer that question that I have asked.

ADV BATOHI: I did not.

MS RAMAGAGA: Right, thank you.

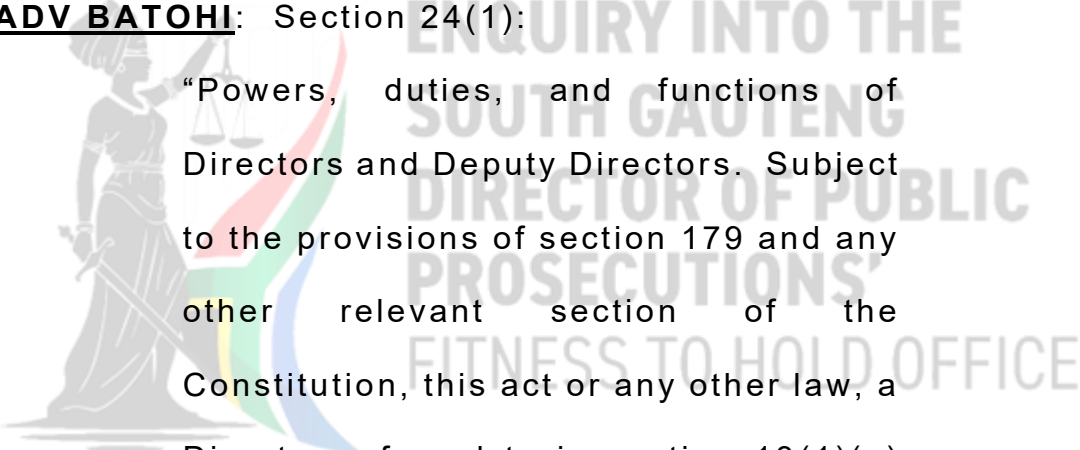
ADV BALOYI-MERE SC: Advocate Batohi, you say, when you were asked whether a DPP can straddle provinces when

prosecuting in another DPP's jurisdiction, you went to the Constitution, and you came to the conclusion that that is not allowed by the mere reading of the Constitution that a DPP is appointed to a specific jurisdiction.

ADV BATOHI: Not only that, that together with reading section 24 of the implementing legislation, which is the NPA Act, section 24(1), if I can read that.

ADV BALOYI-MERE SC: Please, please assist me before I make a mistake and again ask you a question that is not
10 relevant. I cannot find my Act.

ADV BATOHI: Section 24(1):
“Powers, duties, and functions of Directors and Deputy Directors. 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
20 do all those things.”



And we know that the President appoints DPP's to specific areas of jurisdiction and it is only in those areas, territorially defined areas, that the DPP can exercise his or her jurisdiction.

ADV BALOYI-MERE SC: I want to take you back to section

179 of the Constitution because it has sub (5) that gives the NDPP some discretion to do something. For example, the subsection that we referred to, (c), that the NDPP may intervene, an intervention may come in different forms because it is not specified what type of intervention. But then I would like to, if possible, for you to refer us to a specific section that makes it exclusive for the DPP to only operate in their area of jurisdiction. Do you have such a clause, either in your enabling legislation or your policies, because I know
10 in the Constitution it is not there.

ADV BATOHI: In my view, Chairperson, and I think that this can be subject to argument later, the Constitution, section 179(3)(b) read with the NPA Act, section 24(1), means that together, given the fact that a President appoints a DPP to a specific area, it is clear in my view, Chairperson, that the Constitution intended, and the NPA Act, that a DPP exercise his or her powers in a very specific area of jurisdiction and that even the National Director's powers under section 24(1), 24, it is the power of intervention, cannot supersede this and
20 give a DPP jurisdiction in another area where the DPP has not been appointed.

ADV BALOYI-MERE SC: The power of intervention given by the Constitution cannot supersede the Act, the power of intervention given by the Constitution at 179(5)(c).

ADV BATOHI: Chairperson, it is not, that is a very, it is a

broad provision. It certainly does not state that the National Director has the power to appoint or to give a DPP powers to exercise his or her jurisdiction in another area. And my view is if a National Director does that, it would be violating the Constitution as well as the NPA Act, as well as the appointment of the President of a DPP to exercise his or her powers in a very specific area of jurisdiction.

I think I testified that in the event that a DPP, there is circumstances that the Executive considers it that a DPP
10 should exercise powers in another jurisdiction, then the Minister or the Executive has to give them that power by way of appointment to another jurisdiction.

ADV BALOYI-MERE SC: Thank you.

ADV MOHLAMONYANE SC: Maybe Advocate ...[intervenes].

