

**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**

4 DECEMBER 2025

DAY 12



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

PROCEEDINGS ON 4 DECEMBER 2025

CHAIRPERSON: Good morning everyone. Advocate Mtsweni and junior counsel, do you need time to confer? We can give you time to talk. Good morning everyone, good morning Advocate Batohi.

ADV BATOHI: Good morning Chairperson, morning to the panel and morning to Advocate Chauke and his team.

CHAIRPERSON: Good morning *Ntate* Chauke. Good morning. The lady sitting over there, what is your name?
10 Obili. Are you from? Oh, okay. Good morning madam. I thought that you were working with our spokesperson from the department. Good morning, good morning everyone. Madam, you are still under oath?

ADV BATOHI: I am, thank you Chairperson.

CHAIRPERSON: Yes, thank you. You may proceed, Advocate Mohlamonyane. Advocate Batohi, we thought that, before you begin, counsel, counsel from the NPA should, as and when it is necessary, she can sit next to you actually. Is it possible to have that chair being brought closer to her at
20 the corner? If necessary you can whisper to *Ntate* Mkabela. But feel free to sit there and when it is necessary, madam, you can go back to the junior counsel but take that as your seat from now, to make it easier for Advocate Batohi to paste through her documents. And when you need to go back to the other side, feel free to do so.

ADV BATOHI: Thank you Chairperson.

CHAIRPERSON: You may proceed, *Ntate* Mohlamonyane.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Ja, I was getting to it.

MS RAMAGAGA: Okay, sorry about that.

ADV MOHLAMONYANE SC: When we adjourned, Madam Ramagaga wanted to ask a few questions for clarification to Advocate Batohi.

MS RAMAGAGA: Good morning, Chair. I am still of the
10 intention to ask questions and I will proceed to do so. Advocate Batohi, can you just advise as to why we were only getting annexures to Dr Broughton's report yesterday? Or is it annexures to Dr Broughton or whoever? I think that supplementary documentation that we received.

ADV BATOHI: Yes, thank you. Those are not annexures to Dr Broughton's affidavit. Those are annexures to what has been referred to as the De Kock report, which is part of my affidavit.

MS RAMAGAGA: Yes.

20 **ADV BATOHI:** Which is part of my affidavit.

MS RAMAGAGA: Ja, thank you for the correction. Why were we only getting those annexures yesterday?

ADV BATOHI: The reason for that is that because of the volume of it, it was the De Kock report. If one reads the De Kock report, it is clear that they are annexures to the report

and it is also clear that those annexures are not attached to my affidavit. The reason why we did not do it, is because I think in my affidavit we referred to, I hope we do, or the De Kock report refers to the annexures, but I am not sure whether in my affidavit we actually refer to where in the bundles they can be found.

My understanding is some of, if you look at my supplementary affidavit, some of the, and I am speaking from memory because I am not looking at it now, but some of the
10 documents are documents that are in the bundles and there is a reference to it and some of them, thank you, and some of them, if you look at, ja, in my affidavit, paragraph 13, as I explained yesterday, the first three annexures to Advocate de Kock's affidavit, well not his affidavit, the panel report and opinion, is in the bundles, the first three, and the remaining four are not contained in the bundles.

It was only because of the voluminous nature that we did not attach it, and I would suppose because of the serious time constraints that we had in terms of trying to put my
20 affidavit together, and that is the reason.

MS RAMAGAGA: Ja, I am asking this because it is my understanding that when you read a document that refers to annexures, that document will only be complete when you also read the annexures.

ADV BATOHI: That is correct.

MS RAMAGAGA: So the proper thing to have been done would have been to avail those annexures simultaneously with the report.

ADV BATOHI: Accepted, Chairperson.

MS RAMAGAGA: Thank you. Now, on the balance of your affidavit, are there still any outstanding annexures to the documents that support your affidavit, or as far as you are aware, all documents have been availed?

ADV BATOHI: I think we must check that, because some of
10 the documents referred to in my affidavit, for example, Dr Broughton's report and the annexures thereto, it was, those annexures were certainly not attached to my affidavit because of the voluminous nature of it, but my understanding is that those have been uploaded and we can refer to them. What I propose through you, Chair, is that we do is go through my affidavit carefully and make sure that every document that is referred to either has an annexure attached to it or there is a clear reference to where it can be found in the bundles, so that we panel can easily access the documents.

20 **MS RAMAGAGA:** Yes, ja, that is the exercise that ought to have been undertaken earlier, but I hope in my questioning it will not become necessary for other documents that are outside the record that we have, that would have to be brought in. Now, when do you say you formed an opinion that Advocate Chauke's conduct requires or necessitates the

establishment of an enquiry?

ADV BATOHI: As I mentioned, I had been considering this matter for a while and I had been receiving opinions over a period of time. In fact, it went, spanned years from the first Nalane report opinion. I finally would have decided to refer it at the point I had considered the evidence in the Booyesen matter and the evidence in the Mdluli matter that had been placed before me. So after that, I made my final decision to refer it and then I wrote to the Minister.

10 **MS RAMAGAGA:** Can you just give us an idea, when did you form the opinion or when did you come to a conclusion that this matter or this conduct necessitates a recommendation for an enquiry to be held?

ADV BATOHI: When I had looked at all the evidence.

MS RAMAGAGA: Yes, the timeline, was it around February 2024, 2021 and so forth? That is what I would like to ...[intervenes]

ADV BATOHI: I think it would have been finally on the Booyesen matter, I had made a decision after, well I will look
20 for the timelines, but just in terms of when it would have been. I was clear after I looked at Dr Broughton's report. With regard to the Mdluli matter, I made the final decision after I looked at the evidence that was attached to the Hulley and Wentzel, and we can look at opinion and we can look at those to get dates. If you would like me to do that now?

MS RAMAGAGA: Ja, it will help, you know, I do not want us to be going back again and forth, at least let us travel this path and, you know, moving forward and without having to time and again go back and check.

ADV BATOHI: Certainly, I would appreciate that as well. So, if we can try, we will try to get the documents to make sure we have the timeline. Dr Broughton's report is the date of that. If we can just look at the date of that, that would be the first thing. So, the second report, and understand I am
10 giving an estimate of the timeline.

MS RAMAGAGA: I understand well.

ADV BATOHI: The second report of Dr Broughton with all the annexures is dated the 21st of April 2023. I would have taken time to consider all of this and it would have been, the decision would have made, been made sometime after this. When I did, when I did, before I got the opinion of, and I am trying to get the timeline, maybe we will get the opinion, if we can get the opinion of Advocate Hulley and Wentzel, that will give me a sort of window period when I was considering these
20 matters.

That opinion is dated... I do know that I certainly looked very carefully at the, all the evidence in the Broughton report. This, this document is dated the 10th of July. So, it would have been sometime between the 21st of April and the 10th of July that I would have decided that I had sufficient

evidence with regard to the Booyesen matter to refer the matter.

MS RAMAGAGA: And the Mdluli matter?

ADV BATOHI: Yes, in a moment. I just want to make sure I make a note of these dates, so when I am asked later, I am not trying to understand what those dates were again. 21 August until 10 July. Okay, and the Mdluli matter, it would have been sometime after the 8th of, sometime after the 10th of July and the date on which I sent the referral to the
10 Minister, which is an attachment. I think it is in my bundle. It is SB10. I think it is SB10. SB10 is dated the 18th of August 2023. It is page 275, SB10, and the date of that is 18 August 2023.

MS RAMAGAGA: Is 18 August 2023 the date on which you took the decision in respect of the Mdluli matter?

ADV BATOHI: No, it is not. I did not give a date. I said there is a window period. It will be after the 16th of July. Oh, it is not 16th. 10th of July. 10th of July 2023 when I got the Hulley and Wentzel report. Between that date and the 18th
20 of August 2023 when I forwarded the recommendation to the Minister.

MS RAMAGAGA: I beg your pardon. I think we are going to spend some time on three documents to get clarity on issues and those will be the SB5, which is in pages 231 to 235. And then SB5A, which is in pages 236 to 237. And then SB6,

which is in pages 240 to 260. And LO1, which is in pages 30 to 119. Yes, I think that will be the main documents that I will seek clarity in respect of. But I will then start off with the SB5, nè?. SB5 makes a reference to a request for further information.

You say it is headed request for further information relating to decisions made by you as the SDPP. Now a request for further information supposes that there was information that had been received earlier and this is a
10 follow-up to request for further information. Now what I would like to get from you is when was the other information received by yourself or obtained by yourself? It may have been something that is lying in your records or it may have been something that you actually sought for from someone.

ADV BATOHI: So must I go through each one of those of those matters?

MS RAMAGAGA: No, no, yes. I am asking as to if you ask for further information it means you had you have some other information that you could have possessed either by virtue of
20 being in the office or you could have obtained from someone else. The first question is the information that you already had, where did you get it from?

ADV BATOHI: Okay, so I will deal with each one of the matters. I did refer to it yesterday but I will deal with it again. Each one, so the Booyesen matter, we will start off with that

one.

MS RAMAGAGA: Yes.

ADV BATOHI: So with regard to the Booysen matter there was a lot of information that I had. I had information, well the Zondo Commission was in progress and there was a lot of evidence that was tended there. There were Court decisions relating to the Gorven judgment and ja so there was all of that information that I had which led me to, especially given the Gorven judgment, to the point where as a National
10 Director I believed I could not bury my head in the sand. I needed to look into this, because there was there was clearly having considered having all of this information something that I needed to enquire into. So that is the Booysen matter.

MS RAMAGAGA: So with regards to the Booysen matter there was information in the records of the NPA. There was information out in the public in the form of the Court judgments and ja in Court matters and as well as the Zondo Commission. Right, thank you. And then with regard to the Mdluli charges.

20 **ADV BATOHI**: And with regard to the Mdluli charges, they had been at the time I recall, there was let me just say talk in the NPA that these charges were, that Richard Mdluli was being protected and he was not prosecuted in these matters. In fact I do recall that I spoke to Zais van Zyl himself. We had had one of the, geez I cannot remember the date or even

the year, but I am thinking it was reason, I do not know, reasonably early in my term. It certainly would have been before this this letter I imagine, but it is part of the information, you know there was part of me getting the information, but I cannot recall when I got this. I think, I know it was early in my term. I spoke to Zais van Zyl and he told me, he is the prosecutor ...[intervenes]

CHAIRPERSON: Is that Advocate van Zyl SC?

ADV BATOHI: That is correct. Advocate Zais van Zyl, he
10 was a deputy prosecutor, deputy DPP in the Johannesburg office at the time and was the lead prosecutor in the Richard Mdluli murder matter. I am not sure what his role was in the others but he might have been the lead prosecutor in in all of the dockets. I did have a conversation with him and he told me about the very strong case that they had in this Richard Mdluli murder case. You will note from my letter I say there:

“I have perused the NPS representation file
to this matter. From a reading of the
documentation contained in the file, I
20 understand that Mdluli was arrested at 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 on April 2012 but following a representation you decided to withdraw charges and a formal inquest was held.”

I then refer ...[intervenes]

MS RAMAGAGA: Advocate Batohi, I have read ...[intervenes]

ADV BATOHI: Okay, so that was the information that I also had.

MS RAMAGAGA: Ja but what I was asking is where do you
10 get the, this thing, that information, you have said there was talk in the NPA about the Mdluli case and also that you spoke to Advocate van Zyl, who informed you that there was a strong, strong case ...[intervenes]

ADV BATOHI: There was also...

MS RAMAGAGA: ...and who else or what else, just give me the source and you do not have to really read this, we have read this ...[intervenes]

ADV BATOHI: I am reading it to refresh my memory so that I answer properly, so this is a long time ago, I am trying to
20 refresh my memory, but also so I had the NPS representation file as per paragraph 2.1. There were also the judgments in the Mdluli matter the Freedom Under Law case that I referred to in paragraph 2.2. From my recollection so that was the information on the Mdluli matter but as I say, it may not be exhaustive.

MS RAMAGAGA: And the information relating to the Karima Brown complaint?

ADV BATOHI: That was a complaint from Miss Brown herself and I see that that annexure was attached to my letter I am not sure if it is part of this bundle but if not, is? I think if we could check if it is, let me check the index and see if it is in there. Oh ja it is 5c SB5c. So that was that was what triggered.

MS RAMAGAGA: The complaint that your office received
10 from Miss Karima Brown?

ADV BATOHI: That is correct.

MS RAMAGAGA: Okay.

ADV BATOHI: I then, that was...

MS RAMAGAGA: The basis.

ADV BATOHI: The information. Paragraph 4, as I had indicated ...[intervenes]

MS RAMAGAGA: Just before you, now when you said you were asking for further information, is there any information that you had received other than the complaint?

20 **ADV BATOHI**: Not that I can recall. I think it may have been in the public space. There may have been some media reports about it if I recall, but I am not sure.

MS RAMAGAGA: You are not sure?

ADV BATOHI: I am not sure. But I think it was in the public space.

MS RAMAGAGA: Okay but Advocate Chauke had not as yet furnished any information to you ...[intervenes]

ADV BATOHI: Not that I am aware of.

MS RAMAGAGA: ...with regard to the ...[intervenes]

ADV BATOHI: I cannot recall, but I do not think so.

MS RAMAGAGA: You do not think so?

ADV BATOHI: I cannot recall.

MS RAMAGAGA: You cannot recall, thank you. And then ...[intervenes]

10 **ADV BATOHI**: I do feel like I am being cross-examined but I do I cannot recall.

MS RAMAGAGA: Maybe it does help you know to express your view that you feel like you are being cross-examined. And I think the other day the Chairperson touched on that to explain and it is an explanation out of Courtesy because this enquiry is an enquiry of lawyers about lawyers. The, and I think all of us understand the term enquiry and all of us understand the nature of the enquiry that we are now conducting ...[intervenes]

20 **ADV BATOHI**: That we do understand...

MS RAMAGAGA: Ma'am please, please, please ...[intervenes]

ADV BATOHI: My apologies.

MS RAMAGAGA: ...when I speak please listen.

ADV BATOHI: Certainly.

MS RAMAGAGA: And respond at your turn.

ADV BATOHI: Certainly.

CHAIRPERSON: So we understand, you know with an enquiry of this nature, part of what you do as the panel, you have got to make sure that you get all information, so that when the time comes for you to write a report you do not wish to call people that testified and to ask them for more information. And in this particular enquiry you are the key witness. Any other witnesses that come after you are not
10 really key.

They may be important but they are not key witnesses because this enquiry has come into being because of your opinion. And your opinion was also based on other opinions that you obtained. But at the end of the day it is about your opinion. And any other witnesses that may come here after you, they will not be able or they may not be able to answer adequately about issues especially with regard to the motivation for the enquiry to be held and many other things.

20 If they come here and corroborate that is fine, that becomes a bonus. But at the end of the day this matter should be traversed properly and adequately in respect of every witness including yourself and well mindful of the fact that you are the key witness. So we are enquiring. It is unlike in a Court of law, in a criminal case where there will be cross-

examination.

And I think as a seasoned lawyer you understand or generally you know with the rules of cross-examination that you ask leading questions. You are not asking for information. You are giving information when you cross-examine and you expect responses and that is not what is happening here. We are trying to get information and I will proceed on that understanding.

And I just want to make you understand that the
10 panel is not confused about what is cross-examination and what is asking questions for clarity, what is asking questions in an inquisitorial environment and what is leading evidence-in-chief. There is no confusion about the concepts. Now I will proceed.

ADV BATOHI: May I comment on that?

MS RAMAGAGA: Yes you may.

ADV BATOHI: Thank you. That is very helpful. I think it is important that we are all on the same page because the Chairperson did indicate to me in chambers as well that this
20 is there is not going to be cross-examination. So I am glad that we are all, there are differing views about it. I certainly have my own view about this but I have got to be part of this process. I am here to help the enquiry and I will continue to answer the questions to the best of my ability. I do want to, in respect of me being the key witness, of course I agree it is

an important witness.

My views on things that happened prior to me taking office, of course important but all of that other evidence that is being presented outside of my views on this is the hard evidence in this matter which in my view is, I am not saying my view is not important, it is critical because as you say correctly I referred the matter having a reasonable belief that this matter needed to be enquired into and this is the enquiry and my evidence is in fact in many instances it is hearsay
10 and there will be other evidence by witnesses, documents, et cetera that will speak for itself. So I wanted to make that point. Thank you.

CHAIRPERSON: Might I take this opportunity to clarify your statement as you answer Ma'am Ramagaga, that I made it clear in chambers that you will not be cross-examined. Did I understand you to say that?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: It is important to put context to that question, to that answer rather, and place that correctly on
20 record, that it is not correct that I said that you will not be cross-examined. You know why I am saying that? That following the party's submissions or memoranda requesting that this enquiry should begin in February 2026, we concede that it is appropriate to call you as the head of the NPA and caution that it cannot be that your team, including the

evidence leaders, or the view that we should begin this enquiry even four months later than the date that has been allocated to this enquiry, correct?

ADV BATOHI: That is correct. I, in fact, agreed with you.

CHAIRPERSON: You indeed agreed. It was in that spirit that we considered it appropriate to call you as the head of the NPA so that you could sound a caution to your team to do things right, because at the end of the day, the buck stops with you, correct?

10 **ADV BATOHI**: That is correct, as the head of the NPA.

CHAIRPERSON: And we made it clear to you that this enquiry will not begin in February 2026, as was requested by the parties, precisely because we believed that when the complaint or the referral was made to the President, the NPA was or ought to have been ready to kick start with the enquiry, correct?

ADV BATOHI: That was indeed your view, Chairperson.

CHAIRPERSON: And we formed the view that although the NPA is dragging its feet in providing information, we will
20 begin to hear or to proceed with this matter on the 17th of November. Is that correct?

ADV BATOHI: Chairperson, you did mention that and I think in the context of our conversation, I explained to you that the NPA was really trying hard, given the volume of documents, to get things together.

CHAIRPERSON: And that meeting took place a day after I had called you telephonically to request you to attend the meeting and during our discussion you mentioned that you would not want to be cross-examined.

ADV BATOHI: Chairperson, that was in the course of our meeting, when we met at your office. I said to you that I was not even sure that I was going to be testifying in this matter and you expressed the view that it would be important that I do testify and I agreed that I do and I said to her, I recall
10 saying something along the lines that, ja, you know, cross-examination is something that you do not look forward to. I certainly would not look forward to it and in that context I agree. We talked about cross-examination and the Judge then made certain comments.

CHAIRPERSON: I am referring to my telephonic discussion with you when I called to request you to attend a meeting at the chambers. Do you recall?

ADV BATOHI: I do recall the conversation, Chairperson.

CHAIRPERSON: And during that discussion you expressed
20 the view that you would not be keen to be cross-examined and I said to you we need not talk about that. We will have a discussion the following day?

ADV BATOHI: Chairperson, I cannot recall but I do not doubt it. I have absolutely, I agree that that if that is what you say that is what happened. I know we talked about it the next

day.

CHAIRPERSON: And more particularly you expressed the view that you do not want to be cross-examined by Advocate Ngcukaitobi and I cautioned you that let us not discuss this matter on the phone. Let us have a meeting with you.

ADV BATOHI: You did indeed caution me and said we should not discuss it on the phone and we should have a meeting the next day.

CHAIRPERSON: Now at this meeting, in respect of which
10 we wanted to discuss with you as the head of the NPA about the starting date of the enquiry, we clearly said to you that you will be the first witness to testify because you are the complainant who should set the tone of the enquiry. Is my recollection correct?

ADV BATOHI: You did indeed say that, Chairperson.

CHAIRPERSON: And at what stage did I express a view that you would not be cross-examined?

ADV BATOHI: During that meeting, Chairperson, my
20 recollection is that I did mention the issue of cross-examination at that point and that you mentioned that it will be questioning but no cross-examination. That is my recollection, because it is an enquiry.

CHAIRPERSON: You see, Counsel, it is very important not to misrepresent facts to anyone, especially when you impute information to any Presiding Officer.

ADV BATOHI: I agree with that, Chairperson.

CHAIRPERSON: It will be totally unacceptable for you to impute wrong information about me or about any of my colleagues sitting as panel members. I am going to park it there and close by saying, in any event, it will be totally uncalled for to even discuss issues relating to whether you will be cross-examined or not, when there is a litigant against whom you have made allegations. Advocate Chauke is represented and there is no doubt that you will be cross-
10 examined. And I am sure you understand that.

ADV BATOHI: I accept that I will be. I have no doubt about that either.

CHAIRPERSON: I will leave it there and ask my sister to take it up if she wants to do so.

