

**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**

11 DECEMBER 2025

DAY 15



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

PROCEEDINGS ON 12 DECEMBER 2025

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

ADV BATOHI: Good morning, Judge. Good morning to the Panel. Good morning to Advocate Chauke and his team. Good morning to the Evidence Leaders, who I have also not seen this morning, and my counsel as well.

CHAIRPERSON: Good morning, *Nthate* Chauke. Let me place on record the following, that the evidence leading team
10 filed an interlocutory application to amend the terms of reference. The application was filed of record yesterday, Wednesday, the 10th of December 2025, at 09:37. Advocate Chauke's team has not had an opportunity to file an answering affidavit. As we discussed in chambers, the parties have agreed that Advocate Chauke's team will file an answering affidavit tomorrow, Friday the 12th of December 2025, and that the evidence leading team, if they are so minded to do so, will file the replying affidavit on Saturday, the 13th of December 2025. The Panel will consider the
20 interlocutory application and make a decision in the course of next week. We so order.

ADV MOHLAMONYANE SC: As you please.

CHAIRPERSON: Advocate Ngcukaitobi, we paused when you were cross-examining. Advocate Batohi, let me remind you, madam, that you are still under oath.

ADV BATOHI: Noted, Chairperson.

CHAIRPERSON: You may proceed, Advocate Ngcukaitobi.

SHAMILA BATOHI: (still under oath)

CROSS-EXAMINATION BY ADV NGCUKAITOBI SC

(CONTINUES): Thank you, Madam Chair. We are indebted to the Panel. Advocate Batohi, if you recall, when we adjourned on Monday, I was still dealing with the basis for the charge in relation to, I think, Lieutenant General Mdluli. Do you recall that?

10 **ADV BATOHI:** I do.

ADV NGCUKAITOBI SC: Now, you will also recall that I had asked a question as to whether or not there was an exclusive reliance on the opinion of Advocate Katgale [?], and your answer was that there was not. You had other material you looked into. Correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Now, can I just understand, why did you approach Advocate Katgale? What was the problem?

20 **ADV BATOHI:** There was not a problem. It was just that I was wanting to, at that stage, I had looked at the opinions. I had considered the other material that I mentioned yesterday, so I will not – well, the last time we were here, I will not repeat that. I had not looked closely at the evidence itself. Advocate Hulley and Wentzel were at the Zondo Commission, and had an intimate knowledge of the evidence itself.

I then asked him for that, for an opinion, together with aspects of the evidence that I could look at. And the purpose of this, really, was to make sure, as I mentioned, that I was – that if I did refer the matter, that I had taken all the steps that I could have to make sure that I was not getting it wrong.

ADV NGCUKAITOBI SC: Now, the evidence you say you had not looked at, what evidence is that?

ADV BATOHI: Those were the attachments to Advocate
10 Hulley's and Wentzel's statement, well, opinion. We can have a look at that. But included in that was the statement of Colonel Roelofse, who was the investigating officer that summarised aspects of the evidence in the docket.

ADV NGCUKAITOBI SC: Yes. So, it is the statement of Colonel Roelofse. What else?

ADV BATOHI: Maybe we need to go to Advocate Hulley's and Wentzel's affidavit, just to see what was attached to that.

CHAIRPERSON: I think, Counsel, we can, if you have that legal opinion readily, you can take us to the page.

20 **ADV NGCUKAITOBI SC:** I think the witness has found it.

ADV BATOHI: I found the affidavit, Chairperson. I do not have the annexures here. I will have to quickly – they are not attached to this affidavit.

CHAIRPERSON: In our bundles it is LO4. It is LO4. LO, Volume 4.

ADV NGCUKAITOBI SC: And the page?

ADV BATOHI: The page number is, Chairperson?

CHAIRPERSON: 47.

ADV NGCUKAITOBI SC: It is 001047. Yes, yes, yes.

CHAIRPERSON: Thank you, Counsel.

ADV BATOHI: Ja, right. Chairperson, I can ...[intervenes].

ADV NGCUKAITOBI SC: Can this lady who is sitting next to you stop giving answers?

ADV BATOHI: No, she is not giving answers.

10 **ADV NGCUKAITOBI SC:** No, no, no, she is giving an answer. I have heard it, so I am just cautioning her. Please continue, Advocate Batohi, it is not your fault.

ADV BATOHI: May I ask, Chairperson, what answer did she give?

ADV NGCUKAITOBI SC: All right.

ADV BATOHI: Because I did not hear any answer.

CHAIRPERSON: Please, let us not get there. Let us not have that kind of an exchange.

20 **ADV BATOHI:** Chairperson, the only reason why I am asking is because this is a record, and I would not want it to be that she is giving me answers because she is helping me find ...[intervenes].

CHAIRPERSON: I think it is easy, Counsel, to simply say she did not give me any answer.

ADV BATOHI: Thank you, Chairperson. She did not give

me any answers.

CHAIRPERSON: That would be enough.

ADV NGCUKAITOBI SC: All right, well ...[intervenes].

CHAIRPERSON: There also, whatever you say, Madam, will get into the record. The transcription is very, very sharp. If you need to talk to her, or just to give her documents, give her documents, but do not speak because it is going to get into that microphone, whatever you say. Proceed, Counsel. We have ...[indistinct] 1047.

10 **ADV BATOHI:** Chairperson, I am there. This is the opinion of Advocate Hulley and Wentzel, but it is not the annexures. So if I need to answer that question, unless we have the annexures available somewhere in the bundle, I will need to quickly look at. I see these annexures are boldened in the affidavit. It might not be too difficult to go through it quickly. At paragraph 1049, if I may, Chairperson.

CHAIRPERSON: You may.

ADV BATOHI: At paragraph 1049, sorry, page 1049, paragraph 5, the affidavit of Colonel Roelofse, who
20 investigated the charges against Lieutenant General Mdluli was attached, marked A.

ADV NGCUKAITOBI SC: Yes, thank you. What else?

ADV BATOHI: I do not know, I am just checking to see what it is. I see B is a copy of a letter.

ADV NGCUKAITOBI SC: So let us just stop there. That

letter in B has nothing to do with the charge against Lieutenant General Mdluli. Is that correct?

CHAIRPERSON: And where, for the purpose of the record, where is B, Annexure B?

ADV BATOHI: It is paragraph 20, Chairperson.

ADV NGCUKAITOBI SC: It is referenced at LO001, 1057. It is a letter that General Mdluli addressed to President Zuma on the 11th of November 2010. It is referred at paragraph 19 and 20. What I am asking you is that letter has nothing to do
10 with the docket against Lieutenant General Mdluli.

ADV BATOHI: It gives context to Lieutenant General Mdluli's representations to Advocate Chauke in that he alleged a conspiracy as well.

ADV NGCUKAITOBI SC: I understand.

ADV BATOHI: But for that, nothing further.

ADV NGCUKAITOBI SC: Thank you very much. Then let us go to the next document.

ADV BATOHI: I think those are the only annexures.

ADV NGCUKAITOBI SC: Yes, thank you very much.

20 **CHAIRPERSON:** I beg your pardon. At paragraph 27, LO001059, paragraph 27, there is Annexure C there.

ADV BATOHI: That is correct, Chairperson.

ADV NGCUKAITOBI SC: Annexure C is at paragraph 27. Thank you, Madam Chair. But it is a letter by Mr Mdluli's attorney to Advocate Chauke, which is simply

representations.

ADV BATOHI: There is E, there is D and E as well.

ADV NGCUKAITOBI SC: Well, D is at paragraph 31, which again is a letter of the 31st of October 2011, which is an affidavit according to the summary here, which sets out his allegations of a conspiracy. Can you see that?

ADV BATOHI: I do see that.

ADV NGCUKAITOBI SC: Yes. Then there is E, which is at paragraph 32, which again references General Mdluli's
10 allegations of a conspiracy. Can you see that?

ADV BATOHI: I do.

ADV NGCUKAITOBI SC: And then there is F, which is at paragraph 36 of the opinion, which is a letter from Advocate Chauke to Advocate Van Zyl to ask for a response to the representations by General Mdluli. Can you see that?

ADV BATOHI: I do.

ADV NGCUKAITOBI SC: Yes. There is no other annexure referred to there.

ADV BATOHI: I just want to make sure. I thought there
20 were only two. Ja, it appears there is no other annexure. Yes, I see.

ADV NGCUKAITOBI SC: Now, therefore, what it means is that all of the annexures, except for the statement from Colonel Roelofse, all pertain to the representations that Lieutenant General Mdluli made and the responses given by

the NPA. Is that not correct?

ADV BATOHI: I just want to make sure that there are also responses given by the NPA because I am not sure about that part.

ADV NGCUKAITOBI SC: That is Annexure F.

ADV BATOHI: It is not a response. Well, it is a letter from Advocate Chauke requesting Advocate Van Zyl to provide him a report on the representations.

10 **ADV NGCUKAITOBI SC:** Yes, that is what I am talking about.

ADV BATOHI: That is correct. It is so.

ADV NGCUKAITOBI SC: So the only document there that explains the basis of the charge against Lieutenant General Mdluli is the statement of Colonel Roelofse.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes, thank you. Now, I want to come back then to what I was asking you. Advocate Nalane had given you an opinion. Correct?

ADV BATOHI: That is correct.

20 **ADV NGCUKAITOBI SC:** Advocate Moroka SC had not given you an opinion, but had given the Minister of Justice an opinion. Correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Despite the opinion of Advocate Nalane, you did not make a referral. Correct?

ADV BATOHI: Can you explain that question?

ADV NGCUKAITOBI SC: You did not write to the President asking for, or the Minister of Justice asking the Minister to ask the President to set up this enquiry.

ADV BATOHI: I did not do it after the opinion of Nalane, that is correct.

ADV NGCUKAITOBI SC: Yes, you did so only after the opinion of Advocate Katgale.

ADV BATOHI: I did so after I got the response from
10 Advocate Chauke in the form of Advocate Maenetje’s opinion, as well as the opinion of Advocate Hulley.

ADV NGCUKAITOBI SC: I thought we had covered this ground, because I do not want to keep trying to act as if I am catching you, because your own evidence-in-chief made it clear that by the time you went to Advocate Hulley, you had already asked him to send a letter.

ADV BATOHI: I did say that, but I had not made the final decision.

ADV NGCUKAITOBI SC: Which is at paragraph 2 of the
20 opinion by Mr Hulley SC:

“On 4 July 2023, we settled a draft letter for the NDPP in which she recommends that the State President institute an enquiry in terms of section 126(a) of the NPA Act into the fitness of Advocate

Chauke to hold the Office of the DPP.”

ADV BATOHI: I had not made a final decision in the matter, but certainly Advocate Nalane had recommended it, and I still wanted to make sure after I spoke to Advocate Hulley.

ADV NGCUKAITOBI SC: Yes, thank you. Now, you also mentioned that there were gaps in the opinion of Advocate Nalane. Is that correct?

CHAIRPERSON: I beg your pardon, Counsel. Now that you refer to paragraph 2 of Advocate Hulley's opinion, do we have
10 before us a letter requesting Advocate Hulley to prepare an opinion? I just want to follow the date on which that request was made, if any. Are you aware of the letter from Advocate Batohi requesting Advocate Hulley to prepare an opinion? In other words, a brief or a request?

ADV NGCUKAITOBI SC: No, Madam Chair. What we did, I was asking my junior now to remind me. The letter that was asked for is a letter of instruction to Advocate Nalane, which, as I understand, has not been produced yet. This has not been requested, but it is not in the bundles.

20 **CHAIRPERSON**: May we ascertain from Advocate Batohi if there was a letter of instruction ...[intervenes].

ADV BATOHI: I cannot recall.

CHAIRPERSON: May I finish, please?

ADV BATOHI: Certainly.

CHAIRPERSON: To Advocate Hulley, as you did with regard

to Advocate Nalane, if there is any such a letter of instruction?

ADV BATOHI: Chairperson, I will have to check the records. I do recall I spoke to Advocate Hulley about it. Whether there was a further brief from the State Attorney, we will have to look at, or whether he was already doing work for the NPA in this regard, I am not sure whether there was, so we will have to check that. I do not know whether there was a brief specifically for this opinion.

10 **CHAIRPERSON**: But you say that you had spoken to him? I suppose telephonically?

ADV BATOHI: That is correct.

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

CHAIRPERSON: May I also make a follow-up on that outstanding letter, the instructions to Advocate Nalane, so that we get all those documents placed before us before we forget? What has to be done now, because that letter was promised I think last week, or during early this week ...[intervenes].

20 **ADV BATOHI**: Chairperson ...[intervenes].

CHAIRPERSON: Have you been able to find the letter, the instruction letter to Advocate Nalane?

ADV BATOHI: Chairperson, the team has been looking for this. Perhaps they can assist in giving us an update on whether they have located it.

CHAIRPERSON: And may we find out from you, Advocate Mohlamonyane, and your team? I suppose that that letter, we can just record that that letter is still outstanding. And please, let it be made available to us as undertaken by the evidence-leading team.

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

ADV NGCUKAITOBI SC: May I please? If you have the letter, I think make it available so that you do not confuse the record. Do you have the letter, the instructing letter? Has it
10 been made available to you?

ADV MOHLAMONYANE SC: Madam Chair, I am informed by Advocate Lekgetho that it formed part of the list of exhibits. And I am told it is EXHIBIT 9 in the list of exhibits that were handed up sometime last week.

CHAIRPERSON: Yes, I think just to avoid confusing the record, when we adjourn for tea, draw our attention specifically to that document, make sure that we all have it in front of us. And then secondly, please ascertain whether there was a written communication by Advocate Batohi to
20 Advocate Hulley SC, and let us have those documents.

ADV MOHLAMONYANE SC: We will do that, Madam Chair.

ADV NGCUKAITOBI SC: Thank you, Madam Chair. Advocate Batohi, I think we had settled on a position here that there was no decision, whether preliminary or final on your part, informed by Advocate Nalane, but there was a

decision informed by Advocate Hulley SC. Is that correct?

ADV BATOHI: There was no final decision. There was no final decision.

ADV NGCUKAITOBI SC: I understand.

ADV BATOHI: Until after the opinion of Advocate Hulley and Wentzel.

ADV NGCUKAITOBI SC: Yes, I understand. So really the point here is that the decisive opinion that convinced you to make the referral was that of Advocate Hulley.

10 **ADV BATOHI:** Well, it was more the – it was, let me put it this way. It was looking at all the opinions, as well as in particular, the affidavit of Colonel Roelofse that summarised the evidence in the docket.

ADV NGCUKAITOBI SC: No, I understand that. But that affidavit of Colonel Roelofse came to your attention only because it was attached to the opinion of Advocate Hulley SC.

ADV BATOHI: It did come to my attention in that way.

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

20 **CHAIRPERSON:** I think for the purpose of the record, I am sorry to interpose.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: We are dealing with a Mdluli matter.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: My understanding is that the opinion of

Advocate Hulley was sought only with regard to the Mdluli matter. I just want us to get it right.

ADV NGCUKAITOBI SC: Madam Chair, that appears to be so from the summary given by Advocate Hulley himself in the opinion.

CHAIRPERSON: Meaning, if my understanding is correct, that as regard to the Cato Manor issue, an opinion had already been formed as regards the referral.

ADV NGCUKAITOBI SC: Yes.

10 **CHAIRPERSON:** But then Advocate Batohi needed a further opinion following Doctor Broughton's opinion.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: Which was then clarified according to her, I may not be using her words, but she needed a further opinion, hence the request to Advocate Hulley as regards the Mdluli matter.

ADV NGCUKAITOBI SC: Yes, Madam Chair, perhaps we can ask the witness to look at the opinion of Advocate Hulley at page 001049, LO001049, at paragraph 4.

20 **ADV BATOHI:** I am there.

ADV NGCUKAITOBI SC: Now, what is stated there by Mr Hulley is that:

“The NDPP is satisfied that Advocate Chauke has committed misconduct in relation to the Cato Manor matter. She

has requested us, however, to provide her with a brief memorandum explaining the process of reasoning regarding the Ramogibe matter and to provide her with whatever evidence is available to support our process of reasoning. We do so below.”

So that seems to make it clear that the brief to Mr Hulley was limited to the matter of Lieutenant General Mdluli.

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

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

CHAIRPERSON: Thank you, Counsel.

ADV NGCUKAITOBI SC: Thank you, thank you, Madam Chair. Now, the Chair has prefaced the next point on this issue, which is the references to Doctor Broughton. If I could start by asking you to look at the third file. We gave you three files. There is a third file that was submitted this morning. And to go to page 130. We have also given File 3 to the Panel as well. I am told that the secretariat was waiting

20 for a request to submit them. I apologise. Please do. Yes.

CHAIRPERSON: Yes, thank you, Counsel.

ADV NGCUKAITOBI SC: Thank you.

CHAIRPERSON: That is my order.

ADV NGCUKAITOBI SC: Yes, thank you very much.

CHAIRPERSON: Thank you. This will be File 3.

ADV NGCUKAITOBI SC: File 3, yes, Madam Chair.

CHAIRPERSON: Yes.

ADV NGCUKAITOBI SC: So if I could ask you to go to page 130.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: And it is 130 of File 3?

ADV NGCUKAITOBI SC: Of File 3, yes, Madam Chair. Yes.

Now, there is an extract from your evidence of the 28th of
10 November 2025. Correct?

ADV BATOHI: I see that.

ADV NGCUKAITOBI SC: Yes. Now, there you are explaining how you got to advocate Hulley. This is what you say:

“I was of the view that there were indeed gaps that were identified by Advocate Nalane SC, and that all the relevant evidence needed to be thoroughly considered.”

Correct?

20 **ADV BATOHI:** I do say that.

ADV NGCUKAITOBI SC:

“In mid-February, I therefore requested Doctor Advocate Broughton, a research and legal support and legal advisor in the office of the NDPP, to furnish me

with an opinion in this matter.”

Is that correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC:

10 “To such end, I provided Doctor Broughton with Advocate de Kock's memorandum and the opinions of Advocate Nalane SC, Advocates Maenetje SC and Scott. On 23 February 2023, Doctor Broughton provided me with his opinion. He concluded that I should make a recommendation to the President regarding the fitness of Advocate Chauke to hold the office in respect of his involvement with the handling of the Booyesen matter. He did not deal with the Mdluli matter.”

Is that correct?

ADV BATOHI: That is correct.

20 **ADV NGCUKAITOBI SC**: And then you have attached the opinion of Doctor Broughton. And then, when we look at your affidavit, I could ask you to look at page – we just took the relevant passages because it is a long affidavit. If you go to page 139, sorry, 138.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: So if we start at paragraph 173.

ADV BATOHI: Sorry, I think I am in the wrong place.

ADV NGCUKAITOBI SC: So maybe then ...[intervenes].

ADV BATOHI: SB138, actually. No.

ADV NGCUKAITOBI SC: No, it is the same document, File 3.

ADV BATOHI: It is this?

ADV NGCUKAITOBI SC: Yes, we took extracts from your sworn statement.

10 **ADV BATOHI:** Okay, so where should I go to?

ADV NGCUKAITOBI SC: So page 133 of the same file, do not move from the file.

ADV BATOHI: Okay.

ADV NGCUKAITOBI SC: 138.

ADV BATOHI: Okay, I am there.

ADV NGCUKAITOBI SC: So does it start with paragraph 173?

ADV BATOHI: It does.

20 **ADV NGCUKAITOBI SC:** Yes, so that is the extract from your affidavit. You say here:

“On 23 February 2023, Doctor Broughton provided me with his opinion. He concluded that I should make a recommendation to the President regarding the fitness of Advocate

Chauke to hold office in respect of his involvement with and the handling of the Booysen matter.”

Then you say he did not deal with the Mdluli matter. Correct?

ADV BATOHI: I do.

ADV NGCUKAITOBI SC: Yes, and then you go further at paragraph 176, the same page, where you are again summarising the second opinion of Doctor Broughton.

CHAIRPERSON: That is paragraph?

10 **ADV NGCUKAITOBI SC**: 176, Madam Chair.

CHAIRPERSON: Paragraph 176.

ADV NGCUKAITOBI SC: Yes, so you have summarised it at 175, and then you have affirmed it at 176.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: So you say here:

“His opinion was based once again on Advocate Chauke's handling of the Booysen matter. He did not deal with the Mdluli matter.”

20 **ADV BATOHI**: I do say that.

ADV NGCUKAITOBI SC: Yes. Now, if I could ask you then to go to the opinion of Doctor Broughton, which is at LO00149.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: And if I could ask you to turn to

LO00161?

CHAIRPERSON: It is, Counsel, LO01, this Volume 1?

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: This was the number of volumes of this opinion of this document. It is Volume 1, LO?

ADV NGCUKAITOBI SC: So it is 00149, that is where it starts.

CHAIRPERSON: 00149, thank you.

ADV NGCUKAITOBI SC: Yes, but I have asked the witness
10 to go to 00161.

CHAIRPERSON: Yes, thank you.

ADV NGCUKAITOBI SC: So if the Panel could also have a
look at 00161?

CHAIRPERSON: Thank you.

ADV BATOHI: Particularly from paragraph 41.16, up until
41.21. Can you see there that those paragraphs, firstly are
headed Mdluli prosecution. Can you see that?

ADV BATOHI: I do.

ADV NGCUKAITOBI SC: Yes. And can you see there that
20 there is a discussion between 41.18 to 41.21?

ADV BATOHI: I see that.

ADV NGCUKAITOBI SC: And then if you turn to page
LO00163.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: At paragraph 45.

ADV BATOHI: Yes.

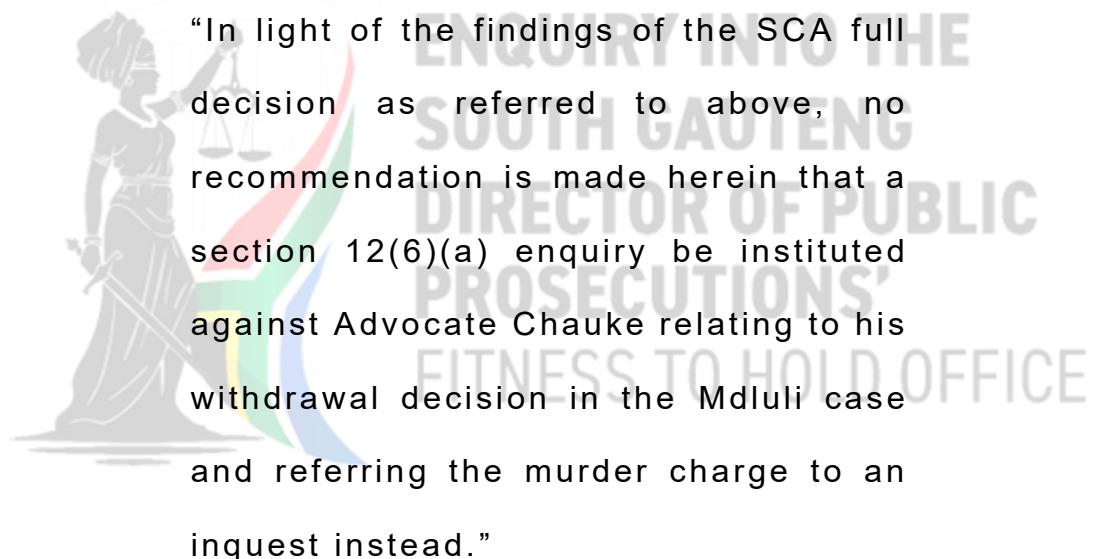
ADV NGCUKAITOBI SC: Can you see there that there is a heading analysis?

ADV BATOHI: I see that.

ADV NGCUKAITOBI SC: And then the first sub-topic there is the withdrawal of the murder and related charges in the Mdluli case.

ADV BATOHI: I see that.

ADV NGCUKAITOBI SC: And Doctor Broughton then
10 concludes and says:



“In light of the findings of the SCA full decision as referred to above, no recommendation is made herein that a section 12(6)(a) enquiry be instituted against Advocate Chauke relating to his withdrawal decision in the Mdluli case and referring the murder charge to an inquest instead.”

Can you see that?

20 **ADV BATOHI:** I see that.

ADV NGCUKAITOBI SC: If you compare that to paragraph 68, which is at 00170.

ADV BATOHI: Yes?

ADV NGCUKAITOBI SC: Ja.

CHAIRPERSON: 00?

ADV NGCUKAITOBI SC: 00170, Madam Chair.

CHAIRPERSON: 70?

ADV NGCUKAITOBI SC: Yes. At paragraph 68.

CHAIRPERSON: Yes, thank you.

ADV NGCUKAITOBI SC: Yes, there Doctor Broughton recommends the institution of an enquiry in relation to the Cato Manor case. Is that correct?

ADV BATOHI: He does.

ADV NGCUKAITOBI SC: Yes. And then if you go back to
10 45, there he is expressly clear that he is persuaded by the SCA decision not to make a recommendation in relation to the Mdluli case.

ADV BATOHI: I do not agree with that.

ADV NGCUKAITOBI SC: Then if you go to the second opinion.

CHAIRPERSON: I beg your pardon. Advocate Batohi, you do not agree with what?

ADV BATOHI: That he is expressly clear to make – I did not get a chance to read the full, as Advocate Ngcukaitobi was
20 saying it, but he was expressly clear to not – my understanding was to not recommend that the issue of the Mdluli matter be referred to the President, and I disagree with that.

ADV NGCUKAITOBI SC: I will come back to that. I just want you to go to the next document. It is in the same – no, I want

you to look at in the same volume at LO00171.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: And that is the second opinion on the 21st of April 2023.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Now, at LO00172, paragraph 5, Doctor Broughton says:

“My legal opinion was moreover based on relevant reported decisions cited...”

10 ...[intervenes].

