

**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**

3 DECEMBER 2025

DAY 11



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

PROCEEDINGS ON 3 DECEMBER 2025

CHAIRPERSON: Good morning, everyone. Good morning, Advocate Batohi.

ADV BATOHI: Good morning, Judge. Good morning to the Panel. Good morning to Advocate Chauke and his team.

CHAIRPERSON: Good morning, *Ntate* Chauke. Good morning, Advocate Mohlamonyane. We are supposed to resume from where we ended on Friday. We have seen correspondence between yourselves, the evidence-leading
10 team and Advocate Chauke's representatives. What we assist with is a purported application to amend. I suppose that it is to amend the terms of reference. We are of the view that if you would like us to consider your request, you have to file a substantive application for an amendment if we are to consider this request, failing which, I suppose you know where this request should go to. I am going to pause there on this aspect, and then you tell us whether we are misguided in relation to the latter suggestion.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. May
20 I, at this stage, point out that actually this application does not emanate from the Evidence Leaders themselves. It emanates from the NPA, and the NPA would like to address the Panel in that regard. Advocate Hulley would like to address the Panel in that regard, if you allow him. And I will ask that he be given that opportunity so that he should put it

ADV MOHLAMONYANE SC: May I then, Madam Chair, with your permission, enquire as to whether I understand Madam Chair clearly. If the NPA wishes to pursue the proposal for the amendment or the application for the amendment with the President, they themselves, the NPA itself, should direct such application or such request to the Office of the President and not through the Panel here. Did I understand Madam Chair to be saying so?

CHAIRPERSON: Yes, I am not here to advise anyone. I am
10 simply saying there are two options. If you would like us to consider the contents of the correspondence, you would have to approach us by substantive application. We need not tell Counsel that. You people are senior counsels. You know how to do these things. Alternatively, if we need not consider your request, the option is to start where the NPA started by approaching the President.

The terms of reference are clear. Matters of amendment fall within the space of the President, not necessarily us. But if we are to consider all the things that
20 you are, or the allegations or averments in your request, it should be put in a proper application so that we can consider that. I need not explain myself further.

ADV MOHLAMONYANE SC: I hear you, Madam Chair.

CHAIRPERSON: I think all of you know what I am talking about.

ADV MOHLAMONYANE SC: Indeed. Sorry, Madam Chair.

In a sense, it does affect us because any amendment has a knock-on effect. I just want to put that on record.

CHAIRPERSON: You need not raise your voice, Advocate Ngcukaitobi, because they have to choose. If they need to file, you will have an opportunity to say your piece. At the moment, we cannot speak to the contents of the correspondence. They must file a substantive application if they so elect. If not, they know the route to follow, or should

10 know the route to follow.

The second matter, Advocate Mohlamonyane, is the second supplementary affidavit. This big document. It is actually more than that. It was filed off record yesterday. I am not sure how you wish to proceed. Obviously, we have not even read this document, but I suppose that you will be able to continue from where you started, or you ended, rather, last week in terms of your initial, or Advocate Batohi's initial affidavit.

If my recollection is correct, you paused at paragraph
20 179, where you were dealing with the opinion, the legal opinion that was presented by Advocate Hulley SC. Am I correct? 179 is page 73 of the affidavit of the witness, Advocate Batohi.

ADV MOHLAMONYANE SC: You are correct, Madam Chair.

CHAIRPERSON: So you may proceed from where you ended

and indicate to us how you wish to proceed with these bulky documents that you filed off record yesterday. Secondly, may I know whether Advocate Chauke's representatives have been given these documents?

ADV NGCUKAITOBI SC: We received them, Madam Chair, also today, this morning.

CHAIRPERSON: You received the bundle today?

ADV NGCUKAITOBI SC: We have not received a physical copy, but it was sent on email, but we can work on the email.

10 But we also got it this morning.

CHAIRPERSON: This morning. Counsel, how do you propose to proceed?

ADV MOHLAMONYANE SC: When we consulted with Advocate Batohi on Monday, she indicated that she will not, if my memory serves me well, get into these annexures at any great length, save to point out maybe one or two documents therein. But I got the impression that that is how we will proceed with the document today.

20 **CHAIRPERSON:** We have not read the document. We do not know why they were filed in the first place. Counsel, I am sorry. You may confer with your colleague.

ADV MOHLAMONYANE SC: My apologies. My Co-Evidence Leader indicates to me that Advocate Hulley asked that he go back to his original seat from where he is sitting today because he thought he was going to address the Panel on the

issue of the TOR amendments, the proposed TOR amendments.

CHAIRPERSON: You may, Counsel. We speak to you through the Evidence Leader. And I suppose you understand our position regarding the request that you wanted to make.

ADV HULLEY SC: Thank you, Judge. I just did want to walk across your line of discussion.

CHAIRPERSON: No, by all means.

ADV HULLEY SC: Thank you, Judge.

10 **CHAIRPERSON:** By all means, Counsel. Feel free. Our chamber, as you can see, ordinarily our clerk should be sitting in front of us. This is not the best chamber that we could ordinarily have had, but we had to make the best of what we have. So feel free, even during the proceedings, if you need to move around, we will understand.

ADV SKOSANA SC: Madam Chair, while we are still discussing the logistics, I just wanted to indicate that I may have to request to be excused precisely to go and prepare what the Madam Chair has talked about, the substantive
20 application and so on, those issues, so that simultaneously, without disturbing the process, we also attend to that. I just wanted to indicate that.

CHAIRPERSON: Advocate Skosana, we will excuse you to, if you are still minded to do so, to go and prepare the substantive application and please serve it timeously on

Advocate Chauke's team so that they can respond timeously. We will have to talk about timeframes. Ordinarily in court you will follow the court rules within which to file an answering affidavit responding to your founding papers. We have not dealt with those aspects in our rules.

We did not anticipate an interlocutory application. We may, during lunch break, have to speak to both, not lunch break, maybe teatime, talk to both parties with a view to determine orally the timeframes that will be reasonable in the
10 circumstances without having to amend the enquiry rules. We will listen to both of you as to the reasonable time that Advocate Chauke will need and the timeframes within which you will need to file a reply, if any. For now, if it is necessary, you may leave or leave during teatime after our discussion.

ADV SKOSANA SC: Thank you, Madam Chair. I will await the teatime.

CHAIRPERSON: I think that is the correct approach, so that when you leave you know within what time period you would file your substantive application, within what time period they
20 will answer, and within what period you will reply.

ADV SKOSANA SC: Thank you, Madam Chair.

CHAIRPERSON: Then we can consider your application accordingly. The other matter regarding this bundle, because it was filed off record online, the parties will then have to agree when you are going to be afforded the bundle, the

hardcopy.

We realise that there seems to be a problem with the printers. This is one of the reasons why we got delayed to come to the chamber. You will agree when you will have the bundle, if Advocate Mohlamonyane is going to take us through the bundle itself as you proceed. My sisters do not have the bundle. I have the copy. So both of them will then have to be given the same bundle as I have. For now, Counsel, you let us know where you would like to begin for
10 today.

ADV MOHLAMONYANE SC: May I whilst ...[intervenes].

MS RAMAGAGA: Just before that, Advocate Mohlamonyane, you have indicated that in your evidence leading today you are going to be referring to maybe one or two or a few parts that appear on this supplementary document that have been provided to us. Is that correct?

ADV MOHLAMONYANE SC: It is correct, but it may not even be necessary because the supplementary affidavit seeks to have certain documents filed which were perhaps omitted and
20 it seeks to put them on record. Certain documents, for instance, the last page of the Ndlondlo [?] affidavit, where it has a signature to have it on record. That was the main purpose of this supplementary affidavit and these annexures.

MS RAMAGAGA: Ja, ja. I am asking because I see the document appears to be voluminous, right? And if it is

voluminous, we would really want to know as to whether, like you are saying, it is documents that are being placed on record for one reason or the other. But then the question is, without speaking to those documents that are in the folder, is it the intention of the Evidence Leader to have them recognised as part of the evidence without speaking to the specifics in that folder? I just want to understand the intention of introduction of this supplement.

ADV MOHLAMONYANE SC: Well, some of them have
10 already been spoken to but were inadvertently omitted from becoming part of the record. And the supplementary affidavit seeks to have them placed on record. They have already been spoken to. For instance, the last page of the Ndlondlo affidavit, which was the signed page, was not part of the record initially. But my learned colleague, Advocate Ngcukaitobi, indicated that they have the document.

MS RAMAGAGA: Ja, I hear you keep on addressing the issue of Ndlondlo, which is quite clear. I mean, it is on record that the signed last page, the commissioned last page is
20 available and it should be on record. And that constitutes a page, one page, I want to understand. I understand.

ADV MOHLAMONYANE SC: Yes.

MS RAMAGAGA: Can you just – you know, I do not want to be taken by surprise. Can you just indicate to us as to what other documents, without giving an exhaustive list, but just

for us to understand as to which documents were not before us but have been spoken to and are now necessary to be introduced into evidence as – ja, into evidence as part of Advocate Batohi's evidence. Thanks.

ADV MOHLAMONYANE SC: I hear your concern, Madam Ramagaga.

MS RAMAGAGA: Yes.

ADV MOHLAMONYANE SC: In that regard, may I ask for a short adjournment to take instructions, to line them up, with
10 the permission of Madam Chair?

CHAIRPERSON: Advocate Mohlamonyane, I think we will afford you that opportunity. But just following on the question my sister has posed to you, we were just given this bundle this morning and we do not know the relevance of this bundle. Secondly, when are we expected to read this bundle in relation to the evidence of Advocate Batohi? So it is important that you guide us. We cannot read this bundle from page 1 to the end.

We do not know what is relevant, what we are
20 expected to do. That is why I indicate to you that you will have to address us about this bundle. How many minutes do you need?

ADV MOHLAMONYANE SC: 15 at the most, Madam Chair.

ADV BATOHI: Chairperson, can I help?

CHAIRPERSON: I beg your pardon, Advocate Batohi?

ADV BATOHI: Can I try to assist? Because it is my affidavit, I can maybe explain and we can proceed without the adjournment if I am allowed to speak.

CHAIRPERSON: I think the proper thing is for you to speak to your counsel, to Advocate Mohlamonyane without us being here, because we do not want to have this back-and-forth engagement with Counsel about what appears to be an obvious thing. It makes it difficult for us to proceed without knowing why documents are placed before us.

10 **ADV BATOHI:** I can explain that quite easily, Chairperson.

CHAIRPERSON: No, you talk to Advocate Mohlamonyane. He is leading you. I think let us accord him the respect and for him to understand why these bundles have to be used. If they need not be used, the question then remains, why are they filed off record? We already have bundles and bundles of documents to read. So talk to him, and as soon as you are ready, you will let us know, we will reconvene. Thank you, we will adjourn.

ENQUIRY ADJOURNS

20 **ENQUIRY RESUMES**

ENQUIRY RESUMES

CHAIRPERSON: Good morning again, counsel and everyone. Advocate Batohi, *Ntate* Chauke, Advocate Mohlamonyane. It is 11 o'clock and ordinarily we would be adjourning for tea at quarter past 11. Whatever you are going

to propose, bear that in mind.

ADV MOHLAMONYANE SC: I will, Madam Chair, thank you. Thanks to Madam Chair and your fellow sisters for affording me the opportunity to confer with Advocate Batohi and the team. The supplementary affidavit of Advocate Batohi has been filed and served for a particular purpose, and that purpose appears on page 2 in paragraph 5. Is that paragraph 5 on page 2 of the supplementary ...[intervenes]

CHAIRPERSON: I beg your pardon, on page 2 of the second
10 supplementary affidavit?

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: Please give me a second. Remember, counsel, that I mentioned that we received the documents this morning. My sisters do not have the copies. I suppose you will read, for their benefit, you will read what you are submitting to us because they do not have the bundles. It is because of the lateness and the fact that the printers are giving us a bit of problems. They were able to print one copy, which I have, and you can then refer us to those pages and
20 if necessary, you can read that document that you are referring us to. Thank you.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. I am reminded by my co-evidence leader that I should inform the panel that Advocate Hulley would like to step out to attend to the issue of the TOR amendment. For the rest of the day, he

will not be here.

CHAIRPERSON: Please speak up.

ADV MOHLAMONYANE SC: I am reminded by one of my co-evidence leaders that I should mention that Advocate Hulley would like to step out for the rest of the day's proceedings because he wants to attend to the TOR amendment issue.

CHAIRPERSON: We are going to take a tea amendment at quarter past and I suppose this will be an opportune moment for all of you to decide on that. Advocate Skosana had
10 requested to step out and I suggested that it be done during a tea amendment. If you do not come back after tea, we will understand that you are using this opportunity to prepare the substantive application. Will it be okay? Counsel, Advocate Skosana, Advocate Hulley? Advocate Skosana?

ADV SKOSANA SC: It is, Madam Chair, it is fine.

CHAIRPERSON: It is because we are not yet dealing with the evidence. We are dealing with these documents that have just been filed before us. And it may be beneficial to the evidence leader to have you around as we address this
20 bundle. Without going into the details, Advocate Mohlamonyane, you may have to indicate to us whether you want to go through the bundle in its entirety or certain aspects of it. Bearing in mind that my sisters... please bear with us.

The supplementary affidavit is now filed in our documents. There are annexures thereto which are filed in

this bundle that we spoke about this morning. One of my sisters does not have the bundle of annexures. But if you can just indicate to us whether of the documents that are filed of record, particularly the annexures, whether you are going to use these documents in their entirety, it will assist us in preparing.

Because what you have done, you filed online on record these documents, without us knowing what you intend to do. Ordinarily, you would have handed them from the bar
10 so that you only filed the relevant document before us. We do not want to compile a record to the President of documents that were not properly filed before us. I am sure you understand why that is the case. Because what is filed before us online may have to be a record to the President.

Meaning we have to consider everything that is filed before us. Is that clear, counsel?

ADV MOHLAMONYANE SC: It is, Madam Chair, thank you.

CHAIRPERSON: So indicate to us which of these documents are relevant for your purpose or for the purpose of the
20 Advocate Batohi. Documents that are not relevant may have to be excluded from this bundle. Proceed, sir. It is 10 past 11. If you can just briefly indicate to us your way forward, we will then take a tea break. Then we will proceed.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. As I indicated earlier, the second supplementary affidavit has

been filed for the sole purpose of placing certain documents before this enquiry. And these documents are spelled out in this second supplementary affidavit on page 2 and on paragraph 5 of this affidavit. And for convenience, permit me to read the whole of paragraph 5 up to subparagraph 3.

CHAIRPERSON: It may be convenient for the witness to speak to her affidavit. You can lead her to speak to her own affidavit.

ADV MOHLAMONYANE SC: Advocate Batohi, you have the
10 second supplementary affidavit in front of you.

ADV BATOHI: I do. And Chairperson, I am still under oath. I will note that.

CHAIRPERSON: I beg your pardon. We got carried away to discuss preliminary issues. And it escaped my mind that I should remind you that you are still under oath, madam.

ADV BATOHI: Thank you noted, Chairperson.

CHAIRPERSON: Thank you. And thanks for reminding me.

ADV MOHLAMONYANE SC: May you then kindly read the whole of paragraph 5 up to 5.3 on page 2 for record purposes.

20 **ADV BATOHI:** Certainly. Paragraph 5:

“The present supplementary affidavit is delivered for the purpose of placing the following documents before the enquiry:

5.1. All of the annexures attached to the internal memorandum dated 27 June

2019 submitted to me by Advocate RJ de Kock and other members of his team. A copy of the internal memorandum was attached to my principal affidavit as annexure SB3.

5.2 The last page of the statement of Colonel RS Aiyer, attached to my principal affidavit as Annexure SB1b.

10 5.3 The last page of the statement of Bhekinkosi Mthiyane Ndlondlo, attached to my initial supplementary affidavit as Annexure SB11.”

But should I continue, counsel?

ADV MOHLAMONYANE SC: You may continue to read into the record paragraph 7.

CHAIRPERSON: Before you do that, counsel, I beg your pardon. These annexures, SB3, SB1b, SB11, are they included in the pack that you filed of record this morning? Because I see SB3 in the index at 132 to 228 and SB1b at 20 088 to 090. SB11 is indexed at 277 to 282, correct?

ADV MOHLAMONYANE SC: That is correct. What has actually happened here is, Advocate Batohi's bundle is already on record with her annexures referred to by the acronym SB. Now, SB3 is part of Advocate Batohi's affidavit, which is an internal memorandum of Advocate de Kock. Now,

in this second supplementary affidavit, she refers to her original affidavit as the principal affidavit. Now, SB1 is a statement of Colonel RS Aiyer, which is attached to her principal affidavit.

CHAIRPERSON: No, no, no, SB1b.

ADV MOHLAMONYANE SC: SB1b, my apologies. I beg your pardon. SB1b, which is on page 090, yes, of the principal affidavit. SB11, which is the last page of Ndlondlo's affidavit.

CHAIRPERSON: I beg your pardon?

10 **ADV MOHLAMONYANE SC:** SB11.

CHAIRPERSON: Before you go there, SB1b in terms of the amended index to NDPP affidavit is at 088 to 090. Is that of the principal affidavit?

ADV MOHLAMONYANE SC: That is of the principal affidavit. In other words, this is a continuation of Advocate Batohi's pack of documents. The principal affidavit, including SBs, which were annexures to that principal affidavit. Now, this is

a continuation of the pagination that has been done previously and is continued here in this second
20 supplementary affidavit. That is why the first one will be SB3284, which is on page 007, which is the last page of Ndlondlo's affidavit and it is a continuation. Now, it is SB13. We need to be reminded that the principal affidavit, Madam Chair ...[intervenes]

ADV BALOYI-MERE SC: Can I, Advocate Mohlamonyane,

let us go back to SB1b. In the original, the principal affidavit, it started at 088. That is how we have it. That is Colonel Aiyer's statement. It starts at... ja, dated the 3rd of August, if I am not wrong.

ADV MOHLAMONYANE SC: Yes, Madam Baloyi-Mere.

ADV BALOYI-MERE SC: It starts at 088, SB1b 088 to SB1b 090. Meaning this is a duplication, or was it just an amended index so it...

ADV MOHLAMONYANE SC: It is an amended index, Madam
10 Baloyi-Mere.

ADV BALOYI-MERE SC: It is an amended index so it does not change anything.

ADV MOHLAMONYANE SC: It does not.

ADV BALOYI-MERE SC: On this one, it does not change anything. And when you go to the internal memo of SB3?

ADV MOHLAMONYANE SC: SB3 on the amended index...

ADV BALOYI-MERE SC: It starts at...

ADV MOHLAMONYANE SC: 132.

ADV BALOYI-MERE SC: Remember why it did not start at
20 132? Because the first two pages were duplications. So we have it on record as starting at 134.

ADV MOHLAMONYANE SC: Indeed, that is so.

CHAIRPERSON: But maybe before you do that, you proceed with my sister. Why did you include SB1b in the amended index when there is no change in that document?

ADV MOHLAMONYANE SC: Well, I have not taken instructions on that, but I thought the idea was to... I am speaking for them, but I should not be doing that.

CHAIRPERSON: Do not speak for them. Take instructions.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

CHAIRPERSON: Because the very document that I referred to, SB1b, reflected at 088 to 090, seemed not to have changed. It is the same document that has been filed of record earlier. The question is, why did you include it in the
10 amended index? Because you are piling us with documents which are repetitive. Will you please take instructions?

ADV MOHLAMONYANE SC: May I?

CHAIRPERSON: Yes, sir.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Thank you, Madam Chair. I have conferred with the NPA team.

CHAIRPERSON: Please do, because I do not understand.

ADV MOHLAMONYANE SC: They are saying to me that they have not included documents that were included previously.
20 But all what they intended to do was to do a continuation, but at the same time, an amendment which has to be understood. And if Madam Chair can be referred to SB13, that is where this additional bundle starts. The principal affidavit ended with SB12, and SB1 and its sub annexures, up to SB12, have not been included in this bundle. All those that are included

start from SB13 up to and including SB15g, if that answers the panel's concern, Madam Chair. And may I remind, may I draw your attention that it is almost through...

