

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

**HELD AT**

**SALU BUILDING, 316 THABO SEHUME STREET,  
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

**27 MARCH 2026**

**DAY 45**



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

**PROCEEDINGS ON 24 MARCH 2026**

**CHAIRPERSON:** Good morning family, good morning everyone. Good morning, Advocate Chauke.

**ADV CHAUKE:** Good morning, Chair.

**CHAIRPERSON:** Let me take this opportunity to apologise to all of you, you might have heard of my challenge, hence the delay, thank you for your patience. All is under control. Advocate Ngcukaitobi?

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

10 **CHAIRPERSON:** We can begin. I do not know whether you have used this morning to have tea, are you going to ask that we adjourn for a short time for tea or...?

**ADV NGCUKAITOBI SC:** Yes, we might, Madam Chair, it is ten past 11 already, so if it is convenient to the Panel, we can start with our adjournment and then we can commence thereafter. [Laughter]

**CHAIRPERSON:** Yes, I think we can do that, so that we keep the time as we normally do.

**ADV NGCUKAITOBI SC:** Yes.

20 **CHAIRPERSON:** At least I have reported.

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

**CHAIRPERSON:** Thank you. My sister is concerned that I cannot walk, but I can walk back.

**ADV NGCUKAITOBI SC:** We could say that you could walk, Madam Chair.

**CHAIRPERSON:** Yes, I can walk. Yes, so we will adjourn until half past 11 and we start.

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

**CHAIRPERSON:** Yes, Advocate Chauke, we will adjourn for 15 minutes.

**ADV CHAUKE:** Thank you, Chair.

**ENQUIRY ADJOURNS**

**ENQUIRY RESUMES**

**CHAIRPERSON:** Yes, thank you. Good morning again.

10 Advocate Chauke?

**ADV CHAUKE:** Good morning, Chair.

**CHAIRPERSON:** Good morning. You continue to be under oath.

**ADV CHAUKE:** Thank you, I confirm.

**ANDREW CHAUKE** (s.u.o.)

**CHAIRPERSON:** Thank you. You may proceed, Advocate Ngcukaitobi.

**ADV NGCUKAITOBI SC:** Yes, thank you, Madam Chair. Mr Chauke, yesterday we had finished the analysis of the terms  
20 of reference relating to Cato Manor. We had also done the list of judgments that you read and considered at the time. But there is one more that is outstanding. It is the De Kock report, which is referred to, if you remember, this judgment that lists what you considered at page 5 thereof. And SB3, the De Kock report, is the last of those items, correct?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, I do not know if you have it easy to get the De Kock report in front of you. It says here SB3, so that should be one of the annexures to the statement by Advocate Batohi.

**ADV CHAUKE:** I have got a copy of the report, although it is not on SB3.

**ADV NGCUKAITOBI SC:** No, that is fine. I think there are various versions flying around, so any version will do. So  
10 what page is that that you are looking at?

**ADV CHAUKE:** It is 053.

**ADV NGCUKAITOBI SC:** Oh, is that one of the annexures to Advocate Batohi's statement?

**ADV CHAUKE:** Yes, correct.

**ADV NGCUKAITOBI SC:** All right, thank you. Let us just wait for the Panel to get their own copies. Well, mine is not numbered. What page is this that you are looking for?

**ADV CHAUKE:** It is SB3.

**ADV NGCUKAITOBI SC:** 134.

20 **ADV CHAUKE:** 134, but on the attached it says 053.

**ADV CHAUKE:** I think the Panel is using SB3-134.

**ADV CHAUKE:** That is fine.

**CHAIRPERSON:** You may proceed, Counsel.

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

**CHAIRPERSON:** They are getting my bundle.

**ADV NGCUKAITOBI SC:** Yes, thank you, Madam Chair. Now, I cannot remember whether that one, if you look at the end, is that the one signed at page 96 of the document? Is that the one signed by Advocate de Kock alone or the one signed by Advocate de Kock and Advocate Mamabolo?

**ADV CHAUKE:** The one that I have got is the one that is signed by Advocate de Kock alone.

**ADV NGCUKAITOBI SC:** Yes, all right. The one I have is signed by Advocate de Kock and Advocate Mamabolo, and we  
10 have covered this before about the discrepancies in the signature.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. But what would this tell you that you have a report that is drafted by four people, signed either by one or by two, and then it has got portions that it says on behalf of, but one of them has signed nevertheless?

**ADV CHAUKE:** One can accept that maybe when the final report was drafted, the colleagues were sitting from very far apart, and they were not able to sign the report from one  
20 place.

**ADV NGCUKAITOBI SC:** I understand that, but they would still be able to sign all of them?

**ADV CHAUKE:** Indeed. They would take the last page and then email it to one or another two, to append their signatures.

**ADV NGCUKAITOBI SC:** Yes. And the fact that they never actually signed it up until now, I mean, this is a 2019 report.

**ADV CHAUKE:** Ja. Obviously, one will need to get an understanding from those who have not signed as to the reasons why they have not signed, but one can only think theories and what have you, other than to get the explanation from them why they have not signed the report.

**ADV NGCUKAITOBI SC:** No, that is fine. If you forget about their reasons for not signing, I am asking more about the  
10 effect of not signing, because the Panel cannot work on speculation about why they did not sign. Advocate Riley is coming to explain why she did not sign, but her explanation may be irrelevant because the effect of not signing could impact on the legal standing of the document.

**ADV CHAUKE:** I am with you. I accept that if the document is not signed, you cannot place a reliance on it.

**ADV NGCUKAITOBI SC:** Yes. Well, if it is written by four people, I mean, would not it need a majority in order to be a report of four?

20 **ADV CHAUKE:** Of course.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Like I indicated, the initial one was signed by two. The last one is signed by one. So either way, even if the one that you have got with you, it is signed by two, there is a stalemate.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** This one is even worse. That one that was attached to Advocate Shamila Batohi is the one that was signed only by on the 28th of June, 2019, signed by Advocate de Kock alone.

**ADV NGCUKAITOBI SC:** Yes. And then Advocate Batohi has repeatedly referred to this as unanimous.

**ADV CHAUKE:** Indeed. That is how I understood it.

**ADV NGCUKAITOBI SC:** Yes. What does that mean, that  
10 unanimous?

**ADV CHAUKE:** It is questionable because the signatures of the other members of the panel are not appearing.

**ADV NGCUKAITOBI SC:** Yes. Did you try to understand this thing? Because these are your colleagues. You could phone them up and say, Mr de Kock, what is going on? Why have your colleagues not signed? Or Ms Riley, what is happening?

**ADV CHAUKE:** No. My interaction with Advocate de Kock was, one, why did you finalise the report and write about me  
20 without speaking to me? And then he said, no, it is just unfortunate. They did not think it was necessary to speak to me. And then, again, I said, but why did you not speak at least to the prosecution team, at least to hear their views? And he indicated to me that that is unfortunate, but they had the prosecution's memorandum, so they did not think it is

necessary to speak to them. That is how far I could take it. I did not even take up the issues about the others not having signed.

**ADV NGCUKAITOBI SC:** Yes. And the other people there, Mr Mamabolo, I think is deceased.

**ADV CHAUKE:** Mamabolo is deceased.

**ADV NGCUKAITOBI SC:** Yes. And Advocate de Kock himself is deceased.

10 **ADV CHAUKE:** Indeed. Unfortunately, may his soul rest in peace.

**ADV NGCUKAITOBI SC:** Yes. And the only remaining members are the ones who did not sign.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Advocate Tenga and Advocate Riley.

**ADV CHAUKE:** Yes, Advocate Riley and Advocate Tenga.

20 **ADV NGCUKAITOBI SC:** So do you think it might be a good idea, because it is not clear to me why the NPA keeps telling us about Advocate Riley alone and does not say anything about Advocate Tenga.

**ADV CHAUKE:** Let me not comment about that, Chair, asked Advocate Tenga should answer for herself instead of me speaking on her behalf.

**ADV NGCUKAITOBI SC:** Yes, no, but I am asking a different question. If you have a scenario like this where there is a

glaring problem of a report signed by one or by two and we do not know which one is the final, which one is not the final, but two are deceased, there are two remaining, that you would expect that the NPA will invite both of those that are remaining to give clarification to the Panel about what actually happened? And the fact that they are calling one and not the other, what does that mean?

**ADV CHAUKE:** There could be some underlying causes as to the reason why Advocate Tenga is being called. Like I am  
10 saying, once the report is unanimous, it should be easy to say it is unanimous. If it is not unanimous on the appearance of the document that the others have not signed, one would want an explanation as to why the other person has not signed and why he is not being called to confirm whether she agreed with the report or not.

**ADV NGCUKAITOBI SC:** There is also another thing I do not follow with their choice of who must come and speak to this report. Who is the senior between Ms Tenga and Ms Riley?

20 **ADV CHAUKE:** It is Advocate Tenga. She is the DPP in Limpopo. Advocate Riley is a deputy in the Western Cape.

**ADV NGCUKAITOBI SC:** So that is also another thing that I do not understand why the senior will not be called.

**ADV CHAUKE:** Ja, well, like I said, I do not want to speak about some of the things that might not be conducive in this

enquiry. But, ja, it is...

**ADV NGCUKAITOBI SC:** But would it be an option for the Panel to invite on its own Advocate Tenga to give her own perspective to how this report came about?

**ADV CHAUKE:** Indeed. Advocate Tenga would be in a position to explain her views about the report and the process that was followed.

**ADV NGCUKAITOBI SC:** Thank you.

**ADV CHAUKE:** If you are not aware, Advocate Tenga is the  
10 one who decided not to prosecute Advocate Jiba in respect of the so-called perjury charges.

**ADV NGCUKAITOBI SC:** Yes. No, we looked at that yesterday.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And we found her actual report...

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** ...dated the, I think, 27th June 2019?

**ADV CHAUKE:** Yes.

20 **ADV NGCUKAITOBI SC:** All right, thank you very much. That matter will be followed up later, depending on what the NPA decides to do, but it is really the cherry-picking that worries me. Now, when you look at this report now as a whole, there is something I also just do not understand. There is a judgment of the full Court, which we looked at

yesterday, which already answers fully the question whether there was evidence or not in the docket to prosecute Major General Booyesen. It is contained in paragraph 60 of the case of *GCB v Jiba*. And we went through it painstakingly yesterday.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Now, then you have the National Director of the NPA who then asks four advocates to essentially redo all of the work that has been done by the  
10 High Court.

**ADV CHAUKE**: In order to find a reason to justify the withdrawal of the case against the accused.

**ADV NGCUKAITOBI SC**: Yes, well... Yes, that is the ulterior motive, but assuming there is no ulterior motive, I am just talking purely in terms of the legal hierarchy in this country. What you have got, you have got a judgment. It is a full-bench judgment. It goes thoroughly into the contents of the docket. Then it comes to the conclusion that there was evidence, and it summarises that evidence. And then it says,  
20 based on this, there is no *mala fide* or irrationality on the part of Advocate Jiba in authorising the racketeering. The Court has made that pronouncement. One would have expected that the NPA, being an organ of state bound by the Constitution, would regard itself as bound by those findings.

**ADV CHAUKE**: Indeed, I accept that. And it is highly

improper that you second-guess the Courts by trying to investigate that which they have decided. If you are not happy with the findings of the reasoning of the Court, the issue is to appeal.

**ADV NGCUKAITOBI SC:** Yes. And the same with the terms of reference we looked at yesterday. The effect of the matter, there is a judgment that says there is evidence and that the prosecution is not *mala fide*. And then you have the NPA, which then goes to the President and then somehow gets the  
10 President to agree to set up a panel to investigate what the Judges have already found.

**ADV CHAUKE:** Yes, like I indicated yesterday, Chair, to me, that is highly improper because, in essence, the President was misled in that respect.

**ADV NGCUKAITOBI SC:** Yes, well... The other thing, when you look at this judgment, I mean, sorry, this report, you know, there is no reference whatsoever to the findings that we looked at yesterday from the GCB case.

**ADV CHAUKE:** Indeed.

20 **ADV NGCUKAITOBI SC:** There are many references to the judgment of Judge Govern.

**ADV CHAUKE:** Yes. I saw that. My only view is that Govern's judgment, in them having misread it anyway, was able to be used to justify the narrative that there is no evidence at all against the Cato Manor officers and General

Booyesen.

**ADV NGCUKAITOBI SC:** And you see, this is a 2019 report. The judgment of Judge Lehodi is a 2016... Yes, it is a 2016 judgment.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** So, it was there.

**ADV CHAUKE:** It was there.

**ADV NGCUKAITOBI SC:** And then they, for some reason, elected, well, they will not refer to it.

10 **ADV CHAUKE:** Which is a worry and a concern that at that high level, such omission could be made about the judgment of the full Court that was there.

**ADV NGCUKAITOBI SC:** Yes, yes. Now, you anticipated me, and I was going to ask you the process as well. Because there is the problem of their breach of the *stare decisis* principle. And there is the problem of their selective references to judgments that suit them and those that do not suit them are just discarded. And then there is a process problem, which is the people that worked on the case, like  
20 yourself and Advocate Maema, who was here, said we were never consulted. And there is a judgment we looked at with Advocate Maema of the Supreme Court of Appeal, which says it is highly irregular for the National Director of Public Prosecutions to withdraw charges, in that case it was charges against President Zuma, without speaking to the prosecution

team.

**ADV CHAUKE:** That is fundamentally wrong. Because in this case, as I indicated yesterday, Chair, once the NDPP at that level receives the representation from the accused or another person, the process is to call the prosecution team responsible, take their views, take the views of whoever, and then make a decision. In this instance, as I indicated, I am not aware of any representations that have been made by General Booyen. And on the record, since the start of this,  
10 I have never seen them. That is the first thing. The second thing is the prosecutors who dealt with this specific matter have not been consulted. Thirdly, me as well, that I am said to be affected, that I was part of the decision-making process, I was not consulted. So is Advocate Noko. She was also not consulted.

**ADV NGCUKAITOBI SC:** Yes. That is the process.

**CHAIRPERSON:** Are you aware of that Supreme Court of Appeal judgment? Which judgment is that, Counsel?

**ADV NGCUKAITOBI SC:** Madam Chair, I can find it easily.  
20 It is somewhere in our...

**ADV CHAUKE:** I think it is the *DA v President Zuma*.

**CHAIRPERSON:** Democratic Alliance.

**ADV CHAUKE:** The Democratic Alliance case.

**ADV NGCUKAITOBI SC:** That is all possible. But we have a specific extract...

**CHAIRPERSON:** We will locate that citation.

**ADV NGCUKAITOBI SC:** ...of the judgment in our bundle.

So we were dealing now with a process that there is a judgment of the SCA that it is highly irregular for the national director, in that case it was Advocate Mche, to withdraw a charge without speaking to the prosecution team.

**ADV CHAUKE:** Yes, yes.

**ADV NGCUKAITOBI SC:** Now, then you raise other procedural problems, which is... A charge can only be  
10 withdrawn upon representations made by an accused.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And in this case, there were no representations.

**ADV CHAUKE:** No. Unless if... I might have misread the record as we have it here in this enquiry. But I have never seen it. In fact, I remember even when Advocate Batohi testified, she did not make any reference to the representations having been made by General Johan Booyesen. Now, we went through this issue with Advocate  
20 Batohi.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** You remember how it started? She comes in in February 2019, and then early March of 2019, she has a meeting with Mr Booyesen's attorneys and her advocates. And that is where she talks about having to

discipline people like Mr Maema and then referring them back to the North West.

**ADV CHAUKE**: It was the very same month when she started in February.

**ADV NGCUKAITOBI SC**: Towards the end of February.

**ADV CHAUKE**: Ja. I think the third week of February that she met with the attorneys of Mr Johan Booysen and where those remarks were made.

**ADV CHAUKE**: Yes, and then she gets advice from Mr Hilton  
10 Epstein, who explains the strength of the case of the NPA against Major General Booysen.

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: But thereafter, Mr Hilton Epstein is then side-lined.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: And then that is how this report is then brought about.

**ADV CHAUKE**: Yes, but in the scheme of things, if you look at the pattern, that which is unfavourable to the no evidence  
20 rule will be suppressed. You can start from where we are referring to, the advice of Epstein. You can go to the issue where the prosecutors are saying there is a case. You can go to an issue where it is being indicated that the recommendation of De Kock is contrary to what is being done. So it is a pattern.

**ADV NGCUKAITOBI SC:** Yes. Now, just on the process issues, we know for a fact, because Advocate Batohi was here and I confronted her about that, that there were no representations from Major General Booyesen. What had happened is that she met with the attorneys and the advocates of Major General Booyesen and then began a scheme to withdraw these charges.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** When I asked her what was the  
10 basis for this decision, she was referred to what was out there, including what was being said at the State Capture Commission.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** That was the basis on which she began this exercise.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** It was not triggered by representations.

**ADV CHAUKE:** Yes, yes.

20 **ADV NGCUKAITOBI SC:** Now, is that proper?

**ADV CHAUKE:** It is highly improper.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** And as I said, my view is that the withdrawal or otherwise of these charges has got nothing to do with the rule of law or the interest of justice. There is something

underlying that which, unfortunately, one can just suspect that this is the motive, this is the reason. But legally speaking and in the rule of law and the interest of justice, this is highly irregular.

**ADV NGCUKAITOBI SC:** Mr Chauke, in paragraph 450, page 126 of the statement, no, not where you are reading, of the statement of Mr Maema, is an extract from the case of *Zuma v Democratic Alliance and others* 2018 (1) SA 200, paragraph 89, where it is stated:

10            “The exclusion of the prosecution team from  
the process leading up to the decision to  
prosecute, especially the final deliberations  
that took place on 1 April 2019, was in itself  
irrational. The compelling conclusion is that  
this exclusion was deliberate. There were  
senior litigators steeped in the case,  
acquainted with the legal issues and had a  
critically important contribution to make  
regarding the ultimate decision to terminate  
20            the prosecution.”

**ADV CHAUKE:** That is the judgment I was referring to because it is compulsory. There is no discretion that the NDPP can just do a review without following that due process which is stipulated in the Act.

**ADV NGCUKAITOBI SC:** Yes, but there is a judgment of the

SCA delivered in 2018 that says if you want to terminate the prosecution, you must include the prosecution team. Excluding them is irrational.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Now, we have a withdrawal or a termination happening in 2019. You know, this is now the third time it appears to be no respect for binding authorities by the former NDPP Advocate Batohi.

**ADV CHAUKE:** What I am saying is it is one thing to pay lip  
10 service to the rule of law and then we act differently. This is the case in this one.

**ADV NGCUKAITOBI SC:** Yes. There is a further problem that I want you to comment on around the circumstances of the production of this report. You established in your evidence yesterday, but even if you did not, it is common cause. There is so many witnesses that have testified on this, that Advocate Batohi was the fourth of NDPPs that dealt with issues of Cato Mano, starting from Advocate Jiba, Advocate Nxasana, Advocate Sean Abrahams.

20 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Advocate Jiba issued a racketeering authorisation. Advocate Nxasana did not reinstate but at the same time did not withdraw.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. And Advocate Sean

Abrahams reinstated.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And then the very first prosecutor to make this extraordinary claim that there is no evidence was Advocate Batohi.

**ADV CHAUKE:** Who did not read the dockets.

**ADV NGCUKAITOBI SC:** Yes, we know that. But I am talking about the authority. There is a decision that is already existing made by Advocate Sean Abrahams. How does it work  
10 in this NPA that somebody just comes in and they say, although it is my decision because of the principle of legal succession, but I am just going to change it. I will not ask a Judge to change it for me but the racketeering authorisation, I am just going to retract and withdraw them.

**ADV CHAUKE:** My understanding of decision making, administrative or otherwise, even prosecutorial decision making, is that you do not do them personally. You do them in terms of the office. And at times, you become *functus officio*, unless if there is a reason for you to reconsider. If it  
20 is an administrative decision, as I indicated, that is what it is up. A prosecutorial decision, it is once you receive representations, of course, that you will be entitled to reconsider. But in this instance, that exercise of that to withdraw is not lawful because it was not done within the framework of the law. As I indicated, this is probably we can

also check it out when you discuss about the advice of Advocate Epstein SC. There was a review application like in the case when it was Advocate Jiba which was ready to be, that was going to be argued about the issue of the validity of the certificate as issued by Advocate Sean Abrahams.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** And after relevant to that meeting that we are referring to, Chair, the NDPP instructed the State Attorney to withdraw the opposition to that review.

10 **ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Which is concerning.

**ADV NGCUKAITOBI SC:** Now, there are other... Sorry.

**CHAIRPERSON:** Pardon, Counsel. And the matter was never adjudicated?

**ADV CHAUKE:** Not at all, Madam Chair.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** And in respect of Advocate Batohi, was it open for her to launch a review application in 2019?

**ADV CHAUKE:** No, because...

20 **CHAIRPERSON:** Before she withdraw those charges against General Booysen?

**ADV CHAUKE:** One would have thought that she would have followed either one to review the decision made by her predecessor on receipt of representations from the accused persons or if she felt otherwise, she could have subjected

that decision from her office as an office to get a declaratory order from the Court to set aside that decision for her to reconsider the decision without any representation having been received.

**CHAIRPERSON:** None of the two options she considered?

**ADV CHAUKE:** No.

**ADV NGCUKAITOBI SC:** Okay. Thank you, Madam Chair.

You know, then there are also other things I do not follow just in terms of the content of this report. So if you go to the  
10 section headed conclusion, which is page 92 of the report  
itself.

**CHAIRPERSON:** Counsel, I am sorry. Just hold on on that point.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** Am I correct that as at the time Advocate Batohi walked away, these issues had not been encompassed with her yet?

**ADV NGCUKAITOBI SC:** No, Madam Chair. They had not.

**CHAIRPERSON:** Thank you.

20 **ADV NGCUKAITOBI SC:** Yes. Hopefully, whenever she comes back, we can cover them with her.

**CHAIRPERSON:** If she decides to come back.

**ADV NGCUKAITOBI SC:** Yes, she elects to come back, yes.

Now, if I can just ask you to turn to the, I think it is page 92, under the section on conclusions. Some aspects there I do

not fully understand.

**ADV CHAUKE:** I am there, Chair.

**ADV NGCUKAITOBI SC:** Yes.

**ADV BALOYI-MERE SC:** Page 92 of...?

**ADV NGCUKAITOBI SC:** Of the actual report at the bottom.

So it is SB 3225. That is where it starts. So that is where the conclusions start. If you turn the page to the following page 93. So paragraph 233, 234, 235, up to 238. They seem to be neutral statements that do not make any evaluative judgments.

10

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And then the first evaluative judgment is at paragraph 239. They say:

“After a careful evaluation of the evidence contained in the dockets....”

Now, we went through this. We know that there are at least 12 dockets that they just never made any references to. They claim they looked at them, but they never actually made any analysis of them. And those that they analysed are done in such a superficial way that it is impossible that they were applying themselves to them. But giving them the benefit of the doubt. And then they say that:

20

“Pleadings in the various applications brought in this matter, we conclude that there was insufficient evidence placed

before the acting NDPP Advocate N Jiba and NDPP Advocate S Abrahams to justify the authorisation to institute a prosecution in terms of section 2(1)(e) and 2(1)(f) of the POCA.”

Now, Advocate Batohi says she relied on this report to come to the conclusion that there was no evidence. But the report does not say there was no evidence. It simply says that it was insufficient, but it acknowledges that it was there.

10 **ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: So where would she have got this idea that there was no evidence?

**ADV CHAUKE**: I think it is a preconceived idea that she always had when she called for this report. Like I said, remember, at the time when this report was written, they are making reference to pleadings. Those that I take it they refer to the review proceedings which was withdrawn and which

has taken a decision to withdraw from her first month when she was in office. That somehow the meeting that she would have had with the legal representative of Mr Booyesen and she  
20 accepted that indeed there was no evidence.

**ADV NGCUKAITOBI SC**: No, but she, okay, well, you say she accepted that there was no evidence, but the point is that the report she relies on does not say there was no evidence. And now she has managed to get this Panel to investigate the

question whether there was no evidence or not and also managed to get the President to sign terms of reference that say there was no evidence. And when you ask her where did you get this from, she says she got it from this report. You look at the report, it does not say that.

**ADV CHAUKE**: Ja, but it is a misrepresentation in itself that you say you got this from that, when in fact when you look into that, that information is not there.

**ADV NGCUKAITOBI SC**: And then in paragraph 240, it says:

10 “Despite the prosecution memoranda and the statements that were placed before the acting NDPP Advocate N Jiba and the NDPP Advocate S Abrahams, these were not sufficient to implicate the accused in the alleged racketeering offences.”

Now again, you do not get a statement that says there is nothing. You just get a statement that says, well, in our view, we think it is insufficient.

**ADV CHAUKE**: Yes.

20 **ADV NGCUKAITOBI SC**: Yes. Then they say:

“The obvious credibility challenges that the prosecution would face in respect of the evidence of Colonel Aiyer, in our view, would be insurmountable during a criminal trial.”

Now, I wrapped my head around this to understand why do they say there is a credibility problem with Colonel Aiyer, which seems to be the entire basis on which that statement is concluded. The only thing I could find in this report is that Colonel Aiyer was criticised in his disciplinary hearing by Advocate Nazeer Cassim on the basis that she, he felt that he was important. So you will find that at paragraph 109. So if you go to, of the report. So yes, that you will see at page 35 of the report.

10 **ADV CHAUKE**: I am there, Chair.

**ADV NGCUKAITOBI SC**: Now, this is where they talk about credibility. Remember that they have made an extreme statement in 240 that we have got a credibility problem with Aiyer that would be insurmountable and therefore there is no sufficient evidence. You then try and find out in the report what is the credibility problem. So you get it at 109. This is what it says.

20 “Aiyer's credibility was questioned and he was discredited by Advocate Cassim SC in the Booyesen internal disciplinary hearing. Advocate Nazeer Cassim SC, the chairperson of the disciplinary hearing against Booyesen, described Colonel Aiyer who testified before him as a dismal witness in material respects, is obsessed by the

notion of his own importance, and his entire testimony was permeated by his political acceptability and self-importance.”

Now, those are the only three lines that speak to the issue of the credibility of Colonel Aiyer. Is that correct?

**ADV CHAUKE:** That is correct.

**ADV NGCUKAITOBI SC:** Now, two of the statements that are referenced in your own document, are the statements of Colonel Aiyer. Just explain to the Panel how you, in your own  
10 judgment, evaluated them.

**ADV CHAUKE:** The statements of Colonel Aiyer were corroborating the fact that he was not in command or in charge of the Cato Manor Organised Crime Unit, which was also confirmed to a certain extent by General Johan Booysen himself when he responded to the interdict application by Bongani Mkhize, which was also confirmed by the documentary evidence from the police in which General Booysen were given monetary awards in respect of the activities of the Cato Manor Unit.

20 **ADV NGCUKAITOBI SC:** And Commissioner Brown?

**ADV CHAUKE:** And Commissioner Brown, who was also confirming that General Booysen actually took over the command structure of the Cato Manor Organised Crime Unit.

**ADV NGCUKAITOBI SC:** Yes. But, I mean, is it rational, then, to say, well, we think there is no sufficient evidence

because one witness, we have a credibility problem with that?

**ADV CHAUKE:** No, no. Maybe let me even clear that. When you make a decision to prosecute, whether or not to prosecute, the issue of credibility does not play. The credibility plays when you need to consider the totality of the whole evidence, whether the whole of the evidence that you have is unreliable to the extent that it is not going to be admissible in court. But the credibility, per se, is not an overriding principle in making a decision whether or not to prosecute. We always say, as prosecutors, to say, look, the credibility is going to be determined in court. But what we have here is a *prima facie* case that can lead into successful prosecution.

10

**ADV NGCUKAITOBI SC:** Yes. So, in other words, even in talking, quite apart from the question I am asking, which is, well, was there a basis to question his credibility based on the three lines from Mr Cassim? And your answer to that is no.

**ADV CHAUKE:** No.

20 **ADV NGCUKAITOBI SC:** And especially because it was corroborated by other witnesses.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Mr Booyesen himself, Commissioner Brown, making it clear that Mr Aiyer is not, in fact, in charge of the unit.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. But you are saying, and this is a more fundamental point, that the focus on credibility is itself a misdirection.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** When you are making a decision to prosecute.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. So, yes, that is because the  
10 prosecution is based on a *prima facie* case.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. I mean, the idea that you can actually get witnesses that are so exceptionally strong that they do not have an iota of a credibility gap.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** It is just a mystery.