ADV BATOHI: Sorry, what paragraph?

ADV NGCUKAITOBI SC: Paragraph 5.

ADV BATOHI: Page number again?

ADV NGCUKAITOBI SC: 00172, yes.

ADV BATOHI: Yes, I am there.

ADV NGCUKAITOBI SC:

“My legal opinion was moreover based

on relevant reported decisions cited

therein, which decisions pertain to the

20 Booyesen and Mdluli matters.”

Correct?

ADV BATOHI: I see that.

ADV NGCUKAITOBI SC: Yes. If you then turn the following page, at LO00173.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: At paragraph 7.

ADV BATOHI: Yes.

ADV NGCUKAITOBI SC: There he says:

10 “In my legal opinion, no recommendation was made as to the institution of an enquiry in terms of section 12(6)(a) of the NPA Act against Advocate Chauke relating to his decision to withdraw the murder and related charges in the case involving then Lieutenant General Richard Mdluli, who was the head of Crime Intelligence within the South African Police Service, and to refer the murder charge to an inquest instead.”

And then he continues, and that is where you then jumped and you said you did not disagree. You did not agree. Then he says:

20 “This stance is based on pertinent findings contained in the judgment of the Supreme Court of Appeal in *National Director of Public Prosecutions and Others v Freedom Under Law* as discussed in my legal opinion.”

Correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Now, we then come back to your affidavit at paragraph 173, page 138, where you state that advocate ...[intervenes].

ADV BATOHI: Sorry, can you repeat that?

ADV NGCUKAITOBI SC: Page 138, paragraph 173 of Volume 3 of File 3.

ADV BATOHI: 173? Ja.

ADV NGCUKAITOBI SC: Yes, 173.

10 **ADV BATOHI:** Sorry, this one.

ADV BALOYI-MERE SC: Sorry to disturb. Let me take your step back. Paragraph 7. What was the witness's response to paragraph 7, or you did not ask for a response?

ADV NGCUKAITOBI SC: No, I did not.

ADV BALOYI-MERE SC: Okay.

ADV NGCUKAITOBI SC: I asked the witness to confirm that paragraph 7 says what is contained there.

ADV BALOYI-MERE SC: Okay, so it is fine, because I did not get any answer, yes.

20 **ADV BATOHI:** Can you repeat where you are now?

ADV NGCUKAITOBI SC: I am at page 138 of File 3, paragraph 173.

ADV BATOHI: Okay, I am there.

ADV NGCUKAITOBI SC: Now, that is an extract from your affidavit. And I want to just go to that fourth line where you

are saying Doctor Broughton did not deal with Mdluli matter. Now, that statement is false because we have looked at both opinions. He expressly deals with the Mdluli matter twice.

ADV BATOHI: It is not false in the way that I meant it.

ADV NGCUKAITOBI SC: But, Advocate Batohi, please, we can all read English. You said the man did not deal with Mdluli matter. We have established that he dealt with Mdluli matter.

ADV BATOHI: My response is that it is not false in the way
10 that I meant it.

ADV NGCUKAITOBI SC: And then at paragraph 176 of that same page you again repeat that he did not deal with Mdluli matter.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. And in your own affidavit before this Panel, and I started you there, you repeated that Doctor Broughton did not deal with Mdluli matter.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes, but we know as a fact that
20 Doctor Broughton dealt with the Mdluli matter twice.

ADV BATOHI: It is about the meaning of did not deal with the matter as I intended it in my affidavit. It is pertinent. I mean, one glance at the affidavit shows it is there. I mean, the opinions of Doctor Broughton, it is not like I am hiding anything, but what I meant by he did not deal with the matter

is what is critical in this regard.

ADV NGCUKAITOBI SC: Can you explain yourself? I do not understand. It seems to me clear, and I have no doubt that anyone who understands the English language can see that it is clear that in both opinions Doctor Broughton dealt with Mdluli matter, but your affidavit says he did not deal with the matter. So it is either you are misleading the Panel now or you misled the Panel in your affidavit.

ADV BATOHI: I did not mislead at any stage. And the
10 English language is not that simple to interpret. Sometimes it is about context and it is about different understandings of the same word. So I agree. I used the words he did not deal with the Mdluli matter, but I have not yet been asked what I meant by that, but I am happy to explain if I may.

ADV NGCUKAITOBI SC: In fact, if you go to page 131 of that File 3, now right at the beginning of that page, the Chairperson says to you, and this is a discussion about why you went to Advocate Hulley. You say:

20 “As you say, because the former team of Advocate de Kock, and correct me whether it is Doctor Broughton or de Kock, one of the two had not expressed a view in relation to the Mdluli matter.”

And then you say:

“It is Doctor Broughton who had not

expressed a view.”

And then he says it is Doctor Broughton. Now, I still want to stick to the fact that you say Doctor Broughton did not deal with the Mdluli matter. We have looked at the opinions. Do you accept that Doctor Broughton did deal with the Mdluli matter?

ADV BATOHI: I would like to explain what I meant when I said he did not deal with the matter.

ADV NGCUKAITOBI SC: I am not asking you that question.

10 Do not answer your own questions. Do you accept that Doctor Broughton did deal with the Mdluli matter?

ADV BATOHI: He addressed it in his affidavit.

ADV NGCUKAITOBI SC: Again, you are not answering my question. You are putting your own statements. Do you accept that Doctor Broughton did deal with the Mdluli matter?

ADV BATOHI: He addressed it in his affidavit.

ADV NGCUKAITOBI SC: Yes, I just ...[intervenes].

ADV BATOHI: I would like to explain what I meant ...[intervenes].

20 **ADV NGCUKAITOBI SC:** No ...[intervenes].

ADV BATOHI: By he did not deal with the matter.

ADV NGCUKAITOBI SC: Advocate Batohi, just answer my questions. Do not ask your own questions for yourself. When addressing the matter, that was dealing with Mdluli matter.

ADV BATOHI: Not in my opinion. Not in my view.

ADV NGCUKAITOBI SC: Yes, thank you. I think the facts are clear for anyone to read. Could we then move on to the next topic?

CHAIRPERSON: Yes, Counsel. Reference is made to the transcript.

ADV BATOHI: That is correct.

CHAIRPERSON: And I do not want to belabour this point, but I would like to understand what you mean in answering the question by counsel because we have the transcript here, 10 the very transcript that we are going to have to rely upon when we write the report. And I just need clarity from the answer that you gave when I asked you questions, when you testified in chief, referring to that page 131 that has been made available to us of the transcript, where you answered the question saying it is Doctor Broughton had not expressed a view. The words, had not expressed a view, what should we understand that to mean in relation to the Mdluli matter?

ADV BATOHI: Thank you, Chairperson, for giving me an opportunity to explain this. I think it is really important that 20 I do. If we go to Doctor Broughton's affidavit again, where I was referred to earlier on, various parts of it, I have not been – if we go to LO00163. I mean, firstly, I want to make it clear, as I have said, that I have these affidavits. I have his opinions.

It is clear that he has, there is a part of it relating to

the Mdluli matter that is included. But when I said he did not deal with the matter, this is what I meant by it. If you look at paragraph ...[intervenes].

CHAIRPERSON: He did not express a view. That is what you say.

ADV BATOHI: Chairperson, if you look at my understanding of paragraph 45 in, this is at LO00163, paragraph 45.

CHAIRPERSON: Is that the analysis part?

ADV BATOHI: That is correct, Chairperson.

10 **CHAIRPERSON:** Yes.

ADV BATOHI: Chairperson, he says:

“In light of the findings of the SCA full decision as referred to above, no recommendation is made that a section 12(6) enquiry be instituted.”

My understanding of that is that he was not making a recommendation not to recommend, but he was making no recommendation. And my understanding that he was not saying do not refer, he was making no recommendation. And
20 that was my understanding when I said he did not deal with it. He made no recommendation regarding this matter.

CHAIRPERSON: But then look further at the paragraph Counsel, Advocate Ngcukaitobi referred you to. It is not only the analysis part at paragraph 45. Counsel referred you to further parts of Doctor Broughton's opinion. For instance, if

you look at LO00170, he makes a conclusion there, and he says:

“In all the premises, it is respectfully submitted that the NDPP ought to concede that making a submission to the President for the institution of an enquiry in terms of section 12(6)(a) of the NPA Act against Advocate Chauke pertaining to his involvement with and
10 handling of the Booyesen's Cato Manor case.”

ADV BATOHI: That is correct.

CHAIRPERSON: He makes a conclusion there.

ADV BATOHI: That is correct.

CHAIRPERSON: And it is that paragraph 68 that has to be read in the context of the earlier paragraphs which were referred to you by Advocate Ngcukaitobi, should we not?

ADV BATOHI: Chairperson, my response to that is that my understanding was that he was making no recommendation
20 with regard to the Mdluli matter. He was not saying it should not be referred. Look, if you look at it with paragraph 45, that was my understanding, is that he was making no recommendation.

CHAIRPERSON: The point that I am making is in relation to your earlier evidence at page 131, the transcript where you

said Doctor Broughton has expressed no view.

ADV BATOHI: That was my recollection, Chairperson, is that because my understanding was that he made no recommendation, I took that as not expressing a view. He made no recommendation. That was my understanding and how I interpreted it.

CHAIRPERSON: Yes, thank you.

ADV BALOYI-MERE SC: Advocate Ngcukaitobi, let us go back to paragraph 45.

10 **ADV BATOHI**: Paragraph?

ADV BALOYI-MERE SC: 45, LO00163.

ADV BATOHI: I am there.

ADV BALOYI-MERE SC: Do you mind reading it aloud into the record?

ADV BATOHI: Sure:

20 “In light of the findings in the SCA full decision as referred to above, no recommendation is made herein that a section 12(6)(a) enquiry be instituted against Advocate Chauke relating to his withdrawal decision in the Mdluli case and referring the murder charge to an inquest instead.”

ADV BALOYI-MERE SC: There is no full stop after no recommendation.

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: It proceeds and say:

“No recommendation is made herein
that a section 12(6)(a) enquiry be
instituted.”

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: So that is Doctor Broughton
expressing his opinion that no recommendation should be
made or no referral should be made to refer Advocate Chauke
10 in relation to the Mdluli matter, if you read that whole
paragraph because it is just one sentence.

ADV BATOHI: That is not the way I read it.

ADV BALOYI-MERE SC: You read it up to no
recommendation and stopped there.

ADV BATOHI: No, I did not.

ADV BALOYI-MERE SC: Okay. So what do you make about
the next few words: it is made herein that a section 12(6)(a)
enquiry be instituted against Advocate Chauke relating to his
withdrawal decision?

20 **ADV BATOHI:** As I mentioned, my understanding of this is
that he made no recommendation. It is not that he
recommended that the matter not be referred.

ADV BALOYI-MERE SC: Okay, I will accept it. It is a matter
of semantics.

ADV BATOHI: Thank you.

CHAIRPERSON: Thank you, Advocate Batohi. The rest will be a matter for argument.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: You may proceed, Counsel.

ADV NGCUKAITOBI SC: Thank you. Advocate Batohi, I will argue that you have lied in your evidence when you claimed that Doctor Broughton expressed no view. Doctor Broughton expressed a view. You have also lied in your evidence when you said Doctor Broughton did not deal with the Mdluli matter.

10 He dealt with it extensively. Could I move on to the ...[intervenes].

ADV BATOHI: No, I would like to respond to that, please.

ADV NGCUKAITOBI SC: Yes, respond.

ADV BATOHI: I was just writing it down so I get it right when I respond. Firstly, I have got no reason to lie in this matter. No doubt you probably find an argument that I do have a reason, but let me say that I did not lie when I tendered my evidence. My understanding of it, the way – in light of Doctor Broughton's entire, the part that he deals with the Mdluli
20 matter, my understanding of it was he was making no recommendation in that matter. And that was my understanding. I am not lying about that.

And when I said in my affidavit he did not deal with this matter, why would I lie about it? When his supplementary affidavit, it is there for everyone to see that it is addressed,

he addresses it in his affidavit. So why would I lie about that when a glance at his opinion would see that there is a portion that addresses the Mdluli matter? So it is not a lie. It is my understanding about it.

And the comment by counsel that it is dealt with extensively in his opinion is, in my view, not the correct one because if you look at his entire opinion and annexures, the Mdluli matter is dealt with, I would say if it is, I am guessing, 1% of that opinion would be too much. But it is just in a few
10 pages and we have two lever-arch files. So I want to really emphasise that I am not lying about this. I have got no reason to lie about it. That was my understanding.

ADV NGCUKAITOBI SC: To show your lie, when you answered the Chairperson until the cross-examination, those paragraphs pertinently addressing the Mdluli matter were never brought to the attention of the Panel by yourself.

ADV BATOHI: Can you repeat that?

ADV NGCUKAITOBI SC: I am saying to show your lies to this Panel, those paragraphs were never brought to the
20 attention of the Panel by yourself until the cross-examination.

ADV BATOHI: In my view, there is a lot in this document that I have not – otherwise I would have – I should have been given a few days to read out Doctor Broughton's opinion, all of them, the first one, the supplementary one, and to go through all of his evidence. I have just dealt with the key

aspects of his evidence.

But what is before this enquiry is all the reports, all the documents, and this is in fact what the enquiry has to look into is whether all of that evidence supports that Advocate Chauke either conducted misconduct or is not fit to hold office, but it is not just those parts that I have referred to. It is the totality of all of the evidence.

ADV NGCUKAITOBI SC: Yes. Could I move on to the next topic? When we left on Monday, we had left a question
10 around the origins of the terms of reference, you remember that?

ADV BATOHI: I do not remember specifically, but I know we did deal with it.

ADV NGCUKAITOBI SC: Do you not remember that the Chairperson had asked how did the President get to those terms of reference? Were they recommended by you or were they not recommended by you? And you denied that you had recommended them. In fact, you said that the terms of reference that were concluded were different to the terms of
20 reference that you submitted.

ADV BATOHI: I did say they are different.

ADV NGCUKAITOBI SC: Yes. If I could ask you to go to File 3 again, starting at page 163.

ADV BATOHI: Is that your file?

ADV NGCUKAITOBI SC: Yes, File 3, 163.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: Now, this is a letter written by Advocate Lekgetho, who is part of the NPA team. One of the annexures that are submitted is Annexure L. Now, Annexure L is a draft letter to be signed by the President, and it is itself not signed. And I want to show you, it is at page – I must find it now. It is at page 181. Yes, it goes from page 181 to 183.

ADV BATOHI: I see that.

10 **ADV NGCUKAITOBI SC:** Who gave the President this draft letter?

ADV BATOHI: I did. I think it was the one that was attached to the bundle that was sent to the Minister.

ADV NGCUKAITOBI SC: Yes, you gave the President this draft letter.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Now, if you then go to ...[intervenes].

20 **CHAIRPERSON:** I beg your pardon, Counsel. Annexure L, is it that letter at 181, at page 181?

ADV NGCUKAITOBI SC: Yes, Madam Chair, it is.

CHAIRPERSON: Should we then mark it in your bundle?

ADV NGCUKAITOBI SC: Yes, Madam Chair, we have just put this as a cross-examination bundle.

CHAIRPERSON: This is the exhibit document. It forms part

of the exhibit document. This list, Annexure SB10 to – you see in that page 163, I am trying to get my thinking right. Page 163, those annexures, including 12, Annexure L, draft letter to be sent to Advocate Chauke by the President. These documents form part of the list of exhibits that were handed to us last week, early this week.

ADV NGCUKAITOBI SC: Madam Chair, I need to just confirm with my junior. I am not sure what the answer is. My junior tells me that, no, this is the first time we have been
10 given this particular annexure. It is not part of the SB10.

CHAIRPERSON: This is the letter that we spoke about that was handed from the bar. Which letter is this? Page 181.

ADV NGCUKAITOBI SC: Madam Chair, what had happened is that Advocate Batohi wrote to the Minister of Justice asking for the establishment of this enquiry attaching various annexures. One of the annexures that were attached is Annexure L.

CHAIRPERSON: Annexure L is the Presidential response to Advocate Batohi's formal letter?

20 **ADV NGCUKAITOBI SC:** No, Madam Chair, it is a draft for the President to append his signature.

CHAIRPERSON: Thank you.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: Thank you.

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

CHAIRPERSON: Yes, just a minute.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: Just a minute. I just want to understand because we have bundles and bundles of documents here. And these are the documents which had been requested.

ADV NGCUKAITOBI SC: Yes. They were requested in the cross-examination.

CHAIRPERSON: Yes. Yes, thank you. Now I understand. Thank you.

10 **ADV NGCUKAITOBI SC:** Yes. Now, Advocate Batohi, just to go back to the answer you gave, do you accept that you are the author of this document?

ADV BATOHI: Well, my office would have prepared it and I attached it to the memo to the Minister.

ADV NGCUKAITOBI SC: Well, when I say you, I mean you and your office. I am not saying you were typing it, if that is how I came across. Do you accept that your office ...[intervenes].

ADV BATOHI: It came from my office, that is correct.

20 **ADV NGCUKAITOBI SC:** Yes. Now, if you then go to page 182.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: Item A. Your office said to the President that the President must institute an enquiry into whether or not Mr Chauke in the Booyesen matter supported a

decision to prosecute, notwithstanding that there was no evidence justifying the decision. Correct?

ADV BATOHI: I see that.

ADV NGCUKAITOBI SC: Yes. Now, and then the balance there refers to the indictment in the case, which does not appear in the final terms of reference.

ADV BATOHI: Sorry, can you repeat that?

ADV NGCUKAITOBI SC: After the word KwaZulu-Natal, can you see that?

10 **ADV BATOHI**: I do see that.

ADV NGCUKAITOBI SC: It talks about sign the indictment. Correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: That was your draft, but in the final terms of reference, that particular, those words have been taken out. Correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. The rest of those words are exactly as they were in your original terms of reference.

20 Correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: If you look at B, B has been taken exactly as it is and put in the final terms of reference.

ADV BATOHI: It appears so.

ADV NGCUKAITOBI SC: Yes. The same with C has been

taken exactly as it is and put in the terms of reference.

ADV BATOHI: That appears so.

ADV NGCUKAITOBI SC: Yes. The same with D. It is a cut and paste.

ADV BATOHI: I have not checked, but I will take your word for it.

ADV NGCUKAITOBI SC: Yes. Well, I have checked. That is why I am able to say the words sign and indictment appear in the draft. They do not appear in the final version.

10 **ADV BATOHI**: I accept that.

ADV NGCUKAITOBI SC: The same with E. It is a cut and paste.

ADV BATOHI: I will take your word for it.

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

CHAIRPERSON: What do you mean? It is important for me to understand what you mean when you say you take counsel's word for it.

ADV BATOHI: Chairperson, if I have to agree, then I will need the other document next to me, and I need to then check
20 word for word. In the interest of time, all I say is I do not disagree with counsel. I accept what he is saying.

CHAIRPERSON: And I should accept that to mean you agree with counsel. It is important for me to understand what you mean when you say you take counsel's word for it.

ADV BATOHI: Chairperson, then I need to look at the other

document to check every word to make sure it is correct. I am saying is I have no reason to doubt counsel.

CHAIRPERSON: And therefore you agree?

ADV BATOHI: I do not doubt him, Chairperson.

CHAIRPERSON: I beg your pardon?

ADV BATOHI: I do not doubt him.

CHAIRPERSON: Therefore, because you do not doubt the veracity of what he says, you agree with him?

ADV BATOHI: If that is a conclusion, Chairperson, then so
10 be it.

CHAIRPERSON: I beg your pardon?

ADV BATOHI: If that is a conclusion, then it is fine. But I do not – I have no reason to doubt him.

CHAIRPERSON: Perhaps counsel must go to the terms of reference.

ADV BATOHI: Chairperson, may I just clarify one thing? That when I said that the terms of reference were different, look, I have not looked at this letter again. I have to go to the fact that this affidavit was drafted at very, very short
20 notice. We attached documents that we had sent in the interest of transparency so that Advocate Chauke's team has all of the necessary information.

The terms of reference when I said were different, I was not referring to this letter to the President. My understanding is that there is another draft terms of reference

that I have looked at. That is my understanding when I said they were different because there is another draft that we prepared and I looked at that draft and the terms of reference and that is a lot more different. But it appears what the President's office did is they have taken from this letter and added to the terms of reference, but we have another draft, which when we looked at with the terms of reference is different. My understanding was that we had submitted that draft as well to the President's office.

10 **CHAIRPERSON:** It is a very long answer. I just wanted to ascertain whether I understand your answer to Advocate Ngcukaitobi. It may well be that he is going to cover those aspects that you are raising but I just want to understand when you say you do not doubt the correctness of what he puts to you whether you are saying you agree or not, that is just as simple as that. Maybe to assist Advocate Batohi, Advocate Ngcukaitobi, you can take the terms of reference and contrast them with the contents of the letter and take Advocate Batohi to each and every part of that so that when
20 she answers, she answers correctly, understanding what has been put to her. It may take a bit of time, but it is important to get the correct answers from her in relation to the questions that you are putting to her.

ADV NGCUKAITOBI SC: Yes, Madam Chair, thank you. Perhaps then let us go to the beginning. If you could just

take a copy of your terms of reference and then turn to page 4 of the terms of reference, and then let us start at 3.1.1.1.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: Yes. So if you exclude the preamble, because the President has included his own preamble, but you look at where it says supported.

ADV BATOHI: Yes, I am there.

ADV NGCUKAITOBI SC: Supported a decision to prosecute the accused.

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

ADV NGCUKAITOBI SC: Notwithstanding the fact that there was no evidence justifying the decision and you sought improperly to have the then Acting DPP of KwaZulu-Natal sign the indictment in the case without providing him with the case dockets and/or prosecution memorandum detailing the alleged evidence implicating the accused on which the decision to indict had to be made. You see there that the

only words that are not included are the words the indictment in the case that are not included in the final draft. The rest
20 of it is identical.

CHAIRPERSON: In other words, when you take the gazette at terms of reference, and I suppose I am correct, Advocate Ngcukaitobi, and you contrast them, or at least let us look at 3.1.1.1 of the gazette at terms of reference and you contrast that with page 182A of what has been referred to you. Do

you agree with Counsel's question?

ADV BATOHI: Chairperson, I am looking at the two paragraphs and what I see in the terms of reference, what is also not in the terms of reference, I am not sure whether counsel has covered this, it says without providing him with the case dockets and/or prosecution memorandum, and in the terms of reference it says to sign the case dockets and/or prosecution memorandum.

ADV NGCUKAITOBI SC: Yes, we agree on that. That is the
10 part I was reading saying that is excluded in the final terms of reference. It starts with sign the indictment without providing.

ADV BATOHI: In the terms of reference it says sign the case dockets.

ADV NGCUKAITOBI SC: No, I am saying in your draft it says sign the indictment.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: So that is all excluded.

ADV BATOHI: That is correct.

20 **ADV NGCUKAITOBI SC:** Now, you remember where this became an issue is the reference to the word case dockets which you said does not exist. And then I asked how can it not exist because you drafted these terms of reference?

ADV BATOHI: Can you repeat that?

ADV NGCUKAITOBI SC: I am saying you remember where

this discussion started, it was when I referred you to the words in the final terms of reference case dockets and you said there are no case dockets. And I asked, how can there be no case dockets because the charge sheet refers to case dockets? And then you says, well, I do not know about this charge sheet, I did not prepare it. But what I want to refer you is ...[intervenes].

ADV BATOHI: Can I respond to that? Because that is not what I said. And when the questions are too long, I am not
10 able to respond to things and then it gets confusing towards the end.

ADV NGCUKAITOBI SC: All right, answer it.

ADV NGCUKAITOBI SC: So firstly, I did not say there were no case dockets. I said there was no – to my knowledge, there was no racketeering case dockets. That was my answer. I did not say there were no case dockets.

ADV NGCUKAITOBI SC: I understand.

ADV BATOHI: Because we know for a fact that there were 23 murder dockets.

20 **ADV NGCUKAITOBI SC:** Yes. We are talking about the racketeering case dockets.

ADV BATOHI: So I think that should be made clear. I did say there was no racketeering case docket to my understanding.

ADV NGCUKAITOBI SC: Yes. Well, this is the point I am

making to you. You said the entire Charge 3.1.1 is about racketeering.

ADV BATOHI: Can you repeat that?

ADV NGCUKAITOBI SC: You said the entire charge in relation to 3.1.1 is about racketeering. That is the only case docket we are talking about.

ADV BATOHI: So when I said it relates, I did not say the entire charge. You know, we must look at the record and see what words I use because they have been put to me as me
10 saying the entire charge. What I meant is that the charge that we were referring to was racketeering.

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: But that is the only charge that you have an issue with under 3.1.1.1 until 3.1.1.5.

ADV BATOHI: That is correct. We are dealing with the racketeering.

ADV NGCUKAITOBI SC: Yes, yes. Now, we come back then to the reference to case dockets comes from your own draft
20 at A.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Now, can we then move on to the ...[intervenes].

ADV BATOHI: Can I explain that before we move on?

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: I would like to explain it because we leave things hanging and then there is no explanation for it. Chairperson, the reference to the case dockets there, there were 23 murder case dockets, and that is the reference to the – what this is saying is that he was not provided with those case dockets. But those case dockets could potentially or would potentially be the basis for predicate offences in any racketeering charge.

So it would have been important for a DPP to have
10 all of that if he is required to sign an indictment for a racketeering charge. So that was my, the context or what I would have said at the time with regard to case dockets.

ADV NGCUKAITOBI SC: Yes. Could I then move on to item B? Now, if you remove the first words in the Booyesen Cato Manor matter you start with recommended. Now, I did not see any difference of substance there. So you can compare it yourself and tell me.

ADV BATOHI: I will do that now. That is correct. It is the same.