CHAIRPERSON: Before that, Counsel. Advocate Batohi, in respect of 179(5)(d), the review envisaged in that sub-provision, within what period should or can it be undertaken by the NDPP?

ADV BATOHI: That is a very good question, Chairperson. It
20 simply says, sorry, it is 179(5)(d):

“Within a specified period.”

And these review processes sometimes take extremely long. So we try to specify periods and give accused persons where they indicate they want to review, a decision reviewed, very often, there would be an indication in

the lower courts that an accused person wants to submit a review to the National Director and you know, sometimes it takes long before we get the representations.

But once the matter arrives at the office of the National Director, we certainly try to expedite it. You will note from section 179(5)(d)(i) it does require that the National Director obtain representations in this process from various persons, including the accused, the complainant, or any other party that the NDPP considers relevant. Sometimes those
10 processes also take a while.

So I cannot give you a specific timeframe, save to say that we do try to finalize it as expeditiously as possible in the circumstances.

CHAIRPERSON: Thank you. As regards this matter, within what period was the review process undertaken?

ADV BATOHI: This was not a review process in terms of section (5)(d). This was, it was the NDPP reconsidering the authorization decision of a previous NDPP and we actually need to address the panel on specifically what the legal
20 framework would be. I was asked this question, I think, yesterday about this and it certainly is not a review contemplated in 179(5)(d). It could be an intervention, but I am not sure. But we will have to address the panel after having looked at this more carefully, this legal issue.

CHAIRPERSON: It is important to get this correct because it

is a constitutional imperative.

ADV BATOHI: Absolutely, Chairperson.

CHAIRPERSON: It speaks of a review of a decision to prosecute or not to prosecute.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And it requires the Head to receive representation from a specific DPP.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And assuming you are incorrect that this
10 matter does not fall within the purview of (5)(d), Advocate Chauke, as you did request him to make representation, did so.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: In relation to his alleged prosecutorial decisions that he took.

ADV BATOHI: That is correct.

CHAIRPERSON: Let us assume this scenario that I am setting out is the correct version, the question still is, within what period did this review, on the assumption that it is a
20 review ...[intervenes].

ADV BATOHI: I get that, Chairperson.

CHAIRPERSON: Within what period did it happen?

ADV BATOHI: Chairperson, if I am not mistaken, it would have been about three months, maybe. I am not sure. It was in 2019 that it happened. I got the De Kock report in 2019,

July, I think it was, and I would have made a decision after that. I do not have the precise date when I took the decision, finally. We can get that, though.

CHAIRPERSON: Yes, I am also asking this bearing in mind that when most of these things happened, you were still out of the country.

ADV BATOHI: That is correct.

CHAIRPERSON: And certain decisions were taken when you were not in the country.

10 **ADV BATOHI**: That is so.

CHAIRPERSON: Including the alleged prosecutorial decisions by Advocate Chauke. And you arrived in the country a while after such prosecutorial decisions were taken.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: We will probably look at the dates to get the chronology correct. And my question is based purely on that background that, and I do not expect you to remember the first decision that was taken, the first impugned decision was taken, but I am just trying to figure out, constitutionally speaking, can we revisit decisions that happened many years
20 ago, given the principle of finality?

ADV BATOHI: Chairperson, this question, Chairperson did raise this question, I think, a couple of days ago.

CHAIRPERSON: Yes, I asked it because it really worries me.

ADV BATOHI: I get, I understand, Chairperson. It is an

important issue. And Chairperson, I, given the, I should say that the Zondo Commission was investigating allegations of state capture in the National Prosecuting Authority. In fact, that is in my affidavit. We were going to come to that in the process.

And there was, given the evidence that has emerged, I did not expect that my predecessor would have, well, it was his decision that I, ja, his authorization, there were two authorizations for racketeering. One was, I think, around, 10 taken by Advocate Jiba in about 2014 or 2013. The other one was a subsequent one taken by Advocate Abrahams in, it was later, probably around 2016, I am not sure, thereabouts. I will have to check those dates.

And you certainly, I would not have, so the first decision relates to the racketeering authorizations and Advocate Chauke's role. So given that they were part of that, I did not expect that they were going to review it. The other matters relating to Mr Mdluli were, yes, certainly much older and for whatever reason, I cannot speak for my predecessors, 20 they did not consider that there was potentially a gross miscarriage of justice, which I did, and therefore looked into the matter.

There were several other matters that I also looked into, but these were the two that I recommended to the President, that he consider appointing a panel to inquire into

Advocate Chauke's fitness to hold office.