ADV BALOYI-MERE SC: Just to add, and I am going to try and quote you the way you put it. When you raised the issue of cross-examination, I remember saying, are you scared of cross-examination? And you said, no, I am not scared to be cross-examined because I attend the Justice Portfolio
20 Committee where I get cross-examined all the time. Do you still remember that?

ADV BATOHI: I do.

ADV BALOYI-MERE SC: So you accept that there was never a time when you were promised that you will never be cross-examined? Because that never featured in our meeting with

you.

ADV BATOHI: Your comments are noted, Chairperson.

CHAIRPERSON: Pardon?

ADV BATOHI: I say I note the comments.

CHAIRPERSON: I beg your pardon?

ADV BATOHI: I note the comments.

CHAIRPERSON: Note the comments.

ADV BATOHI: I do, thank you.

CHAIRPERSON: Might I caution counsel that all of us are
10 lawyers here. You are a lawyer. The litigant is a lawyer.
Advocate Chauke is a lawyer. The team, we are all lawyers.

ADV BATOHI: That is correct.

CHAIRPERSON: We understand basic principles of
conducting disciplinary enquiries. And it is important that we
take one another into each other's confidence because we
are here searching for the truth. And it will be totally
improper for anyone's name to be dragged into this record,
basically on any proposition or suggestion that we have
misconducted ourselves. Because if you put a statement to
20 the effect that I told you something that is incorrect, it is
putting me in a very bad light. It is for that reason that I
placed this context on record, so that anyone who reads this
record at a later stage understands why a discussion was
held and why you are incorrect to suggest that I told you that
you will not be cross-examined.

ADV BATOHI: Chairperson, if I may, I certainly did not intend to suggest that the Chairperson had acted improperly in any way at all. It was my understanding. And so I really apologise if that is the way it came across. But it was certainly not my intention to create that impression that there was anything improper that was said to me during that conversation at all.

CHAIRPERSON: The question is whether that was said or not.

10 **ADV BATOHI:** It was my understanding. In fact, precisely in the context of what Madam Baloyi-Mere mentioned, that we did speak about cross-examination. And I did indeed say that. That was my understanding. It could have been a mistaken one. But that was my understanding.

CHAIRPERSON: Yes, thank you.

MS RAMAGAGA: Thank you, Chair. Ja, I had asked you about Ms Karima Brown. You had indicated that you had received a complaint.

ADV BATOHI: That is correct.

20 **MS RAMAGAGA:** And now let us proceed to the next matter. It is the matter of Brian Hlongwa. Remember that the question that I am still asking is about further information requested.

ADV BATOHI: I do. So Brian Hlongwa matter.

CHAIRPERSON: It is about further information requested.

ADV BATOHI: Correct, so the Brian...

MS RAMAGAGA: It is not apparent from paragraph 4 as to where you have received the information from. I may be wrong because when I read the second sentence, the third sentence, it says:

“The DNDPP NPS has requested you to provide reasons for the delay.”

ADV BATOHI: Sorry, I am just trying to get back to the page.

CHAIRPERSON: In the matter, it is page 234, SB523.

10 **ADV BATOHI:** Yes, I am there.

MS RAMAGAGA:

“The DNDPP NPS has requested you to provide reasons for the delay in the matter and I have been placed in possession of same.”

So when you say that I have been placed in possession of saying, what are you talking about? Is it about the request by the NPS or is it about any other information that Advocate Chauke could have provided or had provided by them?

20 **ADV BATOHI:** So I am going to try to the best of my ability to recall the events prior to that. I have testified here before that after I took office, General Lebeya mentioned this matter to me and expressed his concern that this matter had not, in fact, I cannot recall whether it had been withdrawn or they were about to arrest Brian Hlongwa and they were stopped

from arresting him. I cannot remember the details, but his concern was that it was now about seven years later and the matter had not been enrolled.

As a result of that information, I discussed it with Advocate de Kock and being the deputy in charge of the NPS. On the basis of this, and I am trying to refresh my memory, what would likely have happened is Advocate de Kock would have sent a letter to Advocate Chauke and asked him for, well, sent a letter in response and Advocate Chauke would
10 have responded to that. That is what my note here says and I am giving him the opportunity to add anything further.

MS RAMAGAGA: Ja, you know the institution that we are talking about here is an institution that I believe is an institution of record and it will help, you know, it is to try and, I do not know, when I say remember, I cannot say you can only remember to an extent possible within your capacity, but at the same time, where you are raising issues about conduct, it helps to get the records. Did you look at the records that pertain to the matter of State versus Brian Hlongwa or did
20 you then get information, it would appear, unless you indicate otherwise, in passing from General Lebeya and Advocate de Kock?

And just to avoid giving you a compound question, I must break it into pieces. Firstly, let us talk about General Lebeya. Did General Lebeya present a formal documentation

wherein he was briefing you about the matter, bringing his concerns to your attention so that you can deal with the matter accordingly? Or how did he, and I am still just confining you to General Lebeya, then we will go to the next one.

ADV BATOHI: With regard to General Lebeya, I cannot recall him sending a formal letter to me, but it was certainly not a conversation in passing. I had a meeting with him, my recollection, and it would not have been a meeting about this particular matter. It would have been a meeting about other things. He is an important stakeholder. He was the head of the Hawks at the time, the DPCI, and of course you have meetings with your partners in the system.

And it was during one of these meetings that he expressed very serious concerns about this matter, that my recollection of this conversation was that it had been, I am repeating what I said, so it had either been enrolled and withdrawn, I do not recall, or whether they were about to arrest Mr Hlongwa when they were stopped from doing so by the DPP in Johannesburg.

But he was very concerned that the matter had not been re-enrolled after that, because their understanding was that it will be, and I think there was some, what Advocate Chauke mentioned to me at a later stage, there was a possibility of racketeering charges, but that was not

discussed in the meeting with General Lebeya. All he did was express concerns to me about the fact that a number of years had passed and the matter had not been re-enrolled.

MS RAMAGAGA: You had a formal relationship with General Lebeya?

ADV BATOHI: I am not sure what you mean by a formal relationship.

MS RAMAGAGA: A formal relationship as a stakeholder. You said he was a stakeholder and I think it is common
10 knowledge that he must have been a stakeholder there. He comes, he talks about something, you know, serious matters, or a serious matter which is not getting attention and so forth. That comes through to me like, it is a casual reporting. Like you say, there was no meeting about this. You had another meeting, you had another meeting, then he tells you that there is this matter that is very serious, that is not receiving attention, and now, because it was not a meeting about this matter, we are likely not to get the minutes of that meeting or
20 of that discussion. But at least I am sure if he was serious and the matter was serious and it is about the concern, about the interest of the administration of justice, he could not have been that casual. I want to believe that he must have communicated with you in writing. He did not.

ADV BATOHI: I am not sure, I am not sure why the honourable panel member does not accept that it could have

been something that was given to me during a conversation because we are, we are not just stakeholders, we are critical partners. We work together very closely on a range of matters and cases. And during one of my meetings, he mentioned this to me as a very serious concern that he had. I do not recall him sending anything to me in writing, but receiving that as a National Director, I need to take it seriously. And I did.

And from what I read here, because I am trying to
10 cast my mind back a number of years, Advocate de Kock or someone from NPS, I am not sure if he was there at the time because he joined the NPS in 2021, I think. So I am not sure when this went to him. But there was a formal, there was a letter written to Advocate Chauke and he was asked to provide reasons for the delay. Because as I said, Advocate Chauke, General Lebeya was concerned that there were a number of years and the matter had not been enrolled. So in my view, that was the proper thing for me to do in the circumstances.

20 **MS RAMAGAGA**: Ja, well, I have noted the meaning. I do not remember. I cannot recall. We spoke. It is fine. So the second line is saying:

“The NDPP has requested you to provide reasons for the delay.”

Where can we find a copy of this request that was made to

Advocate Chauke about the matter?

ADV BATOHI: We will check the NPS records.

MS RAMAGAGA: Okay, so it will be provided?

ADV BATOHI: Yes.

MS RAMAGAGA: Ja, the problem, I had hoped that today we would sail without the possibility of having to go back. We do not know what the document will be having. It may even then become necessary to go back. But then we will see as it comes as to whether it is necessary or not. Let us go to

10 the last matter.

CHAIRPERSON: Might I? If the document that is to be provided, should not it be part of the list of exhibits, Advocate Mohlamonyane? To the extent it may be necessary. Paragraph 4.1.

ADV MOHLAMONYANE SC: I see that, Madam Chair. It will be made part of the exhibits.

CHAIRPERSON: Advocate Batohi undertakes that it will be provided, that request.

ADV MOHLAMONYANE SC: Which is supposedly in writing.

20 **CHAIRPERSON:** Supposedly in writing.

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: Please make a note of that, Madam Junior, and include it in the bundle of the index for the exhibits.

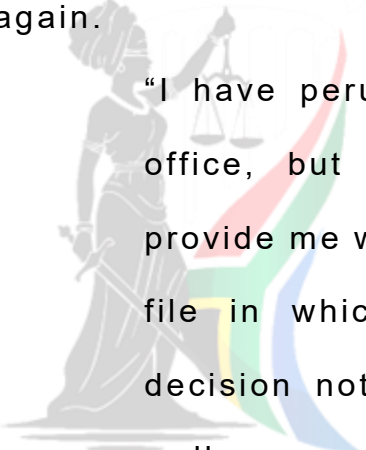
ADV MOHLAMONYANE SC: And it will be accordingly marked, Madam Chair, as an exhibit.

CHAIRPERSON: Yes, thank you. Proceed, colleague.

MS RAMAGAGA: The last one is the matter of state versus Duduzane Zuma. Again, in respect of that matter, talking about the question of your source of information, where you requested him then to avail further information. You indicate that you have perused the representations. Please, it is SB5234.

ADV BATOHI: Yes, I am there, thank you.

MS RAMAGAGA: Oh, are you there? Okay, sorry. I am
10 sorry about that because I did not mention the page number again.



“I have perused the representation file of office, but you are kindly requested to provide me with a further copy of your office file in which the record of the original decision not to prosecute is recorded, as well as a copy of the related office files.”

Now, here it is clear from what you are saying that you have perused some documents and now you are giving him an
20 option, or you are inviting him to provide further information if he so wishes. Now, this document that you had, the representation that you had perused, have they been availed to the enquiry?

ADV BATOHI: Not that I am aware of. I have not even perused it since then. We certainly can make that available.

MS RAMAGAGA: Yes, it will help to make them available because in the beginning we can see that, you know, there are the matters, right? I do not know whether there were even more than that, but we see that this letter of the 13th is referring to these five matters, and much as the enquiry now is proceeding in respect of the two matters, it does help to look at the matter holistically when we deal with the report, right? So that is another document that will be availed.

ADV BATOHI: It will be more than a document. My
10 understanding is that it is a file, because once there is a representation, there is a representation file that is sent. It is opened in the NPS, so we will certainly make available that file.

MS RAMAGAGA: Noted, yes, fine.

ADV BATOHI: And if I may confirm that with regard to that particular matter, Advocate Abrahams overturned Advocate Chauke's decision and prosecuted in that, decided to prosecute in that matter.

MS RAMAGAGA: Ja, we will come to talk about that. The
20 focus of the questions that I have been asking now was just about the source and why you are asking for further information.

ADV BATOHI: Sure.

MS RAMAGAGA: Now the issues about the matters will receive attention. I think we can then proceed to deal with

now those matters in particular. And I think when we deal with them, I will be maybe even cross-referring where necessary, right? Cross-referring between the SB5 and the SB6. Right, now let us look at the Booyesen matter. I have said SB6 pages 244 to 254, nè?

ADV BATOHI: Sorry, what is the page numbers again?

MS RAMAGAGA: SB6 244 to 254, right? What I would like to draw your attention to or the enquiry's attention to in respect of that matter, is at paragraph SB5. I will start with
10 your letter, that letter of the 13th. I think it should just be recorded that it is the letter of the 13th day of May to Advocate Chauke. Then the SB6 is the reply to that letter, that reply of the 28th from Advocate Chauke to your good self.

ADV BATOHI: That is correct.

MS RAMAGAGA: All right. Now in your letter of the 13th at SB5232, paragraph 1.2, the apparent accusation against Advocate Chauke is he is supporting a decision to prosecute. Do you see that?

20 **ADV BATOHI**: Sorry, where is...?

MS RAMAGAGA: Paragraph 1.2.

ADV BATOHI: Ah, yes, I see that.

MS RAMAGAGA: 1.2 and the conduct complaint of there is supporting the decision to prosecute in this matter. I will read that subparagraph 2 into the record. SB5232, paragraph 1.2:

“As the lead prosecutor, explain why your reasons were for supporting the decision of the prosecutor in this matter.”

So in that one is the question of him supporting the prosecution.

ADV BATOHI: That is correct.

MS RAMAGAGA: Yes. And then a question that arises from that is whose decision is he accused of supporting?

ADV BATOHI: It is not a particular person, but it is the
10 decision to prefer racketeering charges against General Booyesen.

CHAIRPERSON: Ja, the sentence is support, supporting. So when you support, you would be supporting something from someone, unless my understanding is wrong. It says as the lead prosecutor, explain what your reasons were for supporting the decision to prosecute in this matter. Maybe let me hear from you. I think you can better interpret that. I may be misinterpreting what you are saying there. Supporting?

20 **ADV BATOHI**: So what I am saying is that there was a decision to prosecute General Booyesen and on racketeering charges. And there would have been various decisions made at different stages in that process by different people. So you have a team of prosecutors who would be looking at the case. They may decide there is sufficient evidence and they

make a decision then to refer the matter to the DPP in charge at the time, who was General, Advocate Chauke. He then makes a decision to support that decision and then to support a recommendation, having satisfied himself to the National Director. So what I was saying here is just saying in one line to Advocate Chauke to explain his reasons for supporting this decision and being a part of that decision to prosecute General Booysen.

MS RAMAGAGA: [Indistinct – 1:07:14]... Ja, I beg your
10 pardon. We should get the automated ones where you control from that side. Okay, this was not on record. I will just read it again into record. Paragraph 1.3 reads:

“Please also advise on your views on the legal position regarding the legality of you leading the prosecution in another province as well as that of the rest of the team.”

Now, the first question that I will ask is, there are two paragraphs, subparagraph 2 and subparagraph 3. Do they relate to the same matter?

20 **ADV BATOHI:** That is correct, they do.

MS RAMAGAGA: Where in paragraph 2 he is referred to as the lead prosecutor?

ADV BATOHI: Pardon me?

MS RAMAGAGA: Ja, where in subparagraph 1.2 he is referred to as the lead prosecutor?

ADV BATOHI: That is correct.

MS RAMAGAGA: And in paragraph 1.3, is it that one that relates to the Mlotshwa matter, the Advocate Mlotshwa's jurisdiction, the KZN?

ADV BATOHI: It is the KZN jurisdiction, that is correct. It was partly Advocate Mlotshwa and partly Advocate Noko.

MS RAMAGAGA: Okay, I think the issue of the Cato Manor has been addressed almost adequately, and maybe let me leave it there, except for one thing that has caught my eye, and it is in L01. Before I take you to L01, I think in the process of the presentation of evidence, there is a moment at some point where there was an indication that the suspects or accused, whatever their status, in the Cato Manor case, had a close working relationship with the DPP of KZN. Do you remember that, or do not you remember that?

ADV BATOHI: I recall something that either Advocate Jiba or Advocate Chauke mentioned in one of the documents.

MS RAMAGAGA: And that suggestion that there was this close working relationship between the KZN DPP and the Cato Manor suspects or accused, whatever their status. Would you agree with that suggestion, that there was a close relationship between them?

ADV BATOHI: I cannot agree with that because I was not there at the time, but my recollection also is that what Advocate Jiba and Advocate Chauke, one of them or both of

them, I am not sure, was saying was that there was a close relationship between these accused or suspects in the Cato Manor matter who were police officers and the prosecutors. I do not think they mentioned the DPP.

MS RAMAGAGA: Okay, I think that will be verified from the record. Thank you. Do you agree that section 22(3) of the NPA Act does, in interpreting that provision, where... should I proceed, have you found it?

ADV BATOHI: Yes, I have, thank you.

10 **MS RAMAGAGA**: Where the NDPP is of the view that it would be looking at the relationship between the suspects or the accused with the prosecutors or even with the DPP of the jurisdiction where the offence has taken place, can, if he or she finds that it would be in the best interest of the administration of justice, to bar the DPP of that jurisdiction that is affected from prosecuting the matter on the basis that the matter, it would not be in the interest of justice to allow her or him to prosecute the matter?

ADV BATOHI: So on this scenario that you sketch, because
20 it is still not established as a fact whether the prosecutors were compromised or not, or whether the DPP was compromised or not, and Advocate Mlotshwa can talk to that, but on the scenario that you sketch, there is a provision. What would happen in those circumstances if the National Director is of the view that the DPP is compromised with

regard to a particular case? Am I understanding correctly?

MS RAMAGAGA: May I just interrupt you? I think you understood the question. I have not even asked it in the context of this case or, you know, related to the facts. I have just said, looking at that provision in particular, do you agree or not that it does allow for the NDPP to bar the DPP in whose jurisdiction an offence may have taken place, to bar that DPP from prosecuting on the basis that there is this relationship which is likely to affect or to be seen to affect the exercise of
10 the prosecutor's powers?

ADV BATOHI: I understand the question well. In those circumstances, in order to ensure that the DPP does not oversee that matter, has no legal authority over the matter, what the National Director would be required to do in order to give effect to what you term as barring the DPP from dealing with that matter, would be to remove that matter from the jurisdiction of the DPP case at end and place that matter in the jurisdiction of another DPP, who will then have the legal authority to deal with that matter in his or her
20 jurisdiction.

CHAIRPERSON: Let me just get clarity on that. Will that happen, Advocate Batohi, even if an offence or offences were committed far from the jurisdiction of this DPP who is now appointed to deal with the matter? I am just thinking of a scenario where, for example, a number of transgressions or

offences, serious offences are perpetrated in KZN and there are allegations that the DPP KZN is or may be compromised and the NDPP then decides to move the dockets from the jurisdiction within which these offences happened, in this scenario KZN, and move these cases to Johannesburg so that they may be prosecuted by the Johannesburg or South Gauteng, I am just giving an example, DPP. Does that happen at the practical level?

ADV BATOHI: Chairperson, there will be no other way of
10 dealing with it. If that happens, that will be the only option, even though it will cause inconvenience for witnesses, but the DPP, if the National Director is of the view that the DPP is compromised as the scenario that has been sketched, there will be no other option because there is nothing that empowers, it would go against the constitutional framework to give power to another DPP to be the DPP in charge of another jurisdiction.

So in as much as it would cause inconvenience, there would be nothing else to do. Alternatively, if the DPP is
20 compromised, you would look at whether you need to remove the DPP, but it will have to be removed, the case will have to be transferred from the jurisdiction of KZN or any whichever it is, into another jurisdiction and arrangements will have to be made to deal with it.

CHAIRPERSON: I do understand the constitutional

imperatives, but the Constitution is a document that must be given life. Now, if in the administration of justice you cannot prosecute a case within the area of jurisdiction or cases, for example, in the Cato Manor matter, where a lot of killings happened in KZN and the suspects are also from KZN, meaning that all witnesses involved will be in KZN, will it be against the letter and spirit of the Constitution for the NDPP to exercise his or her control and direction in terms of the law to delegate a DPP from, say, Northwest to go and prosecute
10 in KZN in a matter of matters in which he or she is not compromised?

ADV BATOHI: Chairperson, in my view, it would be against the constitutional framework to give a DPP from another division any powers, prosecutorial powers, in respect of a case that is not in his or her jurisdiction.

CHAIRPERSON: I am just thinking about the interest of justice.

ADV BATOHI: Sure.

CHAIRPERSON: Public interest, interest of justice, the cost
20 of moving people to Gauteng or to North West, witnesses and people who have lost families to be relocated to Johannesburg for the case to be heard in Johannesburg, purely because the Constitution says you cannot delegate. I am not sure whether it says there, but purely, let us even assume the Constitution is phrased in such a manner that it

negates one DPP from one jurisdiction to go and perform a prosecutorial function in another, but looking at the broader picture, given the interest of justice, public interest, and all other aspects that I have mentioned, will that be in the interest of justice? To move that case, those cases, to Northwest or to Johannesburg, instead of moving one prosecutor to go to Durban or KZN and deal with those matters, will that be in the interest of justice?

ADV BATOHI: Chairperson, as I have said previously, I am
10 not a constitutional law or an administrative law expert.

CHAIRPERSON: No, no, I beg your pardon, madam. I am just talking at a practical level. I mean, I am not taking the law here. Just a common logic, simple logic.

ADV BATOHI: With all due respect, Chairperson, it is about a constitutional framework. That is my understanding.