**ADV CHAUKE:** Yes. You can have, you can get a very strong witness and do these things, a very strong evidence, and two minutes into cross-examination that witness falls  
20 apart. It is highly probable. It has happened in many instances.

**ADV NGCUKAITOBI SC:** But I mean, the point ...[intervenes]

**CHAIRPERSON:** Yes, of course, that is why it is a [indistinct] for the trial court.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Yes. The point you are making about the misdirection, I mean, it is a point I had not considered, especially because I am not a criminal lawyer. But it must be obvious to prosecutors. Why did it escape Advocate Batohi?

**ADV CHAUKE:** I do not think it escaped her. The result that she always wanted to have clouded her in that respect. That is an obvious thing. It does not need any further than that.

**ADV NGCUKAITOBI SC:** Yes. All right. Thank you. Now,  
10 so that was in paragraph 240. Then there is 241. I mean, everyone seems to have been so taken up by this idea of Mr Danikas. But we have gone through this case now. There are just so many other witnesses other than Mr Danikas. And they say:

“In respect of the potential witness Danikas,  
at the time the NDPP Advocate S Abrahams  
issued the authorisation, the statements  
were still unsigned and no certified  
translation of the Greek statement had to  
20 date been filed in the docket.”

Now, this is also something I do not fully grasp. Yesterday we looked at paragraph 38, 39, and 40 of the judgment by Govern J in the case of *Booyesen v NDPP and others*. The 2014 judgment. In which the Judge says the statements do not need to be sworn. And where the Judge says my only

problem is that in your affidavit you have said you have relied on sworn statements and I cannot see the sworn statements.

We also know that to have been subsequently corrected by the full bench. But assuming that to have been correct, that the Judge says you have relied, you say you relied on sworn statements, I do not see the sworn statements. And the same Judge says later in another portion, actually you do not need sworn statements because in POCA you are entitled to sign a racketeering certificate  
10 without a sworn statement. How does that square up now with what they are saying in paragraph 241?

**ADV CHAUKE:** No, no, it does not square up at all. Worse still, when this report was written and it was considered, that statement was signed. So...

**ADV NGCUKAITOBI SC:** I see.

**ADV CHAUKE:** So what I am saying is at the time when the De Kock panel sat and wrote and considered these matters and that statement which they alleged that it was not signed, it was actually signed. If indeed they have considered the  
20 dockets and everybody that is there. It is obvious.

**ADV NGCUKAITOBI SC:** I think they knew that it had been signed because there is somewhere where they say that it had not been signed in February 2016 when Advocate Abrahams issued the second authorisation. It was later signed. But your point is that why does that matter? Because

in 2019 there was a signed statement.

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: Yes. So in other words, if they were saying there is a gap because the statement is unsigned before Mr Abrahams, there was no gap before Ms Batohi?

**ADV CHAUKE**: No.

**ADV NGCUKAITOBI SC**: But then what is the problem with an unsigned statement?

**ADV CHAUKE**: As it is, in racketeering prosecutions, 10 whether the statement is signed or not, it is immaterial. That statement is... The decision maker who has to issue a racketeering certificate can rely on that certificate. What happens in the trial about that statement is something completely different.

**ADV NGCUKAITOBI SC**: Yes. Thank you. Now... Then it says:

20 “The prosecution would furthermore have challenges in presenting this evidence as similar fact evidence for the reasons as discussed in this memorandum.”

Now, what is the relevance of the difficulty? So you are sitting there as a prosecutor to decide whether to introduce a statement, and you have a witness who says, look, I can tell you that I know this man for 10 years, and this is his modus operandi. I left before the... Well, he left after the period in

the indictment, by the way, because one of the incidents, Berea, is an incident that he witnessed.

But he says, I know this man. I know his methods of torture. I know his methods of using policemen to extract cash from communities. I have been there, I witnessed it. So what is the problem they are talking about, about similar facts, that the prosecution would have a problem in establishing a similar fact?

**ADV CHAUKE:** No, no, there is no problem at all. I think  
10 the coining of this is one thing, to justify the conclusion that they reached. But even at the conclusion as they reached it, you will see that it is not necessarily about that there is no evidence at all. They are talking about probative value, which at the decision-making stage, it is not a here and a there.

**ADV NGCUKAITOBI SC:** Yes, but I am saying that if you are sitting there as a prosecutor to make a decision, do I go ahead or not? And you think, well, there might be a challenge with a similar fact. What is the issue there? I do not understand.

20 **ADV CHAUKE:** There is no issue at all, because you prepare yourself to go and meet that challenge in court and then prepare to argue if that challenge comes anyway.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Now here, the challenge is being anticipated, that there is going to be this challenge, which is not apparent

from the report, because the report did not make any reference to representations having been made by the accused or by the defence anyway.

**ADV NGCUKAITOBI SC:** Yes, well, because they have always avoided dealing with the merits of the case.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** All these reviews never really engaged with the charges. Yes. Now, it then says:

10                   “The hearsay statements of Dlondlo, Mkhize,  
                          and Mathonsi have its own challenges in  
                          respect of the low probative value and  
                          reliability of the statements.”

Now, if I can just stop here. We went through this case with the Dlondlo statement. Now, Mr Dlondlo had witnessed personally the exchange of money with Inspector Mostert and Major General Booysen. Mr Mathonsi had witnessed the collection of cash within the taxi association, which was intended to be paid to Major General Booysen and Inspector Mostert. But I do not understand why they are regarded as  
20   hearsay. Do you understand?

**ADV CHAUKE:** No, it is a misdirection, Chair. It cannot be, even if it is hearsay. That is why there is section 3 of the Evidence Amendment Act.

**ADV NGCUKAITOBI SC:** But just forget about it. We are going to deal with that now, assuming it is hearsay. But I am

talking about, you have got two witnesses. We went through Mr Mathonsi' statement. Mr Mathonsi was present when the money was collected. And he was present when it was said that the money is for Mr Booyesen. The only thing he did not witness is the exchange, but it was witnessed by Mr Dlodlo.

**ADV CHAUKE**: Of course.

**ACCUSED**: So where is the hearsay? I do not understand that.

**ADV CHAUKE**: It is not hearsay. I was answering, even if  
10 it is said to be hearsay, that it should not be a problem.

**ADV NGCUKAITOBI SC**: Yes. Now, when they are talking about a hearsay statement, I mean, is that a misdirection?

**ADV CHAUKE**: It is a misdirection, indeed.

**ADV NGCUKAITOBI SC**: Because that seems to be direct witnesses. I mean, there was, of course, a problem, that Mr Dlodlo was subsequently killed after he gave his statement. And Mr Mathonsi was also killed after he gave his statement. And Mr Bongani Mkhize, who, and I also do not understand the thing about Bongani Mkhize. He was a deponent in an  
20 affidavit which Major General Booyesen criticised some aspects that they were hearsay. But all of those were then subsequently confirmed by the direct witnesses who were present when people were killed. So even in relation to that affidavit, it is unclear why it was regarded as hearsay.

**ADV CHAUKE**: It could not be hearsay, especially the one

that would have been made in the process of court proceedings in respect of Bongani Mkhize. You know? Although at the time when the trial was going to be undertaken, he would have been dead, that statement of his would still be admissible.

**ADV NGCUKAITOBI SC:** Yes. So you have got, then, three witnesses that the De Kock panel claims to be hearsay. All of them are direct witnesses. The only thing that has changed now is because Mr Mkhize was killed, Mr Dlondlo was killed,  
10 Mr Mathonsi was killed.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** All of them killed miraculously after giving statements, they were then murdered.

**ADV NGCUKAITOBI SC:** Indeed. And those statements do not become inadmissible because the deponents thereof have died. They will still be admissible in the subsequent trial.

**ADV NGCUKAITOBI SC:** Yes. Now, how would this happen? Because they are talking here about low probative value and reliability of the statements. Now, I struggle to understand  
20 that because in the case of Mr Mkhize, there are, in fact, admissions made by Major General Booyesen in his own answering affidavit. Now, how would a Court deal with those admissions if you were to prosecute Major General Booyesen and you put his own affidavit to him that here you admitted this fact, how would that make it a low probative value?

**ADV CHAUKE:** It is a misdirection in itself because when you put a statement to the maker, it cannot be a low probative value. It cannot.

**ADV NGCUKAITOBI SC:** Yes. And his statements were made under oath.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** So the only thing that has happened is that the first opponent is dead, but Mr Booysen is still alive, and he is made his admissions, and you can  
10 cross-examine him on that.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Yes. And then they are talking here low probative value and reliability of the statements. Now, that I also do not understand. This was a statement made to a Judge, and the Judge accepted it, which is why the interdict was granted.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Yes. Now, how would you then go about the admissibility of the statement by Mr Dlondlo, who  
20 they managed to kill, and the statement by Mr Mathonsi, who they also managed to kill?

**ADV CHAUKE:** We will need the evidence of those who took the statement and ask the Court to consider them in terms of section 3 of the Evidence Amendment Act.

**ADV NGCUKAITOBI SC:** And would you have a good

explanation why the persons on whom the probative value of the statements depends, which is a requirement of the Law of Evidence Amendment Act of 1988, which says that, by definition, it is a statement of someone on whose probative value the evidence depends, but that person is not giving evidence. So would you then have a good explanation that the reason he is not here is because he is dead?

**ADV CHAUKE:** He is dead. And the suspicion is that he would have died at the hands of those that are being tried.

10 **ADV NGCUKAITOBI SC:** Well, Mr Mkhize, there is no suspicion. He was killed by them. They admit that they killed him.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Yes. Where we do not know who killed him is Mr Dlondlo and Mr Mathonsi, but how they got killed in the middle of the trial after giving the statements is highly questionable.

**ADV CHAUKE:** But if you look at the patterns and what happened with the killings, one could ask the Court to draw  
20 an inference that they would have been killed in the process of all these other killings, whether it is taxi violence or them being suspected to be involved in this Maphumulo KwaDukuza taxi violence.

**ADV NGCUKAITOBI SC:** Yes. Now look at what happens next in the next sentence. It says:

“The prosecution would have difficulty in having these hearsay statements admitted as evidence. The application to have the hearsay evidence will be unsuccessful.”

Will be unsuccessful. How does anyone say that an application for admission of a statement will be unsuccessful?

**ADV CHAUKE**: It is self-destructive.

**ADV NGCUKAITOBI SC**: But I mean, how do they know?

10 The Judge might admit that.

**ADV CHAUKE**: That is why I am saying it is self-destructive. You cannot even make an application in the circumstances where you think you are not going to be successful. But here ...[intervenes]

**ADV NGCUKAITOBI SC**: But I am asking, how can you make that judgment as the person who wrote the report that I know for a fact that if I make an application, it will be unsuccessful? You are not even saying there is a probability that it may not succeed. You are saying it will not be successful.

20 **ADV CHAUKE**: That is why I am saying, Chair, that it is highly unsustainable. The argument, the proposition there is untenable.

**ADV NGCUKAITOBI SC**: What I also do not understand about their approach to hearsay, we looked at the judgment of the Constitutional Court in a case called Savoy, where the

provisions of POCA were challenged inter alia on the basis that they treat hearsay as a default position and not as an exception, as per the Law of Evidence Amendment Act of 1988. And the Constitutional Court actually upheld the provisions of POCA. And it even explained that what that means is that the admission of hearsay is the rule. Its exclusion is the exception. Now, when I read this paragraph, how does that square up with that judgment of the Constitutional Court?

10 **ADV CHAUKE**: It is at odds. It is at odds with the ruling of the Constitutional Court.

**ADV NGCUKAITOBI SC**: Yes. Why?

**ADV CHAUKE**: Because it is actually recommending that which the Constitutional Court says is lawful and then it is saying hearsay, it will not be admissible.

**ADV NGCUKAITOBI SC**: Yes, I understand. But I mean, the problem is about the test. If POCA, which is what the Constitutional Court says, if POCA says contrary to the Law of Evidence Amendment Act, hearsay is admissible. You, as  
20 an accused, can say it is not in the interest of justice, unlike the usual position where you, as the state, must prove that it is in the interest of justice.

**ADV CHAUKE**: So the test, from the point of the state, as the prosecution, is you need to prove that it is in the interest of justice, that the hearsay should be admitted. The contrary,

the accused should indicate that it is not in the interest of justice, and it is prejudicial to him if the Court were to admit that statement.

**ADV CHAUKE**: Yes, but that is the usual rule under the Law of Evidence Amendment Act.

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: Now, I am talking about now the POCA provisions, which say that the Court must admit hearsay evidence.

10 **ADV CHAUKE**: Yes. So the test, as I say, on behalf of the state in this instance, that issue will not arise.

**ADV NGCUKAITOBI SC**: Exactly the point.

**ADV CHAUKE**: Ja.

**ADV NGCUKAITOBI SC**: And here, they seem to misunderstand the test, where they say, no, no, no, you would have to apply for the admission. But the Act says that the evidence is admissible. And the accused can say it should be excluded, because it is prejudicial.

**ADV CHAUKE**: Yes.

20 **CHAIRPERSON**: What I find strange, Advocate Chauke, is that the report was prepared for the purpose of reconsidering the authorisations in terms of section 2(1) of the POCA. And one would have expected these senior lawyers who sought to advise Advocate Batohi on this reconsideration to have looked at the case law.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** And looked at the specific provisions of POCA, the very legislation that they seek to invoke. One would have expected to look at all these authorities that Advocate Ngcukaitobi is speaking about, to the cases that had been dealt with in the High Court, and the decisions of the Supreme Court of Appeal and the Constitutional Court. I mean, these are lawyers. So that they could give Advocate Batohi well-considered advice.

10 **ADV CHAUKE:** I agree, Chair.

**CHAIRPERSON:** But I look at this report, and I see none of that. Or have you seen the relevant authorities cited here on these very critical issues?

**ADV CHAUKE:** No, Chair. No. Even the Chair has indicated the heading of the report. It is a reconsideration of the authorisations. That presupposes that Advocate Batohi was actually reviewing a decision of her own office. She was reviewing herself, which is problematic in a sense.

**CHAIRPERSON:** That aside, that aside, when you get into  
20 that exercise, to reconsider what your predecessor has done, one would expect that you will go and look into the legal principles that advances your case for reconsideration and come to a totally different conclusion.

**ADV CHAUKE:** Indeed, I agree.

**CHAIRPERSON:** As these advocates have done. And I am

saying, it seems to me that they never even looked into any of the authorities, the case law authorities, on these critical aspects of the law that Advocate Ngcukaitobi is referring you to.

**ADV CHAUKE:** I agree, Chair. That is what is glaringly obvious. And it appears glaringly that those High Court decisions were not considered.

**ADV NGCUKAITOBI SC:** Yes. Well, I mean, we know, Mr Chauke, that they looked only at US authorities exclusively.

10 There is not a single South African authority they looked at. They even misapplied the US authorities because they looked at a case in Florida, which has got a different wording to our POCA.

**ADV CHAUKE:** To their credit, Chair, they looked at Govern judgment.

**ADV NGCUKAITOBI SC:** No, no, no. For purposes of deciding the test for POCA, there is not a single South African authority cited. When they looked at the Govern J judgment, they excluded paragraph 38, 39, and 40. They did not look  
20 at the GCB case. They did not look at the Savoy case.

**ADV CHAUKE:** Indeed, I agree.

**ADV NGCUKAITOBI SC:** Now, this is the question that the Chair is asking. How do you actually place any credibility to a report that is so glaringly misconceived?

**ADV CHAUKE:** It is a misnomer. It is unfortunate. But as

you know, I know from where I am sitting, in the past seven years, it was the high-level, the glaring De Kock report, when some of us knew that there are serious problems with this report.

**ADV NGCUKAITOBI SC:** But I also Advocate Batohi, you know, that the most obvious thing would have been to ask the advocates that are representing her in the racketeering charges, which in this case was Advocate Hilton Epstein. And then she was vague about that until we found out that she did  
10 speak to Advocate Hilton Epstein. And Advocate Hilton Epstein was not in support of the retraction of the charges. That was the whole problem.

**ADV CHAUKE:** Yes. And remember, that was concealed, or it was not disclosed to the Panel, that she actually met with a legal representative who was representing the state or the NDPP's office in that review proceedings. It came out once she was asked about it.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** Ja, I beg your pardon, Counsel.

20 **ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** As I understand the report, I think the challenge might have started right from paragraph 167, and probably elsewhere, after they dealt with the US or USA authorities. You see in paragraph 167?

**ADV CHAUKE:** Yes. I am there, Chair.

**CHAIRPERSON:** You can read that paragraph.

**ADV CHAUKE:** After paragraph 166, there is a reference to the US Courts. 167?

**CHAIRPERSON:** 167.

**ADV CHAUKE:**

10 “The prosecution does not, at any stage, explain how the accused that were not charged with racketeering knowingly performed activities helpful to the operation of the criminal enterprise. There is, in any event, no evidence in the dockets to substantiate an averment that the accused performed activities helpful to the operation of the enterprise, as it can be argued that they acted within the cause and scope of their work. Furthermore, there is no evidence that they acted with a common purpose in the furtherance of the objectives of the enterprise.”

20 **CHAIRPERSON:** That seems to be a problem.

**ADV CHAUKE:** Very problematic.

**CHAIRPERSON:** And this might have given rise to the draft terms of reference, which speaks of no evidence throughout that proclamation. And because they had formed this view, then there could not have been any reason for them to even

look at the authorities regarding the principles, regarding hearsay, unsigned statements. They had forgotten that they are dealing with POCA. Correct?

**ADV CHAUKE**: It seems so, Chair.

**CHAIRPERSON**: And as counsel is saying, had they then had regard to the POCA principles there and looked at the case law, South African case law, they would probably have thought otherwise. Now, we have the terms of reference that echoes this very paragraph. And yet, this paragraph says,  
10 there is in any event no evidence in the dockets. But we do not even have a summary or an analysis of those dockets in this report. So that Advocate Batohi, who did not read the dockets herself, could have a sense of what evidence was contained in those dockets. Is that not a problem?

**ADV CHAUKE**: That is a problem, Chair.

**CHAIRPERSON**: And this is the problem we are sitting with here.

**ADV CHAUKE**: Indeed.

**CHAIRPERSON**: Thank you.

20 **ADV NGCUKAITOBI SC**: Thank you, Madam Chair. Yes, Chair, just to complete this section. We were at paragraph 241, where they just make an assertion that an application for the admission of hearsay will be unsuccessful. And then it says, paragraph 242:

“There appeared to be undue haste on the

part of the prosecutors to obtain the racketeering authorisations.”

I do not fully understand this. As I understand the facts, the first time this matter came to the attention of the public is in December 2011, when the Sunday Times published the article that contains the picture, among others, of Major General Booyesen in the scene where the Magojela Ndimande was killed, which is the case subsequently became Howick.

**ADV CHAUKE:** Yes.

10 **ADV NGCUKAITOBI SC:** Now, the certificate was signed only the following year in August, almost a year of painstaking investigation, before the prosecutors were satisfied that they have enough now to sign a racketeering certificate. Advocate Maema was here. He spoke about meetings that were held between March, when he became involved, right up to June, when the draft indictment was held. But even there, they were still not happy. They still had further discussions until August.

20 He spoke about interactions with experts to help them along, about visiting the victims, taking statements. Eventually, the indictment was just hundreds and hundreds of pages. The prosecution memorandum was itself in excess of 100 pages. The response to the request for further particulars was itself 200 pages. Now, an allegation like this made by people that are sitting in an office, that the

prosecutors were unduly hasty in obtaining racketeering authorisation. Is this a fair statement?

**ADV CHAUKE**: Very unfair and unfortunate.

**ADV NGCUKAITOBI SC**: You know, one of the things I do not understand what the NDPP was doing here, the impact of what she is doing on the ability of the NPA to prosecute organised crime. What is the effect of this? She is not applying the law. She is disciplining people that are trying to apply the law. Now, we hear that they have been consulting  
10 extensively with Major General Booyesen, somebody who is a criminal suspect. I just do not understand what is happening.

**ADV CHAUKE**: This Cato Manor case is a bad example of how the NPA should behave in terms of where they need to prosecute or not prosecute. Take out the issue of then in 2012, when Advocate Jiba would have issued. Another four years thereafter, the NDPP, Sean Abrahams, do exactly the same thing to say this matter should see its light at the end of the tunnel. And unfortunately, for reasons that are not obvious, other than that there was this hype that everybody  
20 seemed to buy the narrative that there is no case, there is no case, the case was just simply withdrawn. And people had to find justification for them to be able to withdraw that case. And once you do those kind of things, this is what you see. And it affects the confidence that the public would have in the NPA about what kind of decisions do we make in respect

of prosecution of organised crime.

**ADV NGCUKAITOBI SC:** Yes, but your, I am talking about institutionally, the organisation itself, the damage that you cause to an institution. If you target your own people for doing their jobs, that is what I want your comment on.

**ADV CHAUKE:** It is unfortunate. And then you have the prosecutors or advocates who will be afraid to make decisions in respect of this kind of crimes, because they will be thinking that they will be subjected to misconduct. And  
10 their careers will be affected because of the decisions that they make.

**ADV NGCUKAITOBI SC:** And then this idea that you can work with, you know people throw around a lot of phrases, s capture, this. But you can work with a potential criminal suspect, right, to build up a case to purge prosecutors inside the organisation. I really struggle to understand this. I am serious when I say that.

**ADV CHAUKE:** Let me be direct with this specific case.

**ADV NGCUKAITOBI SC:** We are talking about the fact that  
20 they are working with Major General Booyesen to get people like yourself purged out of the system.

**ADV CHAUKE:** Ja.

**ADV NGCUKAITOBI SC:** Major General Booyesen was once a criminal suspect. He remains a criminal suspect even now.

**ADV CHAUKE:** General Booyesen was the head of the

Organised Crime in KZN. Advocate Shamila Batohi was the DPP in KZN at the time, and even at the time of most of all these incidents. And in the nature of work as the DPP, you will meet and work with the heads of institutions. And in this case, that working relationship appears to have played a role between Major General Booysen and Advocate Shamila Batohi.

**ADV NGCUKAITOBI SC:** Yes, but I am making more a principled point that the impact of the NPA going out of its way to forge a relationship. In this enquiry, they forged a relationship with Major General Booysen to assist them to find a case against you.

**ADV CHAUKE:** It is highly deplorable.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Highly deplorable. And in fact, I am using the simple term, but it is more deeper than that. That you become an accused at the expense of a criminal.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** But look at what the President tells you in his letter. Your annexure AC-6. AC-6 to your affidavit.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** Paragraph 5. In relation to this very point that counsel is addressing. Paragraph 5, would you like to read that into the record?

**ADV CHAUKE:**

“The NPA is a constitutional entity, and its work is central in the fight against crime, including corruption. As the NPA is an integral part of the criminal justice system, your obligations as a Director of Public Prosecutions warrant that the integrity of the NPA be preserved at all times.”

**CHAIRPERSON:** Your comment?

**ADV CHAUKE:** I fully embrace what the President is  
10 conveying to me, Chair. But at the same time, the worry and concern that I have was the inclusion of the word corruption in the context of me having been addressed. Because as I am sitting here, I am also not aware that I am facing any allegations of corruption.

**ADV NGCUKAITOBI SC:** Well, I mean, we know for a fact you are not facing allegations of corruption. So there is nothing about not being aware of that. You are aware that you are not facing corruption.

**CHAIRPERSON:** Counsel repeated yesterday that move  
20 away from the Zondo Capture Commission statements. The Zondo Commission did not make any findings against you, and you need not really concern yourself about issues of corruption. I think counsel said it again and again yesterday. But I just wanted to comment on the statement. That seems to be so apt to the very point that counsel is making now.

And that is why I sought your comment on this very apposite point that the President is making.

**ADV CHAUKE**: My apologies, Chair.

**CHAIRPERSON**: No, you need not apologise. I think you have said that, if I understood your answer to say, you fully agree with the sentiment expressed by the President insofar as the position or the role of the NPA is concerned in relation to its role of fighting crime.

**ADV CHAUKE**: Indeed. I accept that, counsel on that. In  
10 fact, it is very profound that that is what is expected of the NPA as an institution.

**CHAIRPERSON**: And you now tell us, or your answer, that it is concerning that the head of the institution that seeks or is constitutionally obliged to fight crime, seems to do the opposite.

**ADV CHAUKE**: Indeed, Chair. That is my view.

**CHAIRPERSON**: I am saying seems. I am putting it at that level. Seems to do the opposite.

**ADV CHAUKE**: Indeed, like counsel is indicating. At worst,  
20 if you do not agree that there is a case against the accused person and the case is withdrawn, that should be the end of the matter, and then life must go on. But to go to an extent that you team up with a suspect to purge your own, is very, very worrying. It cannot describe an institution of government, let alone the NPA.

**CHAIRPERSON:** The least that one would expect from the head of the NPA who has not even read the dockets concerned, would have been to allow this matter to be ventilated in the courts, so that finally the Court, which is the appropriate forums to deal with these very issues, intricate issues as far as POCA is concerned, could finally decide.

**ADV CHAUKE:** I agree, especially in this matter, which was so high profile where many, many, many lives were lost at the hands of those who were supposed to protect them.

10 **ADV NGCUKAITOBI SC:** Yes. Do you know...

**CHAIRPERSON:** I beg your pardon, counsel. And when you look at paragraph 9 of the President's letter, the very letter I referred you to, 6A-39, if you may also read it into the record.

**ADV CHAUKE:** Paragraph 9:

“I have carefully considered the allegations levelled against you. I am of the view that the allegations need to be independently and impartially investigated by an enquiry established in terms of section 12(6)(a) of the NPA Act. As such, I have decided to institute an enquiry in terms of section 12(6)(a) of the NPA Act to enquire your fitness to hold the office of Director of Public Prosecutions.”

20

**CHAIRPERSON:** Do you want to comment there?

**ADV CHAUKE:** I agree, and it is fair that if the President is placed in a position where there is this serious allegations which concerns the Director of Public Prosecutions, they indeed need to be investigated for the integrity of the NPA and for the integrity of the person that is affected, in this case, myself.

**CHAIRPERSON:** Thank you.

**ADV NGCUKAITOBI SC:** Thank you, Madam Chair. What about the words independently and impartially?

10 **ADV CHAUKE:** And I accept that the enquiry, as it were, and as instituted by the President, is able to independently and impartially investigate these issues that are before the enquiry.

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

**ADV CHAUKE:** Maybe I should say something.

**ADV NGCUKAITOBI SC:** Yes, please carry on.

**ADV CHAUKE:** I am aware, and this is even on record, that the NDPP Advocate Shamila Batohi addressed the NPA and prosecutors at VGM, in which she said something about the  
20 conduct of these proceedings and what is happening to her, that she is being bullied by the Panel and what have you. And that is unfortunate.

**ADV NGCUKAITOBI SC:** Well, she will come back and explain herself. Now...

**CHAIRPERSON:** If she does.

**ADV NGCUKAITOBI SC:** If she does, if she does, indeed.

Can we just complete then, we have dealt with this paragraph 242, where, you know, there is this idea that the prosecutors were doing something wrong by fulfilling their obligations under the Constitution, which is to prosecute without fear, favour, or prejudice. And that comes from the head of the prosecution, who has come to this enquiry with a potential criminal suspect as their main witness. Now, paragraph 243:

10                   “The investigation, both in respect of the racketeering and predicate offences, are incomplete.”

Now, this statement, I found it remarkable. The people that are writing this are saying the investigations are incomplete. But then they recommend the withdrawal of the charges. What is your comment on that?

**ADV CHAUKE:** It is very unfortunate and improper. With respect, it looks like my colleagues did not go in-depth into the evidential material that were contained in the case dockets. Because I cannot say an investigation in respect of 20 Mkhize’s death and investigation in respect of Kwasi Ndlovu, and investigation in respect of Magojela, and in respect of the Biella brothers is incomplete. It cannot be.

**ADV NGCUKAITOBI SC:** But I mean, let us assume they were correct. I understand what you are saying. I mean, for instance, in Bhekithemba, we have been given an incomplete

docket. And then in relation to the killing of Mr Choncho, apparently the only person with some portions from the docket is the one evidence leader. And it is unclear where he got them from and it is because he went to disclose his sources. The dockets are there somewhere. They are being hidden from the Panel. But assuming that it is true that these are incomplete, you know, how do you then say, let us close the file and withdraw the charges, instead of saying, okay, find document A, B, C?

10 **ADV CHAUKE**: No, in fact, what is happening in this enquiry is not that the investigations were not complete. It is that evidence of investigations were complete that is being suppressed in this enquiry.

