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**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

ARTHUR FRASER

APPLICANT

and

MZUVUKILE JEFF MAQETUKA

1st RESPONDENT

GIBSON LIZO NJENJE

2nd RESPONDENT

RIAZ "MOE" SHAIK

3rd RESPONDENT

FHOLISANI SYDNEY MUFUMADI

4th RESPONDENT

LOYISA JAFTA

5th RESPONDENT

SETLHOMAMARU ISAAC DINTWE

6th RESPONDENT

MR Y

7th RESPONDENT

RULING¹

Zondo ACJ, Chairperson of the Commission

Introduction

1. The applicant, Mr Arthur Fraser, lodged an application with the Secretary of the Commission on the 20th April 2021 for leave to cross-examine certain witnesses who

¹ In order to ensure clarity, minor editorial corrections have been made to this ruling subsequent to its delivery on 1 December 2021. The corrections do not affect the substance of the ruling or its reasons.

had testified before the Commission or deposed to affidavits or both. Those witnesses were:

- 1.1. Ambassador Mzuvukile Maqetuka
- 1.2. Mr Gibson Lizo Njenje
- 1.3. Ambassador Riaz "Moe" Shaik
- 1.4. Dr Fholisani Sydney Mufamadi
- 1.5. Mr Loyiso Jafta
- 1.6. Mr Setlhomamaru Isaac Dintwe
- 1.7. Mr Y (pseudonym)

2. The applicant's application consisted of a notice of motion, a founding affidavit and two unsigned statements. The first one of those statements is marked "AF1" and the second one "AF2". The applicant annexed to the second one his application before the Commission that he had lodged with the Secretary of the Commission on the 9th of March 2021 for an order effectively compelling the Minister of State Security, the Director-General of the State Security Agency and the State Security Agency to furnish him with a long list of documents about which I will say more later. The applicant's statement marked "AF1" is a statement that is said to be aimed at responding to the evidence given in the Commission by the witnesses whom the applicant seeks leave to cross-examine. That statement is about 208 pages. The statement marked "AF2" is said to be the applicant's response to the report of the High-Level Review Panel that was chaired by Dr Mufamadi in regard to the State Security Agency and its functioning. The application for an order compelling the SSA to provide the applicant with certain

documents was about 159 pages. From the above, it would be realised that the applicant has furnished the Commission with statements (and annexures) amounting to about 447 pages².

3. The applicant did not serve his application for leave to cross-examine on the witnesses he sought to cross-examine.

Background and consideration of the application.

4. In considering the applicant's application for leave to cross-examine witnesses, it is necessary to first outline the background against which that application should be decided. That background emerges from the applicant's application, his application for an order compelling the Minister of State Security, the Director-General of the State Security Agency and the State Security Agency to furnish him with certain documents, the transcript of the proceedings of the Commission on the morning of 14 April 2021, an affidavit deposed to by Mr Frank Dutton, another affidavit deposed to by Mr Patrick Mlambo, a letter from the Secretary of the Commission to the applicant's attorneys and the State Security Agency dated 17 June 2021 and the response to that letter from the State Attorney representing the State Security Agency and the applicant's affidavit deposed to on 22 November 2021.
5. Reference will be made to the applicant's application relating to documents because the applicant said in his affidavit for leave to cross-examine that his statement to the Commission was not complete without the documents he sought from the State Security Agency. The affidavits of Mr Frank Dutton and Mr Mlambo as well as the transcript of the Commission's proceedings of 14 April 2021 were furnished to the applicant and he was informed that the purpose of furnishing them to him was to enable him to deal with

² That includes annexures.

them by way of an affidavit should they be taken into account in deciding his application for leave to cross-examine. The applicant asked for an extension of time to deliver his affidavit and he was granted such extension. He subsequently delivered an affidavit in terms of which he made certain allegations against the Commission and the Chairperson of the Commission.

