

**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**

8 DECEMBER 2025

DAY 14



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

PROCEEDINGS ON 8 DECEMBER 2025

CHAIRPERSON: Very good morning to all of you. Good morning, Advocate Chauke, Advocate Mohlamonyane. Good morning.

ADV MOHLAMONYANE SC: A very good morning to all of you. Good morning, Advocate Chauke. Advocate Mohlamonyane, good morning.

ADV MOHLAMONYANE SC: Good morning, madam Chair and your sisters. Advocate Batohi is available. She is in
10 her office. I thought she would be here before we start.

CHAIRPERSON: May she be called, please. As a matter of housekeeping, whilst we are waiting for Advocate Batohi, we adjourned on Friday and discussed this morning that at the instance of Advocate Batohi, we will adjourn early and not sit tomorrow and on Thursday to enable her to attend to matters pertaining to her office. A very good morning to you, Advocate Batohi.

ADV BATOHI: Good morning, Chairperson. Good morning, panel. Good morning to Advocate Chauke and his team.
20 Apologies, we did not realize that you were called. Sorry for that.

CHAIRPERSON: You are welcome, no problem.

ADV BATOHI: Thank you.

CHAIRPERSON: As they went to call you, I was reminding all concerned that when we adjourned on Friday, there was a

request from your office, yourself, that we adjourn midday to attend to personal matters and also not to sit tomorrow and Wednesday also to attend to matters pertaining to your office. Good morning and remember you continue to be under oath.

ADV BATOHI: I do, thank you, Chairperson.

SHAMILA BATOHI (s.u.o.)

CHAIRPERSON: Thank you. Advocate Ngcukaitobi?

ADV NGCUKAITOBI SC: Thank you, Chair. Perhaps ...[intervenes].

10 **CHAIRPERSON**: The stand is yours.

ADV NGCUKAITOBI SC: Thank you. What we have done is that we have pulled various parts of the record into a cross-examination bundle to make it easy to page through it rather than moving from page 1002 to page 2002. Could I just ask my team to put those in front of the panel and in front of the witness and, of course, to my learned friends.

CHAIRPERSON: Thank you, Counsel, you may.

ADV NGCUKAITOBI SC: Thank you. Oh, I am told it is also uploaded electronically. So for those where they do not have
20 individual hard copies, it is accessible. If the panel has file 1 and file 2 of the cross-examination bundle.

CHAIRPERSON: I have file 1 and file 2. My sister has file 2, file 2.

ADV NGCUKAITOBI SC: All right. No surprises there. Thank you, Chair. I may commence then.

CHAIRPERSON: Thank you.

CROSS-EXAMINATION BY ADV NGCUKAITOBI SC: Thank you. Advocate Batohi, I understand that you started as the NDPP on the 1st of February 2019. Is that correct?

ADV BATOHI: That is so.

ADV NGCUKAITOBI SC: Yes. And in your evidence, you stated that one of the cases that you inherited was an application for the judicial review brought by Major General Boyson against the racketeering certificate which had been
10 issued by Advocate Shaun Abrahams. Is that correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Then you also stated that you instructed a panel led by Advocate Rodney De Kock to review the evidence and to give you advice on the way forward. Is that correct?

ADV BATOHI: That is so.

ADV NGCUKAITOBI SC: Yes. Then Advocate De Kock gave you the advice on the 27th of June 2019. Is that correct?

ADV BATOHI: I do not have the report in front of me, but I
20 have no doubt that that is correct.

ADVOCATE NGCUKAITOBI SC: Yes. After you received the report, you withdrew the opposition to the case.

ADV BATOHI: That is correct.

ADVOCATE NGCUKAITOBI SC: Yes. Now, there is something that does not make sense with this narrative. I

presume that the NPA had senior counsel on brief to defend the application. Is that correct?

CHAIRPERSON: I beg your pardon, Counsel. You, take it slowly.

ADVOCATE NGCUKAITOBI SC: Thank you.

CHAIRPERSON: Take it slowly. The withdrawal of the matter following Advocate De Kock's report pertains to the Cato Manor matter.

ADVOCATE NGCUKAITOBI SC: Yes.

10 **CHAIRPERSON**: Thank you.

ADVOCATE NGCUKAITOBI SC: Thank you. Now, Advocate Batohi, there is something that I need to get clarification because it does not appear to make sense to me. I assume that the NPA had briefed senior counsel to defend the application by Major General Booysen. Is that not correct?

ADV BATOHI: My recollection is that is the case.

ADVOCATE NGCUKAITOBI SC: Yes. Now, did you take advice from the senior counsel on the prospects of success in defending the application?

20 **ADV BATOHI**: I do not think so.

ADVOCATE NGCUKAITOBI SC: Well ...[intervenes].

ADV BATOHI: I am trying to think back. I am trying to even think who the counsel was.

ADVOCATE NGCUKAITOBI SC: Well, I can tell you who the counsel was. It was Advocate Hilton Epstein.

ADV BATOHI: That is quite possible because he was dealing with a number of matters at the time.

ADVOCATE NGCUKAITOBI SC: Well, I have got this information from Advocate Shaun Abrahams. He had briefed Advocate Epstein. Now, you have not answered my question. Did you take advice from Advocate Epstein or not?

ADV BATOHI: No.

ADVOCATE NGCUKAITOBI SC: All right.

ADV BATOHI: I do not think so.

10 **ADVOCATE NGCUKAITOBI SC:** All right. And did he give you any written advice?

ADV BATOHI: I cannot recall.

ADVOCATE NGCUKAITOBI SC: Now, Advocate Batohi, it cannot be no and you cannot recall at the same time.

ADV BATOHI: Well, I cannot recall whether he did and I am, it is difficult trying to cast your memory back a number of years. I know he was dealing with a number of matters, and this is, as you say, one of them. I honestly cannot recall whether he did give any advice.

20 **ADVOCATE NGCUKAITOBI SC:** No, the problem I have is that you have disclosed many legal opinions, and you have not mentioned Advocate Hilton Epstein at all in your evidence in chief or in your statement. So I am wondering why have you suppressed that information?

ADV BATOHI: I have not suppressed anything. I honestly

cannot remember whether he gave us any opinion on this.

ADVOCATE NGCUKAITOBI SC: But nevertheless, it seems to me that a responsible NDPP would have asked the senior counsel on brief for an advice on the prospects of defending the application.

ADV BATOHI: In my view, I had the opinion of a very senior experienced team from the NPA, and I accepted their advice.

ADVOCATE NGCUKAITOBI SC: No, I am talking about before you obtained the opinion of Advocate de Kock.

10 Advocate de Kock gave you an opinion only on the 27th of June, but you had been seized with the matter as soon as February 2019. I am asking you, you have said initially you did not obtain advice. Later, you said you do not recall if you obtained advice. But I am asking you, it seems the most prudent thing would have been to ask the advocate you have briefed for advice. Why did you not do that?

ADV BATOHI: In my view, the most experienced persons to give me advice on this racketeering issue would be persons in the NPA who are experienced with racketeering and that is
20 why I decided the most appropriate and reasonable way would be to get not just one person, but a panel of four people, very experienced in these issues, to give me a view on this.

ADVOCATE NGCUKAITOBI SC: Yes. And I just want to make sure that I have given you a fair chance on the question

whether you did or did not obtain advice from Mr Hilton Epstein, because I am going to ask the panel to give me a chance to consult with him and to ask him whether or not he gave you advice. And you have given so far two inconsistent answers. One, I do not remember. Other, no, he did not give me advice. Do you want to consider your position?

ADV BATOHI: No, I really am trying to think about what happened at the time. My initial response was, in fact, I really do not remember. But having thought more, I am inclined to
10 think that I did not get it from him. But, of course, you are most welcome to speak to him, and we will also check our files to see if there is anything to that effect. But we are certainly not suppressing anything.

ADVOCATE NGCUKAITOBI SC: Now, my instructions are that, in fact, there was a meeting with Mr Epstein on the 6th of March, 2019, called by you at your office, which included the State Attorney, Mr Sebelemetsa. Do you remember that?

ADV BATOHI: I did have meetings with Mr Epstein.

ADVOCATE NGCUKAITOBI SC: You did have meetings with
20 him?

ADV BATOHI: It may have, in fact, been more than one, because he had been dealing with a number of matters in the NPA, and so I just wanted an update on what was going on.

ADVOCATE NGCUKAITOBI SC: Yes, I am asking you about one meeting, which is the 6th of March, 2019. I am not asking

you about other meetings.

ADV BATOHI: All I am saying is that I did meet with him, and that is possibly also a date on which I met with him. Now, that meeting, I understand, was also attended by counsel for Major General Booysen, Advocate Anton Katz. Do you have any comment on that?

ADV BATOHI: Unless my memory is failing me, I cannot recall having a meeting with Booysen and, sorry, Katz and Epstein. But I am not saying that it did not happen, but I
10 really, at this point I cannot remember that.

ADVOCATE NGCUKAITOBI SC: Well, it would have been a big story on your diary that you have called the advocate who represents the person who is suing the NPA into the same meeting with the advocate who is defending the NPA. I am not understanding why you cannot remember such a big event.

ADV BATOHI: Well, it may be a big event in your calendar, Advocate, but for me, I meet with lots of counsel, and I cannot recall whether they were both in the same meeting.

20 **ADVOCATE NGCUKAITOBI SC:** So your answer is, I do not remember?

ADV BATOHI: That is correct, I do not remember.

ADVOCATE NGCUKAITOBI SC: Just like you do not remember if you got an opinion from him or not.

ADV BATOHI: That is correct.

ADVOCATE NGCUKAITOBI SC: Yes. Now, I am also told that it was at that meeting that you instructed the State Attorney to withdraw the opposition to the Major General Booyesen application.

ADV BATOHI: What date was that?

ADVOCATE NGCUKAITOBI SC: 6th of March, 2019. I presume you also cannot remember.

ADV BATOHI: I cannot.

ADVOCATE NGCUKAITOBI SC: Yes.

10 **CHAIRPERSON:** I beg your pardon. I beg your pardon. The answer, if I understand it, is that you do not remember the meeting ...[intervenes].

ADV BATOHI: No, whether ...[intervenes].

CHAIRPERSON: Where Advocate Katz was present, or what is it that you do not remember?

ADV BATOHI: The last question was whether I gave an instruction to withdraw the opposition to the review application on that date, and I cannot recall that.

ADVOCATE NGCUKAITOBI SC: Yes. Can I ask you then,
20 Advocate Batohi, because legal opinions are privileged information, can I ask Advocate Epstein to give me from his records the advice, if any, that he gave you?

ADV BATOHI: This is an enquiry seeking to establish the facts. I have no issue with that.

ADVOCATE NGCUKAITOBI SC: Yes. No, thank you.

Because it seems to me, if your evidence is that you only took the decision to withdraw the opposition on the 27th of June, after the 27th of June, that would be fundamentally inconsistent with the facts as they happened, which, as I understand, already that decision was taken by the 6th of March, 2019. Would you accept that?

ADV BATOHI: That would be inconsistent, yes.

ADVOCATE NGCUKAITOBI SC: Yes, all right. We will come back to that topic after I have spoken to Advocate Epstein.

10 Can I ask you another topic. You have repeatedly mentioned state capture in this enquiry. Do you remember that?

ADV BATOHI: I do.

ADVOCATE NGCUKAITOBI SC: Yes. Now, the definition of state capture as adopted by the Commission under Justice Zondo:

“Is a misuse of the state and its organs
for private gain or for unlawful aims.”

Do you accept that definition?

ADV BATOHI: Yes.

20 **ADVOCATE NGCUKAITOBI SC:** Do you have any personal knowledge that Advocate Chauke was involved in state capture?

ADV BATOHI: I do not have any personal knowledge.

ADVOCATE NGCUKAITOBI SC: Yes, all right. So then, it was grossly irresponsible of you to mention state capture in

the context of Advocate Chauke when you have no personal knowledge of his involvement in state capture.

ADV BATOHI: Should I comment on that?

ADVOCATE NGCUKAITOBI SC: If you want to. I am putting it to you that I will argue that you were attempting to poison the atmosphere when you had no evidence, but you mentioned state capture together with Mr Chauke.