CHAIRPERSON: Let me figure out whether I understand you. What you are presenting before us from SB1 to SB12 of the index is merely an index without documentation.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: And what appears from SB12 ...[intervenes]

10 **ADV MOHLAMONYANE SC:** From 13.

CHAIRPERSON: Yes, SB12 or SB13. Look at the previous SB12.

ADV MOHLAMONYANE SC: In the original bundle.

CHAIRPERSON: The original bundle. That SB12 is a document marked SB12-283.

ADV MOHLAMONYANE SC: It ends with 283, Madam Chair.

CHAIRPERSON: 283.

ADV MOHLAMONYANE SC: Yes.

20 **CHAIRPERSON:** And the current SB12, the last page of internal memoranda from Advocate de Kock and team panel report dated 27 June 2019. Correct?

ADV MOHLAMONYANE SC: That is correct, Madam Chair, where the signature of Advocate de Kock appears.

CHAIRPERSON: Yes, it is actually not the 27th of June. It should be 28th of June. If you look at the last page at SB12-

283.

ADV MOHLAMONYANE SC: It should be 28th of June, I agree.

CHAIRPERSON: Should we therefore correct the index?

ADV MOHLAMONYANE SC: Yes, may it be corrected, Madam Chair. To the extent to which the date is changed to 28 June 2019.

CHAIRPERSON: Advocate Batohi, do you confirm that?

ADV BATOHI: Yes, I do.

10 **CHAIRPERSON:** The SB12 reading, last page of internal memoranda from Advocate de Kock and team panel report dated 27 June 2019. That document in the original is 28th day of June 2019.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Should it be corrected in the index?

ADV BATOHI: In the index, that is correct, Chairperson.

CHAIRPERSON: We have corrected it accordingly. The first document of the new index is SB13-284. This is the last document. It is the commissioning document. Am I correct,
20 counsel?

ADV MOHLAMONYANE SC: You are correct, Madam Chair.

CHAIRPERSON: Yes, thank you. It then follows that all the subsequent documents as per the amended index are filed of record.

ADV MOHLAMONYANE SC: That is so, Madam Chair.

CHAIRPERSON: And I assume that you will then be referring to them as you move forward.

ADV MOHLAMONYANE SC: We may be referring to them or we may not because the majority of these annexures have already been referred to. But the problem was they were not attached to Advocate de Kock's internal memoranda dated the 28th of June 2019.

CHAIRPERSON: Yes, thank you. You will take us along those SBs when you present the evidence through Advocate
10 Batohi then.

ADV MOHLAMONYANE SC: Yes, Madam Chair.

CHAIRPERSON: Thank you for your patience. We now understand why this amended index had to be filed. And I propose, we propose that we adjourn, then you can start leading the evidence. Will that be appropriate for you?

ADV MOHLAMONYANE SC: That will be appropriate, Madam Chair. Thanks.

CHAIRPERSON: Thank you, counsel. Advocate Skosana and Advocate Hulley, you will be excused to proceed with
20 what you intend to do after or during tea. We will adjourn for tea.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

CHAIRPERSON: Thank you, Advocate Mohlamonyane, you may proceed. Madam, you are still under oath.

ADV BATOHI: Yes, thank you Judge.

ADV MOHLAMONYANE SC: Thank you Madam Chair.

CHAIRPERSON: Proceed sir.

ADV MOHLAMONYANE SC: Thank you Madam Chair. We were dealing with the documents that have been filed in terms of what is contained in this second supplementary affidavit. Advocate Batohi, please go to page 3 and add paragraph 11, just read paragraph 11 to the record. Maybe start with 10.

CHAIRPERSON: I beg your pardon?

10 **ADV MOHLAMONYANE SC:** She should start with 10 on page 3 of the second supplementary affidavit.

ADV BALOYI-MERE SC: Second supplementary affidavit?

ADV MOHLAMONYANE SC: Indeed, Madam Baloyi-Mere.

ADV BALOYI-MERE SC: The affidavit itself or the annexures?

ADV MOHLAMONYANE SC: The affidavit itself, which is page 3. It is called the second supplementary affidavit of the National Director of Public Prosecutions.

20 **CHAIRPERSON:** Perhaps you must hand it up properly and refer to it as an exhibit. This supplementary affidavit is a continuation of the record. You filed it, it is not marked. Are we not supposed to mark it, the affidavit itself? Or will it be marked as an exhibit at a later stage or what are you going to do?

ADV MOHLAMONYANE SC: I never thought it should be

marked because it is just an affidavit and it is numbered. And it is there, it is numbered and it can be easily accessed and it is easy for one to locate it. I did not have it in mind that it should be an exhibit as such.

CHAIRPERSON: Please give me a second. [Indistinct – 0:04:18]...

ADV MOHLAMONYANE SC: Original one.

CHAIRPERSON: And her supplementary, where does it appear in the index?

10 **ADV MOHLAMONYANE SC:** In the index, it does not appear, I did enquire, but I was told it has original numbering.

CHAIRPERSON: No, no, no, counsel. Your index refers to the front number, 001 to 0081 is the original affidavit. You see in the index?

ADV MOHLAMONYANE SC: In the index, yes.

CHAIRPERSON: On the face of the document itself.

ADV MOHLAMONYANE SC: I see that, Madam Chair.

CHAIRPERSON: My question then is, when you file the supplementary or the additional document, it must also form
20 part of this index, so that we know where to find it, as you have done with the first. Does it not follow?

ADV MOHLAMONYANE SC: It should have followed.

CHAIRPERSON: Or should it not follow?

ADV MOHLAMONYANE SC: It should have followed, ja.

CHAIRPERSON: It should follow?

ADV MOHLAMONYANE SC: Yes. It appears to me that that has not been done and it is not referred to anywhere else in the amended index.

CHAIRPERSON: So when we read this index, we do not know where to find this very supplementary affidavit you are referring to. That is why my sister was also finding out where do we find it on the pages. But I suppose your junior is here. She must correct this document and refer to that affidavit, the supplementary affidavit. It is not in the index. But because
10 we have the affidavit itself, you can proceed in the interest of time. Your junior will then have to do the right thing.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: Madam, you are taking note of our challenge. Please prepare a better index and paginate it properly. You may proceed, sir.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, I have taken you to page 3, which is the original page 3 of this second supplementary affidavit and requested you to read into the record paragraphs 10 and 11.

20 **ADV BATOHI:**

“The last page of the Ndlondlo statement already forms part of the record as A90, 9-0, in the bundle titled Documents as per Agreement, dated 18 November 2025 – Booyesen Racketeering Docket A90. I

accordingly attach here to the last page of Ndlondlo's statement, marked Annexure SB14."

ADV MOHLAMONYANE SC: Continue to paragraphs 12 and 13.

ADV BATOHI:

"In my principal affidavit ...[intervenes]"

CHAIRPERSON: I beg your pardon. Advocate Batohi, you are reading from paragraph 11 of the supplementary.

10 **ADV BATOHI:** Paragraph 10, Chairperson.

ADV MOHLAMONYANE SC: She initially read 10 and then went on to 11 [indistinct – 0:07:43]...

CHAIRPERSON: Yes, thank you.

ADV BATOHI: Yes, 10 and 11, Chairperson.

CHAIRPERSON: You may proceed, ma'am.

ADV BATOHI: Thank you.

ADV MOHLAMONYANE SC: Proceed to 12.

ADV BATOHI: Paragraph 12.

ADV MOHLAMONYANE SC: 12 and 13, Advocate Batohi.

20 **ADV BATOHI:** Certainly. Paragraph 12:

"In my principal affidavit, I included Annexure SB3, being the internal memorandum prepared by Advocate de Kock and his team. However, the annexures referred to in SB3, that is the annexures to

the De Kock report as it has been referred to in these proceedings, the annexures referred to in SB3 were not attached to the affidavit, as several of them already form part of the existing record under other bundles and one is a High Court judgment. These annexures comprise the supporting documentary materials relied upon and referred to throughout the internal memorandum.”

10

That is the de Kock internal memorandum. If I may proceed.

ADV MOHLAMONYANE SC: Just hold it there. Allow the Chairperson...

CHAIRPERSON: I am trying to find my documents. Confusion happens when the index is not properly done, Advocate Mohlamonyane.

ADV MOHLAMONYANE SC: I agree. I take the point, Madam Chair.

CHAIRPERSON: Were we at paragraph 13?

20 **ADV MOHLAMONYANE SC:** May she proceed?

CHAIRPERSON: Were we at paragraph 13?

ADV MOHLAMONYANE SC: We were at paragraph 13. She was just about to read paragraph 13 into the record.

CHAIRPERSON: Yes, she may proceed.

ADV MOHLAMONYANE SC: May you proceed, Advocate

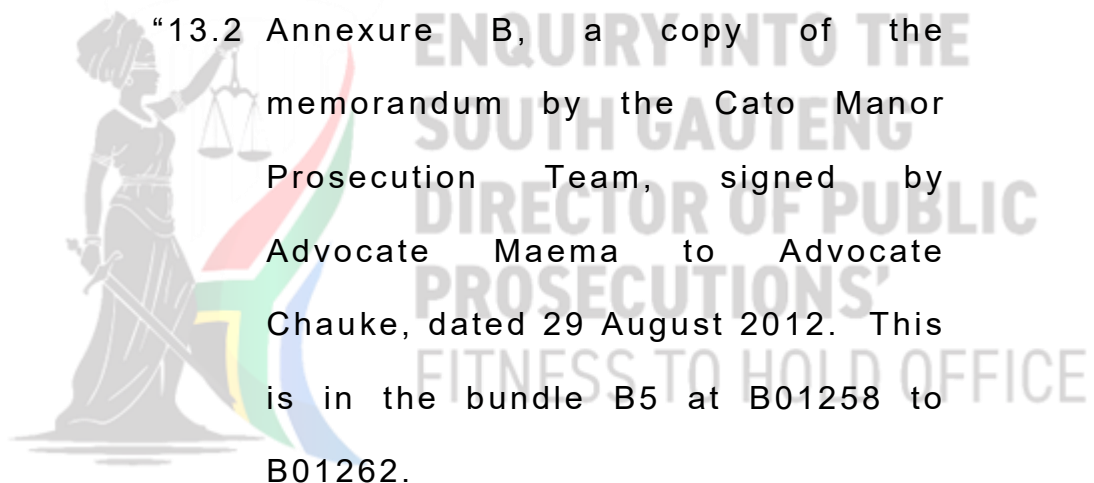
Batohi?

ADV BATOHI: Yes, thank you, counsel.

“The annexures to SB3, which are now attached to my present affidavit, are as follows:

13.1 Annexure A, Mosing Affidavit, filed at the State Capture Commission, dated 5 May 2015.”

And it is in the bundle at L03, L00704 to L00720. The second
10 document:



“13.2 Annexure B, a copy of the memorandum by the Cato Manor Prosecution Team, signed by Advocate Maema to Advocate Chauke, dated 29 August 2012. This is in the bundle B5 at B01258 to B01262.

20 13.3 Annexure C, a copy of the judgment in the Booyesen v. Acting National Director of Public Prosecution 2014 (2) ALL SA 391 (KZN). Bundle CL00352.

13.4 Annexure D, State Capture Commission transcript of Mr Nxasana's evidence, which is not in

the bundle.

13.5 Annexure E, Advocate S Abraham's affidavit, dated 17 May 2017, which is not in the bundle.

13.6 Annexure F, Advocate S Maema's affidavit, it is another affidavit dated 17 May 2017, which is not in the bundle.

10 13.7 Annexure G, a letter to Carl van der Merwe Attorneys regarding the disclosure of the outstanding contents of the court docket, dated 8 May 2013.”

Chairperson, to the extent that this might require any further clarity, to say that Advocate de Kock's report is SB3, but at the time of me signing the affidavit, we included the report, but did not include the annexures to the De Kock report. This, in fact, is, besides the two single documents, which are the Commissioner of Oaths relating to Aiyer and I think it is
20 Ndlondlo, the rest of the documents are all annexures to the De Kock report, as it has been referred to, and that is attached as SB3 to my affidavit. I hope that clarifies, Chairperson. Thank you, counsel.

CHAIRPERSON: Thank you, Advocate Batohi. I see, and I am asking this just for clarity because we have not gone

through the documents as yet, but I see that 13.4 that you read into the record, which is Annexure D, State Capture Commission transcript of Mr Nxasana's evidence, you say it is not in the bundle.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: I see in the bundle we have a long document, a transcription, where Mr Mxolisi Sandile Olifant Nxasana is testifying. Is it before the Zondo Commission?

ADV BATOHI: Chairperson, which, if I may, which bundle is
10 Chairperson referring to?

CHAIRPERSON: It is part of this big document that was presented to us. Okay, all right. If you look at SB15D-376, just after the index, there is a transcription there. That transcript, from the look of things, appears to be a transcript where Advocate Nxasana was testifying. My question is, was it before the Zondo Commission?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Which, if I am correct, means 13.4 Annexure D, which you have indicated does not form part of
20 the bundle, may be incorrect.

ADV BATOHI: Chairperson, let me clarify. My apologies for that. I was not clear. Chairperson, if you look at 13.1, 13.2, and 13.3, we say it is in the bundle, meaning the bundles that have been uploaded that you have already. They are at those references, 13.1, 13.2, 13.3. You will see it is in bundle LO

or bundle B5 and bundle CL. But I did not clarify that 13.4, from 13.4, 13.5, 13.6, and 13.7 are not in any of the bundles before this panel. But they are in, in fact, this bundle contains all from 13.1 to 13.7, but the first three are contained in other bundles. The remaining four are not contained in other bundles. I hope I have clarified, Chairperson.

CHAIRPERSON: Thank you, counsel, which then means, as you have explained, 13.4, Annexure D, will be that SB15D376
10 at the beginning of the new bundle, the transcript. Correct?

ADV BATOHI: I just want to check that, Chairperson. 13.5?

CHAIRPERSON: Yes, your 13.4.

ADV BATOHI: 13.4

CHAIRPERSON: Those are new documents.

ADV BATOHI: That is correct.

CHAIRPERSON: That do not form part of the original
bundles.

ADV BATOHI: Any of – that is correct, Chairperson.

CHAIRPERSON: Yes, thank you. My question then is 13.4,
20 Annexure D, should then be your SB15D376 of that new bundle. Look at your index, through you, counsel. Maybe I should talk to you.

ADV MOHLAMONYANE SC: Maybe I should explain.

CHAIRPERSON: No, no. I do not know what you are explaining. Listen to me first because I need to clarify my

document. Your index is followed by three pages. The very first page on that new – in that new bundle, is marked SB15D376. Look at the bundle, counsel, not the index. SB15D376 is the first page after the index. You have it? I will speak to the witness through you, then you can just clarify. You have it, Advocate Batohi.

ADV BATOHI: Chairperson, I am trying to follow here. SB15D...

CHAIRPERSON: Yes, I see. Thank you. My sister is helping
10 me with the bundling of these documents, meaning the transcript that is referred to in 13.4, Annexure D, starts at SB15D333.

ADV BATOHI: SB15D333 is the start of the transcript of Mr Nxasana at the State Capture Commission until SB468.

CHAIRPERSON: Yes, thank you. Thank you very much. That makes it easier to follow. You may proceed to Advocate Mohlamonyane.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, for completeness, go to the next page, page
20 5, under subparagraph C, and read paragraph 16 up to 16.3 into the record.

CHAIRPERSON: Page 5 of the second supplementary affidavit.

ADV MOHLAMONYANE SC: That is so, Madam Chair.

CHAIRPERSON: Kindly place it on record correctly?

ADV MOHLAMONYANE SC: It is page 5 of the second supplementary affidavit of the National Director of Public Prosecutions. Go to page 5.

ADV BATOHI: Thank you, Chairperson. Paragraph 16?

ADV MOHLAMONYANE SC: Paragraph 16, yes.

ADV BATOHI: So it deals with the amended index, and it says at 16:

“The index to my principal affidavit has been revised to correspond with the fully updated annexure bundles.”

10

Chairperson, from what the Chairperson herself pointed out, the index does not include my supplementary affidavit, and to that extent, the index needs to be corrected. So I am not sure that I should read this in, given that we have agreed that there is a, the index needs to be updated to include my supplementary affidavit.

ADV MOHLAMONYANE SC: Subject to what has been indicated.

20

ADV BATOHI: Yes, that is correct. Subject to that, we certainly tried to reflect, correctly reflect all the annexures from SB1 to SB15, added all the annexures that had previously been omitted, and it reflects corrected and continuous pagination, but subject to the addition of the supplementary, the second supplementary affidavit.

ADV MOHLAMONYANE SC: Now, in your testimony, we may

or may not refer to the De Kock report. Am I correct?

ADV BATOHI: That is correct. We will likely refer to the De Kock report, but for completeness, given that the report was filed without the annexures, we have now filed all the annexures as well. So that the record is complete.

ADV MOHLAMONYANE SC: Having said so, Advocate Batohi, let us then proceed with your evidence-in-chief, and in this regard, go to page 73 of your original, which you call principal affidavit, in your original bundle, original pack, so
10 to put it, and go back to paragraph 179.

ADV BALOYI-MERE SC: Advocate Mohlamonyane, before the witness takes us through her original affidavit, I am wondering what it means when you say we may or may not refer to the De Kock memorandum, when you have filed the De Kock memorandum. What should we, should we just wait? It is on a need-to-know basis, or it will take us by surprise?

ADV MOHLAMONYANE SC: No, Madam Baloyi-Mere. I wanted her to clarify that in certain instances, we will refer to the memorandum, the memorandum itself, but there will be
20 other instances where it will not be necessary to refer to it. It is not a need-to-know basis, as you put it.

CHAIRPERSON: Am I correct, however, that reference was made earlier, last week, by Advocate Batohi to the De Kock memorandum, which, if my understanding was correct, was the memorandum of the De Kock team that Advocate Batohi

referred to quite extensively to her earlier evidence, or her previous evidence, am I correct?

ADV MOHLAMONYANE SC: You are correct, Madam Chair.

CHAIRPERSON: The memorandum, however, did not form part of the original bundle, correct?

ADV MOHLAMONYANE SC: The memorandum itself is marked SB3.

CHAIRPERSON: My question, counsel, is this very memorandum, as Advocate Batohi testified last week, she referred to it, but the memorandum was not filed of record, am I correct?

ADV BATOHI: Chairperson, it is SB3.

CHAIRPERSON: It is SB3.

ADV BATOHI: That is correct, attached to my affidavit.

CHAIRPERSON: The original affidavit.

ADV BATOHI: That is correct, Chairperson.

ADV MOHLAMONYANE SC: What was not referred to, Madam Chair, with your permission, were the annexures referred to in the internal memorandum of De Kock's team.

CHAIRPERSON: Yes, thank you. But the memorandum was dealt with extensively.

ADV MOHLAMONYANE SC: As SB3.

CHAIRPERSON: Yes, thank you.

ADV BALOYI-MERE SC: Advocate Mohlamonyane, I might have a follow-up question on the De Kock memorandum later.

I am just looking at my notes. Because, and correct me if I am wrong. Did De Kock's team prepare one memorandum or two? Because I know we were finished with one. And I suspect that I asked a question about the second one. But I will check on my notes. Just keep that in mind.

ADV MOHLAMONYANE SC: Would you perhaps like me to comment on that before we proceed?

ADV BALOYI-MERE SC: Yes, if it will clarify my confusion.

ADV MOHLAMONYANE SC: There was another one, which
10 was a memorandum as well, in which Advocate de Kock did not recommend that the Chauke issue should be referred to the President's Office. It has just escaped my mind as to what annexure it is, but it is marked elsewhere. I will ask my colleagues to assist me in that regard.