**ADV NGCUKAITOBI SC**: Yes.

**ADV CHAUKE**: Now, that is why, like you indicated, I have got no doubt in my mind that once an evidence leader has got the statements which he says he has got, he would have

gotten them from the accused and nowhere else, if he cannot disclose that they are from the NPA. Because the NPA said

20 they do not have those statements.

**ADV NGCUKAITOBI SC**: Yes. Look, I think the NPA is innocent on this. They have shown us the statement directly from the police station.

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: Which shows that they have tried

to go to the police station, and the police do not have it. But the point is this. The NPA does not have the dockets. The police station does not have the docket. And then one evidence leader has portions from the docket, but he will not disclose the sources.

**ADV CHAUKE:** The docket the NPA says does not have. So in the process of prosecution, when you decide to prosecute, you disclose the contents of the dockets to the defence, to the accused. And you remain with the copy.

10 **ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** So once you remain with the copy and the copy is lost, the thing that you do is either go to the police station to get a copy, or to go to the defence to say we have provided you with a copy, we have lost our copy, can you give us the copy? There is no other way where you are going to get it.

**ADV NGCUKAITOBI SC:** Yes. Now, this idea then that, well, even the investigation on the predicate offences, because that is where the whole thing becomes relevant, because you  
20 then have to find the justification for the killing of six people is the killing of Mr Choncho. The justification for the killing of an additional five is the killing of Mr Zondi.

**ADV CHAUKE:** Inkosi Zondi.

**ADV NGCUKAITOBI SC:** And then in the Inkosi Zondi, we have 105 pages. The rest are not to be found. Then in the

one, we have got nothing, except there is scraps of paper that Advocate Mohlamonyane has. Now, where would this be? I do not understand. You come from the system. You can educate us.

**ADV CHAUKE:** I am saying to you that those, you can only get them from the accused if the NPA and the police themselves do not have them.

**ADV NGCUKAITOBI SC:** Yes, but how does this work? There is a point at which a docket is at a police station.

10 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** There is a point at which it is with the NPA.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** There is somewhere where it must be electronic.

**ADV CHAUKE:** Electronic, I think, is a new phenomenon in the past six, seven years. But in those days, these electronic things, the electronic dockets, the decoding system was not necessarily available. But in this specific case, as I say,  
20 copies would have been made and preserved. But unfortunately, in the space of things, dockets do get lost one way or another. And we need to investigate how they got lost. But in this instance, it is just unfortunate that you will have one section of a particular stakeholder in this instance having information that the others do not have. And then they

will not necessarily disclose. I am not so sure whether that is privileged or not. I am not so sure. You can school me in respect of that.

**ADV NGCUKAITOBI SC:** No, there is nothing privileged.

**ADVOCATE MOHLAMONYANE SC:** Madam Chair, with your permission, may I come in there? Because Advocate Batohi, I mean Advocate Ngcukaitobi is referring to me by name. I am the one who had those portions. And there was never at any stage where it came to a point where I was asked as to  
10 where I got them. I never, at any stage, pretended not to want to disclose where I found them. At any stage, if that came up, I would have disclosed my source. It is not a secret. And I have also asked the person from whom I got them to make the docket available. And he replied to me and said, will do. So the insinuation that I was hiding, I know where the docket is. Perhaps I am colluding with some people. It cannot be correct.

**ADV BALOYI-MERE SC:** Advocate Mohlamonyane, if I may, I think we might need to check the transcript. But I think that  
20 question was posed to you. And you said, at that stage, you are not prepared to disclose where the documents came from. I think I will have to confirm with the transcript. I am not too sure about that. But I know there was a bit of an exchange when you produced the documents. But we ended up not knowing where you got the documents and what was your

source. We might have to go back to the transcript. And I take it you do not quarrel with the fact that you are the only one who have the documents. It is just that you are quarrelling with being called by name and also that you were not asked where the documents come from.

**ADVOCATE MOHLAMONYANE SC:** I am quarrelling with the insinuation that I was hiding the documents. Because Advocate Ngcukaitobi is insinuating that I did not want to disclose where I got the documents. It cannot be correct.

10 **CHAIRPERSON:** Advocate Ngcukaitobi?

**ADV NGCUKAITOBI SC:** Madam Chair, I think the best...

**CHAIRPERSON:** Let me...

**ADV NGCUKAITOBI SC:** Sorry.

**CHAIRPERSON:** We had a long debate about those documents, if you remember, Counsel. And we even asked Advocate Lekgetho whether those documents emanated from the NPA. And I can remember what she said. She said, no, those were your documents. So perhaps what we should do, I am not anticipating what you are going to propose, Counsel,  
20 is to look at the transcript when we adjourn, then we can revisit this point. But Advocate Ngcukaitobi, tell us what you think.

**ADV NGCUKAITOBI SC:** No, I agree, Madam Chair. If the transcript shows that my learned friend was not asked where the documents came from, I will withdraw and apologise. If

the transcript shows that he was asked and he refused to disclose his sources, then he has a lot of explaining to do.

**CHAIRPERSON:** I propose, and my sisters agree, that we park this point. When we reconvene after lunch, we will start with this objection. All of us must look at the transcript and come and address this issue.

**ADV NGCUKAITOBI SC:** Madam Chair, it is quarter past. It might be a convenient time, bearing in mind that the temperatures are up.

10 **CHAIRPERSON:** The temperatures are up. Only yours is up. [Laughter] Yes, Advocate Ngcukaitobi. Thank you. Advocate Mohlamonyane, we will take an early lunch break. That will enable all of us to look at the transcript and have lunch. Then we will deal with this aspect when we reconvene. Advocate Chauke, remember you are still under oath. We will adjourn until half past two. We adjourn.

**ADV CHAUKE:** Thank you, Chair. I am still under oath.

#### **ENQUIRY ADJOURNS**

#### **ENQUIRY RESUMES**

20 **CHAIRPERSON:** Good afternoon, all. Good afternoon, Advocate Chauke.

**ADV CHAUKE:** Good afternoon, Chair.

**CHAIRPERSON:** Advocate Ngcukaitobi. Thank you, Madam Chair. Madam Chair, to start with the subject we left hanging, I have asked my team to find the exchanges of that day. They

have found day 39, the 6<sup>th</sup> of March 2026, at page 12.

**CHAIRPERSON:** Yes, Counsel.

**ADV NGCUKAITOBI SC:** Where the following exchange takes place. Advocate Baloyi-Mere, right at the beginning of the page:

“Advocate Mohlamonyane, can I find out, these documents, you obviously found them from somewhere.”

Advocate Mohlamonyane:

10 “Yes, from someone.”

Advocate Baloyi-Mere:

“From someone?”

Advocate Mohlamonyane:

“Yes, from someone.”

Advocate Baloyi-Mere:

“And that someone will obviously come to testify on these documents.”

Advocate Mohlamonyane:

20 “Not necessarily. Chairperson, how possible is that?”

It goes on and on. So the idea that they were not asked to confirm the source seems to be contradicted by the record. So Mr Mohlamonyane can take whatever steps he wishes to take, but the question is a legitimate one.

**CHAIRPERSON:** Let me understand the point of objection.

Advocate Mohlamonyane, what is your point of objection exactly?

**ADV MOHLAMONYANE SC:** My point is, Madam Chair, from what Advocate Ngcukaitobi SC is suggesting, it would appear he is insinuating that I am suppressing evidence and I am refusing to give the source. Nowhere in this record have I refused to give a source. As evidence leaders, Madam Chair, we ...[intervenes].

**CHAIRPERSON:** Let me, let us not take much time on that.

10 We have read the transcript, and as we understood, understand this transcript, there is nowhere, Advocate Ngcukaitobi, where Advocate Mohlamonyane was asked where he got the documents from. Is that your concern? Is that the, your concern?

**ADV MOHLAMONYANE SC:** My concern is, Madam Chair, that I never ever said I will not disclose my source. I never said that. Because the insinuation by Advocate Ngcukaitobi is that we are suppressing documents, we are suppressing evidence, and I have not disclosed my source. I have never  
20 refused to disclose my source. I went out there as evidence leaders, as an evidence leader, to try and assist this enquiry by going out and getting witnesses. We do not have investigators. We do it ourselves.

**CHAIRPERSON:** Yes, I understand that.

**ADV MOHLAMONYANE SC:** Yes.

**CHAIRPERSON:** I do not want us to get out of the issue because we must settle it and proceed. Can we agree on this before we rule out?

**ADV NGCUKAITOBI SC:** Yes, we can agree on that, Madam Chair. As I say, the fact of the matter is that there was no disclosure of the source. I take it no further than that.

**CHAIRPERSON:** We will make a ruling that in the transcript, there is no suggestion that Advocate Mohlamonyane had been asked to give the source of the document. I think that  
10 is how far we can take it.

**ADV NGCUKAITOBI SC:** Thank you, Madam Chair. I am not taking it beyond that.

**ADV MOHLAMONYANE SC:** Thanks, Madam Chair.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** But I would like to go further, outside this ruling, that Advocate Mohlamonyane, where did you find the document, because if you look at the transcript, from the debate we had with you and Advocate Lekgetho, following Advocate Ramogale's objection to your handing up the  
20 documents, we had that long, long exchange and Advocate Lekgetho made it clear that indeed, this documents, the Choncho's docket, had been searched by the KZN police and the NPA, they could not find the document, to the extent that the Station Commander, KZN, prepared an affidavit that was handed to you by Advocate Lekgetho to say, they cannot

locate the document. Efforts were made by the NPA even to search or to enquire from IPID. So this document has not been available and has been searched for by several people, and it resurfaced that day.

What we found strange, Advocate Mohlamonyane, and I do not want to repeat what we said, you were in chambers, you never disclosed to us about the disclosure that you wanted to make of that very document that came from the Choncho's docket. You had neither spoken to the Chauke's  
10 team about it, and you took all of us by surprise, hence the objection. So we should not find ourselves spending time on issues such as this. I request all of you, we must take this panel into your confidence, both teams, and disclose documents.

If I may ask you now, what is the source of that document? Where did you find it, because everybody has been looking for it?

**ADV MOHLAMONYANE SC:** In, I will speak for myself, in my attempt to assist the enquiry, when we consult with  
20 witnesses, I usually ask them as to whether they can provide any documents that can assist.

**CHAIRPERSON:** No, but let us get to the point. My question is very straightforward, Mr Mohlamonyane. Where did you find the document, because everybody is saying we have not found the document?

**ADV MOHLAMONYANE SC:** I am getting there, Madam Chair.

**CHAIRPERSON:** No, no, no, but we cannot spend so much time on this simple question. Where did you find it?

**ADV MOHLAMONYANE SC:** I was referred to an officer, Paul Mostert.

**CHAIRPERSON:** Paul Mostert?

**ADV MOHLAMONYANE SC:** Yes, who was one of the Cato Manor officers.

10 **CHAIRPERSON:** Yes.

**ADV MOHLAMONYANE SC:** And he provided these documents to me. I requested for documents that can assist me in cross-examination.

**CHAIRPERSON:** So it was Paul Mostert who gave you the document?

**ADV MOHLAMONYANE SC:** Yes.

**CHAIRPERSON:** Yes, thank you.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** Please proceed, Advocate Ngcukaitobi.

20 **ADV NGCUKAITOBI SC:** Yes, thank you, Madam Chair. You know, Mr Chauke - has he been warned or, he has not been warned? Has he been warned? I do not know.

**CHAIRPERSON:** Please bear with me. I was trying to locate where we ended when this issue arose. Advocate Chauke.

**ADV CHAUKE:** Yes, Chair.

**CHAIRPERSON:** Please bear with us, the panel and the advocates. You have been watching this exchange and sitting there patiently. You will remain under oath.

**ADV CHAUKE:** Thank you, Chair. I confirm.

**ANDREW CHAUKE** (still under oath)

**ADV NGCUKAITOBI SC:** Thank you, Madam Chair. I think, Mr Chauke, maybe you can comment on this. Your speculation was that these documents could have only come from the accused.

10 **ADV CHAUKE:** Yes, indeed.

**ADV NGCUKAITOBI SC:** Now, for the first time after, I think, seven months, we are told that the Choncho docket is sitting with Mr Paul Mostert. What is your comment on that?

**ADV CHAUKE:** Very unfortunate. Very unfortunate that the NPA and the police stations themselves they do not have that docket and are sitting with an accused person.

**ADV NGCUKAITOBI SC:** Now, Mr Mostert ...[intervenes].

**ADV CHAUKE:** All I can say it is just unfortunate.

20 **ADV NGCUKAITOBI SC:** I think Mr Mostert has 13 murder charges against him, 13 murder charges. He killed 13 people.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And so that is the person the NPA is using, sorry, not the NPA, the evidence leaders are using in these proceedings.

**ADV CHAUKE:** I understand so.

**ADV MOHLAMONYANE SC:** Madam Chair, I object to that. I object to that proposition that my learned colleague is putting to the witness. We are evidence leaders who have no interest in the matter. We must be seen to be neutral and we try our best at all material times, Madam Chair, to be neutral. We cannot be seen to be blemished in the manner in which my learned colleague is doing.

The document has not been sitting with me. I asked for documents that could assist me in my cross-examination  
10 of Shamila Williams, Ms Shamila Williams, and these are the documents that I got. Now it appears my learned friend wants to suggest, it is suggestive, what he is saying is suggestive that I knew all the time where the documents were. I have no business, really.

**CHAIRPERSON:** What he say is you are using Paul Mostert. That is what you are objecting to?

**ADV MOHLAMONYANE SC:** Yes, I am not using Paul Mostert, Madam Chair. I was referred to Paul Mostert when I was consulting with Johan Booysen. And now it appears a  
20 picture has now been painted before this enquiry and before the public that we are consulting with criminals, with suspects.

**CHAIRPERSON:** Do not put words into Counsel's, it is better to just focus on the point that you are objecting to, and not say things that you are being, a suggestion is made that you

are consulting with criminals and all that. He did not say that. So let us just confine ourselves to what you are objecting to, please.

**ADV MOHLAMONYANE SC:** As it pleases you, Madam Chair, I will leave it at that.

**ADV NGCUKAITOBI SC:** Madam Chair, the person I am talking about is Paul Mostert. There are 13 murder charges against him. That is a fact. He is the source of the evidence, leaders. That too is a fact. That is what I want Mr Chauke  
10 to comment on.

**ADV CHAUKE:** I confirm that he is amongst the suspects who have been arrested and were indicted to appear in the High Court.

**ADV NGCUKAITOBI SC:** Yes, but on 13 murder charges, killed 13 people.

**ADV CHAUKE:** Yes, yes.

**ADV NGCUKAITOBI SC:** Now ...[incomplete].

**ADV BALOYI-MERE SC:** Advocate Ngcukaitobi.

**ADV NGCUKAITOBI SC:** Yes.

20 **ADV BALOYI-MERE SC:** Is it not that it is an allegation for now because he is a suspect? No court has pronounced that he killed 13 people.

**ADV NGCUKAITOBI SC:** No, it is common cause that he killed 13 people.

**ADV BALOYI-MERE SC:** Oh.

**ADV NGCUKAITOBI SC:** The question is whether that killing was murder or not.

**ADV BALOYI-MERE SC:** Oh.

**ADV NGCUKAITOBI SC:** Yes, but it is common cause everywhere, he killed 13 people.

**ADV BALOYI-MERE SC:** Okay. Well, the question is whether it is murder or it is ...[intervenes].

**ADV NGCUKAITOBI SC:** Or self-defence.

**ADV BALOYI-MERE SC:** Yes.

10 **ADV NGCUKAITOBI SC:** Yes, but he killed 13 people. He accepts that.

**ADV BALOYI-MERE SC:** Okay.

**ADV NGCUKAITOBI SC:** I am simply saying that the NPA, well, not the NPA, the evidence leaders are using that person as a source. That is the only point I wanted your comment on.

**ADV CHAUKE:** Indeed. I am saying I understand where this background of this thing is coming from and suspects would have to be consulted because apparently it is the  
20 understanding of the NPA that there is no case against them. So they would probably want to use them too, to purge the prosecutors at their expense.

**CHAIRPERSON:** Let me understand, Advocate Chauke, before we make a ruling. The source of this document is from Mr Mostert, who is an accused, well, one of the accused in

the Cato Manor matter.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** Ordinarily, where will these dockets be, all the dockets, including the Choncho docket?

**ADV CHAUKE:** They would be with the investigation team. In this instance, because the case would have been withdrawn and the charges were withdrawn, they would have been filed back to the various police stations from the IPID and from the investigation team of the DPCI that were  
10 investigating the matters, once the NDPP and the Director of Public Prosecutions have decided that no prosecution should follow.

**CHAIRPERSON:** So, meaning, if I understand you correctly, the relevant police station will be having those dockets?

**ADV CHAUKE:** That is how I understand it, that they would have been filed back at the police stations where they emanated.

**CHAIRPERSON:** Does it then make sense that the NPA went to the Station Commander, KZN, to look for this docket?

20 **ADV CHAUKE:** That is how I understood, that is where you need to trace them once you want the docket.

**CHAIRPERSON:** But to no avail, as you know.

**ADV CHAUKE:** To no avail, that is how I understood the response from the NPA.

**CHAIRPERSON:** And ultimately, NPA, in its effort to trace

this docket, was going to ascertain or to search or to find out from the IPD.

**ADV CHAUKE**: Yes.

**CHAIRPERSON**: About the whereabouts of this docket.

**ADV CHAUKE**: Yes.

**CHAIRPERSON**: How does a docket then end with an accused person? Does it happen?

**ADV CHAUKE**: It can happen that the attorney of record who was representing the accused would have been served with  
10 copies of the dockets and disclosure. So probably the accused might have gotten the copies of those dockets from his defence attorney, who the disclosure would have been made to.

**CHAIRPERSON**: And in this instance, the evidence leaders whose task is to gather information would have been entitled to receive that document from wherever it was sourced, let us say from Mr Mostert in this case?

**ADV CHAUKE**: I ...[intervenes].

**CHAIRPERSON**: As he was made to believe that Mr Mostert  
20 had the document.

**ADV CHAUKE**: Yes, that is how I understand it that they will be in a position to get it if Mr Mostert got it from his attorney or from IPID and he is having it, he would probably be, when he is asked, he would say, I have it, I can provide it.

**CHAIRPERSON**: So given these circumstances, following

your answers, it is not unheard of that an evidence leader in the position of Mr Mohlamonyane would have then received this document from one of the accused persons?

**ADV CHAUKE**: No, no, no, not. I think what is problematic now from ...[intervenes].

**CHAIRPERSON**: No, no, no, just answer the question first and then elaborate.

**ADV CHAUKE**: No. No.

**CHAIRPERSON**: No.

10 **ADV CHAUKE**: Yes.

**CHAIRPERSON**: And what did you want to say?

**ADV CHAUKE**: I wanted to say in the circumstances where we are, that the NPA and everybody was looking for them, they could not get it. It was a concern, but I think bravo that the evidence leader could get it outside of everybody.

**CHAIRPERSON**: But if he consulted with Mr Booyens, as he did, Mr Mohlamonyane ...[intervenes].

**ADV CHAUKE**: Yes.

20 **CHAIRPERSON**: And maybe all others who are supposedly lined up for testifying, that will not be unheard of.

**ADV CHAUKE**: Indeed, that is how I understand it.

**CHAIRPERSON**: Counsel, both of you, following my questions and answers by Advocate Chauke, the objection is sustained.

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

**ADV MOHLAMONYANE SC:** Pleases, Madam Chair.

**ADV NGCUKAITOBI SC:** Can I ask you this ...[intervenes].

**CHAIRPERSON:** Before you proceed, Ntate Mohlamonyane, I want to make it clear and place it on record to both of you, we cannot be sitting here complaining about each and every issue. Let us get to the chase and get to the crux of the matter. It does happen between lawyers that we do not agree about how we address one another, how we, what language, unless it is very, very serious.

10           But if we are seen in a public stage like this, when we are complaining about everything, Ntate Mohlamonyane, let us please try to, not to do that. As you know, litigation, we all need to have hard skins and bear with each other. You can discuss these things outside this hearing, and it does happen. You get out of court, you are not happy with what your colleagues did, you go and have coffee. It happens every day. I am just requesting both, Ntate Ngcukaitobi, let me also caution you.

**ADV NGCUKAITOBI SC:** Yes.

20           **CHAIRPERSON:** I know these issues that we talk about, most of you feel very sensitive about them, but let us try to maintain the decorum that we are all expected to maintain. After all, we are all officers of court. When we emerge out of here, the public will judge all of us in the manner we behave here.

So I request you, as Senior Counsel, to make our task easy and not to make determination on each and every thing. We have substantive applications to adjudicate upon, instead of focusing on the real core issue, this enquiry. I request you, and I am sure I am speaking on behalf of my sisters, if they wish to say anything, before you proceed, they may.

**ADV BALOYI-MERE SC:** [Indistinct]... [microphone off].

**MS RAMAGAGA:** Well said, thank you, Chair.

10 **CHAIRPERSON:** Thank you to both of you, Counsel. Ntate Chauke, thank you.

**ADV CHAUKE:** Thank you.

**CHAIRPERSON:** You may proceed, Counsel.

**ADV NGCUKAITOBI SC:** Thank you, Madam Chair. Mr Chauke, I think this is the right time. I will still come back to those conclusory paragraphs, but I think the point of the discussion right now requires me to take you to page 70 of that report, 70 at the bottom left. Do you have that?

**ADV CHAUKE:** I am there, Chair.

20 **ADV NGCUKAITOBI SC:** Yes, now, this is the section in the report where there is a discussion on some of the dockets, not all, but some of the dockets. But the context in which the discussion is taking place is in paragraph 191, where they say:

“The prostitution team alleged in the

October 2015 memorandum that in their analysis of the *modus operandi* of the accused, that the tracking or tracing of the suspects for questioning happened without shreds of evidence linking them to any offence. They also alleged that the accused also killed civilians and or suspects without any tangible evidence against them and in the absence of warrants of arrest for the suspects.”

So what they are trying to do is to say, look, your claim that the suspects are killed without linking them to the offences being committed is unfounded, correct?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** It is in that context that the Maphumulo docket is mentioned if you look at paragraph 192.1.1, okay.

**ADV CHAUKE:** Yes, Maphumulo CAS 99/9/2008.

**ADV NGCUKAITOBI SC:** Yes, now they say in the docket Maphumulo CAS 99/9/2008, the murder docket of Superintendent Choncho, correct?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now can I ask you if Mr Paul Mostert was a suspect in the killing of Mr Choncho?

**ADV CHAUKE:** From the top of my head now, I cannot

...[indistinct] I might have to refer to the indictment, to ...[intervenes].

**ADV NGCUKAITOBI SC:** No, Mr Choncho's killing is not part of the indictment. Remember, it was a trigger for the killing, the same as the killing of Mr Zondi.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. Now, I ask you the question again, is Mr Paul Mostert an accused in the killing of Mr Choncho?

10 **ADV CHAUKE:** No.

**ADV NGCUKAITOBI SC:** Exactly the point. Why on earth is he going around with this docket?

**ADV CHAUKE:** I may just suspect that maybe because he is a police, or this docket, because it did not form part of the indictments, then they would have access to them in the scope of them being police.

**ADV NGCUKAITOBI SC:** Precisely. That is the only explanation is that he has access to it in the course and scope of being a police officer.

20 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** The station does not have it, the NPA do not have it. Mr Paul Mostert who is not an accused, has it.

**ADV CHAUKE:** I see. I, ja, that is what it is.

**ADV NGCUKAITOBI SC:** Yes. And now you have here a

strange scenario. This report is prepared by the NPA, correct?

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Which means that as of June 2019, they had this docket.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Yes. They do not have it now.

**ADV CHAUKE**: From the confirmation that the NPA made, yes.

10 **ADV NGCUKAITOBI SC**: Yes, well they told us, Ms Lekgetho told us they do not have it.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: And we had a letter from Mr Anton Du Plessis that they do not have it.

**ADV CHAUKE**: The Deputy National Director of Public Prosecutions then.

**ADV NGCUKAITOBI SC**: Yes. This is the point is that they had the docket in June 2019.

**ADV CHAUKE**: Yes.

20 **ADV NGCUKAITOBI SC**: So this is the point, how does this thing happen that you have a docket, four people are working on it, and then it vanishes?

**ADV CHAUKE**: That is very strange.

**ADV NGCUKAITOBI SC**: But how would this happen? I mean, because the dockets we ended up getting, the 23 that

we ended up ...[indistinct]. I know there are many problems with missing information, etcetera, but they are all sent to us in an electronic form.

**ADV CHAUKE**: Yes, it should follow that if the de Kock panel also considered this case docket, it would have formed part of the ones that would have been on the electronic registers of the electronic storage of the NPA.

**ADV NGCUKAITOBI SC**: Yes, this is why this thing is very difficult to explain that the NPA who had it and purports to  
10 have analysed it does not have it. Then someone who is not an accused has it.

**ADV CHAUKE**: The one who is not an accused then ...[intervenes].

**ADV NGCUKAITOBI SC**: In that docket.

**ADV CHAUKE**: In that docket has it, yes.

**ADV NGCUKAITOBI SC**: Yes. Now, they then talk about a statement that is coming under oath from the witness. They talk about cellphone records. The whole paragraph 192.1, 192.2, 192.3, the whole of that up until 192.1.6 purports to  
20 extrapolate information from this docket that is in the possession of Mr Paul Mostert. Now, you have many alternatives, well, perhaps only two alternatives. The one is that these people who drafted this report also consulted with Mr Paul Mostert and he gave it to them, or they got it from somewhere else and then through negligence they have now

lost it.

**ADV CHAUKE:** Ja, I can accept that because there is no indication that they consulted the witnesses. They consulted the dockets and statements and the like, so, I will take it that maybe they worked on it and then somehow it got lost after they have worked on it.

**ADV NGCUKAITOBI SC:** Someone must have given it to them. The source could also be Mr Paul Mostert. It is very difficult to know.

10 **ADV CHAUKE:** No, it is very difficult to know. I am talking here on the assumption that the de Kock panel said they received the case dockets, they received the prosecution memorandum and they started working on this docket.

**ADV NGCUKAITOBI SC:** But the point is this, the panel still does not have a proper explanation about this docket because it is not enough for the NPA to say we do not have it, because they once had it.

**ADV CHAUKE:** Ja, I agree.

**ADV NGCUKAITOBI SC:** Yes, and now it is getting scraps  
20 from this docket from Mr Paul Mostert.

**ADV CHAUKE:** Very unfortunate.

**ADV NGCUKAITOBI SC:** And this is a crucial docket because it is a turning point in the conduct of these Cato Manor police officers when they decided they were going to go on a killing spree.

**ADV CHAUKE:** Indeed, the justification was that all the guys who were supposed to be arrested and they shot at the police, it was because they were suspects in the killing of Superintendent Choncho.

**ADV NGCUKAITOBI SC:** Yes, but now we have a scenario where, because we do not have this docket, we cannot make head or tail of the summary.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, the same thing, you know, it  
10 is funny. The next case they analyse here is the killing of Nkosi Zondi from paragraph 192.2.1, 192.2 ...[intervenes].

**ADV CHAUKE:** 1.

**ADV NGCUKAITOBI SC:** 192.2.3, 192.2.4, and then they conclude at 192.3. Now, these are the two crucial dockets. So, this one is called Kwa-Maphumulo, the killing of Superintendent Choncho. This one is called Bhekithemba ...[intervenes].

**ADV CHAUKE:** Bhekithemba.

**ADV NGCUKAITOBI SC:** The killing of Nkosi Zondi. Now,  
20 you recall, you have been part of this proceedings, the struggle it took for us to finally get the docket of the killing of Nkosi Zondi. When we finally got it, we found that it was only 105 pages. So many pages were missing.

**ADV CHAUKE:** Yes, I recall that.

**ADV NGCUKAITOBI SC:** Yes, but we also know now from

the evidence of Mr Mhlongo that these so-called confessions, how they were procured, the two that the NPA is relying upon in this report, you see, because look at what they are relying upon. It is somewhere where they are relying, oh yes, at 192.2.3. This information, now this is the information referred to at 192.2.2 about the assassination of Mr Bongani Mkhize. They are saying:

10                    “This information was later confirmed by  
                         Mr Swayo Mkhize as well as Sphe  
                         Mhlongo after their respective arrests.”

                         It says Mswayo, but I presume that is Swayo.