20 **ADV NGCUKAITOBI SC:** Yes. If you look at C, if you compare that with 3.1.1.3, again just remove the words in relation to the Booyesen matter, it starts with sought to defend. Again, I did not see anything different there.

ADV BATOHI: That is correct. It is the same.

ADV NGCUKAITOBI SC: If you look at D, let us do the same

exercise and compare it with 3.1.1.4.

ADV BATOHI: That is correct. It is the same.

ADV NGCUKAITOBI SC: Then the last of the racketeering charges is E, compared to 3.1.1.5, starting with the words attempted. Again, I saw nothing different there of any substance.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Now, the matter of Lieutenant General Mdluli is worded slightly differently. The 3.1.2 starts
10 with the words:

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

Those words do not appear in your draft. Is that correct?

ADV BATOHI: That is correct.

ADV BALOYI-MERE SC: But the critical part starts with caused and it comes directly from your own paragraph F. Compare those words caused starting with where it says
20 Advocate Chauke caused at 3.1.2 and at F look at after the Mdluli matter caused and tell me if there is any difference.

ADV BATOHI: It is the same.

ADV NGCUKAITOBI SC: Yes. Now, this is the whole point why we asked for the draft that you sent to the President. What we can now see is that these terms of reference are

virtually identical to what you gave the President except for item A which we discussed, and yet you have given evidence that seeks to distance yourself from your own terms of reference. Can you explain yourself?

ADV BATOHI: Yes, I am not seeking to distance myself from my own terms of reference. When I said that these final terms of reference were different to the terms of reference the draft that we had submitted, Chairperson, I was not comparing it with this. This is not a terms of reference. The document
10 that Counsel is referring to is a draft letter to the President and I accept that we have gone through this exercise.

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: I was referring to a draft terms of reference which I understood that we sent to the President's office separately from this letter. Now, I have seen a draft of that document, but my office was trying to find the precise one that was sent to the President, and that is the document that I was referring to when I said that it was different from these terms of reference.

20 I was not comparing this final terms of reference with the draft letter to the President. In fact, I have not even, you know, but for when this letter went, I have not even looked at this letter in preparation for this enquiry because I have just had no time to look at all of these documents. But to be clear, when I said it was different, I was not referring to the draft

letter of the President. I was referring to a draft terms of reference which we also submitted, is my understanding, to the Minister.

ADV NGCUKAITOBI SC: So the problem, Advocate Batohi, even this document we have now gone through painstakingly was never disclosed by you. It came up in the cross-examination.

ADV BATOHI: So, Chairperson, again, I want to be very clear. There is nothing we want to hide in this matter. These
10 documents are all referred to in the document that was sent to the Minister. They are all attached as annexures to my SB10. They are Annexures A to M, which are referred to, well, it should be referred to. Let me just get to SB10 before I start saying things that are not absolutely accurate because I do want to be accurate in the circumstances, as accurate as I can be. I am looking at SB10.

It goes to Annexure F, J, K. What is the last one?
J. K is on 175. Annexure K, L, and M. So SB10 refers by name to every one of these documents that was submitted in
20 the bundle. We are not withholding anything, Chairperson. It was just that my affidavit would have been extremely long if we attached everything to my affidavit. So what we did is we referred to them and did not attach them. But it is not withholding evidence, Chairperson. It is all in my affidavit.

ADV NGCUKAITOBI SC: You see, the problem even with

that answer is that if you are going to give evidence to this Panel that the President has given you terms of reference that are different to what you submitted, you have an obligation to disclose to the Panel that you also gave them Annexure L.

ADV BATOHI: It is in my affidavit that I gave them Annexure L. So I am not withholding it. It is SB10 refers to Annexure L.

CHAIRPERSON: Just one, you know, concern. And it is a
10 concern that I have raised even in the past about non-provision of documents in advance. This SB10 that you are now talking about.

ADV BATOHI: Pardon me?

CHAIRPERSON: I say this SB10 that you are now talking about is part of the documents that came late to the enquiry ...[intervenes].

ADV BATOHI: No, it is an ...[intervenes].

CHAIRPERSON: The annexures – I am still talking. The annexures, I think as lawyers generally and even as human
20 beings, we understand that it is very important that if you give me a document that makes reference to annexures, those annexures must be part of the document. The reason that you deem it fit to see it as an annexure to the document, it means it is an important document. So here we are today, we get these documents that we are told just came into

service to the enquiry for the first time today. Thank you. I am told for a change my voice is very soft. Okay.

ADV BATOHI: I am struggling as well, that is why I have been asking.

CHAIRPERSON: Okay, maybe there is something wrong with me. Sorry about that, I beg your pardon. Ordinarily, I am told I scream. So I try to be a ladylike and talk softly. It does not help. Okay, you understand my concern?

ADV BATOHI: I do.

10 **CHAIRPERSON:** Okay, thank you.

ADV BATOHI: Can I respond?

CHAIRPERSON: Yes, you may.

ADV BATOHI: Thank you. So I did tell my team, we did say that we must look at my affidavit and make sure that all the annexures are uploaded, and I would have expected that all of these documents that are annexures to my annexures would have also been uploaded. So to the extent that they have not been, and I need to confirm with the team, I will apologise for that, but that was an exercise that they were
20 meant to go through meticulously to make sure that every annexure to an annexure is uploaded. So I will check with them and see what the position is. And I would have thought that that would have been done by now.

CHAIRPERSON: Ja, I do not want to believe at a point. I have just been tempted to reiterate this concern now. Thank

you.

ADV BATOHI: No, thank you, Chairperson.

ADV NGCUKAITOBI SC: Yes, Advocate Batohi, I am sorry. I am not done on this point.

ADV BATOHI: It is fine.

ADV NGCUKAITOBI SC: Because your claim that Annexure L was attached to SB10 is a lie. If you go to SB10, page 275, paragraph 31, and that is your letter of the 18th of August 2023, it says:

10 “It is further recommended that

Advocate Chauke be afforded an opportunity by the President to advance reasons as to why he should not be suspended and a fitness enquiry be instituted against him. A draft letter is attached here to Annexure L.”

Annexure L itself was never there.

CHAIRPERSON: I think it is important for the record to make mention of the fact that SB10 forms part of Advocate Batohi's
20 affidavit.

ADV NGCUKAITOBI SC: Yes, indeed. Thank you, Madam Chair. So if you, Annexure SB10, which is a...

CHAIRPERSON: It is SB10266.

ADV NGCUKAITOBI SC: Yes, SB10266, yes. That is where the document starts. And the specific paragraph I am

referring to is at paragraph 31, which is at SB10275. What I am asking you, Advocate Batohi, is that your statement that Annexure L was included in SB10 is a lie because Annexure L was never attached to SB10.

CHAIRPERSON: Before Advocate Batohi answers, which paragraph did you refer to?

ADV NGCUKAITOBI SC: Paragraph 31, Madam Chair, at page SB10275.

ADV BATOHI: Chairperson, can Counsel please repeat that?
10 Because I want to be clear about what it is alleged that I am lying about.

ADV NGCUKAITOBI SC: When you say – I said to you, you failed to disclose Annexure L. Then you said, I did not fail, it is part of SB10. And I have now gone back to SB10, particularly at paragraph 31. What is stated there is that:

“It is further recommended that
20 Advocate Chauke be afforded an opportunity by the President to advance reasons as to why he should not be suspended and a fitness enquiry be instituted against him. A draft letter attached hereto Annexure L.”

Annexure L was never attached to SB10.

ADV BATOHI: That is correct. Annexure – well, let me rephrase that before I answer that quickly. SB10 is a letter

to the President. Let me get that right. It is a memo to the Minister. And those annexures that you are referring to are annexures to the memorandum to the Minister. These would have been attached to the memorandum to the Minister, but they were not attached to my affidavit.

So when the attachments to my affidavits were put together, the memorandum only was attached, not the annexures. But my point was that if one reads the memo itself, it refers to all of these annexures and gives a
10 description of them. Let me just make sure that I am clear about that because I am – just a moment, Chairperson, if you give me a moment. I just want to make sure.

I am going to look at Annexure L now so that I am clear. Annexure L is in the bundle provided by Advocate Chauke's team. If I could just be helped with the page number, it will be useful.

CHAIRPERSON: I beg your pardon.

ADV NGCUKAITOBI SC: What page?

CHAIRPERSON: Let me correct that. Annexure L forms part
20 of the documents that were referred to or put together by junior counsel, Advocate Lekgetho.

ADV BATOHI: That is correct.

CHAIRPERSON: In a document that was emailed to Katlego Aubrey and to yourself, among other people mentioned in that email.

ADV BATOHI: That is correct.

CHAIRPERSON: So it is not correct that it is provided by the team of Advocate Chauke. It was provided by your office, if I may put it that way, and that consists of the list of those documents at page 163.

ADV BATOHI: Chairperson, I am not incorrect when I say it was provided by them. I meant it was provided in this big file. This is the file that I received from them. So that is what I meant. But you are correct indeed that this is something
10 that came from my office and was sent to them by email.

CHAIRPERSON: And Advocate Lekgetho copied you in that email?

ADV BATOHI: Yes, that is correct.

CHAIRPERSON: So you had the document?

ADV BATOHI: Yes, I am not disputing that.

CHAIRPERSON: I am just correcting the fact that it was provided by Advocate Chauke's team.

ADV BATOHI: Chairperson, I am saying I did not – what I meant when I said that is that this entire bundle in this black
20 file has been given to me by Advocate Chauke's team, and it is in this bundle. That is all I meant. But of course, it comes from my office ...[intervenes].

CHAIRPERSON: The source is your office.

ADV BATOHI: Yes, absolutely. But they handed me this bundle. That is what I meant when I said they gave it to me.

CHAIRPERSON: It is very important to get it right because we will get confused when we write the report.

ADV BATOHI: Certainly, Chairperson. I will be mindful of that. So let me look at Annexure K. I am going to try to... If anyone can guide me to the page, it will be quicker so that I can read this document.

CHAIRPERSON: I am sorry, Advocate Ngcukaitobi. I interrupted.

ADV NGCUKAITOBI SC: Yes.

10 **CHAIRPERSON:** You had referred Advocate Batohi to ...[intervenes].

ADV NGCUKAITOBI SC: Paragraph 31, which is ...[intervenes].

CHAIRPERSON: Paragraph 31.

ADV NGCUKAITOBI SC: Yes. Simply to ask her, and I think she has done that, to confirm that that Annexure L was not part of SB10.

ADV BATOHI: Let me correct that, Chairperson. It was not attached to SB10 in my affidavit, but it was certainly part of
20 the memorandum that was submitted to the Minister when it was submitted. But as I have been painfully trying to explain, we did not add all the annexures when we did my affidavit, and they have been now supplied to Advocate Chauke's team.

ADV NGCUKAITOBI SC: Advocate Batohi, can I ask you, on your main defence on this issue, which is that this was a draft

letter that you prepared for the President to sign when suspending Advocate Chauke and you did not expect that this would be the terms of reference. Now, it is a bit of a puzzling expectation on your part. Why did you not expect them to be part of the terms of reference when you have given them to the President?

ADV BATOHI: My understanding is that we submitted a draft, but I could be mistaken about that. But this was a letter to the President, and I did not know what the – in fact, it was
10 a draft. The President is at liberty to change that letter as he deems fit. We did not expect that this will find its way into the terms of reference. It was explaining to the President, in summary, what issues we had with Advocate Chauke's conduct.

ADV NGCUKAITOBI SC: Yes. There was another document, but we have not found the source of it. If you go to page 177 of File 3.

CHAIRPERSON: Counsel, I am sorry. This draft letter, as you have just mentioned, sought to convey to the President
20 what issues you had with Advocate Chauke, as you have just mentioned. I just want to check.

ADV BATOHI: Can we look at the draft letter again?

CHAIRPERSON: No, no, no. I am referring to your answer that you have just given now.

ADV BATOHI: Yes, I answered it, but when I realise it is

being scrutinised to the level it is, I would like to look at the letter.

CHAIRPERSON: No, no, no, Counsel. I am asking you. You responded just maybe a minute ago that the draft letter sought to convey to the President what issues you had with Advocate Chauke. That was your response ...[intervenes].

ADV BATOHI: Chairperson ...[intervenes].

CHAIRPERSON: Because I want to ask you a question on that statement.

10 **ADV BATOHI**: Well, I would like to look at the letter first.

CHAIRPERSON: No, no, no, no. Did you answer to Counsel his last question when I interrupted him, that you answered your draft letter to the President was to convey the issues you had with Advocate Chauke?

ADV BATOHI: Chairperson, that was loosely put. That is why I am asking that I refer to the letter. There may have been other things there that I added, and I think in fairness, I should be allowed to look at the letter and then say exactly. I loosely put it. I did not refer to it because we have been
20 through some of it and we have compared it with the terms of reference, and it relates certainly to some of the conduct that we had an issue with, but there are other things in the letter as well.

CHAIRPERSON: No, I am not talking about the contents of the letter. I am asking you a question based on your answer

to Advocate Ngcukaitobi that your draft to the President was to convey the issues that you had with Advocate Chauke. That was your answer. Correct?

ADV BATOHI: Chairperson, we sent a whole bundle of documents to the President ...[intervenes].

CHAIRPERSON: No, no, no, Counsel. And I am going to ask you again for the last time. When you responded to Advocate Ngcukaitobi a short while ago, you said your draft letter to the President sought to convey to him the issues that
10 you had with Advocate Chauke. It was to convey the issues you had with Advocate Chauke. Is that what you said?

ADV BATOHI: That is what I said loosely.

CHAIRPERSON: Yes, thank you.

ADV NGCUKAITOBI SC: Yes. In fact, on this topic, the suspension letter of Advocate Chauke is identical to the draft that you prepared. I do not need to go through it, but we can accept that.

ADV BATOHI: Sure.

ADV NGCUKAITOBI SC: Yes. Now, I wanted to just come
20 back to trying to understand what is the substance of your answer. There is a document headed the Presidency Draft Terms of Reference at page 177 of File 3.

CHAIRPERSON: What page is that?

ADV NGCUKAITOBI SC: 177, Madam Chair.

CHAIRPERSON: 177.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: And what is the question with regard to that?

ADV NGCUKAITOBI SC: Yes, thank you. If you could go to page 179? What this document does is to identify the issues to be decided.

CHAIRPERSON: What is this? I am sorry.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: For the purpose of the record, what is this
10 document at page 177?

ADV NGCUKAITOBI SC: I am very happy, Madam Chair, you have asked that question because it is one of the documents we received from Advocate Lekgetho and I was going to ask the witness to explain what is the status of this document.

CHAIRPERSON: At 177?

ADV NGCUKAITOBI SC: At 177, yes.

CHAIRPERSON: Thank you.

ADV NGCUKAITOBI SC: Yes. Advocate Batohi, if we could
20 just go to 179? This document purports to identify the issues to be determined by the enquiry at Roman figure one and Roman figure two in broad and generic terms, but does not identify any terms of reference in the same detailed sense that the gazetted terms of reference do. Now, who prepared this document at page 177?

ADV BATOHI: So this is the draft terms of reference that I was referring to earlier, Chairperson. It was prepared by my office.

ADV NGCUKAITOBI SC: Was this a first draft, a final draft?

ADV BATOHI: I cannot recall. I assume it would have been the final draft.

ADV NGCUKAITOBI SC: And what happened to it? You gave it to the Minister?

ADV BATOHI: Well, I thought it would have been sent to the
10 Minister because that is why we drafted it, but I am not sure.

ADV NGCUKAITOBI SC: Yes. In any event, the point I am really trying to understand here is it is only at page 179 where there is an identification of the issues to be decided, but there are no actual terms of reference in that document at all.

ADV BATOHI: The heading of the document is draft terms of reference. In fact, there is nothing wrong with having broad terms of reference.

ADV NGCUKAITOBI SC: Now, what I am asking you is there are no terms of reference in the document. There is an
20 identification of the issues to be decided at page 179.

ADV BATOHI: This is a draft terms of reference document. We can quibble about semantics, but this is the draft terms of reference. And at page 179, as you say, the issues are broadly defined.

ADV NGCUKAITOBI SC: Yes. The only document that

specifies the complaints against Mr Chauke to the level of the terms of reference is what we were looking at, at page 181.

ADV BATOHI: That is the letter to the President and not the draft terms of reference.

ADV NGCUKAITOBI SC: Indeed, yes.

ADV BATOHI: It is correct.

ADV NGCUKAITOBI SC: And that is what ultimately makes it as terms of reference by the President, page 181.

ADV BATOHI: That is the President's decision.

10 **ADV NGCUKAITOBI SC**: Yes. Thank you. Now, in relation to that final document and your own draft, you have never identified the issue of Mr Chauke acting in excess of his authority as part and parcel of that letter at page 181.

ADV BATOHI: Chairperson, I will have to look at this carefully. Chairperson, the terms of reference have got to be drafted, have got to be read in its entirety. If we look at page 178, it refers to – well, before that, Chairperson, if I may, page 177 refers to the relevant sections in the Constitution, and I will not go through all of them. It refers to sections in
20 the NPA Act. And then at page 178, it states in the third paragraph:

“And whereas section 24(1) of the NPA provides that a DPP has, in respect of the area for which he or she has been appointed, the power to do various

things.”

It just quotes the section again. If we go to page 179.

ADV NGCUKAITOBI SC: Just remember, you are trying to find a section that says Advocate Chauke acted in excess of his authority by getting involved in the KZN matter.

ADV BATOHI: I am answering the question.

ADV NGCUKAITOBI SC: Well, okay. Well, show us then the passage.

ADV BATOHI: I am answering the question, Counsel. Sorry,
10 Chairperson. Chairperson, at page 179, it states:

“The issues to be determined by the enquiry are set out below.”

And then if we go to (ii), it says:

“Insofar as it relates directly or indirectly to the conduct of Advocate Chauke and his fitness and propriety to hold office.”

Sorry, that is not what I should be reading:

20 “(ii) Whether in fulfilling his responsibilities as Director of Public Prosecutions:

[1] Advocate Chauke complied with the Constitution, the National Prosecuting Authority Act, and any other relevant laws in his position as a senior leader

in the National Prosecuting Authority.”

Chairperson, if we also look at the bullet on page 180, the second round bullet, and this may not be the only ones. Advocate Chauke exercised his powers and performed his duties. Well, before that, Chairperson, the first bullet:

10 “Advocate Chauke duly respected Court processes and proceedings before the Courts as required by applicable prescripts and as a senior member of the NPA.”

And the bullet, THE next one:

“Advocate Chauke exercised his powers and performed his duties and functions in accordance with the Prosecution Policy, Policy Directives as determined under section 21 of the NPA Act.”

20 Chairperson, certainly it does not specifically state, those words are not used here, that he acted outside his jurisdiction, but everything that I have read indicates that very aspect, it requires Advocate Chauke to exercise powers as a DPP within his area of jurisdiction. And all of these paragraphs that I have mentioned must be read with the conduct when Advocate Chauke exercised powers that were not granted to him by the Constitution or the NPA Act in that

he exercised them outside of his jurisdiction.

ADV NGCUKAITOBI SC: Advocate Batohi, you have now summarised a new term of reference, which would have been one sentence. Why did you not include it in the draft?

ADV BATOHI: Chairperson, I do not know. I cannot answer that. So if it is a mistake, it does not mean this enquiry cannot – the purpose of this enquiry is to enquire, in my humble view, into the conduct of Advocate Chauke. And certainly it cannot be if there was an oversight or if it was
10 drafted in a way differently to what Counsel thinks it should have been, that it should in any way constrain this enquiry.

ADV NGCUKAITOBI SC: So you see this enquiry as also fixing your mistakes and your oversight and your sloppiness in drafting?

ADV BATOHI: That is your comment and I will not respond to that.

ADV NGCUKAITOBI SC: But you are the one who said that merely because there was a mistake, merely because there was an oversight, should not constrain the enquiry. So it is
20 completely justified for me to put it back to you that you see the role of this enquiry as fixing your mistakes, fixing your oversights and fixing your sloppiness in drafting.

ADV BATOHI: Counsel, you think you justified. I do not. We can agree to disagree on that.

ADV NGCUKAITOBI SC: Are you going to answer the

question or not?

ADV BATOHI: I disagree with that.

ADV NGCUKAITOBI SC: So you do not see this as the job of this enquiry to fix your mistakes and fix your sloppiness in drafting?

ADV BATOHI: I do not see it as the job of this enquiry to fix my mistakes or my sloppiness.

ADV NGCUKAITOBI SC: Yes. Now, when you look at the draft letter from page 181 ...[intervenes].

10 **ADV BATOHI**: I should add that that is your ...[intervenes].

CHAIRPERSON: Pardon me, Counsel. Counsel asked you a question, you answered, and he is now asking you another question then your answers whilst he is asking you. I think it is important, Advocate Batohi, to accord one another the respect and just to observe the quorum.

ADV BATOHI: I have absolute respect for Advocate Ngcukaitobi, Chairperson.

CHAIRPERSON: Well, you can say it, but you do not show it.

20 **ADV BATOHI**: I apologise, Advocate Ngcukaitobi.

ADV NGCUKAITOBI SC: There is no need to. Anyway, thank you for the apology. Let me not poison the water already.

CHAIRPERSON: Advocate Batohi and Advocate Ngcukaitobi, it is quarter past 11. You may pause where the

apology – it is quarter past 11. You just pause where the apology is given and you will continue when you reconvene after the tea adjournment.

ADV NGCUKAITOBI SC: Thank you, Madam Chair.

CHAIRPERSON: Just remember the point where you stopped and then you will take it from there. We will adjourn for tea until 11:35

ENQUIRY ADJOURNS

ENQUIRY RESUMES

10 **ADV NGCUKAITOBI SC:** ...it uses no evidence.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. That document, again, when it comes to the matter of Lieutenant General Mdluli, is limited only to the decision to withdraw the charge and to refer the matter to an inquest. It does not refer to the failure to reinstate the charge after the inquest or the failure to reinstate the murder charge after the judgment of Judge Murphy.

ADV BATOHI: That is correct.

20 **ADV NGCUKAITOBI SC:** That document also does not mention anything wrong with Mr Chauke's decision to instruct an appeal against the judgment of Judge Murphy in the matter of Lieutenant General Mdluli.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Thank you. Might we move

on to the next topic? When we adjourned, there was a third issue to be dealt with, which was the question of the instruction to Advocate Hilton Epstein. Can I understand what your evidence is? Is it that you do not recall the entire interactions with Advocate Epstein or not?

ADV BATOHI: The position is that I had interactions with Advocate Epstein. I remember that. I recall broadly that he had been briefed by Advocate Abrahams in a number of cases and the meetings we had dealt with the status of those matters generally.

ADV NGCUKAITOBI SC: Can you explain why you never disclosed this episode of the involvement of Mr Epstein despite you being completely aware of that fact?

ADV BATOHI: I did not think it was relevant at the time, but I am here to answer questions. I am happy to talk about it.

ADV NGCUKAITOBI SC: So it is not about having forgotten. It is about a deliberate choice that you will not disclose it because it is not relevant.

ADV BATOHI: No, that is not correct. If I can please clarify that. It was not a deliberate choice. It is not like I thought about my interactions with counsel, Advocate Epstein, and decided not to put it in. That is definitely not the case at all. We were trying to put together my affidavit and I think maybe we need to go back to the timelines under which we did this and I think everyone is aware of that, so I will not go through

it again.

But I had a couple of days, amongst other things, an appearance before Parliament. I am not making excuses. All I am saying is that we tried to put in my affidavit aspects that we thought would assist this enquiry and I am not trying to withhold that. I did not even think about Mr Epstein at the time, but I am happy to discuss any aspect of my meetings with him. I have got nothing to hide at all.

ADV NGCUKAITOBI SC: Now ...[intervenes]

10 **ADV MOHLAMONYANE SC:** Madam Chair, with your permission, may I ask to interpose with respect to my learned colleague. I am advised by the NPA team that at the time of the settling of the NDPP's affidavit, there was no instruction about the Epstein issue and I am asked to convey that and to put it on record.

CHAIRPERSON: I do not understand, counsel, are you suggesting that the issue regarding interactions between Advocate Batohi and Advocate Epstein was not brought to the evidence-leaving team?

20 **ADV MOHLAMONYANE SC:** No.

CHAIRPERSON: Or what?

ADV MOHLAMONYANE SC: The NPA team was not brought to the attention of the NPA, rather the attention of Advocate Hulley at the time, and the evidence-leading team as well, when the affidavit of the NDPP was settled. In other words,

it is a response to Advocate Ngcukaitobi's issue that Advocate Batohi has not brought that to light in her affidavit, disclosed the interactions in her affidavit.

CHAIRPERSON: And Advocate Batohi sought to answer that question the way she did? Are you taking issues with her answer?

ADV MOHLAMONYANE SC: Not quite. I was just asked to put it on record. I am not taking any issue with that. Her answers will remain. Those are her answers.

10 **CHAIRPERSON**: Should you not leave this aspect for re-examination, because those are matters that you can clarify maybe in re-examination?

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: Not now.

ADV MOHLAMONYANE SC: I agree.

ADV NGCUKAITOBI SC: Thank you, Madam.

CHAIRPERSON: I see Advocate Hulley is raising a hand. Would you please confer with him?

ADV MOHLAMONYANE SC: Madam Chair, Advocate Hulley
20 is requesting that he be given an audience on this aspect.

CHAIRPERSON: We will confuse this record. As you know, senior counsel, you will have an opportunity later when you re-exam. We cannot have cross-examination and re-examination at the same time. Might I request through your evidence leader, Advocate Mohlamonyane, that you take note

of this aspect and at an appropriate time when you re-examine, if you are minded to do so, you can raise whatever you want to raise.