CHAIRPERSON: No, no, no. I am saying put the Constitution aside. Let us just talk about the day-to-day functioning, that if you were to decide as the head, who has control over the administration of justice, and you assist with
20 such matters, and it appears that, and I am not talking expediency, I am just looking at the broader pictures of circumstances that may necessitate a delegation, for someone to go outside his jurisdiction and perform that prosecutorial function, will that be something that, apart from the Constitution, cannot be done? You would not be having

any discretion as an NDPP to say, given these circumstances, I will delegate, Advocate X to go and prosecute in the jurisdiction outside his or hers?

ADV BATOHI: Thank you, Chairperson. Chairperson, so we have to, I have to understand in your scenario whether you are speaking about a prosecutor, Advocate X, or a DPP exercising jurisdiction. It is an important distinction, and initially the question related to the DPP, but what I am hearing the Chairperson now speak about is someone outside
10 the jurisdiction. So I need clarity on that.

CHAIRPERSON: I beg your pardon. I think let us confine it to DPP.

ADV BATOHI: Thank you, Chairperson. So in that scenario, in my view, the DPP of another division cannot exercise powers in a jurisdiction outside that which he or she has been appointed to, and so a National Director cannot ask a DPP to exercise these powers in an area outside of his or her jurisdiction.

CHAIRPERSON: Thank you.

20 **MS RAMAGAGA**: Before we go, the question is, when did you brief Advocate Nalane? His opinion is dated the 19th of October 2021. That is the date on his brief.

ADV BATOHI: It is at 19 October 2021.

MS RAMAGAGA: Yes, ja. Yes, the question is, when did you brief him?

ADV BATOHI: Chairperson, we have been trying to get that information. We did get one letter that was written to him from my office, not from me, because the procedure to brief counsel is generally that the Legal Affairs Division, together with our Procurement Section, Finance, would send the brief out to counsel. So we have got a letter, but I have still asked them, because the letter is just a one-pager, and we will make it available, but I have asked them to get the actual brief that was sent to him, because this letter is not clear, in my view,
10 about what exactly he's being briefed to do.

Do we have that letter? We must make some copies. So we did have copies of that letter. Counsel, I am not sure if we have got that available, but as I said, I am still trying to get the actual, the brief, because I think there should have been more information, in my view, that went to him, and this document does not seem to be the full brief, or a letter that contains, in my view, sufficient information, but I do not know if it was the only thing that went to him.

MS RAMAGAGA: But can you assist about the date?

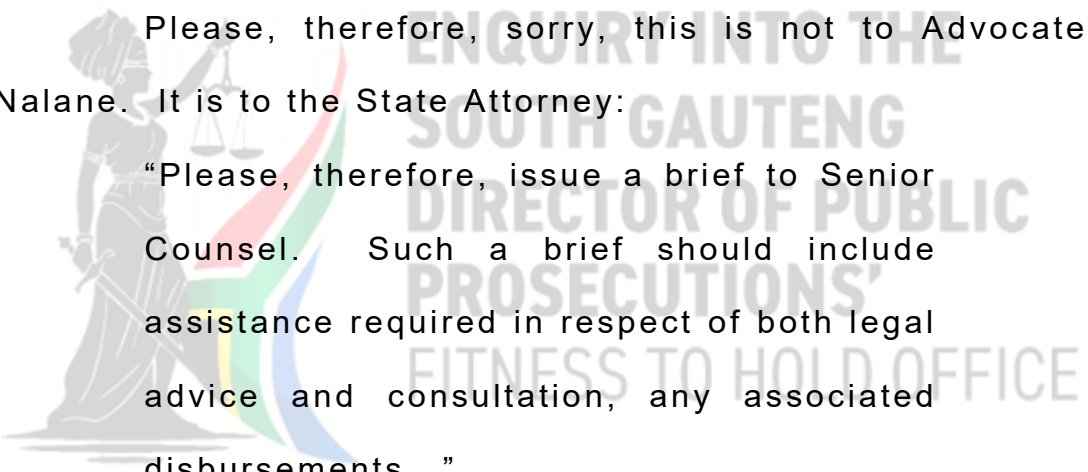
20 **ADV BATOHI:** Yes.

MS RAMAGAGA: If not the precise date, then the estimated date, around which period was he briefed?

ADV BATOHI: I do not see. Oh, there she is. I think my colleagues are trying to find the letter. We did have a copy of it, so if we can get that and get the date, will be helpful.

We do not have it here. I have the electronic version, so in the interest of time, we will make copies. If I may, Chairperson, indicate it is the 21st of July 2021. It is a letter addressed to, it is from the State Attorney's Office. Oh no, it is addressed to the State Attorney. It is from the administration section in the NPA, and it is a letter that is sent to Advocate Nalane, informing him that his appointment has been approved to provide the NPA with an opinion on the implications and decisions taken by Advocate Chauke, the
10 DPP, South Gauteng.

Please, therefore, sorry, this is not to Advocate Nalane. It is to the State Attorney:



“Please, therefore, issue a brief to Senior Counsel. Such a brief should include assistance required in respect of both legal advice and consultation, any associated disbursements...”

They go on to talk about that, and it is dated 21st July 2021, and it is signed by the Acting Chief Director of Financial
20 Management in the NPA.

MS RAMAGAGA: Would it be safe to say he was briefed during or around that period, the 21st day of July?

ADV BATOHI: I would think it would be safe to say so on the basis of this.

MS RAMAGAGA: And is there a way of ascertaining the

precise date?

ADV BATOHI: We are certainly trying.

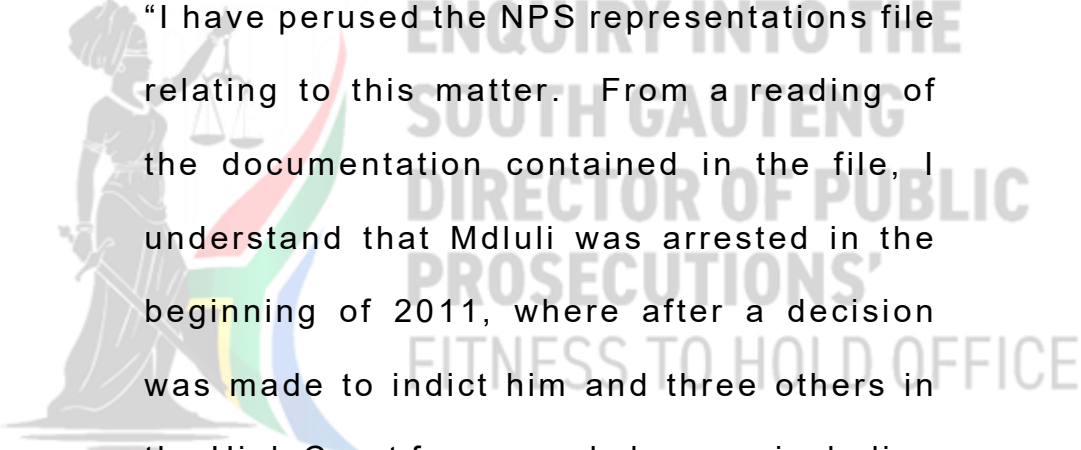
MS RAMAGAGA: Okay. I am sure you will find it. Now, let us go back. So, it is around July 2021, nè?

ADV BATOHI: Yes, late July 2021.

MS RAMAGAGA: I will not dwell much, I have already said, on the Booyesen Matter. Okay. Now, on the Mdluli Matter, SB5, that is your letter, page 232.

ADV BATOHI: Mmm-mmm.

10 **MS RAMAGAGA**: 232, paragraph 2.1, which reads:



“I have perused the NPS representations 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

20 commenced in April 2012, but following representations, you decided to withdraw the charges and a formal inquest was held.”

Now, the representations, the NPS representations file, in fact, those representations, they are in the NPS file.

ADV BATOHI: That is right.

CHAIRPERSON: And where do we find them in our bundles?

ADV BATOHI: They are not in the bundles.

MS RAMAGAGA: They are not in the bundles.

ADV BATOHI: We will make arrangements to get that file.

MS RAMAGAGA: Okay. So then that increases the list of exhibits. It will be noted?

ADV BATOHI: The team are.

MS RAMAGAGA: I beg your pardon?

ADV BATOHI: I say, the team are making a note and we will
10 definitely get that.

MS RAMAGAGA: Yes, ja, that is fine. Right, now, I will proceed to the matter of Karima Brown, right? Ms Karima Brown is the complainant. You invited Advocate Chauke to give you further information or to comment, and his reply is in SB6, pages 255 to 256, as I have said, but in particular, at paragraph 58 to 59. Are you there?

ADV BATOHI: Yes, I am.

CHAIRPERSON: The paragraph 58 is in page 255.

ADV BATOHI: Mmm-mmm.

20 **CHAIRPERSON:** Is that SB6?

MS RAMAGAGA: SB6, yes, SB6, page 255. The paragraphs that I will read into the record is paragraph 58 and 59, and that was the complaint where Ms Karima Brown had complained to the NPA about the conduct of Advocate Chauke, and Advocate Chauke had reported her to the

Broadcasting Complaint commission of South Africa, and where he was not satisfied with the decision, then he appealed, and his appeal was successful, according to this record. It reads:

“I subsequently reported her conduct to the Broadcasting Complaint commission of South Africa. A copy of my complaint is annexures here, too, as Annex AC1.”

Where do I find that AC1, the complaint of Advocate Chauke
10 against Ms Karima Brown's conduct?

ADV BATOHI: It would have been attached to his letter. We will check the files and get that. Is it attached? We will get that document.

MS RAMAGAGA: You will get that document. It is AC1.

“At the BCCSA hearing, the issue of her being intimidated by me arose, and the Commission found that there was no intimidation at all. The BCCSA wrongly made a finding that there was no breach of
20 the code and dismissed the complaint...”

So the BCCSA found that there was no intimidation that arose from Advocate Chauke, and further, then it made a finding that, well, notwithstanding there is no breach, there was no breach of the code. Now, he appealed this decision, and he was successful in his appeal, according to this document.

And the finding of the Appeals Committee or the Appeals Panel, whatever the name is, was made on the 10th day of May 2021. The Appeal Board ruled in his favour.

“...and attached is a copy of the ruling.”

That ruling is not in the record. Can we also have a copy of that ruling? It is described as AC2 in page 256.

ADV BATOHI: Certainly.

MS RAMAGAGA: Right. Thank you, and you say it will be made available.

10 **ADV BATOHI**: I do.

MS RAMAGAGA: Thank you. And now let us go to the, maybe let me finish off this, because the next one will be Brian Hlongwa, and then it will be Duduzane and then the briefing of Advocate Nalane. Let us go directly to the Advocate Nalane's opinion. As I mentioned, I have not only confined this, these questions, to the matters of Mdluli and Booyesen, and I have done so because I am looking at the opinion or the brief, in fact. I think the brief, much as we do not have the brief, and that opinion of Advocate Nalane is
20 found in L01 from pages 30. LO00030. Are you there?

ADV BATOHI: 00030, yes. That is correct.

MS RAMAGAGA: Yes. And now I would like you to turn to page 00034. This, this introduction, or rather the opinion of Advocate Nalane in itself, it is a fair reflection of the brief that was given to him. Is that correct?

ADV BATOHI: It, it looks like it, certainly.

MS RAMAGAGA: It looks like it.

ADV BATOHI: Yes, I, he has been requested to advise that, and I mean that is, it speaks for itself.

MS RAMAGAGA: Okay. So you confirm that it is correct?

ADV BATOHI: Yes, I do.

MS RAMAGAGA: Right. Now, when one, one looks at the paragraph 3 on page 34, it says:

10 “I am requested to advise whether Advocate Chauke is guilty of any misconduct, has failed to adhere to the prosecution policy, or whether he is on account of his incapacity to carry out his duties of office efficiently, not efficient, not a fit, a proper person to hold the office of Director of Public Prosecution.”

ADV BATOHI: I think it should read fit and proper, might be a mistake there. Fit and proper.

MS RAMAGAGA: Ja. And in paragraph 4 he says:

20 “If warranted, I am briefed to draft the necessary submission to the President, advising on the prospect of success in such enquiry into fitness to hold office.”

So is it correct to understand this brief to be a brief that is requesting for an opinion on the, on the conduct of Advocate Chauke, and also a brief that, in the event that the opinion

would be that the enquiry would be justified, then he should also draft the necessary submissions to the President, advising on the prospect of success in such an enquiry into fitness to hold office.

ADV BATOHI: So you are correct. What, what would happen in these circumstances is that when we brief counsel, it is not uncommon for us to, to make sure the brief includes a second step, so that there is no need to go and draft another brief and go through the whole procurement process again, that
10 the office would add that second step in case it is necessary to avoid those logistical issues. That is correct.

MS RAMAGAGA: Ja. What is correct, or what I am actually highlighting is the fact that this, this brief is a brief about opining on the conduct of Advocate Chauke, and the second leg being to draft the representations, representation letter to the President should he opine accordingly.

ADV BATOHI: It is not his decision to draft the letter should he opine that. It would be our decision, in the event that I am of the view that the letter needs to be drafted, having
20 considered the matter, then we would request him to do that.

MS RAMAGAGA: Right. So he would be in the event had you decided upon receipt of his opinion, had you decided to refer the matter to the President, then he would also have been briefed to draw the letter of representations.

ADV BATOHI: That was always, yes, it is a possibility. We

added, as I say, we added in briefs. It does not mean you have to go back to that counsel. You could decide you want another counsel, but it is included in that to avoid unnecessary procurement if that stage is reached.

MS RAMAGAGA: Yes, I do not have briefing a different counsel in mind when I ask this question. Now let me take you to page 37 of that opinion. Now paragraph 14 says:

“The decisions concerned involve the following matters:

10 General Booyesen's prosecution

Mdluli, murder charges.”

How many charges were involved, murder charges were involved here?

ADV BATOHI: My understanding it was one murder charge. In fact it was one murder charge and an attempted murder and other charges.

MS RAMAGAGA: It was one murder.

ADV BATOHI: It was one.

MS RAMAGAGA: And complained by the late Ms Karima
20 Brown, the State versus Brian Hlongwa, and the State versus D Zuma. Now I will not dwell or even deal with it at all. That one of General Booyesen, that one of Mr Mdluli or General Mdluli. With regards to the conduct of Advocate Chauke in respect of the complaint by Ms Karima Brown, it is correct from the evidence that has just been led that as at the 10th

day of May 2021, the Appeals Board or Appeals Committee of the Broadcasting Complaints had cleared Advocate Chauke of misconduct and you were in possession of that information then.

The clearing, the ruling was attached to the reply that was sent to you on the 28th day of April. And it is also correct that, notwithstanding that he had been cleared and his complaint of breach of the code had also been confirmed, you nevertheless sent this complaint as part of the brief to
10 Advocate Nalane in or around July, about two months later. Is that the case?

ADV BATOHI: That is correct.

MS RAMAGAGA: And the matter of State versus Brian Hlongwa, that one too ...[intervenes]

ADV BATOHI: Sorry, the matter?

MS RAMAGAGA: State versus Brian Hlongwa, on page 37. We are in page 37.

ADV BATOHI: Mmm-mmm.

MS RAMAGAGA: Advocate Chauke had already replied to
20 your enquiry on the 28th day of May regarding that and you nevertheless still included it in the brief for opinion from Advocate Nalane SC.

ADV BATOHI: Mmm-mmm.

MS RAMAGAGA: That is correct?

ADV BATOHI: That is correct.

MS RAMAGAGA: Yes, thank you. It will help just to confirm one record, nè? And that was two months after receipt of the reply from Advocate Chauke.

ADV BATOHI: That is correct. I take it if you are going to draw inferences from this, you will ask me further questions. Whether I, in the time...

MS RAMAGAGA: Asking, which question are you answering?

ADV BATOHI: Oh no, that was just a comment.

10 **MS RAMAGAGA**: Oh okay, thank you. And paragraph 14.5 is the case of State versus D Zuma. And it is correct that by this time, this case had been finalised. Is it correct?

ADV BATOHI: I am not sure that it was finalised, I think the, well not the, I know that the previous National Director had decided to prosecute, had overturned Advocate Chauke's decision.

MS RAMAGAGA: Ja, let me just give you the brief background. And that brief background to that matter appears on Advocate Chauke's reply to your letter. And that
20 reply appears in SB6257 to 259. SB257. In fact, to be specific, yes, it is 257 to 259. Now, just the background, it appears here. The background of the matter is that in, I will start off at paragraph 64. This case was referred from Randburg to the Director of Public Prosecutions. And the matter was handled by Advocate Gcaleka and Advocate

Mapiri, a senior state Advocate.

CHAIRPERSON: May I clarify, my sister, you are referring to the Hlongwa matter?

MS RAMAGAGA: I am, sorry about that. I am on SB6257, the Duduzane Zuma matter. SB6257.

CHAIRPERSON: Yes, thank you.

MS RAMAGAGA: And paragraph, I will start with paragraph 64, which reads, that was the response of Advocate Chauke.

10 “The matter came through to this office from
the Senior Prosecutor of Randburg, Mr
Yusuf Baba. The work allocator at the time,
Advocate van Zyl SC, allocated this matter
to Advocate Mapiri, a senior state Advocate,
and Advocate Kholeka Gcaleka, a deputy at
the time...”

I think she is the current Public Protector;

20 “...to be checked of same. On 9th July 2014,
the latter finalised, that is, Advocate
Gcaleka finalised a decision and decided
that an inquest should be held. She
informed me of such a decision.”

And paragraph 65 confirms that the matter was then returned from the inquest and it was then sent for consideration on whether to prosecute or not. And they both, Advocate Gcaleka and Advocate Ngodwana, considered the matter and

then decided to decline to prosecute. Paragraph 66, Advocate Chauke looked at the docket and satisfied himself that the matter, much as there was a *prima facie* case, but there was no winnable case, and as a result he says:

“I was satisfied that there were no reasonable prospects of successful prosecution in the matter and accordingly endorsed the decision not to prosecute.”

So he was endorsing the decision of Advocate Gcaleka and
10 Ngodwana. Then, in paragraph 67, Advocate Shaun Abrahams and Ziyaad then reviewed Advocate Chauke's decision and instituted the proceedings. And the matter then went to Court and the case was then finalised with an acquittal.

Now this happened, the review of Advocate Chauke's decision was done in 2017. And it would help to get information as to when, in actual fact, in, ja, I enclose herewith, in paragraph 69, Advocate Chauke is enclosing an explanatory note from the logistic manager for, because
20 certain information could not be obtained because of the fact that according to policy, I think it is the NPA policy, certain documents get destroyed after a particular period. So we would like to get a copy of that explanatory note from the NPS, AC14.

Now, the reason why I am ...[intervenes]

CHAIRPERSON: I beg your pardon, my sister. Are these documents in 69, for instance, in relation to paragraph 67 pertaining to Mr Zuma matter? Because it seems to me, and Advocate Batohi can clarify, paragraph 67, 68 seem to relate to partly, I must say partly, to the Zuma matter. And that document that my sister refers to, AC14, is it in relation to the Zuma matter?

Because I asked, and I suppose my sister will guide us as to the relevance of these aspects, because the Zuma matters, if I remember from the opinion of Advocate Nalane, he advised that there be no referral in relation to all those matters, the Zuma matter, the Hlongwa matter, and in other words, he confined his opinion to the Cato Manor and the Mdluli matter. And I am not sure to what extent this document may be of relevance. Maybe my sister can maybe guide you in that regard.

MS RAMAGAGA: Right, thank you, Chair. The purpose of the questioning around these matters that were referred for opinion from Advocate Nalane, the importance of that to me is the time period to say, as at July 2021, when Advocate Nalane was briefed, he was briefed with the knowledge that the Karima complaint had been decided upon and Advocate Chauke had been exonerated. The Brian Hlongwa matter, Advocate Chauke had responded to the query and by then you had full information of the response.

And the Zuma matter, at the time when the Advocate Nalane was briefed, it was already known to the witness that the decision not to prosecute had been made by Advocate Gcaleka and another, that the decision of Advocate Chauke had been reviewed, that the matter had gone on trial and finalised. It is about the timelines to say, as at May, this information was there and notwithstanding, the matters were nevertheless referred to Advocate Nalane for an opinion. That is the purpose of the question. Thank you.

10 **ADV BATOHI:** So am I to assume we are sort of looking at the appropriateness of my conduct in this process in terms of the steps that I took?

MS RAMAGAGA: I am looking at the times as to what to make of that information, is something that will be dealt with.

ADV BATOHI: I am just trying to understand so that I can answer properly whether there is any inference that I acted improperly, but I will certainly try to explain it in the best way that I can. I certainly did not have any intention of acting improperly in this matter, but I will explain as best that I can.