6. In the written submissions prepared by the applicant's counsel, the applicant's counsel referred to what he said or announced when he appeared before the Commission on the 20th of July 2020. He also attached to his written submissions the transcript of the proceedings of the Commission on the morning of that day in so far as they relate to the announcement he made publicly on behalf of the applicant. It seems to me that what the applicant's counsel announced on that day publicly is a good point at which to start the background to the applicant's application for leave to cross-examine. This is what the applicant's counsel announced:

"Ordinarily, Mr Fraser would have liked to die with the secrets he is going to have to disclose to these proceedings but it is only because he has been accused of treason that he reluctantly comes here. And he comes here, Chair, to complete your picture of this thing called State Capture. To complete it because what the Chair was told, that at least from the Intelligence's point of view, which is not something that ordinarily should be done at a place like this. His evidence is going to be important because basically he is going to complete the picture for Chair about secrets of the state. And he is going to complete the picture because unlike many other witnesses, he is going to have to share the secrets with the Chair relating, not just to those who were in the administrative arm of government, he will have to complete despite doing something he reluctantly does to tell the Chair about things that relate to the President or the Presidents of this country, past and present, that relates to judges, that relates to Parliamentarians. So those three arms because the Chair will have completed that when he knows what has been happening there. As I have said, I

had advised him not to because he signed an oath never to but he has been accused of treason now..."³ (underlining supplied).

7. Mr Frank Dutton's affidavit and that of Mr Mlambo reveal that, after the Commission's Investigation Team (which included Mr Dutton and Mr Mlambo) had become aware that the applicant had made certain allegations which related to matters that seemed to fall within the terms of reference of the Commission, a decision was taken by members of the Commission's Legal Team and Investigation Team that the applicant be approached and invited to work with the Commission so that the Commission could investigate his allegations. Mr Mlambo was asked to approach the applicant's attorney in order to see whether a member or members of the Commission's Investigation team could interview the applicant. Mr Mlambo says that he approached the applicant's attorney on the 5th August 2020 with that request. Mr Mlambo says in his affidavit that the applicant's attorney, not only rejected the approach, but he was rude and disrespectful to him. Mr Mlambo says he subsequently reported this to Mr Frank Dutton. Mr Dutton then sent an email on the 5th of August 2020 to the Head of the Commission's Legal Team, Advocate PJ Pretorius SC and the Head of the Commission's Investigation Team, Mr T Nombembe.
8. The email from Mr Dutton dated 5 August 2020 to Mr Pretorius and Mr Nombembe read as follows:

³ It is to be noted that at the beginning of this announcement by the applicant's Counsel, he said that "it [was] only because [the applicant] had been accused of treason that he reluctantly comes here." This seems to suggest that, had he not been (allegedly) accused of treason, the applicant would not have approached the Commission to share with it all the information he said or his Counsel said he had about state capture and corruption notwithstanding the fact that the Chairperson of the Commission had been calling for past and present Directors-General, which would include him, to come forward and assist the Commission if they had information about state capture, fraud and corruption. The observation may also be made that the inexplicable conduct on the applicant's part as reflected below of not taking up the State Security Agency's offer that he visits their premises so that he could indicate the documents he wanted may well reflect the reluctance that his Counsel talked about on 20 July 2020.

"Dear, Paul and Terrence.

I asked Pat to phone Fraser's lawyer and refer him to the statements that Fraser would lay bare to the Commission secrets that relates to Presidents and judges.

Further, that should his client wish to open a communication with the Commission we would facilitate this. The lawyer took exception to this and expressed anger at our approach.

Very clearly, according to the lawyer, Fraser does not wish to engage with us but would use their own channels and methods.

An interview with Fraser is therefore not on the cards.

Regards,

Frank"

9. The applicant has said that he was not aware of any conversation that his then attorney may have had with Mr Patrick Mlambo on 5 August 2020 but he says that he had not told his attorney that he did not want to engage with the Commission. Apparently, the applicant's then attorney subsequently passed on. Mr Mlambo has confirmed in his affidavit that he did speak to the applicant's attorney at the time and the latter's response was as reflected in Mr Dutton's email of 5 August 2020 addressed to Mr Paul Pretorius, the Head of the Commission's Legal Team and Mr Nombembe, the Head of the Commission's Investigation Team.
10. It would appear that by way of a letter dated 5 August 2020 the applicant's then attorney wrote to the State Security Agency and requested to be furnished with a variety of documents which he said he needed in order to prepare his statement to the Commission. That the applicant's attorney would, on 5 August 2020, have written a letter or email to the State Security Agency asking for documents which he said he needed in order to deal with evidence led before the Commission is strange because, on Mr Mlambo's version, that was the day on which the applicant's attorney rejected the Commission's approach to interview the applicant. The applicant's attorney said that

the applicant needed those documents in order to deal with allegations made against him by certain witnesses who testified before the Commission.