ADV MOHLAMONYANE SC: I take your point, Madam Chair.

CHAIRPERSON: Yes, thank you. You may proceed, Advocate Ngcukaitobi.

ADV NGCUKAITOBI SC: Thank you, Madam Chair. Advocate Batohi, could you go to page 253 of file 3?

ADV BATOHI: I am there.

10 **ADV NGCUKAITOBI SC:** Yes. Now, there is an email that we received on Monday from Mr Epstein SC that was sent to you on the 26th of February 2019, in preparation for a meeting to be held on the 6th of March. Correct?

ADV BATOHI: It is a letter, an email from Advocate Epstein to myself, dated 26th of February 2019. That would have been about... I took office on the 1st of February 2019, so it is within that month. And I am not sure – I cannot recall the

meeting on the 6th, well, whether it happened on the 6th, but as I said I had a number of meetings with him, so it might
20 have been in preparation for that.

ADV NGCUKAITOBI SC: One of the documents that were given to you is the document that appears at page 254, which is a note prepared by Advocate Epstein and his junior Advocate Govender.

ADV BATOHI: I see that.

ADV NGCUKAITOBI SC: Yes. Now, in that note
...[intervenes]

CHAIRPERSON: Advocate Ngcukaitobi, how do we know that this document at 254 forms part of a note that was prepared by Advocate Epstein and junior? Just by merely looking at the document, how do I know that?

ADV NGCUKAITOBI SC: What they did, Madam Chair, at item 1 of 253, they did not only just extract the – if you go to 253, item 1, there are documents attached. And the first one
10 that was attached is this document at page 1 to 5.

CHAIRPERSON: Will you please clarify it with the witness?

ADV NGCUKAITOBI SC: Oh, yes. Thank you, thank you. Thank you for the guidance, Madam Chair.

CHAIRPERSON: Yes.

ADV NGCUKAITOBI SC: Advocate Batohi, we consulted, as you know, with Advocate Epstein to get ...[intervenes]

ADV BATOHI: I was not aware, but you did ask, and I had no issue with that.

ADV NGCUKAITOBI SC: Yes. Well, we had asked on
20 Monday whether there was an issue that you took on the advice that was given to you, and you said no.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Now, what he tells us is that in preparation for the meeting of the 26th, they sent several documents, which included the note on advice at 254 to 258,

the document at 259, which was an extract from the affidavit of Mr Shaun Abrahams, and then references to case law, which you will find at 274, and then the prosecution memorandum at 278. Do you accept that, or you have no recollection?

ADV BATOHI: My office has been trying to track the emails, and for some reason, we were not able to go this far back. We were struggling with it. So we are not able to trace these, but mmm... he did brief me on a couple of occasions, and I
10 do not have any reason to doubt that these documents would have been part of a pack that he would have sent to me, but as I say, I do not have any independent recollection of it.

ADV NGCUKAITOBI SC: Yes. Well, in the consultation, Advocate Epstein also read out to me and my junior WhatsApp exchanges with you, and I asked him not to copy those because I felt that would be too intrusive. Your
evidence is that you have no recollection whatsoever of these emails.

ADV BATOHI: No, no, I have no recollection of the contents,
20 but we certainly had communications.

ADV NGCUKAITOBI SC: When you say you asked your office, I do not understand that. You asked your office to track these emails, and they drew a blank.

ADV BATOHI: Ja, even the dates of the meetings, our calendar, for some reason, was not taking us back to 2019,

so my PA was having some difficulty actually getting the dates of the meetings as well. I do not know what the issue is.

ADV NGCUKAITOBI SC: So from your side, there is just nothing about 2019 on this particular issue?

ADV BATOHI: I do not have anything in front of me at the moment. I am seeing it now for the first time since then.

ADV NGCUKAITOBI SC: The problem with this is that there are other documents from 2019 that you produced for this
10 enquiry.

ADV BATOHI: Yes, that is right.

ADV NGCUKAITOBI SC: And then suddenly, this one has drawn a blank.

ADV BATOHI: You see, the other documents were attachments or annexures or they were attached to other documents, so we were able to, but I asked my PA to please try to trace the emails as well as the dates, and for some reason, we are not able to do that. I do not know why. I cannot explain that, but it is in my interest that I have all of
20 it.

ADV NGCUKAITOBI SC: No, I do not understand why you are able to get some documents from 2019, and then when it comes to these interactions with Mr Epstein, which you never disclosed, you cannot find anything.

ADV BATOHI: I have no reason to hide my engagements

with Mr Epstein at all. I am not withholding it for any reason. I am telling you, I had – the other documents that we may have got, like Advocate de Kock's report, was one that was attached to Dr Broughton's annexure, his affidavit or his opinion. I am trying to think which of the other 2019 documents we would have had, but it is not like we searched for those documents now. I did not ask my office to do that. I did ask them to check for all my engagements with Mr Epstein, including dates of meetings, et cetera, and I do not
10 know why we are struggling with it.

ADV NGCUKAITOBI SC: Yes. If we then come back then to page 254, just to understand, is your testimony that you have no recollection of page 254 at all?

ADV BATOHI: I have no recollection of page 254 at all. I am seeing it for the first time since I would have first – since it – if it came to me then, I have got no reason to doubt that, but I am seeing it now for the first time.

ADV NGCUKAITOBI SC: Yes. So what they told you, Mr Epstein, as advice, of course you can say it is legal
20 principles, paragraph 1 and paragraph 2, those are the principles when POCA certificates are issued because you asked for it. At page 255, they told you what you are entitled as an NDPP to rely on, which was one of the points of attack against the decision. They also told you, most crucially, what is the case against Mr Booysen – Major General Booysen, I

apologise – at page 255, 256, right up to 257. They also told you to justify the rationality because that was one of the issues that were challenged.

CHAIRPERSON: Please take it one step at a time.

ADV NGCUKAITOBI SC: Sorry, I apologise.

CHAIRPERSON: For Advocate Batohi to respond, you are referred first to 255, then to 257.

ADV NGCUKAITOBI SC: Yes, Madam Chair, thank you for the guidance. We can go back to 255 so that we get an
10 answer per question.

ADV BATOHI: I would prefer to answer it completely. I am making a note.

ADV NGCUKAITOBI SC: Generically, oh, I see.

ADV BATOHI: I am making a note. If you can go a little slower, it will help. Thank you, Chairperson.

ADV NGCUKAITOBI SC: Yes. Now, the reason why they prepared this note is that you had asked for their views on the issue of the application brought by Major General Booyesen, which had been defended by Advocate Abrahams,
20 pleadings were closed and the matter was due for argument. They sent you a short note to prepare for the meeting. Let us stop there. Any recollection?

ADV BATOHI: I do not doubt that.

ADV NGCUKAITOBI SC: You do not doubt it?

ADV BATOHI: Mmm-mmm.

ADV NGCUKAITOBI SC: Yes. Now that note, as most legal advisory notes would say, starts off with general principles, paragraphs 1 and 2, which is page 254 and 255. Is that correct?

ADV BATOHI: It does.

ADV NGCUKAITOBI SC: Yes. And one of the points that were attacked in that application is the question of the extent to which Mr Shaun Abrahams could have relied on summaries prepared by junior prosecutors. I do not mean junior in years, 10 but junior to him. And then they gave an opinion on that at page 255, and that decision-makers are entitled to rely on summaries, correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. And then most crucial ...[intervenes]

CHAIRPERSON: Where in paragraph, page 254, is mention made of the reliance on junior advocates?

ADV NGCUKAITOBI SC: No, it is at 255.

CHAIRPERSON: You must remember, counsel, you have 20 presented these documents for the first time to us this morning.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: Meaning we have not been able to go through it.

ADV NGCUKAITOBI SC: I appreciate it.

CHAIRPERSON: So give us the details as you ask questions, and take us to the relevant points as regards your questions.

ADV NGCUKAITOBI SC: Yes, thank you, Madam Chair. So if you go to 255, under decision-makers are entitled to rely on summaries, it says this is a principle of law, and they are explaining to you why it is correct. They say:

10 “This is consistent with the wealth of authority affirming that decision-makers are entitled to rely upon summaries of underlying material prepared for them by their subordinates.”

ADV BATOHI: That is correct. It is a point that I have also made at this enquiry.

ADV NGCUKAITOBI SC: Who are well-versed in the matter, and whose judgment an ultimate decision ...[intervenes]

CHAIRPERSON: I beg your pardon, counsel. You just made a remark. What are you saying, madam?

20 **ADV BATOHI:** I said that is correct. It is also a point that I have made at this enquiry. So I agree with that.

CHAIRPERSON: But you answered the question, whilst counsel is busy continuing with the question, or did I misunderstand you, Advocate Ngcukaitobi?

ADV NGCUKAITOBI SC: Yes, I had not yet finished. But we can live with the answer that the witness accepts the

proposition.

CHAIRPERSON: It does help us, because we are recording your questions for our own purpose, and the answers, Advocate Batohi, it will be helpful if you can just take a deep breath and wait for counsel to finish. Because you write a question, and before it is concluded, you answer. It is making it difficult for us.

ADV BATOHI: Understood, Chairperson.

ADV NGCUKAITOBI SC: Yes.

10 **CHAIRPERSON:** You may proceed, counsel, maybe from where you were.

ADV NGCUKAITOBI SC: Yes, thank you.

CHAIRPERSON: So that we can get the answer from Advocate Batohi.

ADV NGCUKAITOBI SC: Yes, after the word subordinates, comma:

“...who are well-versed in the matter, and whose judgment the ultimate decision-maker is entitled to trust. So that is the advice they gave you on that issue.”

20

Correct?

ADV BATOHI: It is there. It is in the document.

ADV NGCUKAITOBI SC: And then one of the most important issues, I wanted to come to this page 255, that Major General Booyesen kept on repeatedly saying publicly that there is no

case against him. They then sought to condense the case for you, what is the case of the NPA against Major General Booyesen. Now that is stated at page 255 under the heading, the case against General Booyesen. And then they explain to you in paragraph one that the applicants challenged the decision of Advocate Abrahams to prosecute Booyesen on counts 8 to 12, the five predicate offences in the indictment. And then they explain what the defence of the NPA is. From paragraph 2, paragraph 3, paragraph 4, paragraph 5, 6, 7, 8, 9, 10. They also even, at paragraph 10, give you the basis for that case. The factual basis for that case.

ADV BATOHI: At paragraph 10?

ADV NGCUKAITOBI SC: Yes. Paragraph ten, page 256.

ADV BATOHI: Mmm-mmm.

ADV NGCUKAITOBI SC: They say:

“Witness statements are relied upon as well as a statement by Danikas, a police reservist who worked closely with Booyesen, and corroboration by ballistics reports supporting the allegation that those killed were not in fact resisting arrest when they were killed.”

Now, those two pages are pieces of advice to explain in very condensed format what is the case against Mr Booyesen. They are doing it to prepare for the meeting of the 6th of March.

Is that correct that that is the advice they gave you?

ADV BATOHI: That is the advice that they provided in this document.

ADV NGCUKAITOBI SC: Yes. You then turn to page 257. Now it is going into a different topic because one of the issues is to challenge the rationality of the decision by Advocate Abrahams That is covered under the heading, the decision made by Advocate Abrahams to issue the section 2 POCA certificates. And that is paragraph, they even tell you there:

10 “A presentation to guide Advocate
Abrahams through the evidence was made
to him on the 27th of August 2015. It is an
Annexure, JP27. Then Advocate Abrahams
told the prosecution team that he wanted
additional information to be obtained and
investigations pursuant thereto to be
conducted. Advocate Abrahams requested
a list of items After these were furnished
to him, he was not satisfied and instructed
20 Advocate Maema to travel to Greece to
consult with Danikas.”

Then paragraph 4:

“Danikas supplemented his statements and handed Maema additional photographs and video clips on flash discs. Dawood Adam

and Advocate Maema briefed Advocate Abrahams regarding their consultations. He was handed a copy of Danikas' supplemented statement and he was shown certain photographs and video clips on the flash drives concerning the manner in which the Cato Manor Serious and Violent Crime Unit dealt with suspects and then Advocate Abrahams then issued the POCA certificates.”

10

Now, I asked him about this. This is to explain the rationality of the decision by Advocate Abrahams. Do you accept that as the advice you received?

ADV BATOHI: This relates to the rationality and that is an important point that you make.

ADV NGCUKAITOBI SC: Yes, yes.

ADV BATOHI: It is not about the correctness, it is about rationality.

ADV NGCUKAITOBI SC: I understand, but this is the advice

20 they are giving you.

ADV BATOHI: Sure.

ADV NGCUKAITOBI SC: Yes. And then the final page ...[intervenes]

ADV BALOYI-MERE SC: Sorry, Advocate Ngcukaitobi, can we... We seem to be getting answers but one is not clear

whether the witness accepts that this is the advice that was given to her or not. Her latest answer is sure, so I do not know where to place sure.

ADV NGCUKAITOBI SC: Thank you, thank you, Madam Baloyi-Mere. Could you answer expressly? I am putting to you that this page 257 under the heading, The Decision Made by Advocate Abrahams, was the advice given to you on the rationality of the decision by Advocate Abrahams, by Mr Epstein SC.

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

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: And then they sum up the whole thing at page 254 by referring you back to legal principles.

ADV BATOHI: Sorry, at what page?

ADV NGCUKAITOBI SC: 258, sorry, I think, or did I say 254? Yes. Page 258, which is the last page where they sum up these requirements by reference to section 2(4) and there they draw your attention to the reasoning of Judge Scott JA
20 and in the judgment, firstly, there is a judgment of the Western Cape Division in paragraph 1, S v. Chow, and that judgment is already referenced earlier at 254. Can you see that?

ADV BATOHI: Mmm-mmm.

ADV NGCUKAITOBI SC: Yes. And they support it with

another authority, NDPP v. Moodley and others. And then paragraph 3, to sum up why they believed that the decision was defensible. Can you see that?

ADV BATOHI: Sorry, where is the sum up?

ADV NGCUKAITOBI SC: This is the sum up, what I am referring to you, because it is under the heading, The Requirements for a section 2(4) POCA Authorisation, page 5.

ADV BATOHI: They set out the requirements there.

ADV NGCUKAITOBI SC: Yes. Yes, page 258, correct?

10 **ADV BATOHI**: Yes, they mentioned two cases and set out the requirements.

ADV NGCUKAITOBI SC: Yes, exactly. Now, this note is given to you because you have asked for it in preparation because you want to understand the strength of your case, correct?

ADV BATOHI: That is indeed so, I wanted to understand the position that they were taking and the reasons for it.

ADV NGCUKAITOBI SC: Exactly. You know, when I asked you on Monday, are you sure that you never received written
20 advice from Mr Epstein SC? You started by saying, no, you did not. Then later on you said, no, I do not recall. Now we know for a fact that you did receive it.

ADV BATOHI: That is so, I could not recall. As I said at the time ...[intervenes]

CHAIRPERSON: I beg your pardon, I beg your pardon,

Advocate Batohi. What is your response?

ADV BATOHI: Chairperson, my response is, as I said, I could not recall. And I want to clarify that I was very clear that I had meetings with Mr Epstein and that I received documents from him with regard to cases that he was handling at the time for the NPA. So, you know, that was what I could recall. Maybe the specifics of it, I could not, but I certainly accept that he had given me these documents, many documents. At the time, he provided me with
10 documents.

ADV NGCUKAITOBI SC: You see, the problem, Advocate Batohi, you have given us so many opinions from your office that you obtained, and on this issue of whether there was a good case or a bad case or at least what the case was, let me not, because I suppose you would disagree if it was a good case, but at least what the case was and what the defence was. You have just not produced this advice from Mr Epstein. Now, that I find extremely difficult to understand, why you did not volunteer these interactions and this opinion.

20 If you are saying there was nothing untoward, then I ask myself, why then not disclose it?

ADV BATOHI: There is still nothing untoward about it. And I have explained, I thought, why, you know, we did not provide it. And as I say, this is the first time I am seeing it, but I was candid when I was asked about it, that we had had meetings,

and he had briefed me on all the matters that he was handling, and of course, this was one of them.

ADV NGCUKAITOBI SC: Well, we will have to look at the record about whether you disclosed that there were meetings. I thought I introduced Hilton Epstein SC into the discussion, you not.

ADV BATOHI: No, you are right. In fact, you did. If my recollection is correct, that you did. And I said, when I was asked these questions about it, I answered it as candidly as
10 I could.

ADV NGCUKAITOBI SC: Yes. Now, the other documents from 254, right up to, sorry, from 259 to 333, were also part of that attachment. We can see from the email cover that they were part of that attachment.

CHAIRPERSON: At 250...

ADV NGCUKAITOBI SC: 259, Madam Chair.

CHAIRPERSON: 259.

ADV NGCUKAITOBI SC: Up until 333.

CHAIRPERSON: What about them?

20 **ADV NGCUKAITOBI SC:** I am saying to the witness that they were part and parcel of that email exchange that is referenced at 253. Correct? Actually, it is not an exchange ...[intervenes]

ADV BATOHI: Sorry, my apologies.

ADV NGCUKAITOBI SC: It is Mr Epstein sending you an

email.

ADV BATOHI: I was just looking at all of the attachments and I do see a minutes of meeting of 6 March as well, which I have not seen.

ADV NGCUKAITOBI SC: Well, I will come back to that minute. I just wanted to look at the attachments.

ADV BATOHI: Chairperson, I ask that I be given an opportunity to read all these documents and then deal with them because it is the first time that I am seeing it. And I
10 think it would be fair for me to have a look at these documents and then be subjected to questioning on it.

CHAIRPERSON: Yes, Advocate Ngcukaitobi, it would be in fairness to advocate, but remember, we all have these documents only this morning. And I am sure she would like to refresh her memory as we wish to also because we have not read the documents. It may just be useful for her in particular to reflect. If it is possible, you may park this question. Hopefully, it is not going to inconvenience you or distract you from your course, just to enable her to reflect on
20 these documents. Particularly, from 259 to 333.

ADV NGCUKAITOBI SC: Look, Madam Chair, if she is going to reflect, she must reflect up until 353.

CHAIRPERSON: 353.

ADV NGCUKAITOBI SC: So that we do not come back and then stand down again for another questioning. Madam

Chair, I have no difficulty that a witness who is asking for time must be given time. I want to record one thing. These are documents that were sent to Ms Batohi in 2019. In other words, these are her documents. If she wants to read them, fine. And my position is they are so crucial to the topics that come thereafter, so if she wants to read, she can read them, but I would like to continue questioning her on these documents before moving to the fourth topic.

CHAIRPERSON: Okay, you say these are the documents
10 that, I beg your pardon, these are the documents that were sent by Advocate Epstein?

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: Team to her, in preparation for the meeting of the 6th of March 2019.

ADV NGCUKAITOBI SC: 2019, yes. As I say, the principle that a witness wants time and must be respected, I accept that.

CHAIRPERSON: Thank you, counsel, for understanding. Advocate Batohi, I beg your pardon, let me just confer with
20 my sisters. Advocate Ngcukaitobi, as you understood, that it is fair for Advocate Batohi to go through these documents, would you be able to proceed then on another aspect or will it be necessary for us to adjourn to enable her to go through these documents in preparation for your next questions?

ADV NGCUKAITOBI SC: Yes, Madam Chair, I do not know

how long she needs, but it should not be more than an hour to read through these documents. So I am happy to adjourn until maybe 2 o'clock and then we can commence thereafter.

CHAIRPERSON: We are minded to enable her to go through the documents then until after lunch, because we will reconvene and then immediately after that hour it will be lunch. Advocate Batohi, how much time do you need to reflect and read these documents?

ADV BATOHI: Chairperson, I may not be as fast a reader
10 as Advocate Ngcukaitobi, but I think up until 2 o'clock I will certainly do my best to go through all of it and be ready at 2 o'clock.

CHAIRPERSON: I am just thinking, counsel, that lunch may not necessarily be ready when you adjourn now. So it may be helpful to not only afford Advocate Batohi sufficient time, to also just use that moment to wait for lunch so that when we reconvene we would have had lunch to avoid many adjournments. I think that will afford you sufficient opportunity, madam, to reflect on and ...[intervenes]

20 **ADV BATOHI:** I hope so, Chairperson. I will do my best.

CHAIRPERSON: ...go through the documents. It will definitely be more than an hour. In that event, Advocate Batohi, we bear in mind that these were the documents sent to you in your office in 2019, of course, it is a long time ago. But you are aware that there were such documents. So it is

not like a totally new document that you do not know of. Nonetheless, we will afford you two hours. Not an hour. Two hours to go through the documents so that we do not take another adjournment after lunch. We will, therefore, adjourn now for that purpose and also to have lunch during that break and reconvene at half past two. We adjourn.

ADV NGCUKAITOBI SC: As it pleases you, Madam Chair.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

10 **CHAIRPERSON:** Good afternoon, everyone. Good afternoon, Advocate Ngcukaitobi. Good afternoon, *Nthate Chauke*, good afternoon. You are still under oath, madam. Advocate Ngcukaitobi, you may proceed. I assume that you managed ...[intervenes]

ADV BATOHI: I did, Chairperson.

CHAIRPERSON: ...to go through the document. You may proceed, counsel.

ADV NGCUKAITOBI SC: Thank you, Chair. Advocate Batohi, from page 259 to 271 are extracts from the answering
20 affidavit of your predecessor, Advocate Shaun Abrahams Is that correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. And in those extracts, he sets out the basis for his decision to issue the section 2 authority, section 2 of POCA.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. He also pertinently responds to the criticism by Judge Gorven. Correct? At page 263.

ADV BATOHI: Yes, he gives his response to that.

ADV NGCUKAITOBI SC: Yes. He also answers the allegation that Advocate Hodes SC made concessions from page 266.

CHAIRPERSON: Yes, he does.

ADV NGCUKAITOBI SC: Yes.

10 **CHAIRPERSON:** Counsel, this affidavit by Advocate Abrahams was made in which proceedings?

ADV NGCUKAITOBI SC: Madam Chair, I think we will have to just submit. We have got the affidavit together with this annexures.

CHAIRPERSON: Yes.

ADV NGCUKAITOBI SC: We will just have to hand it to the panel. There were two proceedings challenging the authorisations. Proceedings number one challenged the authorisations under Advocate Jiba, and they were set aside
20 by Judge Gorven. When Mr Abrahams took over, he reissued those authorisations. Mr Booysen then challenged them again. So, in those second review proceedings, there was a comprehensive 175-page answering affidavit filed by Advocate Abrahams. So, it is in those proceedings that we extracted the – well, it was not extracted by us. It was

extracted by Advocate Epstein for the benefit of Advocate Batohi.

CHAIRPERSON: Thank you very much. That helps.

ADV NGCUKAITOBI SC: Yes. Thank you, Madam Chair. And then, the third feature of this is that he also refers to the findings made by the full bench in the case of General Council of the Bar versus Jiba from page 269. Is that correct?

ADV BATOHI: That is correct. He does.

ADV NGCUKAITOBI SC: Yes. And at page 272 to 273, I
10 think that this may be a duplication because we have looked at the extract from the Act itself, 272 to 273. Can you see that?

ADV BATOHI: I see it.

ADV NGCUKAITOBI SC: Yes. So, you can skip that. And then, he gives you a copy of a judgment called S versus Prinsloo with specific extracts, I think, from paragraph 45 – from paragraph, yes, 45 to paragraph 68, which is at page 276 to 277. Correct?

ADV BATOHI: He does that.

20 **ADV NGCUKAITOBI SC:** Yes. And then, the last document is then the prosecution memorandum of Advocate Maema from page 278 to 333.

ADV BATOHI: Yes, that is correct.

ADV NGCUKAITOBI SC: Yes. So, those are the documents given to you by Advocate Epstein to empower you for the

consultation on the 6th of March 2019. Correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Now, we then go to the meeting itself of the 6th of March 2019. If we can start at 334. Now, this is a minute prepared by Advocate Tinielle Govender, who was the junior counsel to Advocate Hilton Epstein, that which has been read and endorsed by them as being the accurate recollection of what happened. They prepared this in 2019 already on the day of the meeting on the 6th of March.

10 Correct?

ADV BATOHI: I cannot dispute that.

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

CHAIRPERSON: I beg your pardon, Advocate Ngcukaitobi. Advocate Maema's affidavit or memo...

ADV NGCUKAITOBI SC: Statement, yes.

CHAIRPERSON: Memorandum, rather. Where does it start?

ADV NGCUKAITOBI SC: I think the extract, Madam Chair, starts at 278.

CHAIRPERSON: 278.

20 **ADV NGCUKAITOBI SC:** Yes.

CHAIRPERSON: 278.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: Please bear with me. I just want to check something.

ADV NGCUKAITOBI SC: Indeed.

CHAIRPERSON: Oh, thank you. Up to 277 is the State v. Prinsloo.

ADV NGCUKAITOBI SC: Yes. There are only two pages of States v. Prinsloo. It is 276.

CHAIRPERSON: Yes. Thank you very much.

ADV NGCUKAITOBI SC: Thank you, Madam Chair. Now, if we then go back to the minute of the meeting held. Now, in this meeting, you invited Mr Carl Van der Merwe, who was the attorney for Major General Booyesen, and Advocate Anton
10 Katz SC, who was the senior counsel for Mr Booyesen. Is that correct?

ADV BATOHI: They were part of the meeting.

ADV NGCUKAITOBI SC: No, you are not answering my question. You invited them. They did not just show up.

ADV BATOHI: No, they were part of a group of people that were invited to the meeting.

ADV NGCUKAITOBI SC: But they were invited by you.

ADV BATOHI: Yes, they were invited by me.