20 So yes, this information was before me and it is included in the brief to Advocate Nalane.

Let me explain that, again, it must be understood the context within which I took office as the National Director. I was dealing with a period in the history of our country where we had allegations of state capture across government,

including in the NPA. The Zondo Commission was doing its work and there was a lot of information that suggested that people in the NPA were complicit in state capture.

As a responsible National Director, I wanted to make sure that, because I needed, I needed to understand whether there was any truth to those allegations or not, and in the event that there was, if there was appropriate action that a National Director should take. So in these particular cases, but for Karima Brown, the other two persons involved, Brian
10 Hlongwa and Duduzane Zuma, were very prominent persons. Brian Hlongwa, I think at the time, was the MEC for Health in Gauteng, and I should add he is now facing those charges.

So I needed to ensure that decisions taken were properly taken, notwithstanding the reports that I got from Advocate Chauke. I wanted to go the extra mile and have these things properly checked out. So that is the reason why
Advocate Nalane, and I am casting my mind back to the time, I do not know if there was any other information before me at the time, I do not know. All I have are the documents in front
20 of me now, and I am trying to think about what could have prompted that decision.

So that is the reason why they would have been included, is to... to make sure that all possible bases were covered. Well, I am not sure it would have been all with Advocate Nalane's opinion, but certainly to add an extra layer

of checking, and that is what I did. Of course, when his report came back, I did not proceed any further with the three matters, but just the two.

MS RAMAGAGA: Advocate Nalane's opinion. Upon receipt of the opinion of Advocate Nalane, did you peruse the opinion and satisfy yourself as to whether it addressed all the information that you needed?

ADV BATOHI: I certainly did peruse it at the time. There were clear gaps in his opinion at the time, which I think he
10 himself mentions.

CHAIRPERSON: May I just request my sister to park that question or clarification. It is teatime. I propose that we take a tea break and return at half past eleven. We will adjourn.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

CHAIRPERSON: Good day everyone, good day Advocate Batohi, good day Advocate Chauke. Advocate Mohlamonyane, you will proceed, but my sister is going to deal with a few questions in conclusion and you will then take
20 it from where she ends, or rather where you ended yesterday. Remember, Advocate Batohi, you are still under oath.

ADV BATOHI: I do Judge.

MS RAMAGAGA: Thank you. Advocate Batohi, I think the last question that I asked when we adjourned related to the opinion of Advocate Nalane.

ADV BATOHI: Yes, that is correct.

MS RAMAGAGA: That is, we were at a point when I was talking about whether you had read the opinion or not and you said you had.

ADV BATOHI: That is correct.

MS RAMAGAGA: And you said you also observed the shortcomings in the opinion. Right, and those shortcomings that you observed in the opinion, what did you do with them?

ADV BATOHI: Well, at that point, we had obtained the report
10 and I think I need to go back to my affidavit that deals with what happened after that, so that it will address the question. And I can also contextualise it because I am trying to cast my memory back a number of years. Where is my affidavit, I think it is around where we have been for the past couple of days. We are dealing with the process for the referral. It is on paragraph 165 at page 7-0, Chairperson. It is in my affidavit.

MS RAMAGAGA: Yes?

ADV BATOHI: So, Chairperson, I had looked into those
20 matters. I had got Advocate Nalane's report. At that point, the Zondo Commission was doing its work and I had really hoped that the Commission would complete the piece of work relating to the capture of the criminal justice system, including the National Prosecuting Authority and the Commission will make findings with regard to the proprietary

or otherwise of members within, people within the NPA. And so when I received the Nalane report at that point, I did not do anything with it. I waited for the Zondo Commission and it completed its work, the Nalane report was in October of 21. The Zondo Commission completed its work the following year in April. Well, that was the final report that was delivered in April.

I realised then, very disappointingly, that in the sense that, disappointingly in the sense that I was hoping that
10 the Commission would make findings either clearing NPA members or finding that there is some impropriety, in which event I would be able to decide what to do with it. But the Commission did not go into any of that and apparently due to the, my understanding is timeframes, et cetera, time limits and budgets, et cetera I do not have first-hand knowledge of this, but it is what was available publicly, they did not make any findings, either for or against.

I was then in a situation that I had to think about what do I do. I had the Nalane report, the opinion at that point.
20 And so in July then, I sent that opinion to Advocate Chauke, of 2022. That is in paragraph 168 of my affidavit. And asked him to provide me with reasons why I should not request the President to establish an enquiry into his fitness to hold office. And my letter is attached. So to answer your question, at that point that is what I, that was the process

that was followed after that.

MS RAMAGAGA: So when you sent the copy of the opinion, you had already picked up that there are shortcomings, or did you pick that up later?

ADV BATOHI: I mean they were, he had mentioned it in his report. So I would have been aware of certain shortcomings at that point.

MS RAMAGAGA: Right then, thank you. That concludes my questioning. Questioning, Advocate.

10 **ADV BATOHI**: I take note.

MS RAMAGAGA: Just understand that when we ask questions, you are asked questions in order to get at times even a holistic picture of what has been happening. So that at the end, when we are sitting in our office or elsewhere, we should be able to carry out our mandate to finality.

ADV BATOHI: I think at this rate, I will retire in this commission in the end of January.

MS RAMAGAGA: Well, that is all. Thank you.

ADV BATOHI: Thank you very much.

20 **CHAIRPERSON**: Before you begin, Advocate Mohlamonyane, just bear with us. We have taken a bit of time to clarify a few aspects since this morning. How did this matter of the Cato Manor land at the Zondo Commission? Is my reading correct that Advocate Booysen, or rather Major General Booysen, was the one who complained to the Zondo

Commission based on allegations of state capture of a certain member of the Executive, a certain Minister?

ADV BATOHI: Chairperson, I cannot say how it landed on the Zondo Commission table from first-hand knowledge. I can, what I am aware about this case, is that the, it emanated in KZN. There was a case against a person called Thoshan Panday, who is a businessman in KZN. And that case, there were allegations in that case. The case is currently in court. He has been charged subsequently. That case in KZN was
10 against Thoshan Panday and the Provincial Commissioner of Police at the time, I cannot recall the name, was also, if I am correct, one of the accused, I am not sure, but there was also a police officer, and General Booysen was investigating that Panday matter.

He was the investigator, and the matter was, there were allegations, and I am sure he will be able to testify a lot more to this, I am, you know, there were allegations that Panday was connected, highly connected, and that the investigation by Booysen was not seen in a favourable light
20 and had to be stopped. The charges against Panday were subsequently withdrawn in KZN by Advocate Noko. And I should say that I even wrote to Advocate Noko and asked her for various reasons, for various decisions, and I was at the point of referring that matter to the President when she resigned.

But the Panday matter was kind of central to this, and the allegations of connections to high-placed politicians, and Booyesen's involvement in that investigation. That I know, and I am sure there will be evidence presented to that effect, but how it exactly got to the Commission, and who took the complaint there, I cannot say.

CHAIRPERSON: How Advocate Chauke was called to make statements before the Zondo Commission?

ADV BATOHI: I am not aware of that, Chairperson.

10 **CHAIRPERSON:** You are not aware of that? I think it would maybe when Advocate Noko testifies, because when I read his statement, it appears that he was asked to appear before the Zondo Commission, and he subsequently made a statement, but that is a matter for another day.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, you willing remember that yesterday we ended up at paragraph 179, where reference is made to Hulley SC and Wentzel's opinion.

ADV BATOHI: That is correct.

20 **ADV MOHLAMONYANE SC:** Now, when you were being asked questions for clarification, it emerged that there was an annexure attached to Advocate Hulley SC and Wentzel's opinion.

ADV BATOHI: There were a couple of annexures. I cannot remember exactly how many.

ADV MOHLAMONYANE SC: I am specifically referring you to the annexure, which was an affidavit of Colonel Kobus De Meyer Roelofse.

ADV BATOHI: That is correct. I did mention that in my testimony.

ADV MOHLAMONYANE SC: Now, may I direct your attention to, before we revert to the annexure itself, to LO4 bundle, in which Advocate Hulley's and Wentzel's opinion appears.

ADV BATOHI: The page number?

10 **ADV MOHLAMONYANE SC:** The page number is LO001049. In other words, 001049.

ADV BATOHI: Yes, I see that.

CHAIRPERSON: Before you get to the annexures, counsel, yes, indeed, we were at paragraph 179. My recollection is that my Sister Ramagaga was asking you a question about the third sentence of 179 that reads:

20 “They did so, and concluded that there was a sufficient basis to include Advocate Chauke's conduct in the Mdluli matter, in the recommendation to the President.”

I pause there. But the point that she was making, and I would like you to clarify it for me, relates to the sentence itself. ‘They did so and concluded’. When you testified, you inserted, ‘I concluded that there was a sufficient basis’. The insertion from your evidence does not appear in the sentence

itself, and this may be the question of semantics.

I run ahead of myself and say it may be a question of semantics, because when you say they did and they concluded, should not the sentence read as follows? Anyone who reads it like that will probably say ‘they did so and they concluded’, because you referred to ‘they’, and you said yesterday they did so and you concluded, ‘and I concluded’. Would you clarify that for me?

ADV BATOHI: Yes, thank you, Chairperson. I thought I
10 clarified it yesterday. I will repeat what I said and what I recall I said. When the question, when the evidence leader took me to this paragraph, he said to me not to read it verbatim, but to talk to the paragraph. That is the way I understood it, and that is what I was doing. So when I said they did so and I concluded, I was not inserting anything anywhere. I was speaking about what happened after this report, this opinion was obtained. So to be clear, I was not reading. I was talking, and that is why I mentioned it like that. And then I was questioned about it by Madam
20 Ramagaga about the inclusion of the ‘I’, and I said that, and that is in fact the position, Chairperson.

[No audio – 0:18:55 to 0:19:20]

ADV BATOHI: Yes, that is correct.

[No audio – 0:19:22 to 0:19:32]

ADV BATOHI: Chairperson, yes, I was asked this question

as well yesterday, and I said it should read they did so and concluded. That would mean the conclusion is talking about the authors of the document, the way it is framed here. It would mean they did so and they concluded that.

CHAIRPERSON: [Indistinct]

ADV BATOHI: Well, that is, yes, that is from the context.

CHAIRPERSON: So it is the authors of the opinion who made a conclusion.

ADV BATOHI: That is what appears from there, Chairperson.

10 **CHAIRPERSON:** No, no, no, counsel, in fairness to us and yourself, this is your affidavit.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And it cannot be like we are forcing you to say something that you have not said. You said this under oath, and I am asking you to clarify what appears from your own affidavit. If there is an insertion of 'I', if there is no insertion, it is understandable. But my reading of that sentence is that the people who wrote an opinion concluded, and you are saying that is exactly how it should read.

20 **ADV BATOHI:** Chairperson, I must read that opinion again carefully to make sure that that is what, in fact, they concluded. Because I am really trying to, these affidavits were put together very quickly. I tried to explain. We stayed up till midnight on the Friday and uploaded it at 10 to 12 at midnight, the day it was due. So we went through it really

quickly. We wanted to adhere to the very strict timelines. And so I would want to read that opinion again before I say that that is, in fact, what they concluded. Because I, that is, you know, I have to read it before I say conclusively that is what they concluded.

CHAIRPERSON: Advocate Batohi, let us not go around circles, please, this is your affidavit under oath.

ADV BATOHI: Mmm-mmm, that is correct.

CHAIRPERSON: And you know as a lawyer what that means.

10 **ADV BATOHI:** I do.

CHAIRPERSON: We are addressing the contents of your own affidavit. It may well be that it was prepared in haste...

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: ...but when you append your signature, under oath, not me, it means you believe the contents of what you are saying in there.

ADV BATOHI: That is correct.

20 **CHAIRPERSON:** Now, I am saying to you... I beg your pardon, I will try to capture what I said earlier, that this is your affidavit under oath and we need clarity on the contents of this sworn statement about paragraph 177, line 3. What I want to ascertain from you is whether we should read this sentence as it appears. That, open quote, "they did so and concluded". If my reading is correct, it means they who prepared that opinion then made a conclusion. Not that it is

you who concluded.

ADV BATOHI: Chairperson, that is the way it reads. And that is, in fact, the way it reads.

CHAIRPERSON: That is what it is.

ADV BATOHI: I will have to read the report again to make sure that is what it is.

CHAIRPERSON: No, no, no, counsel. That is what it is, that they did so, the authors of the opinion did so, and they concluded that there was a sufficient basis, blah, blah, blah, 10
blah. This is what they concluded, not that you concluded.

ADV BATOHI: Chairperson, as I said, when I prepared this affidavit, I will be honest with this Court, I did not read any of the annexures. These annexures have been read by me years ago. We prepared this under extreme haste. I did not read any of the annexures. I have been reading them subsequently to try to prepare. And that was the position when I, you know, I signed this affidavit. And I agree it reads as they did so and they concluded that there was sufficient basis. But I will have to look at it to make sure that my, what 20
I signed to was, in fact, you know, accurately captured.

CHAIRPERSON: Counsel, it is helpful to be very, very concise and not end up saying things that you do not want to say. When you say you did not read this document, it may mean a lot of things. So please just answer the question and not elaborate on what I am not asking for because it is a

simple thing. Should we read this sentence as it is or do you want to correct it under oath? Because you are still under oath. Yesterday, a question arose as to whether, and I am asking this for the last time, whether it is you who concluded. It is as simple as that. Or whether it is the author of the opinion or the authors of the opinion who made a conclusion.

ADV BATOHI: Chairperson, firstly, I want to clarify, I read my affidavit. And I signed it.

CHAIRPERSON: I know [indistinct – 0:25:37]...

10 **ADV BATOHI**: Yes.

CHAIRPERSON: The question is, is it you who concluded or the authors who concluded based on this sentence?

ADV BATOHI: Chairperson, the reason why I am emphasising I read my affidavit is because the Chairperson said that I did not read documents. So I wanted to make sure, clear that I read the affidavit but not the annexures.

CHAIRPERSON: It is you who earlier on said that you did not read annexures.

20 **ADV BATOHI**: That is correct. So I wanted to clarify it is only the annexures, not the affidavit. Chairperson, on your question, yes, I do say in my affidavit they did so. And as it reads, they concluded that there was sufficient basis. But I will have to read the annexure again to make sure that that is correct, that what I put there is in fact accurate. I cannot correct it now. I might ask to correct it at a later stage if it is

indeed incorrect. But at this point, I do not have any reason to think it would be incorrect.

CHAIRPERSON: I do not know how you correct some statement you made under oath because you bound yourself to the correctness of that because you signed it under oath. But that is a matter for argument.

ADV BATOHI: Chairperson, I did explain the circumstances.

CHAIRPERSON: You may proceed, Advocate Mohlamonyane.

10 **ADV BATOHI:** Chairperson, I did explain the circumstances under which we signed this affidavit. There were really tight time constraints.

CHAIRPERSON: May we proceed, counsel?

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, I was referring you earlier to Advocate Hulley SC and Wentzel's opinion. And I said it is contained, it starts from paragraph, rather from page 001047. And I specifically refer you to paragraph 5 on page LO001049, where they deal, where the authors of the opinion deal with
20 the summary of the crucial conclusions against Advocate Chauke. Do you see that?

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: I am doing this for the simple reason that you were asked as to whether you considered any evidence before you could refer the matter to the President.

Now, before you answer that, please read paragraph 5 into the record.

ADV BATOHI: I will.

“Before delving into our process of reasoning and the evidence to support that reasoning, there are preliminary facts and observations we should set out to better understand what is to follow. These are all derived from the affidavit of Colonel Kobus De Meyer Roelofse, who had investigated the charges against Lieutenant General Mdluli. We attach a copy marked A.”

ADV MOHLAMONYANE SC: Now, when you referred ...[intervenes]

CHAIRPERSON: I beg your pardon, counsel. Where are you reading? Are you at Advocate Hulley's opinion or at 0104721 LO0149?

ADV MOHLAMONYANE SC: Madam Chair, we are on 001049, specifically at paragraph 5.

CHAIRPERSON: LO?

ADV MOHLAMONYANE SC: LO4.

CHAIRPERSON: LO4?

ADV MOHLAMONYANE SC: Yes, page LO001049. That is where she, Advocate Batohi, had just read.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: May I proceed?

CHAIRPERSON: You may proceed.

ADV MOHLAMONYANE SC: Now, when you sent the referral to the President's office, had you taken note or had you read, so to put it, this affidavit?

ADV BATOHI: Yes, and the other annexes as well, but yes.

ADV MOHLAMONYANE SC: And the other annexes as well?

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: Was this affidavit containing
10 the evidence that you said you took account of?

ADV BATOHI: Yes, a summary of the evidence.

ADV MOHLAMONYANE SC: Now, Madam Chair, that affidavit is part of the record. It is contained in bundle RM3. On page, it starts on page RM00748. It is a very lengthy affidavit, which ends on page RM00814, and deposed to by what was the Kobus De Meyer Roelofse, Colonel Roelofse, on the 5th day of April, 2012. It will be marked as an exhibit, Madam Chair. It is already on the record. It will, in due course, be marked as an exhibit.

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

ADV MOHLAMONYANE SC: Now, in the course of questions that arose from the panel members, the issue of provisional withdrawal as against a withdrawal was dealt with. Now, you may want to perhaps clarify what it really means. And in this regard, in order to clarify what it really means, what

provisional withdrawal of a charge or charges as against a withdrawal, you can go to Brand JA's decision.

CHAIRPERSON: I beg your pardon. I am trying to link that question to the statement of Colonel Roelofse. Is it linked or is it a separate ...[intervenes]

ADV MOHLAMONYANE SC: Separate. We are done with the issue of Colonel Roelofse, Madam Chair.

CHAIRPERSON: Yes, you may proceed.

ADV MOHLAMONYANE SC: Go to CL on page 368 where
10 you will find the judgment of Brand JA, CL2. Are you there on page 368 and references here made to paragraph 34?

ADV BATOHI: I am.

ADV MOHLAMONYANE SC: Continue to read paragraph 34 into the record in order to explain provisional and provisional withdrawal as against withdrawal.

CHAIRPERSON: Paragraph 34?

ADV MOHLAMONYANE SC: Paragraph 34.

CHAIRPERSON: Of the SCA judgment.

ADV MOHLAMONYANE SC: Of the SCA judgment. That is
20 Brand JA's judgment and it is on page CL00368 and the bundle is CL2.

ADV BATOHI: Yes, thank you.

ADV MOHLAMONYANE SC: You may proceed.

ADV BATOHI: Thank you. Chairperson, I did explain the, well, that there was no real difference between there was, the

effect of a provisional withdrawal and a withdrawal was the same. I am going to read what Brand JA says about that into the record. At 34 he states:

10 “The withdrawal of charges by Mrwebi and Chauke, so the NDPP's argument went, was covered by section 6(a) and not by 6(b). In consequence, so the argument proceeded, these decisions were only provisional and therefore not subject to review. Although I am in agreement with the premise of the argument that both decisions to withdraw were taken in terms of section 6(a), my difficulty with its further progression is twofold.

20 The first, I see no reason why at common law a decision would in principle be immune from judicial review just because it can be labelled provisional, however illegal, irrational, or prejudicial it may be. My second difficulty is more fundamental. I do not...”

And this is the important part;

“...I do not believe a decision to withdraw a criminal charge in terms of section 6(a) can be described as provisional just because it

can be reinstated. It would be the same as saying that because a charge can be withdrawn, the institution of criminal proceedings is only provisional. As I see it, the withdrawal of a charge in terms of section 6(a) is final. The prosecution can only be recommended by a different, original decision to reinstitute the proceedings. Unless and until it is revived in this way, the charge remains withdrawn.”

10

Thank you.

[No audio – 0:36:37 to 0:36:44]

ADV BATOHI: That is my understanding as well.

[No audio - 0:36:47 to 0:36:53]

ADV BATOHI: I should say that is the position.

CHAIRPERSON: On this reading, if I may clarify, that which the SCA says in this paragraph, does it mean that a withdrawal, which is final, does it bring to an end the prosecutorial decision? Or rather, the prosecution, if I may put it that way. In other words, I am not sure whether I am putting it clearly for you to understand. Bringing a matter to an end in the form of saying, *nolle prosequi* or not prosecuting a decision to prosecute or not to prosecute. So I am using those concepts.

20

Whether what Brandt JA says in relation to the

withdrawal being final, is it akin to saying a decision not to prosecute or bringing prosecution to an end? Because it can either be prosecution or not prosecuting. So if you withdraw, does it mean that it is the end of that matter? In the sense that it is not going to be prosecuted. It has been brought to finality.

ADV BATOHI: Chairperson, it does not mean that. And that is not, in my understanding, what Brandt JA is saying. It is final in the sense that it remains withdrawn until you decide
10 to institute the case, reinstitute, re-enrol. That is correct, Chairperson.