11. By way of a letter dated 23 August 2020 that was sent on 21 September 2020, the Acting Director-General of the State Security Agency, who was Mr Loyiso Jafta at the time, as I understand the position, responded to the applicant's attorneys' letter and indicated that the State Security Agency was prepared to give him documents that were relevant to the allegations made against him in the Commission and relevant to the work of the Commission that could be given to him without being in breach of the law. Furthermore, the then Acting Director-General invited the applicant in that letter to meet with him to discuss the matter and indicated that he would be prepared to expedite the process. That the Acting Director-General of the State Security Agency had extended this invitation to the applicant as far back as September 2020 emerged from the answering affidavit deposed to by Mr Msimanga, the Acting Director-General as at April 2021 which was filed to oppose the applicant's application to compel the SSA to give the applicant the documents he wanted.
12. By way of a letter dated 4 August 2020 addressed to the Minister of State Security the applicant also requested the Minister to furnish him with a variety of documents. I have already referred to the applicant's attorney's letter of 5 August 2020 and indeed I have referred to the response of the Acting Director-General to that letter.
13. On the 14th August 2020 the applicant's attorneys appear to have written a letter to me as the Chairperson of the Commission, requesting that I help the applicant by persuading the President, the Minister of State Security, the Inspector General and the Director-General of the State Security Agency to comply with his request for information.

14. The applicant or his attorneys did not respond to the letter from the Acting Director-General dated 23 August 2020 but that was sent in September 2020 to which reference has been made above. This was still the case by the 9th March 2021 when the applicant lodged his application for an order compelling the State Security Agency to furnish him with the documents he had asked for. However, there are two or three letters that the then applicant's attorney wrote in the second half of 2020 and early in 2021 suggesting that they were still pursuing the idea of obtaining documents from the State Security Agency. This has been dealt with in the previous paragraphs.
15. By way of a letter dated 23 January 2021 addressed to the then Acting Director General, Mr Loyiso Jaftha, once again the applicant's attorney requested the declassification of various documents. No reference was made to the letter of September 2020 from the Acting Director-General to the applicant's attorney in which the Acting Director-General had extended an invitation to the applicant to meet with him to discuss his request for documents.
16. On the 9th March 2021 the applicant lodged his application with the Secretary of the Commission. That is his application for an order compelling the Minister of State Security, the Director-General of State Security Agency and the State Security Agency to furnish him with various documents. In his affidavit in that application the applicant stated that he needed the documents in order to complete his statement to the Commission. In paragraph 18 of his founding affidavit, the applicant said:
- "These documents are necessary to enable me to respond to the allegations levelled against me and assist the Commission uncover the true nature and extent of State Capture and I am convinced that the respondents are in possession thereof."
17. In the next paragraph in his affidavit the applicant said that up to that date the respondents in that application, which would include the Acting Director-General of the State Security Agency, had "ignored, failed and/or refused to provide" him with

intelligence documents and/or information that he had requested. He said that they had not provided him with any reasons for their failure or refusal to comply with the request.

18. On the 17th of March 2021 the answering affidavit of the Acting Director-General of the State Security Agency, who was Ambassador Tony Msimanga by then, was lodged with the Commission and would have been served more or less around that date on the applicant's attorneys. The answering affidavit was deposed to by Mr Msimanga but a confirmatory affidavit of Mr Loyiso Jafta, who had been the Acting Director-General earlier in the year and in 2020 or part of 2020, was also filed.
19. In the answering affidavit Mr Msimanga complained that the applicant had failed to give adequate details of the information or documents he was requesting with the result that the State Security Agency could not determine which documents exactly he wanted. He also complained that the information that the applicant had provided made it difficult to determine the relevance of some of the information or documents to the work of the Commission.
20. In paragraphs 14,15 and 16 of his affidavit, Mr Msimanga said the following which I consider very important:

14. "However, in my capacity as Acting Director-General, I am willing to cooperate with and where possible provide the applicant with documents that are considered relevant to the Commission's scope of work and which may enable him to address the Commission with regard to allegations that were made against him in the Commission. To this end, I am willing, acting in the best interests of the agency and the Commission, to afford the applicant access to the relevant files and or documents.