ADV BATOHI: The reason why I did is that I was asked about why I took certain actions when I did and I explained
10 that, because that was in fact the NPA and capture of the criminal justice system was something that the Zondo Commission was inquiring into and I could not turn a blind eye to the fact that that was what was being inquired into, and that as a responsible National Director, in my view, I needed to consider all options and the only reason why I mentioned it is because I was asked about the context and why I took certain actions, and that was what was also something that was on my mind at the time. So I considered all of this, and therefore I took certain actions.

20 **ADVOCATE NGCUKAITOBI SC:** Advocate Batohi, we are in an enquiry against Advocate Chauke. We are not in a state capture enquiry. My question was simple. You have given me an answer. You have no evidence that Advocate Chauke was involved in state capture, yet you have repeatedly mentioned state capture in the context of this enquiry into

Advocate Chauke. That is what I am saying to you, is intentionally designed to poison the atmosphere of this enquiry, to create the impression that Mr Chauke is involved in state capture, when you know full well that you have no such evidence.

ADV BATOHI: I was asked what were the reasons for me doing certain things at the time, and I explained that that was the context within which I took those decisions.

ADVOCATE NGCUKAITOBI SC: Yes, anything else to add?

10 **ADV BATOHI:** No.

ADVOCATE NGCUKAITOBI SC: Now can I then move on to another topic, just to understand these charges. My understanding of the way in which these terms of reference emanated is that you drafted them, and the President endorsed your draft. Is that correct?

ADV BATOHI: Well, actually what happened is we went and checked this after. We did submit a draft to the President, but what the President adopted subsequently is quite different from the draft, and we did not input into any draft
20 that the President had. So there is a difference between the two.

ADVOCATE NGCUKAITOBI SC: All right. Well, I have not seen the draft you gave the President, and maybe you should send us that draft, because I understood all along that the President endorsed the draft that you gave to him.

ADV BATOHI: No, that is not the case. We can let you have the draft.

ADVOCATE NGCUKAITOBI SC: Yes. Now, can I then go to making sure that I understand ...[intervenes].

CHAIRPERSON: I beg your pardon. Advocate Batohi, what is the answer? You are saying Advocate Ngcukaitobi can have the draft.

ADV BATOHI: That is correct.

CHAIRPERSON: Do you have it?

10 **ADV BATOHI:** We do have it.

ADVOCATE NGCUKAITOBI SC: Thank you, Madam Chair.

CHAIRPERSON: Has it been made available to the evidence-leading team, that draft?

ADV BATOHI: I am not sure if it has.

CHAIRPERSON: May we ascertain whether the draft document that was sent to the President as regards the terms of reference has been made available to the team?

ADV BATOHI: Sure.

20 **CHAIRPERSON:** May I just verify with Advocate Mohlamonyane. Has it been made available to you?

ADV MOHLAMONYANE SC: Madam Chair, I am not aware of any draft. All what I am aware of are the terms of reference that have been gazetted.

CHAIRPERSON: Might we find out from your team, Advocate Hulley and junior and the lady next to you, if you probably

have the document in your possession? It may also be relevant, I am not sure at this stage, because you have raised, Advocate Batohi, a question of the correctness, or not necessarily that way, because you seek to amend the terms of reference, correct?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: That document may be relevant in determining what you conveyed to the State President.

ADV BATOHI: Sure.

10 **CHAIRPERSON**: May it be made available, if you have it, Madam, Advocate Halley and junior?

ADV HULLEY SC: Madam Chair, we no doubt will make it available, but my instructions are, and I have got to verify this, but my instructions are ...[indistinct] [microphone off].

CHAIRPERSON: Do you have it though? Do you have the document?

ADV HULLEY SC: Not ...[indistinct].

CHAIRPERSON: Not at this stage.

ADVOCATE NGCUKAITOBI SC: Yes.

20 **CHAIRPERSON**: Are you making an undertaking, Advocate Batohi, that your office will make available the initial letter or document, whatever it is, or a memo to the State President?

ADV BATOHI: Yes, we will.

CHAIRPERSON: When will we have the document?

ADV BATOHI: Today, as soon as we are adjourned.

CHAIRPERSON: Yes, thank you. Will it help, Advocate Ngcukaitobi?

ADVOCATE NGCUKAITOBI SC: Yes, Madam Chair, it will help. I still have one more question on the issue of this draft. Advocate Batohi, I want to confirm whether it is your testimony that the draft you gave to the President is different to the terms that the President finally signed?

ADV BATOHI: That is correct.

ADVOCATE NGCUKAITOBI SC: Yes, and you cannot, at
10 this stage, tell us what the differences are?

ADV BATOHI: I cannot.

ADVOCATE NGCUKAITOBI SC: Yes, all right. Can we then go to the terms of reference that the President endorsed, because I am not understanding them. They have been referred to in several parts of the case. Hopefully the panel can access the terms of reference easily.

CHAIRPERSON: Do you have that?

ADV BATOHI: I am trying to find my copy, Chairperson.

CHAIRPERSON: Do you have the copy?

20 **ADV BATOHI:** I do not have it yet.

CHAIRPERSON: Advocate Mohlamonyane, do you probably have a copy that we can give to Advocate Batohi? A copy is now made available.

ADV BATOHI: I do have a copy.

ADVOCATE NGCUKAITOBI SC: Thank you. Can you go to

item 3.1.1. It reads:

“The institution of the racketeering charges in terms of section 2(4) of the Prevention of Organized Crime Act, 1998, against Major General Booyesen and members of the Cato Manor Unit, and the defence of those actions in subsequent review proceedings brought by Major General Booyesen to have the racketeering certificates set aside in that ...”

Now, there are a couple of points that arise from that. The first one, is that charge limited to racketeering or does it include the predicate offenses?

ADV BATOHI: Racketeering by its very nature includes predicate offenses.

ADVOCATE NGCUKAITOBI SC: Yes, but you know what I am asking you. I am asking if the murder charge standing alone is included or excluded. And if I can give you an example to make it easy, Major General Booyesen is charged with seven counts, two of racketeering, two of murder, one of defeating the ends of justice, and two of violating the provisions of the Firearms Control Act.

My question is a simple one. Does that charge exclude the two murder charges, the one charge of defeating

the ends of justice, and the two charges of violating the Firearms Control Act?

ADV BATOHI: As I said, racketeering by its very nature includes the predicate offenses, so it must include the predicate offenses as well.

ADVOCATE NGCUKAITOBI SC: Advocate Batohi, please answer my question. I am not asking you about racketeering offenses and its elements. I promise you I can read for myself. I am asking you whether or not the independent
10 charges of murder, the independent charges of defeating the ends of justice, and the independent charges of breaching the Firearms Control Act are included or excluded.

ADV BATOHI: My answer to that is that it includes racketeering charges.

ADVOCATE NGCUKAITOBI SC: I know it includes racketeering charges because it says racketeering. I am asking you if it excludes the charge of murder against Mr Booyesen.

ADV BATOHI: It does not exclude it in the context of
20 racketeering.

ADVOCATE NGCUKAITOBI SC: Advocate Batohi, I think we are going to be here for a long, long time if you do not answer the questions directly. We know racketeering, in order to establish, requires predicate offenses. That is not what I am asking you. What I am asking you is that Major General

Booyesen was charged independently of murder. Is it suggested in this charge that he should also not have been charged of murder independently of racketeering?

ADV BATOHI: That is not what I am saying. What I am saying is that I cannot, that is my answer, is that the predicate offenses are included in the racketeering charge. And so my understanding is that he would have been charged for those predicate offenses in the context of racketeering.

ADVOCATE NGCUKAITOBI SC: I honestly do not understand that. Let me give you a final chance. If you withdrew racketeering, Major General Booyesen would still face a murder charge.

ADV BATOHI: That is a different question and I will answer that now.

ADVOCATE NGCUKAITOBI SC: Yes, no ...[intervenes].

ADV BATOHI: So when I did withdraw the racketeering ...[intervenes].

ADVOCATE NGCUKAITOBI SC: No, I am not asking you to answer anything. I am telling you the question that I am going to ask you. Is 3.1.1 intended to suggest that Major General Booyesen should not have faced the murder charge?

ADV BATOHI: Not at all.

ADVOCATE NGCUKAITOBI SC: So you accept that he should have continued to face the murder charge or not?

ADV BATOHI: Can I answer that question?

ADVOCATE NGCUKAITOBI SC: Yes.

ADV BATOHI: After I decided to withdraw the racketeering charges, I sent all of the dockets back to the DPP, KZN, and asked her to consider each one of them and whether anyone should be charged with the predicate offenses outside of racketeering.

ADVOCATE NGCUKAITOBI SC: No, I still do not understand that. I am asking you about the charge against Advocate Chauke, whether or not you accept that there was sufficient
10 evidence for Major General Booyesen to be charged with the crime of murder or not, or do you say there was also no sufficient evidence of the crime of murder?

ADV BATOHI: On the basis of the decisions of the DPP, KZN, after I sent the dockets there, she found that there was no evidence to justify murder charges against anyone of the accused except in the one docket, and that did not include
Major General Booyesen.

ADVOCATE NGCUKAITOBI SC: Yes. Those are later decisions. I am asking you about the decisions taken by
20 Advocate Chauke. Is it the case of the NPA that Advocate Chauke erred in charging Major General Booyesen with murder?

ADV BATOHI: My understanding is that Major General Booyesen was charged with racketeering and that those were the predicate offenses.

ADVOCATE NGCUKAITOBI SC: Yes.

ADV BATOHI: And that is where we say Advocate Chauke erred, in supporting racketeering charges.

ADVOCATE NGCUKAITOBI SC: Yes.

CHAIRPERSON: I beg your pardon. I beg your pardon, Advocate Ngcukaitobi. Is this question premised on the assumption that Advocate Chauke made a prosecutorial decision to charge?

ADVOCATE NGCUKAITOBI SC: Yes, I am working now on
10 the best case for the NPA.

CHAIRPERSON: That is why I am asking the question because ...[intervenes].

ADVOCATE NGCUKAITOBI SC: Yes, no, absolutely.

CHAIRPERSON: All along, when we read the opening address, it seems to me that there was an issue regarding whether he made a prosecutorial decision ...[intervenes].

ADVOCATE NGCUKAITOBI SC: Yes.

CHAIRPERSON: In relation to the Cato Manor matter. My understanding of the evidence favourable to you was that
20 Advocate Chauke was appointed merely as a coordinator in relation to the KZN Cato Manor matters.

ADVOCATE NGCUKAITOBI SC: Yes.

CHAIRPERSON: That is why I am asking the question as to whether you premised this question on the assumption, at least for now ...[intervenes].

ADVOCATE NGCUKAITOBI SC: Yes.

CHAIRPERSON: That he did make this particular prosecutorial decision as regards the charge of murder against Major General Booysen.

ADVOCATE NGCUKAITOBI SC: Indeed so. I am working now, Madam Chair, on the best case for the NPA, that Mr Chauke has taken all of the decisions they claim. I am trying to understand the substance of the complaint, but I will still deal with whether he did make those decisions or not. So I
10 am still trying to analyse the charge.

Let us come back then, Advocate Batohi, to understand what 3.1.1 is about. You have said that your understanding is that murder featured only because it was a predicate offense, not because it was an independent offense. Is that correct?

ADV BATOHI: It was a predicate offense to racketeering, that is correct.

ADVOCATE NGCUKAITOBI SC: Yes. And therefore, it is irrelevant to section 2(4) as an independent offense. It is
20 only relevant as a predicate offense.

ADV BATOHI: That is correct.

ADVOCATE NGCUKAITOBI SC: Yes, all right. Now, the reason I am asking you this is because even on your own version, you have accepted that at least in relation to one of the charges, there was sufficient evidence to prosecute. Is

that correct?

ADV BATOHI: No, I am not understanding you.

ADVOCATE NGCUKAITOBI SC: Well, you have told us that you gave all of the dockets to the DPP of KZN. She enrolled one case against Mr Padayachee on a count of murder. So she must have considered that there was sufficient evidence to charge Mr Padayachee with murder.