CHAIRPERSON: Thank you for clarifying that. You may proceed.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. We will then leave that aspect and go to the issue of delegations of authority. Remember, you were being asked as to who has to issue out delegations when prosecutors straddle, go to another jurisdiction. Now, there are delegations issued here, and they are not part of the record, not so.

20 **ADV BATOHI**: That is correct. I am not sure if they are not part of the record, but I know there are delegations that you have.

ADV MOHLAMONYANE SC: Oh, my apologies. They are part of the record. They are part of the record. And let us go to B1, page 00144 to page 00145. Madam Chair, the letter

B.

CHAIRPERSON: It will be helpful if you tell us the volumes.

What volume is that?

ADV MOHLAMONYANE SC: It is volume B1.

CHAIRPERSON: B?

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: Volume B1, page?

ADV MOHLAMONYANE SC: On page 144, B00144 is the delegation of Sello Gladstone Maema by Advocate Nomgcobo Jiba. And on the next page, B00145, appears the delegation of Khulekani Raymond Mathenjwa by Advocate Nomgcobo Jiba. They will later be handed, rather be marked as exhibits, Madam Chair, but they are on record. Are you having them in front of you?

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: Can you confirm?

ADV BATOHI: Yes, I can confirm that.

ADV MOHLAMONYANE SC: Please confirm that on page 144 and 145.

20 **ADV BATOHI:** I do.

ADV MOHLAMONYANE SC: Now go to page still on B1, 00470. Are you there?

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: It is a delegation ...[intervenes]

ADV BATOHI: Sorry, 004?

ADV MOHLAMONYANE SC: 470.

ADV BATOHI: It is 469 as well.

ADV MOHLAMONYANE SC: Start with 469.

CHAIRPERSON: [Indistinct – 0:42:25]

ADV MOHLAMONYANE SC: We are starting with 469.
00469, B1.

ADV BALOYI-MERE SC: [Indistinct – 0:42:47]

ADV MOHLAMONYANE SC: My apologies, it is B2, actually.
B2, Madam Chair, and Madam Baloyi-Mere.

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

ADV MOHLAMONYANE SC: 469.

CHAIRPERSON: 469.

ADV MOHLAMONYANE SC: In B2.

CHAIRPERSON: I note that you refer to these letters as letters of delegation. The Act speaks of authorisation. Should not we stick to the letter, to the word used there, or in the letter itself? It is authorising.

ADV MOHLAMONYANE SC: Yes, authorising.

20 **CHAIRPERSON:** Because it may well be an issue whether the DPP has the powers to delegate. It is another matter, but let us use the wording used in the letter. Even in the heading, they use authorisation.

ADV MOHLAMONYANE SC: Yes, Madam Chair.

CHAIRPERSON: I see you refer to them as delegation letters.

ADV MOHLAMONYANE SC: Loosely like that, but you are correct, Madam Chair. They should be referred to as they appear in the Act and in document itself. Let us go back to 00144. The authorisation by Nomgcobo Jiba to say less than Sello Gladstone Maema to exercise the powers in section 21 in KZN. Can you confirm that?

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: Go to the next one on page 145, B1. Page 00145. That is the authorisation by Advocate
10 Nomgcobo Jiba to Khulekani Raymond Mathenjwa.

ADV BATOHI: That is correct, and they are both dated 8th of March 2012.

ADV MOHLAMONYANE SC: Let us go to the next one in B2. Bundle B2. Page B00469, being the authority to institute and conduct criminal proceedings by Cyril Simphiwe Mlotshwa to Mahlubi Ntlakaza. Can you confirm that?

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: What was the date?

ADV BATOHI: 5th of June 2012.

20 **ADV MOHLAMONYANE SC:** It is not the 1st?

ADV BATOHI: It is with effect from 1 June 2012, but it is dated 5 June 2012.

ADV MOHLAMONYANE SC: Okay. Proceed to the next one on page 470, B00470. In B2, 00470. Whose authority is that?

ADV BATOHI: Patience Moleko, granted authority by Cyril

Simphiwe Mlotshwa, the acting DPP of KZN. Also dated 5 June, the authorisations from the 1st of June.

ADV MOHLAMONYANE SC: The next one on page ...[intervenes]

CHAIRPERSON: Who is Ntlakaza?

ADV MOHLAMONYANE SC: The question from Madam Chair is who is Ntlakaza, Mahlubi Ntlakaza?

ADV BATOHI: I cannot recall. I am not sure if he was one of those... He was part of the team under Advocate Maema.

10 But we can check the document.

CHAIRPERSON: The prosecution team under the leadership of Advocate Maema?

ADV BATOHI: Yes, I think, I think his name was also there in that list.

CHAIRPERSON: Is he a prosecutor, director, or DPP? What is he, Mahlubi?

ADV BATOHI: Definitely not a DPP. I do not know what his rank would be. It would be below that. Either prosecutor, senior, or a deputy. I am not sure.

20 **CHAIRPERSON:** Do you know from which province is he from?

ADV BATOHI: No, Chairperson.

ADV MOHLAMONYANE SC: Madam Chair, maybe for convenience and for cross-reference, the names of the Cato Manor team of prosecutors appears in bundle S, in annexure

SB3, which is the internal memorandum of Advocate de Kock and others. Their names appear there. The team's names appear there.

CHAIRPERSON: [Indistinct – 0:48:50]

ADV MOHLAMONYANE SC: It is not clear here. It is only stated as Advocate Mahlubi.

CHAIRPERSON: He is described as?

ADV MOHLAMONYANE SC: Advocate Mahlubi Ntlakaza. It ends there. But we know, Madam Chair, that Advocate Sello
10 Maema, evidence has been led here, that he was from Northwest Province.

CHAIRPERSON: The only one we know that he was from outside KZN, by virtue of the fact that certain crimes were committed in the Northwest. That is why, counsel, I am asking you about Advocate Ntlakaza. Was he from KZN or was he from elsewhere? You will let us know at a later stage.

ADV BATOHI: Chairperson, if I may, none of these colleagues could have been from KZN because they were all being granted authority to prosecute in KZN. That means
20 they are not KZN prosecutors.

ADV MOHLAMONYANE SC: My colleagues are advising me, Madam Chair, that Advocates Mathenjwa, Ntlakaza, JJ Mlotshwa, Pumeza Futshane were all from South Gauteng, except Futshane.

CHAIRPERSON: Even Advocate Mlotshwa?

ADV MOHLAMONYANE SC: Yes, JJ Mlotshwa.

CHAIRPERSON: JJ, not the other one.

ADV MOHLAMONYANE SC: Not the other one from KZN.

CHAIRPERSON: Yes, I know that.

ADV MOHLAMONYANE SC: And Futshane was also from Gauteng, but not South Gauteng.

CHAIRPERSON: Thank you. It helps, counsel.

ADV MOHLAMONYANE SC: Thanks, Madam Chair.

ADV BATOHI: Chairperson, we need to clarify that and
10 check that it was not South Gauteng.

ADV MOHLAMONYANE SC: About which one?

ADV BATOHI: My understanding is that the four of them might in fact be from South Gauteng. But that can be easily clarified.

ADV MOHLAMONYANE SC: Including Futshane?

ADV BATOHI: Yes.

CHAIRPERSON: You may proceed.

ADV MOHLAMONYANE SC: Now, go to the next page, Advocate Batohi, where you will find authorisation by
20 Advocate Cyril Simphiwe Mlotshwa to Pumeza Futshane. Do you see that?

ADV BATOHI: Yes, I do. It is the same authorisation dated 5 June with effect from 1st June 2012. Authorisation to conduct prosecutions in KZN.

ADV MOHLAMONYANE SC: In the same bundle before, go

to the next page, 00472, where you will find authorisation by Advocate Mlotshwa to Advocate Jabulani Mlotshwa. Do you see that?

ADV BATOHI: I do. It is the same authorisation and the dates are the same. And signed by Advocate Mlotshwa, acting DPP KZN.

ADV MOHLAMONYANE SC: All these were authorisations to institute prosecutions in KZN.

ADV BATOHI: That is correct.

10 **ADV MOHLAMONYANE SC:** By prosecutors who were not stationed in KZN.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: From another jurisdiction, in this case South Gauteng.

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: Madam Chair, maybe to get clarity on Futshane, I am informed that Futshane was at the time the Chief Regional Court Prosecutor in the Magistrates Court. I believe Johannesburg. And Futshane, I am told, was
20 a lady.

ADV BALOYI-MERE SC: Advocate Mohlamonyane, you just said these are authorisations for all these members who are all from South Gauteng. But earlier on you said some were not from South Gauteng.

ADV MOHLAMONYANE SC: All but one.

ADV BALOYI-MERE SC: All but one.

ADV MOHLAMONYANE SC: Ja, all were from South Gauteng. Okay. It was only Maema, Advocate Maema who was from Northwest. Another point of clarification is that Ms Futshane was a lady who was a Chief Regional Prosecutor in the Magistrates Court, Johannesburg. These authorisations will later be marked in due course, Madam Chair, as exhibit.

CHAIRPERSON: Thank you, counsel. You may proceed.

ADV MOHLAMONYANE SC: Advocate Batohi, we now leave
10 the issue of authorisations and get on to... or before we leave them. Is the validity of these authorisations in issue?

ADV BATOHI: No, they are not. I mentioned in the testimony that they had received, these prosecutors had received delegated authority to prosecute in KwaZulu-Natal either by the DPP or by the National Director. And this confirms that.

ADV MOHLAMONYANE SC: What is in issue exactly?

ADV BATOHI: It is the fact that Advocate Chauke had no authority to exercise powers in KZN.

ADV MOHLAMONYANE SC: Now, let us leave that aspect
20 and get on to the next one, which is the issue of evidence or no evidence, as you stated in your evidence. You have been asked questions in clarification about evidence or no evidence. Now, you would want to clarify that position, that issue, by getting to the report of the internal memorandum, rather, of Advocate de Kock. Is that correct?

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Now, go to paragraph, go to your paragraph 182 before you do that, your paragraph 182 of your affidavit. You may read it into the record.

ADV BATOHI:

10 “Ultimately, what struck me is that in the Booyesen matter, Advocate Chauke had vigorously pursued criminal charges against Booyesen when there was, as found by the High Court and in my assessment, no evidence against Booyesen...”

And this is the aspect that I want to clarify, I continue;

“...but in the Mdluli matter, had adopted the opposite stance and declined to prosecute, instead referring the death of the victim, in that case, to an inquest when there was strong case against Mdluli.”

I do know the Chairperson asked me about this particular paragraph and we will deal with it now.

20 **ADV MOHLAMONYANE SC:** Go to SB3, Annexure SB3.

CHAIRPERSON: Let us get the correction. I did not ask about this paragraph. I was asking about the terms of reference, in which you find a common thread of the allegation that Advocate Chauke did what he is alleged to have done when there was no evidence. Now, that common

thread runs through the terms of reference in relation to the allegations levelled against him. You might have wanted to answer that question in relation to this paragraph.

ADV BATOHI: Thank you, Chairperson.

ADV MOHLAMONYANE SC: Go to the De Kock panel internal memorandum, which is SB3 in your ...[intervenes]

CHAIRPERSON: Are you done with paragraph 182?

ADV MOHLAMONYANE SC: It is linked to what she is going to explain. No evidence. Insufficient evidence issue.

10 **CHAIRPERSON:** You are going to a new matter?

ADV MOHLAMONYANE SC: No.

CHAIRPERSON: It is linked to it.

ADV MOHLAMONYANE SC: It is linked to it, it is linked to paragraph 182.

CHAIRPERSON: Yes, thank you. Which paragraph now?

ADV MOHLAMONYANE SC: We are now getting to SB3, Madam Chair, to which I referred Advocate Batohi.

ADV BATOHI: Page number?

ADV MOHLAMONYANE SC: SB3. Go to page 153.

20 **CHAIRPERSON:** You can tell us what the document is.

ADV MOHLAMONYANE SC: The document is an internal memorandum by Advocate de Kock and others and his team, which starts on page 134.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: Are you on page 153, Advocate

Batohi?

ADV BATOHI: I am on page 153.

ADV MOHLAMONYANE SC: Maybe before you go to 153, first go to 152.

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: Under paragraph B, where the panel deals with the legal position in respect of racketeering prosecution.

ADV BATOHI: That is correct.

10 **ADV MOHLAMONYANE SC:** Read that into the record and thereafter I can explain whatever you wanted to explain in regard thereto.

ADV BATOHI: So, Chairperson, to contextualise, I had been asked about whether there was no evidence and there was a discussion around no evidence and insufficient evidence. I wanted to clarify that my evidence that there was no evidence relates to charges, to support the charges of racketeering. I

want to explain that now. If we from page 152, paragraph 63, that is SB3. Paragraph 63 first, that part deals with the, that
20 section in the document is headed:

“Legal position in respect of racketeering
prosecution”

And the subhead is:

“The nature of the crime of racketeering”

And then from page 63, it sets out the nature and I will read

aspects of it but I can read the whole thing if I am required to. Paragraph 63:

10 “Criminal law targets the perpetrator. The crime of racketeering as defined in POCA focusses on the enterprise and objects rather than on the perpetrator. Racketeering is a complex crime which bears some resemblance to the common law crime of conspiracy. It usually involves group activity. In South Africa, for a person to be liable under section 2(1)(e) of POCA, he or she must participate or be involved in at least two underlying offences listed in schedule one of the act.”

65: “The offence consists not in the commission of an act such as stealing but in the membership of an organisation which has been shown to have committed at least two particular offences. The focus is on the relationship between the accused, the enterprise, and the pattern of racketeering activity.”

20

And then the next subhead deals with:

“The offence of participating in the affairs of

an enterprise”

Which is section 2(1)(e) of the POCA, Prevention of Organised Crime Act. And then the panel sets out in paragraph 66, 67, 68, essentially what this offence entails, that is participating in the affairs of an enterprise. And if we look a little further down, 66, the accused is guilty by virtue of being involved in an enterprise and being involved in the commission of two or more offences. And 67, they set out factors that would be taken into account to determine a
10 pattern of racketeering activities.

And the factors are listed there. I will not list them. In paragraph 69, the panel looks at what the pattern of racketeering activity requires, at least two acts of racketeering activity.

“It has been held in several cases, US cases, that a mere existence of multiple acts of racketeering may not be enough. The criteria are that the acts must amount to or pose a threat of continued criminal activity.”

20 Paragraph 17 deals with the elements of this offence of participating in the affairs of an enterprise in terms of section 2(1)(e). And that is set out:

“An enterprise existed, the accused managed or was employed by or associated with the enterprise, pattern of racketeering

activity existed, the accused directly or indirectly conducted or participated in the affairs of the enterprise through a pattern of racketeering activity.”

ADV MOHLAMONYANE SC: 71.

ADV BATOHI: The next subsection is the next offence. And these are the two offences that the authorisations of Advocate Jiba and Advocate Abrahams related to. Section 2(1)(f) is the offence of managing the enterprise in terms of
10 POCA. And section 71 states:

“Managing the operational activities of the enterprise is the offence. Here the target is the manager. It must be shown that the accused occupies some kind of management position in the enterprise.”

72 deals with the elements of this offence of management. And those are set out in that subsection. I will not read it in detail unless I am required to.

ADV MOHLAMONYANE SC: You do not have to. Yes, is
20 there anything that you want to?

ADV BATOHI: No. That is just in brief what these offences actually entail.

ADV MOHLAMONYANE SC: Now, having in mind what you set out in paragraph 182 of your affidavit, when you say, and in my assessment, no evidence against Booyesen, can you

explain this concept, no evidence?

ADV BATOHI: Yes.

ADV MOHLAMONYANE SC: Vis-à-vis racketeering charges.

ADV BATOHI: Yes. So that is the position. I concluded that and looking at the evaluation that was done by the panel, and bearing in mind also that Judge Gorven also found that there was no evidence to support racketeering charges, but on the basis of the evaluation in this report, which starts at page 157.

10 **ADV MOHLAMONYANE SC:** In paragraph 77.

ADV BATOHI: 77 they state:

“The evaluation of the evidence in the docket will be done in accordance with the principles of the law discussed above...”

Some of which I had just referred to a moment ago. They then proceed in the paragraphs that follow with their evaluation of the evidence.

ADV MOHLAMONYANE SC: The next one is paragraph 82, if you go to that one.

20 **ADV BATOHI:** At paragraph 82 they state:

“We also read and analysed the evidence in the 23 dockets that the prosecution team in their PowerPoint presentation to Abrahams said implicated the accused in racketeering activities. It appears based on analysis of

the two...”

Sorry, let me start again.

“It appears based on an analysis of the two indictments that formed part of the documentation Jiba and Abrahams considered, that no further dockets were added or removed. Table 3 refers to these dockets.”

And if we turn the page at 160, Table 3 is the list of the 23
10 dockets that they considered in this matter.

ADV MOHLAMONYANE SC: Go to paragraph 83. You do not have to read it, just the content.

ADV BATOHI: Paragraph 83:

“We will discuss the content of the dockets and in particular some of the challenges in the investigations. In the discussion on the racketeering investigations, reference will also be made to incidents that traversed a period of four years from 2008 to 2011. It
20 should be noted that the bulk of the racketeering events occurred between 2008 to 2009, whilst in 2010 there were only three events and in 2011 two events.

Durban North CAS67/7/2011, CAS69/7/2011 and CAS71/7/2011 referring to one moving

crime scene.”

And those CAS are police dockets, those CAS numbers.

ADV MOHLAMONYANE SC: Go to SB3, page 228.

Paragraph 246.

CHAIRPERSON: 246 you said?

ADV MOHLAMONYANE SC: Paragraph 246, Madam Chair.

Are you there, Advocate Batohi?

ADV BATOHI: Yes, I am.

ADV MOHLAMONYANE SC: Read paragraph 246 into the
10 record.

ADV BATOHI: Just in terms of context, what followed from what I had read up until this point in the report is an analysis of all the evidence, of the statements of witnesses, et cetera and in 246 they state:

“In respect of both sets of authorisations, a proper case for racketeering was not made out on the papers presented.”

That is their conclusion.

ADV MOHLAMONYANE SC: Are you then able to...

20 **ADV BATOHI:** Yes.

ADV MOHLAMONYANE SC: ...explain that?

ADV BATOHI: It was on the basis of this and also on the basis of the judgment of Gorven and looking at the evidence that was presented there, that I concluded that there was no evidence to support racketeering charges.

ADV MOHLAMONYANE SC: Go to paragraph 274.

ADV BATOHI: Sorry, in the report?

ADV MOHLAMONYANE SC: In SB10.

CHAIRPERSON: What volume is that?

ADV MOHLAMONYANE SC: That is one of the annexures to Advocate Batohi's affidavit.

CHAIRPERSON: Thank you. SB10.

ADV MOHLAMONYANE SC: SB10.

CHAIRPERSON: Are you still on the point of the no evidence
10 or is it in relation to something else?

ADV MOHLAMONYANE SC: We are still on the no evidence issue, Madam Chair.

CHAIRPERSON: SB10 page?

ADV MOHLAMONYANE SC: Page 274. In the contrast between the Mdluli matter and the Booyesen matter. Are you there, Advocate Batohi?

ADV BATOHI: I am.

CHAIRPERSON: Just describe this document. It is the letter by Advocate Batohi to Minister Lamola, correct?

20 **ADV MOHLAMONYANE SC:** Yes. It is a ministerial memorandum to Minister Lamola, Minister of Justice and Correctional Services from Advocate Batohi. Which is a request to institute an enquiry in terms of the NPA Act.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: Can you read paragraph 24 and

25 into the record?

ADV BATOHI: Yes, I will certainly, but before that, Chairperson, to answer your question about the no evidence aspect, to be clear, Chairperson, what I am going to read now speaks to the entire paragraph 182. Where I say that:

10 “Advocate Chauke had vigorously pursued criminal charges against Booysen when there was, as found by the High Court and in my assessment, no evidence against Booysen, but in the Mdluli matter had adopted the opposite stance and declined to prosecute instead of referring the death of the victim...”

Et cetera. So the point I make, Chairperson, I am referring to this part to also addressing that stark contrast in Advocate Chauke's assessment of these two matters. If I may proceed, Chairperson.

CHAIRPERSON: Before you proceed, let me look at your paragraph 182. No, I understand, I understand. And this memorandum to the Minister also addresses, part of it
20 addresses this very point.

ADV BATOHI: It deals with the same point, Chairperson.

CHAIRPERSON: You may proceed.