**ADV CHAUKE:** Yes, yes.

**ADV NGCUKAITOBI SC:** Yes.

                         “Swayo Mkhize made a warning  
                         statement, confession, and pointing out.  
                         The statements of Mkhize implicated the  
                         deceased Bongani Mkhize in the  
                         conspiracy to kill Zondi. They also  
                         identified Sibongile Batumile and Sifiso  
20                    Ndimande who were present when they  
                         planned to kill Zondi. The motive for the  
                         murder was that they believed that  
                         Zondi gave the police, Booyesen  
                         information on the whereabouts of  
                         Magojela Ndimande who was killed in

Howick CAS 106/09/2008.”

This is the information we went through together with Mr Mhlongo.

**ADV CHAUKE**: Mhlongo, yes.

**ADV NGCUKAITOBI SC**: Now, when was the Mhlongo trial, 2009?

**ADV CHAUKE**: 2009.

**ADV NGCUKAITOBI SC**: Yes, at the end of that year he was acquitted.

10 **ADV CHAUKE**: Ja, and this civil claim about two years later.

**ADV NGCUKAITOBI SC**: It was settled in 2016. The civil claim was settled in 2016, but the criminal trial was in 2009 ...[intervenes].

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Because he was detained from February 2009. I think he was acquitted in 2010.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: That record is all public, the judgment of Judge Giyanda. There is no attempt here in this report to consider the judgment which acquitted Mr Mhlongo. There is an affidavit given by Mr Swayo in which he retracted the so-called confession which was accepted by the Judge in the case of Mhlongo, not referred to at all.

20

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: The entire docket that we looked

at from Mr Mhlongo is just not referenced. It is as if it does not exist.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Yes. Now, I come back to really what is the value of this report. It is relying on information which has been discredited for more than 15 years.

**ADV CHAUKE:** Yes, in fact, by 2019 when this report was made, it was made almost three years later, not three years, after the police had settled the claim against them in respect  
10 of Mhlongo and almost eight years after his acquittal.

**ADV NGCUKAITOBI SC:** Yes. So, two crucial documents, one is this affidavit. Now they are still saying, no, no, no, these people were implicated because of the confession by Mr Swayo, but we know everything about the confession. It was retracted.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Then they are also talking about the confessions made by other accused, but we know who those accused are, it is Mr Mhlongo.

20 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And we know what happened to Mr Mhlongo. Now, you have a scenario where the NPA, the NPA, I am not talking even about the police, the NPA is relying on information that has been obtained through torture because the authors of this report is Mr de Kock, Mr Tenga, Ms Riley,

Mr Mamabolo. These are senior employees of the NPA.

**ADV CHAUKE:** Yes, in defence of the accused.

**ADV NGCUKAITOBI SC:** Whatever they were trying to do. Whether they are doing good or bad, the fact of the matter is that information obtained through torture is unconstitutional. This is what used to happen under apartheid.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Now, you have here the four senior prosecutors together with the National Director of Public  
10 Prosecution. They hoist this report around, but it is relying on information obtained through torture and they do not tell anyone that there is a trial that declared the information inadmissible.

**ADV CHAUKE:** Very unfortunate.

**ADV NGCUKAITOBI SC:** Yes. You see, which is why they conclude in paragraph 192.3 in both the Choncho and the Zondi murders, there was a *prima facie* case against the suspect. But we do not know anything about Choncho because the docket is being hidden from us by Mr Mostert.  
20 We know about Mr Zondi because we have got some scraps of the docket. But we also know about that case because Mr Mhlongo bothered to contact me and insist on testifying before this panel so he can tell the truth.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. And we know that the source

of that information that was used to implicate people there was torture.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: And this is what they say is the *prima facie* case.

**ADV CHAUKE**: Very unfortunate.

**ADV NGCUKAITOBI SC**: Yes. Now, then you have their purported analysis after that of paragraph 192.4, Berea. You know what happened in Berea. You have been sitting here.

10 **MS RAMAGAGA**: Maybe before you go to that analysis, Advocate Ngcukaitobi, I should ask some questions, put some questions to Advocate Chauke. Advocate Chauke, I am going to ask once more, I am sure, about the life of a case docket that ends up at the NPA offices. The origin would have been the police station, am I correct?

**ADV CHAUKE**: Yes.

**MS RAMAGAGA**: Then, in the context of this enquiry, it would then land at the DPP's office.

**ADV CHAUKE**: Yes.

20 **MS RAMAGAGA**: And then it would land at the NPA's office.

**ADV CHAUKE**: At national office.

**MS RAMAGAGA**: At national office.

**ADV CHAUKE**: Yes.

**MS RAMAGAGA**: Now, what I would like to know is when you send, and I am talking about the DPP, sends a docket to

the NDPP's office, would the DPP be left with a copy, or what is the position, or would it just go as that original docket moving from one station to the other up to the NDPP?

**ADV CHAUKE:** As a rule of practice, the DPP's office will make copies of the dockets.

**MS RAMAGAGA:** So, which means that you would send the original docket to the NDPP without keeping a copy for the Director of the Prosecution station?

**ADV CHAUKE:** In general, if the DPP sends the docket to  
10 the national office, he or she will keep copies of that docket in her office.

**MS RAMAGAGA:** So, ordinarily, the DPP would keep a copy and send the original to the NDPP.

**ADV CHAUKE:** Yes.

**MS RAMAGAGA:** And would there then be, I see you are nodding, is that yes?

**ADV CHAUKE:** Yes.

**MS RAMAGAGA:** Right, thank you. Now, would there be a register where there is, you know, checking the trade, where  
20 the DPP would have then delivered the dockets to the NDPP and let them sign acknowledgement of receipt, or what is the position?

**ADV CHAUKE:** Yes, there will be a register where somebody will sign for the docket. In most cases, copies of dockets are sent to the NDPP for review. The original will be kept at the

DPP's office.

**MS RAMAGAGA**: Okay, so it is the copy that would be sent to the NDPP.

**ADV CHAUKE**: Yes.

**MS RAMAGAGA**: The DPP would be sitting with the original docket.

**ADV CHAUKE**: Yes.

**MS RAMAGAGA**: And that docket would not then, obviously, be at the police station, it will be sitting in the DPP's office.

10 **ADV CHAUKE**: Yes.

**MS RAMAGAGA**: And once the NDPP makes a decision, taking into consideration that the NDPP would be sitting with a copy, does it become necessary for the NDPP to then return the docket to the DPP, or would the NDPP keep the docket at the NPA offices? What is the norm?

**ADV CHAUKE**: The NDPP, the copies that would have been sent to the NDPP will remain at national office archives, yes.

**MS RAMAGAGA**: So which means at least there would be a likelihood of getting this docket at the archives NPA. If it  
20 cannot be found there, at least at the DPP's office.

**ADV CHAUKE**: Yes.

**MS RAMAGAGA**: Thank you.

**ADV CHAUKE**: But what I wanted to explain, Chair, is in the context of the general. This prosecution was a POCA prosecution, so the prosecution team and the original dockets

were all at the national office.

**MS RAMAGAGA**: Okay, thank you. So the original, but then because my understanding is that this whole thing starts at the, even if it is racketeering or what, it would have started at the seat of the relevant DPP. Is that the case?

**ADV CHAUKE**: That is the case, Chair.

**MS RAMAGAGA**: Exactly. Now that DPP would then have to recommend the issuance of the certificate of racketeering.

**ADV CHAUKE**: Yes.

10 **MS RAMAGAGA**: And that DPP would be sitting with the copy because this is a matter of national, what, imperative or the jurisdiction of the NDPP. The DPP would then send the original docket to the NDPP's office.

**ADV CHAUKE**: Yes, that is why I was saying that in respect of this because it was a national project.

**MS RAMAGAGA**: Yes.

**ADV CHAUKE**: So the dockets were actually being done from national office. The prosecution team that was now at the time of Advocate Sean Abrahams were sitting at national  
20 office with these case dockets. So they were not at the DPP, not even at the KZN DPP.

**MS RAMAGAGA**: By implication, even those that drew reports like the report presently under consideration would have been, would have had access to the original docket.

**ADV CHAUKE**: At national office.

**MS RAMAGAGA:** Thank you.

**ADV CHAUKE:** At national office, not at the DPP's office.

**MS RAMAGAGA:** Yes, thank you.

**ADV NGCUKAITOBI SC:** Thank you. I wanted to ask you, Mr Chauke, about paragraph 192.4. That is the Berea case. Now you look at the summary that is given here.

10 "Thabo Sunshine Msimang was arrested on Brighton Beach on a charge of armed robbery. He later escaped from members of the unit and the docket was registered."

Now this is the only thing that is said about Berea. Now you remember the case of Berea. The gentleman jumped out of the window on the fourth floor. He was shot three times by Mr Mostert.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** You see. Now, what do you say about this analysis here? I mean, is this any meaningful engagement with what happened in that case?

20 **ADV CHAUKE:** It is a whitewash.

**ADV NGCUKAITOBI SC:** Yes. Now, assuming that he was wanted for armed robbery, what is the justification of killing him?

**ADV CHAUKE:** There is none at all.

**ADV NGCUKAITOBI SC:** Yes. Then look at what they say

then about Melmoth. Now, these are the four top, top, top officials in the NPA. It is them who are writing this, what we are dealing with here. 192.5, they are talking about Melmoth. Now, Melmoth, you remember, it is the Biyela brothers. They are, one of them is naked and is lying on a *rondawel* veranda. And the other is younger than him. I think he was 17 years old. He is wearing blue and white shorts and is killed inside the *rondawel*. The place is just full of blood.

**ADV CHAUKE:** Yes, that is where they were. There were  
10 also shown photos of the police enjoying their drinks outside  
...[indistinct].

**ADV NGCUKAITOBI SC:** But there is a thorough report of ballistics by Mr Mangena.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, look at what they say about this. They say:

“Kanyisani Biyela was also killed.  
According to the police, this person shot  
at them from one of the *rondawels*  
20 through the window. They then moved  
into the *rondawel* and fired one round in  
the direction of the suspect as more  
shooting erupted.”

Now, is there any reference here to the reconstruction of the crime scene, which is evidence in the

docket?

**ADV CHAUKE:** No.

**ADV NGCUKAITOBI SC:** Yes. Now, you see, on this point, I asked Advocate Batohi in relation to the killing of Kwazi Ndlovu, why her letter to the mother of the child did not refer, while the mother, through the ...[intervenes].

**ADV CHAUKE:** Mary de Haas.

**ADV NGCUKAITOBI SC:** Mary de Haas, yes, did not refer to the evidence of the expert. She says it is because it was  
10 not in the docket. She never knew that it was there. It was, in fact, the first time in this enquiry that Advocate Batohi became aware that there was a report by Mr Mangena. Now, this is the full extent of the analysis, this paragraph I have read to you. I mean, what do you say about this? And it also just does not make any references to all of the evidence pointing to the guilt of the accused.

**ADV CHAUKE:** No, it is a whitewash. And the last sentence in that paragraph, 192.5, which says, they then moved to the *rondawel* and forced one round in the direction of the suspect  
20 as more shooting erupted.

**ADV NGCUKAITOBI SC:** Yes. This is a killing in the early hours of the morning and the gentleman is naked. I mean, it is truly, truly bizarre. Then they talk about Phoenix. That is the killing of Mr Nzuzza, and then they say, well, he is wanted on various, that is the only thing that is said here. There is

nothing mentioned about whether the killing by the police was justified. I think this was also a Mostert special. Nothing at all in paragraph 192.6, which explains why the killing was justified. It just says, well, he was wanted on various offences.

**ADV CHAUKE**: Indeed, one would be interested to hear the part of the authors of this report to say why the analysis of ballistic reports and the actual statement of the police were not analysed as against the ballistic reports.

10 **ADV NGCUKAITOBI SC**: And then the same thing with KwaMashu, 192.7. They here talk about, this is now the killing of Mr Thabethe, who was also known as Mtako. Then all the thing that is said here is that there was a reliable source that implicated him in a statement dated 26-11-2009. But again, nothing about why was the killing justified.

**ADV CHAUKE**: It is my proper reading of the analysis here, it moves on the assumption that all the killings by the police are justified. So all they needed to do was to identify who has been killed or not. That is what the report is doing.

20 **ADV NGCUKAITOBI SC**: Yes, but the report is meant to show why your team, well, not your team, it was Mr Maema's team, but why the prosecution team was wrong in preferring the charges of racketeering, which include being in the racket and committing the predicates. That is what it is meant to do, and what you get is this, that there was a reliable source,

no information about this reliable source, no information about how this reliable source linked, and no information about why the execution of this gentleman was justified.

**ADV CHAUKE:** Yes, Chair, even if there was a reliable source and indeed they killed those people, but still they had to be arrested.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** The report, if you remember the paragraph 176 in relation to what they say, 167 rather.

10 **ADV CHAUKE:** Yes.

**CHAIRPERSON:** That there was no evidence.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** You can see with the summaries that you are referring us to, it seeks to corroborate that very statement because when you read this paragraph, the summaries, they can only seek to corroborate paragraph 167 to say there was no evidence. Am I correct ...[intervenes].

**ADV CHAUKE:** You are correct.

**CHAIRPERSON:** Advocate Chauke.

20 **ADV CHAUKE:** You are correct, Chair.

**ADV NGCUKAITOBI SC:** Yes, thank you, Madam Chair. And then you look at the, probably one of the saddest, though one does not want to compare death, death is death, it is as bad for an 18-year-old and it is as bad as for a 6-year-old, so maybe that is a wrong statement. But then you look at the

killing of Mr, of the young man, Kwazi Ndlovu, at how it is dealt with by these four senior prosecutors, 192.8. In E In Esikhawini, look, there are also many spelling errors in this report, you people's names are misspelt, places' names are misspelt, the dockets' names are misspelt. It also just shows it was a bit of a, they just did not care what they were doing you know, so many errors. And like now they cannot spell Esikhawini. They say Esikwanini.

**ADV CHAUKE:** I see that, Chair.

10 **ADV NGCUKAITOBI SC:** But, ja, you can do the same thing, you will find so many errors in this report.

“The deceased was Kwazi Wiseboy Ndlovu. The police were investigating the murder related to Westville CAS 26/3/2010, in which nine prisoners escaped from Westville prison, medium A, seventh floor.”

And then they give a date.

20 “They were following up on information of the suspect, Thilili Mzimela, who escaped from Westville. On their arrival at house number J63, they introduced themselves as the police, and they entered the house. The deceased was killed. Mzimela later on made a statement in which he states that his family rented out the property to the

Ndlovu family.”

Again, there is just no analysis here.

**ADV CHAUKE:** Yes, there is no analysis. If I remember well, Advocate Shamila Batohi, when she testified, she said she accepted all the decisions except for this one, where the matter was referred to trial and the accused, Padayachee was acquitted.

**ADV NGCUKAITOBI SC:** Yes, I understand, but I am talking about the report itself, that the report is so bad that it does  
10 not address the fact that this was a young boy that was sleeping on a couch watching television. And old men from the police force came with rifles and executed him in cold blood fashion.

**ADV CHAUKE:** Yes, and they claimed that he was pointing a gun at them.

**ADV NGCUKAITOBI SC:** And after that, they planted a gun, yes, after having shot him with an R5. And this is all you get from four very, very, very senior prosecutors.

**ADV CHAUKE:** Very unfortunate, especially for this young  
20 boy who was killed in that fashion. It is very unfortunate.

**ADV NGCUKAITOBI SC:** Yes, but what is it saying about the competencies that reside in the NPA? The NPA is a constitutional office. The people that are employed there are meant to do better than what they have done here.

**ADV CHAUKE:** Oh, you can Google even this report, you

will see how highly celebrated it has been for the past years.

**CHAIRPERSON:** When you say four senior prosecutors, you say it on the assumption that the report was unanimous.

**ADV NGCUKAITOBI SC:** Yes, let me say two.

**CHAIRPERSON:** Or one.

**ADV NGCUKAITOBI SC:** Or one. Thank you, Madam Chair. That is a big mistake ...[indistinct] myself.

**ADV BALOYI-MERE SC:** I have a follow up, especially on this matter in 192.8. There was later a statement by Mzimela.

10 I am not sure who Mzimela is. But I think even in testimony, we were, by, was it Advocate Maema or the ballistic who flighted a picture of the area and showed us that the Ndlovu family had rented a house, a property nearby because they were renovating their house.

**ADV CHAUKE:** Yes.

**ADV BALOYI-MERE SC:** Which, I mean, common sense would then say or bring one to the conclusion that this was a question of mistaken identity because they went into this house looking for a specific person. They were looking for

20 Thilili Mzimela.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Yes.

**ADV BALOYI-MERE SC:** And the Mzimela's were not in that house.

**ADV CHAUKE:** Yes.

**ADV BALOYI-MERE SC:** So it was the Ndlovu's who were in the house and a family member of the Ndlovu's was killed.

**ADV CHAUKE:** Yes.

**ADV BALOYI-MERE SC:** Was there, as far as you know, so my question would be twofold. Was there, as far as you know, an apology that was tendered to the Ndlovu family on behalf of SAPS, or as a prosecutor, does it ever happen where a mistake such as this one has occurred where you would apologize or show remorse or talk to the family and explain  
10 to the family what happened?

**ADV CHAUKE:** In most instances, if something like this happens, you consult and update the families and bring them up to speed about what is happening in the process, indicate your position as the NPA, as the prosecutor, to say this is what has happened, this is the resultant of this and where necessary, tender an apology, especially in the sense where you have realized that the prosecutor has got it completely wrong.

**ADV BALOYI-MERE SC:** Did any of that happen in this  
20 instance?

**ADV CHAUKE:** Not that I am aware of, Chair.

**ADV BALOYI-MERE SC:** Thank you.

**ADV NGCUKAITOBI SC:** Thank you, Madam Baloyi-Mere. In fact, Mr Chauke, the NDPP, the most senior person, came here and said, well, we prosecuted the case, there was an

acquittal. And when I asked her, why are you singling out this case and she could not give me a straight answer. It seems that it was vindication for them that there was no evidence, that is why there was an acquittal.

**ADV CHAUKE:** That is how I understood the evidence from Advocate Batohi.

**ADV NGCUKAITOBI SC:** Yes. What she could not explain is why the evidence of Mr Mangena was not used in the trial when he was available and willing to testify.

10 **ADV CHAUKE:** Unfortunately, the people who did the prosecution and who submitted the reports to her, they failed her in that regard because they should have made sure that they provide her with all the information in respect of that matter.

**ADV NGCUKAITOBI SC:** Sorry, I do not understand that. The letter was written by Ms de Haas to her.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** She wrote in her own name, justifying the decisions made by the prosecutors in that case.

20 And when I asked her here, why was the evidence of Mr Mangena not used, she could not explain. So why are you saying she was failed by someone else? That was her own decision.

**ADV CHAUKE:** I am saying this because as we heard from the evidence, that she asked for a report that came to her to

explain what happened at the trial, which was forwarded to her by Advocate ...[indistinct] who had received it from the DPP of KZN who had received the report of the Advocate Shankar, I cannot remember ...[intervenes].

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Who did the actual prosecution and who would have provided the reasons why that evidence was not considered. It is in that context that I am saying that.

**ADV NGCUKAITOBI SC:** No, but you see, I would have  
10 expected that if you are going to, if you have a complaint from a member of the public, in fact, this is not a member of the public, this is the mother of the child ...[intervenes].

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** You would at least say, well, just give me the documents of this particular case, I want to look at them. You would not look at one memorandum.

**ADV CHAUKE:** That is unfortunate. It is unfortunate and given the history and the high profile of the matter and the decisions that she made then, one would have said she  
20 needed to go an extra mile, especially in the context of what the case involved.

**ADV NGCUKAITOBI SC:** Yes, I understand. But what I also could not work out there is why she learned here when she was being cross-examined, that there was, in fact, a report of Captain Mangena.

**ADV CHAUKE:** That I understood that she conceded that she did not read, and she does not read some of the things. I think that surprise came to her when she, that is why she was surprised when she was sitting.

**CHAIRPERSON:** Not some of the things. She said she does not read the dockets.

**ADV CHAUKE:** Yes. Yes, Chair.

**ADV NGCUKAITOBI SC:** Yes. It also looks, Advocate Chauke, that it is not only her. It is also the authors of this  
10 report because there is no engagement with that report here.

**ADV CHAUKE:** I agree.

**ADV NGCUKAITOBI SC:** Yes. This is what I really am perplexed by, and this is really an honest question. But how does the NPA actually work, because the country entrusts so much responsibility on this institution. So no one reads the dockets. Dockets go missing. Decisions are just made without any assessment of the pros and the cons.

**ADV CHAUKE:** Very unfortunate, but the reality for me sitting here, this does not define the whole of the NPA in  
20 terms of how they do their work. Unfortunately, in this instance, this was done for ulterior motives. It could not be that the NPA as an organization would be described by this conduct of what happened in this specific report.

**ADV NGCUKAITOBI SC:** Yes. And then there is also Mr Gwala that is referenced at 192.9 in the second Esikhawini

case, which again is spelled as Esikwanini. Then they are also talking about someone who went to do a pointing out. I cannot remember whether this is the gentleman that they went to his house and they took him from a meeting, a community meeting, and they took him to his house and they murdered him inside the house.

**ADV CHAUKE:** I think that is the one because there were two Esikhawini incidents in the indictment.

**ADV NGCUKAITOBI SC:** Yes. Now, but again, we only have  
10 five lines here which do not tell us anything about why this murder, this killing rather, would have been justified if in understanding order 251 or under section 49(2) of the Criminal Procedure Act.

**ADV CHAUKE:** Indeed, there is nothing.

**ADV NGCUKAITOBI SC:** Yes. And then they say, well, this deceased had a pending case of an illegal firearm. I just do not understand. And then the police found a pump-action  
firearm lying between the mattress and the base, but we again know the story of these firearms, how they end up  
20 there. We have at least three eyewitnesses who saw the police planting the firearms.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. Oh, yes, in fact, I am corrected on this one that even this narrative is actually wrong that this is Mr Gwala who was wanted. Yes, I

remember this case. This is exactly the one. This is the one they took someone from a community meeting.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: And they were looking for somebody called Bah.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: And this is not the guy called Bah.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: But they killed him.

10 **ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Yes. They do not even reflect that story here in this report.

**ADV CHAUKE**: Yes. Like I said, once you do a whitewash thing, the thing that will dispel your intended conclusion, you will never ...[indistinct].

**ADV NGCUKAITOBI SC**: Yes.

**ADV CHAUKE**: Like it has been pointed out, once they started to say there is no evidence, so you could not, when you make an assessment, go and find evidence which  
20 contradicts your finding already that there is no evidence.

**ADV NGCUKAITOBI SC**: Yes. But at the very least, you would expect there will be honesty to the facts, even if you reason them away. There would be honesty in recording the facts accurately, and you would expect this from the NPA.

**ADV CHAUKE**: Yes, that is the expectation, but

unfortunately, in this instance, because it was a whitewash, the facts, if you consider them, they will contradict. Just considering the facts without doing anything more, they will contradict the notion that there is no evidence.

**ADV NGCUKAITOBI SC:** Yes. Then there is the second last case, 192.12. It is the same gentleman. There are several matters against him. Esikhawini CAS 423, Esikhawini CAS 196, Esikhawini CAS 484, and more and more and more, attempted murder, attempted murder, and attempted murder.

10 Now, when I looked at this, it seems that what the *modus operandi*, in fact, it is similar to what Mr Booyesen wrote in his book you know, when he said that in relation to the killing of Mr Mkize, Bongani Mkhize, the gentleman who was driving a black ...[intervenes].

**ADV CHAUKE:** Lexus.

**ADV NGCUKAITOBI SC:** Lexus, he says, well, the beans were spilled by Swayo. That is how he met his death. He says, if there is somebody who makes a confession against you, you can just be killed.

20 **ADV CHAUKE:** Very unfortunate.

**ADV NGCUKAITOBI SC:** Yes, and that is the kind of picture they were trying to create here against the deceased in the second discovery, Mr Gwala.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Who, in fact, they mistook from

someone else.

**ADV CHAUKE:** Unfortunately. Like I am saying, if you, look, the summaries here, which are down here, as to indicate that all these people were shooting at the police, and the police were justified to kill them.

**ADV NGCUKAITOBI SC:** But there is no, nothing here that says they were shooting at the police, not a single one in the summaries.

**ADV CHAUKE:** In the opening of where they start dealing  
10 with the summaries, that is how I understood that they were saying that the suspects were killed once they were trying to shoot back at the police.

**ADV NGCUKAITOBI SC:** Yes, I thought that the only thing they said was that they were sought for offences.

**ADV CHAUKE:** For offences.

**ADV NGCUKAITOBI SC:** If you look at paragraph 192.2.

**ADV CHAUKE:** Oh. No, no, I take it. I think I was reading from the assessment of the indictment, ja.

**ADV NGCUKAITOBI SC:** Yes, so the only thing here is that  
20 they are sought for offences, but there is no analysis of the justification of the killing.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Which you would expect, because Standing Order 251 says if the police has killed, it is up to the police to justify.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And section 49(2) says that if you overuse force, you become the aggressor.

**ADV CHAUKE:** Yes, yes.

**ADV NGCUKAITOBI SC:** Now, so that takes us to Mr Gwala. Then the next one is Mr Majola in Estcourt. This is one of the gentlemen sought for so-called ATM bombings. You know one of them is the one that was found in a rubbish bin and then shot from the top there.

10 **ADV CHAUKE:** Yes, I remember that incident.

**ADV NGCUKAITOBI SC:** Yes. Now, again, the only thing that is said is that, well, he is a suspect in an ATM bombing. But who decides whether he should meet his maker or not? I mean, no one. The Constitution says no one, the state has no power to kill because of the right to life. But the police here, and the NPA in particular, which worries me greatly, is that they seem to suggest that these people are sought for offences and therefore the killing is justified.

**ADV CHAUKE:** Very unfortunate.

20 **ADV NGCUKAITOBI SC:** And then paragraph 193:

“This analysis clearly shows that all of the deceased either had cases pending or were being sought in connection with cases in order to be questioned or charged and that the averments that the

police traced or tracked the deceased without there being a shred of evidence against them is misleading.”

Now, it is very unclear why they say this. They have just analysed the case of Kwazi Ndlovu, which is the most glaring one. They have also just analysed the case of Bah, also another glaring one, where these people had nothing to do with what was being sought.

**ADV CHAUKE:** Yes, as I say, once you start from the premix  
10 that there is no evidence, what follows thereafter should stick to what you have already concluded.

**ADV NGCUKAITOBI SC:** Yes. Now, then they have an issue with what they call killing of innocent civilians which the police alleged were suspects, and then they talk about Khanyisani Biyela and Kwazi Ndlovu, and then they try to analyse that in 195 and 196. And then in 197, they say that:

“In relation to the latter ...”

And that is now Ndlovu, Kwazi Ndlovu.

20 “We are of the opinion that the investigation should be concluded and a decision be made whether Padayachee should be charged.”

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** But the other 17-year-old boy, they do not make a similar conclusion. That is Khanyisani Biyela.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Because they are talking about cartridges found in the *rondawel*, but there is still no engagement with the expert report that reconstructed both of the scenes.

**ADV CHAUKE:** Ja, in the report, there is, it is not there.

**ADV NGCUKAITOBI SC:** Yes. And, you know, that then ends the analysis of the dockets. You go through this. You do not find any analysis of the dockets. Then you get at page  
10 82, lack of proper investigation. One paragraph you find also just starking arbitrarily is the paragraph 200 that is talking about, you remember the lady, Ms Denise Hulley, who witnessed the police planting a firearm.

You know how she is criticized in this report. It says:  
“There are, however, contradictions between her first and second statements she deposed to and between her statements and that of the two accused who were arrested before the  
20 deceased, Nxaba Mdluli and ...[indistinct].”

Now, they allege, they are now explaining the so-called contradiction.

“They allege that it was Mostert who came to look for the firearm in the

Quantum vehicle in which they were seated. A21 saw Mostert take out a .38 from under the seat. A22 overheard Mostert ...”

This is now Paul Mostert who has killed 13 people.

10 “Asking the other police officers for his book, it appears highly unlikely that Mostert would do this in front of the co-accused of the deceased. It also appears that Hulley changed her version of the events to fit in with theirs.

Initially, she said that the white male instructed the Indian male to shoot. She never said she saw him leaving and then returning. She also pertinently said Mostert came in afterwards and asked what happened. She never said he came in with a firearm and placed it in the room. In her 2012 statement, she refers to more than one, two white males who went into the bedroom and placed the firearm there.”

20 Now, that is the only analysis that is made. Now, the only eyewitness who was there, you remember what happened where they put a blanket over her head and then

they killed the husband and they removed it.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And then she says after they had removed it, she saw them putting a firearm. Now, the prosecutors spent three paragraphs looking at her statement but if you excluded her statement altogether, you would still be left with the analysis, the ballistics analysis.