ADV BATOHI: Yes, I did not realize you were referring to that docket. That is correct.

10 **ADVOCATE NGCUKAITOBI SC**: Yes. That is why I come back to say in at least one of the cases, there was sufficient evidence to proceed with a murder charge.

ADV BATOHI: That is correct.

ADVOCATE NGCUKAITOBI SC: Yes. Now, that distinction is not made clear at all in 3.1.1. If you read 3.1.1, it suggests that in none of those cases, there should have been a charge.

ADV BATOHI: Against Major General Booyson, that is what that suggests.

ADVOCATE NGCUKAITOBI SC: No, that is false. It says
20 Major General Booyson and members of the Cato Manor Unit.

ADV BATOHI: Let me read this carefully.

ADVOCATE NGCUKAITOBI SC: Mr Padayachee was a member of the Cato Manor Unit.

ADV BATOHI: The point I made earlier is that this related to racketeering charges and therefore, it is clear here that this

section is relating to racketeering charges and murder as a predicate offense and not as separate independent charges. And so it is correct in that regard that it is racketeering. It does not refer to murder at all.

ADVOCATE NGCUKAITOBI SC: Yes, I thought we had moved from that question and we were debating the independent charges. And I asked you a question whether you would accept that in at least one of the dockets, the case against Mr Padayachee, there was sufficient evidence to charge and I understood your answer to be yes.

ADV BATOHI: That was my answer.

ADVOCATE NGCUKAITOBI SC: Yes, and when I proceeded with that, you said, well, exclude Major General Booyson, and then I pointed to you that actually it exclude all members of the Cato Manor Unit.

ADV BATOHI: The point I make is that whether it is Major General Booyson or all members, this particular paragraph refers to racketeering charges and not independent murder charges.

ADVOCATE NGCUKAITOBI SC: Yes. Now, could I then ask you to turn over the page. 3.1.1.1 refers to supporting a decision to prosecute the accused. Who is the accused?

ADV BATOHI: All the accused in the racketeering charges.

ADVOCATE NGCUKAITOBI SC: Yes. That is where we come back from, where you say no evidence justifying the

decision. And now we understand that you would accept in relation to one that there was evidence justifying a murder charge against Mr Padayachee.

ADV BATOHI: But not a racketeering charge ...[intervenes].

ADVOCATE NGCUKAITOBI SC: Yes, I understand. You have made that clear. I am asking you a different question. Was there sufficient evidence, in your opinion, having studied the dockets, if you did, to support a murder charge against Major General Booyson?

10 **ADV BATOHI**: There was not.

ADVOCATE NGCUKAITOBI SC: There was not. Now, you gave evidence earlier that you did not study the dockets, and you relied on a memorandum by Advocate de Kock. Was that evidence accurate?

ADV BATOHI: That is correct, but my answer now also relies on the evidence of a report of the DPP, KZN.

ADVOCATE NGCUKAITOBI SC: Yes, I am not asking you about the DPP, KZN. I am asking you, at the time you took the decision to institute a disciplinary case against Advocate
20 Chauke, you relied on the report of Advocate de Kock. You never studied the docket. Is that not correct?

ADV BATOHI: That is correct, I did not. Let me just check the time that I decided - no, that is correct. I did not study the dockets.

ADVOCATE NGCUKAITOBI SC: Yes.

ADV BATOHI: The 23 dockets.

ADVOCATE NGCUKAITOBI SC: Yes, I am asking just the docket around Major General Booyson, two murder charges, one charge of defeating the ends of justice, two charges of violating the Firearms Control Act. Can I tell you, Advocate Chauke read the docket. Did you know that?

ADV BATOHI: I would have expected him to.

ADVOCATE NGCUKAITOBI SC: Yes. But you have come to say to the panel, there was no case against Major General
10 Booyson without ever having read the docket. Can I suggest that that is an astonishing proposition coming from the Head of our prosecution service and I am going to tell the panel that at the end, that your evidence must be rejected as incredible, because it is irresponsible to make such a claim without having read the docket.

ADV BATOHI: It is not irresponsible at all, and I will explain why. There is case law that National Directors are not expected to read every single bit of evidence and every docket in cases, and that they are, it is perfectly acceptable
20 for a National Director to rely on reports, to rely on presentations, to request aspects of evidence, and to take decisions on that basis. So it is certainly not irresponsible. It is what is expected of a responsible National Director.

ADVOCATE NGCUKAITOBI SC: Yes. But can I also suggest something else to you, that section 2 of the Prevention of

Organized Crime Act is within the exclusive power of the NDPP. Do you accept that?

ADV BATOHI: I am not sure what you mean by exclusive power, but certainly ...[intervenes].

ADVOCATE NGCUKAITOBI SC: Well, only the NDPP can sign a racketeering certificate under section 2(4). I would have thought that to be obvious.

ADV BATOHI: Certainly. I agree that only the National Director can sign that authorization.

10 **ADVOCATE NGCUKAITOBI SC**: And exclusively the NDPP. No one else can sign a racketeering certificate.

ADV BATOHI: That is correct.

ADVOCATE NGCUKAITOBI SC: Yes. Now it is in that context that I say, for you to tell the panel that there is no case against Major General Booyen, also of racketeering, without ever having studied the docket against him, is a grossly irresponsible thing.

ADV BATOHI: I repeat what I said.

ADVOCATE NGCUKAITOBI SC: Of course.

20 **ADV BATOHI**: There is case law that states that a National Director is not expected to read every docket and to look at every piece of evidence before coming to that conclusion. A National Director, it is permissible for a National Director to consider evidence that is presented to him or her by a team, present presentations, and to ask for specific aspects of

evidence if he or she requires it. But it is certainly not expected of a National Director to read every single docket in any context. Sometimes a docket can fill a room, and it is certainly not expected that that is what a National Director should do.

ADVOCATE NGCUKAITOBI SC: Well, can I challenge you on that and put two propositions to you. Firstly, the docket against Major General Booysen does not fill a room. It is a small docket. Do you accept that?

10 **ADV BATOHI:** I am not sure that there is a docket against Major General Booysen. I know that there are 23, there were 23 murder and other related charges, dockets. I am not sure that there ever was a racketeering docket as such.

ADVOCATE NGCUKAITOBI SC: Now, you see the problem is that you answer, but you always overlook what you wrote. Go to 3.1.1.1, where you say, supported a decision to prosecute. I mean, I know you say it is the President who says this, but you never wrote this, or you do not know the difference, so I will accept that.

20 Until I see what you wrote, your answer remains qualified. That there was no evidence justifying the decision, and that he sought to improperly have the Acting Director of Public Prosecutions of KwaZulu Natal sign the case dockets. You are the one who relied on case dockets. Now you are telling the panel there was no docket.

ADV BATOHI: I said there was dockets. There were dockets, lots of dockets, but I am not aware of a racketeering docket as such.

ADVOCATE NGCUKAITOBI SC: Now Advocate Batohi, I think there is a real problem. You have said that 3.1.1 is exclusively about racketeering and does not include the independent offences. And you have also confirmed in 3.1.1.1 that that too is exclusively about racketeering. The charge refers to case dockets. What case dockets are those?

10 **ADV BATOHI:** Which charge refers to case dockets?

ADVOCATE NGCUKAITOBI SC: Read 3.1.1.1.

ADV BATOHI: Yes, it does appear there.

ADVOCATE NGCUKAITOBI SC: It was put there by you.

ADV BATOHI: I am not sure about that. We will have to check that.

ADVOCATE NGCUKAITOBI SC: Yes. But then answer my question, please. The docket that is referenced, we have gone through this exercise ourselves. It is only seven charges against Major General Booyesen. It is not the
20 exaggerated docket that fills a room. What do you say to that?

ADV BATOHI: The only point I made about dockets that fill a room is to make the point that it is not expected of a National Director to read every bit of evidence when a decision is made. That is the only reason why I mentioned

that. But getting back to this issue, there were dockets relating to, there were the 23 case dockets. I am not aware - let me read this carefully before I answer this. This is clearly incorrect, because to say that he sought to improperly have the Acting Director of Public Prosecutions of KwaZulu Natal sign the case dockets, it is not our case that Advocate Chauke asked the DPP to sign any case dockets. So this is clearly incorrect and ...[intervenes].

ADVOCATE NGCUKAITOBI SC: So the charge is incorrect.

10 **ADV BATOHI:** If I may be allowed to continue.

ADVOCATE NGCUKAITOBI SC: Sorry, I thought you had finished. Please continue.

ADV BATOHI: It is okay. And or the prosecution memo. He sought to improperly have the acting - sign the case dockets and or sign the prosecuting memo. If you read it like that it is incorrect. That is not what we are saying.

ADVOCATE NGCUKAITOBI SC: So charge 3.1.1.1 is a wrong charge.

ADV BATOHI: It is incorrect.

20 **ADVOCATE NGCUKAITOBI SC:** Well, incorrect and being wrong are the same thing.

ADV BATOHI: Well, part of it is correct, is that Advocate Chauke supported a decision to prosecute the accused, notwithstanding that there was no decision justifying, no evidence justifying the decision. And then the next part of it

is incorrect to the extent that I have indicated.

ADVOCATE NGCUKAITOBI SC: You see, that is why I need the memorandum you gave the President to see whether the President is at fault for charging Mr Chauke incorrectly or whether you are at fault, but are now escaping responsibility.

ADV BATOHI: I am trying to explain as best as I can and not to escape responsibility.

ADVOCATE NGCUKAITOBI SC: Yes. No, I understand that. I am not criticizing you, I am criticizing your evidence.

10 **ADV BATOHI:** It is fine.

ADVOCATE NGCUKAITOBI SC: Now ...[intervenes].

CHAIRPERSON: Before you proceed, I think this will also help us. Advocate Batohi, when you look at the gazetted terms of reference, the date is the 30th of September, 2025.

ADV BATOHI: I do not have that gazetted copy in front of me.

CHAIRPERSON: The front page of the gazette ...[intervenes].

ADV BATOHI: I have it now. Yes, that is correct.

20 **CHAIRPERSON:** Regulation, Gazette number 11889, volume 723, 30 September 2025, number 53444.

ADV BATOHI: That is correct.

CHAIRPERSON: When did you see for the first time the gazetted terms of reference?

ADV BATOHI: I am not sure, Chairperson. I cannot recall

when I saw it for the first time.

CHAIRPERSON: Should I assume that by 1 October 2025, you had already looked at the terms of reference?

ADV BATOHI: No, we cannot assume that, Chairperson.

CHAIRPERSON: Should I assume that by the 17th of October, when this enquiry started, I beg your pardon, by 17th of November, when this enquiry started, you had already looked at the gazetted terms of reference?

ADV BATOHI: Chairperson, I honestly cannot remember
10 when I looked at it, and whether I scrutinized it at any great detail or cast a quick look through it. I honestly cannot recall that.

CHAIRPERSON: When you took oath, the first day you took oath, had you already looked at the terms of reference?

ADV BATOHI: Chairperson, on the first day of the enquiry?

CHAIRPERSON: On the first day you took oath.

ADV BATOHI: I would certainly have had a look at it, but I do not know to what detail.

CHAIRPERSON: You may proceed, sir.

20 **MS RAMAGAGA:** Just one thing. Advocate Batohi, when the bundles or documentation was prepared for this enquiry, it was prepared with a view to addressing issues raised in the terms of reference. Is that correct?

ADV BATOHI: I am not aware that it was prepared for that specific purpose.

MS RAMAGAGA: Did you care to establish as to whether the documentation was prepared for that purpose?

ADV BATOHI: No, I did not.

ADV BALOYI-MERE SC: Sorry, a follow-up. Advocate Batohi, when you prepared your affidavit together with your legal team, you knew that you were preparing an affidavit to come and testify in relation to the terms of reference in this enquiry.

ADV BATOHI: I knew that I was preparing an affidavit in
10 order to come and testify before this hearing.

ADV BALOYI-MERE SC: Testify in this enquiry in terms of the terms of reference, wherein you referred a matter to the President, who then constituted an enquiry and issued the terms of reference to deal with whatever you referred to the President.

ADV BATOHI: Yes, the terms of reference were for the panel, and of course evidence was going to be provided to support what is in the terms of reference by various witnesses.