ADV NGCUKAITOBI SC: Yes. Now, when you invited the
20 legal team of Advocate Booyesen, you had not consulted with the prosecution team, your own prosecution team. Correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: And you did not invite your own prosecution team to that meeting.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: You had not consulted with the investigators in the matter.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: You did not invite the investigators to the meeting.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: You had not consulted with the complainants.

10 **ADV BATOHI:** I did not think there was any need for me to consult with the complainants.

ADV NGCUKAITOBI SC: Just answer my question. You had not consulted with the complainants.

ADV BATOHI: I did not.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: And who would be the complainants?

ADV NGCUKAITOBI SC: It would be the families of the deceased.

CHAIRPERSON: All the deceased's' families, let me rephrase, the deceased in relation to the 28 dockets.

20 **ADV NGCUKAITOBI SC:** Indeed.

CHAIRPERSON: Yes, thank you.

ADV NGCUKAITOBI SC: Thank you. Now, at page 3, page 336, if you count 1, 2, 3, 4, the fourth column which says SB, we asked the author of these minutes, SB refers to Shamila Batohi.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: 336?

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: How does the fourth point read?

ADV NGCUKAITOBI SC: It says:

“Okay, but I understand.”

Yes. You say:

“Okay, but I understand. People are angry
and the NPA has behaved badly.”

10 **ADV BATOHI:** Sorry, I am not in the same place as you are.

ADV NGCUKAITOBI SC: So it is 1, 2, 3, 4.

ADV BATOHI: On page 336.

ADV NGCUKAITOBI SC: Page 336, yes.

ADV BATOHI: Yes.

ADV NGCUKAITOBI SC: Where it starts with:

“Okay, but I understand people angry and
the NPA has behaved badly.”

ADV BATOHI: Mmm-mmm.

20 **ADV NGCUKAITOBI SC:** You already condemned the NPA
as having behaved badly, but we know that you had not done
any investigation at that stage. Is that correct?

ADV BATOHI: I think we need to look at the context of that
comment. That comment is made in the context of, we were
discussing a number of, the purpose of the meeting was to
discuss other matters as well, and if you look at what happens

before that mmm... we are referring to mmm... the Pandey matter, because I see Madhu's name is there, he was one of the accused in the Pandey matter mmm... In fact, you will see on the first page, Counsel Epstein says, can I come and see you at a later stage regarding Madhu and Pandey? And that is the matter we are discussing. And so that comment, the Booyesen matter starts after the comment. The comment is made with regard to other cases. You see, Mr Epstein says:

10 “Van Loggerenberg, we received a very aggressive letter. Perhaps I should come back to you and talk to you.”

My response then is:

“Okay, but I understand people angry and the NPA has behaved badly. Three deputies from the PCL...”

That is incorrect, actually it should be the PCLU;

20 “...are going back to where they came from, including Maema. Concerning discipline, I will look into that. I need to apply my mind.”

So, having read all of that, I think it relates to all of these matters, well, more than just the Booyesen matter.

ADV NGCUKAITOBI SC: I think you are not answering my question. At that point, you had not done any investigation.

ADV BATOHI: Into the Booyesen matter?

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: As indicated?

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: I had not.

ADV NGCUKAITOBI SC: Yes. You mentioned the three deputies from the PCLU that will go back to where they came from, including Mr Maema.

ADV BATOHI: Mmm-mmm.

10 **ADV NGCUKAITOBI SC:** Now, you had not consulted with Mr Maema or these deputies before you made this comment.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: And then you mentioned discipline. Who were you planning to discipline?

ADV BATOHI: I said concerning discipline, I will look into that. I need to apply my mind. I had not decided on anything at that point. I need to indicate again the context within which

this was happening. There was the Zondo Commission that was ongoing and a lot of evidence had been led there about
20 possible capture of the NPA. And the team that was dealing with these cases that were allegedly the result of capture were the cases that this team was dealing with. It was on that basis I said I will look into it. I need to apply my mind.

ADV NGCUKAITOBI SC: Okay. Just answer my question. Who are you referring to when you say discipline? Surely

there must be an employee that will be subjected to discipline.

ADV BATOHI: There will be employees that I will apply my mind to with regard to possible discipline.

ADV NGCUKAITOBI SC: Who are those employees?

ADV BATOHI: It is Maema. Matenjwa was another deputy. It was the team that was dealing with a number of these matters.

ADV NGCUKAITOBI SC: So already within a month of your
10 arrival, without any investigation, you already had a list of people to be disciplined.

ADV BATOHI: No, I did not have a list of people to be disciplined. I had a number of people against whom there were lots of allegations in the public. And I had said I need to look into that and apply my mind.

ADV NGCUKAITOBI SC: Yes, but the point is that you
already put them under the bracket of discipline. And I asked you who these people are. You have given us Mr Maema, Mr Matenjwa. And I asked you as a responsible NDPP how you
20 could talk of discipline without any form of enquiry at all.

ADV BATOHI: Because there was a lot of allegations in public about capture of the NPA. I needed to consider the matter. I had made absolutely no decision about discipline. And I will not make a decision about discipline without any evidence at all.

ADV NGCUKAITOBI SC: Yes. Other than those two employees, Mr Matenjwa and Mr Maema, who else did you think fell into this category of discipline?

ADV BATOHI: There were a number of staff members that were potentially compromised. It would be Maema, Matenjwa, JJ Mlotshwa, Advocate Mosing mmm... And I am not sure about others.

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: But all of them are currently undergoing
10 disciplinary proceedings.

ADV NGCUKAITOBI SC: Now, you say that the basis for you
...[intervenes]

CHAIRPERSON: These, I beg your pardon, these people that you referred to by names are advocates within the NPA.

ADV BATOHI: That is correct. Well, some of them have left since. But they were at the time.

CHAIRPERSON: They are nonetheless advocates.

ADV BATOHI: Yes, that is correct.

ADV NGCUKAITOBI SC: Now, just explain to me. You say
20 that the basis for the allegations, or at least the basis for the reference to discipline, was because of what had been stated at the Zondo Commission, correct?

ADV BATOHI: Pretty much, I would think. Casting my mind back seven years, I would imagine that is what it was.

ADV NGCUKAITOBI SC: By who?

ADV BATOHI: I beg your pardon?

ADV NGCUKAITOBI SC: Who said things about these people that warranted the reference to discipline at the Zondo Commission?

ADV BATOHI: I cannot say who said what. It was public knowledge at the time.

ADV NGCUKAITOBI SC: Well, surely you can tell us that so and so had made allegations against Advocate Matenjwa. So and so had made allegations against Advocate Maema.

10 **ADV BATOHI:** I cannot say that.

ADV NGCUKAITOBI SC: Was General Booysen one of the people that made allegations against them?

ADV BATOHI: I cannot recall.

ADV NGCUKAITOBI SC: Was Advocate Masana one of the people who made allegations against them?

ADV BATOHI: I cannot recall.

ADV NGCUKAITOBI SC: You see, it is extremely difficult to make sense of your evidence when you say there were allegations of capture against Advocate Matenjwa and
20 Advocate Maema. And I ask you from who, you cannot recall. And I ask you the nature of these allegations, you also cannot recall. It makes me believe that there is simply no basis for the claim that you have made, which is why you cannot recall when I ask you about detail.

ADV BATOHI: That is your opinion.

ADV NGCUKAITOBI SC: Well, help me to disabuse my mind of this view, because I have given you two potential candidates that could have made these allegations because they testified at the Zondo Commission. Major General Booyesen and Advocate Masana.

ADV BATOHI: I said I cannot recall. There was a lot that was in the public space at the time.

ADV NGCUKAITOBI SC: Yes. Can I tell you the problem with the references to the State Capture Commission is that
10 General Booyesen's evidence was only given on the 16th of April 2019. Did you know that?

CHAIRPERSON: No.

ADV NGCUKAITOBI SC: Advocate Masana's evidence at the Zondo Commission ...[intervenes]

CHAIRPERSON: Please repeat that.

ADV NGCUKAITOBI SC: It was given on the 16th of April 2019. That is Major General Booyesen.

CHAIRPERSON: 2019?

ADV NGCUKAITOBI SC: Yes.

20 **CHAIRPERSON:** At the Zondo Commission?

ADV NGCUKAITOBI SC: At the Zondo Commission, yes. Now, Advocate Masana's evidence was only given on the 11th of June 2019 at the Zondo Commission. Did you know that?

ADV BATOHI: I was not aware.

ADV NGCUKAITOBI SC: Yes. And you were already making

these statements about discipline on the 6th of March 2019. Now, if we could go further at page 336. Immediately after you have ...[intervenes]

CHAIRPERSON: Sorry, Advocate Ngcukaitobi, did you... Were you expecting a response from the witness or were you just putting a statement and moving on?

ADV NGCUKAITOBI SC: I think it is common cause that she was making those allegations on the 6th of March 2019.

CHAIRPERSON: But she did not respond, she did not react,
10 or you did not give her a chance to react.

ADV NGCUKAITOBI SC: All right, thank you. Do you want to respond, Advocate Batohi?

ADV BATOHI: No, there is no need to respond.

ADV NGCUKAITOBI SC: Okay. Then, immediately after you have spoken, HE, we asked the people that gave us this minute, is Hilton Epstein, who says:

“On the Booyesen matter, I spoke to Katz...”

And we are told that is Anton Katz SC,

“...here is the amended Notice of Motion.”

20 And then he read it out.

“So, they want the decision to issue of POCA certificates to be set aside, the latest position is...”

He said that:

“This is my view.”

So, already at that meeting, there was a draft order to set aside your decision, correct? Not your decision, the NDPP's decision.

ADV BATOHI: I cannot remember what it was, but from the note it says:

“Here is the amended Notice of Motion.”

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: So, I do not know what that was about. But certainly, counsel was speaking and they brought something
10 to the meeting. I could not prevent that.

ADV NGCUKAITOBI SC: I am not sure what you mean when you say you could not prevent. You had invited Mr Katz, you had invited Mr van der Merwe. You had a reason to invite them.

ADV BATOHI: I invited everybody. I cannot recall what the circumstances were, but I invited my counsel, their counsel, and I cannot remember what actually led to the meeting and how it came about. As well as the State Attorney was also there. I think that was the State Attorney. I think, looking at
20 the list in front, I think Joseph Sebelemejta, I think he is the State Attorney. And so, they came to the meeting and what they brought with them, I could not control. So, yes, that was what was at the meeting. I did invite them. There is nothing wrong with that, but I do not know, I could not, you know, they brought what they felt they needed to.

CHAIRPERSON: Advocate Batohi, but do not say things that have not been put to you. Nobody is saying there is anything wrong with you having invited them to the meeting. Would you please confine yourself to the questions that I put to you? Because when you answer broadly, you invite questions from us to seek clarity from this elaborated or rather expensive answer you gave. Would you please just confine yourself to the questions?

ADV BATOHI: Chairperson, with all due respect, I think this
10 is a fact-finding and I am really trying to give the facts as I understand them, but I will certainly try to be shorter.

CHAIRPERSON: I know we are all searching for the truth, but we are also trying to record your answers to the questions, pertinent questions that are put to you. You may just ask if there is a need to elaborate, but when you just answer, sometimes I am not even sure what you are answering, and it makes it difficult for me to follow your evidence. Would you please confine yourself to the questions? And if a need arises that you want to elaborate,
20 seek my guidance, then we will do so, but I am trying to write your answers to the pertinent questions that I asked you. Otherwise, I am just writing and I am not even sure what I am writing here. Would you please do that to assist us? I will try to assist you.

ADV BATOHI: I will try to assist you, Chairperson.

ADV NGCUKAITOBI SC: Thank you, Madam Chair. Advocate Batohi, let us just go back to make sure we have a clear answer. What I am putting to you is that the draft amended Notice of Motion concerned the decision to issue the POCA certificate being set aside. That much is clear from what Advocate Epstein said. Is that not correct?

ADV BATOHI: That is clear from that, what is written there.

ADV NGCUKAITOBI SC: Thank you. Then you respond, which is why I put to you that you actually knew about Mr Carl
10 van der Merwe and Mr Katz coming. You say:

“I bumped into them this morning, meaning Mr Katz and Mr Carl van der Merwe, but I know Carl from Durban.”

Do you remember this?

ADV BATOHI: Well, I must have bumped into them that morning, but when you asked me about it, I could not remember and I could not even remember the meeting. But clearly, I bumped into them that morning before the meeting.

ADV NGCUKAITOBI SC: Accidentally.

20 **ADV BATOHI:** However, I do not know.

ADV NGCUKAITOBI SC: Of people you have invited to the meeting, just bumping into them accidentally.

ADV BATOHI: I cannot even recall where I bumped into them, frankly.

ADV NGCUKAITOBI SC: That is the oddity of it, is

accidentally bumping into people that you have invited into a meeting before you have even met with your own counsel.

ADV BATOHI: I cannot respond to that.

ADV NGCUKAITOBI SC: Now, you say, I know Carl from Durban. What does that mean?

ADV BATOHI: I know Carl van der Merwe. He is a lawyer from Durban.

ADV NGCUKAITOBI SC: But what is the extent of your knowledge of him?

10 **ADV BATOHI:** I know Carl for many years in Durban. I was a prosecutor. He was a criminal lawyer. And there were many cases where we were against each other for many, many years.

ADV NGCUKAITOBI SC: Yes. Were you friendly with him?

ADV BATOHI: I am friendly, well, I do not know how you would describe friendly, but I had not seen him for many years at that time. But we had a good relationship, as I do with many defence counsel.

ADV NGCUKAITOBI SC: So you had a good relationship
20 with him?

ADV BATOHI: Well, ja.

ADV NGCUKAITOBI SC: What about General Booysen? Did you know him before this case?

ADV BATOHI: I did know him before this case.

ADV NGCUKAITOBI SC: Know him from where?

ADV BATOHI: He was a police officer in Durban. I was a prosecutor. And I must say I did not really know him well, but I did know him.

ADV NGCUKAITOBI SC: You knew him. I do not understand when you say he was a police officer. That much is a notorious fact. What I am asking you is whether you had any interactions with him in the course and line function of your duties.

ADV BATOHI: I did have interactions with him.

10 **ADV NGCUKAITOBI SC:** You were the Director of Public Prosecutions in KwaZulu-Natal until 2009. For how long were you the Director of Public Prosecutions?

ADV BATOHI: From 2002 until 2009.

ADV NGCUKAITOBI SC: And during that period of seven years ...[intervenes]?

ADV BATOHI: Wait a minute, please. From which period, 2002...

ADV BATOHI: 2002 to 2009.

CHAIRPERSON: 2009.

20 **ADV NGCUKAITOBI SC:** Yes.

CHAIRPERSON: Thank you.

ADV NGCUKAITOBI SC: During that period of seven years, you became acquainted with Major General Booyesen.

ADV BATOHI: I am not sure what became acquainted with him means, but I certainly knew him because he was in the

police force and ja, I got to know him at that time.

ADV NGCUKAITOBI SC: I asked you, when I say acquainted, it is based on the answer that you gave when you say you had several interactions with him in the course and scope of your employment.

ADV BATOHI: I cannot recall several, actually. I must think back. This is a long time. Because, to be frank, he does not stand out as someone that I, you know, one of the investigators that was involved in any of the cases. I had...

10 I honestly cannot say that I had a lot of interaction with him. But, of course, as the – I do not know if he was a head of the unit at the time, but I knew of him, and I am sure I would have met him in certain contexts.

ADV NGCUKAITOBI SC: Yes. Not only was he the head of the unit of Cato Manor, he also became promoted in 2007 to be the Provincial Head of Serious and Violent Crime of the province. So, even in that capacity, you would have interacted with him on several occasions.

ADV BATOHI: I am not sure. I used to interact more with
20 Commissioner Brown, who was his superior. I know we met in meetings, and I had a lot of – my interactions were a lot with Commissioner Brown. But I cannot remember Booysen.

ADV NGCUKAITOBI SC: Sorry, Advocate Batohi, if I am sounding confused, it is because I am. I thought you had admitted that you had interactions with Major General

Booyesen in his capacity as the Head of the Serious and Violent Crime Unit at ...[intervenes]

ADV BATOHI: I am sure I would have.

ADV NGCUKAITOBI SC: Yes, and I thought – this is the only thing I was adding, is that those interactions would have been strengthened by the fact that he was holding a provincial position.

ADV BATOHI: No, I did not really have a close relationship with General Booyesen. I must have had interactions. I cannot
10 even remember specifically, but I am saying that because he was a police officer in KZN. But Commissioner Brown was a person I had a lot of interaction with.

ADV NGCUKAITOBI SC: Okay. Advocate Batohi, this is not an enquiry about Commissioner Brown. It is an enquiry about Major General Booyesen, if we can confine ourselves to that. Now, when you say you had several interactions, in what context were those interactions? What were you discussing?

ADV BATOHI: I cannot recall. In fact, I may have used the word several, but as I said, I do not recall having a close
20 relationship with General Booyesen, and I cannot recall in what context we would have had conversations.

ADV NGCUKAITOBI SC: Now, you did not speak of conversations in your earlier answer. You spoke of meetings. I am asking you, what were those meetings about?

ADV BATOHI: I am not even sure if I have had meetings

with him. All I am saying is that he was the head of a unit in police, and I am just, because it is casting my mind back 15 or so years away, longer than that, I am just, you know, I am not sure, I cannot recall what these interactions or communications were, and I am trying to answer as best I can.

ADV NGCUKAITOBI SC: Advocate Batohi, you are the one who introduced the concept of meetings. I was simply talking about being acquainted with him, and then you said you would
10 have had several meetings in his capacity as the head of the unit or as a senior policeman.

ADV BATOHI: I am not sure if I used the word several, but we can look at that.

ADV NGCUKAITOBI SC: That is fine. You said meetings, then, set in the plural.

ADV BATOHI: I said I assume I would have, but I cannot recall that I did. But as I said, to clarify, and I know you say do not speak about Commissioner Brown, but he was his superior, and I had a lot of meetings with him.

20 **ADV NGCUKAITOBI SC:** Yes. Now, I think where we got stuck is you remembering meetings but not remembering the content of the meetings. Your final answer is you remember the meetings, you do not remember the content of the meetings.

ADV BATOHI: I honestly cannot even remember the

meetings.

ADV NGCUKAITOBI SC: And your first answer that you had meetings with him was a false answer.

ADV BATOHI: It was not a false one. I am not trying to mislead this. I am trying to recall events way back 20 years ago mmm... so it is difficult.

ADV NGCUKAITOBI SC: Yes. Anyway, so when you come to that meeting of the 6th of March, you have Mr Carl van der Merwe, who you volunteer acquaintanceship with, and you
10 have Major General Booyesen and his client, whom you say you knew before. Is that correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Now, then Mr Epstein tells you, immediately after you have said you had bumped into Mr Carl van der Merwe, that Mr Katz's view is that he wants you to withdraw the POCA charges against everyone. We can
continue with the predicate charges because there is not enough information. The interdict will not carry on. He is banging on the NDPP, not issuing new POCA certificates.
20 You can later reinstate. He is now narrating the demand from Major General Booyesen, communicated through Mr Katz SC. Is that correct?

ADV BATOHI: That is their demand.

ADV NGCUKAITOBI SC: Yes. Look at your response.

CHAIRPERSON: I beg your pardon. At 335, 1.4, is that the

same Advocate Katz who is mentioned there? TM. Is it somebody different?

ADV NGCUKAITOBI SC: No, Madam Chair. You will see when he enters the meeting. He has not yet entered at this stage.

CHAIRPERSON: He is not yet there.

ADV NGCUKAITOBI SC: Yes, he is not yet there. This is Advocate Batohi only with his legal team. So, Advocate Batohi, you see at this point the demand has been set out
10 about what they want. But look at how you respond. You say:

“I would do something like that. It would look like you do not know what you are doing. If it stands now and if it is withdrawn, that is it.”

So, your answer when you are told what their demand is, is that you would do something like that and you do not want to appear as if you do not know what you are doing.

ADV BATOHI: I cannot vouch for the accuracy of this
20 transcript. What I would say is that I would never, ever simply accede to the demand of any counsel, ever. I would consider evidence and facts. It is not the way I work. If you read that, it says, I would do something like that. Then I go on to say, it would look like you do not know what you are doing. My inclination is that I would have said, I would not do something

like that. It would look like you do not know what you are doing.

ADV NGCUKAITOBI SC: Yes, thank you very much.

ADV BATOHI: So, that is definitely not what I would have said.

ADV NGCUKAITOBI SC: And then here responds Advocate Epstein, the following page at 337, about costs. We can leave that it is not particularly germane. In the end, the order was without costs. But I am interested in what you say
10 thereafter. You say:

“We will have to look whether the POCA certificates were properly issued, the decisions of the NDPP on these matters are being tested. I need to assess the evidence. On the one hand, I get a sense that with the mechanist, if the victims get justice strategically, this case, if racketeering stands, they will have to take my decision to the end. I am not afraid of
20 it being tested if the decision is taken properly. If I have that view, I do not need to do anything, it just proceeds.”

And now, this is the part I want your comment on.

“They are taking SKA's decision on review.”

Now, that is Shaun Kevin Abrahams, correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes.

“It is the worst case to take on review.
SKA's credibility has a bad perception. It
is there. This case, imagine a Judge
saying this, Jiba, Shaun, et cetera, they
would say it was not done properly.”

Can I just ask you to explain why immediately you believed
10 that simply because the decision is taken by Ms Jiba, sorry,
Advocate Jiba and Advocate Shaun, a Judge would
immediately say it was not done properly?

ADV BATOHI: I have to say that I have an issue with us
thinking that this, accepting that this transcript is accurate in
every word. Because if you look at the top of that very same
part that you have read, it just does not make sense, what is
written. It says:

“On the one hand, I get a sense that with
the machinist, if the victims get justice,
20 strategically, this case, and it ends.”

It just does not make sense. So my point is ...[intervenes]

ADV NGCUKAITOBI SC: No, there is a later part where you
explain the strategic part. That is why I have not asked you.
Can you just focus on what I asked you ...[intervenes]

ADV BATOHI: My point is, Chairperson, please, can I

respond? Because I am being asked details about a transcript that, in my view, I cannot even recall. I do not know if it is accurately captured. And I am being asked to answer questions as if it is accurately captured. So I should be given an opportunity to deal with it with that understanding that it may not be accurately captured.

CHAIRPERSON: Advocate Ngcukaitobi, I think take it one step at a time. Maybe we can just capture that portion you read so that she can respond to that very portion. And as I
10 cautioned also Advocated Batohi, just confine yourself to the question. If you need to elaborate, you may request that you do. Maybe then capture that portion that was read to you and then you can comment or answer.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: Would you kindly read that portion that you focused on, counsel?

ADV NGCUKAITOBI SC: Yes, thank you, Madam Chair. It is the sentence that starts with:

20 “They are taking SKA's decision on review.
It is the worst case to take on review.
SKA's credibility has a bad perception. It
is there. This case, imagine a Judge
saying this, Jiba, Shaun, et cetera. They
will say it is not done properly.”

I just want to understand that part. On what basis could you

allege that simply because a decision was taken by Advocate Jiba and Advocate Abrahams, a Judge will say it was not taken properly?

ADV BATOHI: I cannot say that because a Judge must consider the case before him or her.

ADV NGCUKAITOBI SC: So this would just be your own prejudices and biases?

ADV BATOHI: No, I would say it has not been captured properly.

10 **ADV NGCUKAITOBI SC:** Because part of the problem with this, there was never any credibility finding against Advocate Abraham. Never any findings at all in any forum that he had done something calling into question his credibility.

ADV BATOHI: Credibility does not only depend on what is said in fora.

CHAIRPERSON: May you please answer? Was there any such credibility? I beg your pardon. Was there any such credibility findings made anywhere?

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

20 **CHAIRPERSON:** Thank you.

ADV NGCUKAITOBI SC: Yes. And even if we talk about Advocate Jiba, by March 2019, even the decision of the Judge Mokgoro Commission was not yet out. It came out only in April 2019.

ADV BATOHI: [No answer]

CHAIRPERSON: I suppose, counsel, he says there has not been any credibility findings against them. So does not that answer? Does not that also cover the Mokgoro Commission's findings, which then followed later?

ADV NGCUKAITOBI SC: Yes. And, in fact, it gets stronger with Advocate Jiba. At that point, she had been reinstated by the Supreme Court of Appeal as an advocate after being struck by the High Court in Pretoria. I come back to this, Advocate Batohi. You seem to be expressing opinions about
10 people based on nothing other than your own prejudices about those people.

ADV BATOHI: I disagree.

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

ADV BATOHI: Let me say I have no prejudice against Advocate Abrahams, Advocate Jiba, or anyone. They may be very good people. I have absolutely nothing against them.

ADV NGCUKAITOBI SC: Well, you have just told us that a credibility finding does not require a formal enquiry. But I ask myself the question, where is the credibility question
20 around these two advocates?

ADV BATOHI: At that point, we had had the Gorven judgment, and Advocate Jiba had been charged. But, as I said, I am still not making an... I do not have a personal issue with either of them, with any one of them. They are probably very good people. But I am dealing with the

evidence and what was before me at the time.

ADV NGCUKAITOBI SC: Yes. When it comes to Advocate Shaun Abrahams ...[intervenes]

CHAIRPERSON: I beg your pardon, counsel. Advocate Batohi, I think these questions arise from that sentence where you refer to SKA's credibility. I think this gives rise to all these questions that counsel is asking you.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: And as lawyers, we know when you speak
10 about somebody's credibility, what do you mean? His reliability, his honesty, and all those factors. The question then arises, as counsel asked you, and you answered, that there is no way, neither during the Mokgoro Commission, was his credibility questioned. And then that begs the question, why were you talking about Advocate Abrahams' credibility at that stage?