**ADV CHAUKE:** Which corroborates that the deceased did not have a firearm.

10 **ADV NGCUKAITOBI SC:** Yes, but the way that this analysis is taking place is like, well, just attack the victims.

**ADV CHAUKE:** Ja, in this instance, you see a contrasting view between those who wanted to prosecute and those who did not want the prosecution to ensue.

**ADV NGCUKAITOBI SC:** Yes, but I mean, let us assume that you have, because what is also strange about this, when you go to those statements, is that actually she never changes her basic view that she saw them planting a firearm. It just never changes. She does change about how many  
20 people walked in and out, etcetera, but you know, this is in the middle of the night. She has been blindfolded effectively, and she is too traumatized because they have just killed her husband.

**ADV CHAUKE:** But it is also immaterial how many people went in there. If the people who went there to shoot, they

themselves said they shot.

**ADV NGCUKAITOBI SC:** They admit ...[intervenes].

**ADV CHAUKE:** So whether they are four, ten, or fifteen, it is neither here nor there.

**ADV NGCUKAITOBI SC:** Ja, so those contradictions would be immaterial.

**ADV CHAUKE:** Of course.

**ADV NGCUKAITOBI SC:** Yes, I see. So, that is your point that actually these contradictions they are talking about, are  
10 irrelevant to the decision of whether there is a *prima facie* case.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Yes. Yes, so I come back then to this point that thereafter you do not find any assessment of these dockets. Then you come to the section, page 86, where there is an attempt to deal with the ballistics report. Now, I will show you something here about the ballistics, which we dealt with in full. The first thing is that Mr Mangena gave us 23 ballistics reports. What you do not find here is an analysis  
20 of those reports. Mr Steyl, I think, gave us 10. Again, you do not find an analysis of Mr Steyl's reports. Can you see it yourself?

**ADV CHAUKE:** No, in fact, now that I am looking at it closer, I am just surprised that if they say ballistics evidence and then there is, they are referring to LCR and the like. I am

just concerned that maybe the interpretation and the analysis of ballistics, the understanding is not the same.

**ADV NGCUKAITOBI SC:** I am not sure I understand. I am saying between paragraph 220 and paragraph 227 is where they are addressing ballistics. The ballistics that the NPA was relying on is Mr Steyl and Mr Mangena, Mr Mangena having produced 23 reports and Mr Steyl having produced 10 reports. These paragraphs do not refer to any of those.

**ADV CHAUKE:** Yes. I see that. That is why I am saying I  
10 am surprised that the heading is ballistics evidence, but the actual ballistics evidence of Steyl and Mangena is not what is being summarized.

**ADV NGCUKAITOBI SC:** Yes. And then in paragraph 221, they ...[intervenes].

**CHAIRPERSON:** Counsel, before, sorry, to interpose. Paragraph 205, do you understand what it means? If you may read it into the record first.

**ADV CHAUKE:** -:

20 “This allegation should be evaluated against the totality of the evidence in the docket. There is evidence in many dockets of *prima facie* residue found on the hands of the deceased.”

**CHAIRPERSON:** Do you understand what they mean?

**ADV CHAUKE:** They are conveying to say most of the

deceased in their hands there was primary residue of the firearms that were found with them.

**CHAIRPERSON:** Do you understand what the first sentence means, these allegations should be evaluated against the totality of the evidence in the docket.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** What does that mean?

**ADV CHAUKE:** I understand the allegations against the police.

10 **CHAIRPERSON:** Yes.

**ADV CHAUKE:** Yes. So the allegations that the prosecution team are making against the police should be evaluated against the totality of the evidence in the docket.

**CHAIRPERSON:** Do you understand what that means in practical terms?

**ADV CHAUKE:** No. In practical terms Madam, I do not necessarily follow.

**CHAIRPERSON:** Does it not mean that, and correct me if I am wrong, does it not mean that these summaries that they  
20 have provided, which seems to be in favour of the accused persons, should be evaluated against the totality of the evidence that is contained in those very dockets that they are summarising?

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** Now if that is the case, could they have

come to the conclusions they have come?

**ADV CHAUKE:** I do not think so. If the totality of the evidence as they say is what is contained in the dockets then the conclusion should completely be different.

**CHAIRPERSON:** The converse should be true.

**ADV CHAUKE:** Indeed, Chair.

**ADV BALOYI-MERE SC:** As a follow up, maybe the question should be when this report was compiled, did the four prosecutors have all the dockets in front of them and also did  
10 the dockets have all the necessary evidence that is supposed to be in the docket? For example, the NDPP when the, or Advocate Batohi testified that she was seeing Captain Mangena's ballistic report for the first time, so I am asking this question that does that not mean that this four prosecutors should have had all the dockets in front of them and the dockets containing all the necessary evidence inside?

**ADV CHAUKE:** That is correct, because when, remember Advocate Maema and Mathenjwa, they were sitting at national  
20 office in the NDPP's office with all these dockets. So the assumption will be when this team was appointed to have a look in those dockets, they would have looked on those dockets that would have been in the custodian position of Advocate Maema and the prosecution team.

**ADV BALOYI-MERE SC:** And so in conclusion to, and in

responding to the Chairperson's question you said they would have come to a different conclusion.

**ADV CHAUKE**: Indeed.

**ADV BALOYI-MERE SC**: Okay, thank you.

**ADV NGCUKAITOBI SC**: Thank you. Now I took you to the ballistic section and I showed you there that in the section where they must be dealing with ballistics, Mangena, Mr Mangena and Mr Steyl are not mentioned, correct?

**ADV CHAUKE**: Yes.

10 **ADV NGCUKAITOBI SC**: Now then they make passive appearances firstly at paragraph 208.

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

**ADV NGCUKAITOBI SC**: 208, page 81, Madam Chair. Now they say here:

20 “In an attempt to counter the defence that the deceased fired at them and were in possession of firearms, statements were obtained from experts such as Steyl, Captain Mangena and Dr Reggie Perumal. Steyl was initially appointed as the defence's expert in some of the dockets.”

Can you just comment on that why is this an important fact that they must mention?

**ADV NGCUKAITOBI SC**: Because Steyl was appointed by

Hlapane Attorneys on behalf of the families of Mkhize and others.

**ADV NGCUKAITOBI SC:** Yes, but why does that matter, that is what I am asking.

**ADV CHAUKE:** The impartiality or otherwise of the report of Steyl is being put into question.

**ADV NGCUKAITOBI SC:** But why? He is an expert. I do not understand.

**ADV CHAUKE:** It was because of the attorneys. It was not  
10 by the state. That is how I read.

**ADV NGCUKAITOBI SC:** But that is what I do not understand. An expert is an expert, period, and there are rules of expert evidence. Whether you are called by me or called by my opponent, if you are an expert, you are there to assist the court. So when Mr Mangena was here, he is not here as Mr Chauke's witness. He is an expert. He is there to assist the panel.

**ADV CHAUKE:** The prosecutor in me says when an expert is procured by the defence, I am reluctant to consider it  
20 because it is coming from the defence. That is how it happens in practice.

**ADV NGCUKAITOBI SC:** No, I am not sure I understand. An expert is meant to assist the court. So I bring an expert or you bring an expert, he will assist both of us.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Because he will make concessions where it is fair, but he will be neutral.

**ADV CHAUKE:** Yes, I am saying you are asking me to comment why the prosecutors are saying that. Now ...[intervenes].

**ADV NGCUKAITOBI SC:** So, you are trying to interpret what they are saying.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** No, but I am asking you why does  
10 it matter.

**ADV CHAUKE:** It does not matter.

**ADV NGCUKAITOBI SC:** Okay. Now, then he says in 2012 he was appointed to do reconstructions of some of the crime scenes and is now to be called as the prosecution's witness. Now, of course the problem here is that they do not mention Steyl was there in 2008 when Mr Mkhize was killed. All of these experts relied on crime scene photographs, post-mortem photographs and other statements in the docket. Their evidence should be evaluated against the evidence of  
20 the pathologist and ballistics experts that examined the bodies of the deceased and the exhibits. I presume that is a fair statement.

**ADV CHAUKE:** It is a fair statement but it contradicts their conclusion.

**ADV NGCUKAITOBI SC:** Well, the problem is they never

engaged with it.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** You know, they never engaged with, these are the findings of Mr Steyl and this is why they are wrong.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. And they are also not telling the truth about what they relied upon, because Mr Mangena primarily relied on being present at the crime scenes. The  
10 idea that they were so distant, they say it was photographs, post-mortem photographs and other statements in the docket. But Mr Mangena's evidence was that he visited the crime scenes himself.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** He did not just sit in an office and then rely on statements in the docket.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And Mr Mangena's evidence was that he spoke to some of the witnesses.

20 **ADV CHAUKE:** And in respect of Steyl, he actually attended the physical bodies when the post-mortems were being conducted.

**ADV NGCUKAITOBI SC:** Yes. Now then in paragraph 211, the experts come back again. In Mandeni CAS 760/9/2008, the highwater mark of statement is that he alleged that the

police fired at the suspects when they were already in a lying position. He says that:

10 “The deceased, Mzimane Johannes Nduli, death register, sustained multiple gunshot wounds. The police officer concerned is not denying that he shot at the accused while they were lying. According to Naidoo as they entered the room a black male alighted from the cupboard armed with a pistol. Stolz fired a shot. Naidoo fired several shots towards the suspect. The suspect fell to the floor. The suspect still had the pistol in his hand and Naidoo continued to fire at the male.”

Now again, this is just an acceptance of the entire police version and it is not tested against any logic and against any crime scene reconstruction.

20 **ADV CHAUKE:** But the summary of that paragraph at the end of it says directly the opposite that then there is a *prima facie* case, then which the accused must reply to.

**ADV NGCUKAITOBI SC:** I am saying your conclusion from what they have written ...[intervenes].

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** That it simply shows that Naidoo

should have been charged.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes, I see. Then the last paragraph where the experts come back to the scene is paragraph 224 and that is the Mandeni case where it says:

10 “The ballistic investigation is also incomplete. Several of the cartridges, bullet heads and fragments found on the crime scene are not linked to any firearms. It appears that the firearms of the police were not seized at the time and send for ballistic testing and comparison. The ballistic expert, Steyl, appointed by IPID ...”

Now, was Steyl ever appointed by IPID?

**ADV CHAUKE:** Yes, I think in one or two instances the IPID appointed Mr Steyl as the ballistic expert.

**ADV NGCUKAITOBI SC:** Yes. And then he says:

20 “The ballistic statement in this case is not complete as none of the shooters’ firearms were connected with the cartridge cases and exhibits at the scene.”

**ADV CHAUKE:** Yes, Chair, you will remember even when Maema, sorry, Mangena, even at Maema, when they testified

that when Mr Steyl and Mr Mangena were doing the presentation before the prosecution team, the prosecution team would have preferred and asked Mangena to take over from Steyl and then Steyl was there being instructed, requested by IPID who were doing investigations.

**ADV NGCUKAITOBI SC:** Yes, but what is the relevance of what they are saying? I mean, it looks like these are just arbitrary and irrelevant assertions made in this report. They bear no resemblance whatsoever to the case that is before  
10 them, which is are these policemen guilty of the crimes that they have been accused with or not.

**ADV CHAUKE:** This is irrelevant and like I indicated, once you are looking for an excuse not to do something, you would have to justify it somehow and unfortunately this is how it is being done, but it is done poorly.

**ADV NGCUKAITOBI SC:** Yes. And then the one thing which I, in this paragraph 224, is that there is only one sentence that is quoted from the report of Mr Steyl and so if, according to Advocate Batohi, the only thing she has read is this  
20 document. So she will only think that this is the only thing that comes from that statement. But if you go to the actual statement in this Mandeni CAS 76/09/2008, it is at, so yes, the report of Mr Steyl is at MD0082.

**ADV CHAUKE:** I am there, Chair. It is paragraph 6, that is where it says scene investigation.

**ADV NGCUKAITOBI SC:** Yes. Yes, thank you. Now, you see, the point here is, again a sleight of hand. If you read only this report, you would come to the conclusion that Mr Steyl's evidence is that the firearms of the shooters are not connected to the cartridges found on the scene. That is what you would conclude.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, if you go to the actual report where the statement appears from, it is at MD0094. So just  
10 go there, MD0094.

**ADV CHAUKE:** I am there, Chair.

**ADV NGCUKAITOBI SC:** Because it looks like these authors were doing something more than just recording things that support the NPA. They were also, and things that support the police, they were also distorting information. I want to show you what they did here. MD0094 under paragraph 10, now, that paragraph, it says:

20 “The ballistic statement in this case is not complete, as none of the shooter's firearms were connected with the cartridge cases and exhibits at the scene.”

Okay.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, if you stop there, you see, if

you compare with 224, the last sentence, you know they put a full stop there. Can you see that?

**ADV CHAUKE**: Yes, I see.

**ADV NGCUKAITOBI SC**: Yes. But when you go to the actual document, you know they put a comma and they continue, right. It says:

10                   “However, in summary, it appears that  
                          two 9mm pistols, one LEWZ88 pistols  
                          with erased serial number, and one CZ  
                          pistol with serial number G2921, were  
                          retrieved from the scene.”

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Now, that information is excluded from the report.

**ADV CHAUKE**: Ja, that is very unfortunate, because it suggests ...[intervenes].

**ADV NGCUKAITOBI SC**: But it continues. It then says:

20                   “This is also depicted on the scene  
                          photographs, indicating the pistols on  
                          the carpet in the vicinity of the  
                          deceased. One of these pistols fired  
                          two shots.”

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: None of that actually appears. It is deliberately excluded.

**ADV CHAUKE:** I follow ...[indistinct].

**ADV NGCUKAITOBI SC:** Then it continues:

10 “However, there were two 9mm shot  
9.17mm calibre cartridge cases  
retrieved from the scene, where there  
was no firearm on the scene that could  
have fired these cartridges. It is also  
unclear if these two cartridge cases  
come from one pistol or two different  
pistols. Furthermore, there is no  
mention of the exhibits, which I  
retrieved from the scene and handed  
over to the Independent Complaints  
Directorate.”

Then look at paragraph 11, which again is just not  
quoted. I mean:

20 “Based on the information available to  
me at this time, it is my opinion that  
deceased Zamani Johannes Ndluli,  
death register 3472/08, sustained  
multiple gunshot wounds. There was an  
entrance and exit gunshot wound to the  
head, which is consistent with the  
deceased in a lying position, as  
depicted in LCRC photographs with an

orange striped shirt. I retrieved a 9mm P bullet, which had impacted on the carpet directly underneath the position of the head of the deceased. The exit wound on his head is consistent with the bullet impact mark in the carpet underneath. A further 5.56 calibre fragmented projectile was retrieved from the carpet in the vicinity of the waist of the same deceased as above.”

10 Now, what do we know about the 5.56 calibre fragmented projectiles?

**ADV CHAUKE:** Those are the ones that are being carried by the police.

**ADV NGCUKAITOBI SC:** Yes, they come from the R5's.

**ADV CHAUKE:** The R5.

**ADV NGCUKAITOBI SC:** Yes. Then it goes on and on and on and on. It is too long. It goes on and on. But the point is this, in many parts, they ignore the reports. Where they refer to the report, it is just deliberately misleading, because it cuts sentences down, and then it omits all of the other information that points to the culpability of the police.

20 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. Now, we have now dealt with those two parts, one on the ballistics. Sorry, there is one

more actually on the ballistics, which is the issue of the residue. I forgot to ask you about it. At paragraph 221 ...[intervenes].

**CHAIRPERSON:** Just a minute, please. Are you okay over there? Is it at the back? Madam, are you fine?

**FEMALE SPEAKER:** Yes, I am okay. I drank water ...[indistinct] [microphone off].

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

**ADV CHAUKE:** Sorry, Chair, can I take a stretch and make  
10 a turn at the bathroom?

**ADV NGCUKAITOBI SC:** Too much information.

**CHAIRPERSON:** You are absolutely correct, Counsel. You are absolutely correct. We had anticipated, actually, that we will adjourn this time. Yes, let us take a ten minutes break and reconvene.

**ADV CHAUKE:** Thank you, Chair.

**CHAIRPERSON:** Yes, thank you. You are still under oath, Counsel.

**ADV CHAUKE:** Thank you, Chair.

20 **ENQUIRY ADJOURNS**

**ENQUIRY RESUMES**

**CHAIRPERSON:** I see notes right in front of me, Counsel, about when we are going to adjourn and when we are going to resume, before Good Friday and after.

**ADV NGCUKAITOBI SC:** Oh.

**CHAIRPERSON:** Someone has been kind to write some notes for me.

**ADV NGCUKAITOBI SC:** Oh, giving you the answers or asking the questions?

**CHAIRPERSON:** Would you like us to remind you?

**ADV NGCUKAITOBI SC:** Yes, Madam Chair, that would be appreciated.

**CHAIRPERSON:** The last hearing date, as we had mentioned, will be on Tuesday, the 31<sup>st</sup> of March, meaning  
10 that we will recess from Wednesday, the 1<sup>st</sup> of April, until and including Tuesday, the 7<sup>th</sup> of April 2026. The hearings will then resume on Wednesday, the 8<sup>th</sup>. If you can remember that, so that whatever you do, you bear that in mind, Advocate Ngcukaitobi.

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

**ADV CHAUKE:** And before I caution the witness, how far are we going to still sit here?

**ADV NGCUKAITOBI SC:** Madam Chair, I think I, no, I think yesterday I did not make an undertaking, but I probably still  
20 have another 40 minutes on the analysis of this report. But on Mdluli, I have done most of the work already. I will probably be another, let us say, hour. So, I think maybe then I have an hour and 40 minutes to go in total.

**CHAIRPERSON:** [Indistinct]... [microphone off] Let me just find out from my sisters. In other words, you will need

something like one hour, 45 minutes, closer to two hours.

**ADV NGCUKAITOBI SC:** Yes, closer to two hours. I think to be realistic, that is what I would need. I am happy to adjourn now if that is the feeling and then, but then I will need between 9 and tea time on Monday.

**CHAIRPERSON:** [Indistinct]... [microphone off] Counsel, you can finish conferring with your sister.

**ADV MOHLAMONYANE SC:** We are done.

**CHAIRPERSON:** Are you done?

10 **ADV MOHLAMONYANE SC:** [Indistinct]... [microphone off].

**CHAIRPERSON:** You heard what Advocate Ngcukaitobi is saying, that we will still need about one hour, 45 minutes to finish with this witness. The plan was to afford you an opportunity to start cross-examining on Monday, also with the view that his last few witnesses could be squeezed before we retire on Tuesday. Are you opposed to us proceeding? May we still proceed?

**ADV MOHLAMONYANE SC:** Today?

**CHAIRPERSON:** Yes, sir.

20 **ADV MOHLAMONYANE SC:** To afford ...[intervenes].

**CHAIRPERSON:** To 7 o'clock.

**ADV MOHLAMONYANE SC:** To afford my colleague ...[intervenes].

**CHAIRPERSON:** An opportunity to finish with this witness today.

**ADV MOHLAMONYANE SC:** To finish. No, I have no objection to that.

**CHAIRPERSON:** That will enable you to prepare for cross-examination. And ...[incomplete].

**ADV MOHLAMONYANE SC:** Even if he were to proceed on Monday, if he were to proceed on Monday, I am amenable to that suggestion.

**CHAIRPERSON:** Yes, the point is, you remember he still has other witnesses who may not even be long, though. But  
10 the idea is to have his case being closed when we leave, when we retire on Tuesday. Then when we reconvene in April, you will have an opportunity to proceed with your witnesses. We bear in mind, as we mentioned in chambers, that your period in April is already truncated by these holidays. So we are trying to facilitate finality to afford you ample time. Are you opposed to us proceeding until about 7  
o'clock?

**ADV MOHLAMONYANE SC:** I am not opposed, Madam Chair.

20 **CHAIRPERSON:** You are not opposed?

**ADV MOHLAMONYANE SC:** No.

**CHAIRPERSON:** Everybody else? We are guided by Counsel here. We have a lot of witnesses to finish with and I think if you can bear with us so that we finish, hopefully, Advocate Ngcukaitobi ...[intervenes].

**ADV NGCUKAITOBI SC:** Yes, Madam Chair.

**CHAIRPERSON:** By quarter to 7 ...[intervenes].

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** If you can aim at that.

**ADV NGCUKAITOBI SC:** Yes, thank you, Madam Chair.

**CHAIRPERSON:** If a need arises, we will take a five minute comfort break, Advocate Chauke. I have not even enquired from you. You are the main person. You have been talking since morning. Are you comfortable that we proceed, or you  
10 would rather pause and continue early on Monday? If we decide to proceed on Monday, we may have to start even early.

**ADV NGCUKAITOBI SC:** No, I am not complaining, Madam Chair. I will have to, you know, actually, today I arrived here at 10 past 8. No one knows this and no one ...[indistinct].

**CHAIRPERSON:** Advocate Chauke, are you comfortable that we proceed until about quarter to 7?

**ADV CHAUKE:** I am comfortable, Chair.

**CHAIRPERSON:** You are comfortable?

20 **ADV CHAUKE:** Yes.

**CHAIRPERSON:** Yes, thank you. You are the main person here, and your decision guides us. Thank you. You may proceed, Counsel.

**ADV NGCUKAITOBI SC:** Thank you.

**CHAIRPERSON:** You are under oath still, sir.

**ADV CHAUKE:** I confirm, Chair, thank you.

**ANDREW CHAUKE** (still under oath)

**CHAIRPERSON:** Yes, thank you.

**ADV NGCUKAITOBI SC:** Thank you.

**ADV BALOYI-MERE SC:** Advocate Ngcukaitobi, I am sorry to interrupt.

**ADV NGCUKAITOBI SC:** Yes.

**ADV BALOYI-MERE SC:** Although I am the one complaining about leaving here late, but I had a question on the last point  
10 that you were dealing with, the Mandeni CAS 78/09/2008.

**ADV NGCUKAITOBI SC:** Yes.

**ADV BALOYI-MERE SC:** Advocate Chauke, if you can school me here, the first sentence there says the ballistic investigation is also incomplete. Now, I want to understand that is it incomplete in terms of the documents that have been filed, or it is incomplete because the investigation is still ongoing, especially given that none of the shooters' firearms were taken for ballistics or something, unless if I understand it wrong. But if my understanding is correct that the ballistic  
20 investigation is incomplete, then it means this docket is still, or this case is still open.

**ADV CHAUKE:** No, Chair. The ballistic report is complete. That is why before we adjourned, Counsel took me through the completeness of the investigation, of the ballistic report of Mr Steyl. That is why where they write to say the ballistic

...[indistinct] appointed by IPID also confirms this. He says:

“The ballistic statement in this case is not complete as none of the shootists’ firearms were connected with the cartridges, cases, and exhibits at the scene.”

On the conspicuous of the evidence, as you have it, to do the ballistics test of the shootists in the circumstances where they admitted that they have shot and then  
10 ...[indistinct] did not shoot at them, there will be no reason for Steyl to do any further analysis on that.

**ADV BALOYI-MERE SC:** You are confusing me further.

**ADV CHAUKE:** Oh.

**ADV BALOYI-MERE SC:** Because if I go to the docket itself ...[intervenes].

**ADV CHAUKE:** Yes.

**ADV BALOYI-MERE SC:** My apologies. If I go to the docket itself, the Forensic Ballistic Services at page MD0094, at paragraph 10, the last sentence says:

20 “Once the complete ballistic statement is received, I will add or alter this section of the statement.”

And then, under conclusion, at bullet number 5, it says:

“The ballistic statement is incomplete as

it does not refer to the shootists' firearms or the exhibits I handed over to the ICD.”

And my understanding of the shootist is, it refers to, for example, the person who shot, who used the 9mm whatever gun, the 9x17mm calibre cartridge, 5.56 calibre fragmented projectile, and so on and so forth. So the person who prepared this statement says, the statement is incomplete as it does not refer to the shootists' firearms or  
10 the exhibits that the person handed over to ICD, meaning they have not received the feedback. So in that regard, my question is, is the case closed? Can we assume that the docket is closed maybe because of lack of evidence or we are still investigating, because my understanding ...[vernacular] so there would not be any time period or expiry of time.

**ADV CHAUKE**: Yes, you are right that if the investigation is not complete, then it means a decision will not have been made one way or another, whether to prosecute or not to  
20 prosecute.

**ADV BALOYI-MERE SC**: Thank you.

**ADV NGCUKAITOBI SC**: Thank you.

**CHAIRPERSON**: But I think on the point in relation to paragraph 224, that if you look at the heading in the forensic ballistic report of Mr Steyl, that specifically deals with the

ballistic statement.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** And what they did there, they just captured the first few words in the first sentence of the report itself.

**ADV CHAUKE:** That is what I was referring to, because the conclusions at the end of the statement, the very same statement, the conclusions indicate that particular findings have been made.

**CHAIRPERSON:** And that is the point that you made earlier  
10 upon the questioning by Counsel that this distorts the Steyl's report.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Thank you, Madam Chair. Just to complete this section, we might as well go to the statement of Ms Shamila Williams, because this is one of the files that she looked into. And so it is, do you have it, Mr Chauke?

**ADV CHAUKE:** In which volume, if I can ...[incomplete].

**ADV NGCUKAITOBI SC:** In which volume?

**ADV CHAUKE:** Yes.

20 **ADV NGCUKAITOBI SC:** That is a good question. It is the statement here in this enquiry, but I do not know where exactly it is located.

**ADV CHAUKE:** Oh, you mean when she testified here?

**ADV NGCUKAITOBI SC:** When she was testifying here, yes.  
Do you have it?

**ADV CHAUKE**: No, no. No, I do not have it. So the one on the computer here, I see it is 3 ...[incomplete].

**ADV NGCUKAITOBI SC**: All right. Okay. And there is problem number one, which is the report of these prosecutors, the senior prosecutors, distorts the findings of the ballistics by cutting it in a comma and putting a full stop, whereas the meaning changes as soon as you read after the comma.

**ADV CHAUKE**: Indeed.

10 **ADV NGCUKAITOBI SC**: That is problem number one. But problem number two, this investigation in fact was completed as per the statements made by Shamila Williams. If you go to paragraph 140 of her statement, page 42, she explains exactly what happened in this investigation.

**CHAIRPERSON**: Sorry, can I get ...[indistinct] [microphone off].

**ADV NGCUKAITOBI SC**: Paragraph 140 of the statement, page 42. I am not sure if it is, there is no effective way of getting ...[incomplete].

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

**ADV CHAUKE**: Oh, I am at BBT. There is a problem with the ...[incomplete].

**ADV MOHLAMONYANE SC**: Madam Chair, it is actually page 60, 140 is found in page 60, if I may assist my colleague.

**ADV NGCUKAITOBI SC:** Sorry?

**ADV MOHLAMONYANE SC:** I am saying ...[intervenes].

**CHAIRPERSON:** [Indistinct]... is trying to help ...[indistinct]  
[microphone off].

**ADV MOHLAMONYANE SC:** Paragraph 140, Advocate Ngcukaitobi, is actually found on page 60 of Advocate Batohi's statement.

**ADV NGCUKAITOBI SC:** Why would it be in Advocate Batohi's statement?

10 **ADV MOHLAMONYANE SC:** I thought you were referring to Advocate Batohi's ...[intervenes].

**ADV NGCUKAITOBI SC:** No, no, no. Shamila Williams.

**CHAIRPERSON:** Shamila Williams.

**ADV MOHLAMONYANE SC:** Oh, I am sorry. My apologies.

**ADV NGCUKAITOBI SC:** Yes, okay.

**CHAIRPERSON:** It is actually paragraph 140, page 3-41, not so, Counsel? Or which paragraph were you looking at?

**ADV NGCUKAITOBI SC:** Yes, I am looking at paragraph 140.

20 **CHAIRPERSON:** One four zero.

**ADV CHAUKE:** I am there, Chair.

**CHAIRPERSON:** Thank you.

**ADV NGCUKAITOBI SC:** Yes. Now, so this is how she explains what happened. So this is the Mandeni CAS 76/09/2009.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, if you compare it with paragraph 224 of the report by the de Kock panel, that is Mandeni CAS 76/09/2008. So we are talking about, I think there was a problem with 2009 in an earlier docket, but it was corrected. This is the 2008 dockets.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Because the killing was in September of 2008.

10 **ADV CHAUKE:** 8, yes.

**ADV NGCUKAITOBI SC:** So this is what she explains.



“On 16 September 2008, Mr Nzame Nduli and Nkosinathi Mthembu were shot and killed by members of the Cato Manor SVC.”