ADV BALOYI-MERE SC: Advocate Batohi, when you
20 prepared your affidavit, you prepared your affidavit to sustain the allegations that you made to the President, which, well I am not sure whether rightly or wrongly, convinced the President to constitute a panel. But the President depended on the evidence or on the information that was supplied by you, which you intended to support by way of an affidavit that

served before this panel. Is that correct?

ADV BATOHI: I did not prepare the affidavit with an intention to support the terms of reference. I prepared an affidavit on the basis of what I knew and what I did in this matter. It is not like I prepared the affidavit and then checked whether it is aligned with the terms of reference. That is not what I did.

ADV BALOYI-MERE SC: And what you knew is what you submitted to the President, for the President to take a decision to set up an enquiry.

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

ADV BALOYI-MERE SC: Thank you.

ADVOCATE NGCUKAITOBI SC: Thank you, Madam Chair. Advocate Batohi, I am not yet done with this enquiry about case dockets. You have now testified that the reference to case dockets and trying to get someone else improperly to sign is incorrect, okay? I am not going to quibble with that. But do you accept that the case against Major General Booyesen, whether contained in a docket or elsewhere, is a fairly narrow case. It is not the example that you posed of a docket filling up a room.

20 **ADV BATOHI**: It is certainly not a docket that fills up the room, that is correct.

ADVOCATE NGCUKAITOBI SC: Yes. Now, it also continues to say, and/or prosecution memorandum, okay. That is one of the things I do not understand. You said you never gave

evidence in this enquiry that Advocate Chauke sought to have Mr Mlotshwa sign a prosecution memorandum. Is that also incorrect?

ADV BATOHI: I mentioned earlier that it is incorrect.

ADVOCATE NGCUKAITOBI SC: Yes, so both that case docket reference and the prosecution memorandum are wrong.

ADV BATOHI: It is not our case that Advocate Chauke sought either of those to be signed by Advocate Mlotshwa.

10 **ADVOCATE NGCUKAITOBI SC**: Yes. Now, then it continues to talk about evidence implicating the accused. Who is that accused?

ADV BATOHI: I would imagine it is all the accused.

ADVOCATE NGCUKAITOBI SC: All of those accused with what, because there are people like Mr Mostert, 11 counts of murder. Does it include them or not?

ADV BATOHI: For racketeering charges.

ADVOCATE NGCUKAITOBI SC: So all of the accused on racketeering?

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

ADVOCATE NGCUKAITOBI SC: Yes. Now, the way then it would read is that the case docket would be a case docket for racketeering. The prosecution memorandum would be a prosecution memorandum for racketeering. But because the charge is wrong, we can strike that out. We can put a red

pen across that.

ADV BATOHI: Can you repeat that?

ADVOCATE NGCUKAITOBI SC: I am saying the way it would read before your evidence today, the way it would read would be it is the case docket for racketeering and then it is the prosecution memorandum for racketeering, but because you have now conceded that that is a wrong charge or incorrect charge, we can scratch that out with a red pen.

ADV BATOHI: No, I am not following you. I said that there
10 was no, I am not aware of a case docket for racketeering. I am aware of a lot of other dockets, the 23 murder dockets and related charges. I do not even know if there was a case docket for racketeering. So I do not understand your question.

ADVOCATE NGCUKAITOBI SC: Well, my question is exactly linked to what you have just said, that you have charged someone for trying to get a signature on a case docket that you say does not exist. You have also charged someone for trying to get a prosecution memorandum to be signed which
20 you admit was never done.

ADV BATOHI: I have not charged anyone for that.

ADVOCATE NGCUKAITOBI SC: All right, I see.

ADV BATOHI: I did indicate that that is definitely not the case and that must, that is definitely an error on that because there is no evidence at all that Advocate Chauke was required

to do any of these, either sign a case docket or sign a prosecution memo. The evidence is that he sought Advocate Mlotshwa to sign the indictments.

ADVOCATE NGCUKAITOBI SC: Indeed, there is not a single charge here that refers to an attempt to sign an indictment.

ADV BATOHI: That is correct.

ADVOCATE NGCUKAITOBI SC: If you can see it, show me.

ADV BATOHI: That is correct, there is not.

ADVOCATE NGCUKAITOBI SC: Yes.

10 **ADV BATOHI:** And it is not meant to be.

ADVOCATE NGCUKAITOBI SC: Yes.

ADV BATOHI: Because there is no evidence to that effect.

ADVOCATE NGCUKAITOBI SC: No, I thought you said the case against Advocate Chauke is that he sought to have Advocate Mlotshwa sign an indictment.

ADV BATOHI: That is correct.

ADVOCATE NGCUKAITOBI SC: I am saying to you there is not a single charge here that refers to Advocate Chauke attempting to get Advocate Mlotshwa to sign an indictment.

20 **ADV BATOHI:** That is correct. I am not aware of the other, if it is anywhere else on this, but certainly not on this.

ADVOCATE NGCUKAITOBI SC: You can go through them now, there is enough time and then show me where it is alleged that Advocate Chauke sought to have Advocate Mlotshwa sign an indictment.

ADV BATOHI: Well, it may or may not be there, but that is our case.

ADVOCATE NGCUKAITOBI SC: Well, Advocate Batohi, please.

MS RAMAGAGA: Just before you proceed, just one thing. Advocate Batohi, did you familiarize yourself with the terms of reference?

ADV BATOHI: No, I did not.

MS RAMAGAGA: And you are the complainant in this matter.

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

MS RAMAGAGA: Thank you.

ADV BATOHI: Well, you can call me the complainant, it is the President that decided. So I am not sure that I am the complainant, but I certainly made a referral to the President.

MS RAMAGAGA: Which question are you answering now?

ADV BATOHI: Whether I am, well, it was not a question, it was a comment that I am the complainant in this matter and I am seeking to clarify that I do not see myself as a complainant.

20 **MS RAMAGAGA**: Thank you.

ADV BATOHI: It is the President who decided. I made a referral to the President.

MS RAMAGAGA: Thank you.

ADVOCATE NGCUKAITOBI SC: All right, I am going to come back to this question by Madam panel member Ramagaga,

but I still want an answer to my question, which is, show me where it is alleged that Advocate Chauke sought to have Advocate Mlotshwa sign an indictment.

ADV BATOHI: I accept from you that it is not, otherwise it is going to take me a while to read this entire terms of reference.

ADVOCATE NGCUKAITOBI SC: No, it will not take you a while. There are only five paragraphs. So you can do that now and tell us which paragraph refers to Advocate Chauke
10 trying to get Advocate Mlotshwa sign an indictment.

CHAIRPERSON: May I, Advocate Ngcukaitobi, it is quarter past ten, and perhaps in fairness to you, Madam, as we take a 15 minutes tea break, you will go through the terms of reference to enable you to answer the question that Advocate Ngcukaitobi has just asked you in relation to whether there is any referral in the terms of reference, if I capture his question correctly, that appears in the terms of reference in the entirety. And when we reconvene, you will then answer the question. Advocate Ngcukaitobi?

20 **ADVOCATE NGCUKAITOBI SC:** Perhaps, Madam Chair, we can also get the draft, because I want to put her draft and the President's decision side by side. If we can get that during this 15 minutes, that would be appreciated.

CHAIRPERSON: Yes, I was going to deal with that. You had just mentioned that the first letter to the President, the

referral letter, if I may call it that, is readily available. We will appreciate to have a copy of that letter when we reconvene. You can send it to us either online or hard copy and give it to our researchers. Advocate Ngcukaitobi?

ADVOCATE NGCUKAITOBI SC: Yes, if we, are we adjourning now?

CHAIRPERSON: We will adjourn now

ADVOCATE NGCUKAITOBI SC: Yes.

CHAIRPERSON: Anything else that ...[intervenes].

10 **ADVOCATE NGCUKAITOBI SC:** Nothing from our side, thank you. Thank you, Chair.

CHAIRPERSON: Those two things, reflect upon the gazetted terms of reference with a view to answer counsel. Secondly, may we have the first referral document to the President, which you said is readily available or can be made available, so that we deal with this matter when we reconvene. Thank you.

We will adjourn for 15 minutes for tea and reconvene at half past ten.

20 **ENQUIRY ADJOURNS**

ENQUIRY RESUMES

CHAIRPERSON: Thank you, counsel. Advocate Batohi, you are still under oath. Advocate Ngcukaitobi.

ADV NGCUKAITOBI SC: Thank you, Madam Chair. Advocate Batohi, can you tell us whether or not you have had

a chance ...[intervenes]

CHAIRPERSON: I beg your pardon, may I? I beg your pardon, sir.

ADV NGCUKAITOBI SC: I did not realise.

CHAIRPERSON: Yes, I thought that you would let us know that you have received the referral document to the President. Did you receive it?

ADV NGCUKAITOBI SC: No.

CHAIRPERSON: Not as yet.

10 **ADV NGCUKAITOBI SC:** I am sure at some point it will be produced.

CHAIRPERSON: It will be produced.

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: They are still trying to locate it, Chairperson.

CHAIRPERSON: Yes, thank you. You may proceed ...[intervenes]

ADV BATOHI: The correct version.

CHAIRPERSON: ...Advocate Ngcukaitobi.

ADV NGCUKAITOBI SC: Yes, thank you, Madam Chair. We
20 will come back to it whenever it is produced, but Advocate Batohi, I am still on 3.1.1.1. And when we adjourned, I had asked you to study the whole charge sheet and to tell us whether or not there is an allegation that Advocate Chauke sought improperly to get Advocate Mlotshwa to sign the indictment.

ADV BATOHI: There is not.

ADV NGCUKAITOBI SC: Thank you very much. Now, can I ask you about 3.1.1.2? It says that presumably you recommended to the then-acting National Director of Public Prosecution, Advocate Nomgcobo Jiba, the application for issuing a racketeering authorisation in terms of Section 2(4) of the POCA Act, whereas there was no evidence justifying the institution of racketeering charges against the accused. Now, the recommendation that is referenced there, is it the
10 document we went through repeatedly, which is PP'd by Advocate Chauke? I just want to get the ...[intervenes]

CHAIRPERSON: Would you please repeat your question, counsel?

ADV NGCUKAITOBI SC: Maybe what is better is that I must just refer to the document itself.

ADV BATOHI: I think that would be helpful.

ADV NGCUKAITOBI SC: My learned junior will find it now. The question really is this. You had a discussion with Madam Ramagaga about whether or not Advocate Chauke's
20 recommendation was PP'd or signed by him. I just want to know if the charge is referring to that particular document.

ADV BATOHI: That is certainly one of the documents it will be referring to. I am not sure if it is the only one.

ADV NGCUKAITOBI SC: All right, let me find the specific document right now because you might help us on that. But

the second question I have, I will come back to this as soon as we find it ...[intervenes]

ADV BATOHI: I think I should try to find it as well. Chairperson, if I can get some assistance so that we have the documents ready. Through you, Chairperson, I am not sure where these documents are.

CHAIRPERSON: Yes, yes, madam. Advocate Hulley, where' is your junior? He does not appear to be here.

ADV BATOHI: They are trying to find the documents.

10 **CHAIRPERSON:** She is trying to find the documents.

ADV HULLEY SC: [indistinct – 0:04:12]...

ADV NGCUKAITOBI SC: No, my junior was quick on the mark. It is LO00780.

CHAIRPERSON: M?

ADV NGCUKAITOBI SC: LO.

CHAIRPERSON: LO.

ADV NGCUKAITOBI SC: 00780.

CHAIRPERSON: 80.

ADV NGCUKAITOBI SC: Yes.

20 **CHAIRPERSON:** Is that an internal memo from Advocate Noko-Mashilo to Advocate Jiba?

ADV NGCUKAITOBI SC: Yes, Madam Chair.

CHAIRPERSON: Yes, thank you.

ADV NGCUKAITOBI SC: Yes. Dated the 15th of August, 2012. Now, the reason I ask ...[intervenes]

CHAIRPERSON: May we wait for Advocate Batohi? Do you have it?

ADV BATOHI: I do have it now.

CHAIRPERSON: You have it, madam.