CHAIRPERSON: Is that the first one?

ADV MOHLAMONYANE SC: That is the second one.

CHAIRPERSON: The second one?

ADV MOHLAMONYANE SC: Yes, the second one.

CHAIRPERSON: Yes, and then the first one?

20 **ADV MOHLAMONYANE SC:** The first one is the De Kock, what used to be referred to as the De Kock report, but we have since coined it as it appears in the documents as the internal memorandum of the De Kock team.

CHAIRPERSON: Would you please confer with your team, your junior, and take us to those two documents in the

bundles so that we can mark them properly?

ADV MOHLAMONYANE SC: As it pleases Madam Chair.

CHAIRPERSON: Remember, your team still has to prepare the index that will guide us, the proper index with exhibits. We still do not have that. That is why we get confused. She is trying to talk to you right now. You can just confer with her and just get the pages right for us, because we may be missing something here.

ADV BALOYI-MERE SC: I found a note in my notes. There
10 is, the witness gave evidence that she consulted a panel of De Kock and other people around April 2019, and she said she would still confirm the date, because I have written in red that date still to be confirmed. And then what then followed was received an opinion, which was then called a memorandum, from the De Kock team on the 27th of June, I think it is 2019. So there are two De Kock memoranda that we were told about. But one, and then I have a question here, where do we find this? Because we are not referred to the specific page.

20 **ADV MOHLAMONYANE SC:** Which one, Madam Baloyi-Mere?

CHAIRPERSON: The April 2019.

ADV MOHLAMONYANE SC: June. It should be June 2019.

ADV BALOYI-MERE SC: Not the June. The June we have.

ADV MOHLAMONYANE SC: Which is?

ADV BALOYI-MERE SC: The 27th of June 2019.

ADV MOHLAMONYANE SC: Where the team gave this opinion to the NDPP. Dated 28 June. Remember, the date was corrected. As the date of signature was the 28th June, but then when they send it through, as appears in SB3, the date appears there as 27 June 2019. But the actual date of signature was 28 June 2019, as previously corrected by Madam Chair. That is the first memorandum. Internal memorandum.

10 The second one is contained in bundle C. It is called the bundle folder of correspondences, yes, and it appears on page C00001.

ADV BALOYI-MERE SC: That is the [indistinct] of February 2023?

ADV MOHLAMONYANE SC: Indeed, Madam Baloyi-Mere. It goes up to page C00007. Where Advocate de Kock advised and made a recommendation to the NDPP, Advocate Batohi, alone. There was no team here, if I may, for want of a better term. There was no team here. He was alone when he, he
20 drafted this memorandum alone. He signed it alone, as his signature appears on page 7 thereof, C7. Does that clarify the status of the two memoranda?

ADV BALOYI-MERE SC: The two memoranda, through you, Chair, and I am not trying to create a dialogue here. The two memoranda are fine. We have them. But there was a

reference to some consultation with the panel in April 2019. And the witness said she was still going to confirm the date. And I made a note, where do we find this, because we were not finished with it. Unless if it was just a consultation, no notes and nothing was finished to us, then I would have to amend my notes. But this is what I have in my notes. That is why in my mind I remember that there is something to do with April 2019.

ADV MOHLAMONYANE SC: My colleagues inform me, lest
10 I be seen to be testifying from the bar, that the date was the 9th April 2019. Advocate Batohi can confirm that. That a mandate was given to the de Kock panel.

ADV BALOYI-MERE SC: That is when she was given the instructions.

ADV MOHLAMONYANE SC: Yes, to the de Kock panel.

ADV BALOYI-MERE SC: I will correct that.

CHAIRPERSON: And that brought about the internal memo dated 28 June 2019.

ADV MOHLAMONYANE SC: Indeed, Madam Chair, and she
20 can confirm.

CHAIRPERSON: That is the first internal memorandum of 28 June 2019.

ADV BATOHI: Yes, that is correct, Chairperson. And if I may also mention that Madam Baloyi-Mere is actually correct. I did talk about April sometime when I had thought I had

instructed the panel to do the work. We have actually traced the letter that I wrote to them, to the panel. It is dated 9th April 2019. And it is the letter that I sent to all the panel members requesting them to do this work. I do have a copy of it in my file.

ADV MOHLAMONYANE SC: The one that you have now?

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: Ja, it will later be marked as an exhibit and be handed up. You may proceed.

10 **CHAIRPERSON:** No, no, no. Before you mark it, I think place it on record properly that there is such a letter of instruction by Advocate Batohi to the De Kock team that gave rise to the first internal memorandum dated 28 June 2019. That sequence is critical. If you wish, counsel, if you have copies of those documents, that is of the letter of 9 April 2019 instructing the De Kock team to prepare an internal memo, you can then file it on record and hand it out from the bar.

ADV MOHLAMONYANE SC: Ja, I have been furnished with copies, Madam Chair. I think enough copies for the panel
20 and our colleagues. Dated the 9th of April 2019 and I beg leave to hand it up.

CHAIRPERSON: May our Judges pay attention, please.

ADV BALOYI-MERE SC: And, Madam Chair, through you, on the same page, we were promised that we will get the dates for the review application because Advocate Batohi

said she assumed office in February 2019 and upon her entering the office, she found that there was an application to review Advocate Abraham's authorisation of the Racketeering Certificates. That matter was pending and she promised to get us the dates of the review.

ADV MOHLAMONYANE SC: Would you like to respond, perhaps?

ADV BATOHI: Well, I would certainly. We make a note of it and make sure my team follows up on all of these things so
10 that we do not miss out these things and have to deal with it. So, we will certainly apologise for that. It has not come through yet. We will get that date. It is easily obtainable.

ADV MOHLAMONYANE SC: The document that you say you are having in your possession.

MS RAMAGAGA: Let me just come in. You know, I am getting worried. That documents seem to be sprung on us at any time without even either the evidence leader knowing of the intention to use the document or the evidence leader not having had the courtesy to just advise us about that. And if
20 you look at our record, the transcriptions, they are littered by lots and lots of interruptions, which I believe they could be avoided by proper communication between the evidence leader and the witness and proper introduction of documents without the panel inviting for the introduction of documents, just like it has happened now.

So, we would like this enquiry to run quite smoothly. And that can only be achieved if there has been proper consultation and communication between the party and the evidence leader. And moving forward, now speaking for myself, I would really appreciate if the matter were to run that smoothly. And the only way to achieve that would be if there are any other documents that the evidence leader is aware of the intention to introduce them to us, please just enlighten us about that so that we do not stop and go. A lot of time is
10 spent on the stop and go, go and stop.

So, like this letter, it was like it is not going to be introduced. And then we see the witness bringing the letter to our attention, whereas it should have been the evidence leader bringing the letter to our attention to say, I have a copy of this letter here, do you have it in front of you? Do you recognise it? Whose letter is that? And then hand it up as evidence without marking subject to later marking. Thank you.

CHAIRPERSON: Counsel, I suppose you have noted the
20 concern raised by our sister.

ADV MOHLAMONYANE SC: Yes, I have.

CHAIRPERSON: I think we have raised this concern right from the beginning. It makes our work so difficult. So, please, through your team, you have an able team of an SC and a junior counsel and a support team from the NPA. There

is no reason why we should be taken by surprise from time to time. And we pause because we cannot be reminding you all the time how you should run this matter. But let us try by all means to make it easier for all of us. And including Advocate Chauke's team, they should be battling the same way we are battling with these records from the NPA. Thank you. You may proceed.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. I have taken note of the concerns raised. Advocate Batohi,
10 you indicated there is a document you are having here, you are having with you.

ADV BATOHI: That is correct.

CHAIRPERSON: And remember, your junior should be listening. This is some of the documents that I handed from the bar which are going to have to be marked as exhibits. Do not forget that. Because I do not even know what to call this document. Your index of exhibits should reflect all these documents accordingly. You may proceed, counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.
20 Which document is it?

ADV BATOHI: It is a document, it is an internal memorandum addressed to Advocate de Kock, to Advocate I Thenga. Sorry, counsel, should I? It is an internal memorandum from myself. It is dated 9th of April 2019. Addressed to Advocate de Kock and Advocate Thenga,

Advocate Riley, Advocate Mamabolo, and copies to Advocate Mzinyathi and Advocate McAdam. And its subject is reconsideration of authorisation in terms of Section 2(4) of the Prevention of Organised Crime Act.

ADV MOHLAMONYANE SC: Before you proceed to read it, Madam Chair and your sisters, this document will later be handed up and marked as an exhibit.

CHAIRPERSON: Well, it is handed up already. All you need to do is to hand the exhibit index referring to all these
10 documents because we have it already.

ADV MOHLAMONYANE SC: Okay. Ja, let us proceed with the document. Can you read the document into the record?

ADV BATOHI: So, I am reading the contents of the document now.

“In terms of Section 2(4) of the Prevention of Organised Crime Act, POCA, all racketeering prosecutions must be authorised by the National Director of Public Prosecutions. In this matter, the former
20 NDPP, Advocate Abrahams, authorised two separate racketeering prosecutions as set out above.

The defence have brought an application to have these authorisations set aside (the application) and the NDPP is a party thereto.

As the new NDPP, I am in the process of considering this matter. This is not only because of the citing of the NDPP as a party, but also because of the implications for the NPA.

10 In this case, I have taken note of the controversy surrounding Advocate Abrahams' decision to authorise the two racketeering prosecutions. His decision has also informed the approach that has thus far been taken in the application. As the new NDPP (and now the affected party) I must be satisfied that the prosecutions on racketeering charges in this matter are justified. The decision ultimately rests with me and will also inform the approach that I will take in the application.

20 This specific case and the application present certain complexities and dynamics which could also affect racketeering authorisations in general. In the circumstances, I request your assistance in perusing all the evidence and other relevant material, and thereafter furnishing me with a well-reasoned and motivated opinion as to

the validity and appropriateness of the decision by Advocate Abrahams to authorise the two racketeering prosecutions in terms of section 2(4) of the POCA in this matter.

Please include in your report any factors that you regard as relevant and should be brought to my attention. Advocate McAdam, the Special Director of the PCLU, the unit that was seized with this matter, will be your liaison person. He will assist in collating all

10

the necessary documentation you will need to properly apply your minds to this matter. Maria and Danie will assist with the logistics.

I have indicated to the defence that we will revert in the second week of May. Please advise me, after you have assessed the work to be done, what you consider to be a reasonable timeline to revert to the defence.”

20

It is signed by me and dated the 9th of April 2019.

ADV MOHLAMONYANE SC: Madam Chair, the document will be properly marked and indexed.

CHAIRPERSON: If I may just clarify with Advocate Batohi. Advocate Batohi, as at that time, the 9th of April 2019, you

correctly, in my view, indicated that the final decision regarding these matters rests with you. Had you been given all the evidential material at that time, or were you expecting the team to put together all the relevant evidential material?

ADV BATOHI: Chairperson, the latter. I was expecting them to do that.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Go back to page 73 of your original or principal affidavit. When
10 we adjourned last week, we were busy with paragraph 179. You do not necessarily have to read it again into the record. Just explain its content.

CHAIRPERSON: Counsel, please speak up so that we can hear you.

ADV MOHLAMONYANE SC: When we adjourned last week, we were busy with paragraph 179. And to tie it up, you may not necessarily read it again. Just explain its content.

ADV BATOHI: Yes, so just to contextualise, we are dealing with the process that led to my referral of the matter to the
20 President. And at paragraph 179, I deal with the issue of the Mdluli matter, and having requested an opinion from Advocates Hulley and Wentzel, which they did, and following that, I concluded that there was sufficient basis to include this matter in the recommendation to the President.

CHAIRPERSON: At the risk of repetition, just to recap where

we ended on Friday, it is when reference was made to the legal opinion sought by Advocate Batohi, madam. And in your testimony, you said that you wanted to make a decision based on evidence. I am quoting you verbatim, as per my notes. And the question then arose, or questions then arose as to whether, at that stage, when you sought a legal opinion, you had been presented with evidence to make that decision. If my recollection is correct, and correct me if I am wrong, you said that you were not presented as yet with the evidence,
10 correct?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And this is notwithstanding the fact that you wanted to base your decision on evidence, correct?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: To what extent would a legal opinion have assisted you in forming your decision regarding this matter?

ADV BATOHI: Chairperson, at this stage, if one looks at my evidence that I testified about already, although I had not been placed with the evidence initial this matter, I did have
20 Advocate Nalane's matter, opinion in this matter, that dealt with both the Booyesen matter as well as the Mdluli matter and recommended a referral to the President in respect of both these matters.

Advocate Hulley was intimately involved with this, as I said, there was no evidence before me, Advocate Nalane's

opinion was before me, Advocate Hulley was involved in this matter at the Zondo Commission and I requested him to give me a further opinion on this matter, so that I had also evidence that I could consider, to ensure that I was getting it right. So that is when I requested the further opinion, and Advocate Hulley then, Hulley and Wentzel provided the opinion with annexures, and that opinion is in the bundle.

I am not sure if the annexures to the Hulley-Wentzel opinion are also included. But as I testified earlier, the
10 annexures included an affidavit or a statement, I am not sure, by the investigating officer, Colonel Roelofse, that set out the essential aspects of the evidence.

CHAIRPERSON: Thank you, Advocate Batohi. You may proceed, counsel.

MS RAMAGAGA: Just before you proceed, I just want to get something right on record. I may have misheard you. As you were reading that paragraph 179, now on the portion that starts with 'they did so', do you see that? 'They did so, and', do you see that portion?

20 **ADV BATOHI:** I do.

MS RAMAGAGA: Ja. I think, and I want correction from yourself, I think I heard you say they did so and I concluded that there was a sufficient basis to include Advocate Chauke. So the purpose, just wait, ma'am, let me finish my question. Thank you. The purpose of my question now is to find out as

to whether, as you were reading this paragraph, you read the 'I' that was not in the paragraph, into the paragraph, or if the record will reflect that you said 'I concluded', that would not be what you said. What is the correct position?

ADV BATOHI: The correct position is that I was not reading the paragraph at all. In fact, counsel made it clear to me, saying without reading it, can you explain? And so I was explaining.

MS RAMAGAGA: So in your explanation now, in that
10 explanation, is it correct that you said they did so and I concluded that there was sufficient basis?

ADV BATOHI: That is correct. That is correct.

MS RAMAGAGA: And that 'I' was introduced in the evidence today?

ADV BATOHI: I am not sure what the panel member means by that.

MS RAMAGAGA: What I mean is very simple. It is what I am looking at as your source of information as against what you have said. The only thing that I am concerned with is
20 that 'I', to understand as to whether when you put the 'I' to say 'I concluded that', as to whether that was deliberate or by mistake, but it appears from your answers that it was deliberate. Is it correct?

ADV BATOHI: Yes, it is deliberate because what I was doing is paraphrasing and saying, in fact as, if you look at what is

in paragraph 179, that seems to suggest that they, the authors, actually did so and they concluded, right? But what I was saying today is that when I got this opinion, I concluded that there was sufficient.

MS RAMAGAGA: Ja, now, you know, this affidavit, ma'am, it is your affidavit, where you were explaining as to who did what, who said what, and why certain steps were taken. And as you correctly point out that as one reads this affidavit of yours, as we all know affidavit is under oath, as you read this
10 affidavit, one gets an impression that 'they', meaning that team, the team is the one that concluded that there was a sufficient basis to include Advocate Chauke's conduct in the Mdluli matter. Right? And I believe that when you drafted this affidavit, you drafted it voluntarily. You satisfied yourself of the contents of the affidavit before you signed it. Is that assumption correct?

ADV BATOHI: That is correct.

MS RAMAGAGA: And subsequent to you signing this affidavit, which you accepted as correct, at some point now
20 during this enquiry, the hearings of this enquiry, an issue arose around whether the conclusions relating to Advocate Chauke would have been done by yourself or the panels. And you said you depended on the panels because you trusted the panels. Is that correct?

ADV BATOHI: I am not sure in what context I said that, but

I certainly said that I took into account all of the opinions and when I came to the conclusion that I did.

MS RAMAGAGA: Thank you.

ADV BALOYI-MERE SC: I have a follow-up question. When you were asked that, at this stage when you asked for an opinion from Advocates Hulley and Wentzel, you had not been furnished with the evidence. So are you saying to this panel that you read the opinion and based on the opinion, without having had sight of the evidence, you then concluded that
10 there was sufficient basis to include Advocates Chauke's conduct in the Mdluli matter?

ADV BATOHI: No, Chairperson, that is not what I am saying. I will repeat what I said. I said that at the time that I asked for the Hulley and Wentzel opinion, I had Advocates Nalane's opinion already. At that point, I did not have any evidence. Advocates Nalane's opinion did recommend that Advocate Chauke, that the matters, the Mdluli and the Booysen matters be referred to the President. I did not have evidence at that stage. And then I said, given the fact that Advocates Hulley
20 was involved in the Zondo Commission and was dealing with these matters, I asked him for an opinion. And so Hulley and Wentzel gave me a second opinion also had evidence, some aspects of the evidence attached to it, including a statement by Colonel Roelofse, which summarised the key aspects of the evidence in the Mdluli matter.

ADV BALOYI-MERE SC: So your decision was taken, or the conclusion that you came to was based on the two opinions, the Nalane opinion and the Hulley opinion?

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: Which we accept that – I mean, somebody does not write an opinion in the sky. The opinion would be based on some of the evidence. So you accepted the two opinions and came to the conclusion based on those two opinions and the evidence that was contained in the
10 opinions, without you having gone to the evidence and read it. Because that one you have already testified to, and it is accepted that at this stage you had not seen the evidence yourself.

ADV BATOHI: I still think that I am not clear, so I apologise for that. To the extent that I am not clear, Advocates Hulley's opinion also had annexures, the actual evidence as annexures to his opinion. And I considered the opinion together with the annexures attached to the opinion. And as I said, I am not sure if the annexures are part of the bundle,
20 but that was what was before me. And included in the annexures was a statement from Colonel Roelofse which analysed the key aspects of the evidence in the matter. And there is also other annexures that were attached to that opinion that will be apparent from the opinion itself. So I considered that as well.

ADV BALOYI-MERE SC: Thank you.

CHAIRPERSON: May I just follow up with one or two? Or did you want to? Proceed, ma'am.

MS RAMAGAGA: Okay, thank you. Thank you, Chair. Advocate Batohi, when first, or rather, let me just ask what I think is factual. Is it correct that you first communicated your inclination to recommend the establishment of an enquiry in 2021?

ADV BATOHI: [Pause] I do not think so. I am not sure. I do know that in 2021, I wrote to Advocate Chauke asking him for an explanation on various cases. But I did not at that stage, as far as my recollection goes, communicate any inclination to recommend. I could be mistaken, but at that point, my recollection is that I did not.

MS RAMAGAGA: Okay, thank you. I think the correspondence will speak for itself. That is fine. And is it correct that you sent correspondence to the Minister of Justice, Minister Lamola, with an expression of an inclination to recommend that an enquiry be established regarding the conduct of Advocate Chauke?

ADV BATOHI: I did.

MS RAMAGAGA: And when was that?

ADV BATOHI: I think we have traced that. I am not sure if it is part of the bundle, but I know that we have traced that letter to the Minister or the memorandum. If counsel can

assist me.

MS RAMAGAGA: You have not yet accessed the document.

ADV BATOHI: I think it is SB... I beg your pardon.

MS RAMAGAGA: Okay, you have traced it.

ADV BATOHI: Yes, I have. I think I see it as SB10.

MS RAMAGAGA: SB10, yes.

ADV BATOHI: Yes, and it is dated 18 August 2023.

MS RAMAGAGA: So it was in August 2023 when you expressed your inclination to want the enquiry established.

10 SB?

ADV BATOHI: 10.

MS RAMAGAGA: 10, yes. I think I must not look at you, I must look at the documents.