15. This may take place in the form of the applicant's visit to the premises of the Agency where he would be allowed access and perusal of the documents under supervision during which process he will be required to specify precisely which documents he would like to be declassified.

Such documents may only be those that are relevant to the Commission's scope of work and or which are relevant to the allegations that were made against him in the Commission, which as such, will enable him to refute such allegations."

16. Such process will have to be in compliance with the provisions of Chapter XXIV of the Regulations in terms of the Intelligence Services Act, 65 of 2002. This process would then be followed by the official internal processes in relation to the consideration of the applicant's need for declassification and the manner in which such documents or information would be made available to him which would include redaction of sensitive information. If necessary the prescribed process may be expedited". (Underlining supplied).
21. On the 13th April 2021 the applicant deposed to a replying affidavit to Mr Msimanga's affidavit. In paragraph 5 of his replying affidavit this is what the applicant said about the contents of paragraphs 14, 15 and 16 of Mr Msimanga's affidavit:

"The purpose of this affidavit is to set out the basis upon which I submit that the documents are relevant to the allegations raised by certain witnesses against me. In doing so I will accept the offer made by the SSA in paragraphs 14, 15 and 16 of its answering affidavit. Furthermore, and in view of the time constraints facing the Commission, I will request that the Chairperson sets out a clear time-frame within which such documents must be declassified and furnished to me."

22. It is clear from this paragraph in the applicant's replying affidavit that he completely, unequivocally and unconditionally accepted the offer made by Mr Msimanga and the State Security Agency including the requirement that, in order for him to have access to the documents and information that he required, there would have to be compliance with Chapter XXIV of the Regulations made under the Intelligence Services Act 65 of 2002. I note that in paragraph 10 of his replying affidavit the applicant said, among other things:

"I have cast the net wide because the testimonies of Mufamadi, Njenje, Maquetuka, Jafta and Ms K all sought to attribute all Intelligence failures to me and my tenure. .

. . . I stress that my statement is incomplete without the documents I seek. As a courtesy I have elected to attach it in its current stage in order to demonstrate that I seek to assist the Commission and await these documents in order to complete the picture painted in my draft statement." (underlining supplied).

23. Paragraph 17 of Mr Msimanga's answering affidavit is also important. It is the paragraph that comes immediately after the three paragraphs to which the applicant referred to in his replying affidavit to Mr Msimanga's affidavit. Accordingly, the applicant could not have missed paragraph 17. In that paragraph Mr Msimanga refers to the letter dated 23 August 2020, which was sent on 21 September 2020 by his predecessor, Mr Loyiso Jafta, to the applicant's attorneys in response to their first letter to him. That is the letter of 5 August 2020 in which they requested the SSA to give the applicant the documents he said he needed.

24. In paragraph 17 of his affidavit Mr Msimanga says:

"I am advised that Mr Jafta, in a written response to the applicant's attorney's letter to the office of the Director-General of the agency dated 5 August 2020, advised and invited the applicant to follow the appropriate procedure to enable the agency to properly consider his request for information. In the said letter, dated 23 August 2020, (which was sent to the applicant's attorneys on 21 September 2020), Mr Jafta also extended an invitation to the applicant for consultation with him to discuss how best the matter could be dealt with. However, this advice and invitation came to naught as the applicant did not follow the said advice and ignored the invitation. A copy of the aforesaid letter from Mr Jafta to the applicant is attached [hereto] and is marked Annexure "TM1". The Chapter XXIV Regulation attached to the said letter is annexed hereto and is marked Annexure "TM2". Proof of despatch of the said letter by email on 21 September 2020 is attached here to and is marked Annexure "TM3". (underlining supplied).