ADV BATOHI: Thank you, Chairperson. At paragraph 24, I state that:

“The Cato Manor and Mdluli matters were all part of a much larger complaint of state capture levelled against several prosecutors, including Advocate Chauke, and dealt with before the Judicial Commission of Enquiry into allegations of state capture, corruption and fraud in the public sector, including organs of state (the State Capture Commission.

10 Unfortunately, the State Capture Commission was unable to complete its enquiry into the state capture of the NPA.”

Paragraph 25:

“The significance of the Cato Manor and Mdluli matters is above all to be found in Advocate Chauke's starkly contrasting actions and his exercise of decision-making powers in dealing with the two matters.

20 a. It is apparent that there was no evidence to support the racketeering charges in the Cato Manor matter, yet Advocate Chauke and the prosecution team seemed to be determined to institute charges against Major General Booysen and did so with great vigour,

committing various breaches of the prosecution Code of Conduct in their efforts to do so.”

I should add it should have included the Constitution as well as the NPA Act, prosecution policy and directives.

10 b. This must be contrasted with Advocate Chauke's handling in the Mdluli matter, in which there was a strong case against Lieutenant General Mdluli, yet Advocate Chauke appears to have been at pains to avoid prosecuting him.”

At 26:

“It is important to note that these apparently contradictory stances were adopted at approximately the same case point in time. It was around this time that the fraud case against Lieutenant General Mdluli was also withdrawn in the NPA.”

I will stop there, counsel.

20 **ADV MOHLAMONYANE SC**: You have dealt in a nutshell on what you are now stating in your paragraph 183, paragraph 183 of your affidavit.

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: Go to paragraph 184 of your affidavit.

ADV BATOHI: Just a moment.

CHAIRPERSON: Paragraph?

ADV MOHLAMONYANE SC: 184.

ADV BATOHI: Yes, I am there.

ADV MOHLAMONYANE SC: Proceed to read it into the record.

ADV BATOHI: Perhaps I will read 183 as well.

10 “I considered Advocate Chauke's versions in relation to the Booyesen matter and the Mdluli matter. I have outlined his defences in respect of both of the matters above. I was satisfied that his version in respect of the Booyesen matter was untrue. As explained above, there was ample evidence to suggest that he acted as the *de facto* DPP of KZN, took prosecutorial decisions, managed and coordinated the investigation process, and that he was intimately involved in the prosecutorial process.”

20 At 184, I say:

“I did not accept this version in respect of the Mdluli matter for the reasons set out above.”

And 185. Sorry, counsel. 184.

ADV BALOYI-MERE SC: Advocate Mohlamonyane, if I may

ask a question and I am sorry, I am going to take you back to paragraph 182 where the witness was supposed to show us that there was no evidence. And I would like the witness to go back to SB3, page 226. Because that is where I think the team deals with their conclusion. The conclusion starts at 225.

ADV MOHLAMONYANE SC: 225, Madam Baloyi-Mere?

ADV BALOYI-MERE SC: SB3. Page 225. But I want us to go to page 226.

10 **ADV MOHLAMONYANE SC:** 226. I am there.

ADV BALOYI-MERE SC: Yes. And if the witness can read paragraph 239 and explain her understanding of that paragraph.

ADV MOHLAMONYANE SC: Are you there, Advocate Batohi?

ADV BATOHI: Yes, I am there.

ADV MOHLAMONYANE SC: The request by Madam Baloyi-Mere is that you should read paragraph 239 on page 226.

ADV BATOHI: 239.

20 **ADV MOHLAMONYANE SC:** Yes.

ADV BATOHI:

“After a careful evaluation of the evidence contained in the dockets, the pleadings in the various applications brought in this matter, we conclude that there was

insufficient evidence placed before the acting NDPP Advocate N Jiba and NDPP Advocate Abrahams to justify the authorisations to institute a prosecution in terms of section 2(1)(e) and 2(1)(f) of the Prevention of Organised Crime Act 121 of 1998. Despite the...”

Sorry, should I continue to 240?

ADV BALOYI-MERE SC: No, no. Just enlighten me what
10 you understand by this, the contents of this paragraph.

ADV BATOHI: Yes. Having looked...

ADV BALOYI-MERE SC: And in particular in relation to the
no evidence principle.

ADV BATOHI: Having looked at the report in its entirety, I
came to the conclusion that there was no evidence to support
the racketeering charges. That does not mean that there is
no evidence. But there is no evidence to support the
racketeering charges. So I think it is important to make that
distinction because the docket contains statements, et
20 cetera. But whether there is evidence to support racketeering
charges is the question.

And in that regard, having looked at the entirety of
the report, I concluded that there was no evidence to support
the racketeering charges. And as the panel puts it, they say
there was... in – sorry, at 246, in respect of both sets of

authorisations, there were a case, a proper case for racketeering was not made out on the papers presented. So that is the way I can explain the way they refer to not sufficient and insufficient evidence. And when compared to whether there was evidence to support racketeering charges..

ADV BALOYI-MERE SC: Advocate Batohi, you read your paragraph 182 and then you referred us to this memorandum and particular paragraphs to show that there was no evidence.

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

ADV BALOYI-MERE SC: And to support racketeering charges.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: And racketeering charges, if you may assist me, is in terms of section 2.

ADV BATOHI: 2(1)(e) and 2(1)(f).

ADV BALOYI-MERE SC: 2(1)(f).

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: That paragraph, paragraph 239...

20 **ADV BATOHI:** Yes.

ADV BALOYI-MERE SC: ...deals with sections 2(1)(e) and 2(1)(f).

ADV BATOHI: That is correct, Chairperson.

ADV BALOYI-MERE SC: And it talks about insufficient evidence.

ADV BATOHI: That is correct, Chairperson.

ADV BALOYI-MERE SC: So your submission, your overall submission is that you read this whole memorandum and after reading it, you came to the conclusion that there was no evidence to support racketeering charges.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: Despite the fact that the authors of the memorandum tells you that there is insufficient evidence. They are not saying there is no evidence. They
10 say there is insufficient evidence. And then the paragraph that you just read now, 246, that a proper case for racketeering was not made out on the papers. But this statement, 'a proper case was not made out on the papers', does not mean there is no evidence. Or is that how you understand it, that it means there is no evidence?

ADV BATOHI: I want to explain why I say that. If you look at the report in its entirety, and I want to highlight a few aspects from the report that will explain why I came to the conclusion that there was no evidence, and I would submit
20 that the panel, in fact, also came to the same conclusion. Firstly, Advocate Shaun Abrahams, when he took office, he was not prepared to sign the POCA certificates. Understanding that Advocate Jiba had already signed authorisations, I think in 2014, Advocate Abrahams was not prepared to sign the authorisation, and he wanted additional

information. He wanted additional investigations.

It was in 2015 that he was presented with a new memorandum. At this stage, he was still not satisfied. He then sent two staff members, Maema and another colleague, to Greece to get the statement of Danikas. When they returned, they said, when they returned, he said, and this is looking at his statement I think he made before the Zondo Commission, but that is also an attachment to the De Kock report. Advocate Abrahams' statement is attached. He says
10 that when they returned, there was now considerable material before him when he issued the authorisations that did not serve before Advocate Jiba.

The panel concluded at page 103 of the De Kock report that these were the statements and factors that he considered as the basis for the decision to authorise the racketeering prosecutions, and that is important. And they are the statements that we have dealt with. Some of them, Colonel Aiyer's further statements. He also referred to the ex-provincial deputy commissioner Brown's statement. He
20 refers to the Danikas statement, the statements of Mtijane, Mathonsi, and Mkize. And after studying, this is what he calls new evidence. Sorry, let me rephrase it.

After studying the new evidence, according to Advocate Abrahams, the panel concluded as follows:

“Firstly, the statements of Aiyer and Brown

were unable to assist the prosecution in proving that Booyesen managed a criminal enterprise and or participated ...[intervenes]”

ADV BALOYI-MERE SC: Sorry, where are you?

ADV BATOHI: I just got, I pulled out from the report, and I have just got some notes that I am reading through at the moment to show that there was no evidence.

10 **ADV BALOYI-MERE SC:** Which report? The one that is in front of us?

ADV BATOHI: The De Kock report. That is correct.

ADV BALOYI-MERE SC: You are now reading the conclusion?

ADV BATOHI: No. I have taken out of the report some aspects to show why I concluded that there was no evidence, and I am going through that, but that is from the report, but I have pulled them out and made separate notes, which I am going through now.

20 **ADV MOHLAMONYANE SC:** Through you, Madam Chair, maybe to assist the witness and Madam Baloyi-Mere to answer the question and to get maybe the required answer, reference can be made to paragraph 190. Whilst dealing with this issue of no evidence, insufficient evidence and sufficient evidence, it might well be 190 of the internal memorandum of

Advocate De Kock and others.

CHAIRPERSON: Page?

ADV MOHLAMONYANE SC: Page 201.

CHAIRPERSON: SB3?

ADV MOHLAMONYANE SC: SB3.

CHAIRPERSON: Please refer to that.

ADV MOHLAMONYANE SC: SB3, Madam Chair. Annexure SB3 to Advocate Batohi's affidavit. On page 201, specifically in paragraph 190. If you may read that paragraph 190.

10 **ADV BATOHI:** Yes. Thank you, counsel.

ADV MOHLAMONYANE SC: It is on page 190.1 and 190.2. That may assist you in answering the question.

ADV BATOHI: Yes. Thanks for referring me to this part. The heading of this section is:

“Concluding remarks on the racketeering offences”

190. It is clear from our discussion that the prosecution will not succeed in proving the racketeering offences for the following reasons.

20

190.1 There is no evidence to establish the existence of an unlawful enterprise separately from the existence of a pattern of racketeering activity.

190.2 The prosecution simply had several

cases that they alleged established a pattern of racketeering activity and then attempted to show through the statements of Aiyer, Danikas, Mathonsi, Mkize and Ndlolo that an enterprise existed. The case law is clear that an enterprise cannot simply be the undertaking of acts of racketeering. A racketeering indictment should focus on the entire enterprise rather than individual participants in specific acts.”

10

Should I read the entire 190?

ADV MOHLAMONYANE SC: No, it is enough up to there. I intercepted Madam Baloyi-Mere with this questioning. She can then proceed.

ADV BATOHI: Thank you.

ADV MOHLAMONYANE SC: I just wanted you to have this in front of you when you are answering the question.

20 **ADV BATOHI:** Thank you, counsel.

CHAIRPERSON: What is therefore relevant is 190, 190.1 and 190.2.

ADV MOHLAMONYANE SC: That is correct, Madam Chair.

CHAIRPERSON: For this purpose?

ADV MOHLAMONYANE SC: For current purposes.

ADV BATOHI: I think perhaps if we look at 190.3, the statements do not, I think that no means should be not proved that an organised criminal group existed that acted in common purpose and conspired together on a continuous basis to commit murder. I think given that the Chairperson has asked specifically, I think if one looks at the rest of 190, I think it is also relevant for these purposes. And, counsel, maybe I should just quickly go through those as well.

ADV BALOYI-MERE SC: I think the witness should because
10 I am looking at 190.6. So maybe it is better to read all those subparagraphs of 190.

ADV BATOHI: Certainly. 190.4 ...[intervenes]

ADV MOHLAMONYANE SC: Go to 190.6.

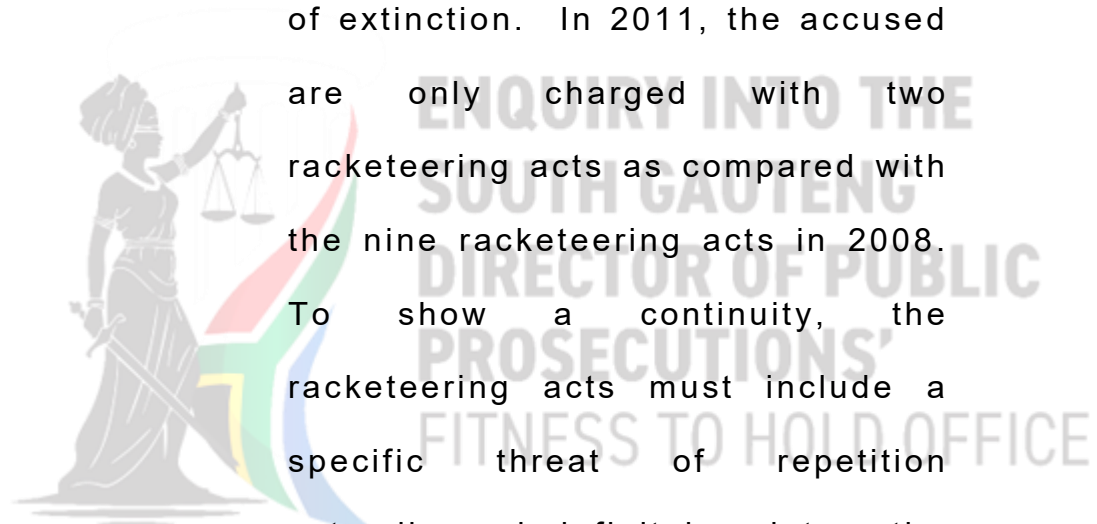
ADV BATOHI: 190.4:

20 “190.4 The statements do not prove that each of the managers in the criminal enterprise played a defined role in its operations and pursued their common goal to commit murders for profit on an ongoing basis as a cohesive unit. By simply choosing the managers of the enterprise according to the organisational structure of the South African Police and the positions they held within

their own units and or sections, the fallacy of this approach was exposed. Despite Mostert's alleged managerial role, the prosecution could not charge him since he was not a manager in the police.

190.6 If one has reference to the evidence as contained in the dockets, the alleged enterprise was on the verge of extinction. In 2011, the accused are only charged with two racketeering acts as compared with the nine racketeering acts in 2008. To show a continuity, the racketeering acts must include a specific threat of repetition extending indefinitely into the future."

10



ADV BALOYI-MERE SC: So from this report, we are now told that it is clear from the evidence contained in the dockets that the alleged enterprise was on the verge of extinction.

ADV BATOHI: What they are referring to there, they say alleged enterprise.

ADV BALOYI-MERE SC: Yes.

ADV BATOHI: And the enterprise that they are referring to

would be the Serious and Violent Crime Unit of the police. And perhaps that was closed shortly thereafter. I cannot remember. I cannot recall. But that is what they are referring to.

ADV BALOYI-MERE SC: I am sorry, I did not get that. You said the alleged enterprise would be?

ADV BATOHI: The Serious and Violent Crime Unit of the police.

ADV BALOYI-MERE SC: How do I differentiate between,
10 because this is concluding remarks on the racketeering offences and it talks about an enterprise? But I do not see anywhere where it specifically refers. To the unit that you referred to.

ADV BATOHI: It is in the report. And as I have said, you know, the entire report is in evidence. I am just dealing with some aspects of it. If I can be guided, there is a section in this report that talks about the enterprise.

ADV BALOYI-MERE SC: But before you even go further, let us read the 90, 190.6 in its entirety. You can read it again.

20 **ADV BATOHI:**

“If one has reference to the evidence contained in the dockets, the alleged enterprise was on the verge of extinction. In 2011, the accused are only charged with two racketeering acts as compared with nine

racketeering acts in 2008. To show a continuity, the racketeering acts must include a specific threat of repetition extending indefinitely into the future.”

ADV BALOYI-MERE SC: So that could, cannot possibly refer to the unit that you are referring to. It could possibly refer to the alleged racketeering enterprise, which evidence shows that from, in 2008, there were, how many charges? Nine. And then in 2011, there is only two. Because if it were to
10 mean the unit that you are referring to, then it would mean that you are actually charging the unit. But we are now here talking about racketeering charges, which we are told have gone, that the charges have now reduced from nine in 2008 to two in 2011. Not unless I am, I do not understand this paragraph.

ADV BATOHI: Yes, with all due respect, I think I need to explain the aspect of an enterprise in a racketeering charge. And that is dealt with in this report. Because you can have, in terms of the Act, an enterprise can be defined as an
20 existing formal structure, which is, for example, a unit in the police. Or the enterprise can be an association of individuals, in fact, a more informal structure. So this, what it was is dealt with in what the enterprise, how the enterprise was considered in this matter is dealt with, I am not sure where it is, but there is definitely a section in this report that

speaks to this very issue about how to define the enterprise. And this is an important aspect of racketeering.

CHAIRPERSON: Would it not be helpful to go to the definitions of the Act rather?

ADV BATOHI: Yes, it certainly will.

CHAIRPERSON: In relation to enterprise.

ADV BATOHI: But just, it certainly will, Chairperson. We can do that. We have POCA. But in terms of how the enterprise was understood in this case, just to answer Madam
10 Baloyi-Mere question about it being a unit in the police, it would be important to go to this, to the report. But generally, in terms of defining the enterprise, we can go to the Prevention of Organised Crime Act, which I have somewhere.

CHAIRPERSON: And when you look at 2(1).

ADV BATOHI: If you will bear with me, Chairperson.

CHAIRPERSON: It is a saying of relevance for this question could be the definition of enterprise. And you could also have regard to section 2 that deals with offences. And then 2(1)(e) and (f), in which reference is made of managing relevant to
20 the Cato Manor issues.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON:

“Managing, association with an enterprise or conducts or participates in the conduct directly or indirectly of such enterprise

affairs through a pattern of rectifying activity.”

F:

“Manages the operation within the context of the group or activities of an enterprise and who knows or ought reasonably to have known that any person while employed or by association with the enterprise conducts or participates in the conduct.”

10 **ADV BATOHI:** Yes, Chairperson, if I may go to the definitions of enterprise first in section 1 of the Act.

“Enterprise includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated, in fact, although not a juristic person or legal entity.”

So the point being you could have a formal structure or you could have an informal structure. And in this case, this aspect was dealt with. And I just want to try to find things with the paragraph that deals with the enterprise. I think it is page 152, paragraph 152. I think it is paragraph 152. I beg your pardon.

CHAIRPERSON: Of the affidavit?

ADV BATOHI: No, it is of the report SB3. I am just looking

at that to make sure that I have got the right reference.

ADV MOHLAMONYANE SC: 154 deals with the 23 dockets.

Is that the one you are looking for?

ADV BATOHI: No, Chairperson, it is, I see at 152 it does, paragraph 152 at page 185, it does deal with the enterprise and its characteristics. It goes into the Act which we had dealt with. If I could just read that carefully.

CHAIRPERSON: What paragraph is that, counsel?

ADV BATOHI: I beg your pardon, Chairperson.

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

ADV BATOHI: Paragraph 152.

CHAIRPERSON: SB3.

ADV BATOHI: Yes, SB3, page 185. I am just reading, Chairperson, to make sure that it is the paragraph I am looking for. Here it is more general. I do not think that is the paragraph I am looking specifically for, Chairperson. My apologies, but I am trying to...

ADV MOHLAMONYANE SC: Advocate Batohi, 152 deals with an enterprise. Is that not the one that you are looking
20 for?

ADV BATOHI: Yes, it deals with the characteristics of the enterprise, but I was looking for a particular paragraph where the team was considering whether the enterprise being the Serious and Violent Crime Unit of the police.

ADV MOHLAMONYANE SC: Okay, maybe that, what will

help is maybe we should start at 70, paragraph 70, and then go to the organogram of the entity, Cato Manor unit, which is dealt with ...[intervenes]

ADV BALOYI-MERE SC: Advocate, we have veered from my question. Can I bring us all back to my question?

ADV MOHLAMONYANE SC: My apologies.

ADV BALOYI-MERE SC: I wanted clarity on paragraph 190, was it 190.6, on no evidence, now we are bringing in a lot of things, but I want us to go back to SB3, page 135, and look
10 at the purpose of this memorandum. If the witness does not mind reading the purpose at SB3, page 135, into the record.

ADV BATOHI: If you bear with me for a moment, SB3, page 1...

ADV BALOYI-MERE SC: 135.

ADV BATOHI:

“The purpose of this memorandum is to provide the NDPP with an opinion as to the validity and the appropriateness of the decisions by the former National Director of Public Prosecutions, Advocate S Abrahams, and the acting National Director of Public Prosecutions, Advocate N Jiba, to authorise a prosecution in terms of section 2(4) of POCA read with section 2(1)(e) and 2(1)(f) in respect of the State versus Booysen and
20

others.”

ADV BALOYI-MERE SC: That was the purpose of this memorandum.

ADV BATOHI: Mmm-mmm.

ADV BALOYI-MERE SC: Now, what they say at paragraph 190.6, and I wanted to, okay, I wanted to, I wanted you to look at it, at paragraph 190.6 and paragraph 239, because when you started dealing with this document, you said you are clarifying the no evidence issue, and when I went to
10 paragraph 239, you then said, okay, they said there is insufficient evidence, but upon reading the whole memorandum, you came to the conclusion that there was no evidence.

ADV BATOHI: To support racketeering charges.