CHAIRPERSON: I suppose the referral action on your part was eventuated by complaints. Was it on your own accord?

ADV BATOHI: This was on my own accord in the context of a lot of public outcry about the possibility that the NPA had been captured and that there were decisions that were being taken that were politically influenced. And there was, as a National Director, I felt that it was my duty to look into that matter. And of course, if there was no basis for it, then to
10 assure the public that that was not the case. But if there was a concern with it, then of course I needed to take steps that I needed to in the circumstances.

CHAIRPERSON: I ask these questions following (i), or rather 179(5)(d) read with (i) to (iii) in particular, that there would have been representations from the accused people or persons, the complainant or a complainant or any other party who would have then approached the NDPP. That is why I am asking if there would have been a complaint to you in the context of (d), that would have necessitated your referral to
20 the President. But you have answered it that you did it on your own accord.

ADV BATOHI: Thank you, Chair.

CHAIRPERSON: Proceed, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

CHAIRPERSON: I am looking at the time in front of me, and

it appears that this is the right time to adjourn. Would you like to park it here, or is there another matter linked to what you have been dealing with, particularly the provisions of the Constitution, so that we may not deal with issues piecemeal?

ADV MOHLAMONYANE SC: Madam Chair, before you asked, before you intended to ask her questions, Advocate Batohi questions, and before you proceeded with asking her questions, I wanted to deal with, not for quite a long time, to this straddling. I am very, very, very cautious. I am very
10 cautious without getting into argument. I just wanted to refer her to certain sections of the Act, the NPA Act, just for reference purposes, which may become relevant when these matters are argued, just for emphasis ...[intervenes].

CHAIRPERSON: Thank you, Counsel. Yes, thank you.

ADV MOHLAMONYANE SC: I am very, very cautious because this may be tentative prolixity. I do not intend to embellish. I beg everybody's pardon, because I will be referring to sections of the Act which have already been read into the Act, but I just wanted to put it to this perspective,
20 within which, when this straddling from one province to another is considered at the end of this enquiry, then one can be able to refer to these sections of the Act, and then perhaps at that stage, it will be proper to interpret them. Advocate Batohi ...[intervenes].

CHAIRPERSON: I beg your pardon.

ADV MOHLAMONYANE SC: Ja.

CHAIRPERSON: It is the court that interprets the law.

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: Maybe you can refer us to the provisions, and maybe refer to the relevant portions, because I am not sure what - my interpretation of the law here, or of the Act here, may not necessarily be binding on anybody, as we are not even bound by the decision of another Commission. So when you say you seek to interpret those provisions, I am not
10 sure whether it will help us, but you may, you may proceed.

ADV MOHLAMONYANE SC: Ja, they may become relevant in argument when we put our argument forth at the end of the enquiry, Madam Chair, but I take your point.

CHAIRPERSON: Yes, you can draw our attention to the specific provisions.

ADV MOHLAMONYANE SC: Let me start with Advocate Batohi, section 20(3) of the NPA Act and draw your attention to subsection (3)(a), which says:

20 “Subject to the provisions of the Constitution and this Act, the Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of:

(a) the area of jurisdiction for which he

or she has been appointed.”

Do you see that?

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: Now, go to subsection (4) of the same section. It is still:

“Subject to the provisions of this Act that any Deputy Director shall, subject to the control and directions of the Director, consent, exercise the powers referred to in subsection (1) in respect

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of:

(a) the area of jurisdiction for which he or she has been appointed.”

Do you see that?

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: Go to subsection (6). It says:

“A written authorization referred to in subsection (5) shall set out:

(a) the area of jurisdiction.”

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Now, the same ...[intervenes].

CHAIRPERSON: Did you jump (5)? Did you jump (5) deliberately?

ADV MOHLAMONYANE SC: I jumped it deliberately because I wanted to highlight the area of jurisdiction.

CHAIRPERSON: Thank you. Thank you, Counsel. Sub (6)?

ADV MOHLAMONYANE SC: Sub (6) I dealt with. I referred to it, rather. It says:

“A written authorization referred to in subsection (5) shall set out:
(a) the area of jurisdiction.”

When you go to section 24 ...[intervenes].

ADV BATOHI: Before I ...[intervenes].

CHAIRPERSON: May I, you see, this will necessitate questions. May I refer you to the wording of the provisions themselves. Sub (6) refers to a written authorization referred to in (5). Does it mean that a DPP may be authorized by the NDPP to perform, or rather, maybe to designate him or her to perform prosecutorial functions in another jurisdiction?

ADV MOHLAMONYANE SC: She may answer.