ADV BATOHI: Yes, SB10 is signed by me and dated 18 August 2023, and it is a memorandum addressed to Minister Lamola. I just want to confirm that, yes, Minister Lamola, who was the Minister of Justice at the time.

MS RAMAGAGA: Okay, thank you. Now, when you sent this, when you wrote this memorandum to Minister Lamola,
20 which opinions had you secured then?

ADV BATOHI: My recollection is that I had all of them. That would be the Nalane one, Maenetje, as well as the Wentzel and Hulley. That is my recollection. Let me check and make sure. I think that is the case. I would have only done it after. It is not clear from the memorandum, but that is my

recollection.

MS RAMAGAGA: That would be clarified by?

ADV BATOHI: Bear with me for a moment. Yes, it will be clarified by, if you look at SB10, I go through the document in terms of the, I mentioned the various opinions that I had, and in paragraph 11 at page SB271, I state that:

“As the NDPP, I requested Advocates Hulley and Wentzel, both of whom were evidence leaders in the Zondo Commission, to provide a short memorandum outlining the summary and essence...”

10

And their memorandum was also attached and sent to the Minister. So I did have that memorandum. Opinion I should say.

MS RAMAGAGA: And by then you also had the memorandum from Advocate de Kock?

ADV BATOHI: Yes.

MS RAMAGAGA: Where he was advising or recommending that the request for the establishment of the enquiry should not be proceeded with.

20

ADV BATOHI: That is correct. He advised against a referral to the President.

MS RAMAGAGA: Now, at the time when you sent out this request or this memo to Minister Lamola, was this advice by Dr de Kock or I beg your pardon, Advocate de Kock, included

in the memorandum that accompanied the request or the memo?

ADV BATOHI: In fact, that memorandum was not included anywhere. It was not sent in the bundle, and that is why Advocate Chauke also did not receive it. And as I mentioned when I was examined about this earlier, it was not included. It was, Advocate Chauke requested it, and it was then sent to him as well as to the, I think it was sent to the President's office as well at that point. I am almost sure, but I just need
10 to confirm that.

MS RAMAGAGA: So your long answer to the question is, yes, it did not accompany the memo?

ADV BATOHI: Indeed, that is my long answer.

MS RAMAGAGA: Thank you. Thank you, Chair.

CHAIRPERSON: Advocate Batohi, through your counsel, when was the first letter written to the Minister of Justice, the very first letter regarding the complaints where the President was requested to set up an enquiry? That would have been the letter, the first letter to Minister Lamola.

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

CHAIRPERSON: Do you remember?

ADV BATOHI: Yes, I am looking at it. I think it is SB10, and that is dated 18 August 2023.

CHAIRPERSON: Sometime in 2021, and please correct me if I am wrong, I cannot pinpoint to the document in these

bundles, but when I read, it appeared that sometime in 2021 there was a communication to Advocate Chauke regarding allegations of misconduct on his part. Am I correct, or am I missing something?

ADV BATOHI: That is your recollection, Chairperson. That letter, I think, is part of the bundle. I think it is one of the annexures.

ADV MOHLAMONYANE SC: May I help in that regard?

10 **CHAIRPERSON:** You may help the witness if you have that document.

ADV MOHLAMONYANE SC: Madam Chair, thanks. The document is dated 13 May 2021. Advocate Batohi, it is SB5231 in your bundle. And the response of Advocate Chauke ...[intervenes]

CHAIRPERSON: Before you go to the response, let us look at that letter. SB5?

ADV MOHLAMONYANE SC: 231, Madam Chair, 231. It is a page.

CHAIRPERSON: SB5, yes, thank you. SB5231.

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

CHAIRPERSON: Yes, dated 13 May 2021. And this is the first communication by Advocate Batohi to Advocate Chauke about these allegations. He was, Advocate Chauke, requested to provide a response by 31st of May 2021. That is correct, madam?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: From May 2021... I beg your pardon. May 2021, what was this – after the response by Advocate Chauke, what was the next step? I may have to put it properly. What was the next step from your side as the head of the NPA?

ADV BATOHI: Chairperson, I am going to look at my affidavit to refresh my memory. Hopefully that is covered. So, Chairperson, my affidavit at paragraph 161 starts with the
10 process. I am reading through just to refresh my memory. Chairperson, from my affidavit at paragraph 165, on the 19th of October, Advocate Nalane provided an opinion, so I would have requested that opinion before that date. So that would have been the next step.

CHAIRPERSON: Would you have a letter of request to Advocate Nalane as you have handed the letter of request to the other counsel for an opinion?

ADV BATOHI: Chairperson, we should have it in the office. We can certainly get that and get the date as well then.

20 **CHAIRPERSON:** Counsel, may we, through your junior and the NPA team, be given that letter of request to Advocate Nalane?

ADV MOHLAMONYANE SC: That will be done, Madam Chair.

CHAIRPERSON: Would you confer with your junior to tell us

when we should have that letter? Because I realise that things fall through the cracks. We request for documents and when we reconvene, you would have forgotten what needed to be placed before us. Let us place you or your team on terms to tell us when they will give us that letter, so that you do not forget. It should be an easy matter to attend to.

ADV MOHLAMONYANE SC: Thanks for the indulgence, Madam Chair. They are currently sending a correspondence to the office of the NDPP to enquire about the letter. For the
10 moment, we are unable to say exactly when we will provide the letter, but they will let me know. They will give me a tinkle in whatever way to let me know about the answer, what the answer is.

CHAIRPERSON: It is important for the purpose of the sequence of events because when you look at the affidavit 162, reference is made to the response of Advocate Chauke and then at 165, it was only in 19 October 2021 when Advocate Nalane provided an opinion. In between the dates, 28 May 2021 and October 2021, something must have
20 happened between those two dates. A request to Advocate Nalane. It should have been in writing as was done with regard to others where Advocate Batohi requested an opinion. I would like to have a look at the contents of that requesting letter. If your junior counsel can follow up on that matter and give us a copy of that request.

ADV MOHLAMONYANE SC: It will be done, Madam Chair.

CHAIRPERSON: Thank you

ADV BALOYI-MERE SC: Advocate Batohi, when you wrote this letter to Advocate Chauke on the 13th May 2021, the only document or the only information that you had before you was the De Kock memorandum. Am I correct?

ADV BATOHI: The De Kock memorandum was a document that was obtained for a different purpose. But yes, I had it at the time.

10 **ADV BALOYI-MERE SC:** Actually, I may not be correct because the De Kock memorandum is 28 June, let me check the year, oh 2019.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: So when you wrote this letter to Advocate Chauke, you did not have the De Kock memorandum?

ADV BATOHI: I think I did, actually. I did.

ADV BALOYI-MERE SC: No, the De Kock memorandum is dated...

20 **ADV BATOHI:** 2019.

ADV BALOYI-MERE SC: Oh 2019.

CHAIRPERSON: It is dated 28 June 2019.

ADV BALOYI-MERE SC: So you did not have it, ma'am, before you because this letter is... Sorry, sorry, I mixed up the years. So you had the De Kock memorandum?

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: And based on your evidence, you had not read the record. You had not gone through the evidence. You relied on the De Kock memorandum, including its annexures.

ADV BATOHI: The De Kock memorandum I relied on for a completely different purpose.

ADV BALOYI-MERE SC: Okay.

ADV BATOHI: Should I explain?

10 **ADV BALOYI-MERE SC:** **CHAIRPERSON:** It had nothing to do with... So it was not a precursor to why we are here?

ADV BATOHI: No, that is correct.

ADV BALOYI-MERE SC: So the letter to Advocate Chauke, what prompted you to write the letter to Advocate Chauke, if I may ask?

ADV BATOHI: Well, there were, at the time when I took office, the State Capture Commission was taking place at the time. And there was a lot of public outcry about a number of cases. Now, if you look at the cases that I referred to in the
20 memorandum, I think it is important to understand the context, that I actually go to the memorandum itself.

ADV BALOYI-MERE SC: Yes, ma'am, I have seen, I think it is five or six cases.

ADV BATOHI: Yes. So I want to explain why those particular cases were included there. The first matter is the Booyesen

prosecution and I think we have led a fair amount of evidence regarding this matter. So I asked Advocate Chauke in paragraph 1.2 to explain his reasons for supporting the decision. The next matter is the Mdluli murder matter.

ADV BALOYI-MERE SC: Okay.

ADV BATOHI: And at 2.1, I state:

10 “I have perused the NPS representation file relating to this matter. From a reading of the documentation contained in the file, I understand that Mdluli was arrested in the beginning of 2011, where after a decision was made to indict him and three others in the High Court for several charges including murder, attempted murder, intimidation, kidnapping. The trial would have commenced in April 2012. But following a representation, you decided to withdraw charges and a formal inquest was held.”

I then go on, 2.2:

20 “The failure of the NPA to prosecute Mdluli was successfully challenged...”

And at a later stage in the same paragraph:

“...thereafter the prosecution proceeded on charges of intimidation, kidnapping, assault with intent to cause grievous bodily harm

and defeating the ends of justice. No charges of murder were put. The prosecution was successful and the remarks of the presiding judge in the judgment of the matter relating to the murder are a cause for reflection. Please provide me with the following information or reports and respond to the following issues.”

Chairperson, I then raise, should I read all of those out? I
10 am happy to do so.

ADV BALOYI-MERE SC: No, you do not have to.

ADV BATOHI: So that is what triggered the Mdluli matter.

ADV BALOYI-MERE SC: Okay.

ADV BATOHI: And then there was the other matter which was a complaint by the late Karima Brown. And she filed a complaint to me regarding intimidation, alleged intimidation. I attached a copy of the complaint to the letter to Advocate Chauke and asked him to respond to the allegations. The next matter was the case of State v. Brian Hlongwa. This
20 matter, this was a matter that General Lebeza, who was the head of the Hawks at the time, when I took office in 2019, he raised this matter with me as a matter of serious concern that the matter was in the Johannesburg jurisdiction and had been withdrawn by the DPP.

And in his view at the time, and this matter was

withdrawn, if I recall, around 2012, if I am not mistaken. So when I met General Lebeya, it would have been about seven years later. And his concern was that the matter had been withdrawn and had not been re-enrolled. They had been given to understand that the matter will be re-enrolled. So as a result of this, I then requested Advocate Chauke's reasons for the delay in this matter and that is in paragraph 4.1.

And then the last matter was that of State v. Duduzane Zuma, which was also a matter which the DPP in Johannesburg, Advocate Chauke declined to prosecute. But that matter, Advocate Abrahams overturned that decision and in fact, took a decision to prosecute that matter. And then in that regard, I asked Advocate Chauke, I state:

“I have perused the representation file at the National Office, but you have kindly requested to provide me with a copy of your office file in which the record of the original decision not to prosecute is recorded, as well as a copy of all related files and information. I am in possession of your report to the then NDPP in response to his request for a report. The report does not deal with the original decision not to prosecute this matter, and your explanation

of this decision would be highly appreciated.”

So that is the context and the triggers that caused me to request this report, or a report from Advocate Chauke relating to all of those matters.

ADV BALOYI-MERE SC: Thank you. Advocate, no, no, no, before I step off this, the next page, SB7, page 261, it is a further letter from you dated the 27th of July 2022.

ADV BATOHI: That is correct.

10 **ADV BALOYI-MERE SC**: And at paragraph 4 you say you are inclined to make a submission to the President to hold an enquiry into the fitness of Advocate Chauke to hold office as contemplated in section 12(6)(a). That is on the 27th of July 2022. You had already, and correct me if I am wrong, you had already formed a view where you say you are inclined, in line with, after careful perusal of Advocate Chauke's responses to your request, you are inclined to approach the President or to make a submission to the President to hold an enquiry in terms of section 12(6)(a) of the NPA Act.

20 **ADV BATOHI**: I do say I am inclined to do that.

ADV BALOYI-MERE SC: And further to that, you went ahead and sought further opinions.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: And I might add, without looking at the evidence, because your testimony is you relied on

opinions and their annexures. And you say at the stage when you requested Advocates Hulley and Wentzel to give you an opinion, you had not been furnished with the evidence, with the facts.

ADV BATOHI: You are correct. At this stage, when I said I am inclined to, I only had Advocate Nalane's opinion. And I did not have details. I did not have Dr Broughton's opinion. I did not have Hulley and Wentzel. And there was, on the basis of Advocate Nalane's opinion, I indicate that I am
10 inclined to do so. But it was not a final decision.

CHAIRPERSON: You had a De Kock memorandum, Nalane opinion, and Maenetje that I believe was provided by Advocate Chauke. Or was it before that?

ADV BATOHI: I did not have the De Kock memorandum at this stage. I had the De Kock 2019 report, the panel report, for a different reason. But with regard to this process, I only had Advocate Nalane's opinion at this stage. My recollection is that as a result of this letter that I sent to Advocate Chauke, that he then obtained the opinion from Advocate Maenetje0
20

ADV BALOYI-MERE SC: Okay, thank you.

ADV BATOHI: And after that, Advocate de Kock then sent me the memorandum. Just for completeness, if I may, I know I am inclined to give long answers. So stop me if I am going too long.

ADV BALOYI-MERE SC: No, no. Ja, you have dropped my

memory that Advocate de Kock gave you a memorandum after seeing the gaps in the Nalane and Maenetje opinion.

ADV BATOHI: That is correct. So I got that memorandum. And then after that, I got David Broughton's opinion and the Wentzel and Hulley opinion. And yes, and after that, I made the referral.

ADV BALOYI-MERE SC: Thank you.

CHAIRPERSON: If I may, I know it is almost lunchtime. Counsel, I am not sure of the time we normally take lunch, 10 whether it is half past one or half past two. My sisters are saying half past one.

ADV MOHLAMONYANE SC: They are correct, Madam Chair. It is usually at half past one. [Laughter] But I may proceed. We may proceed until 2 o'clock if it pleases Madam Chair and the panel members.

CHAIRPERSON: We will take a cue from you. But before we adjourn, if I may just follow up on the last questions, then we will take an adjournment. Will that be fine?

ADV MOHLAMONYANE SC: That will be fine, Madam Chair.

20 **CHAIRPERSON**: I do not want to derail a train of thoughts on this very point. Advocate Batohi, it is of concern to me, and I need clarity. When you look at the sequence of events after you had received the opinion of Advocate Nalane, which I believe was the first opinion, please do not nod because the record will not reflect your nodding. Please answer.

ADV BATOHI: That was the first opinion.

CHAIRPERSON: Yes, indeed. Thank you. And subsequent to Advocate Nalane's opinion, you received, not necessarily in terms of chronology, but you subsequently received an internal memo from Advocate de Kock on the 15th of February 2023. It was after a number of events where, let me just refer you to this document. Maybe you can help. It is a document at C00001. That document is indexed to folder correspondence. That is the document that we have, indexed
10 to folder N-correspondence. That document is C00001, and it is addressed to you by Advocate R de Kock.

ADV BATOHI: I see it, Chairperson.

CHAIRPERSON: You see it. In that document, let us look at the subject there:

“Commission of Enquiry into Fitness to Hold Office in Terms of Section 12(6)(a) of the National Prosecuting Authority Act, number 32 of 1998

Purpose:

20 The purpose of this memorandum is to submit a representation to the NDPP, Advocate H Chauke, DPP Johannesburg, in response of allegations of misconduct levelled against him as per report dated 19 October 2021 by Advocate Nalane SC.”

I will not take you through the entire document, but if you look at page C00004 against 6.1.12, under the heading Misrepresentation to the Employer, do you see that?

ADV BATOHI: I do.

CHAIRPERSON: 6.1.12 reads:

“Nalane SC's opinion does not specify what clearly much more than that amount to.”

And Advocate de Kock goes on.

10 “In order to rise to the level of unlawfulness, Chauke, as the DPP South Gauteng, would have had to conduct himself such that he exercised the powers in section 21 of the Act in the Cato Manor prosecution, that would otherwise have vested in the DPP KZN by virtue of section 23 of the Act.”

I am not going to read the entire part, which is also relevant, but I would like us to go to paragraph 7 at C00005.

20 “Nalane SC refers to paragraphs 180 to 186 of the decision of the High Court in Freedom Under Law versus National Director of Public Prosecutions (refers to the citation there) where the Court held that Chauke failed to apply his mind to the relevant considerations mandated by the Constitution and acted capriciously by failing to obtain

input from victims and other role players, and further, that there was a direct and circumstantial evidence implicating Mdluli and Chauke could only withdraw the charges against Mdluli in the face of formidable evidence if there were compelling reasons to do so in terms of the prosecution policies/directives.”

And then he deals with the High Court's decision. I think it is Judge Murphy's judgment. But look at the evaluation, paragraph 11.

“It is respectfully submitted that Advocate Chauke has overall provided satisfactory response to the allegations levelled against him for the employer not to proceed with the formal enquiry into his conduct or fitness to hold office in terms of the NPA Act.”

Advocate de Kock continues:

“Advocate Chauke denies trying to influence Advocate Mlotshwa improperly in the Cato Manor prosecution. It was critical, in my view, for Advocate Nalane SC to interview Mlotshwa with a view to establish the existence of any malicious attempt on the part of Chauke to pressure Mlotshwa to sign

the indictment in the Cato Manor matter.

More so...”

So says Advocate de Kock;

“...Mlotshwa did not seemingly lay any complaint with the employer as an expression of discontent at the time of the occurrence of the alleged offending incident. It is also a well-established principle that issues of discipline ought to be dealt with timeously for purposes of achieving procedural fairness.

10

That Chauke apologised to Mlotshwa about an omission by him to provide Mlotshwa with the prosecution memorandum and that there is no bad blood between the two relatively settles, it is respectfully submitted the matter and further underlines the need for Nalane SC to have interviewed Mlotshwa for the purpose of his report.

20

It also fortifies the principle that discipline must be progressively applied. It is also important to take note that Chauke got involved in the KZN matter at the instance of his senior and supervisor, Advocate Jiba, and therefore the employer, as a matter of

practise and the law, the NPPs have in the past assigned prosecutors and even DPPs' matters that fell outside their jurisdiction for one reason or the other.

Assertions by Chauke regarding his role in the Cato Manor matter were raised in the context of representations in his defence to the NDPP and has satisfactorily explained his role as that of a coordinating the activities of the prosecution team from his office.

10

An understanding of one's role can, it is respectfully submitted, be subjective and in the absence of glaring evidence of *mala fide*, it will not be worth pursuing a misrepresentation charged against Chauke.

The assertion in the report of Nalane SC that Chauke's role was clearly much more than that, without any indication of what Chauke's exact role was, is rather vague and embarrassing to form the basis of a charge against Chauke. The SCA found Chauke's strategy of withdrawing the charges against Mdluli to hold an inquest not to be irrational. Pursuing a charge of distortion of the SCA's

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judgment in respect of the Mdluli case made in the context of representation to the NDPP in his own defence and where Chauke has made available a copy of the relevant judgment to the NDPP in support of his assertion is not supported in the absence of clear evidence of *mala fide* on the part of Chauke. Besides, the judgment envisaged that the NDPP will reconsider Chauke's decision to withdraw the case against Mdluli.

10

Recommendation...”

Advocate de Kock then recommended to you:

“It is recommended on account of the shortcomings identified in Nalane SC's report as per the legal opinion of Advocate Maenetje SC and Advocate Scott, that the NDPP make no submissions to the President for holding of any formal enquiry against Advocate Chauke in terms of section 12.”

20 It goes on. I am reading this letter or this memo or recommendation by Advocate de Kock. I do know that from the record that Advocate de Kock has since passed on. But this is one of your senior advocates who, with his experience and having served in this office for a number of years, made certain recommendations to you. After this recommendation,

that seemingly favoured Advocate Chauke following his criticisms of Nalane's report because of his shortcomings, which he points out, and following the SCA decisions that he correctly puts, absolved Advocate Chauke, if I may use the word, because his decision was found not to be irrational, you nonetheless proceeded to obtain further legal opinions.