So, common cause, it was Cato Manor that killed him.

20 “The ICD investigator assigned to this case was Ridwan Haffejee. In January 2010, I reopened the ICD investigation into this matter. When I perused the SAPS investigation diary and the documents contained, I identified two critical gaps in the investigation. The first was that the firearms discharged by the Cato Manor SVC members had not

been collected and submitted for politics analysis and had not been checked against the IBIS database.”

Now, that is the problem referred to by Mr Steyl, that I go to the scene and I find cartridges, but the killers have not handed in the weapons. That is the gap.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. Now:

10 “And then I contacted the Cato Manor  
SVC to enquire about the additional  
firearms involved in the incident that  
were not collected when the scene was  
processed. I was informed that  
Inspector Mostert's firearm ...”

This is one of Mostert's specials.

20 “Would need to be uplifted from the  
SAPS in Rustenburg as it had been  
discharged in the shooting that is the  
subject of the SAPS investigation in  
Rustenburg, CAS 1098/09/2008. On 17  
June 2010, I visited the scene in  
Mandeni to locate and interview with the  
witnesses.”

That is a different matter, but the point is this.  
Mostert has shot different people in Rustenburg and in

Mandeni.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And the firearm is in Rustenburg.

It has not been handed in, in Mandeni.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** That is the problem.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And that is why there is a gap between the cartridges and the firearms that have been

10 tested.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, this is the explanation of this.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Then if you go further to paragraph 148, you will recall that when we read the statement of Mr Steyl, he was puzzled by this idea that he found a 5.56mm cartridge without the firearm. Now, that puzzlement is resolved by paragraph 148 of Ms Shamila Williams' statement.

20

“In or about 10 June 2010, I obtained the missing firearms from the Rustenburg SAPS. I collected one R5 rifle with serial number 347921ICD12297 and one Z88 pistol.”

Remember the specialist of the Z88?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Who is that?

**ADV CHAUKE:** Mostert.

**ADV NGCUKAITOBI SC:** Yes.

10 “With serial number 2119840ICD22615,  
together with one R5 cartridge and one  
R5 bullet head, ICD12297. Len, John,  
and I requested a ballistic analysis of  
the additional firearms and the  
additional cartridge cases and bullets.”

Now, this is the whole point, is that if you read, this  
is where this report really, really, really is problematic. If you  
read both statements of, this statement I am dealing with is  
also contained in that docket, in the Mandeni docket  
...[intervenes].

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Of Ms Williams. One investigator  
says, there is a problem that I am collecting cartridges of a  
Z88 and an R5, but I cannot find these weapons. And then  
20 Ms Williams says, no, I went to find the weapons. That,  
therefore, concludes the investigation. Now, you then get a  
report like this, paragraph 224. I mean, this is gravely  
misleading, is it not?

**ADV CHAUKE:** Indeed, yes.

**ADV NGCUKAITOBI SC:** Yes. Because no one refers to the

statements made by Ms Shamila Williams, who says, no, the problem was that these people shot someone in Mandeni and in Rustenburg.

**ADV CHAUKE:** And Rustenburg.

**ADV NGCUKAITOBI SC:** Yes, and the weapons were there in Rustenburg, being tested that side. And that is why, at the time of the completion of the first report, these weapons could not be linked to the cartridges.

**ADV CHAUKE:** Yes.

10 **ADV NGCUKAITOBI SC:** But then she says, I sorted that out. I found the rifles.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. But you would expect, Mr Chauke, would you not, that in 2019, when these prosecutors are sitting around the table, they will do precisely what we have done, which is, if somebody says, I have looked at the statement, it has got something missing, you look somewhere else in the docket to see whether it can be found. And then, that is where the answer is.

20 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** That is to be expected, a thorough evaluation of, especially where you are reviewing at the scene that we have made earlier on, you will be as thorough as doing the comparisons of all the statements of what is contained in the

docket.

**ADV NGCUKAITOBI SC:** Because the problem is that they leave you with the impression, in paragraph 224, that the ballistic investigation is incomplete.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And therefore, you would think that the people who did this case, the policemen and your team, were incompetent because they did not make sure that everything is in the docket.

10 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** But that is simply because the reader has not done their job.

**ADV CHAUKE:** Not that they did not do their job.

**ADV NGCUKAITOBI SC:** Okay.

**ADV CHAUKE:** They did their job to mislead.

**ADV NGCUKAITOBI SC:** Well, yes, the reader has produced a misleading report.

**ADV CHAUKE:** Yes.

20 **ADV NGCUKAITOBI SC:** Yes, thank you. So that is the answer, Advocate Baloyi-Mere.

**CHAIRPERSON:** Sorry, when I looked at everybody earlier about whether we should proceed, I did not recognize the NPA. Advocate Lekgetho, I suppose you are fine with the arrangements?

**ADV LEKGETHO:** [Indistinct]... [microphone off].

**CHAIRPERSON:** And also, members of our team from Harris Molebatse Attorneys.

**FEMALE SPEAKER:** We are happy to proceed.

**CHAIRPERSON:** I meant no disrespect to you. And of course, all the journalists. Yes, thank you.

**ADV NGCUKAITOBI SC:** Everyone happy to, well, everyone is proceeding, whether they are happy or not.

**CHAIRPERSON:** But of course, it is the respect that you accord them.

10 **ADV NGCUKAITOBI SC:** Yes. Okay, thank you, Madam Chair. Look, if you asked me, I would have preferred to adjourn, but anyway, I am now here. My colleagues point me to another error that I had not picked up, but they picked up, which is in paragraph 225.

**ADV CHAUKE:** I am there, Chair.

**ADV NGCUKAITOBI SC:** Yes. Now, so it says in some of the dockets, there are mistakes in some of the ballistics reports, and some reports are not filed in the docket, okay. So let us focus on the part which says that reports are not  
20 filed. In Mandeni CAS 76, it is stated that:

“The report that the cartridge case is mentioned in 3.1 were fired from one firearm. This is a typographical mistake in the ballistics report and should be corrected. 3.1 refers to a firearm, one

9mm Parabellum, calibre ...[indistinct]  
models, Z88 semi-automatic pistol with  
serial number obliterated and not  
cartridge.”

Now, why would a prosecutor be worried on their own  
version with a typographical mistake?

**ADV CHAUKE:** I am surprised.

**ADV NGCUKAITOBI SC:** Yes. Now, then they explain  
another part, which would be more serious, where there is a  
10 report that has not been included in the docket. And then  
they say:

“In Durban Central CAS 185/02/2009,  
the ballistics report with reference  
number LAB-185920905 was not found.”

All right, so that would be material, would it not be,  
that there is a report that is not found?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, when we go to that docket,  
which is 185, you remember that is a big one. It has got lots  
20 and lots of documents. And we then try and find it. So,  
Madam Chair, it is DC451 up to DC454. Yes, I think it is  
DC000451. Now, have you got DC000451?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, the numbering is actually  
clearer on DC000452, which is the following page.

**ADV CHAUKE:** I am there, Chair.

**ADV NGCUKAITOBI SC:** Yes. Now, there it says LAB18592/09(6).

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And then, so that is clearer. Then if you go up, this is an affidavit because the number at the top there is a little bit obscure. The name seems to be Solomon Kgotlaetsile Modisane, who is a warrant officer in the ballistic section employed as a forensic analyst. Can you  
10 see that?

**ADV CHAUKE:** You mean the deponent of the statement?

**ADV NGCUKAITOBI SC:** Yes, that is the name of the deponent of the statement. But the point is that this is a man from the ballistic section of the police.

**ADV CHAUKE:** It is warrant officer, I think, Solomon Kgotlaetsile Modisane.

**ADV NGCUKAITOBI SC:** Yes, exactly. But if you look at where he comes from, he is a warrant officer employed as a forensic analyst, but he is attached to the ballistic section.

20 **ADV CHAUKE:** Yes, in Silverton, forensic analyst with address, Pretoria Road, Silverton.

**ADV NGCUKAITOBI SC:** And then he provides this ...[intervenes].

**ADV CHAUKE:** His force number.

**ADV NGCUKAITOBI SC:** Yes, he provides this ballistics

report, which ends at DC000454 on the 27<sup>th</sup> of March 2012.

**ADV CHAUKE:** Yes, yes.

**ADV NGCUKAITOBI SC:** So, I come back then to this report.

So the impression you would get, therefore is that the, there is no reference to the ballistics report that is there from the forensic analysis section. Sorry, so the impression you would get therefore if you go back to paragraph 225, is that there is no ballistic report. In other words, they do not say, well, we have got a ballistic report from Mr Modisane. If they are

10 saying there are flaws with it, then they must say there are flaws with it. But you get the impression that there is no ballistic report.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** You see what I mean? Because this is, if you look at where the sentence starts:

“In some of the dockets, there are mistakes in some of the ballistics reports, and some of the ballistics reports are not filed in the docket.”

20 **ADV CHAUKE:** Which is incorrect.

**ADV NGCUKAITOBI SC:** Yes. Now, you would expect then that somebody would say, but I have seen a ballistics report from Mr SK Modisane, it says the following.

**ADV CHAUKE:** But, Chair, in respect of this specific ballistic report, that sentence, that says, in Durban CAS 185/2/2000,

the ballistic report with reference LAB18592(5) was not found. Then the one that we opened here is 185/2/90(6).

**ADV NGCUKAITOBI SC:** Yes, no, I see that. The difference is the 5 and the 6.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** But the point I am making is this. If you look at the beginning of the report, you think that when you read the report, if that is the only thing you have read, that there is, in fact, no ballistics report.

10 **ADV CHAUKE:** Exactly, because the next sentence that says, in the same docket there appears to be mistakes in the reports.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** So you cannot have mistakes in the reports which you say it could not be found.

**ADV NGCUKAITOBI SC:** Yes. So what you would expect, if you are fairly analysing the docket, you would say, look, I am missing report 6, if we are talking about report 6. But I have got report 5.

20 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** That is a ballistics report.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** You see.

**ADV CHAUKE:** In this context, it will say, we did not find a ballistics report 6, we found ballistics 5.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** We found ballistics 6.

**ADV NGCUKAITOBI SC:** Yes, and then you would say this is what it says.

**ADV CHAUKE:** Yes, yes.

**ADV NGCUKAITOBI SC:** But if you are like Advocate Batohi, the only thing you have read is this, you would think, okay, well, there are no ballistics reports here.

**ADV CHAUKE:** Indeed.

10 **ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** Counsel, even in relation to that 6, it is clear that it relates to the Durban Central CAS 185/2/2009.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** We know that it is 2008.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** Am I correct, Counsel?

**ADV NGCUKAITOBI SC:** Yes, yes. That is the ...[intervenes].

20 **CHAIRPERSON:** So they say there, that in relation to this Durban Central, the ballistics report was not found, this number 5.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** But where is mention made in respect of number 6, because it is there?

**ADV CHAUKE:** Yes, that is the point I was making, to say if

they say they did not find the (5), the (6) is there.

**CHAIRPERSON:** At least they must make mention of (6).

**ADV CHAUKE:** Yes, because they say, the last sentence, in the same docket, there appears to be mistakes in the reports, which according to them, they did not find. In the same docket, a second set of bullets from the mortuary are missing.

**ADV NGCUKAITOBI SC:** Yes, but where are those from?

**ADV CHAUKE:** It can, on the reading, when you read there to say the report could not be found, you cannot say in the  
10 same breath say there are mistakes in the reports.

**ADV NGCUKAITOBI SC:** Yes. Now it then goes further. If you then look at 226, they say:

“In some of the dockets, either the firearms found in possession of the deceased had a serial number, or in the case of obliterated serial numbers, some of the numbers were retrieved through the etching process.”

Okay, now, this again is another sleight of hand.  
20 They are saying already that these are firearms found in the possession of the deceased.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Now, where is the version that actually these firearms were not found in the possession of the deceased, they were found in the possession of the

shooters?

**ADV CHAUKE:** It does not appear from that paragraph, on the ...[indistinct] reading it does not show.

**ADV NGCUKAITOBI SC:** Yes. But this is a blanket acceptance of the version of the police who have shot these people and they have said, we found these firearms.

**ADV CHAUKE:** My point exactly.

**ADV NGCUKAITOBI SC:** Yes. Then it says:

10 “No investigation was done to determine ownership of how the firearm possibly came in possession of the deceased.”

But the person who brought the firearm is the shooter, so where should the investigation have taken place?

**ADV CHAUKE:** It is accepted that the firearm was with the deceased ...[intervenes].

**ADV NGCUKAITOBI SC:** Yes, but ...[intervenes].

**ADV CHAUKE:** In this narrative.

20 **ADV NGCUKAITOBI SC:** Yes, but where you know that there are at least three witnesses who have said it is the police that planted these firearms, the person to be investigated, would it be the deceased or would it be the police?

**ADV CHAUKE:** On the evidence, as we have it, it will be the police. My problem is they do not say in this docket this is the, you see the opening line there, it is somehow problematic because it says in some of the dockets, either firearms, and

then the example that it is made on the bottom there, in Mandeni, which we have just looked, the second firearm with that serial number was stolen at a police station from SAPS safe 13 and appears to be one of several that went missing from that police station, from that police station ...[indistinct]. No suspects were identified. It therefore begs the question how the state is going to prove that the accused planted this firearm.

**ADV NGCUKAITOBI SC:** But just explain that to me. A  
10 firearm goes missing from a police station ...[intervenes].

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Who has access to a police station?

**ADV CHAUKE:** It is the police.

**ADV NGCUKAITOBI SC:** Yes, and the case that is being made by the NPA is that some of these firearms are used in the commission of offences by the police.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** So why then would they come to  
20 the conclusion that you would not be able to prove that the state, that the accused planted the firearm?

**ADV CHAUKE:** Well, on the face of it, that is easy to prove because the firearm is there in the scene.

**ADV NGCUKAITOBI SC:** And they can trace it back to the police station.

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: Yes. Now, before we took the adjournment, I had wanted to take you to paragraph 221 on the different topic of residue tests.

**ADV BALOYI-MERE SC**: Sorry ...[intervenes].

**ADV CHAUKE**: That is in the de Kock report.

**ADV NGCUKAITOBI SC**: In the, Advocate de Kock's report, yes.

**ADV BALOYI-MERE SC**: Before you go there, in this memo, 10 the de Kock memo, a number of shortcomings were identified in terms of the analysis of these cases. But, and in most instances, we can see that not all the information was included. So some of the information was maybe deliberately or inadvertently excluded. But in instances where the team identified that there was supposed to be a ballistic report and it is not there, and that is the first instance. In the second instance, there are mistakes in the docket and in the reports, things that can be corrected.

Should they not have sent back the dockets to the 20 prosecution team to correct and deal with the issues and go forward, sort of maybe reviewing or overseeing the prosecution team? Or was it the correct procedure to follow to just withdraw or drop the charges because there are mistakes and there are things that can be easily corrected?

**ADV CHAUKE**: No, they could have sat with the prosecution

team. They could have called their colleagues to say, look, we are here, we have got this particular problem because this is not even a problem. What has been characterized there is not accurate.

**ADV BALOYI-MERE SC:** Thank you.

**ADV NGCUKAITOBI SC:** Yes. Yes, I suppose, I mean, it does not even have to be a technical report like a ballistic that contains technical errors that are obscure from the naked eye.

10 **ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Even an ordinary lay witness can make a mistake in a statement.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Do you then say I have no case because the lay witness has made mistakes in the statement?

**ADV CHAUKE:** No, not really. That is why I am saying if they had discovered this and there was a consultation with the prosecution team, they would have got an explanation how those things came about and how they could be overcome without making a meal out of that.

20

**ADV NGCUKAITOBI SC:** Yes. So then we just deal with the Howick case. You know, somewhere else in the report they say in several instances primer residue was found in the hands of the deceased. They say several. Then you try and find in the report where is the several. You then come to one

paragraph that talks about one instance, which is this one of Howick.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Paragraph 221. Now, if you remember the story of Howick, now, this is the story of Mr Magojela Ndimande.

**ADV CHAUKE**: And his bodyguard, Tembe.

**ADV NGCUKAITOBI SC**: And Mr Tembe.

**ADV CHAUKE**: Yes.

10 **ADV NGCUKAITOBI SC**: And you remember how ruthlessly they were executed.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: And one of the statements by the police, Mr Mostert was there. Mr Mostert used a shotgun, Z-88. The police admitted that Mr Tembe was shot while he was running away.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: And they never alleged that Mr Ndimande, who was driving the vehicle, pulled a gun.

20 **ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: At the time that they were shot from the statements that we analysed. Now, look at what they say here in this case, Howick CAS 106/08/2000.

“Residue tests were done on the hands of the deceased and police officials.

Primer residue was found on the test sample marked *inter alia* B638 right. There is a statement from Zondi that simply stated that he collected 11 spent cartridges, 86 live rounds, five rifles, three pistols, five magazines. And he produced primer residue test results on two deceased and on the policemen involved. It is not clear on whose hands the primer residue was found and why, if several police officers admitted that they shot, he took primer residue on the hands of one police officer.”

Now, just reading this, I could not work out why does this matter. It is common cause there that those two gentlemen were killed by the police, and it is also common cause which of the bullets were the fatal ones.

**ADV CHAUKE:** But it is irrelevant.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** To the extent that the allegation of the police is that there is residue in one of the deceased. Why must we investigate that? And then he say it is incomplete. Why the other policemen's hands were not tested for residue? Why do you test them when they said they have shot?

**ADV NGCUKAITOBI SC:** No, no, no. You see, it is worse

than that. They do not say that there was primer residue in the deceased. No. They say it is not clear in whose hands the primer residue was found. So this is not even a case where they say the primer residue proves that the deceased was trying to shoot. No. They say we tested the cops and tested the deceased and we found primer residue and we cannot work out in whose hands the primer residue was.

**ADV CHAUKE**: My point is, even if you do not know in whose hands the primer residue was, on the facts of what we now  
10 know and the explanation from the police, the residue, whether it is from the two deceased or from the police, I am saying it does not matter, because on the evidence, what the statements that we refer to, they shot the deceased when the deceased was running.

**ADV NGCUKAITOBI SC**: Yes.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: No, but I mean, you see, the whole thing of the primer residue, which is the point the evidence  
20 leaders tried to make with Mr Mangena, you remember, was that, well, the primer residue, in fact, not just the evidence leaders. It was also Advocate Nazir Cassim who said, look at the primer residue. The primer residue shows that you are shooting. But this is not a case here where the primer residue is found in the hands of the deceased. This is a case where it is unclear on whose hands the primer residue is. Why

would that be a reason not to proceed with the charge?

**ADV CHAUKE:** No, it is irrelevant. That is what I am saying it is to find an excuse, to do a whitewash. It cannot. That is what I am saying even if there was a residue on the hand of, take it further on the hand of the deceased, you needed to determine whether, indeed, the deceased shot at the police, because the presence of residue on the hand of the deceased does not necessarily follow that you fired the shot.

**ADV NGCUKAITOBI SC:** Yes. And then the same thing they  
10 make in Mandeni, the case we have just looked at, and then they say in paragraph 222:

“It is not clear from the evidence in the docket on whose hands the primer residue were found.”

And then they talk about two boxes where the primer residue tested positive, and then there is no report from the LCRC. Now, again, where it is admitted that the police shot the deceased, and then you say, well, on the evidence, I cannot work out where the primer residue comes from. What  
20 is the relevance of that?

**ADV CHAUKE:** It is irrelevant. That is why I am saying, if a policeman said, I am the one who shot at the deceased, why do you have to prove that his firearm is the one that shoot the deceased when the policeman himself says?

**ADV NGCUKAITOBI SC:** Yes. So we have now done a lot

of, well, most of the evidential and methodological flaws in what the de Kock panel did. Do you think some of this could have easily been resolved had they just, not just spoken to the prosecution team, but spoken maybe to the investigators?

**ADV CHAUKE:** Either way. Either way, whether they could have spoken to the investigation team or they could have spoken to the prosecution team, they would have, this would have been simply clarified, simply clarified.

**ADV NGCUKAITOBI SC:** Yes. Then you have another  
10 section then that I need you to deal with, because it looks like it is an overarching section on racketeering. We dealt with all of the legal problems of racketeering with Advocate Maema. I am not going to ask you about those, because I have been spending time with you just on the facts.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** This is at page 82 of the report, paragraph 212, under the heading, lack of proper investigation, subheading racketeering offences. So then they say here:

20 “It is evident after the analysis of the dockets that there were serious concerns regarding the quality of the investigation into the racketeering offences and the underlying predicate offences. Investigations of this nature

ordinarily take more than five months to  
be finalized.”

Now, let us just stop there. Now, what is the  
relevance of the fact that racketeering investigations usually  
take more than five months? If you finish it in a month, what  
is the problem?

**ADV CHAUKE:** Ja, there is no problem at all. If you read  
further, you will see that it is trying to come with a  
justification which is untenable.

10 **ADV NGCUKAITOBI SC:** Yes, but in this particular one, we  
know that this investigation began in January 2012 when  
General Mabula was asked by General Dramat, after the  
newspaper report, to go to KZN and constitute a team of  
investigators. We also know that the indictment was finalized  
only in August, which would, therefore, meet their period of  
five months, because this was done in eight months.

**ADV CHAUKE:** Yes. If you look at that five months, Chair,  
the arrests were done in June.

**ADV NGCUKAITOBI SC:** Yes.

20 **ADV CHAUKE:** So that five months is intended to describe  
that arrest of June.

**ADV NGCUKAITOBI SC:** Yes, but they were not arrested in  
June. That is where there is a slight offhand again. In June,  
they were not arrested for racketeering.

**ADV CHAUKE:** No, no. I hear you, but I am saying if one

read this in accordance with what would have actually happened, the suspects, firstly, when they were arrested for the general offences of murder and related offences was in June, so if you calculate from January to June, that is where the five months is coming from.

**ADV NGCUKAITOBI SC:** Well, that is still six months. That is still more than five months. In fact, the investigation here began in December 2011.

**ADV CHAUKE:** No, no, I am accepting that it started in  
10 January, like you are giving an example about General Mabula.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** In January to June. That is how I see the five months trying to speak to that.

**ADV NGCUKAITOBI SC:** But why would you, as the NPA, criticize a prosecutor for investigating a case over six months? I just do not understand what the problem is.

**ADV CHAUKE:** When he should comment that the investigation was done as quickly as possible.

20 **ADV NGCUKAITOBI SC:** No, but their point is that investigations of this nature generally take more than five months to be finalized. But yours took eight months to be finalized.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** So it is more than five months, so

what is the problem?

**ADV CHAUKE:** It is fluffing.

**ADV NGCUKAITOBI SC:** Then they say in cases of this ...[intervenes].

**CHAIRPERSON:** Are you saying he should actually be commendable?

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** Because it shows thoroughness.

**ADV CHAUKE:** Yes.

10 **ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Yes, that is what I was referring to, Chair.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** That the more time you take to consider these things, the better, because at least we now know that a thorough investigation has been done.

**ADV NGCUKAITOBI SC:** Yes. Then they say:

“In cases of this nature, a racketeering docket will be registered that will document the investigation.”

20 This did not happen in this case.

“There is consequently no investigation done that shows how this case was investigated. There is thus no objective record of the investigation.”

What is your answer to this?

**ADV CHAUKE:** Completely hogwash. There is no way where you go to the police station and go and open a racketeering docket. There is nothing like that. There is just nothing like that. Racketeering is determined because you look at predicated offences and then look at patterns and then you determine as a prosecutor that there is racketeering.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** No, a policeman is not going to sit at the police station and then he says this is a racketeering docket.

10 There is nothing like that.

**ADV NGCUKAITOBI SC:** Yes, yes, because racketeering is a conclusion of law.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Based on the predicate offences and the other elements.

**ADV CHAUKE:** Yes, indeed.

**ADV NGCUKAITOBI SC:** Yes. So now you have got 23, you can see the patterns, and you describe that as racketeering.

**ADV CHAUKE:** Yes.

20 **ADV NGCUKAITOBI SC:** And as you say, that there is no policeman sitting at a police station who is going to open a docket of racketeering.

**ADV CHAUKE:** No.

**ADV NGCUKAITOBI SC:** Where do they get this from, this idea, because they do not even reference their source. They

just assert this as their own conclusion.

**ADV CHAUKE:** I do not know. I can suspect. Like I am saying, once you do things to want to reach a particular conclusion, you will do some of these things.

**ADV NGCUKAITOBI SC:** Yes.

**ADV BALOYI-MERE SC:** Should we assume that they did not know what they were doing?

**ADV CHAUKE:** I happen to know closely three of the members of that prosecution team, except one who is based  
10 in Cape Town, but the one, unfortunately, may his soul rest in peace, Mamabula, I think he is the one who drafted this thing.

**ADV BALOYI-MERE SC:** Meaning he did not know anything about racketeering?

**ADV CHAUKE:** Ja.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** Did he sign? Did he sign this report?

**ADV CHAUKE:** Yes, Madam Chair. You have got the two reports where he, him, and Advocate de Kock signed. And  
20 then you have got the other one where only Advocate de Kock signed.

**ADV NGCUKAITOBI SC:** Yes. Well, I mean, you would expect in something like this that they would produce something like a racketeering manual, you know, or a racketeering policy, you know, that you can reference and

say this is how it is done. You cannot just thumb suck and just put a sentence like this.

**ADV CHAUKE:** Of course.

**ADV NGCUKAITOBI SC:** Yes. Then they say:

10 “In the Danikas statement, the allegation is that the criminal enterprise has been in operation for a longer period than what is alleged in the indictment. If the purpose of a racketeering investigation is to look at the life and continuity of the criminal enterprise and how it evolved over a period, the allegations in the Danikas statement and corroboration thereof should have been fully investigated, which has not been done at all.”

I do not understand what this means.

**ADV CHAUKE:** No, it is a lack of experience of the drafter.

**ADV NGCUKAITOBI SC:** Yes.

20 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. But, I mean, what does it mean that you have not corroborated the allegations contained in the Danikas statement? One of the allegations, just as a common example, is the Berea case.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** There is a full Berea case docket.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** With full witness statements, including an admission by Mr Mostert that he shot at the gentleman.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And the other policemen that were on the floor when he landed from the fourth floor.

**ADV CHAUKE:** Yes.

10 **ADV NGCUKAITOBI SC:** And continued to shoot him.

**ADV CHAUKE:** Yes. So it could not be that you can come with that kind of statement with reference to Danikas. It just is untenable.

**ADV NGCUKAITOBI SC:** Yes. Then they say:

“This once again shows that there was a haste to obtain the racketeering authorizations since an investigation focused on the life and continuity of the criminal enterprise should have been done over a long period.”

20

It is unclear what this means. It is either it means you should have delayed your investigation, you should not have finished it in eight months, you should have done it over one year maybe, over two years, I do not understand.

**ADV CHAUKE:** No, but apart from that, Chair, that statement

alone indicates that the drafter of the statement does not even understand what POCA and the enterprise and the life of enterprise is all about.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** That is what it shows.

**ADV NGCUKAITOBI SC:** Yes. I mean, the other thing about this sentence is that if you read POCA, one of these objects is to enable the police to disrupt the enterprise.

**ADV CHAUKE:** Yes.

10 **ADV NGCUKAITOBI SC:** So I do not understand what they mean that you should take longer to investigate the enterprise, because if you take longer to investigate the enterprise, rather than achieving the goal of disrupting the enterprise, you actually achieve the opposite of enabling it, because you are just watching them committing crimes and just waiting for, I do not know, a time to lapse, an arbitrary time to lapse.

**ADV CHAUKE:** Indeed. If you are able to determine the racketeering patterns, even in a month or two months, you  
20 should be in a position to act decisively to disrupt or to stop it. The reason why it will take longer is because you are unable to pin the role players and all. That is what takes long. But if in a month or two or three, you are able to pin them together and the like, there will be no reason for you to take long to disrupt that enterprise.

**ADV NGCUKAITOBI SC:** Yes.

**CHAIRPERSON:** Am I, let me just verify this, knowing how difficult it is to investigate, for instance, white-collar crimes.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** Which is also part of the racketeerings. Sometimes it takes longer because those concerned know how to hide.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** And it becomes very difficult to trace them  
10 or to trace the money, for instance.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** So you try to connect the dots. The connection of the dots becomes sometimes a bit difficult.

**ADV CHAUKE:** And even tedious.

**CHAIRPERSON:** And tedious. And it takes a bit longer time.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** So it can also happen that it takes a bit longer time to come to the crux of, or the conclusion of the investigation.

20 **ADV CHAUKE:** Especially where, especially in this case where you are investigating those who are supposed to investigate.