ADV BALOYI-MERE SC: To support racketeering charges, and when we, the whole memorandum was on racketeering charges, on the authorisation on racketeering charges by both Advocates Jiba and Advocate Abrahams.

ADV BATOHI: That was the purpose of the memorandum.

20 **ADV BALOYI-MERE SC:** That was the purpose of the memorandum.

ADV BATOHI: Correct.

ADV BALOYI-MERE SC: And nothing else. Now, paragraph 239 tells us that there was insufficient evidence to support the authorisation in terms of 2(1)(e) and 2(1)(f).

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: And then, you then read 246, which says, in respect of both sets of authorisation, a proper case for racketeering was not made out. And it was when I asked this question that does not, if papers are submitted, but they do not make out a case to support or to, ja, to result into a positive order given. Does that mean that there was no evidence at all? And then we went to then 190.6, which then spoke about an enterprise that was, an alleged enterprise
10 that was on the verge of extinction. And then, that is where you said the enterprise might not mean the racketeering issue. It might mean, what did you call the Cato Manor? You called it?

ADV BATOHI: SVC. Serious and Violent Crime Unit.

ADV BALOYI-MERE SC: Serious and Violent Crimes. And that is when we started talking about the enterprise. And when we, the proper reading of the definition of enterprise, and also when you look at the purpose. The purpose was not to investigate the SVC, Serious and Violent Crimes. It was
20 to investigate whether there was a reason to issue authorisation certificates for racketeering. So, can I conclude by saying, can we agree that after reading this, you came to your own conclusion that there was no evidence? Despite the fact that in some instances, the authors of the memorandum tells you that there was insufficient evidence.

And we know what insufficient evidence means.

ADV BATOHI: Okay. So, I cannot agree with your last question, and I have got to explain why. Firstly, there are several comments that you made in the course of getting to the question that I need to comment on. For example, the purpose was not to investigate the SVC, but to investigate racketeering authorisations. Now, the whole point here is that my understanding is what the team was saying is that the SVC is the enterprise. That is what I was trying to find that
10 part in this report that actually talks about how the enterprise is defined, how the team was attempting to define the enterprise.

So, this is a very technical, highly technical issue. And it is important that I be permitted to explain. And I have been taken on tangents. I was actually trying to explain the evidence, no evidence. And I had this document that I had selected parts from this report. And I was trying to go through that to show that my conclusion that there was no evidence was based on those things. And then we went, I got like a
20 third of the way. And then we went to the Act. We got to enterprise. And I am trying to answer the questions. But we do get side-tracked. But now I am coming back to your question, which has a lot to it. So, I need to explain a few things.

Firstly, I am hoping that paragraph 149, which my

colleague says to me might help, is what the paragraph that I am looking for that will clarify the issue of SVC and the enterprise.

CHAIRPERSON: Paragraph?

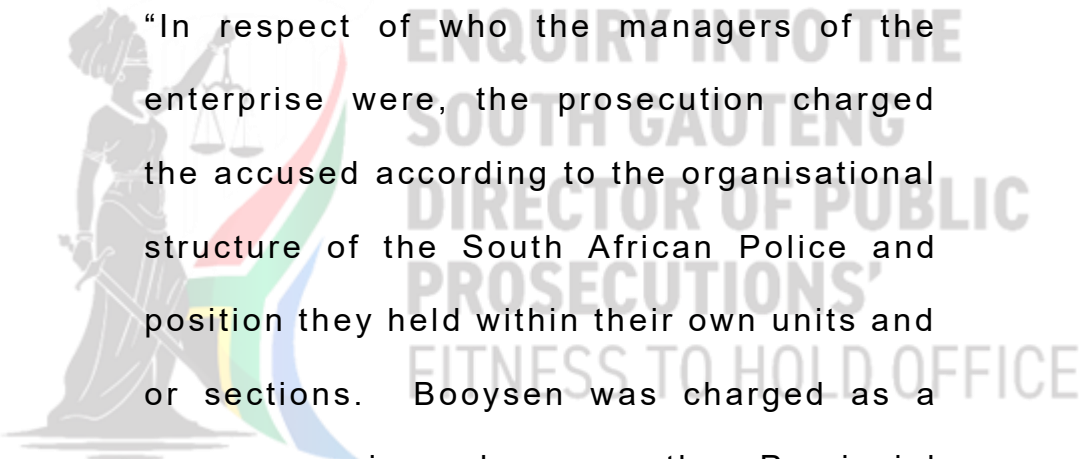
ADV BATOHI: 149, but I am checking myself to make sure it is the correct one. No, I do not think that is the paragraph I am looking for. Chairperson, the point I was trying to make, and maybe I will find it later in this document, is that the team, in order to prove racketeering, you have to prove that
10 there was an enterprise. An enterprise can be a formal structure like a unit of the police, with a formal command structure. Or an enterprise could be a more informal structure where there are individuals that are as the Act states associated in fact. But there is no, it is more of an informal arrangement.

But it is nevertheless has a kind of structure where you have a manager and you have others that participate and do different, play different roles in the enterprise. In this case, my understanding is that the team that were proposing
20 racketeering charges were actually defining the enterprise as the Serious and Violent Crime Unit, a formal structure in the police. And that is why, that is the relevance of that unit to the charges relating to racketeering. So, I am just trying to think how to structure my response. Let me check 152.1, Chairperson, if you will bear with me. I am checking 152.1.

So, 152 states:

“An enterprise is characterised by its members having a common or shared purpose, where there is some sort of hierarchical decision-making structure and where the enterprise is ongoing with some continuity of personnel. The Prevention Organised Crime Act 121 of 1998 does not define who is a manager.”

10 151.1, 152.1:



“In respect of who the managers of the enterprise were, the prosecution charged the accused according to the organisational structure of the South African Police and position they held within their own units and or sections. Booyesen was charged as a manager, since he was the Provincial Commander Organised Crime KZN and later on the Provincial Head DPCI KZN from 2010

20 onwards. Olivier was the Section Commander of the section while Locum and Van Tonder were Group Commanders in the section, whilst all the others under their command were charged in section 2(1)(e).”

So, that is why I was talking about the SVC being the

enterprise that the team was saying was the racketeering enterprise. I think 152.1 actually does address that. I am just looking at the other paragraphs that follow.

ADV BALOYI-MERE SC: Advocate Batohi, I am sorry to interrupt you, I do not think you and I at loggerheads with what you are saying, I think we agree. We agree about an enterprise and we agree that what you have just read that Booyesen was charged, he was deemed to be the manager of the enterprise because of the position that he held. I am
10 paraphrasing, but I hope I am quoting you correctly. And the other person, Olivier, was considered to be a manager because of whatever position he had. So, that does not differ from what I am saying.

All I am saying is the purpose of this memorandum was to deal with the enterprise and was to deal with the authorisation certificates by both Advocate Jiba and Advocate Abrahams and somewhere in this memorandum, they say, maybe they mischaracterised the two police officers as managers of an enterprise. And also, they approached the
20 two acting or the two Heads of NPA with insufficient evidence while seeking authorisation certificates for racketeering. Should I repeat the last portion?

ADV BATOHI: No, I heard it.

ADV BALOYI-MERE SC: Yes. So, I am saying you and I, I think we are on the same page, except only that you, after

reading this whole memorandum, you came to a conclusion that there was no evidence at all.

ADV BATOHI: [No answer]

ADV BALOYI-MERE SC: I will leave it at that.

ADV BATOHI: No, I am considering my response to that.

ADV BALOYI-MERE SC: Oh, okay.

ADV BATOHI: No, sorry. My apologies. I am just reading your question before that because I want to make sure that I respond correctly. So, I am reading about your comments
10 that you say they mischaracterised them as managers. Are you referring to the authors of the report that mischaracterised them?

ADV BALOYI-MERE SC: Not the authors, the authors say the applicants for the authorisation of the racketeering certificates, and that is the paragraph that you just read, I think 152.1. Because they say they charged the accused according to the organisational structure of the South African police. I am saying maybe they mischaracterised, they read or they assumed that they are managers of the enterprise
20 based on the positions that they held within SAPS.

ADV BATOHI: So, maybe the, so you are not, so it is not the authors.

ADV BALOYI-MERE SC: Not the authors.

ADV BATOHI: Sorry, that is fine. Okay, but it is the team.

ADV BALOYI-MERE SC: The applicants, the team, yes.

ADV BATOHI: Understood. Chairperson, yes, we can only surmise about what they thought when they looked at the evidence. So, I cannot comment on that. But what I do want to say is that I was trying to answer the question at the outset about why I came to the conclusion correctly, as you say, having read all of this, having read the report, considered the evidence, as well as the Gorven judgment, that there was no evidence to support racketeering charges.

And I do want to state specifically that in that regard,
10 we have a situation where we have the key statements that the, both Advocate Jiba and Advocate Abrahams say they relied on to come to the conclusion that there was, that they could authorise racketeering, were statements that we have dealt with. And in terms of dealing with the additional statements that Advocate Abrahams said he got, the statements of Aiyer and Brown were not able to assist the prosecution in proving that Booyesen had managed a criminal enterprise or that he participated in the affairs of the criminal enterprise, which Advocate Abrahams had actually took those
20 statements to prove that. Well, maybe with other things as well.

But the Danikas evidence, this was unsworn statement. And I do want to refer to our policy directives that deal with whether, and I was asked a question some time ago about whether information or evidence that is not sworn can

be considered. And I want to specifically refer to our policy directives. I think it is that deal specifically with this aspect.

ADV MOHLAMONYANE SC: Yes, Advocate Batohi, they are not part of the record. We will then ask that they be handed up as exhibits.

ADV BATOHI: Thank you.

ADV MOHLAMONYANE SC: Madam Chair, with your permission. The policy directives are not in the bundles. It is only the Code of Conduct and the prosecutorial. They have
10 the policy directives. And they will later be marked as exhibits accordingly. And I am giving my colleague two copies.

CHAIRPERSON: This is part of the policy directive that runs from part 4. Is it deliberate that they are giving us only these pages?

ADV MOHLAMONYANE SC: It is deliberate. These are the pages, that those copies I have, which have been given to me by the NPA team.

CHAIRPERSON: I have read somewhere where they refer to
20 certain portions of policy directives. But I am not sure whether that is confined only to part 4. Otherwise, we will have a piecemeal referral to this document. And it may end up being marked differently at a later stage.

ADV MOHLAMONYANE SC: Madam Chair, I am informed by the NPA team that, yes, it is deliberate. But the witness will

explain why it is as it is now.

CHAIRPERSON: And this document is in relation to which point, which my sister was asking? Is it connected to those issues that have been raised regarding the no evidence?

ADV MOHLAMONYANE SC: It is connected, Madam Chair.

CHAIRPERSON: It is connected.

ADV MOHLAMONYANE SC: Yes, it is connected, as well as the withdrawals, withdrawal by prosecutors, institution of prosecutions, it deals with that. Advocate Batohi?

10 **ADV BATOHI:** Yes, my apologies, Chairperson. I am trying to find the document. Firstly, I should perhaps deal with the policy directives that we have handed in. Chairperson, the policy directives are confidential, is a confidential document. It is not made public. And this document, so what we have done is we have, I have obtained permission from the Executive Committee of the NPA to disclose these parts of the policy directives. I think it is about a 150-page document that relates to specific aspects that have been canvassed in this enquiry.

20 And that is part 4, part 4 that deals with institution of prosecutions. Part 5 that deals with withdrawal of cases and stopping of prosecutions. And part 6 that deals with the representations and reasons for decisions. Chairperson, but I am looking specifically to go back to where we were. I was dealing with the fact that there was no evidence and I said

that the issue of sworn statements, there is in one of our directives or the policy itself very clear direction that it is only sworn statements that must be considered as evidence before a decision to prosecute is taken. I am going to find that and we will then refer the panel to where exactly that can be found.

ADV MOHLAMONYANE SC: Madam Chair, I am alerted to the fact that it is lunch break.

CHAIRPERSON: Yes, it is a lunch break and I must check
10 first with my sister whether she is done with her questions.

ADV BALOYI-MERE SC: I am done, but I wanted to ask Advocate Batohi to consider something while on lunch. Can you, you keep on referring to, is it Danikas statement that was not deposed to? Can you look at it and also read section 2 of the POCA Act, subsection 2, and advise us on how that is dealt with and whether your policy directives can trump what is contained in the POCA Act in section 2(2).

ADV BATOHI: Certainly cannot trump an Act, but I will have a look at it and see how it works together perhaps.

20 **ADV BALOYI-MERE SC:** Chair, thank you.

CHAIRPERSON: We will adjourn. In relation to this aspect of the no evidence, I would like you to look at paragraph 143, SB3183 at paragraph 143 and clarify what we should make of this statement.

ADV BATOHI: Chairperson, if I have got that right, SB3?

CHAIRPERSON: SB3, 183 at paragraph 143.

ADV BATOHI: Page 183 at paragraph 143.

CHAIRPERSON: 143, the admission made by General Booyesen of his presence at the scenes and I am raising it in relation to the no evidence as regards the racketeering charges.

ADV BATOHI: Certainly, Chairperson.

CHAIRPERSON: You can reflect on that and you may address us when we reconvene.

10 **ADV BATOHI:** Sure, we have found the policy but I will deal with it after lunch.

CHAIRPERSON: Yes, thank you. Let us take a lunch adjournment. It is now ten to two. I have conferred with my sisters. We will have an hour lunch break until ten to three. We adjourn.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

CHAIRPERSON: Afternoon everyone. Afternoon Advocate Batohi. Good afternoon, *Ntate* Chauke. Afternoon, Advocate
20 Mohlamonyane. You may proceed. You are still under oath, ma'am.

ADV BATOHI: Yes, thank you, Chairperson.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

CHAIRPERSON: When we adjourned, I drew your attention to paragraph 143 of SB3183. In relation to the issue of no

evidence, what should we make of the statement, the admission by General Booyens, among other things, insofar as the racketeering charges are concerned?

ADV MOHLAMONYANE SC: Advocate Batohi, you may perhaps want to read that paragraph within its context to enable you to give an appropriate answer.

ADV BATOHI: Yes, sure. Thank you, I will do that. Madame Baloyi-Mere also ask me a question before that. I will deal with that after this question. So, at 143:

10 “Booyen admits in his applications that
 he was on another crime scene, which
 is further corroborated by an entry in the
 occurrence register dated 4 July 2011
 by Captain Msomi. In fact, both Captain
 Olivier and General Booyen, who it is
 alleged managed the activities of the
 SVC section of the Durban Organized
 Crime, were present afterwards at the
 crime scenes in Durban North CAS
20 67/7/2011, 69/7/2011, and CAS
 71/7/2011.”

So the question is, what do we make in relation to this issue when one considers the evidence-no-evidence issue, in relation, particularly in relation to racketeering? So, Chairperson, what this statement says is that Booyen

admitted that he was on another crime scene and in terms of racketeering, one has to prove that you were, you committed two predicate offenses. Now, one has to read the entire, one has to read more of this report to understand whether there is any suggestion that this was one of the predicate offenses.

My understanding is that it is not, because if I am not mistaken, this particular scene relates to the Howick scene. I hope I am not mistaken. And, no, I am not sure that it can be Howick, because it is Durban North CAS 67, so it definitely
10 cannot be the Howick matter. But the point being that they are police officers, and they will be attending crime scenes. That is what part of their job is. And in this particular instance, they are admitting that they were at a particular crime scene.

But the panel that looked at this found that even though there was evidence that Booyesen was at a crime scene, in the one instance in the Howick matter where he arrived after the incident, there was no evidence to prove two predicate offenses in respect of General Booyesen, which is
20 one of the requirements to, one of the elements of the racketeering offense. And even if you are on the scene with regard to predicate offenses, you have to have evidence that the person was actually involved in the commission of that offense. So even arriving on the scene later would not have been sufficient.

So the short answer, Chairperson, is that it would not still prove that there were two predicate offenses that Booyesen had committed within the specified period in order to satisfy one of the elements of racketeering.

CHAIRPERSON: In the context of 2(1)(e) and (f), would your answer still be the same?

ADV BATOHI: Yes, Chairperson, 2(1)(e) and (f) relates to the management or the participation in the enterprise and that is correct, Chairperson.

10 **CHAIRPERSON:** [Indistinct]... [microphone off] I beg your pardon.

ADV BATOHI: One of them is management ...[intervenes].

CHAIRPERSON: In (e) speaks of managing, or employed by, or associated with any enterprise, conducts or participates in the conduct directly or indirectly. Now my question is in relation to 2(1)(e), will your answer, given the phrasing of 2(1)(e), will your answer still be the same?

ADV BATOHI: Chairperson, it will still be the same because ...[intervenes].

20 **CHAIRPERSON:** If it is still the same, I will accept that.

ADV BATOHI: Yes, I will just explain why in one sentence. Because you still have to prove two predicate offenses. Once you establish two predicate offenses, then you can then look at what the role of the person was in the enterprise.

CHAIRPERSON: Where in 2(1) do we see the need to

establish a predicate offense, because 2 speaks of (1) and sub (a), (b), (c), (d), (e), (f). Where does it requires that one would have had to establish a predicate offense?

ADV BATOHI: Two predicate offenses, yes. What section is it? Chairperson, I have to find the section in POCA that, I think it might be in the definition, I am not sure.

CHAIRPERSON: Because ...[intervenes].

ADV BATOHI: It might be in the definition.

CHAIRPERSON: My reading of section 2 is the stand-alone
10 provision that refers to offenses.

ADV MOHLAMONYANE SC: Maybe go to, Advocate Batohi, with your permission, Madam Chair.

CHAIRPERSON: Yes.

ADV MOHLAMONYANE SC: To the definition of pattern of racketeering activity, section 1 of the definitions.

ADV MOHLAMONYANE SC: Yes, that is right, I am there.
Chairperson, one of the requirements, one of the elements of racketeering is a pattern of racketeering activity and it is defined:

20 “It means a planned, ongoing, continuous, or repeated participation or involvement in any offense referred to in Schedule 1 and includes at least two offenses referred to in Schedule 1, of which one of the offenses occurred after

the commencement of this act and the last occurrence occurred within ten years, excluding any period of imprisonment after the commission of such prior offense referred to in Schedule 1.”

So one of the elements is a pattern of racketeering activity and this is what needs to be established.

CHAIRPERSON: Yes, thank you.

10 **ADV BATOHI**: Thank you, Chairperson.

CHAIRPERSON: Thank you.

ADV BATOHI: If I may proceed to the question that was raised by Madam Baloyi-Mere before the lunch break. The question was that I keep referring to Danika’s statement that was not deposed to. I hope I get this right. I am just making sure that it is. To read that with Section 2(2) and advise in the context of Section 2(2). Firstly, or let me deal precisely with that. Section 2(2) of the POCA reads as follows:

20 “The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offenses contemplated in subsection 1, notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not

render a trial unfair.”

Chairperson, in order to answer this question, we have to first go to, well, let us first deal with it in this way. Danika’s statement is not, my understanding is that it is not presented as hearsay evidence in this matter.

Hearsay evidence, as we all know as lawyers, is where a person mentions something in a statement that somebody else told them. But even that person who makes that hearsay statement must depose to that in a sworn statement, in a signed sworn statement, before it can be considered to be hearsay, before it can be considered to be evidence at all. And in this regard, I want to refer us to Part 4 of our policy directives. A states criteria, Section A criteria. Paragraph 1. A case – may I proceed, Chairperson?

CHAIRPERSON: Yes, proceed.

ADV BATOHI: Thank you.

“A case may only be placed on the roll if there is evidence under oath or affirmation that establishes the elements of an offense and links the identified suspect to it. This applies equally when the docket is presented to the prosecutor as a so-called decision docket without any arrest or when the docket is presented following the arrest

of an accused person.”

So it is simply not acceptable, it is not permissible for a prosecutor to consider a statement that is not sworn as evidence at any stage. So, that is my response to that question.

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

ADV BATOHI: Thank you, Chairperson. I think those were the two questions before the lunch adjournment.

CHAIRPERSON: Advocate Mohlamonyane, please proceed.

10 **ADV MOHLAMONYANE SC:** Thank you, Madam Chair.

CHAIRPERSON: I suppose you are going back to the statement, to Advocate Batohi’s affidavit.

ADV MOHLAMONYANE SC: Yes, we will go back to it in a moment. Whilst you are still on the directives, let us go to page 14. That is Part 5 thereof, where it deals with withdrawal of cases and stopping of prosecutions. Read the whole of it.

ADV MOHLAMONYANE SC: Yes, if you could bear with me for a moment. Just bear with me, Chairperson. I am looking
20 for another document. Yes, thank you, Chairperson.

ADV MOHLAMONYANE SC: Do we have it in front of you?