Now, my question follows this backdrop. Why is it so that you were favoured but with an internal memorandum by an experienced advocate in the NPA, you nevertheless
10 decided to seek guidance from outside advocates who do not necessarily have the knowledge within the NPA? Secondly, why was it important to disregard that opinion and then favoured the opinion that seemed to have gone against Advocate Chauke? In other words, you have one opinion by someone within the NPA itself with experience who had been in that office for many years who gave you a well-considered opinion, I must say. You may correct me if I am wrong. And then you went ahead and sought further opinions and then later seemed to have been persuaded by the subsequent
20 opinions that went against that recommendation of Advocate de Kock.

ADV BATOHI: Thank you, Chairperson. So, there is a lot that I need to explain. Chairperson, when I obtained, when I got this report from Advocate de Kock, it is correct that he proposed that there should not be an enquiry into Advocate

Chauke's fitness to hold office. And I hasten to add that Advocate de Kock's memorandum expresses a view and there are a number of opinions that express, legal opinions that express a different view. Chairperson, when I got this, the context of it, you will note from the purpose which you read, was that it was to submit the representation by Advocate Chauke, which was drafted by Advocate Maenetje, to me.

Because just to explain the process at the time, he was the head of the NPS, my deputy. And so he was
10 coordinating, obtaining certain opinions. So when the Maenetje opinion was obtained, it went to his office. And so what he then did is, he was, under cover of this memorandum that the Chairperson just read from, he actually attached, he was forwarding me, Advocate Maenetje's opinion, which I had not seen at that point. He was, ja, that is clear, I hope.

So he sends me the memorandum with Advocate Maenetje's opinion. I also have in my possession Advocate Nalane's opinion, which had been sent already to Advocate Chauke. I looked at his response and there were a number
20 of, what was clear to me is that Advocate Chauke, I beg your pardon, Advocate de Kock seemed to have accepted the say-so of Advocate Chauke on the basis of what was in Advocate Maenetje's opinion. And I will go through some of the details that the Chairperson has read out because I think it requires a response from me.

Also, he had looked at the two opinions at that time. At that time he had Advocate Nalane's opinion and Advocate Maenetje's opinion. And he based his views on those two opinions and came to the conclusion that they were, for reasons that he sets out here, why we should rather accept Advocate Maenetje's opinion over Advocate Nalane's opinion, which had certain shortcomings that were identified. I looked at this at that time and I realised that Advocate de Kock's evaluation of these two opinions, none of us had looked at
10 any of the evidence, the underlying evidence.

And it was clear that ...[intervenes]

CHAIRPERSON: I beg your pardon?

ADV BATOHI: We had not looked at the underlying evidence, so I certainly ...[intervenes]

CHAIRPERSON: I beg your pardon? You say none of that had not looked at the evidence, are you referring to Advocate de Kock, Advocate Maenetje, Advocate Nalane?

ADV BATOHI: No, let me rephrase that. Advocate de Kock had not looked at any of the evidence, I had not either at that
20 point. I had the opinions. And so I realised that ...[intervenes]

CHAIRPERSON: I beg your pardon, I am sorry to intervene, I am sorry. Remember, this paragraph that I read to you, which is a memo by Advocate de Kock, is dated 15 February 2023.

ADV BATOHI: Yes, that is correct.

CHAIRPERSON: It is the second, or rather it is part of the correspondence.

ADV BATOHI: That is correct.

CHAIRPERSON: But it comes later, after a couple of years. You remember the first one was in 2019. Am I correct?

ADV BATOHI: You are correct, well...

CHAIRPERSON: Let me just get that first. Is the first one 2019?

10 **ADV BATOHI**: Chairperson, if I can explain that. That is not, as I said, the first 2019 De Kock report is not, the first opinion to deal with this matter is Advocate Nalane's. The De Kock report, as we have been referring to, which I obtained in 2019, was for the purpose of me trying to establish or determine what approach should I, as the National Director, take in the litigation, the Booyesen litigation at that point, which was a review to overturn Advocate Abrahams' racketeering authorisations.

20 So in the context of that, I asked the team to look into the matter and give me a view because I needed to decide what do I do with the litigation. So that was a report that was not obtained in the context of considering whether to refer the matter to the President for an enquiry. So just to be clear, Advocate Nalane's was the first opinion that was obtained in this process. But yes, I did have that report at

the time.

CHAIRPERSON: With relation to the first Advocate de Kock's report that you say had no relevance to the referral or to Advocate Chauke's misconduct, attached to that affidavit that made reference to the litigation, the review application, the racketeering authorisations, et cetera, there are annexures to that document.

ADV BATOHI: To which document? Sorry, Chairperson.

CHAIRPERSON: To the first memorandum.

10 **ADV BATOHI:** Yes, that is right. That was what we filed. I am getting confused. Today we filed...

CHAIRPERSON: Annexures to that memorandum.

ADV BATOHI: Yes, that is correct.

CHAIRPERSON: Please, counsel, if I am missing something, I see your junior counsel and the lady advocate besides you are nodding, meaning they are agreeing with me. The annexures to the first internal memo by Advocate de Kock were filed of record today.

ADV BATOHI: That is correct, Chairperson.

20 **CHAIRPERSON:** I have not looked intensely to the contents of those annexures, but will any of those annexures form part of the evidence in relation to the matter of Advocate Chauke?

ADV BATOHI: It will, Chairperson. In fact, some of it has already been led. Some of the documents have been referred to already in different contexts.

CHAIRPERSON: I want us to get it correct because it is this issue of evidence. Even if the heading might have been in relation to racketeering authorisations, attached to that memorandum, as early as 2019, we had evidence, a body of evidence, which allegedly implicated Advocate Chauke or which may have implicated him or may not have implicated him. But we do know that there was evidence in relation to his matter.

ADV BATOHI: That is correct, Chairperson.

10 **CHAIRPERSON:** I assume that that evidence, as early as 2019, when you assumed office, when you read it, without the opinions of any other advocate, would have assisted you to form a preliminary view about this matter.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Now that you have that evidence, in 2019, followed by a lot of correspondence, including this very correspondence I have read to you of 2023, in which Advocate de Kock says, this is Advocate de Kock who had the evidential material in 2019. He now writes in 2023,
20 looking not only at the evidence but also looking at the judgment of the SCA and critiquing Advocate Nalane's opinion that it is full of, depleted with shortcomings. And he draws attention to those shortcomings. Why then, given this scenario, by your own advocate who has been in the NPA office, you then even not consider that but go outside and

seek additional legal opinion, when the evidence is in front of you?

ADV BATOHI: Chairperson, there were a number of aspects of Advocate de Kock's memorandum that I did not agree with. And, for example, his interpretation of the SCA judgment. And I can go into details. I already dealt with my evidence earlier on. But I can deal with it again. But we can park that for now. What I did after this, and you are correct, Chairperson, is that there was a lot of information and
10 evidence that I had that seemed to suggest that what Advocate Chauke did in this matter was not conduct himself, well in fact amounted to misconduct. And the Zondo Commission was ongoing looking into allegations of capture in the NPA.

You are correct. I had the original De Kock report. And there was a wealth of information that suggested, in fact, there was also the Booyesen review that had taken place. I had all of that information where the Gorven judgment, also in 2014, I think. So there was a wealth of information that,
20 to me, seemed to point very strongly at misconduct on the part of Advocate Chauke. Notwithstanding what Advocate de Kock said in his report, which, as I said, looked at the two opinions. But you are correct. He also did the 2019 report.

So when I got this, and having all of that information, also aware of what was going on in the Zondo Commission,

at that point, and I need to get the dates right because I am trying to recall, and these documents do help us. After I got the Nalane decision, Nalane opinion, I, we forwarded it to Advocate Chauke. I think it was about a year after we obtained the opinion. And I want to explain what happened in that time as well. After we got the opinion, the Zondo Commission was still doing its work.

And I had conversations with Advocate Chauke as well. Explaining to him that I was waiting for the outcome of
10 the Zondo Commission, when I will decide what to do in this matter because I knew they were investigating allegations of capture of the NPA, of persons in the NPA. The Zondo Commission reports, we got the Nalane opinion. The Zondo Commission reports were released, I think, in 2022. And I must get the dates correct. In fact, I do mention it in my affidavit.

When that report was released, it unfortunately did not deal, did not make recommendations, and did not deal with the aspect of capture of the NPA. Although a lot of staff
20 members, as I said earlier, had testified, had made statements, affidavits to Zondo Commission. And I also had all of that information before me, which seemed to show that something seriously untoward and unlawful took place in the NPA.

So when I got Advocate de Kock's opinion, I still felt

that I needed to properly understand what is the underlying evidence before I make a decision whether to refer or not. And after that, I then looked at, and my evidence is being, the evidence I am tendering now is in a vacuum. Perhaps I should not have been the first witness because there is a lot of other evidence that will be led at a later stage that might actually shed light in why certain things happen. But I do not want to testify about that. But there was a lot of information ...[intervenes]

10 **CHAIRPERSON:** But just on that aspect, Advocate Batohi, I would not imagine anybody speaking before you because you brought us here. It is your complaint to the President that brought us here. And as somebody who has written to the President, based on what you presented to him, you will naturally be the first person to come and tell us why we are here.

ADV BATOHI: Chairperson, I...

CHAIRPERSON: Not anybody else. So I am just saying, I think it is a misguided statement to say you do not know why
20 you should have been the first witness. I think you are properly before us, madam.

ADV BATOHI: Yes, thank you, Chairperson. It was not meant to suggest that... All I was trying to say is that there is other evidence that might contextualise what I am saying. But that evidence will follow depending on what the evidence

leader decides. So when I was... There was a lot of information and evidence including statements to the Zondo Commission that, as I said, that to me, as the National Director, I felt that the matter was still not properly – I did not have the evidence, the underlying evidence, to properly consider whether I should refer this matter or not. There were clearly gaps in Advocate Nalane's opinion.

So after I got Advocate de Kock's opinion, memorandum, which expressed his views, as I say, there
10 were a number of things that I can deal with in detail. But at a high level, at that point, I decided I needed to properly understand what is the evidence in this matter. I then asked Dr Broughton in my office to look at these... I gave him the opinions and I am not sure if we have handed in any document that I sent to him or whether it was a verbal instruction, but I asked him to look into this matter and then to give me an opinion.

He gave me the first opinion, which was, I think, within a week or a little more than that, expressing a view
20 that we should refer the matter to the President, but saying to me that he still felt he needed more time to look at all of the underlying evidence around this matter. For me, it was important that he did that because I needed, I wanted to see the evidence before I made this important decision. I then gave him more time. He then went and his supplementary

affidavit sets out exactly what he looked at, what information he had, and he then gave me the very comprehensive opinion, the second opinion, with the full bundle of actual statements, evidence, documents from Zondo Commission, memoranda, a lot of which we have actually presented to this panel already.

But that entire bundle of Dr Broughton is, in fact, evidence that I took into account, the hard underlying evidence that led to me also forming an opinion that I had
10 reasonable grounds to believe that this matter, there was sufficient, this matter should be referred to the President to hold an enquiry into Advocate Chauke's fitness to hold office. And at that point, as I said, all I need, in my view, Chairperson, is to have reasonable grounds to suspect that this is the case. After I got Advocate Dr Broughton's opinion, as far as the Booyesen matter was concerned, I had looked at the evidence. As far as the Mdluli matter was concerned, I still felt I needed to understand this properly. Was there some grave injustice committed?

20 And then I got the opinion of Advocate Hulley and Wentzel, who, as I said, were working at the Zondo Commission, and when I looked at that together with the annexures to their opinion, which was some of the evidence, the key aspects of the evidence in the Mdluli matter, I then formed an opinion, in my view, that I had reasonable grounds

at that point to believe that Advocate Chauke had in fact committed misconduct, as well as, in my view, there needed to be an enquiry into whether in fact he committed misconduct, and in fact he is a fit and proper person to hold the office of a DPP.

I made the recommendation to the President, and this part of it is the process in my affidavit, through the Minister's office. The President, after his office received what I had forwarded, then requested another opinion, and
10 my affidavit deals with it. That is another opinion by Advocate Moroka, I think it is, SC. That was not obtained by me. It was obtained by the Department of Justice, and the President, having considered all of this, agreed that there was sufficient, well, I cannot speak for him, but because he has decided to hold this enquiry, I can assume, agreed that he was, I do not want to make assumptions for him, but decided that there was sufficient to hold an enquiry into Advocate Chauke's, whether he did in fact commit misconduct, and his fitness to hold office.

20 And this, with all due respect, is the purpose of this enquiry, is to establish precisely that. Thank you, Chairperson. I can go into some of the details. You did read out, Chairperson, a number of aspects of Advocate de Kock's memorandum. Perhaps for completeness, I should go to that, Chairperson, and deal with one or two aspects. If I can just

be referred to that again, I have closed my page.
Chairperson, if I can be guided.

ADV MOHLAMONYANE SC: Where do you want to go?

ADV BATOHI: Advocate de Kock's memorandum.

ADV MOHLAMONYANE SC: SB3.

ADV BATOHI: SB3.

ADV MOHLAMONYANE SC: Yes, in your bundle.

ADV BATOHI: No, the other one.

ADV MOHLAMONYANE SC: The other one is...

10 **ADV BATOHI:** I think it is SB... No.

ADV MOHLAMONYANE SC: It is in C.

ADV BATOHI: Oh, is it in C?

ADV MOHLAMONYANE SC: Yes.

ADV BATOHI: Okay, yes.

CHAIRPERSON: Are you referring to...

ADV MOHLAMONYANE SC: The second one.

ADV BATOHI: The second, well, his memorandum, it is in
C, that is correct.

20 **CHAIRPERSON:** Are you referring to the one that I earlier
on read in?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: C.

ADV BATOHI: That is correct.

CHAIRPERSON: The bundle of correspondence.

ADV BATOHI: Yes, if I could...

CHAIRPERSON: C. You can look at it, it is 00001 to 7.

ADV BATOHI: I have it, Chairperson. So if I deal with some of the aspects that the Chairperson read out...

CHAIRPERSON: I think you may not necessarily deal with them one by one. Those critical aspects, we need not deal with them. I think they were presented as evidence, most of those aspects. For instance, the SCA judgment, it is already before us. And those aspects of Mlotshwa's affidavit, Mlotshwa's affidavit has been referred to us, if my
10 recollection is correct. Advocate Mlotshwa's affidavit at the Zondo Commission. I think it has been referred to us.

I just wanted to, looking at the sequence and the recommendations as to why, if one of your senior officers, advocates, makes such a recommendation, having looked at the evidence, it was preferable to go outside and seek legal opinions by somebody who are not even members of the NPA. I would imagine the internal experience on matters of this nature would be more helpful than somebody who just looks at the law without having the expertise of being an advocate
20 in that office.

I may be wrong, but I thought, it just made me worry that you disregarded an internal opinion by a senior advocate in the position of Advocate de Kock who had prepared a document before and then went ahead to seek more opinions. I know that it is clinic time.

ADV BATOHI: Chairperson, there is one aspect that I want to clarify. The opinion that I sought after Advocate de Kock's was not an external one. It was an internal one. Dr Broughton is in my office. So I asked him to look at all of this and to get the evidence. Just to clarify, he is an internal staff member, but he is my legal officer and he is in my office and he did the supplementary affidavit.

CHAIRPERSON: But you went ahead to get another opinion from Advocate Hulley.

10 **ADV BATOHI**: Yes, that is correct. I did.

CHAIRPERSON: That opinion was obtained five months, if you look at the Advocate de Kock's recommendations of 15 February 2023 and you look at Advocate Hulley's opinion of July 2023. About five, six months later. And on the 4th of July 2023, Advocate Hulley says that they drafted a letter for you in which you were to recommend that the President should institute an enquiry in terms of section 12(6). So even

before Advocate Hulley prepared that opinion, he had been asked to settle a letter to that effect. If you look at LO0010,
20 it is volume LO1. That document is the opinion of Advocate Hulley in paragraph 2, in which he refers to you as ...[intervenes]

ADV BATOHI: The page number, Chairperson?

CHAIRPERSON: Yes, page LO001048. It starts at 47. That memorandum.

ADV BATOHI: 1048.

CHAIRPERSON: Yes. LO...

ADV BATOHI: My bundles are slightly different, so I need to go by page number.

CHAIRPERSON: Yes, it is the opinion by Advocate Hulley of July 2023, which comes approximately five months after the recommendations by Advocate de Kock.

ADV BATOHI: I am sorry, Chairperson. The page number, I am still not there.

10 **ADV BALOYI-MERE SC:** Bundle 4.

ADV BATOHI: Sorry?

ADV BALOYI-MERE SC: Bundle 4.

CHAIRPERSON: Bundle...

ADV BATOHI: The page number, Chairperson.

CHAIRPERSON: LO4.

ADV BATOHI: My bundles are organised differently. I need the page number.

CHAIRPERSON: Yes, it is LO4. Do you have LO4 in front of you?

20 **ADV BATOHI:** Chairperson, my bundles are different, so I just need the page number, and I should be able to...

CHAIRPERSON: Okay, the page is LO001048.

ADV BATOHI: 1048.

CHAIRPERSON: Yes, and this should be the last part because I am cautioned that it is clinic time.

ADV BATOHI: Yes, I do have it.

CHAIRPERSON: The paragraph there, on the 4th of July 2023, that is a few months after Advocate de Kock's recommendation, Advocate Hulley says he settled a draft letter for the NDPP in which he recommends that the Sate President institute an enquiry in terms of section 12.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: You see that?

ADV BATOHI: Mmm-mmm.

10 **CHAIRPERSON:** As at that time, even before Advocate Hulley prepared the opinion in July, you had already formed a view that there must be a referral for the institution of the Commission of Enquiry.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: Yes.

ADV BATOHI: That is correct, Chairperson, so let me clarify this aspect. And I am thinking back, I am trying to cast my mind back because it was a long time ago. I am trying to get the sequence of events correct in my mind. So it is so that
20 by that time, I was satisfied that with regard to the Booyesen matter, and that is my recollection, that I was clear about that, that matter needed to be referred.

And it is in that context that I asked Advocate Hulley to settle the referral letter, if my memory serves me right. That is my recollection. And after that, given Advocate

Hulley's, during those conversations, given his detailed knowledge of the Mdluli matter, I asked him then to provide me with an opinion, and that is when he gave me the opinion with the annexures, having considered that, I then decided to also refer the Mdluli matter. That is the sequence as I recall it.

ADV BALOYI-MERE SC: Advocate Batohi, go back to 001048, the letter that was settled by Advocate Hulley. Look at the last paragraph, at paragraph 2, before the
10 subparagraphs. It says:

“The said letter calls into question the conduct of Advocate Chauke in relation to two criminal matters.”

And if you go to 2.2, it talks to the Mdluli matter. And your answer just now was, at that time, I had already made up my mind about the Booyesen's matter. But the letter that was settled on the 4th of July already refers to the Mdluli matter.

Do you care to comment on that?

ADV BATOHI: I do. I am just trying to recall the sequence
20 of events. And, you know, it is difficult trying to cast one's mind back. But you are correct. I can only imagine, in these circumstances, that...

ADV BALOYI-MERE SC: Sorry, if I may apologise. Paragraph 4 explains what you are saying. I am sorry.

ADV BATOHI: Oh, okay.

CHAIRPERSON: It says you had already made up your mind about the Cato Manor. But in relation to the Ramogibe matter, you were supposed to be provided with... No, but it says with whatever evidence is available to support their process of reasoning. But the letter already contained the matter of Mdluli. So it is like putting the cart before the horse. They settled the letter, and then they give you the evidence to support the reasoning.

ADV BATOHI: I can only imagine again that at that point, I
10 was, of course, settling the letter, I was thinking about these matters, and I was very clear about the Booysen matter. And so my thinking, I am trying to cast myself back, would have been that with the Mdluli matter, even though at that point I had reached some kind of preliminary thinking around it, that I still wanted more. And the purpose of this continuous request for information is because the importance of referring a matter to a President.