**CHAIRPERSON:** Yes.

**ADV CHAUKE:** It will not be easy for you to get into that space.

**CHAIRPERSON:** Yes.

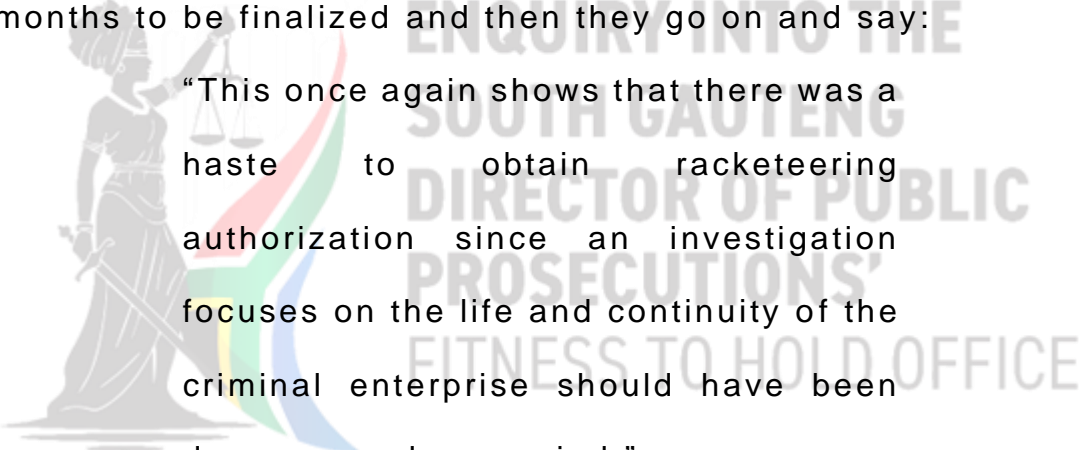
**ADV CHAUKE:** Yes.

**ADV BALOYI-MERE SC:** I have a question. At paragraph 212 and towards the end of 213, are we still talking about the same thing, racketeering, Advocate Chauke?

**ADV CHAUKE:** Yes, that is how I, from the report as I read it, that is what, because in the heading it says racketeering offences.

**ADV BALOYI-MERE SC:** So help me understand this.

10 Investigations of this nature ordinarily take more than five months to be finalized and then they go on and say:



“This once again shows that there was a haste to obtain racketeering authorization since an investigation focuses on the life and continuity of the criminal enterprise should have been done over a long period.”

And from your answer when you were dealing with 212, you said it took almost six months, which was more than  
20 five months.

**ADV CHAUKE:** Yes, I was explaining when I was asked about what is the relevance of five months.

**ADV BALOYI-MERE SC:** And now the team is now being blamed or, ja, that they were in haste to obtain the racketeering authorization since the investigation should

focus on the life and continuity of the criminal enterprise. And my question is, is it really impossible to crack a racketeering case within a shorter period?

**ADV CHAUKE**: Not at all. It is possible. That is why I was giving an example that if in two or three months you are able to crack and disrupt the enterprise and the like, that should be commendable. But unfortunately in most cases it is a complex investigation that needs to be done around those issues.

10 **ADV BALOYI-MERE SC**: But let us come to this specific case in point where there is a pattern coming, building over a number of years and you come in maybe say on the third or fourth year and you go through the dockets, you would be able to establish that pattern within an even shorter period and maybe establish a racketeering principle within a very short period based on the information that you have at hand.

**ADV CHAUKE**: Yes.

**ADV BALOYI-MERE SC**: In that instance, would it be fair to put a blame on a team that delivered before the even  
20 expected time?

**ADV CHAUKE**: No. In fact, you need to commend the people. Remember, this incidents happened from 2007, 2008 that the dockets have been opened. Now, when the so-called investigation will start in 2012, already the incidents have happened, people have been killed. Now, all that you needed

to do is to look at the instances, look at the pattern, take all the dockets, the hundreds of them, 53 like they indicated and out of the 53 and then you realize this other one said 27, we might have problems. With this 23, the pattern is that and then you develop the racketeering and then you indicate the similarities, similar facts and whatever, identify what actors, identify that. That should not even take you three months. That is why the prosecution team were able when they were going, doing these things within three or four months to be able to determine that this, there is this racketeering that is happening in this instance.

**ADV BALOYI-MERE SC:** Thank you.

**MS RAMAGAGA:** Maybe just to follow up on what my sister has said. When one looks at the, well, I will just give the references. The summary that was written by Advocate Mosing that appears on LOO706 to 707, in particular at paragraph 7.

**ADV CHAUKE:** Sorry, Chair, page?

**MS RAMAGAGA:** 00706, LO, né.

20 **ADV CHAUKE:** 706?

**MS RAMAGAGA:** Ja, 706, thank you.

**ADV CHAUKE:** I am there, Chair.

**MS RAMAGAGA:** Yes. Now, when one looks at, right towards the middle, you know there is a sentence that starts with, Hawks had a joint meeting with the Minister a week ago.

Do you see that Hawks, where this sentence starts with Hawks?

**ADV CHAUKE:** Yes, Hawks had a joint meeting with the Minister a week ago.

**MS RAMAGAGA:** Ja, and can you just read that?

**ADV CHAUKE:** -:

10 “Whereby the Minister expressed his dissatisfaction with the slow progress made by the two investigating units since it had been pending since December 2011. It was apparently decided during that meeting that the two units should conduct the matter jointly and that had been working throughout the previous weekend.”

20 **MS RAMAGAGA:** Thank you. Ja, I am just highlighting this also to show, according to what we have on record, that already this issue had already become a pain, even for the country, because if the executive speaks, it means it is urgent.

**ADV CHAUKE:** It is urgent.

**MS RAMAGAGA:** Now, the authors of this report are suggesting that this thing ought not to have been finalized or dealt with or to have progressed to the point at which it was. The expectation was that it should be approved at snail

speed.

**ADV CHAUKE:** Yes, and the importance and the outcry that was out there from the community and the like, it looks like it is being overlooked here.

**MS RAMAGAGA:** And it is my understanding, it is a common understanding that the NPA is independent.

**ADV CHAUKE:** Yes.

**MS RAMAGAGA:** But in that independence, when the executive authority speaks about the concern of the public,  
10 the NPA is expected to rise and address the outcry.

**ADV CHAUKE:** The NPA is independent in terms of prosecutorial function for them to decide cases and the like.

**MS RAMAGAGA:** Yes.

**ADV CHAUKE:** But in terms of the public perceptions and what the public expects, the executive authority will always prevail that the community has got this problem, can you, what is it that you are doing about this?

**MS RAMAGAGA:** While independent, it is there for the people, not for itself.

20 **ADV CHAUKE:** Yes. The independence cannot be used to be legalistic instead of doing your job.

**MS RAMAGAGA:** Right, thank you.

**ADV NGCUKAITOBI SC:** Thank you. Mr Chauke, I wanted to follow up on something that Commissioner Baloyi-Mere was raising, which is that there was something unique in the

case, in a sense, because there were already existing dockets. It was not your typical racketeering, where there is a criminal enterprise selling drugs in Cape Town or in KZN or in Johannesburg, where you are blank.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** You know, so this was a different criminal enterprise because these dockets had been open for a long period of time, but they had gathered dust and so what impact did that have on the expedition in relation to this? I  
10 think that is the crucial distinguishing feature here.

**ADV CHAUKE:** Yes. Once you want to investigate the enterprise and the like, remember you start with doing the, getting the Section 252 authorization for listening devices, traps, and all sorts of things for you to be able to link the different stakeholders in the enterprise.

But where already the offences have been committed in that pattern, you do not need that long ...[intervenes].

**ADV NGCUKAITOBI SC:** Ja.

**ADV CHAUKE:** That long reasoning to say, oh, here 100  
20 people have been killed. I now must go and start investigating to see whether this, you look at the patterns. You look at people have been killed. The *modus operandi* is just exactly the same. And then you get to know that the purpose, the reason for justifications of this is because of this and this and this and that, and then you look at the pattern.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Then you get people who were part of those killings who are saying no, we were there, like Danikas, saying, no, look, I saw. This is the pattern, and ...[indistinct] what more do you need?

**ADV NGCUKAITOBI SC:** Yes. Now, and then, just on this question that has been raised by Madam Ramagaga, it has been raised in different contexts that Minister Nathi Mthethwa intervened and said, get on with it. On the one side, there is  
10 a moment at which he says, you guys are too fragmented. You must work cohesively. And then he destroys the boundary at that point, the investigative boundary between the SAPS investigators and the IPID investigators. And then he asked for reports, and you give those reports on a regular basis.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** So the context in which this is used is, well, look at yourselves, you are being told by politicians what to do. You know, the other context is what Madam  
20 Ramagaga is saying which is the NPA is not an island. It is ultimately accountable to the people.

**ADV CHAUKE:** We are still, Chair. You have a situation where many people have been killed. It is apparent that IPID does not have capacity to investigate those police in that, in this context.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** It is very, it is obvious. So once you sit there as a responsible principal, and then you realize that these guys they actually do not have capacity at all, and then there are these ones who have got the capacity who can be joined together to do investigations and the like, that is the obvious thing to do.

**ADV NGCUKAITOBI SC:** Yes. And that can be done without dictating the ...[intervenes].

10 **ADV CHAUKE:** The operational ...[indistinct] yes.

**ADV NGCUKAITOBI SC:** Of the investigation. You still maintain your independence.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** But what he was doing, I mean, this is where the whole thing sometimes loses sense. He was not telling the NPA what to do. He was getting the operations of the IPID and the SAPS to work in sync.

**ADV CHAUKE:** Ja, in fact, the Minister, with reference here is the Minister of Police.

20 **ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Calling the IPID and the DPCI, the Hawks, together to say, look, guys, you must go and investigate these things. This silo that this one is getting, and that we have now realized that as IPID, there is no capacity. I need to get the DPCI to join you to investigate. The DPCI, that is part of

Cato Manor, because Cato Manor they are also DPCI. But you get the DPCI from another province to help the IPID to investigate the DPCI in KZN. In essence, this is what has happened.

**ADV NGCUKAITOBI SC:** Yes. And now on this issue around interference with the NPA, I mean, you attended some meetings there with the Minister or did you attend meetings with the Minister?

**ADV CHAUKE:** I attended the meeting with the Minister of  
10 Justice with Advocate ...[indistinct] she needed to brief the Minister ...[intervenes].

**ADV NGCUKAITOBI SC:** [Indistinct]... [cross-talking].

**ADV CHAUKE:** There was a question concerning Parliament as well to say this is what is happening and what is the NPA doing and whatever. So the Minister in that sense needed to understand what is the case all about. And the only way he can understand is him being briefed.

**ADV NGCUKAITOBI SC:** And that was the Minister of Justice?

20 **ADV CHAUKE:** Yes, Mr Jeff Radebe.

**ADV NGCUKAITOBI SC:** Yes. And then you did not attend meetings with the Minister of Police?

**ADV CHAUKE:** No.

**ADV NGCUKAITOBI SC:** Yes. Now, under the Constitution, Section 179, is the NPA not answerable to the Minister of

Justice?

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: Yes.

**ADV CHAUKE**: And then even in terms of the NPA Act, Section 34, I think the Minister of Justice may from time to time ask reports from the NDPP relating to a specific case where there are concerns where there is an outcry and ...[incomplete].

**ADV NGCUKAITOBI SC**: Yes.

10 **ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: It looks like someone has found the section in the Constitution. I think there is a section that says the Minister exercises overall responsibility. Yes, Section 179(6). Do you have the Constitution?

**ADV CHAUKE**: I have the similar provision in the NPA Act which will be Section 33, but ja, Section ...[intervenes].

**ADV NGCUKAITOBI SC**: This one is Section 179(6). What does it say?

**ADV CHAUKE**: I am there, Chair.

20 **ADV NGCUKAITOBI SC**: Yes, what does it say?

**ADV CHAUKE**: -:

“The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.”

**ADV NGCUKAITOBI SC:** And you say then you also want to refer to Section 33 of the NPA Act?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Which says?

**ADV CHAUKE:** -:

10 “The minister shall for the purpose of  
Section 179 of the Constitution, this Act  
or any other law concerning the  
prosecuting authority exercise final  
responsibility over the prosecuting  
authority in accordance with the  
provisions of this Act. To enable the  
Minister to exercise his final  
responsibility over the prosecuting  
authority as contemplated under Section  
179 of the Constitution, The National  
Director shall, at the request of the  
Minister, furnish the Minister with  
information or a report with regard to  
20 any case, matter, or subject dealt with  
by the National Director or a Director in  
the exercise of their powers; the  
carrying out of their duties and the  
performance of their functions; provide  
the Minister with reasons for any

10 decision taken by a Director in the exercise of his or her powers; the carrying out of his or her duties or the performance of his or her functions; furnish the Minister with information with regard to the prosecution policy referred to in Section 21(1)(a); furnish the Minister with information with regard to the policy directives referred to in Section 21(1)(b); submit the reports contemplated in Section 34 to the Minister and arrange meetings between the Minister and members of the prosecuting authority.”

**ADV NGCUKAITOBI SC:** Yes, thank you. So it seems explicit that the Minister is entitled to ask for reports in relation to a specific case.

**ADV CHAUKE:** Indeed.

20 **ADV NGCUKAITOBI SC:** So if he says, I want a report on the Cato Manor case, it is not as if you have an option. Parliament has said you must give the report, otherwise you will be breaching your own statutory obligations.

**ADV CHAUKE:** Indeed. The Minister's responsibility, it is defined in the Constitution and in the NPA Act.

**ADV NGCUKAITOBI SC:** Yes.

**MS RAMAGAGA:** Just to conclude, a little question. From where Advocate Chauke had ended, it explains the reason why this meeting and the proposal for a joint effort to try to deal with this matter that was burning and that had been outstanding for some time. It says the reason they came to see the acting NDPP was that they needed to rope in prosecutors to handle the matter urgently and that the prosecutors seemingly promised by acting DPP of KZN, Advocate Molotswa, was not materialising.

10 **ADV CHAUKE:** Yes.

**MS RAMAGAGA:** So that is what created the need, according to the explanation of Advocate Mosing.

**ADV CHAUKE:** Yes.

**MS RAMAGAGA:** Do you agree with this assertion?

**ADV CHAUKE:** I agree to the extent I have got no veracity of what Advocate Mosing is saying, but on the proper reading and understanding of what was happening then, that made a proper sense that that should happen and be done as quickly as possible because there was an outcry in the public there.

20 This thing was in the front pages of the Sunday Times and all that.

**MS RAMAGAGA:** And it is correct that the acting National Director of Public Prosecutions referred to herein was Advocate Jiba.

**ADV CHAUKE:** Indeed.

**MS RAMAGAGA:** Thank you.

**ADV NGCUKAITOBI SC:** Yes. Sorry, when you say you cannot vouch for the veracity, were you not aware that there was a problem of lack of prosecutors emanating from KZN in your role as coordinator?

**ADV CHAUKE:** At the time, I am referring at the time when there were discussions about the prosecutors and what, because I was only phoned to say there is a problem. We need prosecutors, that must...

10 **ADV NGCUKAITOBI SC:** Oh, I see, you came after these discussions.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** I see, but it was also the same explanation you got, why should Johannesburg go and assist in KZN?

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Yes, and what was the reason?

**ADV CHAUKE:** The prosecutors in KZN, most of them, they have been, they have got, they might have conflict of interest  
20 and impartiality because they have worked in the main with the officers of Cato Manor, both from the prosecutors and the DPP's office.

**ADV NGCUKAITOBI SC:** Yes, I mean, but what we also know from the evidence of Ms Shamila Williams is that these cases had been reported for prosecution as individuated offences,

like murder, torture, and all of those, since 2007, 2008, 2009, 2010, 2011.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: But they were not being prosecuted. Instead, senior prosecutors in Advocate Batohi's office were diverting them to inquests.

**ADV CHAUKE**: Inquests, yes.

**ADV NGCUKAITOBI SC**: And sometimes issuing *nolle prosequi* even after the inquests.

10 **ADV CHAUKE**: Yes, and Advocate Batohi as the DPP then would have known about all these cases until 2009 when she left.

**ADV NGCUKAITOBI SC**: Yes, she would have. I mean, she gave evidence here that she was away for 10 years, and then she came back and she discovered this.

**ADV CHAUKE**: Ai.

**ADV NGCUKAITOBI SC**: But I think that was contradicted by the facts.

**CHAIRPERSON**: What was your answer? [Laughter]

20 **ADV CHAUKE**: I am saying that she was not around this is misleading, because she was the DPP from 2002 until 2009. But in terms of the NPA record, she was actually the DPP from 2002 until 2010.

**CHAIRPERSON**: Meaning most of these things happened while she was in office.

**ADV CHAUKE**: In office, in KZN.

**CHAIRPERSON**: Yes.

**CHAIRPERSON**: Thank you.

**ADV NGCUKAITOBI SC**: Thank you. All right, I think we have covered those. Those were the questions from the bench. Can we then go back to the racketeering analysis contained in the report? We have dealt with 212 and 213, and then in 214, they say:

10                   “Racketeering investigation focusses on the  
entire enterprise rather than individual  
participants in specific criminal acts, which  
appears was the focus in this matter.”  
Now, how do you answer this? They say, well, you focused  
on the individuals. You should have focused on the  
enterprise. I mean, sometimes I do not understand what that  
means if you look at the case like *S v Aiyer*.

**ADV CHAUKE**: Ja, but for you to identify an enterprise, you can identify it through individuals.

**ADV NGCUKAITOBI SC**: Yes.

20 **ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Because the enterprise is a collection of the individuals.

**ADV CHAUKE**: It is a collection of various individuals. At times, an enterprise can be one, depending on the nature and effects of a particular case.

**ADV NGCUKAITOBI SC:** So this is also a legal misdirection.

**ADV CHAUKE:** Of course.

**ADV NGCUKAITOBI SC:** Yes. And then they say:

“Consequently, there were no investigations to determine the nature, structure, and scope of the enterprise, as well as the relationships of the members of the enterprise.”

Okay, I mean, I know you have said there is a misdirection of  
10 law, that they think that an enterprise exists in an abstract,  
but an enterprise is a collection of individuals. But they make  
a different criticism, it seems to me, that there was no  
investigation to determine the nature, structure, and scope of  
the enterprise, as well as the relationship. I would imagine  
those are relationships intersect among the operators. Who  
is the boss? You know, who is the guy that hides the  
firearms? Who is the guy that collects the bodies, et cetera?  
So you did not, well, the team did not investigate that.

**ADV CHAUKE:** But what was there to be investigated when  
20 we know that it is Cato Manor? The boss of Cato Manor is a  
general, Johan Booysen. What further were you supposed to  
investigate?

**ADV NGCUKAITOBI SC:** I mean, I suppose they could say...  
I suppose it is whether they are operating, because your point  
is that they are a formal unit, but they are committing crimes.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** They are a formal lawful unit, but they are committing crimes.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And so to that extent, and it is all common cause, by the way, that they shot people.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** The question is whether those shootings were criminal in nature or justified.

10 **ADV CHAUKE:** Ja, whether they were justified or not justified.

**ADV NGCUKAITOBI SC:** Yes. But what would you, you would still need to characterise the conduct.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** So there would still be some work to be done to characterise it.

**ADV CHAUKE:** Hence the prosecutors will have to look at, well, it is predicate offences, all the killings, to determine whether there is a particular fashion or a particular conduct.

20 And then from there, determine what is the purpose for these killings. Because that also is central to see the pattern and the motive and what is killing. And that is why, in this instance, the prosecution investigation, with the investigation team, they were able to determine that some is motivated for monetary and for self-gratification in terms of who shoots

best than who.

**ADV NGCUKAITOBI SC:** Yes, I wondered about that requirement of a motive, because it does not appear to be a requirement in the definition.

**ADV CHAUKE:** Yes, I am saying once you want to satisfy yourself about the operation of an enterprise, you look at all angles and see what could be the reason that people act in this fashion, in this particular fashion.

**ADV NGCUKAITOBI SC:** Yes, but I mean, if you removed  
10 that motive in your analysis, the point I am making is that under the Act, you still have a racket.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** If you can satisfy all of the elements, this idea that there must have been a financial reward, et cetera, is not actually required in the Act.

**ADV CHAUKE:** No, no.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** No, no.

**ADV NGCUKAITOBI SC:** It just happened incidentally that  
20 sometimes they were paid by the taxi association, sometimes they paid themselves from the monies that were collected through the internal systems.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And then sometimes, as Mr Danikas said, you know, they got freebies in hotels and

sometimes they took properties of people that they killed.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Television sets and those things would just disappear.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. Then they continue to say:

“This explains the lack of cellular phone evidence and an analysis thereof to show a pattern of communication between the members.”

10

What do you say to this, that you cannot show that these members were communicating?

**ADV CHAUKE:** It is irrelevant. Show what? They are at the scene together and what have you. Why must you prove that when they went to the scene, they phoned each other?

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** I mean, it is the lowest mark and remark that can be made by a prosecutor in these circumstances.

**ADV NGCUKAITOBI SC:** Yes.

20 **CHAIRPERSON:** Well, the challenge is that they looked at the American authorities, is it not?

**ADV CHAUKE:** Probably, that is what the misnomer comes from.

**ADV NGCUKAITOBI SC:** Yes. I mean, I suppose if you are dealing with a hidden enterprise, a drug cartel, you know, and

you are trying to break it, then maybe you can try and trap people using cell phone records, but what you are dealing with is a lawful unit, which is committing the crime of racketeering, but it is using the state resources.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And as you say, rhetorically, how do they get to the crime scene if they did not communicate?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes.

10 **ADV CHAUKE:** And there are 7, 10 police vehicles in one scene. You must go and check how they called themselves, each other, for them to be in that scene. That is preposterous.

**ADV NGCUKAITOBI SC:** But they also say so themselves. I mean, if you look at the killing of Mr Magojela Ndimande, Major General Booysen says, I got a call from an informer, and then I called Mr Olivier. So what is there to be...?

**ADV CHAUKE:** And he was updating them, as to say he is now from Free State, he is entering KZN and all sort of things.

20 **ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** And why must you prove that indeed he called him?

**ADV NGCUKAITOBI SC:** Well, why should you then go and obtain a cellular phone records.

**ADV CHAUKE:** Cellular phone records to prove that indeed

he called him?

**ADV NGCUKAITOBI SC:** When somebody says, I admit that I called him.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Ja. Then it says:

“This could have shown not only how they communicated at strategic times before, during, or after the incidents, but also their communication with Booyesen.”

10 I mean, it is unclear what this is about, because we have just spoken about one incident where Major General Booyesen himself admits that he is the one who did the communication and puts all of them in the chain of communication.

**ADV CHAUKE:** Now, how does Mr Booyesen get into a scene after the shooting?

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** If he would not have gone there, because he has been called. Now you must prove that Mostert called General Booyesen to come to the scene.

20 **ADV NGCUKAITOBI SC:** Yes. And we have also got evidence here in relation to the death of Inkosi Zondi, where Major General Booyesen admits that he was the head of that investigation.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Having been asked by Mr Ngidi, as

the Provincial Commissioner, to respond to a concern raised by President Zuma, who had a blood relationship with Inkosi Zondi.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** So it is unclear why they are asking for communication when the record is full of the communication.

**ADV CHAUKE:** No, in this instance, Chair, you do not need communication because people are there, they are at work.

10 They are busy working, they are together. Why do you need to prove that they are at work and they are working together?

**ADV NGCUKAITOBI SC:** Yes.

**ADV BALOYI-MERE SC:** But also on the same point, is it not that Mr Danikas testified that every member had Major General Booyesen's number and they would call him, and Major General Booyesen's instruction was call me at any time and if you mess up, I will come and clean it up, but just make

20 sure that you call me as soon as possible. That is proof enough that there was communication between all the members, no matter how junior they are with Major General Booyesen.

**ADV CHAUKE:** Yes, Chair. It is like asking me as a DPP and you say, it must be investigated that I communicate with my fellow prosecutors in the office.

**ADV NGCUKAITOBI SC:** Look, I mean, I suppose the

difference is this, that there is that communication which you would expect. The question is whether this is the communication for the purposes of the enterprise. You see, because the enterprise, in a sense, is here is a deeper enterprise because it is an enterprise that is using the lawful resources of the state. So the whole language, well, let us go and kill a person because they are sought in relation to killing of Inkosi Zondi.

**ADV CHAUKE:** I understand, Chair, but my point being, if  
10 people are colleagues, they are working together, why do you have to prove that they are communicating?

**ADV NGCUKAITOBI SC:** Yes. Yes, no, I think it is obvious that they have communicated. That is why they are all there and that is why there is a person with a gun and thereafter the gun disappears and thereafter the cartridges are found. That is clear that they are communicating.

**ADV CHAUKE:** My point, exactly.

**ADV NGCUKAITOBI SC:** Ja. Then the next criticism at 215  
is:

20 “A racketeering investigation of an ongoing criminal enterprise must determine the size and composition of the group involved, its associates, its past acts, intended criminal goals and its capacity for harm. There was no investigation into the size and

composition of the group that constituted the criminal enterprise, but simply a focus on individual participants engaging in specific criminal acts.”

What do you say about this?

**ADV CHAUKE**: It is a blatant lie. On the evidence as we are sitting here, that statement alone, you can see it is a misrepresentation.

**ADV NGCUKAITOBI SC**: Yes. I mean, yes, we heard from  
10 Mr Maema who made it clear that they spent a long time trying to figure out the scope and size.

**ADV CHAUKE**: And the description of the enterprise is there in the indictment.

**ADV NGCUKAITOBI SC**: Yes.

**ADV CHAUKE**: So for a fellow prosecutor to come up with this kind of a statement is very, very unfair and unfortunate.

**ADV NGCUKAITOBI SC**: Yes. Then they say:

20 “As a result, the investigation is unable to provide a proper analysis of exactly how many cases this group investigated over a period of four years, its outcomes and why there was a focus on 23 dockets, nine in 2008, seven in 2009, three in 2010 and two in 20, of which four dockets were registered in 2011.”

So they say, well, you cannot explain this. I mean, what do you say to that?

**ADV CHAUKE**: What is it that must be explained? Because if you have got hundreds of dockets and where you are able to prove your case is 23, what is wrong with that? So because there are hundreds of dockets, you must just prosecute all of them?

**ADV NGCUKAITOBI SC**: Yes.

**ADV CHAUKE**: It cannot be, it does not work that way.

10 **ADV NGCUKAITOBI SC**: Yes, but I mean, is it not factually inaccurate that there was no explanation? Because in this enquiry, we had Mr Maema who provided an explanation how they whittled down the dockets from 52 to ultimately 23. But at the same time, they did not abandon the remainder. They still asked Captain Mangena to continue working on them.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: And as a consequence, Captain Mangena had 10 more dockets than those that were in the indictment.

20 **ADV CHAUKE**: Yes. Which ultimately, if the prosecution would have proceeded, the indictment would have been amended to include those other incidences.

**ADV NGCUKAITOBI SC**: Yes. And they say:

“If the reason for the existence of the criminal enterprise was to obtain monetary

gain or profits through racketeering activities, the decline in the racketeering activities is peculiar.”

Now, that is because their view is that these activities were at their zenith in 2008 and declined by 2011, starting at nine, ultimately being four in 2011.

**ADV CHAUKE:** But that is irrelevant. It is highly, highly irrelevant. Whether they stopped or it was still continuing or it was subsiding, it is neither here nor there.

10 **ADV NGCUKAITOBI SC:** Yes. It is unclear why there is a complaint that there are fewer acts in 2011. Because it could also be an assessment of the evidence, that we can only prove two in 2011.

**ADV CHAUKE:** Of course.

**ADV NGCUKAITOBI SC:** Yes. But they are talking about this thing about the monetary gain. They say, well, if the purpose of the enterprise is monetary gain, why are they no longer trying to get money in 2011? I think that is what they are asking.

20 **ADV CHAUKE:** Which will be unfortunate because instead of accepting that people had had enough of killing others, they decided now we are no longer going to kill. Why do you want to make a meal out of that, that they should not have stopped killing, they should have continued killing? Because that sentence, that is what it is suggesting.

**ADV NGCUKAITOBI SC:** Yes, I mean, the decline in the racketeering activities is peculiar. But I am not sure what this means because there could be a decline in the activity or there could simply be no decline in the activity. But your own judgment is that there are only two that are prosecutable. And that is why Captain Mangena was continuing to investigate.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** And that number could have gone  
10 up.