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: And, by the way, this policy was updated in April 2012, not so?

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: This policy directives.

ADV BATOHI: This is the one that is dated 2012, April. There was a previous one, I think from 2006, that was up until 2012, April and this one was from 2012, April. This is updated here.

ADV MOHLAMONYANE SC: Read, read ...[incomplete].

ADV BATOHI: I will read paragraph 1.

CHAIRPERSON: Counsel, in relation to which aspect are you referring us to this Part 5, because you have been referring
10 us to a bundle of documents and sometimes I do not follow why you go there. It will assist us for our preparation so that we can read those documents within a particular context. Sometimes you are referred to a document you cannot even figure out where you are going.

ADV MOHLAMONYANE SC: Reference, Madam Chair, thanks, is to the issue that was dealt with where prosecutors can withdraw charges.

CHAIRPERSON: Yes, thank you.

ADV MOHLAMONYANE SC: To what extent can a prosecutor
20 provisionally withdraw a charge or otherwise withdraw it permanently. It deals with that.

CHAIRPERSON: [Indistinct]... [microphone off] meaning that you revisiting that very issue again. Please direct us ...[indistinct] document.

ADV MOHLAMONYANE SC: Indeed, I will do so. Advocate

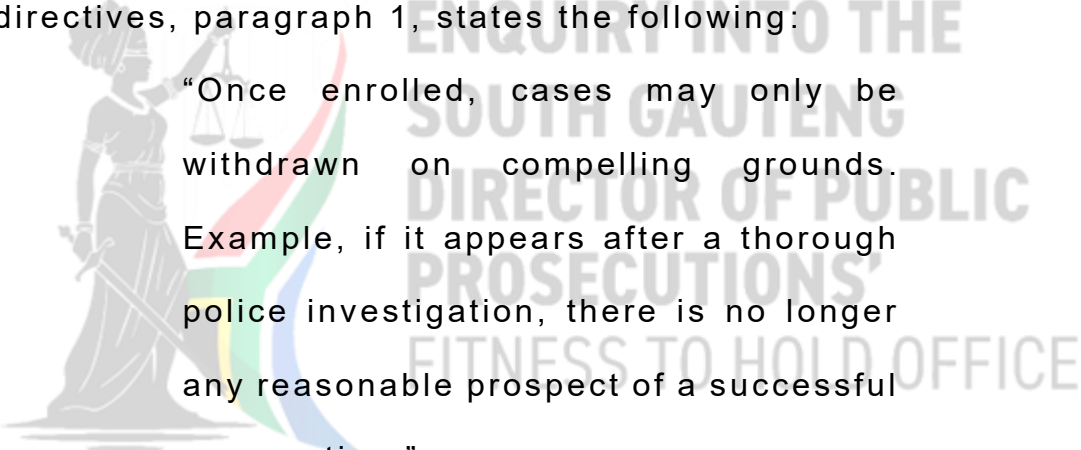
Batohi, would you read Part 5 into the record.

ADV BATOHI: Yes, thank you.

ADV MOHLAMONYANE SC: Paragraphs 1 to 8, to 9.

ADV BATOHI: I will certainly do that. To contextualize for the Chairperson, paragraph 182 that I was dealing with dealt with the issue of the different approaches that Advocate Chauke took in the Booyesen matter where there was no evidence to support racketeering charges and in the Booyesen matter, that was, in the Mdluli matter, that was withdrawn.

10 This part deals with withdrawal of cases. Part 5 of the policy directives, paragraph 1, states the following:



“Once enrolled, cases may only be withdrawn on compelling grounds. Example, if it appears after a thorough police investigation, there is no longer any reasonable prospect of a successful prosecution.”

I will read paragraph 2 as well.

20 “Cases should not be withdrawn solely on the ground that the accused person has compensated or reimbursed the complainant or on the ground that a complainant requests a discontinuance of the prosecution. Prosecutors should exercise special care when approached

by a victim who is in a close relationship
with the accused person.”

I do not think that part, section 2, really applies in
this matter, but it is fine that I have read it in. Paragraph 3:

“Wherever a case is withdrawn, the
reason for the withdrawal must be
provided to the court and noted in the
investigating diary. Where necessary,
direction must be given in the
investigating diary for the further
handling of the matter. The prosecutor
must sign and date such entry in his or
her name must also be clearly printed.”

10

Chairperson, if we go back to the issue of the
withdrawal and just in dealing with section 182 of my affidavit
...[intervenes].

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

ADV BATOHI: Paragraph 182 of my affidavit. I apologize,
Chairperson, it gets rather tiring here and your brain starts
freezing sometimes. Paragraph 182 of my affidavit. Looking
at, again, the decision of Advocate Chauke to withdraw the
charges at the time that he did, there were various reasons
why I had indicated that the decision was incorrectly taken at
that point. And the first one is the strength of the murder and
the attempted murder charges.

As I had said, they were intricately entwined with the other charges and the fact that Advocate Chauke himself recognized this. Also, we must bear in mind, Chairperson, that the findings, these findings were confirmed in the subsequent criminal trial on the other charges.

Another reason why you would not expect a prosecutor in the position of Advocate Chauke not to withdraw these charges in the face of the strength of the circumstantial evidence was the following. The fact that we
10 must not forget, Chairperson, that the murder had taken place some about 12 years before that. And in the case that followed later, when General Mdluli was finally charged and prosecuted for the other charges but not the attempted murder charges, he was also charged, one of the charges that he faced was defeating the ends of justice between 1997 and
2000.

And this is one of the charges that he would have faced prior to the murder charges being withdrawn. That is my understanding. And if one looks at that aspect of it, the
20 fact that General Mdluli, my understanding is Advocate Chauke on his own version says that even though he had doubts about the murder and the attempted murder charges, he felt differently. He felt that there was sufficient evidence with regard to all the other charges and one of those other charges related to defeating the ends of justice.

And the allegations in respect of this charge, defeating the ends of justice, was that General Mdluli had actively suppressed the murder and related charges against himself and his co-accused. Missing dockets, it was alleged, were found in his office.

If he genuinely believed that this case was strong, then it would mean that he believed that the state would be able to prove that Mdluli, being the accused in the murder and attempted murder, had actively tried to stop the
10 investigation and prevent his criminal prosecution.

With respect to any person, particularly in the position of General Mdluli, who tries to do that, that is indicative of a guilty mind when you do not want to face something, you suppress an investigation. So these are all, this is the wealth, this is what Advocate Chauke found before him.

And then we state in our Part 5, well, the NPA, that a case may, once enrolled, a case must be withdrawn only on compelling grounds.

20 **CHAIRPERSON:** You are basing this statement on conjecture, is it not?

ADV BATOHI: Which statement?

CHAIRPERSON: The fact that he did all these things because of, the way you put it, of a guilty mind?

ADV BATOHI: Chairperson, I am concluding that a person

who does all those things is indicative of someone that wants to hide something. Let me, let us put it that way.

CHAIRPERSON: Ja, I am using the term you used, that he would have had a guilty mind. What does that mean? That he would have, he is presumed to be guilty even at that stage?

ADV BATOHI: I would say that he had something to hide, Chairperson, at that stage.

CHAIRPERSON: Is that what you mean?

10 **ADV BATOHI**: That is what I meant.

CHAIRPERSON: Because you are presumed innocent until you are found guilty.

ADV BATOHI: Absolutely, that is correct.

CHAIRPERSON: That is why I am raising this point.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: That when you speak of the concept of somebody having a guilty mind, it may presuppose that you are prejudging this person even before the person is tried.

ADV BATOHI: No, Chairperson, that is not what I intended.

20 If I could explain. When we ...[intervenes].

CHAIRPERSON: No, no, but you used the concept that he has a guilty mind and that is why I try to check with you, what do you mean?

ADV BATOHI: Sure. Sure.

CHAIRPERSON: You may proceed Advocate Batohi.

ADV BATOHI: Thank you, Chairperson. So the point I was trying to make is that, sorry, I am not sure where I was, what I was talking about.

ADV BALOYI-MERE SC: Advocate Batohi, let me remind you.

ADV BATOHI: Thank you. I am not taking notes as I speak. That is helpful.

ADV BALOYI-MERE SC: You said once a, you went back, you gave all your facts, and then you went back to Part 5.

ADV BATOHI: Ah, thank you.

10 **ADV BALOYI-MERE SC**: And you said once enrolled, cases may only be withdrawn on compelling grounds.

ADV BATOHI: Yes, thank you.

ADV BALOYI-MERE SC: I can assure you I had vowed to myself that I am not going to ask you any more questions, but indulge me with this one only.

ADV BATOHI: Can I refuse that, Chairperson?

CHAIRPERSON: You would have to seek my permission.

ADV BATOHI: That is why I asked you, Chairperson.

20 **ADV BALOYI-MERE SC**: There are examples given on one, for example, if it appears after a thorough police investigation that there is no longer any reasonable prospect of a successful prosecution. But I take it this is not exhaustive. This is not the only reason.

ADV BATOHI: Absolutely, Chairperson.

ADV BALOYI-MERE SC: And then I will take you back to the

first sentence that says “compelling grounds.” And from what we have heard so far, even from you, Advocate Chauke withdrew some, withdrew the charges against Mdluli in order to avoid, oh okay, withdrew, referred to an inquest, but his reason being, “I want to avoid a fragmented prosecution.” Would that not fall within a compelling ground?

ADV BATOHI: Chairperson, the issue of avoiding a fragmented trial came much later. That decision was made after the, let me get this right. He withdrew the charges of
10 the murder, and then after the inquest findings were made, he was planning to proceed on the other charges, and not the murder charge and that was when he had indicated, well ja, I am trying to just get my thoughts correct. Sorry for going long, because I want to answer the question properly. Because there are two aspects to it. His withdrawal of the charges initially had nothing to do with fragmentation of the charges. Yes, let me stick to that.

So that was not an issue at that point, fragmentation of charges, the withdrawal of the charges. The reason for
20 the withdrawal of the charges, my understanding, is because of the representations that General Mdluli submitted, alleging a rather far-fetched conspiracy and that was the reason for the, for my understanding, for Advocate Chauke’s decision to withdraw and refer the matter for an inquest.

ADV BALOYI-MERE SC: Proceed, Counsel.

ADV MOHLAMONYANE SC: You were on the policy directives, Part 5.

ADV BATOHI: Yes. I am not sure if there are any other parts to this that I need to read into the record for current, that will be relevant for current purposes.

ADV MOHLAMONYANE SC: Paragraph 8 will be relevant about the stopping of a prosecution.

ADV BATOHI: -:

10 “The stopping of a prosecution in terms
of section 6(b) of the Criminal
Procedure Act effectively means that
the prosecuting authority is abandoning
the case. The accused person will be
entitled to an acquittal and may not be
charged again on the same facts. A
prosecutor may therefore not stop a
prosecution without a DPP’s
authorization.”

ADV MOHLAMONYANE SC: Go to paragraph 9.

20 **ADV BATOHI:** -:

“As a rule, criminal proceedings should
only be stopped ...” [intervenes].

CHAIRPERSON: I am sorry. Like my sister, I was not going to ask any question, but I need clarity, so I give myself permission. Paragraph 8, Advocate Mohlamonyane, it does

not apply here because it speaks of the prosecutor. Is it relevant here?

ADV MOHLAMONYANE SC: Madam Chair ...[intervenes].

CHAIRPERSON: The stopping of prosecution.

ADV MOHLAMONYANE SC: Ja, Madam Chair, it is relevant in the sense that a prosecutor himself, an ordinary prosecutor who prosecutes in the magistrate's court, does not have authority to stop a prosecution. He or she can only do so if he or she is authorized by a higher authority, in this case a
10 DPP. And they can only do that if an accused person has already pleaded. So it is relevant in that regard.

CHAIRPERSON: My question, yes but we are not dealing with a prosecutor here. We are dealing with a DPP on the answer of Advocate Batohi. That is why I am asking, is 6(b) of the CPA relevant for this purpose?

ADV MOHLAMONYANE SC: It is relevant, Madam Chair, because a prosecutor is defined in the Act. It also includes DPPs. They are prosecutors, although they are called directors of public prosecutions, but in essence they are
20 prosecutors.

CHAIRPERSON: That is what I thought, but the answer which we ...[intervenes].

ADV MOHLAMONYANE SC: The Act defines prosecutors and it ...[intervenes].

CHAIRPERSON: From Advocate Batohi a few days ago, she

seeks to differentiate, and correct me if I am wrong, she seeks to differentiate prosecutors with DPPs. And then because here we are confronted with a situation where a DPP is alleged to have misconducted himself, are we now within the zone of Section 6(b) of the Criminal Procedure Act relating to the prosecutors, be it in the High Court or in the Magistrate's Court?

ADV MOHLAMONYANE SC: It may be in the High Court or the Magistrate's Court, Madam Chair. But my understanding
10 of the definition ...[intervenes].

CHAIRPERSON: Let me find out from the witness.

ADV BATOHI: Yes, thank you, Chairperson.

CHAIRPERSON: Do not testify. I think she can clarify that for me.

ADV BATOHI: Yes, thank you, Chairperson.

CHAIRPERSON: Because I may be misunderstanding.

ADV BATOHI: No, Chairperson, you are perfectly correct. The Act defines a prosecutor as different from a DPP, and that is, I think, your question that you asked.

20 **CHAIRPERSON**: Yes, thank you. That is why I am asking, you need not shake your head, Counsel. The witness is speaking, and we will only be guided by her testimony and not what you think. So that is why I thought, do not testify from the bar, let her explain to me my misunderstanding and she says that is how she understands it. My question then

is, is paragraph 8 of the policy relevant for our purpose? Well, if you still believe it is relevant, I thought it is not, you may proceed.

ADV BATOHI: May I answer that question?

MS RAMAGAGA: Just before he takes over or continues, I would like to ask just this one question. The definition of prosecutors, does it include directors?

ADV BATOHI: Let us look at the Act. I do not think it does.

MS RAMAGAGA: In the context of the Act, ja.

10 **ADV BATOHI**: I do not think it does.

“Prosecutor means a prosecutor referred to in Section 16(1).”

And then if we go to Section 16.1:

“Appointment of Prosecutors. A prosecutor shall be appointed on the recommendation of a national director

or a member of the prosecuting authority designated for that purpose by the national director and subject to the

20 laws governing the public service.”

And then it states they may be appointed to the office of the NDPP, the office of the Section 6(1) Director, Investigating Directors, lower courts. DPP’s are appointed by the President.

MS RAMAGAGA: So the answer is that it does not include

directors of public prosecutions.

ADV BATOHI: That is correct.

MS RAMAGAGA: Thank you.

ADV BALOYI-MERE SC: Chair, and I promise I will be brief, Advocate Batohi, at number 1, we are talking about withdrawal and at number 8, we are talking about stopping of a prosecution. And in our case here, we are concentrating on withdrawal.

ADV BATOHI: That is correct, Chair.

10 **ADV BALOYI-MERE SC**: No stopping of prosecution.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: Thank you.

CHAIRPERSON: Proceed, Advocate Mohlamonyane.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. I will leave it at that if the witness disagrees with me. I do not want to proceed where a witness disagrees with me.

CHAIRPERSON: Please, Counsel, you cannot be seen or heard on the record to be saying that. I think you must withdraw that because it is going to go into the record.

20 **ADV MOHLAMONYANE SC**: I withdraw, Madam Chair.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: With respect, I withdraw. And that concludes her evidence.

CHAIRPERSON: Please.

ADV BATOHI: Chairperson, we did not get to the end of my

affidavit.

CHAIRPERSON: I beg your pardon?

ADV BATOHI: Chairperson, we did not ...[intervenes].

CHAIRPERSON: What did you say, Counsel, are you saying it concludes her evidence?

ADV MOHLAMONYANE SC: Yes, I said it concludes her evidence.

CHAIRPERSON: Yes, thank you. Advocate Batohi, Advocate Mohlamonyane suggests to us that this is the end of your
10 evidence.

ADV MOHLAMONYANE SC: Because what remains, Madam Chair, has already been dealt with.

CHAIRPERSON: Is there anything else that, without repeating, that you would like to place before us that you think is of relevance for our determination?

ADV BATOHI: Thank you, Chairperson. I think the evidence leader is correct. Much of it has already been placed before
this enquiry. Perhaps just to mention paragraph 191, the last
two paragraphs of my affidavit. After my referral of the matter
20 to the President via the Minister, a further legal opinion was
obtained from the Minister of Justice.

My understanding is that this, I stand to be corrected, my understanding is that this was an opinion that was obtained on the suggestion or on the request of the President's office, and through the Minister of Justice, that

opinion was obtained from Advocate KD Moroka SC. It is dated 18 March 2024. It is in the legal bundle, the opinions referenced there.

And Advocate Moroka SC, also concluded that there was sufficient evidence of wrongdoing on the part of Advocate Chauke in respect of both the Booysen matter and the Mdluli matter to warrant an inquiry into his fitness to hold office.

Thank you, Chairperson. That concludes the
10 sequence of events.

CHAIRPERSON: Yes, thank you. And the opinion is in the bundles of opinions. We have seen that.

ADV BATOHI: LO, that is correct, Chairperson.

CHAIRPERSON: I suppose that it will be properly marked as an exhibit together with others.

ADV MOHLAMONYANE SC: It will, Madam Chair. I can only point out that it is contained in LO4 bundle, and the pages are reflected in paragraph 191, LO001064 to LO001094.

CHAIRPERSON: Thank you, Counsel. Is that all, Madam?

20 **ADV BATOHI**: Yes, thank you, Chairperson.

CHAIRPERSON: Yes, thank you. Advocate Mohlamonyane, we had agreed that at the end of Advocate Batohi's testimony, you will hand up a list of exhibits. That document must be ready now. It is over a week that it has been prepared. Is it ready to be handed up?

ADV MOHLAMONYANE SC: Yes, it is ready, Madam. Madam Chair, I am informed that the document is ready, but it needs to be updated to include those documents that were referred to today.

CHAIRPERSON: In that event, it means that you will hand these documents, copies to us, to our researchers, extra copies for the Secretariat. And it seems to us that then we will have to postpone the cross-examination to tomorrow, 9 o'clock.

10 **ADV NGCUKAITOBI SC:** Yes, indeed. Madam Chair, we also have noted that we do not have the 2012 indictment, signed indictment. We only have the 2015 signed indictment, so if they could also furnish us with that.

CHAIRPERSON: Did you bring that to their attention before?

ADV NGCUKAITOBI SC: Yes, we assumed that the indictment was there, but it turns out to be a draft indictment. But we have not pertinently raised the absence of the indictment with them.

CHAIRPERSON: Advocate Mohlamonyane, would you have
20 the indictment that Advocate Ngcukaitobi is referring to?

ADV MOHLAMONYANE SC: I will ask that it be acquired and be handed to them.

CHAIRPERSON: But I suppose, Advocate Ngcukaitobi, you will nonetheless be ready to start 9 o'clock tomorrow.

ADV NGCUKAITOBI SC: Yes, yes, yes. We are not trying to

get a postponement.

CHAIRPERSON: In the meantime – thank you, Sir. If your team can provide that document. I remember also outstanding, if my correction is correct, a bundle of the dockets, the document, the 28 dockets that were referred to earlier. At the initial stage of these proceedings, Advocate Ngcukaitobi referred to that. Do you have those dockets?

ADV NGCUKAITOBI SC: Yes, they have given them to us, Madam Chair. There was one outstanding, which was the
10 ...[indistinct]. They have also given that to us. The problem is that we do not have the judgment acquitting Mr Padayachee, who was the accused.

CHAIRPERSON: Well, some of these matters need not be discussed amongst yourselves through us. Lawyers must speak to one another and make sure that you get those documents. If there is a resistance to provide, then you can approach us. But I suppose the team knows precisely what they need to do. And we are, Advocate Ngcukaitobi, minded to adjourn now. We will have that document that is
20 outstanding, and probably even the copies of the dockets. I also want to look at them. We have been talking about 28 dockets.

ADV BATOHI: I believe it is quite voluminous. I think it is 23, but quite voluminous.

CHAIRPERSON: Whatever it is, our task is to try to find the

truth and to gather evidential material to be able to recommend. So whatever it is, please make it available to us, because much has been said about it in these records.

It would be oblivious of us not to consider it if it is necessary.

Well, all counsel, please, you can maybe refer to your notes and then remember all other documents that you said were outstanding. We cannot pinpoint to all of them, but to my recollection, the dockets and that document, that has been, that is in the pipeline, we will receive it tomorrow. And we

10 will adjourn until 9 o'clock tomorrow morning. Yes, thank you. Thank you, Advocate Batohi. We will adjourn.

ENQUIRY ADJOURNS UNTIL 5 DECEMBER 2025



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

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