I wanted to make sure right up until the last moment, before I put my signature on any referral, that I had
20 considered everything that I could, before I made this very, very, you know, a decision like this is not taken lightly. This was a very important decision. And so constantly through this process, I am trying to make sure that I am getting, that my initial thinking is, in fact, the right one. So I then, in fact, ask for more at that stage, and then I am given, as I said, the

annexures with some of the evidence relating to the Mdluli matter.

So this entire process is just me trying to make, forming certain views at certain times, but at the end of the day, trying to make sure that I get it right with the evidence and considering all of that, before I made the final referral to the President. So that was why I constantly asked for more, because I had a sense of what was going on, and I felt that as a National Director, I needed to make sure that I got as
10 much as possible before I finally made the referral.

CHAIRPERSON: Just one last aspect. I hear you that as regards the Mdluli matter, you still needed some more information, and you were satisfied as regards Cato Manor matter, that the matter had to be referred. The Mdluli matter, and please correct me if I am missing something, the SCA, the judgment of Judge Brandt, dealt with the Mdluli matter, and in my view, closed the chapter, meaning that as I understand the judgment, all that needed to be done following the inquest was for the matter to be re-enrolled or for the
20 withdrawn charges to be re-instituted. Am I correct? Just on the reading of the judgment, which judgment seems to absolve Advocate Chauke.

ADV BATOHI: Chairperson, I want to refer to, I did deal with this matter earlier. I want to refer to my notes on this, but my understanding at a very high level of the Brandt judgment

is that it did not absolve Advocate Chauke. I do not mean to be disrespectful. I am trying to find my notes as I speak.

CHAIRPERSON: I am going to request that we park it here. Let us flag that point. All of us will look at that judgment again and then deal with this aspect, because it troubles me.

ADV BATOHI: It is important, yes.

CHAIRPERSON: And the reason why it troubles me is because an Appellate Court has pronounced on a matter, and we seem to go against that decision. I just want to understand, in respect of which aspects of the judgment did the SCA get it wrong?

ADV BATOHI: Chairperson, we are not saying the SCA got it wrong.

CHAIRPERSON: Well, you said earlier that you did not agree with certain parts of the SCA judgment, earlier.

ADV BATOHI: Chairperson, what I mean to say is that we agree with the SCA judgment, but we do not agree that it absolves Advocate Chauke's conduct.

CHAIRPERSON: That is my reading of the judgment. The SCA did not say, I absolve Chauke. The SCA spoke of the conduct of Mr Chauke or Advocate Chauke not being irrational, if I may use the legal terminology. If his conduct was not irrational, what does it do? It absolves him, in my understanding of the law. Now, I want to understand, what is it that the SCA said which disfavoured, if I may use the

terminology, disfavoured Advocate Chauke? When we reconvene, before we all forget, let us look at that judgment and maybe you can assist me in that regard concerning the Ramogibe matter.

ADV BATOHI: We will do so, Chairperson. This is a very important aspect.

CHAIRPERSON: Thank you. Very important indeed. Thank you very much. Might I propose that we pause? Advocate Mohlamonyane, I am sorry that we took a bit long time on this
10 matter that is worrisome to me and I honestly need clarity on these aspects. We will reconvene... My sisters are guiding me that we will reconvene at quarter past three. Thank you.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

CHAIRPERSON: Good afternoon, counsel, Advocate Mohlamonyane.

ADV MOHLAMONYANE SC: Good afternoon.

CHAIRPERSON: Good afternoon, Advocate Batohi. Good afternoon, *Ntate* Chauke. Ma'am, remember you are still
20 under oath?

ADV BATOHI: I do, Judge.

CHAIRPERSON: When we adjourned, we were dealing with that aspect of the SCA judgment regarding whether the conduct of Advocate Chauke in relation to the Mdluli murder was irrational or rational. I think, if my recollection is correct,

the Courts found that Advocate Chauke's conduct was not irrational. The point I made was, given the fact that the Appellate Court had pronounced on that matter, was it still necessary to seek the advice of a senior counsel in the position of Advocate Hulley?

Perhaps I should start with the question. By 4th July, 2023, you had formed a view that there should be a referral to the President, meaning that you had concluded, when you asked Advocate Hulley to draft the letter to that effect, you
10 had concluded that the matter is worth referring to the President for the establishment of an enquiry. Would you please address us on that?

ADV BATOHI: So, Chairperson, there is two parts, two questions that you have essentially put to me. And my understanding is you said that I should deal with the second question first. That is, by the 4th of July, I had formed a view for a referral when I asked Advocate Hulley to draft the referral letter. Chairperson, by that time, I had certainly formed a view with regard to both of these matters. And if
20 my recollection is correct, I think Advocate Hulley settled the draft, not necessarily drafted it.

But the position is that, yes, indeed, at that point, I had formed a view that both of these matters should be referred. And at that point, understanding that I had considered the judgments, including the Brandt judgment,

and having discussed the matter with Advocate Hulley at that point, and given, as I explained earlier, his involvement in this matter at the Zondo Commission with Advocate Wentzel, I asked him for, again, as I said, I was continuously wanting to make sure, even though I had formed opinions at various stages, that I had not signed the letter, this letter had not gone off, that I was getting it right.

So he then sent an opinion with attachments that I have referred to earlier, which was relevant evidence in that
10 matter as well. So that is with regard to the second aspect, second question. The first aspect, Chairperson, your question is whether the conduct of Advocate Chauke in relation to the Mdluli matter was rational or irrational. Chairperson, here it is conduct. What conduct was Brandt actually looking at? And I think that is what we need to be ...[intervenes]

CHAIRPERSON: Could you please refer to him as Brandt J, or Justice Brandt, or Judge Brandt?

ADV BATOHI: Certainly, what conduct was Judge Brandt
20 referring to? And that is what we need to be clear about when we look at the Brandt, Judge JA Brandt decision. So, in my view, Chairperson, is that what Judge Brandt was seized with at that point in time was the rationality of Advocate Chauke's decision not to continue with other charges when he withdrew the murder charge and referred it to an inquest. Brandt JA

was considering the rationality of that conduct. And it is important that we clarify what exactly was the Judge in the SCA considering. And as I said, I agree with the decision of the Supreme Court of Appeal in this regard. Well, we agree, we have no quorum with the SCA decision at all.

Brandt JA was considering the rationality or otherwise of Advocate Chauke's decision not to proceed with the other charges when he withdrew the murder charge and referred it to an inquest. In this regard, with regard to this
10 conduct, the Judge says that Advocate Chauke's reasoning was rational. And in that regard, I agree completely. Because having made the decision to proceed to an inquest with regard to the murder matter, it made sense not to proceed with the other matters, other charges, because they were all so intricately linked. The evidence of one was going to support the evidence of another.

So at that point in time, Advocate Chauke's behaviour or conduct cannot be faulted, because that is the correct, as a prosecutor, experienced prosecutor, that is the
20 right decision. You keep the charges together. And so that, in our view, is what the Judges Brandt JA found to be rational.

ADV MOHLAMONYANE SC: Let me interpose you there, without distracting you. Whilst you are explaining what Brandt JA was dealing with, also have a look at paragraph 43 ...[intervenes]

ADV BATOHI: Of my?

ADV MOHLAMONYANE SC: ...of the judgment of Brandt JA, which is on page CL00369 in bundle CL2. This paragraph has already been read onto the record, Madam Chair. But you may look at it, look at the first sentence where it ends, and it may assist you to answer the question.

ADV BATOHI: Is it paragraph 43, counsel?

ADV MOHLAMONYANE SC: Yes, on page CL00369. It is actually the second sentence.

10 **ADV BATOHI:** Yes.

ADV MOHLAMONYANE SC: You can go to the first sentence and the second sentence. Where the second sentence ends.

ADV BATOHI: Yes, precisely. The Judge states:

“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 that this was irrational.”

20

So this was the conduct that Brandt JA was considering the rationality or otherwise of. And in that regard, the Judge found that his conduct was not irrational. And that is fully

supported. But the question that we are dealing with in this enquiry with all due respect is whether it was the correct, whether the decision of Advocate Chauke to withdraw the murder charge in the first instance and then to refer the matter to an inquest was the correct one. And this was not a question that was before the Supreme Court of Appeal.

With regard to this question of whether, well firstly, was the decision of, and I want to preface this to say, Advocate Chauke is a longstanding prosecutor, a very
10 experienced, and he has got a wealth of experience. And we must understand what he was considering and what a reasonable DPP would have considered at the various stages when he made decisions in this matter. The first decision that we must look at is his decision to withdraw charges at a stage when, we must recall, the matter is already in court.

General Mdluli is charged for murder and all of the other seven attempted murder and the 17 other charges that were separated, that he is referred to in this judgment. He is charged, he is appearing in Court. There is a representation
20 that is made by General Mdluli. The representation does not deal with the merits of the matter. The representation, in a nutshell, alleges a, I would say, I am inclined to say far-fetched, but a conspiracy involving a range of people, starting from the police officers, the prosecutors, the witnesses in protection, they are all conspiring and they have come up

with this false case against him. That is the essence of his representation.

And I will come to our policy and our policy directives at some point, I do not want to interrupt my train of thought, that talks about what we should, how we should approach such representations. In this case, you have this representation. You have Advocate Chauke, who looks at this and experienced DPP, and you have your team that is saying, this is a strong case of murder, we should prosecute.

10 Advocate Chauke, nevertheless, applying his mind, decides at that point to refer the matter for an inquest. And in his, he states, and I am going to check because it is either in his response to me, or it could be in some other response that we can find, that one of the reasons why he did this is because, in his view, there could be more inculpatory evidence that will be obtained during the inquest process.

Now, the question as a DPP, that he should ask at that point, is what more inculpatory evidence was he looking for? On the evidence of the team, you have a strong
20 circumstantial evidence case. What more, you have all the witnesses' statements. What more were you expecting any one of those witnesses to say? And that Advocate Chauke can only explain. At that point, the matter is referred for inquest. We get the inquest Magistrate, that is the first aspect of Advocate Chauke's conduct that we need to

consider, which was not before Brandt JA. The second aspect is after the inquest is held.

The findings of the inquest Magistrate is confusing. Advocate Chauke, in his response to me at, this is an attachment to my affidavit, an annexure, it is SB6, at paragraph, at page 241 and 242. This is Advocate Chauke's response to me in respect of the Richard Mdluli matter. He states that:

10 “In April 2012, I accordingly decided that an inquest should be held in respect of the murder charge.”

This is where he says it.

“My rationale for the inquest was that it might cause inculpatory evidence to surface, which could be used in the criminal trial in respect of the murder charge.”

I dealt with that aspect of what further inculpatory evidence Advocate Chauke expected in this process that would further strengthen the murder charge. At paragraph 6 he states:

20 “The Magistrate conducted a formal inquest hearing into the death of Tefo Oupa Ramogibe, and in September 2012, concluded that the death of Ramogibe was brought about by unknown persons and cleared Richard Mdluli and others

identified.”

And I stress this. He states, cleared Richard Mdluli and others. I will get to the inquest Magistrate's finding. He does not clear Richard Mdluli and it is very clear from the language that that is not the case. Advocate Chauke in paragraph 7 then states:

10 “I then requested and instructed the prosecution team to enrol the matter in respect of the remaining other charges in which I was satisfied there was *prima facie* evidence against the accused.”

What this clearly tells us is Advocate Chauke at this point is of the view that one, the inquest Magistrate has cleared Richard Mdluli and the fact that he wants to proceed with the remaining charges means that he agrees that in respect of the murder charge, he does not have enough to proceed. Chairperson, we must therefore now go to the inquest Magistrate's findings to show that the inquest Magistrate did anything but clear Richard Mdluli of these charges. And if we
20 go to the judgment of, well, it is Murphy's judgment, Judge Murphy as well as Judge Brandt deal with this but Judge Murphy deals with it more succinctly and this is in paragraph 72 and 74 of his judgment which I understand is in CL2, page 295.

CHAIRPERSON: Yes, Advocate Batohi, I think we have read

those judgments. My question was really directed at that initial stage, the conduct at that stage of provisional withdrawal. I think they use the term provisional withdrawal of the charges. That is where I am concerned about, not necessarily what actually happened thereafter. I think the judgments are clear. Let us look at that conduct when he provisionally withdrew the charges and referred the matter to inquest. I would like you to deal with that aspect at that stage when he decided to do so.

10 **ADV MOHLAMONYANE SC:** Madam Chair, with your permission, whilst she is dealing with that aspect of the referral to the inquest, I think it is also imperative that she should refer to the order itself of Brandt JA. Paragraph 754.3 of the order itself, which ...[intervenes]

CHAIRPERSON: You interrupted me, you may ask, because I am trying to pursue a line of reasoning.

ADV MOHLAMONYANE SC: With respect, I am sorry.

CHAIRPERSON: I am not sure what you have in mind. It may be different to what I am trying to pursue, but she can
20 do that. Counsel, the evidence leader asked that you also look at this, you answer, look at the SCA order.

ADV BATOHI: Yes.

CHAIRPERSON: Yes, that may well be. But I'd like us to focus at that stage when he provisionally withdrew the charges pending the finalisation of the inquest. At a practical

level, when an Advocate provisionally withdraws the charges, what is the effect of that? What does it mean? Does it mean the end to prosecution in relation to the provisionally withdrawn charges? Or does it mean what it says, that the charges are provisionally withdrawn with the view that they may be reinstated? I just want to focus on that aspect.

ADV BATOHI: Yes, certainly, Chairperson. You are correct, and we dealt with this in my evidence previously as well, that the effect of a withdrawal or provisional withdrawal is exactly
10 the same. You can reinstate. Prosecutors use the term provisional withdrawal. The effect is not different, but sometimes they use it to kind of create, give the, to give, to show an intention to re-enrol at some later stage in the use of the terminology, but the effect is exactly the same. You can re-enrol after a provisional withdrawal or a withdrawal. There is no difference between either, between these two.

CHAIRPERSON: Thank you. Now, let us look at the order as Advocate Mohlamonyane referred us to and link it with that question, and I suppose your answer, at CL00371.

20 **ADV BATOHI**: Chairperson, we can go there, but I think that my train of thought, I really wanted the enquiry to hear where I was going with that, but let me deal with this, and then I will, with your permission, come back to what I was dealing with, because it is critical, in my view, in terms of the conduct, but we can go to Brandt JA now. If counsel, you say that is

at what chapter, what...

CHAIRPERSON: It is CL, it is a case law, volume 2 of 2.

ADV BATOHI: Okay, I am there. What page number?

CHAIRPERSON: CL200371. You see, I asked this question to clear my mind, and maybe other things do not really worry me, but I asked this question to address those aspects that continually are worrisome to me, and I want your assistance in that regard.

ADV BATOHI: Understood.

10 **CHAIRPERSON:** You can just focus on the question, otherwise, you are going to repeat the evidence. So, when you look at the order, that seems to link to the question and your answer, paragraph 3 of the order. Paragraph 54, in the premises, it is ordered that, 3A, maybe you can read the whole of 3. Let me read it.

“It is recorded that the following undertaking has been furnished on behalf of the first appellant:

- 20
- a. 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 this order.
 - b. To provide reasons to the respondent

within the same period as to why he decided not to reinstitute some, if any, of those charges.”

This means that the order of the Supreme Court of Appeal had to be acted upon by the NPA. So, in relation to the impugned conduct, why is it that the conduct of Advocate Chauke, which constitute a provisional withdrawal of charges pending the finalisation of the inquest, was, if I may use the term, unlawful? When the SCA itself says, and you have just
10 indicated, the withdrawal, provisional withdrawal can amount to a later re-institution of the charges. Now, the SCA, in the order, tells the NPA to decide which of those charges it could re-institute. It was therefore open to the NPA to do exactly that because the decision of Advocate Chauke, as I understand it, did not bring finality to prosecution of those charges. You may comment on that.

ADV BATOHI: Chairperson, the conduct that we complain of with regard to Advocate Chauke, in terms of what we say is not consistent with the policy, policy directives in terms of
20 how we should, what we should consider when deciding to withdraw charges, is the following, and this is important because I was going through the various stages of Advocate Chauke's decision making because it is conduct at the various stages that we are saying. So when we talk about the impugned, I am not sure what the, I just want to make

sure I use the right language, impugned conduct, we must understand what is the impugned conduct that we as the NPA are saying is the conduct that is problematic, to put it loosely. That is firstly, his decision to refer the matter to an inquest, withdraw provisionally withdraw charges and refer to an inquest, that is firstly. Secondly, it is his decision ...[intervenes]

ADV BALOYI-MERE SC: Sorry to interrupt you, can we deal with them one by one because when you rattle them like this, you lose us. You say the first one was to refer the matter to an inquest.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: An issue that Brandt JA dealt with at paragraph 43 and found that decision not to be irrational.

ADV BATOHI: If I could just look at that.

ADV BALOYI-MERE SC: If you can look at line 8, that starts with that line of reasoning at paragraph 43.

ADV BATOHI: Mmm-mmm, I am there.

CHAIRPERSON: That is where Brandt JA considered the issue of referral of the matter to an inquest and withdrawing 17 other charges and also considering Chauke's, Advocate Chauke's reason that he did not want to have a, I want to use the correct, the word that he used that, a fragmented prosecution. And the Court further said:

“The postponement of the other charges is

not just there for the taking. It might have been successfully opposed by Mdluli himself.”

So the Court found that this conduct was not irrational. And that if you go to the order by Brandt JA, he says the appeal succeeds only to the extent that paragraph B, and B, we know from the Court *a quo* that it meant it dealt with the decision made on the 2nd of February to withdraw criminal charges of murder, kidnapping, intimidation, assault, and whatever. So
10 that order was reviewed and set aside by the SCA based on the reasoning that we find at paragraph 43, where the Judge found that Advocate Chauke's decision was not irrational. And you say that is the first ground of misconduct, if I may use that word, that is impugned upon Advocate Chauke.

ADV BATOHI: It is a minor but important nuance about what exactly is the conduct that we are referring to. In what has been mentioned about what precisely the order related to, the conduct is not in my view, the conduct is not about Advocate Chauke's decision to withdraw charges and submit it to
20 inquest. FUL's complaint during those proceedings was the fact that Advocate Chauke, this is my understanding, Advocate Chauke did not proceed with the remaining charges when he withdrew the murder charge. FUL was of the view he should have continued with the remaining charges.

That was the aspect that Brandt JA was considering

whether his decision to withdraw all the charges was rational or not. And in that regard, Advocate Chauke's explanation that he did not want to have a fragmented trial, is absolutely the correct approach if the decision to withdraw is, the murder, the Judge, the Court was not considering whether Advocate Chauke's decision to withdraw the murder charges was in fact the correct decision. In my humble view, what they were considering is whether there was rationality with regard to his decision to withdraw all the charges because he
10 did not want to have a fragmented trial. And in that regard, it was rational.

But the question of Advocate Chauke's decision to withdraw itself was never a matter that the Courts were considering. In fact, if we look at the decisions in my humble view, Judge Brandt is actually quite critical of Advocate Chauke's approach with regard to the murder matter. And that is, I was earlier on going to the various aspects of Advocate Chauke's conduct that we say could potentially amount to misconduct. This is the first one, you are correct.
20 We will move on to the others after we deal with this.

ADV BALOYI-MERE SC: Before we move, let us go back to the high Court decision and look at order B.

ADV BATOHI: Oh, right, okay. Where will we find that?

ADV BALOYI-MERE SC: It is CL2, page CL0. CL0350.

ADV BATOHI: 350.

ADV BALOYI-MERE SC: Yes.

ADV BATOHI: Mmm-mmm?

ADV BALOYI-MERE SC: That order deals with the decision taken by Advocate Chauke to withdraw criminal charges. And you submit that that decision was never considered by the Court, or it was not before the Supreme Court of Appeal.

ADV BATOHI: I am saying that the, whether Advocate Chauke took the correct decision in withdrawing the murder charge was not a matter before the Court.