ADV BATOHI: Chairperson, there was a lot in the public space at that stage, and he had also been removed from office by then. Well, he was forced to vacate office, I think.
20 I do not know what exactly happened. Whether he was removed or forced to vacate as a result of a Court decision.

CHAIRPERSON: As a result of?

ADV BATOHI: A Court decision.

CHAIRPERSON: A Court decision.

ADV BATOHI: I do not know which case it was exactly. It

was the Nxasana matter, I think it was.

ADV NGCUKAITOBI SC: Now, can I just deal with that part? You say there was a lot in the media, or there was a lot in the public space. I do not think you said media, you said in the public. And that he was removed as the NDPP. Do you know the basis on which Mr Abrahams was removed as the NDPP?

ADV BATOHI: I cannot recall. I cannot recall precisely.

ADV NGCUKAITOBI SC: But you have no qualms telling this August panel that it related to his credibility, even though you
10 do not know why he was removed?

ADV BATOHI: No, it is not that I do not know why he was removed. I said I do not know precisely why. If I recall, and again, I am trying to think what the... I am actually not so keen to say something here if I am not really sure about it. But I think it was the Nxasana decision that dealt with Advocate Nxasana, his vacation from office and the appointment of Advocate Abrahams. And the rationality of the President's decision in that regard, if I remember correctly.

20 **ADV NGCUKAITOBI SC:** Can I read to you paragraph 88 of the Constitutional Court's judgment which dealt with this matter pertinently? It says ...[intervenes]

CHAIRPERSON: In which matter?

ADV NGCUKAITOBI SC: The matter of... Madam Chair, that is a good question, actually. I need to find the actual

reference. The judgment is *Corruption Watch and others v. President of the Republic of South Africa and others* reported in 2018 (2) SACR page 442. Now, paragraph 88 deals with Mr Shaun Abrahams, Advocate Shaun Abrahams pertinently. This is what it says:

10 “I next deal with Advocate Abrahams. As a point of departure, I must state that not a single party has suggested that he is not a fit and proper person to hold office. As was to be expected, Advocate Abrahams seeks to get a lot of mileage out of this. Must he succeed? I think not. Former President Zuma appointed Advocate Abrahams following his unlawful removal of Mr Nxasana. That removal was an abuse of power. Advocate Abrahams had benefited from this abuse of power. It matters not that he may have been unaware of the abuse of power. The rule of law dictates
20 that the NDPP be cleansed of all of the ills that have plagued it for the last few years. It would therefore not be just and equitable to retain him, as this would not vindicate the rule of law.”

Seems to be quite clear that the Judges themselves are clear

that this removal has nothing to do with his fitness for office. It is simply because President Zuma did not follow the correct procedure in removing Advocate Nxasana.

ADV BATOHI: I accept that.

ADV NGCUKAITOBI SC: But then why, Advocate Batohi, why are you talking about his credibility, when you have no evidence that there was a problem with his credibility?

ADV BATOHI: I said it was perceptions. His credibility has a bad perception at that point.

10 **ADV NGCUKAITOBI SC:** But you are a lawyer. You are an advocate of the High Court. You know you cannot make decisions on perception. You have to make decisions on fact.

ADV BATOHI: I did not make any decision.

ADV NGCUKAITOBI SC: But then why are you scandalising his name like this?

ADV BATOHI: I did not scandalise his name.

ADV NGCUKAITOBI SC: When you say a lawyer, an advocate has a bad perception of their credibility, that is not scandalising them?

20 **ADV BATOHI:** Well, it was in a closed meeting. I did not expect this to be out in the public because that was...

ADV NGCUKAITOBI SC: So you can scandalise a man with no evidence in a closed meeting.

ADV BATOHI: No, I am not saying that. I am not saying I scandalised in the first place mmm... It was just that there

was a perception about his credibility. And I mentioned it.

ADV NGCUKAITOBI SC: And in fact, it goes further because you do really factor this in. You say:

10 “This also calls into question about what an NDPP must see. If we get a bad decision, that will impact not just on me but all future NDPPs in making authorisation. A bad decision and the perceptions could really have a bad impact on the NDPP. I spoke to Rodney de Kock and I said I want three senior people to look at this case. Now we can do that. I do not want to look like I am just overturning Shaun's decision. I am thinking today, I am open to reviewing it. I asked Tory how long it will take to review it. He said two months. I do not have two months.”

20 Again here you refer to this question of the perception and you say you do not want people to just think you are overturning Shaun's decisions or Mr Abraham's decisions. And it seems to me for you to deny that this idea of the perception played a role in your thinking is false because it carries through. You had this perception and you wanted to do something about this perception.

ADV BATOHI: Perceptions had nothing to do with any of my

decisions. I do not make decisions on perceptions. I make decisions on evidence because the rule of law is really important to me. And so if again, if we look at the transcript it says this also calls into question about what an NDPP must see. I do not talk like that. So I do not even know what it means. If we get a bad decision that will impact not just on me but on future NDPP making authorisations. Clearly there I was trying to make the point that we need to do this properly. So there is the gist of it I get is what we were

10 talking about but to put an emphasis on each one of the words when it is clearly a transcript that might not be accurate. I think I have an issue with that.

ADV NGCUKAITOBI SC: Well I think that is fine but I think on this particular issue of the negative perception of the credibility of Mr Abrahams you have admitted it and you even stated that you thought it was a closed meeting.

ADV BATOHI: It had nothing to do with my decisions at all. My decisions were based only on the evidence because I respect the rule of law.

20 **ADV NGCUKAITOBI SC:** Then if you turn over the page to 338, there is something I want to ask you about this page. The third line which starts with SB, it says:

“The victims do not get justice because of the way the charges are couched.”

That is your stating.

ADV BATOHI: If it is accurately captured.

ADV NGCUKAITOBI SC: Yes. But what I am interested in is the response you are getting from Mr Epstein. Now remember Mr Epstein has already given you a memorandum. He says:

“It is not worth the effort since people can still get justice.”

And then he says:

10 “Obviously you should not issue POCA certificates unless capable of successful prosecution.”

And look at what he says next.

“Legodi said he had enough.”

Now we know which Legodi he is talking about, it is Judge Legodi which is referenced in his memorandum. And then he continues:

“Prosecutors believed that there was. Shaun...”

That is Advocate Abrahams;

20 “...is given a presentation which is JB27. He then gets Danikas' supplemented statement and he looks at what is on the flash drives and then he issues, you are right it must be a rational decision. You can just review. We think it is a valid

reason to say it is in the public interest.

Give proper reasons.”

And then Hilton Epstein takes SB, that is advocate Shamila Batohi, through his presentation. There are three things that are clear here. What Mr Epstein is telling you is that Judge Legodi said there was enough in relation to the Advocate Jiba decision to charge. Your own prosecutors believed that there was enough. Mr Abrahams believed there was enough. Is that correct?

10 **ADV BATOHI**: That is what he says.

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: Again, if it is accurate.

ADV NGCUKAITOBI SC: Well, Advocate Hilton Epstein had given you a memorandum. This is perfectly consistent with that memorandum.

ADV BATOHI: The prosecutor's memorandum?

ADV NGCUKAITOBI SC: No, his own memorandum that we started with this morning.

ADV BATOHI: Can you refer me to that again? Please.

20 **ADV NGCUKAITOBI SC**: At page 254.

ADV BATOHI: So your question again is, counsel?

ADV NGCUKAITOBI SC: I am saying that what he is saying here, the summary is perfectly compatible with the written document that he gave you in preparation for that meeting. Where he explained that Judge Legodi said there was

enough, the prosecutors believed there was enough, Mr Abrahams believed there was enough.

ADV BATOHI: I am not sure if he specifically mentions Judge Legodi in his memorandum mmm... His memorandum sets out the principles of issuing POCA. He then goes into the case against General Booysen. I am just trying to see what the purpose of the memorandum was.

ADV NGCUKAITOBI SC: The Legodi J I thought we had looked at it earlier, appears at page 269 which is part of the
10 document that was sent to you.

ADV BATOHI: Yes, it is not part of the memorandum on 254.

ADV NGCUKAITOBI SC: Yes, but it is an attachment to the email that he sent you.

ADV BATOHI: Yes, that is right. It appears in this document which is an attachment.

ADV NGCUKAITOBI SC: I will come back then to where we were. I still make the point at page 338 that that summary that he gives is compatible with the views that he had expressed either in the memorandum or by way of the
20 attachments to his email. He is just repeating it verbally.

ADV BATOHI: Well, the attachment to the memorandum that you referred me to now where the Legodi decision is mentioned is an extract from Advocate Abraham's affidavit.

ADV NGCUKAITOBI SC: Correct.

ADV BATOHI: Yes, so he attaches Advocate Abraham's

affidavit and Advocate Abraham's views on the Legodi judgment are incorporated there.

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: So on that basis... Sorry, I am trying to keep a lot of pages open here. I am trying to answer your question carefully and properly. Sorry, can you repeat that question to me? I am going to write it down now, so that I...

ADV NGCUKAITOBI SC: There are three points that come clear from what is being said by Advocate Epstein. The first
10 is reiterating that Judge Legodi said there was enough to issue the POCA certificates. Number two, your own prosecutors said there was enough to issue the POCA certificates. Number three, Mr Abrahams also believed there was enough, after looking at the statement of Mr Danikas, looking at the flash drives, and then he issued. Now those three are clear and they are all consistent with the material he had given you beforehand.

ADV BATOHI: That was his view.

ADV NGCUKAITOBI SC: Yes.

20 **ADV BATOHI:** And he, although he said Legodi as it is here, Judge Legodi, said he had enough, that is his view. I have not been asked about the Legodi decision, so I will not comment on that now. But this is what he said, and to that extent, that is correct, that is what he said.

ADV NGCUKAITOBI SC: Yes, this is why this is important,

this part. This is the senior counsel that is acting for the NPA in defending the application brought by General Booyesen. Is that correct?

ADV BATOHI: He was acting for the NPA.

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: In defending the application?

ADV NGCUKAITOBI SC: Yes. But, Advocate Batohi, there is no question that his opinion expressed verbally to you was that these are the basis on which this case can be defended.

10 And he explained where they come from.

ADV BATOHI: His explanation of where it came from was from the prosecutor's memorandum. He says the prosecutors believed that there was. And also from Advocate Abraham's affidavit. So he based his view on those two things.

ADV NGCUKAITOBI SC: Well, also on the judgments. On the Prinsloo judgment. It is a whole lot of things we have just looked at.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: This is what I do not understand, 20 honestly. You have a senior counsel that is acting for the NPA. He gives you full authorities and comes verbally to justify the decision. You override them.

ADV BATOHI: All I say is that I want a team to look at all of the evidence. And of course, that team may have come back saying exactly what, or supporting what Advocate Epstein

had said, and that would have been fine. But I wanted a team to look at all of the evidence in these matters. So that I could get a proper opinion based on all of the evidence. Not only on the prosecutor's memo, the prosecutors who took the decision, the impugned decision, as well as the NDPP, who also took the impugned decision.

ADV NGCUKAITOBI SC: And moreover ...[intervenes]

CHAIRPERSON: At that time, I beg your pardon, sir. At that time, Advocate Batohi, had you yourself, as the head, had an
10 opportunity to peruse the evidence?

ADV BATOHI: No, I did not.

CHAIRPERSON: Did you make any effort whatsoever
...[intervenes]

ADV BATOHI: I did not.

CHAIRPERSON: ...to make time to look at the evidence?

ADV BATOHI: No, that was the purpose of appointing the panel.

CHAIRPERSON: No, I am talking about yourself as a head. It is one thing to rely on what other people are saying, but
20 had you made time or set time aside yourself to read the evidence that was presented, or what was going to be presented to the team?

ADV BATOHI: Chairperson, I was barely two months in office. I thought that the best course of action in these circumstances would be to appoint a very experienced panel

to look at all of the evidence in this matter. And that is what I did. I believed it to be the best course of action in the circumstances.

CHAIRPERSON: And that team, the experienced team that you had in mind, would have included the Advocate de Kock's team?

ADV BATOHI: That is correct.

CHAIRPERSON: And who else?

ADV BATOHI: There was Advocate de Kock, who was at the
10 time the DPP in the Western Cape. Advocate Ivy Thenga, who is currently the DPP in Limpopo, I think she might have been the DPP in Limpopo. She was certainly a DPP, but in which division, I am not very sure at that time. Advocate Riley, who is a Deputy DPP in the office of the DPP Western Cape in charge of the organised crime component. And Advocate Mamabolo, who was at the time at the NPA head office at the racketeering desk.

CHAIRPERSON: And these people constituted what we refer to as the De Kock team?

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

CHAIRPERSON: Now, apart from the De Kock team's memorandum, whose memorandum did you rely on?

ADV BATOHI: In making the decision in this matter?

CHAIRPERSON: Yes, of course.

ADV BATOHI: I relied on the De Kock team memorandum.

CHAIRPERSON: We have just spoken about first the De Kock team's memorandum.

ADV BATOHI: Mmm-mmm.

CHAIRPERSON: You relied upon their recommendation?

ADV BATOHI: I did.

CHAIRPERSON: Now, my question is, who else did you appoint to look into the evidence? Who else did you appoint to look at the evidence subsequent to the De Kock team?

ADV BATOHI: So, the purpose of the De Kock panel report
10 was to decide on the approach in these proceedings. Subsequent to that, I obtained the opinion of, and to be clear, Chairperson, if I may clarify.

CHAIRPERSON: Yes, you may, ma'am.

ADV BATOHI: Thank you very much. To be clear, Advocate de Kock's team was not looking at the conduct of any members of the NPA. They were looking only at the merits of the racketeering prosecution for the purpose of me deciding on the approach in those proceedings. So, they were not looking into the conduct of any particular member of
20 the NPA. That was their mandate, is to consider the evidence and advise on those review proceedings.

Subsequent to that, the other opinions that I obtained specifically dealt with the conduct of Advocate Chauke, and that was Advocate Nalane. Thereafter, Advocate Chauke then got a response to that and provided Advocate Maenetje's

opinion. And then, it was the De Kock memorandum that forwarded me Advocate Maenetje's opinion, where he also expressed a view. And then it was... Well, your question, Chairperson, was the opinions that I sought. So, the ones that I sought, to be clear, are the Nalane one, the one from Dr Broughton, and the one from Advocates Hulley and Wentzel.

CHAIRPERSON: With regard to the conduct, the impugned conduct, if I may put it that way, the opinions that you sought
10 were those of Advocate Nalane?

ADV BATOHI: Correct.

CHAIRPERSON: Followed by that of De Kock, Advocate de Kock?

ADV BATOHI: No, that was not an opinion I sought, Chairperson.

CHAIRPERSON: That is the one that was responding to Advocate Maenetje's opinion?

ADV BATOHI: Yes, it was his memorandum forwarding me Advocate Maenetje's opinion and where he expressed a view.

20 **CHAIRPERSON:** Yes, I am talking about that.

ADV BATOHI: Yes.

CHAIRPERSON: And then, after that, Dr Broughton's opinion?

ADV BATOHI: Correct.

CHAIRPERSON: Specifically on what?

ADV BATOHI: Dr Broughton's opinion was specifically on the Booyesen matter, I should look at my affidavit just to make sure that I am certain about that, Chairperson.

CHAIRPERSON: Maybe to be specific, let me be fair to you, as regards the conduct, the impugned conduct of Advocate Chauke?

ADV BATOHI: That is correct.

CHAIRPERSON: And thereafter, you sought an opinion from Advocate Hulley, but only in respect of the Mdluli matter?

10 **ADV BATOHI**: Yes, Advocates Hulley and Wentzel.

CHAIRPERSON: Yes. I am sorry, counsel, I just needed to get the sequence and what was relevant.

ADV NGCUKAITOBI SC: Yes, indeed. Now, at the bottom of page 338, you comment again, Advocate Batohi, you say:

“Can you give me an opinion on those lines? Even if there is sufficient to charge, but on the basis of what you have just said, victims will still get justice. This case is strategically not worth fighting.”

20 Can you explain what did you mean that the Booyesen, the Majority General Booyesen case is strategically not worth fighting? What is the strategy?

ADV BATOHI: I am not even sure that I said that. I do not know, I cannot answer it. Because I would not have at that point, I did not make a decision on whether we should oppose

that matter or not. So this is actually incorrect.

ADV NGCUKAITOBI SC: You see, this is the second time you are referring to strategically. You started at page 337, in the fourth line, where you said:

“On the one hand, I get a sense that with the mechanist, if the victims get justice strategically, this case...”

And then the sentence is incomplete. I then said to you, there is another place where you complete what you mean by strategically, which is at page 338 at the bottom, where you say this case is strategically not worth fighting. Your answer is you believe this portion of the transcript is wrong, because ...[intervenes]

ADV BATOHI: My point, sorry.

ADV NGCUKAITOBI SC: You believe this portion of the transcript is wrong because you would not have used the word strategically not worth fighting.

ADV BATOHI: No, all I am saying is that the fact that I may have used the word strategic earlier on and then later on use it again does not mean that logically I was referring to the same thing. I cannot recall what I was talking about at the time and in what context. I mean, a National Director must think about strategic issues, but in this case, I needed to deal with the evidence in the matter and take a decision after that. If you look at the portion that you have just quoted from, at

338 at the bottom, Chairperson, it says:

“Can you give me an opinion on those lines?”

I do not even know what lines is being referred to there.

“Even if there is sufficient to charge, but on the basis of what you have just said, it ends there.”

And that sentence does not make sense as it is. Then it says:

10 “Victims will still get justice. This case is strategically not worth fighting this.”

I have no idea what the point is. It just does not make sense to me because I would not make a decision. I did not make a decision at that point and I will not make a decision on matters like this without properly understanding what the essence of the case is and the evidence. And that is what I did. I immediately followed to say:

“I really do need three people to review this case. Then I do not need to.”

20 And that is the end of that sentence as well. I do not know what that means. I do not need to do what. It is just not clear.

ADV NGCUKAITOBI SC: Yes. We will come back to that.

CHAIRPERSON: Just for my own clarity, this seemed to be minutes of a meeting that was held with the people listed at page 334.

ADV BATOHI: That is correct.

CHAIRPERSON: On 6th March 2019.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: You were present at that meeting.

ADV BATOHI: I was.

CHAIRPERSON: Did you get a copy of the minutes of that meeting afterwards?

ADV BATOHI: I cannot recall having received this, Chairperson.

10 **CHAIRPERSON:** Did you not ask for the copy of the minutes?

ADV BATOHI: No, I did not. I had Danie Smit, if you look at 335, at the top, who was also in attendance. He was my Chief of Staff at the time. He is no longer in office. He and also Advocate Matzke, Trish Matzke, who was also a Deputy DPP in the office at the time. And they would have taken notes, because normally I have colleagues in meetings to

take notes. Advocate Matzke left the office, and we do not have any of her notes. Advocate Smit has also left the office,
20 and we do not have any of his notes. But I imagine that either one of them would have taken, so we did not ask for any minutes.

CHAIRPERSON: I ask the question because your answers seem to challenge the authenticity of these minutes, most of your answers.

ADV BATOHI: Yes, that is correct. That is why I am asking the question. You have a meeting with senior advocates regarding these important matters, and nobody takes minutes.

ADV BATOHI: That is not what I said, Chairperson.

CHAIRPERSON: What are you saying?

ADV BATOHI: I said that Danie Smit and Trish Matzke would have taken minutes of this meeting. They would have made notes of the meeting, because it is important that we keep a
10 record of this. And that is why I have staff members in my meetings, to make sure that they do take notes of meetings. Advocate Matzke has left, and I know none of her notes are available. I was not aware of when this meeting happened. We have not... I mean my office has been trying to get the dates of these meetings, and I have asked them to try to get notes and minutes of the meetings, because it is important that I have it for these purposes. But up until now, we have not been able to trace these matters. So we will keep looking, Chairperson.

20 **CHAIRPERSON:** Yes, but my concern, Advocate Batohi, is that as the head of the NPA, who has just attended a meeting with senior counsel, at least on the 7th of March, the following day, or a few days thereafter, for your own recording, for your own record-keeping, I would imagine that you would have asked for the records of the interactions or the discussions

at that meeting.

ADV BATOHI: Chairperson, if I may, I do not always do that. I expect that my team will keep the record of these meetings carefully for future use, and that is the way, you know, we deal with these issues. Someone takes notes, and they are meant to be properly filed so that we have them for future. But if I have formal meetings like EXCO and MANCO, et cetera, I then insist that we get minutes immediately after that, I check them very, very carefully, because there must
10 be an accurate record of the meetings, and then they are dealt with in that way. So with formal meetings, we do, but I am not saying this was not an important meeting. It was, and we would have a note of this meeting. But at this point in time, I am not able to find it.

CHAIRPERSON: You may proceed, counsel.

ADV NGCUKAITOBI SC: Advocate Batohi, were you not trying to hide this meeting? Were you not ...[intervenes]

ADV BATOHI: Not at all.

ADV NGCUKAITOBI SC: ...concerned that this meeting
20 should never be known, and this is why it was not recorded?

ADV BATOHI: Absolutely not. I had no reason to hide this meeting.

ADV NGCUKAITOBI SC: Well, this is what I do not understand. If you had no reason to hide this meeting, why do you not invite your own prosecutors that were involved in

this matter?

ADV BATOHI: It was not hiding it from them. I invited those people that were relevant, that I thought relevant at the time.

ADV NGCUKAITOBI SC: Well, the most relevant stakeholder is the party that is doing the prosecution.

ADV BATOHI: At that point, we were not discussing the merits of the prosecution. We were deciding... we were talking about the review application.

ADV NGCUKAITOBI SC: So? The review application is a
10 review against the prosecution.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: That is what I am asking. You were trying to hide it from them. You did not want anyone other than those who were in the meeting to know about it.

ADV BATOHI: How can I hide it when it is – I mean, there are external people there. They can talk about it. It was not a secret meeting.

ADV NGCUKAITOBI SC: Well, you understood it to be a secret meeting with only those who attended.

20 **ADV BATOHI**: No, I did not say it was secret.

ADV NGCUKAITOBI SC: Can you go to page 346, the second line, where you say:

“I would prefer that none of this gets out.”

And Mr Epstein's response:

“Can I suggest this? Even that other

people are being brought in, the only thing to be said is that an approach has been made to the NDPP, and she is considering it.”

It seems to have been explicit that you were trying to hide this meeting.

ADV BATOHI: I was not trying to hide it. If you look at it further, context is everything. It is about the media, and this was a very high-profile matter, and I did not want it to get out
10 into the media. If you look further down, I say I have stayed out of the media, again, on the assumption that this is accurate. I have stayed out of the media, so I am talking about the media. In fact, if you look at page 345 at the bottom, we were discussing the context of timelines, it appears, if you look at that, and it was when should we meet again, how long will we take to have a decision, and then they were asking, if you look at the bottom, Advocate Katz says:

“Can I tell him in a month you will be in a position to advise on the way forward?”

20 I am not sure who he was talking about tell him. It is probably Booyesen. I am not sure. I am assuming, and then I say:

“Things get out in the public, and the media makes a meal of it. I would prefer that none of this gets out.”

So I did not want it to get out in the media that we were having

conversations about this, but this was not a secret meeting.

ADV NGCUKAITOBI SC: But you also did not want it to get out to your own prosecutors. You never, ever told them about this meeting up until today.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Now, that is the real reason why no one took minutes, and we were only assisted by the team of Advocate Hilton Epstein that was prudent enough to take minutes. You simply did not want this meeting to be known.

10 **ADV BATOHI:** That is totally untrue.

CHAIRPERSON: I beg your pardon?

ADV BATOHI: I say that is totally untrue.

MS RAMAGAGA: Just one thing. Advocate Batohi, how often would you have meetings similar to that one, where there would be no record of the minutes of the meeting?

ADV BATOHI: I always have somebody in the meeting to take notes. And I suppose it is only... Sorry. I only have... I generally, unless it is a one-on-one meeting for any particular reason, I generally have someone in the office
20 present taking notes, because it is important that we have a record of these meetings. It is only if at some point we are looking for the record and we cannot find it that I realise that there is some filing issues in my office that I need to look at, and it is not acceptable at all. Because the record of these meetings must be properly kept for future reference. So I

certainly do not have meetings where there is no one taking some notes of the meeting.

MS RAMAGAGA: Ja, what steps would you take to ensure that whatever is minuted can be relied upon as an authentic and accurate record of what happened at meetings?

ADV BATOHI: I generally do not look at the notes immediately after the meeting. I expect that my team will have a good note of what happened during that meeting and especially the key decisions that were taken and that if we
10 need it at a future stage, I should have access to it.

MS RAMAGAGA: The question is, what steps would you take to ensure that the document that is produced either as a report or a minute of the meeting is the accurate record of the meeting that has been held? And maybe I must tell you why I am asking you this question. Well, much as we are told that this record that we are being referred to now is a minute of the meeting that was held on the 6th day of March 2019. But when one goes through this document and you have been saying it again and again, I am not sure whether this is an
20 accurate reflection, I do not know whether this is what happened, but if it is an accurate reflection, then this is the answer.

Ultimately, we are going to remain with unanswered questions because all of them either they are premised with an if it is correct or I do not know, I do not know. So hence

the question, what do you do in your office? What steps do you take to ensure that and it is not only for your benefit as a person who is an officer there, but even for the benefit of your successors. What do you do? What steps do you do to make sure that whoever finds documents in your office as a record of what happened at meetings is a real, correct, and accurate document? It is not just a document that one can come across and see this is one of them. What steps do you do to avoid the situation where we find ourselves in now that

10 in everyone is I do not know but if, if, if. Do you understand my question?

ADV BATOHI: I understand your question well.

MS RAMAGAGA: Please answer the question that I have asked of you, thank you.