ADV NGCUKAITOBI SC: Now, the reason I ask Advocate Batohi is that it is the only document I could find that uses the word, I have perused the documents and recommend the application. And when you look at what is recommended, is at 1.3 are the draft authorisations for section 2(1)(e) and
10 2(1)(f) of POCA. Is that what you are referring to in 3.1.1.2?

ADV BATOHI: This is definitely what we are referring to.

ADV NGCUKAITOBI SC: All right, that is fine. We can note that, that is the document you are referring to.

ADV BATOHI: I did not say it is the only document, but it is a document that we are referring to.

ADV NGCUKAITOBI SC: Show us any other document.

ADV BATOHI: I am not sure. If it is shown to me, then I might be able to comment on it.

ADV NGCUKAITOBI SC: Well, in your evidence-in-chief,
20 you did not make reference to any other document. In our own search, we did not find any other document where there is a recommendation for the signature of the racketeering authorisation, other than that document that involves Advocate Chauke.

ADV BATOHI: I think there is another document that is

prepared in his name, but is not signed by him.

ADV NGCUKAITOBI SC: Yes, exactly. That is the only document that is signed. I know what I am asking you.

ADV BATOHI: Mmm-mmm.

ADV NGCUKAITOBI SC: So I come back to my question. This is the only document we could find that is signed by Advocate Chauke.

ADV BATOHI: Relating to the racketeering authorisation.

ADV NGCUKAITOBI SC: Well, that is obvious, Advocate
10 Batohi, please, because I am talking about 3.1.1.2, which is about the racketeering authorisation.

ADV BATOHI: No, with all due respect, I do not want to take, things may not be that obvious. I want to make sure when I answer, we are clear about what I am asking.

ADV NGCUKAITOBI SC: All right, I apologise. Yes, the answer is yes.

ADV BATOHI: So in this case, it does relate to the authorisations for racketeering. That is correct.

ADV NGCUKAITOBI SC: Yes, well, let us make this clear,
20 because I just do not want to proceed. But as far as we could see, this is the only document signed by Advocate Chauke, which references a recommendation for the authorisation under section 2(4) of POCA, is that correct?

ADV BATOHI: That is my recollection.

ADV NGCUKAITOBI SC: Yes, thank you very much. Now,

with staying on 3.1.1.2, that charge has nothing to do with the predicate offences independently. I understand that predicate offences are part of POCA, but it has nothing to do with the separate charges. It is limited only to section 2(4), is that correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes, thank you. Now if we could also analyse 3.1.1.3, it says:

10 “Mr Chauke sought to defend the institution of the aforementioned racketeering charges in the review proceedings brought by Major General Booyesen to have the said racketeering charges set aside, and that he finalised the answering affidavit of the then acting National Director of Public Prosecutions, Advocate Nomgcobo Jiba, in the Booyesen review proceedings in opposing the review application, notwithstanding that there was no evidence justifying the
20 institution of racketeering charges against the accused.”

Now, is it the case of the NPA that when it says Mr Chauke defended those proceedings, it is referring to the role he played in the preparation of the answering affidavit of Advocate Jiba?

ADV BATOHI: It is definitely that.

ADV NGCUKAITOBI SC: Yes. Yes, but there is nothing else. It is only that.

ADV BATOHI: I will have to think about the evidence carefully. I have led a lot of evidence, and I do not want to concede that it is only this if I have not really carefully considered what the evidence is. So I need to think about this. Mmm...

ADV NGCUKAITOBI SC: You know, Advocate Batohi, you
10 have spoken in this enquiry, I think, for 12 days. For you to say you still have to think carefully about the evidence really sends a negative signal.

ADV BATOHI: That is your opinion, Advocate.

ADV NGCUKAITOBI SC: But I presume you have thought about the evidence you have given for the last 12 days.

ADV BATOHI: I certainly, it has been something that has consumed me for the past 12 days, but there is a lot of evidence. So I need to be careful when I say it is the only evidence because there is a lot that is on my mind. So I need
20 to think about this. I do not want to concede, and then there is something else. So I should be allowed to think about this carefully.

ADV NGCUKAITOBI SC: I am not asking you not to think about it, but I am putting to you that before you gave the evidence, you should have thought about it. You cannot be

asking to think about it during cross-examination.

ADV BATOHI: That is your view. I am going to think about it anyway before I answer your question. So this is mmm, definitely one of the aspects mmm, of his defending the institution of racketeering. I am trying to think about whether there is anything more in this respect. Mmm...

ADV NGCUKAITOBI SC: Can I also assist you? The charge itself limits the factual basis to the finalisation of the answering affidavit. It does not include any other thing.

10 **ADV BATOHI:** If I may on that point say that these, the chapeau to these charges, if we want to call them charges, for want of a better word, states at 3.1, his direct or indirect conduct, should be the direct or indirect conduct of Advocate Chauke relating to his fitness and propriety to hold office based on information including, but not limited to, the matters related to the following allegations. And my point is that in as much as these attempt to set out or do set out conduct of Advocate Chauke in this context, it is not limited to this.

ADV NGCUKAITOBI SC: Well, this is what I am debating
20 with you, Advocate Batohi. What is the indirect conduct that is referenced?

ADV BATOHI: So I need to think about all the evidence that I have provided thus far.

ADV NGCUKAITOBI SC: But I am asking you, I am putting to you that the charge is 3.1.1.3. You are saying in answer

to me, no, no, no, look at indirect evidence. And I am asking you, what is the indirect evidence?

ADV BATOHI: With all due respect, I did not say look at indirect evidence. What I said is that I was reading out the chapeau and I said it states including, but not limited to, matters related to the following allegations. My point being, not about indirect conduct, but about the fact that the allegations are not limited to what is set out in 3.1.1.1 until 3.1.1.5. That was the point.

10 **ADV NGCUKAITOBI SC:** Now, what are the other allegations that are not included? What we cannot have?

ADV BATOHI: Well, for example, the allegations relating to the signing of the Advocate Chauke's request for Advocate Mlotshwa to sign the indictment.

ADV NGCUKAITOBI SC: No, please.

ADV BATOHI: That should have been included here.

ADV NGCUKAITOBI SC: Please, please, Advocate Batohi, we are at 3.1.1.3. At the stage at which Major General Booyesen is in court, the NDPP is filing an answering affidavit.

20 The charge tells us that its scope is the finalisation of the answering affidavit. You are resisting my submission to you that that scope is limited. You are saying it is unlimited. I am asking you, what are the other facts that support the defence of that review application?

ADV BATOHI: I do not know for now if there are any other

facts.

ADV NGCUKAITOBI SC: Thank you very much. Can we then go to a second aspect of that charge? You know, the last line, which starts with off racketeering charges against the accused ...[intervenes]

CHAIRPERSON: I beg your pardon, counsel, to interpose. The question that you asked Advocate Batohi in relation to the specific aspect, that is the scope of 3.1.3, might we look at page 66 of the affidavit? It might help us. Page 66 of the
10 record that contains your affidavit, paragraph 156. You have it, Advocate Batohi?

ADV BATOHI: In a moment, Chairperson. Yes, I am there.

CHAIRPERSON: Paragraph 156 of your affidavit gives us the essence of the allegations against Advocate Chauke. And for the purpose of the last question by counsel, we may look at 156.4. You remember that?

ADV BATOHI: I do, Chairperson.

CHAIRPERSON: You see that?

ADV BATOHI: Mmm-mmm.

20 **CHAIRPERSON:** And by mere looking at paragraph 156, giving us the essence of those allegations against him, that is Advocate Chauke, the essence is there. And it includes 156.4, to the extent that he settled the affidavit of Advocate Jiba. And there appears to be nothing more in that paragraph 156 as regards the question that is put to you. Am I correct?

ADV BATOHI: This is the essence of the allegations indeed, Chairperson, which is summarised in this paragraph.

CHAIRPERSON: I am specifically referring to 156.4.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: As regards the question that is put to you regarding the conduct of, the alleged conduct of Advocate Chauke in settling the answering affidavit of Advocate Jiba. And I am asking, is it correct that there is nothing more to this paragraph 156.4 in this affidavit? Your affidavit?

10 **ADV BATOHI:** Chairperson, I am not sure if there is nothing more because this was, as I said, summarising the essence of the charges. I do not know if this is dealt with anywhere else in the affidavit.

CHAIRPERSON: But this is your affidavit, counsel, with the greatest of respect to you. You should be able to help us because it is your testimony. You should know this affidavit better than us. It is your affidavit under oath.

ADV BATOHI: Mmm-mmm.

20 **CHAIRPERSON:** Otherwise, we are going to have to adjourn again and read this affidavit so that we ascertain whether there is any other part in your affidavit that makes reference to the further conduct of Advocate Chauke that is impugned.

ADV BATOHI: I am trying to go through the affidavit quickly, Chairperson, to the other sections and look at whether it was covered because I know when we were drafting it, we dealt

with the allegations and then we summarised the essence. So I suspect that it would be covered somewhere else as well.

CHAIRPERSON: May I request the lady next to you and the junior counsel over there, if there is anything else that you might have picked that may be of help to Advocate Batohi, do not hesitate to bring it to her attention.

ADV BATOHI: Yes, if they could check in the electronic version, it will be easier perhaps.

CHAIRPERSON: You may quickly, counsel, look at the
10 electronic version.

ADV BATOHI: I am advised 146 might be applicable.

CHAIRPERSON: I think 146 is just a replica of what is stated
in 156, the essence of it. 146 reads:

“In response, Jiba deposed calls to an answering affidavit. This affidavit was according to Advocate Chauke himself, finalised by him.”

And that reiterates what appears as an essence at paragraph 156.4.

20 **ADV BATOHI:** That is correct, Chairperson. I am checking 180 as well. 180.8, I think, Chairperson. Those are the only other places that they can pick up electronically, Chairperson, and so we should accept that those are the only places where this is mentioned.

CHAIRPERSON: 180.8, page 76 of your affidavit. And the

heading there reads:

“There is *prima facie* evidence that Advocate Chauke was complicit in the fraud and perjury charges levelled against him.”

And 180.8.1 reads:

“Chauke deposed to a confirmatory affidavit in the GCB case, where he confirmed that he finalised Advocate Jiba's answering affidavit before Gorven J's judgment gave rise to the fraud and perjury charges against Advocate Jiba.”

I suppose the point that you are referring to is the first line of 180.8.1, that again, and not necessarily so, that he deposed to a confirmatory affidavit, supposedly following the answering affidavit that you relied upon earlier. Is it a different matter?

ADV BATOHI: No, it is the same matter, Chairperson.

CHAIRPERSON: Thank you.

ADV NGCUKAITOBI SC: Thank you, Madam Chair. I think, could we just come back to this topic because I am just not sure if there is any difference. Let us start with 3.1.1.3, which is the charge.

ADV BATOHI: Mmm.

ADV NGCUKAITOBI SC: Okay. Now the charge says:

“You sought to defend the institution of the

10 aforementioned racketeering charges in the review proceedings brought by Major General Booysen to have the said racketeering charges set aside, and that you finalised the answering affidavit of the then-acting National Director, Advocate Nomgcobo Jiba, in the Booysen review proceedings in opposing the review application, notwithstanding that there was no evidence justifying the institution of the racketeering charges against the accused.”

Now, my question to you was, my reading of this charge is that the scope of that charge is limited to the role Mr Chauke played in the preparation of the answering affidavit of Advocate Jiba. Your answer was, no, it may be broader than that. That is where the discussion started. Now the Chair then intervened to say, perhaps your affidavit can shed more light. Now let us look at each of the paragraphs you have now cited, starting with 146. Paragraph 146 reads:

20 “In response, Jiba deposed to an answering affidavit. This affidavit was, according to Advocate Chauke himself, finalised by him.”

Would you accept that that is the same as 3.1.1.3? It does not add any additional facts.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Now let us go to paragraph 156. Now paragraph 156, the relevant part, as pointed out by the Chair, is 156.4, which says:

“He settled the affidavit of Jiba and the allegations contained in Jiba's affidavit were found to be false, and as such he had made himself party to those false allegations.”

But the conduct is still the same. It is the role he played in the finalisation of the answering affidavit, is that correct?