10 **CHAIRPERSON:** Your quibble is in relation to the withdrawal of the murder charge in the face of circumstantial evidence. Correct?

ADV BATOHI: That is the first, yes, that is correct. The first aspect of Advocate Chauke's conduct.

CHAIRPERSON: Now, to that first aspect, and we need to get it correctly, of withdrawal of the murder charge for the reasons advanced by Advocate Chauke in the face of circumstantial evidence. Firstly, it was not conclusive. It was a provisional decision. Secondly, look at paragraph 44
20 of the SCA, the last sentence, the last but one sentence. CL00369. CL00369 at paragraph 44.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: If you read the last but one sentence, it reads, to the extent that I can read the finer print here:

“I do not believe 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 those charges was not justified. To that extent, the appeal must therefore succeed.”

What should we make of that?

ADV BATOHI: Chairperson, if you will bear with me. I cannot seem to find my notes that dealt specifically with this
10 aspect because this is the critical aspect. In my view, Chairperson, and again, this is about interpreting judgments. I think this might be best left for argument, but I will try my best to deal with it. I do ...[intervenes]

CHAIRPERSON: Maybe you should read the sentence yourself quietly.

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

CHAIRPERSON: Yes, I think read that last but one sentence. Brandt J is speaking to the withdrawal of the charges, the impugned decision.

20 **ADV BATOHI**: Chairperson, I can try now, but let us start from the beginning, if I may, of that paragraph because I think the context is important. At paragraph 44, Brandt JA states:

“FUL’s real argument, which found favour with the Court *a quo*...”

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.”

And that is important.

10 “But that decision, that is Chauke's failure to proceed with the murder and related charges after the inquest findings became available, that decision, or his failure to apply his mind afresh to the matter after the conclusion of the inquest, was not the subject of the review application. 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 charges, which is the impugned decision, can be set aside on the basis that a subsequent decision, that is the subsequent decision not to proceed with the murder matter after the inquest findings became available, that a subsequent decision taken in different circumstances, not to reinstate all or some of the charges

20

was not justified.”

So my understanding, and then the Judge goes on to say:

“To that extent, the appeal must therefore succeed.”

So my understanding and interpretation of this Chairperson is that what the Judge is saying is that Chauke's, Advocate Chauke's, Advocate Chauke's, what was not before the Court was Advocate Chauke's failure to apply his mind afresh after the conclusion of the inquest. And that was not before this
10 Court. And what FUL, my understanding of what FUL was trying to, to what they in fact put forward in this second supplementary affidavit, which was filed after the inquest findings became available, bearing in mind that the first was before, was after the inquest findings became available, they put in a supplementary affidavit alleging this. But my understanding is it was not part of the relief that was sought.

And on that basis, the Judge finds that, I do not believe that the earlier decision to withdraw the charges, which is impugned decision, can be set aside on the basis
20 that a subsequent decision taken in different circumstances, not to reinstate all or some of those charges read in after the inquest findings was not justified. To that extent, the appeal must succeed because that aspect was not before the Supreme Court of Appeal.

CHAIRPERSON: I am not sure whether I follow what you are

saying, but let us assume that you are correct in your statement or your evidence to the effect that the impugned decision we are present with here, it is the withdrawal in the face of circumstantial evidence. Let us assume that. But how often do prosecutors assess or evaluate cases when confronted with circumstantial as opposed to direct evidence and decide in these circumstances of circumstantial evidence, I will provisionally withdraw charges until further investigation is done? What is unlawful about that? When

10 you evaluate the evidence, which is not direct, but circumstantial. And all of us know as lawyers is how difficult it is to make decision on circumstantial evidence. Now, if a prosecutor is confronted with circumstantial evidence and provisionally withdraw the charges based on the circumstantial evidence, what is unlawful about that?

ADV BATOHI: Chairperson, we are not saying there is something unlawful about it.

CHAIRPERSON: Let me rephrase that, thank you. On what basis then should such a prosecutor be said to have

20 misconducted himself to the extent that he should be suspended or should lose his employment, possible employment, or should be disciplined?

ADV BATOHI: Thank you, Chairperson, that is a very important question. It is critical because this is not a ...[intervenes]

CHAIRPERSON: That is why I asked the question because I thought so.

ADV BATOHI: I will not say anything to that, Chairperson. Thank you very much. It is a very important question. I agree with you. Prosecutors in their daily jobs, it happens, it happens that you are required to consider evidence, circumstantial evidence, and make a decision of whether you proceed on the basis of that evidence or you do not. And certainly, it is not in every case where a prosecutor decides
10 not to proceed with a case based on circumstantial evidence that there will be a consequence like a disciplinary process that follows. And that is because, Chairperson, each case has to be considered on its own merits.

And if we look at the particular circumstances of a case and we say, okay, we can understand why the prosecutor would have done this, reasonable minds could differ, that is, of course, you are never going to discipline a prosecutor because that is totally understandable. And I would never want prosecutors to be fearful of making the
20 correct decisions based on the evidence before them. And I must go back to our policy directives in this regard because it talks to us. It helps us to make these decisions. But where you have a case of strong circumstantial evidence, I have got in my bundle here where, I think it is De Villiers, and there is also case law that talks about the strength and power of

circumstantial evidence. And ...[intervenes]

CHAIRPERSON: Who makes the call as to whether the evidence is strong or weak?

ADV BATOHI: Chairperson, you would, the prosecutor, him or herself must do that. You are faced with the case. You are the one that makes the assessment and you take a decision. And if that decision is justified on the basis of the facts of that case, well and good. Withdrawal in the face of circumstantial evidence that does not quite reach the
10 threshold is perfectly acceptable. But as I said, you have to look at the circumstances of each case. In this particular case, Chairperson, what we are saying is, we are saying that this was a case that had strong, you have degrees of circumstantial evidence. You can have weak circumstantial evidence, strong circumstantial evidence. Where does it fall in this band?

In this case, according to the prosecutors, the team in this matter, they were of the view the case is strong, the circumstantial evidence is strong. But the DPP, an
20 experienced prosecutor of long standings, who is a good prosecutor, decides in the face of, you have got to then look at the facts. There was a representation. All that the representation did was allege a bizarre, in my language, conspiracy. In fact, when the accused was, Mdluli was finally charged in the decision of Judge in the High Court, I have it

here somewhere, in the decision of Judge Mokgoatlheng, he found that that conspiracy was completely baseless. But let us not go down a rabbit hole. Let us come back to your question.

When, in this particular case, you have a strong circumstantial evidence, you have a representation that alleges a conspiracy amongst a whole range of people, and that is why I am being falsely framed in this. Now, I do want to pause here to go to our legal framework to see what it says
10 about how we assess cases when we deal with withdrawal of matters. And I am going to, I have it somewhere on my desk. I would ask for a few moments to get that, because I think it is really important that this be factored into our consideration of this matter.

CHAIRPERSON: So I will ask Advocate Mohlamonyane and the junior to assist Advocate Batohi to look at that in the meantime.

ADV BATOHI: Okay, so I will continue then.

CHAIRPERSON: Yes, as you pause, just on that aspect. I
20 want us to work on the assumption that you are correct. Advocate Chauke made a mistake or misconducted himself by withdrawing the charges in the face of circumstantial evidence. Let us say you are correct. Should not much more be established to warrant a suspension of an Advocate or prosecutor who makes a mistake of that nature in the absence

of bad faith on his part? If it is not established by way of evidence that this particular Advocate acted in bad faith in making that mistake, will any subsequent suspension or disciplinary hearing be warranted?

ADV BATOHI: Chairperson, if I got you correctly, are you saying if it is established, if it is not established by way of evidence that the prosecutor acted in bad faith, will any disciplinary proceedings be warranted?

CHAIRPERSON: I am making an assumption ...[intervenes]

10 **ADV BATOHI**: Yes, I get that.

CHAIRPERSON: ...in favour of your proposition.

ADV BATOHI: I get that.

CHAIRPERSON: If your proposition is correct and yet there is no evidence to establish the bad faith on the conduct of the particular prosecutor, will his conduct warrant a suspension or a disciplinary hearing against him?

ADV BATOHI: Chairperson, if there is no evidence or suspicion of bad faith ...[intervenes]

CHAIRPERSON: Or *mala fides*.

20 **ADV BATOHI**: if there is no *mala fides* at all, it should not attract any disciplinary processes.

CHAIRPERSON: In that event, will that not then require the NDPP to bring forth evidence establishing the bad faith? The *mala fides* on the part of this Advocate.

ADV BATOHI: Chairperson, let me think about this because

I need to be, there is a lot in this case and I want to make sure that when I answer, I answer correctly. I would say there is a difference between acting *mala fides* and not acting in accordance with the requirements of our policy and policy directives. And even though there may be no *mala fides*, and I am not for a moment saying that is a conclusion in this matter, but even though just speaking hypothetically, there is no *mala fides*, you have to look at what was before the prosecutor at the time.

10 Chairperson, let me go to our policy directives. And I think it will because there is a fine line between *mala fides* is strong and there is also where you do not apply your policy guidelines and prescripts in a way that you would expect an experienced prosecutor to do. So I think I need to be clear about that. In this particular case, Chairperson, there is a lot of, there is evidence that we had led, that I spoke about earlier about three cases involving General Mdluli, that all got withdrawn in different contexts. This is one of them. There is another one involving the fraud matter in respect of
20 the State Security Fund. There is also the disciplinary proceedings in the police. There is also ...[intervenes]

CHAIRPERSON: But of course, those do not relate to the matter we are seized with. And let us focus on this one. I remember that matter of Advocate Mrwebi and others. Let us focus on this particular one. Because, and I may be wrong,

but we hear of many charges being withdrawn against people. Many, many, many. Prosecutors withdraw charges. It is not something new. Even in some of the high-profile matters. And my statement to you, my proposition is, let us assume you are correct, that the charges ought not to have been withdrawn in the face of the circumstantial evidence. Let us assume in your favour. But should there not be more than just an accusation that you ought not to have withdrawn the charges?

10 Should the bad faith on the part of the prosecutor not to be established for the person to be dragged to a disciplinary hearing and be suspended? Because it seems to me, if that were the case, many prosecutors would be suspended or would be investigated without direct evidence of *mala fides* in the actions they took. And of course, you are going to address us on the policy directives. But I would like us to look at the evidence that is suggestive of the fact that Advocate Chauke acted in bad faith.

ADV BATOHI: Chairperson, the issue of intention of a
20 person, whether it is in good faith or in bad faith, is often a deduction based on a range of factors. You come to the conclusion that someone has acted in bad faith because it is not direct evidence. You have to look at various things that someone has done before you conclude that there was perhaps an ulterior motive here because a reasonable person

in this circumstances would have done one, two, and three. This person in these circumstances does four, which you cannot understand.

And when there is a range of those things, you can then begin to infer whether a person is acting in good faith or in bad faith. In this particular case, there is a range of those touch points where we say is indicative of the fact that Advocate Chauke's behaviour was not what it should have been, what a reasonable DPP in his position would have
10 done, and was it being driven by any ulterior motives. And I need to touch on those important points at which he exercised his discretion and what his decision was in this case. I had touched on the first point, the first decision.

CHAIRPERSON: Just remind me.

ADV BATOHI: That was the one where he decided to withdraw charges and refer the matter to an inquest in the face of strong circumstantial evidence. That is the first aspect that I considered. You have got to look at the case holistically. That is the first aspect of the conduct.

20 **ADV BALOYI-MERE SC:** Should we understand you to say that that was done in bad faith?

ADV BATOHI: I think what, with all due respect, you should understand me to be saying is that when we look at all of the conduct of Advocate Chauke in this matter, from that decision through to the SCA decision, almost compelling the National

Director to make a decision in two months in this matter, that I cannot say what conclusion this enquiry will come to, but certainly in my mind, I was concerned that there may be other factors that was driving this behaviour and these decisions at the various points in this process.

CHAIRPERSON: Other factors or circumstances based on? Supposition?

ADV BATOHI: Circumstances based on other facts.

CHAIRPERSON: What facts?

10 **ADV BATOHI:** The fact that there were three charges that General Mdluli was facing, and all three charges disappear, for want of a better word, they get withdrawn at various stages within, I do not know what timeframe, but ...[intervenes]

CHAIRPERSON: I think it is incorrect in law to say that they disappeared. Those charges were withdrawn.

ADV BATOHI: I agree, Chairperson.

CHAIRPERSON: Let us use the correct terminology.

ADV BATOHI: I apologise.

20 **CHAIRPERSON:** Legally speaking, because somebody out there listening to us talking will think that we use those terminologies in courts. Let us use the correct terminologies.

ADV BATOHI: Point taken, Chairperson.

CHAIRPERSON: The provisional withdrawal of the charges do not bring an end to litigation. Just as simple as that.

ADV BATOHI: Chairperson, getting back to the facts that I say, it was not supposition, it was facts. The fact is the charges in respect of the fraud perpetrated by Mr Mdluli were withdrawn. The charges ...[intervenes]

CHAIRPERSON: I beg your pardon. I am sorry to interpose. Those related to the Mrwebi matter, and I requested your counsel that let us not conflate issues. We assist with the matter relating to Advocate Chauke. The fraud and related charges pertain to the Advocate Mrwebi matters. It has got
10 nothing to do with Advocate Chauke. At least on the matter that is before us ...[intervenes]

ADV BATOHI: Chairperson...

CHAIRPERSON: ...and I request you to confine your responses to the matter that we are seized with.

ADV BATOHI: Chairperson, I was trying to answer your question that was whether, what was it, there was direct evidence of *mala fides*. And then I said to you there was a whole range of things that led me to come to a reasonable suspicion that there may have been ulterior motives in this
20 matter. And then I was trying, and you said based on ...[intervenes]

ADV BALOYI-MERE SC: [Indistinct – 1:01:17]

ADV BATOHI: If I may please finish this, please.

ADV BALOYI-MERE SC: Okay.

ADV BATOHI: And the Judge then said it was based on

supposition. And I said no, not supposition, it is based on facts. And then I was trying to set out the facts. Thank you.

CHAIRPERSON: The facts that you are stating do not relate to Advocate Chauke, correct?

ADV BATOHI: Chairperson, they relate to ...[intervenes]

CHAIRPERSON: The fraud matter. As I read the record, those fraud issues or charges related to the representations that were made to Advocate Mrwebi. And Advocate Chauke is not charged, if I may use the word, in relation to the fraud
10 or the withdrawal of the fraud charges. Those matters were matters in relation to Advocate Mrwebi. Am I correct?

ADV BATOHI: Chairperson, you are absolutely correct.

CHAIRPERSON: I request you counsel, let us confine ourselves to those facts that pertain to Advocate Chauke so that we can understand the direct evidence that is suggestive of the fact that he acted in bad faith without bringing all sorts of other issues unrelated to him.

ADV BATOHI: Chairperson, with all due respect, those are important aspects to be taken into consideration. And
20 understanding that I am sitting in this chair as the National Director, I have to consider various factors. If indeed I want to take a decision to refer a prosecutor to disciplinary hearings in a matter, I must have a reasonably, I must have factors, I must consider all factors that lead me to conclude that perhaps there is an element of bad faith here.

I have to, as the National Director, consider all of these matters when I decide to make a decision on whether the matter should proceed to an enquiry or not. And with all due respect, Chairperson, these are important factors that existed at the time that I needed to consider in my decision-making process. And that is why I am bringing them to the attention of this enquiry, because I have been asked about whether there could possibly be bad faith and I am trying to answer that in the best way I can.

10 And with all due respect, Chairperson, in my view, it is hard to then confine it just to this matter.

CHAIRPERSON: The second point related to the fraud charges, the first one was the withdrawal of the murder charges. The second point that you are talking about now, the fraud charges.

ADV BATOHI: That is correct.

CHAIRPERSON: That you agree related to Advocate Mrwebi.

ADV BATOHI: That is correct. And the third...

20 **CHAIRPERSON:** Yes, madam?

ADV BATOHI: And the third one is the one where the disciplinary charges in the South African Police Service was also withdrawn.

CHAIRPERSON: If my recollection is correct, this third aspect related to the disciplinary charges of certain police

officials.

ADV BATOHI: General Mdluli.

CHAIRPERSON: Within the SAPS.

ADV BATOHI: General Mdluli, that is correct, who was in the SAPS.

CHAIRPERSON: Withdrawal of the disciplinary charges against General Mdluli, is he a General? Mr Mdluli?

ADV BATOHI: He was at the time, Chairperson.

CHAIRPERSON: That has got nothing to do with Advocate
10 Chauke.

ADV BATOHI: That is correct.

CHAIRPERSON: It is the SAPS that takes a decision to discipline its own member.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Thank you.

ADV BALOYI-MERE SC: Advocate Batohi, I had expected that in order to show great faith, you were going to list the actions of Advocate Chauke in relation to the matter of Mdluli, to say Advocate did this, one, two, three, four, which shows
20 that he was not acting in good faith. But now you are bringing in outside issues and I fail to understand how do you link this and try to show that they prove bad faith on the part of Chauke. I mean, of Advocate Chauke, the disciplinary charges, did Advocate Chauke influence the withdrawal, the withdrawal of the fraud charges? Did Advocate Chauke play

a role there? So, because I expected you to give us a chain of events that would show us that Advocate Chauke, in his final withdrawal of the charges was acting *mala fides*.

ADV BATOHI: Thank you. I expected to do that myself, is to give this chain of events, but I get asked other questions in between and then I try to answer those questions and then I get off the chain that I was trying to go along. So, it was not like I was ...[intervenes]

CHAIRPERSON: You have now been given a chance. You
10 referred us to three aspects.

ADV BATOHI: Thank you, Chairperson. So, if I now get back to the chain that the Madam Baloyi-Mere is talking about, I was dealing with the different aspects of the conduct of Advocate Chauke that I could not really understand in terms of why he would take these decisions.

CHAIRPERSON: If I may, you gave us three. Were you going to proceed to the fourth aspect?

ADV BATOHI: Chairperson, those were three different aspects. That is why I say I was on a different path. I went
20 into a trajectory and then I gave you three, but I am going back to my first part. So, the three that I gave you were the three cases that General Mdluli was facing at the time that were withdrawn. Going back to the aspects, different aspects of Advocate Chauke's conduct that I said I found difficult to understand in the circumstances was firstly the withdrawal of

the charges and the first one I dealt with, so I do not want to go into detail, withdrawal in the face of strong circumstantial evidence where your team is saying, notwithstanding this representation that alleges a conspiracy, we should proceed. That is the first issue.

On its own, it might seem not too much of an issue on its own, but it is still on the face of it that is seriously concerning in those circumstances. The second aspect is the matter then proceeds to an inquest. The inquest Magistrate's findings are confusing to say the least. In Advocate Chauke's response to my letter to him ...[intervenes]

CHAIRPERSON: I beg your pardon, madam. We are dealing with his bad faith. What the Magistrate did or did not do has got nothing to do with him. Let us look at his conduct that manifests bad faith on his part.

ADV BATOHI: With all due respect, Chairperson, what the Magistrate found and his conduct after that is important, that is my point, is that given what the Magistrate found and then what his conduct is after that, it does not make sense in the face of the Magistrate's findings. So it is important that I explain that. If I may continue, Chairperson.

CHAIRPERSON: I assume then this is the pattern, you are going to go to the SCA's findings in relation to the conduct of the Magistrate.

ADV BATOHI: Chairperson, I am trying to answer the

question. What were the various aspects of Advocate Chauke's conduct that led me to believe, and to use the language of the panel, that he was acting in bad faith, and my language was to led me to believe that there may have been some other aspects at play here. I am not sure why would a prosecutor in these circumstances make this decision. And then, in order for me to do it, the conduct comes after the various Court, and what happens in court, in fact, has have got to be considered in the light of the conduct.

10 So I have to deal with it. I am sorry, Chairperson, I am as exhausted as you potentially are, but I have to deal with it in this way, because otherwise it does not make sense, Chairperson.