25. Paragraph 17 of Mr Msimanga's affidavit is clear. What is very interesting is that in his replying affidavit the applicant, who must have read paragraph 17, did not deny what was said in paragraph 17 nor did he deny that he or his attorney received Mr Jafta's letter which is referred to in paragraph 17. This has to mean that the applicant's

attorneys did receive that email or letter and the applicant knew about it. This has to be so because there can be no doubt that, if the applicant's attorneys had not received the letter or email, the applicant would have said so in his response in the replying affidavit after reading paragraph 17 of Mr Msimanga's affidavit. The fact that he did not deny the contents of paragraph 17 means that he and his attorneys did receive the email or letter.

26. The question that arises if the applicant and his attorneys at the time did receive Mr Jafta's letter is this one: why did the applicant's attorneys then or the applicant not respond to it and accept Mr Jafta's invitation and meet with Mr Jafta and do the necessary to obtain the documents that the applicant had requested? The applicant did not explain this in his replying affidavit. Another question is this: why did the applicant write other letters to the Acting Director-General requesting the documents? This is not explained. Yet another question is: why did the applicant launch an application in the Commission for an order compelling the Minister of State Security, the Acting Director-General of SSA and SSA to give him documents that he knew they had said they were prepared to give him if they were relevant to the work of the Commission or related to allegations that had been made against him in the Commission if he complied with Chapter XXIV of the Regulations promulgated in terms of the Intelligence Services Act, 2002? This is difficult to understand. However, these are not the only unanswered questions relating to the applicant's application. There are more unanswered questions.
27. On the 14th April 2021 when the applicant's application for an order compelling the SSA to give him documents was to be heard, an agreement was reached that the application be adjourned *sine die* to enable the applicant or his legal representative and the State Security Agency to meet with the SSA and seek to reach an agreement on which documents the SSA would be prepared to give him and which documents they were not prepared to give him, if any, and what the grounds were for their unpreparedness to give him some of the documents.

28. The transcript of the proceedings of the Commission on the 14th April 2021 was furnished to the applicant and he was given an opportunity to comment thereon and he has not disputed the contents of the transcript. They reveal that the applicant's own legal representative said the following, among other things, during those proceedings:

"And for the first time in the respondent's answering affidavit do we get told that the respondents are willing to assist us with the documents that [we] require and subject to us providing them with the particularities of the documents that are required."

29. Indeed, the applicant's legal representative is reflected in the transcript to have also said:

"Our view then, which we indicated to our opponents, is that to the extent that they undertook to provide us with documents provided that we give them the particularities, we have done that. As far as [we] are concerned, there is no matter to be argued anymore today."

30. What the applicant's attorneys or counsel was saying was in effect that an agreement had been reached between the parties in terms of which the applicant's side needed to give the State Security Agency particulars of the documents they wanted the State Security Agency to make available to them. It was in this context that he then said that, as far as he was concerned, there was no longer any matter to be argued that day.

31. The transcript then reflects that I had this to say to the applicant's legal representative:

"As it stands Ja. well, it seems to me that because they have given that undertaking, you are right in taking the attitude that you should give them time to apply their minds to the particulars that you have given so that they can give you the information you have asked for.

Or if they have reason not to give you some of the information that is there, they can tell you why but it seems that there is no point in pursuing the application as of today. It may well be that the application should be postponed either to a specific date or sine die so that that stays the one point but the other point, which I must say, is that you and your client [must] appreciate the situation [that the Commission is faced

with..].” “... [that is] to what the Commission can do at the time that your client will have received the documents that he is looking for. In terms of the Commission allocating any time for any evidence. “... I cannot give you any guarantee because of precisely where we are. The oral evidence should have been finalised by the end of March. We are in extra time and there is serious difficulty. You know, April and May and June were supposed to be for the writing of the report. So I am just mentioning that for what it is worth so that as and when you reach a point where you have got your – the information you are asking for, we are not guaranteeing anything. If at that stage you make a request to give evidence or whatever that will have to be looked at, at that time against the constraints that will exist at that time, you appreciate that?” (underlining supplied).