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

ADV NGCUKAITOBI SC: And then the last one is paragraph 180.8.1, which reads:

“Chauke deposed to a confirmatory...”

Should be a confirmatory affidavit;

“...in the GCB case where he confirmed that he finalised Advocate Jiba's answering affidavit before Gorven J, Gorven's judgment gave rise to the fraud and perjury charges against Advocate Jiba.”

20 Again, would you accept that the conduct is still the same?

It is the role of Mr Chauke in the finalisation of the affidavit by Advocate Jiba.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. We can then come back to where I started. There is no other case that Advocate Chauke

faces other than the role that he played in the finalisation of the answering affidavit of Advocate Jiba, is that not correct?

ADV BATOHI: Yes, let me just say that there is different actions that Advocate Chauke took in this process. For example, liaising with the team and Advocate Hodes, but it is all in relation to the finalisation of this affidavit.

ADV NGCUKAITOBI SC: Yes, but I have never asked you about those sub steps. I asked you that the conduct you are worried about is the role he played in the finalisation of the answering affidavit. Obviously, he did many things, including signing a confirmatory affidavit, but what I want us to agree about is that that charge, the scope of it, is limited to the role he played in the preparation of the answering affidavit.

ADV BATOHI: I am trying to answer this certain, in a way that conveys precise, well, not precisely, because it is difficult to be precise, but conveys the full scope as has been put to me of his conduct in defending the racketeering charges. Certainly, the finalisation of the answering affidavit is mmm, an important aspect of that conduct mmm, and is the one that is referred to in this subparagraph or 3.1.1.3, mmm... and I hear Advocate Ngcukaitobi saying that he does not want the sub steps, but it relates to the scope. That is the conduct broadly, and so to that extent, I can agree that it relates to that conduct.

ADV NGCUKAITOBI SC: Yes, now, thank you. Now, the

charge is even more limited because it is about the finalisation of the answering affidavit. Now, you have other things you wish to add to the charge, but they are not in the charge.

ADV BATOHI: So as I mentioned earlier, I have testified about what I know and what I have experienced and what I have found in this process, and I am not attempting to add anything. I am giving evidence, and in my view, it is because of the chapeau 3.1, what I am saying is admissible and should
10 be considered because these sub paragraphs, if you want to call it that, one 3.1.1 to 5 are not limited, and so I am giving evidence about what I know and what I have experienced, and that is all I can do here.

ADV NGCUKAITOBI SC: Advocate Batohi, you are still not answering my question. The question is straightforward. That charge, I know the word charge is a strong word, but it was introduced, thankfully for all of us, by the Chair, refers to the finalisation of the answering affidavit. It does not refer to these other steps you are talking about.

20 **ADV BATOHI:** But it includes them.

ADV NGCUKAITOBI SC: Where does 3.1.1.3 include them?

ADV BATOHI: I said the chapeau includes them.

ADV NGCUKAITOBI SC: Yes. So the preamble.

ADV BATOHI: Yes, 3.1.

ADV NGCUKAITOBI SC: Yes. Now, now, we are still to look

at where, what the draft was, because it seems to me that the simplest thing would have been to tell Mr Chauke that you are accused of preparing the answering affidavit. You are also accused of the following preparatory steps because that is all information that was within your knowledge when these charges were prepared. Is that not correct?

ADV BATOHI: It was within my knowledge, that is correct.

ADV NGCUKAITOBI SC: Yes. And now, why do not you include it in 3.1.1.3?

10 **ADV BATOHI**: If we wanted to include everything, we would have had to include Dr Broughton's bundle as the charge sheet, because it has lots of conduct of Advocate Chauke that would fit into some of these, like his role in preparing the answering affidavit.

ADV NGCUKAITOBI SC: But Advocate Batohi, I am asking you about one aspect. I have not even come close to Dr Broughton. I am asking you about the preparatory steps that you have sought to add to 3.1.1.3. Why were they not reflected, could have been one sentence in 3.1.1.3?

20 **ADV BATOHI**: I cannot answer why it was not included, but that is my evidence.

ADV NGCUKAITOBI SC: Thank you very much. Then I said to you that there was a further aspect of this charge, when in my analysis, I could not understand. It talks at the end, in the last line, with racketeering charges against the accused.

Now, on the one hand, it may appear to refer to all of the accused. And on the other, it may appear to refer only to Major General Booysen. Does it refer to Major General Booysen only, or does it refer to all of the accused?

ADV BATOHI: I am looking at the context of this charge, well, for want of a better word, and the way it is framed in order to answer your question. It says here, he finalised the answering affidavit of the then-acting NDPP Advocate Jiba in the Booysen review proceedings in opposing the review application, notwithstanding that there was no evidence justifying the institution of racketeering charges against the accused. Now, given that it is referring to the Booysen review application, my interpretation of that would be that it refers to Booysen alone.

ADV NGCUKAITOBI SC: All right, so unlike 3.1.1.1, which you said refers to all of the accused, 3.1.1.1.3 refers only to Major General Booysen.

ADV BATOHI: Yes, that is correct.

ADV NGCUKAITOBI SC: Yes. And can you explain why it did not say against Major General Booysen?

ADV BATOHI: I cannot.

ADV NGCUKAITOBI SC: Because that, again, would have been a very simple insertion, you would accept that?

ADV BATOHI: To the extent that it is relevant, it would be a simple insertion. But it does not make a difference to what

is said there.

ADV NGCUKAITOBI SC: Well, okay, let us talk about the relevance. It is clearly relevant to tell Advocate Chauke what the scope of the allegation is. And if the scope is limited to Major General Booyesen, it is relevant to tell him that. Would not you accept that?

ADV BATOHI: Well, in this context, it is telling him that.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: Now, if you look at 3.1.1.4 ...[intervenes]

10 **CHAIRPERSON:** Counsel, before you go there, and Advocate Batohi, this is just a clarity-seeking exercise on my part. Whilst we are still on 3.1.1.3, look at paragraph 142 of your affidavit. It is on page 60.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: This paragraph refers to the unlawful action on the part of Advocate Chauke as the *de facto* DPP. You remember?

ADV BATOHI: Mmm-mmm. I do.

20 **CHAIRPERSON:** That was your evidence. And now, when we unpack this allegation or this statement on your part relating to the unlawfulness or the alleged unlawfulness on his part, I suppose we should then go to the terms of reference 3.1.1.3 that we have just been talking about, and try to relate it to what you allege to be an unlawful action on his part. If one were to look at 3.1.1.3 regarding his having

finalised or settled the answering affidavit, on behalf of Advocate Jiba to defend the review application, will that per se constitute an unlawful action? Put differently, will the mere settling of an affidavit on behalf of the Head of the NPA in itself constitute an unlawful action? Because what I seek to understand is, precisely what is this unlawfulness that you are referring to? Is my question clear to you?

ADV BATOHI: Reasonably, Chairperson.

CHAIRPERSON: I beg your pardon?

10 **ADV BATOHI**: Reasonably clear. I will try to answer it. Chairperson, the unlawfulness of Advocate Chauke's conduct is all actions he took in the context of this matter, particularly relating to prosecutorial decisions as the *de facto* DPP in this matter. Those actions that he would have taken in that context would be unlawful. This particular act of finalising an affidavit, generally, it would not be, in fact, DPPs would be involved in such actions for a National Director to settle affidavits.

20 But if in the settling of the affidavit, you are actually taking a prosecutorial decision to appeal a matter or to recommend to the NDPP that this matter be appealed on the basis of the contents, or not appealed, the matter be opposed mmm... on the basis of what is contained in the answering affidavit, then in my view, that amounts to his role as the *de facto* DPP, and would, in fact, also be something that, a

decision a prosecutor would take in terms of opposing an application, and in that sense, it would be unlawful conduct.

CHAIRPERSON: Kind of a long answer, but I just want to ascertain from you whether that single act in relation to 3.1.3 of the terms of reference, specifically reflected as, I quote:

“He finalised the answering affidavit of the then-acting National Director of the public prosecutions, Advocate Nomgcobo Jiba, in the Booyesen's review proceedings...”

10 It is that act that I would like us to focus on so that I understand whether the allegation of unlawfulness in your affidavit at paragraph 142 covers that limited aspect of the terms of reference that I have just read to you. But let us not talk about anything else because I assume they will deal with further decision. I just want to clarify in my mind whether this act of settling an answering affidavit on behalf of the Head of the NPA in itself constitute an unlawful action.

ADV BATOHI: Chairperson, my answer to that is yes, it does, for the following reason, that a decision to oppose a
20 review application is a prosecutorial decision. And that decision to oppose was taken by Advocate Chauke and supported by him as reflected in the contents of the affidavit that he settled.

CHAIRPERSON: And that affidavit that he settled is not his affidavit. It is under the signature of the Head of the NPA.

ADV BATOHI: That is correct.

CHAIRPERSON: Who will take the rap for whatever is in that affidavit, irrespective of who settled it?

ADV BATOHI: That is correct.

CHAIRPERSON: Am I correct?

ADV BATOHI: Well, that is correct. She will take the rap for it to the extent that, you know, there is anything unlawful about that, if there is.

CHAIRPERSON: No, no, I just want to ascertain from you
10 as to, even if somebody drafts something for you as the Head of the NPA and you append your signature ultimately on that very document, it is you who is going to be accountable for whatever appears in the document that you sign.

ADV BATOHI: Yes, Chairperson, to the extent, with regard to the conduct of the signatory to an affidavit, you will be, but here we are looking at the conduct of Advocate Chauke before that in taking a prosecutorial decision.

CHAIRPERSON: I am not asking about that, counsel. I am just talking about a simple thing in relation to signature...

20 **ADV BATOHI:** Mmm-mmm.

CHAIRPERSON: ...and the impact of your signature on a document, irrespective of who drafted it, that you finally apply your mind to the contents of the document and decide if you align yourself with its content. That is what I am trying to ascertain with you, that finally, irrespective of who proposed,

who advised, who drafted it, you are the final decision maker in relation to the contents of this very document. That is what I am just trying to ascertain with you.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Yes, thank you.

ADV NGCUKAITOBI SC: Thank you, Chair. Advocate Batohi, I am still on 3.1.1.4. And perhaps to close off on the discussion you have had with the Chair, I understood that you accepted that the entirety of 3.1.1 is about racketeering. And
10 you also accepted that racketeering is within the exclusive power of the NDPP. Was I correct?

ADV BATOHI: Sorry, what section, 3.1 point?

ADV NGCUKAITOBI SC: Point 1, all of those sub-paragraphs are about racketeering.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: And racketeering is within the exclusive power of the NDPP.

ADV BATOHI: That is correct.

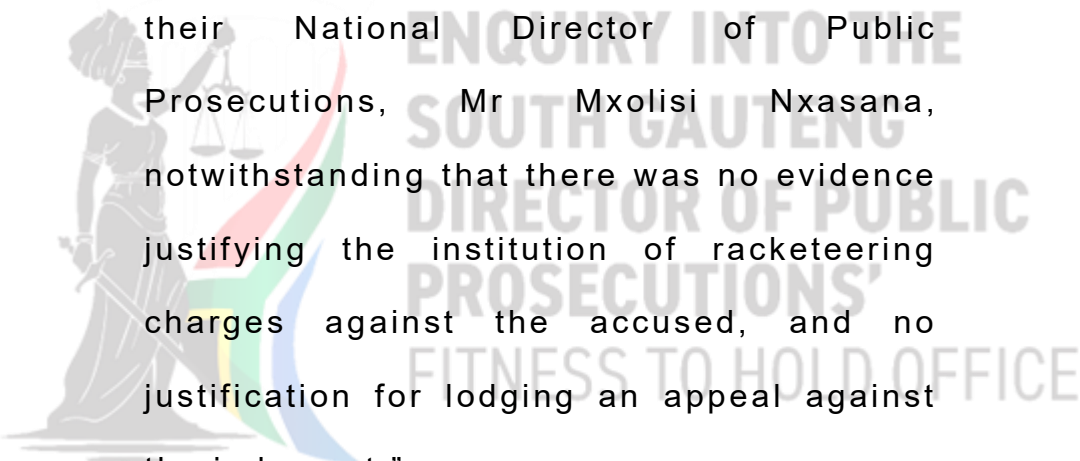
ADV NGCUKAITOBI SC: Now, I will go through now to
20 3.1.1.4, but just to close off on what the Chair has asked you, there is no charge that I have seen here that accuses Advocate Chauke of acting outside of his jurisdiction, particularly on racketeering, which is the exclusive power of the NDPP.