CHAIRPERSON: Yes, counsel, please, and I beg you. Just tabulate those aspects of the bad faith on his part. I mean, you do not need to give a long context. You can just simply that he withdrew the charges in the face of circumstantial evidence. He did X, he did X. That is all that we need to know. We have read this report, and we will continue reading

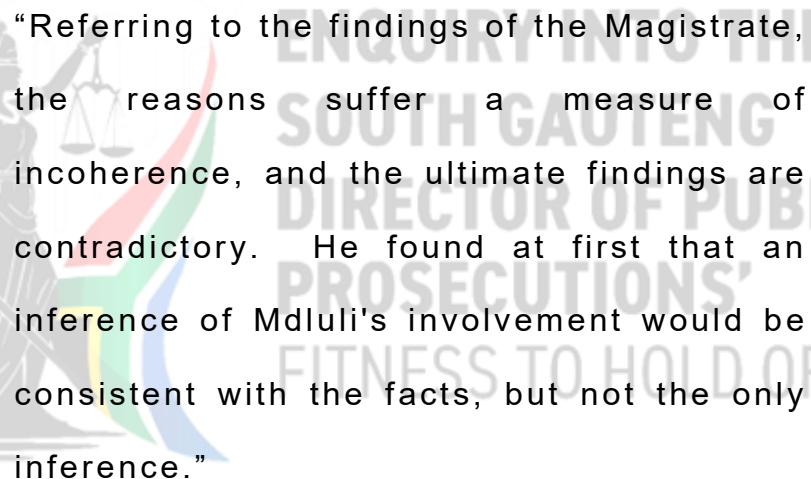
20 it.

ADV BATOHI: So I will try to be very succinct, Chairperson. The second aspect of his conduct comes about after the Magistrate makes his finding. According to Advocate Chauke, and this is important, he says that the Magistrate cleared Richard Mdluli. Now, that is not what the Magistrate

did, and this is important, because the Magistrate in the inquest findings, in fact, found the following, and it is important because it goes to Advocate Chauke's conduct in the face of the Magistrate's findings. The Magistrate states the following, and I am going to refer to Murphy's judgment that actually quotes from the inquest.

CHAIRPERSON: Please refer to the Judges, or Mr Murphy, or Judge Murphy, or Murphy J, please.

ADV BATOHI: Certainly, Murphy J says the following, at
10 paragraph 74:



“Referring to the findings of the Magistrate, the reasons suffer a measure of incoherence, and the ultimate findings are contradictory. He found at first that an inference of Mdluli's involvement would be consistent with the facts, but not the only inference.”

And then he goes on to say, and I will not read that aspect of it, the point, Chairperson, is that the Magistrate in the inquest
20 findings went into great detail to deal with the evidence and did not reject any of the evidence, and so what one would have expected Advocate Chauke at this point to do, now having received the inquest Magistrate's findings, which does not say that there is no evidence against, which did not clear Richard Mdluli, it was, at best, very confusing. One would

have expected Advocate Chauke at that point to do, well, he had a couple of options.

One is he could have, on the face of that lack of clarity, asked the Magistrate for clarification, or given the fact that the Magistrate, in fact, said that, I want to make sure I use the correct language, that the inference of Mdluli's involvement would be consistent with the facts, but says it is not the only inference. I want to just, there were a couple aspects of the Magistrate's evidence that would have made
10 Advocate Chauke think that he is, he has his team saying there is strong circumstantial evidence. Here you have a Magistrate at an inquest that is actually saying that there is a strong indication that Mr Mdluli is involved.

One would have expected that he would have read that carefully, reassessed it, and, in my view, considered charging him with murder at that point. But at that point, if we look at paragraph 89 of Judge Murphy's, he says:

20 “Chauke, in his answering affidavit, simply ignored some of the inquest findings, saying simply that the Magistrate found that there was no evidence implicated in Mdluli. Clearly, there is evidence implicating Mdluli.”

So the Magistrate's conclusion is anyhow not decisive, and it is, guilt or innocence of the matter is for the trial Court. So

my point being, Chairperson, given all of this, one would have expected Advocate Chauke to reassess at that point, and think about instilling, remember, General Mdluli is a police officer, and the interests of justice demand that there should be accountability if there is evidence against him. This is what happens after the inquest. Advocate Chauke then nevertheless does not act after the inquest, and then FUL brings the application. We then get ...[intervenes]

CHAIRPERSON: Pardon, who?

10 **ADV BATOHI:** Freedom Under Law brings the application.

ADV BALOYI-MERE SC: Advocate Batohi, let us go to SB6, page 242, paragraph 7.

ADV BATOHI: Sorry, if you can repeat that?

ADV BALOYI-MERE SC: SB6, page 242, it is an annexure to your affidavit.

ADV BATOHI: Mmm-mmm.

ADV BALOYI-MERE SC: Your submission now is that after the inquest, Advocate Chauke does nothing, and FUL takes the matter on appeal.

20 **ADV BATOHI:** If I may just think about that. Let me think about that before I answer, because I think at that point... before FUL brings it to, takes the decision, I think Advocate Chauke may have decided to proceed with the other charges and not the murder charge at that point, and FUL probably, I think they brought the application after that. But I am

speaking, trying to remember, I am not looking at documents, but that is my recollection of what he might have said, of what might have happened.

ADV BALOYI-MERE SC: Go to SB6, page 242.

ADV BATOHI: SB6?

ADV BALOYI-MERE SC: Yes, page 242.

ADV BATOHI: 214?

ADV BALOYI-MERE SC: 242, paragraph 7.

ADV BATOHI: Mmm-mmm.

10 **ADV BALOYI-MERE SC:** Remember in your evidence, you informed this panel that Advocate Chauke was working with a team, that advised him on whether to proceed with the prosecution or not. Now, please read the first four or five lines of paragraph 7.

ADV BATOHI: Sure. So to contextualise this, this is after the inquest.

ADV BALOYI-MERE SC: Yes.

ADV BATOHI:

20 “I then requested and instructed the prosecution team to enrol the matter in respect of the remaining other charges...”

Yes, which is what I had recalled now;

“...in which I was satisfied that there was prima facie evidence against the accused. The prosecution team, through its lead

prosecutor, Advocate van Zyl SC, hereinafter referred to as Van Zyl, informed me that he had been informed that my decision to refer the matter to a formal... Advocate van Zyl...”

Let me start again.

“The prosecution team, through its lead prosecutor, Advocate van Zyl SC, hereinafter referred to as Van Zyl, informed me that he had been informed that my decision to refer the matter to the formal inquest to be conducted and the findings of the inquest will be or has been taken on review. He proposed that in view thereof, the prosecution team is of the view that we should wait for the decision of the High Court in order to avoid a situation where, if my decision is found to be irrational, et cetera, the trial will have to include the murder and attempted murder charges.”

ADV BALOYI-MERE SC: This is at the back of what you just submitted, that after the inquest, Advocate Chauke did nothing.

ADV BATOHI: I did correct myself.

CHAIRPERSON: I beg your pardon?

ADV BATOHI: I did correct myself before I read this, and I said I think what he did is he decided to enrol the remaining charges, but not the murder charge. That was what my recollection was.

ADV BALOYI-MERE SC: And he gave a reason why?

ADV BATOHI: I would like to comment on this paragraph, if I may.

ADV BALOYI-MERE SC: Please do.

ADV BATOHI: So, in this paragraph, there is nothing that I
10 have a qualm with, because what Advocate Chauke is saying, that this is after the inquest Magistrate has made a finding, and we talked about how confusing that finding was. Advocate Chauke then instructed the prosecution team to enrol the matter in respect of the remaining charges, not the murder charge, because he was satisfied that there was *prima facie* evidence. And that is the point, because Advocate van Zyl then says to him, there is, I am paraphrasing what is written here, what Advocate Chauke is saying.

20 Advocate van Zyl says to him that he has been informed that there is a review matter with regard to the murder charge. And Van Zyl is of the view that in order to avoid the fragmentation, they should not proceed with the remaining charges, but let us wait for the outcome of the review proceedings, which absolutely makes sense, because

we talked about the fact that these charges were so intricately intertwined that it would actually make sense to keep them together. So this was absolutely fine.

But what this also shows is that when Advocate Chauke decided to enrol the other cases, he was satisfied, even at this stage, that he had good reason not to enrol the murder matter.

CHAIRPERSON: But, counsel, you have not read the entire part of paragraph 50.

10 **ADV BATOHI:** Paragraph?

CHAIRPERSON: 50.

ADV BATOHI: Five zero.

CHAIRPERSON: Yes, ma'am.

ADV BATOHI: Of which document?

CHAIRPERSON: The very one that you were looking at. That paragraph goes on to say ...[intervenes]

ADV BATOHI: Five zero of SB6, Chairperson.

CHAIRPERSON: Yes, that is Advocate Chauke's statement.

ADV BATOHI: That is correct.

20 **CHAIRPERSON:** Affidavit at the Zondo Commission.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: He deals with that aspect that my sister referred to. Now, when you read that paragraph in its entirety, you will see towards the end that he acquiesced to what Advocate van Zyl SC said.

ADV BATOHI: Chairperson, I am a bit confused. I am not in the right spot. I am not where you are.

CHAIRPERSON: Okay, I think it is the same paragraph, but let me take you then to his statement, which is almost similar to what was read to you. If you read it from his affidavit at the Zondo Commission.

ADV BATOHI: Which is where?

CHAIRPERSON: His affidavit is ZC01426.

ADV BATOHI: I do not know if I have that bundle.

10 **CHAIRPERSON:** Your team will assist you with that bundle.

As you look, maybe I should just read the entire paragraph, which is almost similar to what my sister, Advocate Baloyi, was saying. It is exactly identical, but you did not look at it to its logical conclusion. Paragraph 50:

20 “I then requested and instructed the prosecution team to enrol the matter in respect of the remaining other charges in which I was satisfied, that there is *prima facie* evidence against the accused. The prosecution team, through its lead prosecutor, Advocate ZJ van Zyl SC, informed me that he has been informed that my decision to refer the matter to the formal inquest, and the findings of the inquest will be, or has been taken on review. He

proposed that in view thereof, the prosecution team is of the view that we should await the decision of the High Court in order to avoid...

That is the latter part;

“...in order to avoid a situation where if my decision is found to be irrational, et cetera, the trial will have to include the murder and attempted murder charges. I acceded to this proposal, and the matter was not enrolled.”

10

ADV BATOHI: Mmm-mmm.

CHAIRPERSON:

“I attach hereto an email from Van Zyl, dated 19 June 2014, marked Annexure AC8.”

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: So Advocate Chauke says he then acceded to the suggestion made by Advocate van Zyl, because the order of the High Court would have found that his decision was irrational, and to avoid that, he then agreed that they should then not enrol the matter, because the decision could have gone to the extent of the decision including the murder and attempted murder. So he says, I agreed.

20

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: What is wrong about that, that approach?

ADV BATOHI: Chairperson, firstly, just to correct, I thought

that Madame Baloyi-Mere had asked me to read the first seven lines, so I may have been mistaken and did not hear properly.

CHAIRPERSON: Well, the entire paragraph speaks for itself.

ADV BATOHI: It is relevant, I agree. And Chairperson, as I said, my answer remains the same. I have no qualm with this approach at all, because what Advocate Chauke, in fact, what he had decided to do after the inquest, according to this paragraph that you have read, is he decided to enrol all the
10 charges except, he says, to enrol the remaining charges, in respect of which he was satisfied. That means the ones, not the murder, and the attempted murder, it seems. And Advocate van Zyl, as I explained, said to him, let us not do that, because this matters on review, in the event that the Court finds that your decision was irrational. We can then proceed with all the charges, because it made sense to keep them all together. And so, this is absolutely fine. I agree with this approach.

CHAIRPERSON: And he says, I agreed.

20 **ADV BATOHI:** He did, so he did. The important point about this, though, is even at this stage, after the inquest findings, Advocate Chauke feels that the murder charges, there is not sufficient evidence to proceed on the murder charges. There is now a review.

CHAIRPERSON: What is wrong with that? He is being

advised by senior counsel, and he agrees with the opinion of senior counsel.

ADV BATOHI: Chairperson, the only thing he has been advised about is to keep the charges together. He is not being advised about the issue of what the, Advocate Chauke's decision not to prosecute the murder matters is not an issue that he is being advised about. Advocate Chauke had decided to proceed with the other charges and not the murder one. Advocate van Zyl says, rather not proceed with those
10 charges, let us wait for the outcome of the High Court.

ADV BALOYI-MERE SC: But at that stage, the murder charges were simply withdrawn, and they could be reinstated at any time should there be evidence that satisfies Advocate Chauke that he can proceed with those murder charges.

ADV BATOHI: That is it. Advocate Chauke was not satisfied. Even at this point, but you are absolutely correct, it could have been enrolled. He could have enrolled it at this point after the inquest. He does not because he is still not satisfied that there is sufficient evidence to charge. And that
20 is, I question that decision. So that is the second point at which Advocate Chauke had an opportunity to reconsider. The matter is now in court in the full application before Judge Murphy. Judge Murphy's judgment, I have read, I am not going to read it again.

But what is clear from Judge Murphy is that I am

definitely not going to read the entire judgment. One or two points, that at this point I want to make, Chairperson, even after Judge Murphy is very critical of Advocate Chauke's conduct, and I want to, and he is critical of the Magistrate. At this point, in fact, Judge Murphy sets aside the decision. And one would have, he reviews it and he sets aside the decisions. And he directs Mrwebi and Chauke to reinstate the prosecutions and the National Commissioner to reinstate the disciplinary enquiry. Those were all subject, but we will
10 deal only with the Chauke part of it.

So at this point where Judge Murphy is saying, you got enough, reinstate, what would one expect a prosecutor in the position of an experienced DPP to do? Your team is saying prosecute. You got strong case, circumstantial evidence. You have got a representation that talks about a fanciful conspiracy against you. And now you get Judge Murphy saying, reinstate. Advocate Chauke does not. He refuses to reinstate. They take it on appeal to the SCA. And that is my question. At every step of the way, one would think
20 at this point, why would you appeal Judge Murphy's decision? Why not prosecute the murder charge at this point?

CHAIRPERSON: But if the SCA then absolves him and say, there was nothing irrational about his conduct. You remember Judge Murphy said that his decision was irrational. The SCA decides otherwise and says, there was nothing

irrational about his conduct. So his approach to the SCA or the NPA's approach in appealing the decision, based on the decision of the SCA, was not wrong.

ADV BATOHI: Chairperson, I have explained my understanding of that decision and the circumstances. I do not believe it dealt with his decision on the correctness or otherwise of Advocate Chauke's decision at various stages to prosecute the murder matter.

CHAIRPERSON: You mean the SCA?

10 **ADV BATOHI:** Yes, let me rephrase that. I have dealt with this issue, I think twice. And the enquiry is aware of my understanding of that decision.

CHAIRPERSON: We need clarity. That is why we keep on going back to it because the fact that we asked you to assist us and clarify this aspect, we clearly want to understand your position of these matters because you do not want to make assumptions after the event and we struggle to write the report because we did not afford you an opportunity to state the position as you understood this judgment.

20 **ADV BATOHI:** Yes, thank you for that, Chairperson. I appreciate that. The panel has afforded me the opportunity twice to do that. And I cannot clarify it any further. I would ask that the matter be left for argument, Chairperson, with all due respect.

ADV BALOYI-MERE SC: Can I ask my last question? And I

promise it will be my last question. Is the NPA precluded from taking a matter on appeal if they feel or if they see that the Judge's decision is based on reasons that they do not agree with?

ADV BATOHI: Chairperson, it should not simply be reasons that you do not agree with. It should be for good reason.

ADV BALOYI-MERE SC: Let me rephrase, for good reason?

ADV BATOHI: If it is for good reason, then of course, nothing precludes you from doing that.

10 **CHAIRPERSON**: My last bit on this. Advocate Chauke says, in any event, I am just paraphrasing what he is saying. At the end of the day, the final decision was that of the NDPP. That was your decision. As the head, be it you or Advocate Jiba or the NDPP then, he says the final decision was that could be made by the NDPP on these matters.

ADV BATOHI: Chairperson, I am trying to understand which final decision you are referring to.

CHAIRPERSON: Is the decision to, I suppose, to reinstate the charges or to act in accordance with paragraph 3 of the
20 SCA judgment? I assume that is what he is saying, but if he is not saying that, I am putting it to you that given the order of the SCA, the final decision was that of the NDPP.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Thank you.

MS RAMAGAGA: Chair, due to the lateness of the hour, I

just want to indicate that maybe it would be better that I ask my question tomorrow.

CHAIRPERSON: Advocate Ramagaga would like to, I am not sure whether to follow up on this question, but she will reserve her question for tomorrow because it is now 10 to five. Advocate Mohlamonyane, please bear with us. This engagement with Advocate Batohi helps us to understand precisely what her case is, so that when we leave this, we finish this hearing, we should know precisely what her
10 evidence is. We will adjourn until tomorrow morning at nine o'clock, and Madam Ramagaga will start with the questions. I beg your pardon, I see you had a conference with your colleague, Advocating Mtsweni there. I will afford you a chance to talk to him.

ADV MOHLAMONYANE SC: My co-evidence leader, Madam Chair, informs me that I should inform the panel that tomorrow he and Advocate Skosana will not be here because they will be doing other duties. They will actually be consulting with a witness.

20 **CHAIRPERSON:** It appears to me that your team is disappearing from this venue, and yet they were appointed precisely to assist you. You know where you come from.

ADV MOHLAMONYANE SC: I know, Madam Chair.

CHAIRPERSON: You know the challenges that we have encountered with you being the only evidence leader.

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: And now you have a team. Tomorrow you will be sitting alone, it appears.

ADV MOHLAMONYANE SC: They are consulting tomorrow, Madam Chair. He and Advocate Mtsweni and Advocate Skosana SC will be consulting with a witness who is going to be called to this hearing.

CHAIRPERSON: Advocate Mohlamonyane, I would not want to be instructing as to how you should proceed with this
10 matter, but you know that there is still going to be cross-examination here. And I would have imagined that you will take advantage of having an assistance from Advocate Mtsweni whilst Advocates Skosana is busy consulting. But if both of them are going to be out of here, I foresee challenges that we had before. And I think in all fairness to you, Advocate Mtsweni must be here, at least until Advocate Batohi is done with her evidence.

ADV MOHLAMONYANE SC: May I confer with him?

CHAIRPERSON: Yes, please.

20 **ADV MOHLAMONYANE SC:** He says he will be here, Madam Chair.

CHAIRPERSON: Thank you, Advocate Mtsweni. You should be here to assist Advocate Mohlamonyane. You can see the bundles of evidence that we are referring to. And in fairness to him, he needs an extra hand to assist him with all these

documents. A consultation will follow, at least at the end of Advocate Batohi, because she also needs to be assisted with the documents that counsel or ourselves are referring to. Please be here tomorrow and the subsequent days until she finishes.

ADV NGCUKAITOBI SC: Madam Chair, I was very pleased to hear that my learned friend needs an extra hand. We just want to record that we have been blue-ticked by the State Attorney on asking for the extra hand.

10 **CHAIRPERSON:** Counsel, I suppose you are out of order. [Laughter] That is not a matter within the space of the panel. When you were appointed, the panel was not involved. I think it is a matter that you should take up with the State Attorney. But I am looking at all of you, it is a team of four here, a team of four lawyers, senior lawyers for that matter. So that matter can be taken up with the State Attorney, Senior Counsel.

ADV NGCUKAITOBI SC: Thank you, Madam Chair. I am not taking it any further. [Laughter]

CHAIRPERSON: And counsels, Advocate Batohi and
20 Advocate Chauke, we will adjourn and reconvene tomorrow at nine o'clock. We adjourn, thank you.

ENQUIRY ADJOURNS UNTIL 4 DECEMBER 2025

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