**ADV CHAUKE:** Indeed, Chair.

**ADV NGCUKAITOBI SC:** Yes.

**ADV BALOYI-MERE SC:** Sorry, but then let us say there were no dockets registered in 2011, which would maybe translate into the activities of the enterprise having stopped. What would be the effect of that? Would it mean that you stop investigating and you close your books and go home because now they have stopped killing people?

**ADV CHAUKE:** The essence of what is being conveyed here,  
20 that is what it means. And which I am saying is untenable. It is very unfortunate that you are saying offences have been committed, because they are no longer committing the offence, they have stopped, then you cannot prosecute them for the offences that they have committed. In essence, that is what it means.

**ADV NGCUKAITOBI SC:** Then it says:

“A criminal enterprise does not necessarily end when one or more of the participants are prosecuted, since they are motivated by the monetary gain or profits.”

Ja, this I found one of the most bizarre statements.

**ADV CHAUKE:** The lesser said about that statement, the better, Chair.

**ADV NGCUKAITOBI SC:** Because once you prosecute one  
10 of the gang members, then natural tendency is for the enterprise to decline because it has finally been broken.

**ADV CHAUKE:** It is very unfortunate.

**ADV NGCUKAITOBI SC:** Yes. Then it says:

“The failure to properly investigate the size and composition of the group involved and its associate explains the lack of charges  
against the Stanger Taxi Association that allegedly entered into a corrupt relationship  
with the members of the SVC, Durban  
20 Organised Crime.”

Now, you know, many years ago, Mr Jackie Selebi was charged by the NPA and there was an outcry about why the people that corrupted him were not charged. And the NPA said to the public, well, we have to stop corruption inside the government first.

**ADV CHAUKE**: That is what was out there in the public, that in order to stop the corruptors, you need to get the, they call it the big fish.

**ADV NGCUKAITOBI SC**: Yes.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: But this reminded me of that incident that the NPA decided it has to stop corruption within the police.

**ADV CHAUKE**: Yes.

10 **ADV NGCUKAITOBI SC**: And now it is being criticised for not charging the members of Stanger Taxi Association.

**ADV CHAUKE**: And you need to ask charging them for what?

**ADV NGCUKAITOBI SC**: That is what they say, because they entered into a corrupt relationship with the police, they were collecting the bags of money and paying the police, which is corruption under PRECA.

**ADV CHAUKE**: But for you to be able to prove that they gave the money, you needed them to testify that they gave the money. Now, if you charge them, if you charge them, how  
20 are you going to prove that money was given?

**ADV NGCUKAITOBI SC**: And they were your witnesses. Well, they were the state's witnesses.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: Yes. Yes, I see your point. Yes.

**CHAIRPERSON**: I beg your pardon on that point. But if you

charge them, and you subsequently decide to utilise section 204 and use them as the witnesses to prove the very point that you are making, that is still possible. So you can still charge them.

**ADV CHAUKE:** Yes, what happened with those kind of witnesses, Chair, it is once it takes the witness stand, you inform the Court that this witness is going to testify about incident which, if the Court is not satisfied, they might be prosecuted for that. Because for a person to say, I gave the  
10 money to the police to go and kill my rival, that is an offence in itself. So in all instances of these witnesses, when they were supposed to testify, that precaution would always have to be taken by the prosecution.

**CHAIRPERSON:** Yes, but I am saying that as you answered counsel, you can still charge them.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** And use them as the section 204 witness.

**ADV CHAUKE:** Yes.

**CHAIRPERSON:** To prove the very point.

20 **ADV CHAUKE:** Indeed, Chair.

**CHAIRPERSON:** Correct?

**ADV CHAUKE:** Correct, Chair.

**ADV NGCUKAITOBI SC:** Yes, so in other words, there was no decision not to charge them. The options were open.

**ADV CHAUKE:** Yes, the options are open. You charge them

now or you make them witnesses, depending on what they testify, you will take it from there. It is a strategic assessment, whatever that the prosecution team has to understand that they will be making.

**ADV NGCUKAITOBI SC:** I understand. You know, the odd thing about this is that if you look at the two critical witnesses that came from Stanger, Mr Dlondlo and Mr Mathonsi, they were actually murdered as soon as it leaked that they were witnesses.

10 **ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** You know, and then when there is a reference elsewhere in the report about the fact that they were killed, you know, and in the context of the hearsay, we looked at that earlier today.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And then now there is a whole thing where you should have charged them, but they were killed.

**ADV CHAUKE:** Of course, they were not fortunate like Danikas who could go.

20 **ADV NGCUKAITOBI SC:** Who could escape.

**ADV CHAUKE:** Who could escape.

**ADV NGCUKAITOBI SC:** Yes, they lived among the black people of KZN.

**ADV CHAUKE:** The fear of Danikas is real.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** Because you have got instances where those who have been identified as witnesses have actually been killed. And the reasoning of the prosecution team, as Maema indicated, not to identify Danikas as a witness. It comes from that particular kind of a scenario.

**CHAIRPERSON:** Yes.

**ADV BALOYI-MERE SC:** Sorry. Advocate Chauke, you, during these investigations, you were the coordinator of the prosecuting team.

10 **ADV CHAUKE:** Yes.

**CHAIRPERSON:** Can you explain to us, because there is a repeated statement that the investigating team failed to properly investigate the size and composition of the group involved. And its associates. So, which then explains that you could not charge other people. For example, the Stanger Taxi Association or what. Is it true that you failed or the prosecution team failed to properly investigate the size and the composition of the group?

20 **ADV CHAUKE:** From the prosecution team's reports and from how I see them having dealt with the matter, it is unfair to say that they did not properly consider this. Even when we would have had Advocate Maema's testimony, he indicated the process that they have undertaken and to the length for them to be able to satisfy themselves that this is the way to go.

**ADV BALOYI-MERE SC:** Thank you.

**ADV NGCUKAITOBI SC:** Yes. But the question is whether they investigated the size of the enterprise. I mean...

**ADV CHAUKE:** Yes, that is why they were able to identify.

**ADV NGCUKAITOBI SC:** Yes, ja.

**ADV CHAUKE:** The reason why they were able to identify who is supposed to be charged in terms of POCA, who is supposed to be the predicate of, it is because you do the investigation and decide who is in, who is out.

10 **ADV NGCUKAITOBI SC:** Yes. That is called size.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes. Then 216:

“Investigations of this nature ordinarily employ informants and confidential sources, financial investigations, monitoring of electronic communication and section 252A operations, especially if the allegation is that the criminal enterprise can be hired to kill for monetary benefits. It appears that none of these investigative techniques was employed and would explain why there are no money laundering charges.”

20

So they say there are certain techniques that are generally used, but they have not been used and you did not charge them for money laundering.

**ADV CHAUKE:** But it is irrelevant. And the fact of this particular case, all that appears in that paragraph is irrelevant.

**ADV NGCUKAITOBI SC:** And 217:

10 “It appears that during the arrests of the accused, searches and seizures of their homes were conducted. There is no indication that there were any searches, seizures at the offices of the accused, in particular to search for documents, operational plans, meeting minutes, and any other relevant information on their computers. It appears that the police seized several items when they arrested the accused at their homes, such as computer discs, printers, cellular phones. It is not clear what, if the items were investigated, and if indeed, to what are the outcomes.”

20 **ADV CHAUKE:** The drafter of this paragraph did not read the dockets and the like. There is no, when was the searches and seizures done? I mean, we are sitting here, we have got the record here. Where do you find that the Cato Manor investigators were searched? So that is written by somebody who obviously would not have read the actual metrics of the case and the dockets.

**ADV NGCUKAITOBI SC:** Yes. But it is also unclear what is the relevance. Why would you, when you have got all of these dockets, why would you then go into a search and seizure in the office?

**ADV CHAUKE:** Searching what? Because the firearms that they were using, the state firearms and they have them officially. So we are going to search for what? That the money that would have been paid, you are going to get it in his house or...?

10 **ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** And then there is the money laundering things and then the cellular phones and the like. What is the relevance of that? It is irrelevant.

**ADV NGCUKAITOBI SC:** But why would you charge them for money laundering? You have got racketeering. That is the charge you have decided to press and you have got the alternatives, which are the predicate offences.

**ADV CHAUKE:** But we have got no evidence of money laundering. Why must we charge people for money  
20 laundering when we do not have evidence of money laundering?

**ADV NGCUKAITOBI SC:** Yes, quite. And then there are also three paragraphs that deal with the predicates. The first one, it says:

“There is a lack of objective eyewitness

accounts of incidents. The prosecution team places reliance on statements made by the persons charged. It appears that the police and/or IPID/ICD made very little attempt to find witnesses that saw the incidents happen.”

Why do you say to this? Is this actually factually true?

**ADV CHAUKE**: It is not true.

**ADV NGCUKAITOBI SC**: Yes.

10 **ADV CHAUKE**: The drafter of that paragraph did not write the statements and the evidence.

**ADV NGCUKAITOBI SC**: Yes.

**ADV CHAUKE**: You cannot charge the accused because of what the accused says. I mean, I am sitting here as a prosecutor and as a prosecutor who wrote this statement, I get embarrassed myself.

**ADV NGCUKAITOBI SC**: Yes, but I mean, we went through this. There are just so many eyewitness accounts.

**ADV CHAUKE**: Yes.

20 **ADV NGCUKAITOBI SC**: Truly astonishing that they would say something like this.

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: And then 219:

“In all of these dockets, no identification parades were held.”

Why would you do an identification parade?

**ADV CHAUKE:** The person says I was there, I am the shooter. Why must he be identified?

**ADV NGCUKAITOBI SC:** Yes.

10 “In counts 3 to 7, the girlfriend of the deceased alleged that she was assaulted by a white male. The absurdity now is that all of the accused, Mostert, Naidoo, Makanya, Obach and Eva, are charged with the assault of her, whilst Eva was not even in the house.”

So somebody says I was assaulted by a white man, you cannot work out who it is, so you charge three white men. Then they say, well, that is a problem.

**ADV CHAUKE:** Well, that is unfortunate as well.

**ADV NGCUKAITOBI SC:** Then:

20 “In Melmoth, two witnesses alleged that they were assaulted by the police. They were only taken to a doctor for a medical report in 2012, which means that the report would be of no value in a trial. No identification parades were held, and all the accused were also charged for the assault of the witnesses, despite the fact that there is evidence that more than 30 officers were on

the scene.”

So, what is the problem?

**ADV CHAUKE**: What is the problem? That you charge 23, you did not charge 30. What is the problem?

**ADV NGCUKAITOBI SC**: Yes. Now, you would be pleased to know that this is all of the qualitative analysis of this report. That is what it ultimately boils down to.

**ADV CHAUKE**: Yes. Like I indicated, Chair, it is at the time when it came out and I was served with a copy, when I  
10 requested it then from Advocate de Kock, these are some of the things that I spoke to him about.

**ADV NGCUKAITOBI SC**: Yes, and this is all that Advocate Batohi read and relied upon.

**ADV CHAUKE**: Indeed.

**ADV NGCUKAITOBI SC**: Yes, would you describe this work as actually shoddy and embarrassing?

**ADV CHAUKE**: I would not say so, but I hear you, Chair.

**ADV NGCUKAITOBI SC**: Yes, all right. Thank you. Madam Chair, I took a lot longer on this report, which I thought was  
20 going to be a short journey. I have now exhausted all of my time. So, I still need to deal with these documents of Mdluli. So, I wonder whether there is still any energy left for tonight. May I ask Advocate Mohlamonyane, who already was keen to break more than an hour ago.

**CHAIRPERSON**: Do not worry about Advocate

Mohlamonyane, Counsel. I thought that you will take these points to their logical conclusion and look at the recommendation, at least for completion.

**ADV NGCUKAITOBI SC:** Oh, yes.

**CHAIRPERSON:** The exercise that you have embarked upon.

**ADV NGCUKAITOBI SC:** Thank you, Madam Chair. Let me take the invitation. Thank you. Yes. Do you have page 95 of the report, section F, under the heading  
10 Recommendations?

**ADV CHAUKE:** I do, Chair.

**ADV NGCUKAITOBI SC:** Yes. Now, it says:

“The following recommendations are made:

1. The racketeering authorisations issued in terms of section 2(4) in terms of POCA by the acting NDPP Advocate, Jiba on 14 August, 2012, is invalid.”

Now, was there a need for this declaration to be made? Because this had already been done by a Judge?

20 **ADV CHAUKE:** Not at all. Not at all. And that is my gripe about this, that you are supposed to review a decision, you are looking at the decision as at 2016 about the case that is decided by Sean Abrahams. Why go back to Jiba if there is no other motive other than what is said to be here?

**ADV NGCUKAITOBI SC:** And then 2:

2. “The racketeering authorisation issued under section 2(4) of POCA by advocate Sean Abrahams on 16 February, 2016 is invalid.”

**ADV CHAUKE:** How can a prosecutor pronounce that?

**ADV NGCUKAITOBI SC:** Yes, that is what I wanted to ask you.

**ADV CHAUKE:** A statement issued is invalid. How is that possible?

10 **ADV NGCUKAITOBI SC:** Who is entitled under section 172 of the Constitution to pronounce the validity of administrative acts?

**ADV CHAUKE:** It is the Court.

**ADV NGCUKAITOBI SC:** Yes. And then...

**ADV CHAUKE:** What is happening here, Chair, is this case was, this matter was at the review in front of the Court. Now, what that statement says, it has taken, it has usurped the work of the Court and substituted itself.

**ADV NGCUKAITOBI SC:** Yes, well, there was a review at  
20 the time, which was, I think, according to the evidence, scheduled for hearing in May of 2019.

**ADV CHAUKE:** Yes, where Advocate Epstein, SC, was going to argue representing the state.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** And that is the Court that was going to say

whether it is valid or invalid.

**ADV NGCUKAITOBI SC:** Yes, and then Advocate Batohi then said, look, I have got my own panel, just withdraw in court, I will deal with it internally.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** But your point is that a declaration of invalidity could not be made by this panel of four.

**ADV CHAUKE:** No.

**ADV NGCUKAITOBI SC:** Or panel of two.

10 **ADV CHAUKE:** No, not even the NDPP itself.

**ADV NGCUKAITOBI SC:** Yes, because her powers are confined to section 179.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:**

3. “That prosecution instituted against all the accused on the racketeering charges, based on the authorisations issued by the acting NDPP N Jiba, and the NDPP S Abrahams, as set out above, should be withdrawn.”

20

**ADV CHAUKE:** Again, Chair, ask yourself, what is the relevance of acting NDPP Jiba there, when, in fact, the case that was on the roll, which was being considered there, was the one authorised by Abrahams. And as in 2019, Jiba's things had fallen by the wayside in 2014 already.

**ADV NGCUKAITOBI SC:** Yes.

**ADV CHAUKE:** I think it was five years thereafter. Now you must ask yourself what is this appetite of Jiba there.

**ADV NGCUKAITOBI SC:** Yes. But, I mean, to say ...[intervenes]

**ADV CHAUKE:** Sorry, of Advocate Jiba.

**ADV NGCUKAITOBI SC:** Yes, but to say that all of the charges against all of the accused, without analysing the case against each of the accused, I mean, you have this thing  
10 about Mr Paul Mostert, who has 13 murder charges.

**ADV CHAUKE:** The qualification of that is the second paragraph, Chair, that they say:

“The Director of Public Prosecution, KwaZulu Natal, should be in compliance with the prosecution policy, review the evidence in respect of the remaining charges preferred against the accused, and decide whether or not to prosecute the prosecution against the individual accused named in  
20 those charges.”

**ADV NGCUKAITOBI SC:** I understand that, but I am talking about racketeering, which requires the existence of predicate offences. I am saying as part and parcel of racketeering charges against Mr Mostert are 13 murder charges, which are predicate charges.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And then you make a blanket statement, like paragraph three, that everything against everyone must be withdrawn, without any analysis of the case against each individual.

**ADV CHAUKE:** Very unfortunate.

**ADV NGCUKAITOBI SC:** Yes. And then the DPP, which is the point you were making, of KwaZulu Natal.

**ADV CHAUKE:** Yes.

10 **ADV NGCUKAITOBI SC:** Now, we spoke with another witness about the DPP. I just want to know if you had any knowledge about the allegations of a conflict of interest relating to her.

**ADV CHAUKE:** I came to know them long after these decisions were made, ma'am that I came to know that she was somehow married to one of the police officers of Cato Manor Organised Crime in KZN. I was not aware.

**ADV NGCUKAITOBI SC:** Yes, but we also know now that she was the prosecutor assigned, specifically in the case of  
20 Mr Mhlongo.

**ADV CHAUKE:** Yes, from what Mr Mhlongo testified, yes.

**ADV NGCUKAITOBI SC:** Yes, and that case actually also emanates from the same set of facts as we are dealing with here.

**ADV CHAUKE:** Indeed.

**ADV NGCUKAITOBI SC:** Yes, and there she was criticised for making a false insertion on an affidavit by a Judge.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Yes, and were you aware of any disclosures that were made by her in relation to exercising the authority to withdraw these charges?

**ADV CHAUKE:** No.

**ADV NGCUKAITOBI SC:** Yes, but we also know that she is the person that had a conversation with the National Director  
10 of Public Prosecutions while she was giving evidence in cross-examination.

**ADV CHAUKE:** I believe so. That is what Advocate Shamila Batohi indicated to the Panel, that she had spoken with the DPP of KZN because after Advocate Noko was transferred to DPP North West, she became the acting DPP of KZN, replacing Noko.

**ADV NGCUKAITOBI SC:** So she is the person who must now review the evidence in respect of the remaining charges preferred against the accused and decide whether or not to  
20 proceed with the prosecution against the individual accused named in those charges. Now, that relates now to the individual offences. And we know here that except for the Kwasi Ndlovu case, everything else was withdrawn.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** Including the 13 murder charges

against Mr Mostert.

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And then a copy of the memorandum will be provided to the DPP in KZN.

**CHAIRPERSON:** The effect of this withdrawals, means that none of the victims concerned have had any closure.

**ADV CHAUKE:** Indeed, Chair, that is how I understand it, from where I am sitting.

**CHAIRPERSON:** In your own words, what does it say about  
10 the role of the NPA?

**ADV CHAUKE:** The NPA failed the victims and the people of South Africa at large in respect of this specific matter.

**CHAIRPERSON:** But would you say that that should not really be the end of the matter because withdrawal does not necessarily mean that such charges cannot be reinstated?

**ADV CHAUKE:** Indeed, from where I am sitting, all the charges, they are capable of being reinstated because there is not even one where the accused have pleaded except the Kwasi Ndlovu case. Even in that one, legally, I think once  
20 one can justifiably send it on a specific kind of review proceedings, one should be in a position to get a declaration.

**CHAIRPERSON:** Yes, if a proper analysis of the docket is done and a finding is made that there was indeed evidence justifying the prosecution.

**ADV CHAUKE:** Indeed, Chair.

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

**MS RAMAGAGA:** Are you still in the report?

**ADV NGCUKAITOBI SC:** No, I am not on the report.

**MS RAMAGAGA:** Okay, I will just want to touch on one or two things on the report. Yes, it is noticed from recommendation number 4 that the recommendation is that the matter be referred back to the public prosecutor, the National Director of Public Prosecutions KZN. That is the recommendation of the authors of the report, right? But then,  
10 I would like to, well, I do not think we have this before us, but it is part of this statement of Advocate Batohi, but in particular, when one looks at SB4, page 449, is it 449? No, man, 228, I beg your pardon, the hour is very late, I beg your pardon. [Laughter] Ja, and actually paragraph 4 on page SB230. Now, that is the letter written by Advocate Batohi to the KZN National Director of Public Prosecutions.

**ADV CHAUKE:** I have it, Chair?

**MS RAMAGAGA:** Yes, and in paragraph 4, in the middle of that paragraph, do you see that sentence that starts 'you are  
20 accordingly requested to evaluate'?

**ADV CHAUKE:** Ja:

“You are accordingly requested to evaluate the evidence in each docket and decide whether to prosecute the individuals who may be implicated in those matters. I bring

to your attention that the panel also found that there is insufficient evidence against General Booyesen in respect of the other charges preferred against him.”

**MS RAMAGAGA:** Thank you, stop there. Now, are you able to comment about this extra comment that is made by Advocate Batohi that he would like, she would like to bring it to your attention that the panel has also found that there is no sufficient or there is insufficient evidence about General Booyesen? I am asking this based on the comparison between the recommendations that are done. They appear to be covering everyone, that the DPP KwaZulu Natal should look at each and every docket. It does not point out to a different approach in respect of advocate, in respect of General Booyesen. But then, Advocate Batohi has deemed it necessary or maybe important to also bring in that rider, to the fact that look at the dockets, but there are no findings against Booyesen. What do you make of that statement?

**ADV CHAUKE:** The metaphors of it all is that Advocate Shamila Batohi has gone all out to protect and decide that General Booyesen in particular should not face prosecution in respect of these cases.

**MS RAMAGAGA:** Thank you, Thank you, Chair.

**CHAIRPERSON:** Let me follow up on that point. But I think in fairness to Advocate Batohi, at least she makes a request

to Advocate Harrison, requesting her to evaluate the evidence in each docket.

**ADV CHAUKE**: Indeed, Chair.

**CHAIRPERSON**: At least there, you should give her the benefit.

**ADV CHAUKE**: I do.

**CHAIRPERSON**: Yes, that at least she left it in the hands of Advocate Harrison to do what she requested her to do.

**ADV CHAUKE**: The unfortunate part is why single out  
10 General Booyesen as opposed to say in respect of all the accused, there is insufficient evidence. Why specifically it should only relate to General Booyesen? That is the comment I was trying to put across.

**CHAIRPERSON**: But it was for Advocate Harrison to use her discretion in the evaluation process.

**ADV CHAUKE**: Indeed.

**CHAIRPERSON**: To determine whether she should find that there was insufficient evidence against General Booyesen.

**ADV CHAUKE**: Yes. She is being informed that there is  
20 insufficient evidence against General Booyesen.

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

**ADV NGCUKAITOBI SC**: Thank you, Madam Chair. I am looking for a section in this report. I think I have looked for it before, but it has now escaped me. Whether there is anything in the report that analyses the predicate offences

against Major General Booyesen that would justify the second part of that paragraph, that there is insufficient evidence against Major General Booyesen.

**ADV CHAUKE**: No, the exercise that we did, Chair, was had gone through the cases to say there is no evidence. Where we analysed to say it was superficial analysis of the evidence in respect of those predicate offences.

**ADV NGCUKAITOBI SC**: Yes, I am looking at, she puts a sentence... Now, the paragraph you referred to by Madam  
10 Ramagaga, SB4-230, says:

“I bring to your attention that the panel also found that there is insufficient evidence against General Booyesen in respect of the other charges preferred against him.”

Remember, there were five of those charges, or seven, two murder charges, firearms control charges, and so there are five predicate and two racketeering.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: So two murder, two of firearms  
20 control, and one for defeating the ends of justice.

**ADV CHAUKE**: Yes.

**ADV NGCUKAITOBI SC**: This report has not analysed a single one of those charges against Major General Booyesen.

**ADV CHAUKE**: Not that I can remember, no. From the exercise that we have done, no, there is not.

**ADV NGCUKAITOBI SC:** Yes. And I could not remember if there is a specific sentence in the report that even says, we have looked at the predicate offences against Major General Booyesen. Our view is that there is insufficient evidence to charge him with them.

**ADV CHAUKE:** It might have escaped us, Chair, but from the report as we have gone through it, I do not remember where we specifically even make reference to General Booyesen as an individual as opposed to all the accused.

10 **ADV NGCUKAITOBI SC:** Yes, I mean, as a matter of fact, there is no analysis of the predicate offences, you know?

**ADV CHAUKE:** Yes.

**ADV NGCUKAITOBI SC:** And that is where it does strike one as odd that the NDPP would go out of her way to say, look, racketeering scratch for everyone, but this one of the predicate offences scratch only for Major General Booyesen, in your discretion, but I mean, just on that issue, the Chair

says, listen, this person is being asked, exercise your discretion, right? But how does that actually work when you  
20 are told by the NDPP that exercise your discretion, but I am telling you there is insufficient evidence?

**ADV CHAUKE:** Proceed with caution.

**ADV NGCUKAITOBI SC:** Yes. But what is the point of doing that? What is the point of saying to someone there is insufficient evidence if you genuinely want them to exercise

their discretion?

**ADV CHAUKE:** This is my view as the NDPP, but you can use your discretion, but understand this is my view.

**ADV NGCUKAITOBI SC:** But are you not trying to, this is the point I am making, are you not trying to influence them towards your view?

**ADV CHAUKE:** Indeed, Chair. That is why I am saying, you are being told, proceed with caution, because already I have considered the merits as the NDPP.

10 **ADV NGCUKAITOBI SC:** Yes. Thank you.

**CHAIRPERSON:** Counsel, what about their independence? The NPA and the Constitution tells them, you are independent, you act without fear, favour or prejudice.

**ADV CHAUKE:** Yes, indeed, Chair.

**CHAIRPERSON:** And this is a senior prosecutor. I am just looking at it from that angle, that Advocate Harrison is not a very junior prosecutor.

**ADV CHAUKE:** Of course.

20 **CHAIRPERSON:** And we have been told by Advocate Batohi many times in her evidence, she actually rehashed the Constitution and the NPA Act in relation to this very point of independence. Now, she is requested to do something, and she says, take note. Now, an independent prosecutor who acts without fear, favour or prejudice, will do her work.

**ADV CHAUKE:** I have got no doubt about that.

**CHAIRPERSON:** Irrespective of what the boss tells her what to do.

**ADV CHAUKE:** I have got no doubt. I think that is what Advocate Harrison would have done.

**CHAIRPERSON:** Yes. So, Counsel, I am saying, I note what you will say, but when we look at the prescripts of the provision of the Constitution and the Act itself, the buck stops with Advocate Harrison.

**ADV CHAUKE:** Indeed. That is why I am saying I have got  
10 no doubt that she would have done that independent of the influence that, or otherwise, that the NDPP would have said.

**CHAIRPERSON:** Yes, thank you.

**ADV NGCUKAITOBI SC:** Madam Chair, I do not think we can proceed further for tonight. If I can ask for an adjournment, I will probably need an hour. Okay, I have been promising an hour. So, I will need, but I will need 9.00 to teatime on Monday to wrap up what I still need to cover with this witness.

**CHAIRPERSON:** That will be two hours.

20 **ADV NGCUKAITOBI SC:** 9.00 to 11, yes. Oh, that is still two hours.

**CHAIRPERSON:** That will be two hours.

**ADV NGCUKAITOBI SC:** Okay, so, I will need, yes, an hour. 9.00 to 10.00.

**CHAIRPERSON:** Okay, thank you. Will that be also in

respect of the outstanding witnesses you would like to call? You remember you mentioned, I am sorry, Advocate Chauke, you mentioned that three to four witnesses that you said may be short.

**ADV NGCUKAITOBI SC:** Yes, there are in total four witnesses that I have consulted with, but we will probably call one. There is General Mabula, we will most likely call. There is Advocate Deon Barnard, he has recently made contact, and we have to decide whether to put in a statement or not. There  
10 is Mr Nxasana, we have finalised his statement, it is a question of him signing on it. And there is Advocate Sean Abrahams. And again, it is not strictly speaking to call him, but we have to decide whether or not to put a statement. So, out of those four, it is General Mabula that I wish to call to give oral testimony, but it is on a single issue.

**CHAIRPERSON:** In respect of all of them?

**ADV NGCUKAITOBI SC:** In respect of the four, the person I am sure I will be calling is General Mabula. I might want to call Mr Deon Barnard because he is on a different issue on  
20 the Mdluli issue. General Mabula is still on the Cato Manor issue.

**CHAIRPERSON:** Yes. We have given you a schedule that we will be available until Tuesday. Yes.

**ADV NGCUKAITOBI SC:** I will make sure to fit in.

**CHAIRPERSON:** Yes, if you can try that, so that we do not

take from the time that we seek to allocate to the evidence leaders.

**ADV NGCUKAITOBI SC:** Yes, thank you.

**CHAIRPERSON:** Okay. Advocate Chauke, we adjourn now until Monday at nine o'clock and you will continue, you remain under oath.

**ADV CHAUKE:** Thank you, Chair, I note.

**CHAIRPERSON:** Thanks to you, Counsel, and to all of you for your patience. We will pause here until nine o'clock on  
10 Monday. And if there are any statements, please, those statements must be circulated timeously, so that we do not adjourn again. And remember, once we adjourn on Tuesday, we will start with the evidence leaders in April. Thank you. We adjourn.

**ENQUIRY ADJOURNED UNTIL 30 MARCH 2026**

**ENQUIRY ADJOURNS**

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