ADV BATOHI: I need to check this, Chairperson. If you will

give me a minute. Yes, there is nothing here that says he acted outside of his jurisdiction.

ADV NGCUKAITOBI SC: Thank you. Can we then move on to 3.1.1.4? And again, just to remind you, the exercise I am doing now is to analyse the charge to ascertain precisely what is the scope. It says you instituted, I am inserting you instituted:

10 “...an appeal against the judgment of Judge
 Gorven in the review case of Booyen
 versus acting NDPP without the approval of
 their National Director of Public
 Prosecutions, Mr Mxolisi Nxasana,
 notwithstanding that there was no evidence
 justifying the institution of racketeering
 charges against the accused, and no
 justification for lodging an appeal against
 the judgment.”



20 Now, you have not referred us to any record indicating the
 decision by Mr Chauke to institute the appeal. And perhaps
 you can come back on that on Thursday when you go through
 the record.

ADV BATOHI: I can try to deal with it now.

ADV NGCUKAITOBI SC: All right, carry on.

ADV BATOHI: To the extent that I can. I certainly will not have time to look at the record between now and Thursday.

The issue is that the matter of the appeal against the Gorven judgment, certainly Mr Nxasana, if he is called, will be able to give clarity on this. But my understanding is that... I think Advocate Chauke's response to the President might help us in this regard. If I could just have a look at that. Where is that letter? If you will bear with me, Chairperson. I just think there is something about this in this letter.

I think paragraph 42 deals with his response to the President, Chairperson. If I could just read it, it might help
10 me. Should I read it aloud, Chairperson, or just to myself?

CHAIRPERSON: You may, ma'am.

ADV BATOHI: Thank you, Chairperson.

“Mr President, following the judgment from the High Court, the prosecution team received a recommendation from Hodes SC who represented the NPA in the review application that there were good prospects of success in the appeal. Advocate Hodes expressed a concern that considering that
20 the DS for the lodgement of the application for leave to appeal were soon to expire, it would be advisable to provisionally launch the application pending the final authorisation from the NDPP, so as to avoid the compilation of having to seek

condemnation if the NDPP were to decide to pursue the appeal, and that if the NDPP decided against the appeal, it would simply be withdrawn. I was present at the meeting at which this was discussed.”

My reading of this then would be that Advocate Chauke decided to mmm... as it says, provisionally or advise or instruct, I should say, because it would be the instruction, Advocate Hodes would only act on the instruction of the NPA, 10 to provisionally launch the application pending authorisation from the NDPP, which means that at that point, there was no authorisation from the NDPP to do this, but Advocate Chauke indicates reasons why they needed to move quickly because of the DS, and so in my reading of that, it would be he is instructing Advocate Hodes to institute the appeal. Yes, thank you, Chairperson, that is my response.

ADV NGCUKAITOBI SC: I honestly do not understand what you have just said. My question is simple. You have not referred us to a single document in which it is recorded that 20 it was Advocate Chauke's decision to institute an appeal. Paragraph 42 does not say that.

ADV BATOHI: In my view, it does.

ADV NGCUKAITOBI SC: Show me the words there which says it was my decision to institute the appeal.

ADV BATOHI: It is my reading of that section that, my

conclusion, well, my reading of this is that Advocate Chauke decided to advise Advocate Hodes to provisionally lodge the application, which in my view is instituting the appeal, but of course, he says pending the authorisation of the NDPP.

ADV NGCUKAITOBI SC: So even though the paragraph does not say I instructed the institution of the appeal, you decided to read it as meaning that that is what it says.

ADV BATOHI: From the evidence, we know that the appeal was in fact lodged.

10 **ADV NGCUKAITOBI SC:** That is not the issue. The issue is whose decision was it. You have charged Mr Chauke as the person who made the decision. I am looking to see the factual basis for the charge, which presumably you would have had even before Mr Chauke made representations to the President.

ADV BATOHI: The factual basis is that Advocate Chauke, as the *de facto* DPP in this matter, met with Advocate Hodes, and after that meeting, there was an appeal that was lodged. And in my reading of that, it was on his instructions, because
20 if you read further, he then briefed, on paragraph 40, well... at paragraph 43, he says he briefed Dr Ramaite on the recommendation we had received from counsel. He expected, I am paraphrasing, Dr Ramaite to brief the NDPP. That is my reading of the evidence.

ADV NGCUKAITOBI SC: Now, Advocate Batohi, please help

us here. This paragraph 42 and 43 are things that happened way after you have recommended to the Minister that Mr Chauke must be charged for bringing the appeal. At that stage, when you took the decision, you must have had a factual basis. Point us to it.

ADV BATOHI: It is in the evidence bundle, Dr Broughton's affidavit and the evidence. My recollection in summary, as I mentioned, and I will mention again, is that Advocate Chauke mmm... if I am not mistaken, there was a prosecution memorandum that was drafted in support of the appeal. 10 Mmm... he met with Advocate Hodes, mmm... and thereafter, there was an appeal that was lodged without the NDPP's approval. In my understanding of that, Advocate Hodes would have acted on the instructions of Advocate Chauke.

ADV NGCUKAITOBI SC: Yes, all right. So as matters stand, you are relying exclusively on the report of Dr Broughton. You are not relying on any objective memorandum signed at the time to instruct the institution of the appeal.

ADV BATOHI: Dr Broughton's report has the evidence 20 attached to it. So I am talking about his report, which has a comprehensive dossier of evidence, which is about a lever arch, maybe more than that. I think it is a lever arch and a half full of the evidence. So I looked at documents and the evidence and not just what Dr Broughton said.

ADV NGCUKAITOBI SC: All right, so as I understand then,

again, to try and define the scope of the charge, you are saying if we read the report of Dr Broughton, we will find there a document prepared by Advocate Chauke which instructs the lodgement of the leave to appear.

ADV BATOHI: It is not what I said.

ADV NGCUKAITOBI SC: Well, I thought that is what we have been discussing for the last five minutes.

ADV BATOHI: We have been.

ADV NGCUKAITOBI SC: So then, when I asked you to
10 exclude the report to the Minister because it came after your decision and you said, well, look at Dr Broughton, and I am now asking you whether it is your evidence that Dr Broughton has attached to his report documentary proof of an instruction from Mr Chauke. Are we going to find it or not? Very simple.

ADV BATOHI: You will not find a document of that nature.

ADV NGCUKAITOBI SC: Yes, all right. Thank you very much. Now, I just want to go to the analysis of 3.1.1.5. It is alleged in this charge that:

20 “You (Mr Chauke) attempted to have racketeering charges against Major General Booyesen and members of the Cato Manor unit reinstated by the then National Director of Public Prosecutions, Mr Nxasana, notwithstanding that there was no evidence justifying the institution of racketeering

against the accused.”

Now, I have three questions. The first is whether or not this charge is limited to racketeering or includes the independent subsidiary offences.

ADV BATOHI: It is limited to racketeering in my understanding.

ADV NGCUKAITOBI SC: Thank you. The second is whether or not this charge suggests that there was no case of racketeering for everyone, not just Major General Booyen.

10 **ADV BATOHI:** It does. Well, let me read that quickly before I respond so fast, mmm... It does.

ADV NGCUKAITOBI SC: Yes. The third one is on what basis do you say it was Advocate Chauke who attempted to have the charges reinstated? Just show me the document where he tried to do that.

ADV BATOHI: I am trying to recall the evidence of what Advocate Chauke did after Advocate Nxasana was appointed... and... I cannot recall it at the moment, what exactly the evidence is in that regard.

20 **ADV NGCUKAITOBI SC:** You cannot recall?

ADV BATOHI: I cannot recall what the evidence is in this regard.

ADV NGCUKAITOBI SC: Yes, I understand. But it is unfair to ask you to recall all of the evidence.

ADV BATOHI: Thank you very much, I appreciate that.

ADV NGCUKAITOBI SC: I can ask you to recall at least one thing, which is on what basis did you suggest that it was Advocate Chauke who attempted to reinstate the charges? Surely you must recall that.

ADV BATOHI: I cannot recall what his conduct was at that point regarding what happened when, but for the appeal aspect mmm... I am not sure what more Advocate Chauke did. What I do know is Mr Nxasana at some point asked Advocate Chauke, after he raised the issue of him exercising, well, I
10 am not sure how it was exactly put, but the fact that Advocate Chauke had no jurisdiction in KZN, and he then said that this matter must be dealt with by Advocate Noko, that is what I recall. So I cannot, besides that, I do not know what exactly he would have done mmm... to have these charges reinstated after Mr Nxasana was appointed.

ADV NGCUKAITOBI SC: Yes. Because it seems to me ...[intervenes]

ADV BATOHI: If there is any evidence, it will speak for itself. As I said, I am testifying about things that happened when I
20 was not even there. So it is about the evidence that should speak and not my trying to recall what the evidence was. That is what the idea of this fact-finding is.

ADV NGCUKAITOBI SC: You see, Advocate Batohi, it seems there are two independent acts that are being conflated. The first one is whether there was ever any attempt to bring life

to these charges under Advocate Nxasana. The second is whether Advocate Chauke was involved at all.

ADV BATOHI: Mmm-mmm?

ADV NGCUKAITOBI SC: As I understand, you cannot help us on either.

ADV BATOHI: I cannot, but hopefully the evidence leader can look into this, and if there is any evidence that needs to be led, any facts that needs to be brought to the attention of this panel, it will be done. If there is not anything, that is the
10 position.

ADV NGCUKAITOBI SC: Can you recall when Advocate Nxasana assumed the office of NDPP?

ADV BATOHI: No.

ADV NGCUKAITOBI SC: If you go to LO00886...

CHAIRPERSON: Please repeat that, Advocate Ngcukaitobi?

ADV NGCUKAITOBI SC: Thank you, Madam Chair.
LO00886.

ADV BATOHI: Mmm-mmm.

ADV NGCUKAITOBI SC: There is an email of the 11th of
20 April 2021 at 2.51pm from Mr Chauke to Dr Ramaite. Can you see it?

ADV BATOHI: See one at 3.20, 2.51.

ADV NGCUKAITOBI SC: Yes, there is one below that.

ADV BATOHI: To Dr Ramaite.

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: Yes, I see that document.

ADV NGCUKAITOBI SC: Now Mr Chauke says:

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

10

accordingly informed the team leader, Advocate Maema, and the DPP KZN Advocate Noko.”

That is dated the 11th of April 2014, referencing a meeting with Advocate Nxasana on the 8th of April 2014, where Mr Chauke says he will no longer participate in any manner whatsoever on Cato Manor. So surely your evidence on 3.1.1.5 must show us that after this date, Advocate Chauke attempted to have the racketeering charges reinstated.

20 **ADV BATOHI:** As I said, I am not the only witness in this matter. I do not know what the evidence is going to show.

ADV NGCUKAITOBI SC: Well ...[intervenes]

CHAIRPERSON: Please repeat the question, and if you can just try maybe to confine yourself to the question that has been asked. If you know, yes. If you do not know, no. So

that we obviously know your stance about this question. Because I am not sure how you are answering it, Advocate Batohi.

ADV NGCUKAITOBI SC: Thank you, Madam Chair. Advocate Batohi, I referred you to the email of the 11th of April 2014 at 2.51pm, written by Advocate Chauke to Dr Ramaite, in which Advocate Chauke says bearing in mind the discomfort of the NDPP, which was expressed in the meeting of the 8th of April 2014, he withdrew from involvement in any
10 manner on the Cato Manor case. Now the question is, surely to establish 3.1.1.5, you would need to produce evidence that after the date of the 8th of April 2014, Advocate Chauke attempted to have the charges reinstated.

ADV BATOHI: My response to that is, I do not need to produce the evidence, the evidence leader needs to. I will testify about what I know, what evidence there is. I do not know what happened after that.