ADV BATOHI: So as I said, with regard to formal meetings, there are minutes that are taken. These are circulated after the meeting. I personally check and make sure that they are accurate. Members, it is circulated to all those that attend the meeting and I make sure and my team knows, I say to

20 them, this is, these are meeting, formal meeting minutes that must be accurate because it is a record for posterity, for whoever needs it. With the, I will call this an informal meeting. Meetings like this, I have someone from my office taking notes. They are professionals and I expect that they will take it, the notes properly and there will be a record of it

for the future. I do not check those notes.

MS RAMAGAGA: Put otherwise. Do you perhaps sign, initial each page? That is one of the easiest way of making sure that even your successor will know that Advocate Batohi was here.

ADV BATOHI: I do not do that.

MS RAMAGAGA: You do not do that.

ADV BATOHI: No.

MS RAMAGAGA: It is just, it is documents that appear like
10 this one.

ADV BATOHI: No, this is not my document.

MS RAMAGAGA: No, no, I know it is not but it appears like this. There is nothing that shows that, you know, and that gives you the comfort that this is a fair reflection of what happened in the meeting.

ADV BATOHI: With informal meetings, I do not check them.

MS RAMAGAGA: Thank you.

ADV NGCUKAITOBI SC: Yes. Now, at the bottom of page
20 339, you welcome Mr Carl van der Merwe and Mr Anton Katz.
You say to them:

“This is a case with a long history. I have only been here for a month. I am trying to get to a point where we can focus on what we should be doing. I am trying to clear the air. As a civilian in the Netherlands,

the NPA is tainted.”

This is the second time you are condemning the organisation as tainted, even though you admit having been there only for a month. Is that correct?

ADV BATOHI: I have never condemned the NPA as tainted. I have always said that there were certain people in the NPA that are tainted and the majority of the prosecutors in the NPA are hardworking and dedicated to the rule of law.

ADV NGCUKAITOBI SC: Yes, according to this note
10 ...[intervenes]

ADV BATOHI: There was a credibility deficit at the time, sorry.

ADV NGCUKAITOBI SC: Yes, according to this note, the references are clear that the NPA is tainted.

ADV BATOHI: The NPA was definitely facing a credibility crisis at the time because of the actions of a few, or alleged actions of a few, I should say.

ADV NGCUKAITOBI SC: Advocate Batohi, we have been through this and I have tried to give you a fair chance to
20 produce the evidence and the best you could do is to refer us to perceptions. And then you invite Mr Katz to present his proposal. What proposal were you inviting?

ADV BATOHI: I was not inviting any proposal. I had my counsel there and the State Attorney and it was a meeting to hear what they had to say.

ADV NGCUKAITOBI SC: Well, it is strange you are saying you are not inviting a proposal because the sentence says:

“I know Hilton has spoken to you.”

And we have seen Mr Epstein started the meeting by telling you that he spoke to Mr Katz. And then he says:

“But I would like to hear your proposals.”

So you are clearly inviting a proposal from Mr Katz.

ADV BATOHI: We are using these notes to cast my mind back to the time and try to understand what happened. On
10 the basis of this, it appears that counsel were talking. Epstein and Katz were talking. And so we decided to meet so that I am there as well because at the end of the day I have to decide on the way forward. So that is what happened. And yes, if they had proposals, then they had proposals.

ADV NGCUKAITOBI SC: Then, Mr Katz explains that he has met with his attorney and does not give a specific proposal.

ADV BATOHI: Where is that?

ADV NGCUKAITOBI SC: But then you say, in the next line, but then you intervene and you say:

20 “The families must be seen to have justice done.”

Again, this is the second time you are referring to perception, that the families must be seen to have justice done. Can you explain how would the families get justice by withdrawing the case?

ADV BATOHI: As I mentioned, it is really important. It does not matter who is involved in the case, whether it is General Booyesen, who might be an angel or might be an ogre, I do not know. It is important as prosecutors we represent the victims of crime and justice for the victims is really important. In this case, justice for the victims could either be by way of racketeering charges if they were justified, or they would be with regard to prosecutions in any of the individual cases if there was evidence to support a prosecution. That would be
10 justice for the victims, either one of those options.

ADV NGCUKAITOBI SC: Just explain my question. How would justice be achieved by withdrawing the case? Because we know both the racketeering charge was withdrawn and the predicate offences were withdrawn. Just explain how would the families get justice out of those withdrawals?

ADV BATOHI: Families and victims can only get justice where there is evidence to support a prosecution. In this case, after I withdrew the racketeering charges, I referred all of the dockets to the DPP KZN and asked her to look at each
20 one of them and to decide whether there was evidence to prosecute any of the accused in the matter. And of course, if there is evidence, we will prosecute. There are many cases where families do not see justice done because there is no evidence and we cannot prosecute if there is no evidence.

ADV NGCUKAITOBI SC: So are you going to answer the

question, how would families get justice by withdrawing the cases?

ADV BATOHI: They would get justice if there is evidence and the case is proceeded.

ADV NGCUKAITOBI SC: All right, I will leave it then on the basis that you will not answer the question.

ADV BATOHI: I did answer the question.

ADV NGCUKAITOBI SC: Perhaps I should ask it once more. How would the families get justice by withdrawing the cases?

10 **ADV BATOHI:** My point is that justice for families and victims means that you, well in some instances, justice means different things to different victims, but one of them is prosecutions. And we must only prosecute, and we have to explain to victims sometimes where there is not enough evidence that we simply cannot prosecute the matter. And in those instances, sadly, families do not see justice. But we cannot prosecute a case simply because we feel that we want to bring justice to families where we do not have the evidence to support a prosecution. We will never do that.

20 **ADV NGCUKAITOBI SC:** Now, we will deal with the evidence at a later stage. But I want to understand whether your answer to this question is that this is one of those cases where you admit that the families never saw justice.

ADV BATOHI: In this case... I am trying to think about this carefully. Because if there is, let me think about how I frame

this. In cases where crimes are committed, there are victims, and as law enforcement, we must try to ensure that there is justice. But we can only do that when there is evidence. In this case, it was apparent from the decision of the DPP as well that there was no evidence to sustain a prosecution in any of these matters. So to the extent that there were crimes committed, yes, the families in this matter did not receive justice.

ADV NGCUKAITOBI SC: Thank you very much. I want to
10 then turn to page 343. It is two pages later. In the third
column, Mr Katz says:

“We come here, I would not want to put
obstacles. Our instruction is that there will
not be a section 179(5)(d), but there may
be some on the docket. There was nothing
to pin the five predicates ...[intervenes]”

ADV BATOHI: Sorry, I am not in the right place. Where are
you?

ADV NGCUKAITOBI SC: It is page 43.

20 **ADV BATOHI:** All right.

ADV NGCUKAITOBI SC: And then in the third column.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: When Mr Katz says:

“We come here, I would not want to put
obstacles. Our instruction is that there will

not be a section 179(5)(d), but there may be some on the docket. There was nothing to pin the five predicates.”

He is talking about Major General Booyesen.

“The Howick events, there is just nothing. It is something that you would have to consider in the fullness of time. I would not want Booyesen to go through a full trial, and then he claims malicious prosecution.”

10 What is clear here is that you have invited the advocates for Major General Booyesen, and they are dictating the terms, and there is no apparent resistance from you.

ADV BATOHI: May I comment on that?

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: They were certainly not dictating any terms in that meeting. Of course, I cannot stop them from saying what they want to in a meeting, but there is no way they were dictating any terms at that meeting. And I, you know, I do not, as I keep saying, I do not know how accurate this is, but
20 even if I just listened and did not say anything, it does not mean there is no opposition from me or that I am simply accepting what they are saying. I am just listening.

ADV NGCUKAITOBI SC: Now, they specifically say, and we know that there are five predicate offences against Major General Booyesen. They say there is nothing on the five

predicates. This is why I asked you, why did you not invite the prosecution team? What you have managed to do is to enable yourself to receive a one-sided account by counsel for the accused.

ADV BATOHI: I had my counsel there as well, Advocate Epstein, and so I was not making any decisions on the merits of this matter. They could say what they want to. So that is an incorrect assumption on your part.

ADV NGCUKAITOBI SC: Did you believe that there was
10 nothing on the five predicate offences, as they said here?

ADV BATOHI: At that point, I had no idea.

ADV NGCUKAITOBI SC: Were you concerned about the risk of malicious prosecution?

ADV BATOHI: I am always concerned about the risk of malicious prosecution.

ADV NGCUKAITOBI SC: He specifically refers to the docket containing information about the five predicate offences. We know from the cross-examination on Monday that you never considered each of those dockets. I just want to ask you, not
20 whether you did or did not, but why not, especially where there is a lawyer that says there is nothing to pin those offences on Major General Booyesen, why do you not say, let me read these dockets myself?

ADV BATOHI: In my view, getting a very experienced panel to do that was the appropriate course of action, and I did that.

I gave them sufficient time to look at all of the evidence, and give me a report.

ADV NGCUKAITOBI SC: I do not think you are answering my question. Why do you not, as the NDPP, ask for these five dockets that are referenced by counsel for Major General Booyesen and say, I want to read it? For me, it strikes me as a dereliction of duty, on your part.

ADV BATOHI: With all due respect, as you quoted from Advocate Epstein earlier on, it is not expected of a National
10 Director to look at all the evidence. But what is expected of you is that you take all reasonable steps to understand the evidence and to get a good, proper opinion on things. And in my view, that was the best course of action here. It did not require me to look at all of the dockets myself.

CHAIRPERSON: On the 6th of March 2019, had you had a sight of any evidence? Of any evidence on the 6th of March?

ADV BATOHI: No, I do not think so. I would not have.

CHAIRPERSON: You would not have. It is page 338, the
20 last block, where you say victims will still get justice. This case is strategically not worth fighting. What do you mean there? This case is strategically not worth fighting?

ADV BATOHI: Chairperson, I do not know if I said that. Because if you look at my very next sentence, it says, then... Oh, well, hang on. I say, then do I really need three people to review the case? Then later on, having listened and

considered more – in fact, and you must understand, Chairperson, that there is two parts to this transcript. The first part is when Advocate Katz and Carl van der Merwe are not present. So this part that you are now referring to ...[intervenes]

CHAIRPERSON: I do not know when were they present, when were they not present. I am just referring you to that portion because it seems certain lines are correct of these minutes and others are not correct. So are we now going to
10 go through the minutes and determine which were correct and which part of the minutes were not correct?

ADV BATOHI: Chairperson, that is impossible seven years after the event. I have no idea what is correct and what is not correct. I am trying my best to answer the questions on the basis of what is recorded here, but I have no idea. And to deal with your first point, Chairperson, if you look at the entire transcript, the Booyesen matter starts on page 336. Well, I am not so sure. Ignore that, Chairperson. If you look at page 339 at the bottom, I welcome Carl and Anton.

20 So my assumption then is, because I also could not recall, but on the basis of that, that what happened prior to that, because we also discussed other matters, is with my counsel, Epstein, and others from my office, and that at that point, at the bottom of 339, is where counsel for Mr Booyesen, General Booyesen, joined the meeting. So what the

Chairperson referred to now was something that was before they had come into the meeting.

ADV BATOHI: Yes, but let us look at the content of 339 that we have just referred to, and then go back to my question, where you say this is a case with a long history. And I suppose the same case is the one that you speak about at 338, the last block, correct? I just want to ascertain ...[intervenes]

ADV BATOHI: I am not sure, Chairperson.

10 **CHAIRPERSON**: I just want to ascertain from you which case are you referring to at 338 and 339?

ADV BATOHI: Chairperson, I am trying to ascertain that from the record that we have before us. If you look at the lines above the portion that you have just read out, it says:

“Elaborates on Madhu prosecution proceeding and mentions that Pandey is an accused in the matter. We can get an early date, but we may lose. Then can you give me an opinion on those lines?”

20 So if you look at the context again, I am not sure. It appears it could be on the Pandey matter because Advocate Epstein was also involved in that matter. There was another review application there. So I do not know which one is being referred to.

CHAIRPERSON: In both instances, at 338 and 339?

ADV BATOHI: At 338, I am not sure. At 339... at 339, it will definitely be the Booyesen matter. At the bottom, are you referring to the block right at the bottom, Chairperson?

CHAIRPERSON: Yes, madam.

ADV BATOHI: That will be the Booyesen matter because counsel and the attorney had joined the meeting.

CHAIRPERSON: And the one at 338 could have been the Pandey matter, you said?

ADV BATOHI: It could have been, or it could have been the
10 Booyesen matter. I am not sure. In fact, the Pandey matter was... Well, it is not necessary for me to explain that, Chairperson.

CHAIRPERSON: On the top of 338, I am just going back to that because counsel was proceeding ahead, and I do not want to forget clarity on this point. 338, the third block, the victims do not get justice because of the way the charges are couched. You earlier on spoke about the evidence. Is it because of the evidence availed or because of the way the charges are couched? What was important?

20 **ADV BATOHI:** I do not know, and I do not even know again whether that is exactly what I said. The victims do not get justice because of the way the charges are couched does not make sense to me, so I am not sure because Mr Epstein, Advocate Epstein just before that, talks about a fraud example. I mentioned to him... I am just trying to get the

context to try to answer your question, Chairperson. I mentioned to him before counsel for Booyesen joins the meeting at the bottom of 337, I say I spoke to Rodney de Kock and I said I want three senior people to look at the case. And so we seem to be dealing with that matter and then he says, we spoke about this.

CHAIRPERSON: Which matter?

ADV BATOHI: The Booyesen matter at the bottom of 337. I say I spoke to Rodney de Kock and I said:

10 “I want three senior people to look at the case. Now we can do that. I do not want to look like I am just overturning Shaun's decision. I am thinking today I am open to reviewing it. I asked Tory how long it would take to review it. He said two months. I do not have two months.”

And then Advocate Epstein says:

 “We spoke about this and gave fraud example.”

20 So I do not know because there are no fraud... not that I am aware of any fraud charges in the Booyesen matter. But there may have been in the Pandey matter. So that is why I am confused about what I apparently said about victims do not get justice because of the way the charges are couched, what it refers to at all, which case. It is very confusing to me as

well.

CHAIRPERSON: Assuming it refers to the Booysen matter, will the evidence has not been more critical than the manner in which the charges were fashioned or couched.

ADV BATOHI: And also on the assumption that I said those words, Chairperson. I am trying to assume that it is in respect of the Booysen matter and assume that I said that. The victims do not get justice because of the way the charges are couched.

10 **CHAIRPERSON:** I beg your pardon. I see the two senior counsels are conferencing over there. He is getting into the mic. Are you having a discussion? Yes, thank you. Please answer, proceed, madam.

ADV BATOHI: Chairperson, I am thinking that justice for victims is a prosecution for... is a prosecution. And how we actually frame the charges is up to the prosecutor. And so justice is not dependent on the way a charge is couched. It

is about the prosecutor deciding on the correct charges and at the end of the day, justice for the victims will be if there is
20 a conviction in the matter. I am trying my best to explain this.

CHAIRPERSON: And the correct charges are on the evidence that is to be presented in support of the charge. Or am I getting it wrong?

ADV BATOHI: Chairperson, yes, I would always... I mean, in my view, there should never be a charge if there is no

evidence. So it would be on the basis of the evidence that is presented.

CHAIRPERSON: Thank you.

ADV NGCUKAITOBI SC: Advocate Batohi, we are still at page 343 on the question of your failure to satisfy yourself by reference to the dockets about whether or not the claims that were made on behalf of Major General Booyesen were accurate. And you have said there are certain cases that say an NDPP does not need to read the docket. But the
10 importance of the docket is placed squarely by the NDPP itself in the opinion, sorry, by the NPA itself in the opinion of Dr Broughton of the 21st of April 2023, which appears at LO00171, volume 1, Madam Chair.

CHAIRPERSON: Please repeat that?

ADV NGCUKAITOBI SC: So it is volume 1, LO00171. That is where the opinion starts.

CHAIRPERSON: And if I may take you back, in relation to which part of 343, by the way?

ADV NGCUKAITOBI SC: It is in relation to the 123...

20 **CHAIRPERSON:** The last block.

ADV NGCUKAITOBI SC: Yes, the third block.

CHAIRPERSON: The third block.

ADV NGCUKAITOBI SC: Yes.

CHAIRPERSON: 18.

ADV NGCUKAITOBI SC: Yes, where it is claimed that there

is nothing on the docket.

ADV BATOHI: Sorry, Chairperson, if I could just be on the same page, at page 343?

ADV NGCUKAITOBI SC: Yes, at page 343, Mr Anton Katz claimed that there was nothing on the docket against Major General Booyesen on the five predicate offences.

ADV BATOHI: Yes, I see that.

ADV NGCUKAITOBI SC: Now, we then debated the centrality of any decision maker to withdraw those charges
10 having regard to the docket. Now, I am putting to you that it is the NPA itself that says that prosecutorial decisions must be based on the docket. If you go to LO00187 ...[intervenes]

ADV BATOHI: If you could just slow down a little bit, I am trying to make notes at the same time. Thank you, counsel.

CHAIRPERSON: 00...

ADV NGCUKAITOBI SC: LO00187.

CHAIRPERSON: 87.

ADV NGCUKAITOBI SC: Yes. At paragraph 51. Now, there the judgment of Miller J in Porrit and another v. NPA is cited,
20 and the underlying portion is clear.

“The decision to prosecute or not is made on the entirety of the contents of the docket and hinges essentially upon the question of whether the person in respect of whom the complaint is made can be successfully

prosecuted.”

Now, you have been extolling the virtue of this opinion. I presume you accept what is stated at paragraph 51 and the case of Porrit that is cited there.

ADV BATOHI: I do accept that.

ADV NGCUKAITOBI SC: Yes. Now, your own decision to test whether it was correct that there was nothing on the docket would have required you to study the dockets.

ADV BATOHI: [Pause] Should I comment on that? Are you
10 done, counsel?

ADV NGCUKAITOBI SC: Yes, I am.

ADV BATOHI: So, firstly, if you will bear with me, Chairperson, I just want to get my thoughts together.

CHAIRPERSON: You may.

ADV BATOHI: I am just trying to find Advocate Epstein's memorandum that deals with this aspect as that is pertinent in this regard as well. If you will bear with me, Chairperson. So, at page 255, although Advocate Epstein does not cite any authorities, there are certainly sufficient authorities. Let me
20 just go before that, Chairperson, if you will bear with me. If you start at 254, where he cites State v. Chow and others, at paragraph 2, he quotes from there and deals with the extent to which every document must be considered before issuing a POCA certificate. And quoting from that decision, may I read it, Chairperson?

CHAIRPERSON: Yes, you may read, ma'am.

ADV BATOHI:

10 “In requiring that the NDPP apply his mind
in issuing a section 2(4) authorisation, it is
by no means logical, necessary or practical
to require the NDPP to read the contents of
an entire docket before making a decision
whether to authorise charges under POCA.
Requiring so would render the issuing of
section 2(4) authorisations a time-
consuming exercise. The operational
requirements of the state must be balanced
against the interests of the affected
parties, as, “a measure of proportionality
must be adopted in the evaluation of the
interests of the affected party and the
burdens placed on the decision-maker to
arrive at a reasonable decision”.”

20 And that is from paragraph 34 of the cited case. And then
Advocate Epstein states at page 255, paragraph 1:
“This is consistent with the wealth of
authority affirming that decision-makers
are entitled to rely upon summaries of
underlying material prepared for them by
their subordinates who are well-versed in

the matter and whose judgment the ultimate decision-maker is entitled to trust.”

Now bearing that in mind and then answering Advocate Ngcukaitobi’s question, firstly, I agree completely, and we are not saying different things when I say that a decision to prosecute must be made on the contents, the entirety of the contents of a docket. But it does not require that the National Director him or herself read the contents of all dockets in a particular matter, a docket or dockets.

In this particular case, it was completely reasonable for me to have appointed an experienced and skilled panel to look into all of the evidence, meaning the evidence in all of the dockets, which they did, and provide me with an opinion. So what was done here was consistent with all the case law that requires prosecutors to make decisions on the basis of the contents of a docket, and where it is clear a National Director is not expected to read the entirety of dockets before he or she comes to a decision in a matter. Thank you, Chairperson.

CHAIRPERSON: Does it mean that the NDPP, even if he or she does not read the entirety of the record, he or she should not even peruse the dockets, not necessarily in their entirety?

ADV BATOHI: That is my understanding. That is my understanding of what it means, Chairperson.

CHAIRPERSON: What?

ADV BATOHI: That is my understanding of what it means.

CHAIRPERSON: Meaning that you need not read, you may not at all read the dockets?

ADV BATOHI: The entire contents of a docket. That is my understanding of what it means, and you are entitled to rely on experts in your office who should, who must do that, who must read the contents of all the relevant dockets.

CHAIRPERSON: So if my understanding of your answer,
10 after reading that passage, you understand it to mean that you need not read the dockets at all yourself as the head?

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Thank you.

MS RAMAGAGA: May I just come in here? I am taking you back to the issue of not inviting the prosecution team to discuss this case of racketeering. Because I am trying to understand your rationale for taking this approach, especially regard being had to the fact that firstly, you had not read the case dockets, and as a result, you bore no personal
20 knowledge of what informed the prosecution team to act in the manner that it did.

And secondly, because at this meeting or any other meeting that you would have called, you had the benefit of the SC who would give advice, in particular in this case, it is Advocate Epstein. Why did you not find it fit to at least put

the prosecution team that has full knowledge of the dockets and Advocate Epstein in the same room so that an intelligent discussion can be held between parties as almost equals about the understanding of this matter of racketeering?

ADV BATOHI: It was never my intention to discuss the merits of this matter at that meeting. That is, what the evidence was, who is right, who is wrong, that was never my intention. So it was never going to become a meeting where one side was going to say this is the evidence, the other side
10 is going to say this is not the evidence, that was not the purpose of the meeting. So I did not think that it was necessary for the prosecution team to be there.

MS RAMAGAGA: Ja, I am saying, looking at the fact that you yourself knew nothing about the dockets and so forth, and I am not proposing a meeting where even [indistinct – 2:05:01] and them would participate, it is not one side against the other, it is one team, it is the advisor, the SC Epstein, as well as the prosecution team working together. I would never just think of a time where you can put the two opposing
20 parties together and to make them then discuss as you did.

My question is based on maybe an expectation from my side that regard being had and taking cognisance of the fact that you knew nothing about the dockets, these dockets in particular, the people that knew about the dockets, it is the prosecutorial team, and I think to an extent Advocate Epstein,

who would also enlighten and be enlightened in the discussions around this. Thank you.

ADV BATOHI: So firstly, I thought you were referring to the meeting of the 6th of May. Is that not correct? Are you referring to another, to something else, for clarity?

MS RAMAGAGA: The meeting of March.

ADV BATOHI: 6th of March 2019.

MS RAMAGAGA: March 2019, the way I read the record, which has not been put in dispute as the fair record of that
10 meeting, I seem to see an indication that there was a time when it was the team of the Booysen, Booysen's team was not available yet. They arrived later. So at that time, you could have actually had the opportunity to have the private discussion where the prosecution team as well as Advocate Epstein and yourself would be sitting together in order to get, for the benefit of the NPA, that exercise would have been undertaken for the benefit of the NPA more than for any other person in particular in his or her personal capacity.

ADV BATOHI: So at that point, I was engaging with
20 Advocate Epstein only, and he was giving me, given that this was the review proceedings, he was giving me briefings, et cetera, I did not engage with the prosecution in this, the team in this matter mmm... I think at that point, I did have concerns about whether they had acted properly in the matter already, so I thought I needed to have a process whereby I could come

to an objective understanding of what exactly happened in this matter and what the strength of the case is.

So at that point, I did not see it necessary to speak to the team. I only spoke to Advocate Epstein. I had also discussed the matter with Advocate de Kock prior to this meeting, and you will note I make, and the only reason that I know that is because there is reference in this minutes to me having spoken to Advocate de Kock prior to that. So at that point, I did not think it would, it was necessary for me to
10 speak to the team.

But there is one, that is my answer to that part of it, but there is one other aspect of your question that I want to make sure, I am not sure if I heard it properly. I thought I heard you say it is not been put in dispute, this record has not been put in dispute as a fair record of the meeting, because it is in dispute as a fair record, as an accurate record of that meeting. So I may have misheard you, I am not sure, I just wanted to clarify that.

MS RAMAGAGA: You heard me correctly.

20 **ADV BATOHI**: So I have clarified.

MS RAMAGAGA: Thank you. Counsel, you may proceed.

ADV NGCUKAITOBI SC: Thank you.

ADV BALOYI-MERE SC: Before...

MS RAMAGAGA: I did not see, sorry about that.

ADV BALOYI-MERE SC: Before you proceed, Advocate

Batohi, at the time when this meeting was held, you were just a month in the office. And you say you wanted to have an objective view of what is happening. Do you not find it peculiar or inappropriate that instead of having a meeting with your prosecutorial team that would give you the facts from the NPA's point of view, you then hold a meeting with an SC, and there is nothing wrong with that, but together with the team, with the opposing team, did you, and at that time, and even maybe sometime in future, as you rely on the fact

10 that you are not forced or you are not expected to read the entirety of the docket, so at the time you had not read, you had not formed your own opinion, but you are now meeting with this SC and the opposing counsel. Would that really give you an objective view of the matters that you were discussing?

ADV BATOHI: I did not say that the meeting would give me an objective view of the matters we were discussing. I said the meeting was more to discuss, to hear what they had to say, but there was not going to be any decisions around it.

20 The objective view that I was talking about is the view that I got after I appointed the panel Chaired by Advocate de Kock with regard to the Booyesen matter. That gave me the objective view in the matter.

ADV BALOYI-MERE SC: What was the purpose of this meeting?