ADV BATOHI: Thank you. Chairperson, if we look at subsection (3), subsection (3) refers to a Director. It says:

“Subject to the Constitution and this Act, any Director shall, subject to the control and directions of the National Director, exercise powers referred to in subsection (1) in respect of:

(a) the area of jurisdiction for which he or she is appointed.”

When one goes to subsection (4), that provision relates to any Deputy Director. So it does not refer to a

Director.

“Any Deputy Director, subject to the control and directions of the Director concerned exercise the powers referred to in subsection (1) in respect of:

(a) the area of jurisdiction for which he or she has been appointed; and

(b) such offenses and in such courts as he or she has been appointed in

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writing by the National Director or a person designated by the National Director.”

Chairperson ...[intervenes].

CHAIRPERSON: I was speaking to (5), not (4).

ADV BATOHI: Yes, it is, (5) is important, Chairperson.

Section (5) relates to:

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“Any Prosecutor shall be competent to exercise the powers referred to in subsection (1) to the extent that he or she has been authorized in writing thereto by the National Director or a person designated by the National Director.”

Now a prosecutor is defined in this, in the Act and we need to go to the definition which will be clear that in

paragraph 5 a Prosecutor is not referring to a DPP. The DPP is referred to only in subsection (3) of section 20. I do want for clarity's sake explain, Chairperson, that a Prosecutor appointed in a particular area of jurisdiction can, and we dealt with this as well, can be appointed to do a piece of work, a prosecution in another, a Prosecutor in another, not a DPP, in another area in which case one of two things need to happen for that Prosecutor to have the authority to exercise powers in another jurisdiction.

10 Either the DPP of the receiving jurisdiction will issue a delegation to that Prosecutor to prosecute in his or her jurisdiction, or you will see that subsection (5) allows the National Director to also issue such a delegation for a Prosecutor from one area to prosecute in another area of jurisdiction.

 In that case the Prosecutor will report to the receiving DPP in whose jurisdiction he or she is, has been deployed to. Let us use that term for current purposes.

ADV BALOYI-MERE SC: As a follow up, let us go back to

20 (4). (4) refers to:

 “A Deputy Director who shall, subject to the control and directions of the Director concerned, exercise powers referred to in subsection (1) in respect of:

 (a) the area of jurisdiction; and

(b) such offenses in such courts as he has been authorized in writing by the National Director or a person designated.”

Is it not a mirror image of (5) while (5) refers to the Prosecutors who would be authorized by the National Director or by a person designated but then it also says the Deputy Director, subject to the control and directions of the Director ...[intervenes].

10 **ADV BATOHI**: You are correct.

ADV BALOYI-MERE SC: Who will perform one of those two, either in the jurisdiction or where they are authorized in writing.

ADV BATOHI: That is correct. Subsection (4) refers to a Deputy Director, and you are correct, subsection (5) refers to a Prosecutor and with regard to either of those categories a National Director can authorize them to conduct prosecutions in an area outside of the jurisdiction where they have been appointed but it does not apply to a DPP.

20 **CHAIRPERSON**: Advocate Mohlamonyane, sorry for interposing. You may proceed. You were just about to proceed to another section.

ADV MOHLAMONYANE SC: I have - excuse me, excuse me, Madam Chair ...[intervenes].

CHAIRPERSON: Yes.

ADV MOHLAMONYANE SC: Am I interrupting you?

CHAIRPERSON: You may proceed.

ADV MOHLAMONYANE SC: Thank you. I have changed my mind. I am no longer proceeding lest this be convoluted.

CHAIRPERSON: I suppose you are parking this legislative framework that you wanted to revisit and we will proceed to another aspect tomorrow?

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

CHAIRPERSON: It is after 4 o'clock.

10 **ADVOCATE NGCUKAITOBI SC:** Madam Chair, just to remind the panel that I have excused myself for tomorrow. If I do not show up, it is not out of disrespect.

CHAIRPERSON: I suppose you are placing it on record but you did mention in the morning.

ADVOCATE NGCUKAITOBI SC: Yes, indeed, thank you.

CHAIRPERSON: Thank you, Counsel. I do remember Advocate Hulley also mentioned that he will be absent for a temporal period because of some engagements. All that is noted. We will take an adjournment until tomorrow morning.

20 We will start at 9 o'clock with a view that we are going to adjourn early and we will instruct the technicians to be here at 4 o'clock in the morning and address their problems. We will adjourn until 9 o'clock tomorrow.

ENQUIRY ADJOURNS UNTIL 28 NOVEMBER 2025

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