ADV NGCUKAITOBI SC: All right, let me not say you need to. Let me ask you, do you have the evidence?

20 **ADV BATOHI:** As I sit here, I do not have any evidence.

ADV NGCUKAITOBI SC: All right, thank you very much. Could I then try and do an analysis of the following charge ...[intervenes]

CHAIRPERSON: Just for clarity, and it is the evidence in relation to the alleged attempt to reinstitute.

ADV NGCUKAITOBI SC: Yes, yes, Madam Chair, correct.

CHAIRPERSON: The racketeering charges.

ADV NGCUKAITOBI SC: Correct. Now, could I also just try to analyse 3.1.2? That is the Mr Mdluli charge. Now, could I just understand the scope of this charge again? Now, I am going to reference a discussion that you had with Panel Member Ramagaga. When she asked you about the charge, particularly with the use of the word ‘in that’, as suggesting a limitation of the scope of the charge, you said in your
10 response, maybe these terms of reference must be amended. Can you explain why you said that?

ADV BATOHI: I cannot remember the context of that particular question, mmm...

ADV NGCUKAITOBI SC: You cannot remember?

ADV BATOHI: Let me read this and see what, try to gauge what I might have meant by that. To the extent that this is not complete in terms of the conduct of Advocate Chauke’s that we complain of, I would have possibly meant that. It should be amended to include his conduct, not just at the
20 point of withdrawal of the charges initially and submitting it to an inquest, but also his conduct after that, after the inquest hearings, not hearings, ja, there were hearings, after the inquest process was completed, his conduct in then not, in accepting, well, not accepting, his conduct in coming to a conclusion that the Magistrate found no evidence implicating

General Mdluli when that was incorrect.

The Magistrate's findings were confusing and contradictory. So in that regard, Advocate Chauke at that point ought to have reconsidered the matter, given two things. One is that the prosecution team said there was strong evidence against General Mdluli. The fact that the Magistrate's findings were confusing and also the fact that the representations of General Mdluli was a fanciful conspiracy. So that is the next point of decision-making.

10 Thereafter, Advocate Chauke case conduct after the Mdluli, not Mdluli, the Murphy judgment, when Judge Murphy was very critical of the conduct of Advocate Chauke and the decision was to reinstate the charges, if I am not mistaken. At that point, Advocate case now having a confusing inquest Magistrate plus Murphy, Judge Murphy's decision, which was also critical of the Magistrate's findings at that point, Advocate Chauke case then decides still not to proceed with the prosecution, but to in fact appeal the decision of Judge Murphy.

20 That is the conduct, that is what I would have meant it should be amended because it does not, it is not, it does not deal with all of the conduct of Advocate Chauke. My reading of it is that it relates potentially to the withdrawal of the charges and not the subsequent conduct.

ADV NGCUKAITOBI SC: Yes, no, that is correct. In fact,

we can read it together and you will see that your statement that you made is the correct statement. It says:

“Your failure...”

I am replacing ‘the’ with ‘you’;

“...to continue with charges against Lieutenant General Richard Mdluli for his involvement in the murder of Mr Tefo Abel Ramogibe...”

And then it says ‘in that’, now the words ‘in that’ are used
10 there to define the scope, the factual scope of the charge.

“...in that you, Advocate Chauke, caused the charge of murder relating to the killing of Mr Tefo Abel Ramogibe and related charges to be withdrawn, notwithstanding that there was strong evidence justifying the institution of a prosecution in the matter, which decision caused a significant delay in proceeding with the charges concerned.”

It seems clear that the scope of the charge is the withdrawal
20 and the simultaneous reference to an inquest. In order to bring in new matter, you have to amend it as you propose.

ADV BATOHI: I am not sure that the amendment is the only solution in this matter, certainly one of the options, but I go back to paragraph 3.1, which says, the conduct of Advocate Chauke relating to his fitness and propriety to hold office

based on information including but not limited to matters related to the following allegations, and 3.1.2 is included in that paragraph. And I would say that it is not included to that, it is not limited to that, and can be included.

ADV NGCUKAITOBI SC: In other words, according to you, a person can be charged on unnamed charges.

ADV BATOHI: No, but a charge, defects in the charge can be cured by evidence.

ADV NGCUKAITOBI SC: Yes, I do not think you are
10 answering my question. A person can be charged on unnamed charges.

ADV BATOHI: This is not an unnamed charge, there is a charge, it is just not comprehensive enough to include all the conduct.

ADV NGCUKAITOBI SC: Yes, the conduct that is included is the withdrawal, no other conduct is included.

ADV BATOHI: That is correct, no other conduct is included.

ADV NGCUKAITOBI SC: Thank you very much. Now, I want to stay on this charge of Mr Richard Mdluli, and I just want to
20 put a proposition to you for your comment. As you know, because Mr Chauke has made representations, he says he was uncertain about the strength of the evidence. Is it your case that a prosecutor does not need to be certain about the strength of the evidence?

ADV BATOHI: That is not my case, that is what Advocate

Chauke says.

ADV NGCUKAITOBI SC: No, I understand that, his justification is that he was uncertain. I am asking you why he is being charged. Is he being charged because you are saying a prosecutor does not need to be certain about the evidence before they enrol a matter?

ADV BATOHI: That is not the reason why he is being charged.

ADV NGCUKAITOBI SC: But what is your answer to my
10 question? Are you saying that the prosecutor does or does not need to be certain about the evidence before they put the matter for a charge?

ADV BATOHI: A prosecutor must be certain of the evidence.

ADV NGCUKAITOBI SC: Yes. Now ...[intervenes]

CHAIRPERSON: Perhaps, counsel, Advocate Batohi, are you suggesting that the prosecutor as regards the evidence that is to be presented at a trial, in the state of charging, a prosecutor must be certain of all the evidence that needs to be presented to prove the charge? Is my understanding
20 correct?

ADV BATOHI: [No answer]

CHAIRPERSON: Or should there be merely a *prima facie* evidence to institute that charge? If you can clarify that to me or clarify your answer to Advocate Ngcukaitobi.

ADV BATOHI: Chairperson, yes, thank you for that question.

I am not suggesting that at the point of charging initially, a prosecutor has to be certain of all the evidence because at that point, it could in fact be *prima facie* evidence. It could be a situation where a person has been charged because there is sufficient evidence to charge. But at that point, you should be certain of that level. Whether it is *prima facie*, you must be certain that you have sufficient basis to charge the accused at that point.

10 It does not mean that it will be all the evidence because investigations could continue and more evidence could be gathered. So, but I think the question that I was answering to Advocate Ngcukaitobi was slightly different. My understanding of his question is that if a prosecutor, well put conversely, is uncertain of the evidence, should you charge? And my answer to that was no, you should not.

CHAIRPERSON: Thank you.

ADV NGCUKAITOBI SC: Thank you. Well, it seems you have given inconsistent answers to my question and the Chairperson's question, which are effectively the same
20 question. Maybe let me give you a chance to clarify what should a prosecutor be certain about, what is he allowed to be uncertain about before he makes a decision to charge?

ADV BATOHI: Well, firstly, let me say I have not given inconsistent answers. I have answered different questions. Mmm... and to your question, and the record will show, we

can go back, your question was put conversely whether a prosecutor should enrol a case if he is not certain of the evidence. And I said, no, that should not be the case. The Chairperson's question went further and asked whether at the stage of charging, a prosecutor must be certain of all the evidence and whether, should not there be a *prima facie* evidence?

And my answer to that was that when a prosecutor charges, they need to be certain that at that point it meets
10 the standard that is required for the enrolment of a matter. That could be either at the level of *prima facie* evidence, which is completely in order for you to enrol it, but that does not mean you are certain of all the evidence because there could be evidence that is obtained after that. So I hope I am clarifying. In my view, I am not giving inconsistent answers because the questions were slightly different.

ADV NGCUKAITOBI SC: Yes, thank you very much. Now, could I also ask you about the allegations in relation to the Mr Mdluli? Is it correct that you relied exclusively on the
20 memorandum by Advocate Garth Hulley SC?

ADV BATOHI: That is not correct.

ADV NGCUKAITOBI SC: What else did you rely on?

ADV BATOHI: Prior to me asking for his opinion, I had received the opinion of Advocate Nalane who recommended the... that this be one of the matters that be included in any

referral to the President mmm... I had Advocate Chauke's response to that in the form of Advocate Maenetje's opinion mmm... I think I must just look at my letter that I sent to Advocate Chauke, before I respond further, to make sure that I am clear that my recollection of what happened a couple of years ago is correct. Might be an attachment to my affidavit, Chairperson.

CHAIRPERSON: Is it when you requested Advocate Chauke to present further information ...[intervenes]

10 **ADV BATOHI:** On the five matters.

CHAIRPERSON: I beg your pardon, may I finish?

ADV BATOHI: My apologies.

CHAIRPERSON: In a document attached to your affidavit, SB6 at 240. And I am not sure, I am not sure whether this is a document. Where you requested for further information relating to the decision made by you as the DPP Gauteng, Johannesburg and Advocate Chauke then responded from SB6241. Is that a document?

20 **ADV BATOHI:** Yes, I think it is SB5, Chairperson. I will just check that now.

CHAIRPERSON: You see, the one that I am referring you to, just let us deal with the one that I am referring you to first. That one is SB6241, attached to your affidavit. Those additional documents that you filed of record and in the first heading, he deals with the Richard Mdluli murder case and

related charges. Is that a document you wish to refer to?

ADV BATOHI: No, Chairperson.

CHAIRPERSON: Okay, let us look at SB5 that you referred us to then. Only SB5 that I have here is your request to Advocate Chauke, SB5231.

ADV BATOHI: That is correct.

CHAIRPERSON: Which then culminated in his response at SB6.

ADV BATOHI: That is correct.

10 **CHAIRPERSON**: The SB5, is that the one that you are looking at, your request to him?

ADV BATOHI: That is correct, yes. I am looking at paragraph 2 on page 232. So I had access to documentation in a file. I had a 2.2, there was a decision, a Court decision. In fact, there would have been all the decisions. It would have been the Judge Murphy decision as well as the SCA, Brandt decision as I set out mmm... So I would have had also Advocate Chauke's response to this matter in SB6. I think that is all the information I would have had. That is
20 information I would have had before the opinion from Advocate Hulley.

MS RAMAGAGA: Ja, I noticed, we noticed that now past 12 o'clock. Thank you.

ADV NGCUKAITOBI SC: 12.03.

MS RAMAGAGA: Ja, past 12 o'clock.

ADV BATOHI: Thank you for reminding us because I cannot be late for my appointment.

CHAIRPERSON: I had actually thought that maybe I should find out, counsel, whether you are ending it up at General Mdluli's point, the last, the terms of reference 3.2, or you want to exhaust this question before we step out?

ADV BATOHI: Chairperson, may I please comment on that? Well, let us hear what Advocate Ngcukaitobi says first.

CHAIRPERSON: That is fair because I am asking him the
10 question, not yourself. Should you not wrap up or you want to tie it up?

ADV NGCUKAITOBI SC: Madam Chair, I can stop now. It is not a convenient place, but the agreement was that we would cut off at 12.00, so I should stick to that.

CHAIRPERSON: Advocate Batohi, as counsel mentions, it may not be a very convenient point to leave the questions hanging, but given your request, we will, I see you anticipate what I am going to say, we will definitely adjourn because we bear in mind your earlier request that you be afforded an
20 opportunity to go and attend to your personal matter.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: So you need not change your face because ...[intervenes]

ADV BATOHI: Thank you, Chairperson. I am only human.

CHAIRPERSON: ...because we are going to adjourn to keep

our undertaking to enable you, as per your request, to adjourn now until Thursday morning. To all concerned, counsel, Advocate Batohi, we will adjourn and reconvene on Thursday morning, the 11th at nine o'clock. In the meantime, we will request that we be furnished with the document that was to be provided earlier so that when we reconvene, we would have had a look at it. Please instruct your team to file that document or give us copies.

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

10 **CHAIRPERSON:** We will adjourn until the 11th of December, Thursday at nine o'clock. Thank you.

ENQUIRY ADJOURNS UNTIL 11 DECEMBER 2025



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