ADV BATOHI: The purpose of this meeting, and I am again trying to, you will recall I could not even remember this meeting when I was asked earlier on, so I am finding it very difficult, but I am basing it now on what we have before us as some record of that meeting. It appears that, and again, I am actually wary to speculate about it because then I am held to it as being the purpose of it when I could not even remember the meeting. So from what we have before us, it appears that counsels were talking, Advocate Epstein and counsel for Mr
10 Booyesen, Epstein acting for the NPA, and they wanted to meet with me for some reason and put some proposals, and I was prepared to listen with my counsel in the context of the review proceedings. So I can only assume on the basis of what we had was that that was the context of the meeting.

ADV BALOYI-MERE SC: Thank you.

CHAIRPERSON: Advocate Ngcukaitobi, it is ten to five. I do not know whether you want to pause here or you want to proceed with regard to these questions that we have been dealing with so that you do not start a new matter and leave
20 it hanging.

ADV NGCUKAITOBI SC: Yes. Madam Chair, let me proceed on this particular theme.

CHAIRPERSON: Yes, thank you.

ADV NGCUKAITOBI SC: Yes, please. Advocate Batohi, there is a simpler reason why you did not invite the

prosecution team. And it is clear from the minutes themselves, that team was at that point led by Advocate Maema. Is that not correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: You already entertained the prospect that Advocate Maema would be subjected to discipline. I asked you about that right now. Correct?

ADV BATOHI: [Pause] As I said, I had not made any decision around that, but given what was in the public space, I needed
10 to carefully consider the matter and then decide. But what was in the public space did not look good. But I still needed to base any decision that I make on evidence.

ADV NGCUKAITOBI SC: Yes, but ...[intervenes]

ADV BATOHI: And I should also say that the decision to hold disciplinary proceedings against all of the, besides Advocate Chauke now, because I see this as a disciplinary proceeding, all of the other accused, sorry, I beg your pardon, all of the other staff members, advocates, was not taken by me. That decision, that is a labour process that requires the
20 appointment of an investigator to investigate the matter and present evidence before a Chairperson. I had nothing to do with that decision to institute disciplinary proceedings. There is a labour process that I am not involved in.

ADV NGCUKAITOBI SC: If you could just keep your answers to my question, they can be long, but they must answer the

question.

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Yes. Now, that seems to be the most logical explanation why you did not invite Advocate Maema to this meeting. It is because of your own bias against him.

ADV BATOHI: May I answer that question?

ADV NGCUKAITOBI SC: Yes.

ADV BATOHI: In order to answer that, I must reiterate what
10 I said earlier. I did not take any decision to institute disciplinary proceedings against any of the other advocates in this matter. I did not even in this matter, I made a referral to the President. So, any suggestion that this is because of any bias against anyone is completely untrue because that decision was not taken by me. There is a completely separate labour process that unfolds. And so, I want to completely dispel any suggestion that because of my bias, they have been disciplined. That is certainly not the case. I had nothing to do with that decision.

20 **ADV NGCUKAITOBI SC:** Again, you are not answering the question. Because of your bias, they were not invited to the meeting. You already had a prejudiced view against them.

ADV BATOHI: So, I did not see the need for them to be at that meeting. I was not sure at that point whether they had in fact applied their minds properly. You may call it a

prejudiced decision or prejudiced view. But I wanted to take an objective decision in this matter to make sure it is not prejudiced by anyone, whether the prosecutors, whether... the... ja, by anyone. And I, therefore, got an independent, objective team to look at the evidence afresh.

ADV NGCUKAITOBI SC: You have been referring to the opinion of Mr Epstein SC that before a POCA certificate is signed by an NDPP, it is not required for that decision to be rational. That each and every scrap of paper must be read
10 by the NDPP. Is that correct?

ADV BATOHI: So, there is two things you said. You said it must, it is not required that it be rational.

ADV NGCUKAITOBI SC: That for it to be rational.

ADV BATOHI: Can you repeat your sentence, please?

ADV NGCUKAITOBI SC: You have been referring to the opinion of Mr Epstein SC that says it is not required for the decision to sign a POCA certificate to be rational.

ADV BATOHI: One moment, please, because I have got to answer this properly.

20 **ADV NGCUKAITOBI SC:** Yes, that the NDPP ...[intervenes]

ADV BATOHI: It is not required?

ADV NGCUKAITOBI SC: Yes, for the decision to be rational. That the NDPP must read each and every scrap of paper that is contained in the docket. You remember that?

ADV BATOHI: [No answer]

ADV NGCUKAITOBI SC: You referred us to the memorandum given to you by Advocate Epstein.

ADV BATOHI: I did refer to the memorandum. I am not sure whether it addressed the issue of rationality. It certainly said that it is not expected of an NDPP to look at all the details in the dockets. I am paraphrasing. I need to look at it again to see precisely what he said.

ADV NGCUKAITOBI SC: I understand, but you answered that question in order to defend yourself. Why you did not
10 read the dockets implicating Major General Booyesen. That is why you referred us to that paragraph. Is that correct?

ADV BATOHI: I did not refer to defend myself. I referred to it to explain what is expected of a reasonable National Director in the circumstances.

ADV NGCUKAITOBI SC: Yes, but I thought it was a response to my question when I put to you that when
Advocate Katz said there was nothing in the dockets, it was incumbent upon you to verify if that statement was accurate or false. Then you referred us to this passage. Hence, I am
20 saying it was you defending yourself against an accusation from me that you should have read the dockets to answer Mr Katz.

ADV BATOHI: With all due respect, I was not defending anything. I was simply stating what is expected of a reasonable National Director in the circumstances.

ADV NGCUKAITOBI SC: Now, the problem I have with that formulation is that the question in this case is you referring Advocate Chauke to a misconduct enquiry on the basis that he took decisions without evidence, but you never having satisfied yourself whether there was indeed no evidence by looking at the docket.

ADV BATOHI: Can you repeat that, please?

ADV NGCUKAITOBI SC: At some point, Advocate Batohi, you will have to ask us to stop repeating ourselves unless
10 you are doing it on purpose, and I have been noticing it is a trend. So not play victim, please.

ADV BATOHI: Chairperson, if I may, I am not playing victim. That is most unfair. I am trying, Chairperson, to write down so that I properly answer the questions. I think I should be given that opportunity.

CHAIRPERSON: Repeat the question, counsel.

ADV NGCUKAITOBI SC: Thank you. The question in this case is whether or you not were entitled to refer Advocate Chauke to a misconduct enquiry on the basis that he took
20 decisions to prosecute or recommended decisions to prosecute or supported decisions to prosecute, all of them, without evidence, when you did not read the dockets to confirm whether there was or there was no evidence. Do you accept that that is the question in this case?

ADV BATOHI: [Pause] It is one of the questions in this case.

ADV NGCUKAITOBI SC: It is the central question. This case has nothing to do with whether a POCA certificate should have been signed by the NDPP. This case is about whether the NDPP can refer a misconduct enquiry to the President about whether the DPP has taken certain actions without evidence when the NDPP knows nothing about the docket.

ADV BATOHI: Chairperson, I am finding it very difficult to respond because these are very important questions and I
10 have to carefully consider them before I respond. So I would appreciate it if it is slower so I am able to write it down and properly respond.

ADV NGCUKAITOBI SC: Thank you. I will be slower.

ADV BATOHI: If you can pause in between.

ADV NGCUKAITOBI SC: Let me break them down. Number one, we have established that you never read the dockets, correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Number two, we have established
20 that you referred a misconduct enquiry to the President, to the Minister, to be referred to the President, correct?

ADV BATOHI: That is correct.

ADV NGCUKAITOBI SC: Number three, we have established that the central issue to be decided in that misconduct enquiry is whether or not the decisions that were taken,

allegedly taken by Mr Chauke, were taken with or without evidence, correct?

ADV BATOHI: [Pause] So to answer that, counsel characterises that as the central issue. My response to that is that it is one of the issues before this Court. Whether it is central or not, I cannot comment on that, but it is certainly one of the issues before this enquiry.

ADV NGCUKAITOBI SC: But Advocate Batohi, the problem is 3.1.1.1 right up to 3.1.1.5 speak about no evidence. It is
10 the golden thread that combines all of the charges.

ADV BATOHI: It is one of the important aspects of this matter.

ADV NGCUKAITOBI SC: Yes. Now, this is why I am putting to you that these cases you have been referring us to are irrelevant to your decision to refer a misconduct enquiry about absence of evidence when you have no clue about the dockets.

ADV BATOHI: These cases are irrelevant to my decision to refer the matter when I have no... Can you please complete
20 the last part?

ADV NGCUKAITOBI SC: When you have no clue about the contents of the dockets because you never read them.

ADV BATOHI: So Chairperson, what is required of a National Director when he or she refers a matter to the President is that you must have reasonable basis to refer a

matter to the President. In the case, in this particular case, in my view, having considered all of that which was before me, I formed the opinion that there was a reasonable basis to refer this matter to the President. And in my view, it was not necessary for me to simply read, to read the dockets itself to form that reasonable basis.

I took a lot of effort in trying to ensure that I got the decision right and that I had reasonable basis to do that. There were opinions, not just one. And that was simply
10 because I wanted – referring a matter to a President, in my view, is a very serious matter that I do not take lightly. And so, I do not agree with the proposition by Advocate Ngcukaitobi.

ADV NGCUKAITOBI SC: See, Advocate Batohi, it is precisely because asking the President to convene an enquiry like this is serious business, that you have a duty to satisfy yourself that the charges are sustainable. The only way you could have done that is by reading the dockets to see whether it is true or not that there was no evidence.

20 **ADV BATOHI:** [Pause] I disagree that this is the only way I could have done this to satisfy myself that there was a reasonable basis to refer the matter to the President.

ADV NGCUKAITOBI SC: And your failure to read the dockets before making the referral to the President shows you either as vindictive against Advocate Chauke or as

grossly negligent in your job.

ADV BATOHI: I have nothing against Advocate Chauke. Absolutely nothing. He is, in fact, a good advocate. But my decision to refer is not about whether Advocate Chauke is a good advocate or not. It is about what, what is the evidence that you have before you that allows a National Director to come to the reasonable conclusion that this matter must be referred to the President. And in my view... to refer a matter simply because I am vindictive, I mean I should be, there
10 should be an enquiry into my fitness to hold office. This is just ...[intervenes]

ADV NGCUKAITOBI SC: I did not say that.

ADV BATOHI: It would be unacceptable for a National Director to refer a matter to a President without any evidence, without coming to a conclusion that there is a reasonable basis to do that. But simply because you are vindictive, that is certainly unacceptable conduct on the part of any National Director. And I would never do that. As far as gross negligence is concerned, in my view, I was anything but
20 grossly negligent. I ensured that I appointed a panel to look into the matter in the first instance.

Thereafter, I obtained several opinions. I may not have read the evidence in the dockets relating to the racketeering charge. But what I did do is I read all of the opinions, in particular Dr Broughton's opinion, that had

evidence in terms of documentary evidence attached to it and satisfied myself that there was a reasonable basis to refer the matter. I am not judging. I came to the conclusion that there is a reasonable basis and it is for this enquiry to decide whether what the outcome should be after this investigation.

ADV NGCUKAITOBI SC: Can we just conclude then that minute? And I want to refer you to page 344. Now, you remember that ...[intervenes]

ADV BATOHI: Just a moment.

10 **ADV NGCUKAITOBI SC:** 344 of file 3.

ADV BATOHI: I am there.

ADV NGCUKAITOBI SC: Now, you remember that on Monday, I put it to you that the information I had was that Mr Sebelemetja was already instructed on that day to take steps to withdraw the opposition. Do you remember that?

ADV BATOHI: I do not recall that.

ADV NGCUKAITOBI SC: All right, well, I put it to you on Monday and you said you did not have any recollection. Now, at page 344, Mr Carl van der Merwe says:

20 "Joseph..."

That is Mr Joseph Sebelemetja,

"...and I need to see the JP and say, do not put the case down immediately. Give us time. We are not going to set it down."

Now, the JP, that is referenced there, was Judge

...[intervenes]

ADV BATOHI: So where are you referring to?

ADV NGCUKAITOBI SC: Page 344, the first line.

ADV BATOHI: Yes, I see that.

ADV NGCUKAITOBI SC: So when he says, Joseph and I, he means Mr Sebelemetja and I, will need to see the JP and say, do not put the case down immediately. Give us time. We are not going to set it down. The JP referenced there is the JP of KZN, Judge Dlwati. Do you know that?

10 **ADV BATOHI**: I know Judge Dlwati, and he was the JP.

ADV NGCUKAITOBI SC: But that is the JP they were talking about.

ADV BATOHI: I do not know. If he was the JP at the time, then it is...

ADV NGCUKAITOBI SC: And look at how the meeting is concluded. Mr Katz then says:

20 “May I suggest that we adjourn today's meeting until a particular date so that the JP can be advised, and then at a date we can trash out a consent order. If I can play it forward, if you find something in terms of the predicates, we would need to continue. Get dates, et cetera. But if you decide that the POCA charges would not be proceeded, then other people may want to review

people, but the Court order may protect you. You could frame the Court order however you like. I am not fast about that. You could massage the message about Jiba and Abrahams.”

There are two things that strike me there. The first one is that he has already told you and everyone in that meeting that the JP must be told that the parties are negotiating a consent order. No one contradicted him on that. Do you have
10 any comment on that?

ADV BATOHI: Yes, I do. There was absolutely no consent order that was going to be dealt with at that point in time.

ADV NGCUKAITOBI SC: I am saying that in the minute, there was no one who contradicted him.

ADV BATOHI: That may have been the case because, you know mmm... I cannot... I cannot dictate to what Counsel Katz would say in a meeting. But what I can say is, firstly, he says, if you look at Joseph and I need to see the JP, do not put the case down immediately, give us time, we are not going
20 to set it down. My understanding of that is there was absolutely no decision. In fact, if you look at 343 at the bottom, I say:

“I am going to get three people to look at everything, the racketeering charges and the predicate offences, after I get advice to

say we will run with it or decide how we are going to deal with the racketeering decision or proceed on the predicate.”

Again, here, I am not saying it is exactly the words that I used. It is a matter of timeframe. There is a lot of reading. I want to give it enough time, maybe a month, et cetera, et cetera. So it was on that basis, the fact that I was going to get a panel to look at this matter, that it appears that they were going to say, look, let us wait, let us not set the matter
10 down. But what Advocate Katz is talking about a consent order, there was definitely no consent order that I had agreed to or that I was even envisaging at that time. So that is all I can say about that.

ADV NGCUKAITOBI SC: But Advocate Batohi, no, no, no, that is not enough because you have referred me to something that was said before. And I already told you that I am telling you how the meeting was concluded. And I put it to you that he is saying, let us tell the JP, the matter must not be set down because the parties are trashing out a
20 consent order. He is not contradicted on that position.

ADV BATOHI: I want to disagree with that vehemently.

ADV NGCUKAITOBI SC: Where is it contradicted?

ADV BATOHI: Vehemently, because sometimes context is everything. If you look at the paragraph, we cannot ignore what was said just before that. The fact that I am going to

get three people to look into this, in fact, I got four eventually, and to then decide what to do. So the fact that he talks about a consent order there, there was never, ever any agreement that there was going to be any consent order. At that point, my decision was I am going to get somebody to look at this matter and then decide what to do after that. I could not take a decision on a consent order at that time because I had no, I did not know this matter. I did not understand it. I needed to have the necessary information before me to make a very
10 considered and informed decision, which I decided to do as per the bottom of paragraph 343.

ADV NGCUKAITOBI SC: Not only that, it goes further to say:

“The Court order may protect you. You could frame the Court order however you like. I am not fussed about that.”

And then you say something extraordinary:

“You could massage the message about Jiba and Abrahams.”

20 What message needed to be massaged about Advocate Jiba and Advocate Abrahams?

ADV BATOHI: I have no idea.

ADV NGCUKAITOBI SC: Well, can I tell you, it is precisely the same message you made when you said that they had no credibility.

ADV BATOHI: I have no idea what this is about. And if Advocate Katz says I could massage it, those are his words. I have no idea what he is talking about.

ADV NGCUKAITOBI SC: And again, you do not contradict him and say, sorry, Mr Katz, there is no message to be massaged. These are my colleagues. I have respect for them.

ADV BATOHI: The fact that someone does not say anything, it does not mean that, I mean, sometimes I just listen. I do
10 not think it is necessary to speak for the sake of speaking. Sometimes you just listen. And if something requires a response, you respond. Otherwise, you just ignore it.

ADV NGCUKAITOBI SC: Well, the problem here, Advocate Batohi, is that he is going along with your earlier statement that these two colleagues are people of no credibility. It is not as if you are ignoring something you disagree with. All
of you agree on this.

ADV BATOHI: I do not know what he is talking about here. I have no idea. I do not know what he is talking about when
20 he says the Court order may protect you. I do not know what protection I needed and why he would say that. I was going to get a panel to look into this matter. So I cannot explain why he said those things or what he meant by them. But from my perspective, I wanted to do things properly.

ADV NGCUKAITOBI SC: Now earlier on, I put it to you that

your intention was that the contents of this meeting must never be known, except by those people who were at that meeting. Do you remember that?

ADV BATOHI: You did put that to me.

ADV NGCUKAITOBI SC: Yes. That is clear at page 346 in the second line and in the third line, where you say:

“I would prefer it that none of this gets out.”

And Advocate Epstein SC responds to support you and says:

“Can I suggest this? Even that other

10 people are being brought in, people other

than those in the meeting. The only thing

to be said is that an approach has been

made to the NDPP and she is considering

it.”

So that includes colleagues in the NPA, colleagues who are part of the prosecution team. All of those are classified as other people being brought in. It seems to me that your intention was always that this would remain a secret known only to the attendees of that meeting.

20 **ADV BATOHI**: Absolutely not. And I want to explain that.

Again, as I did earlier, when I was asked that question, I explained this appears to have been, and again, Chairperson, I am basing it on what I have in front of me. At the bottom of page 12, sorry, page 345, we talk about the media. This was a highly publicised case. Things get out into the public and

the media makes a meal of it, which I have said. And then Karl van der Merwe says:

“I can advise the committee that this is not going to get out there.”

Because I was concerned that him, Booyesen and his team would say something about the we were, the fact that we had spoken. And I did not want it to get out. It was not a secret meeting. I did not want it to get out into the media. And then we get all kinds of media queries, et cetera, about it, given
10 the high profile nature of this matter. And therefore, I would have said, I prefer that none of this gets out. Advocate Epstein, he suggests something, even other people being brought in. I am not sure what he means by that because that sentence is incomplete.

“The only thing to be said is that an approach has been made to the NDPP and she is considering it.”

And from the context, that seems to me to be that if it does get out to the media and I have to respond, then I can simply
20 say that, yes, an approach has been made and she is considering it. So this was never meant to be the kind of secret meeting that Advocate Ngcukaitobi puts to me. It was merely that, how do we manage it if the media gets to hear about this meeting? But it was never secret. It was never intended to be secret and it was never meant to be kept away

from anyone else in the NPA.

ADV NGCUKAITOBI SC: Can I ask you then finally on this topic to explain why you withheld all of this information from this panel until Monday?

ADV BATOHI: I did not withhold anything from this panel. Even when you asked me about it, counsel, I said, you are welcome to speak to Mr Epstein and he can give you whatever he wants because I am not going to raise privilege or anything like that because this is an enquiry and I want to be as
10 transparent as possible. So to answer your question, I did not withhold anything. I could not even remember when you asked me about the meeting with Booysen and his team, well, not Booysen, with counsel for him, I could not even recall that we had had this meeting. And so there is no intention to withhold anything. That is all I can say. And if we had perhaps found the, you know, through a search, the emails from Mr Epstein, we would have been in a better position. But there was no intention to withhold anything because there is nothing secret about this. There is nothing wrong with it.
20 Ja, that is my response.

ADV NGCUKAITOBI SC: Well, if you are saying that there was no intentional withholding, why was it not disclosed? I just do not understand that. You have disclosed information all the way from 2019 and you have kept this out.

ADV BATOHI: I did not even know it existed. So I did not

keep out anything deliberately. That was why it was not disclosed.

ADV NGCUKAITOBI SC: Thank you, Madam Chair, for today.

CHAIRPERSON: Thank you, counsel. Just two matters. Just for my clarity, page 336, Advocate Batohi, the fourth block where you spoke about discipline. But my question relates to the acronym there, PCLA. And your answer was it is incorrect. It should read PCLU.

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

CHAIRPERSON: What is PCLA?

ADV BATOHI: The PCLU, ...[intervenes]

CHAIRPERSON: No, what is PCLA?

ADV BATOHI: I do not know what is PCLA.

CHAIRPERSON: What is PCLU?

ADV BATOHI: PCLU is the Priority Crimes Litigation Unit in the NPA.

CHAIRPERSON: At page 343, [indistinct – 2:45:43], it is Advocate Katz talking here and he is referring to the five
20 predicates. I suppose that refers to... Oh, I beg your pardon. Page 343. The third block reference to five predicates. Am I correct that he was referring to the five predicate offences of the seven in relation to advocate, I beg your pardon, General, Major General Booysen?

ADV BATOHI: Chairperson, I am not sure whether he was

referring to the seven. But he says the five predicates and then he says the Howick events. So it seems like he is referring to the events that took place at that scene. But I cannot say that he is referring to the seven. He will have to.

CHAIRPERSON: Or any of the seven?

ADV BATOHI: Chairperson, I am not... Which seven predicate offences Chairperson is referring to?

CHAIRPERSON: I am just thinking that as Advocate Ngcukaitobi alerted us, the charges, the racketeering in relation to, I am saying racketeering, with a view that that could be inclusive of predicate offences against Advocate, I beg your pardon, Major General Booyesen, were seven. And please correct me if I am getting that incorrectly. And my question is based on that because I see there Advocate Katz says that... he is referring to the dockets, that there was nothing to pin the five predicates supposedly against Major General Booyesen.

ADV BATOHI: I would assume that, Chairperson.

CHAIRPERSON: Is that your assumption also?

20 **ADV BATOHI:** I assume that it is against him. That is correct, because...

CHAIRPERSON: Yes.

ADV BATOHI: Yes

CHAIRPERSON: And I know that the question may be unfair to you, but do you have a sense of what those five predicate

offences could have been?

ADV BATOHI: Chairperson...

CHAIRPERSON: That he says there was nothing to pin on them?

ADV BATOHI: Chairperson, it is... It is difficult to answer what he was thinking. But my recollection of the panel report is that there was no... You require two predicate offences in respect of POCA, at least two predicate offences to be proven. And the report was that this was not – this
10 requirement was not satisfied. So I am not sure what, when he means five predicates, what exactly he is referring to.

ADV BATOHI: And in relation to 344 [indistinct – 2:49:17] ...question by Advocate Ngcukaitobi regarding the conclusion that was reached, or what appears to have been the conclusion, regarding the consent [indistinct] that was to be presented to the JP, Advocate Katz is talking there and later, Advocate Epstein says, he says to him... I beg your pardon. At page 344, it is a long day for all of us. After mention was made of a court order and what ought to have been presented
20 to the JP, below that, Advocate Epstein with someone else is saying:

“We just need a court order to set aside,
those mechanics will not be difficult.”

Do you see that?

ADV BATOHI: I see that.

CHAIRPERSON: And then you make your remark below that:

“I am not sure it will be difficult or easy if
there is a court order.”

And Advocate Katz says:

“It is not just not entering a position, but
withdrawal is more.”

ADV BATOHI: I beg your pardon, Chairperson in the last
part?

CHAIRPERSON: If you read just below you there, after your
10 remark, he says, withdrawal is more. I suppose he means
what he is saying that the Court has a discretion. Do you see
that?

ADV BATOHI: Chairperson, I really do not know what he
means, whether it is accurately captured. It does not make
sense to me. Well, I cannot explain it, Chairperson.

CHAIRPERSON: Yes, but I want it means I want to go back
to your remark. I am not sure it will be difficult. What were
you referring to then?

ADV BATOHI: Well, again, Chairperson, and we are trying
20 to make sense of this record. It appears that Advocate
Epstein says before that:

“Anton, we just need a Court order to set
aside. Those mechanics will not be
difficult.”

So I respond:

“I do not know if it will be difficult or easy.

I do not know.”

Mmm... So... I am not sure what I was trying to convey at that point. I would like to say, Chairperson mmm...

CHAIRPERSON: You are saying you do not know if those mechanics will be difficult or easy. If there is a court order. Do I understand you to mean that?

ADV BATOHI: Chairperson...

CHAIRPERSON: As it appears there?

10 **ADV BATOHI:** Chairperson, it appears that I am saying I do not know it will be easy or difficult, but it is certainly not a conclusion that there will be a court order. And that was in my view, Chairperson, if we look at page 345, I say ...[intervenes]

CHAIRPERSON: No, stay on 344, I just want to understand your latter phrases. If there is a court order. In other words, if my reading is correct, I am not sure whether those mechanics will be difficult or easy. If there is a Court order.

ADV BATOHI: Yes, I do not know what the context was, but
20 for me, I did not understand. And as far as I am concerned, it would have not even been an issue. Because there was not going to be a consent order, certainly in my mind at that point.

CHAIRPERSON: Yes, thank you, counsel.

ADV NGCUKAITOBI SC: Madam Chair, I think this might be

a convenient time. I will start on a new topic tomorrow morning.

CHAIRPERSON: Indeed, it is a convenient time to adjourn. Advocate Batohi, we will adjourn now and reconvene at 9 o'clock tomorrow morning. Thank you.

ADV BATOHI: Noted, Chairperson.

CHAIRPERSON: We adjourn.

ENQUIRY ADJOURNS UNTIL 12 DECEMBER 2025

10



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