32. It will be seen from what is quoted above that Mr Fraser’s legal representative was basically informed that, because of the time when the applicant brought his application, there was no guarantee that, when he obtained the documents he sought, the Commission would be able to hear his evidence or that of any witnesses he might wish to call. It was made clear that the hearing of oral evidence was meant to have been completed by the end of April. The applicant’s legal representative was asked whether he appreciated the constraints under which the Commission was operating and he responded: “We appreciate that Chairperson.”
33. The transcript also reflects what the respondents’ legal representative said in those proceedings. He is reflected as having said:

“The Agency was approached by the applicant as early as August 2020. The then Acting Director General responded to the applicant inviting him to follow the correct procedure and also invited him to have a consultation with him so that they can see how best the agency can help him to expedite the issue of the disclosure of information. And that was the letter to the applicant that was sent on the 21st of September 2020 . . . and the applicant did not respond to the invitation that was extended to him by the then Director General. And now six months down the line they decided to approach the Commission, alleging that there is not – they would not have been afforded an opportunity to get the documents that they are looking for which is not true.” (underlining supplied).

34. The State Security Agency's counsel in that application submitted that Mr Fraser was wasting the Commission's time and abusing the Commission's processes and his application should simply be dismissed. The transcript reflects that at that stage the Chairperson suggested that Mr Fraser's application be postponed to enable the parties to try and reach an agreement and the respondent's legal representative then decided not to persist in his argument that Mr Fraser's application be dismissed.
35. The transcript also reflects something important that Advocate P J Pretorius SC, the Head of the Commission's Legal Team, said in those proceedings. Mr Pretorius is reflected as having said, among other things:

"Mr Fraser says in paragraph 34 of his founding affidavit: 'I am more than eager to expose the machinations of these people who I believe are guilty of abusing their positions in government to favour and unlawfully enrich themselves, their friends and or associates to favour or disadvantage certain political parties and factions of political parties, steal from the public purse and then there is an allegation that I am going to deal with.' Chair, [that is now Mr Pretorius] there are two ways that this will be dealt with, this issue. The commission's powers to order the production of documents are there for the Commission to conduct its own investigation in terms of its own Terms of Reference. Mr Fraser appears on his own statement to have evidence significant to the work of the Commission and from the Legal Team's point of view, of course, and I am sure that will be endorsed by the investigators, we invite Mr Fraser to come and cooperate with the Commission's investigators so that the Commission can with Mr Fraser, conduct an investigation. What is happening here is that an investigation is being conducted outside of the ambit of the Commission's work. So if Mr Fraser has evidence relevant to the Commission, evidence of a serious criminal nature it should have been brought before the Commission long ago but although it is late we invite Mr Fraser to work with the Commission in a Commission investigation." (underlining supplied).

36. This part of the transcript reflects quite clearly that the Head of the Commission's Legal Team publicly invited the applicant "to come and cooperate with the Commission's investigators so that the Commission can with Mr Fraser, conduct an investigation". Later, Mr Pretorius is reflected as having said: "we invite Mr Fraser to work with the

Commission in a Commission investigation.” The applicant’s legal representative did not accept Mr Pretorius’ invitation in those proceedings.

37. The applicant’s application relating to documents was adjourned *sine die* on the basis that he or his legal representatives would meet with SSA and agree on the documents and, if he did not find satisfaction, he could come back to the Commission and ask that the Chairperson decide his application and compel the respondents in that matter, that is the State Security Agency and the Acting Director-General, to give him the documents he wanted in order to complete his statement to the Commission.
38. About two months later – that is on the 17th June 2021 – the Commission’s Secretariat wrote to the applicant’s attorneys and to the Director-General of SSA and called upon them to report back to the Commission on what was happening with regard to the applicant’s application relating to documents. It would appear that the applicant’s attorneys did not respond but the State Attorney responded on behalf of the State Security Agency. The State Attorney did so by way of a letter dated 22 June 2021. It is not necessary to quote the contents of that letter. It is sufficient to say that the State Security Agency seems to have genuinely tried to have the matter expedited but no meeting took place. However, the most important point that is made in the letter is that an agreement had been reached between both sides on the minimum requirement that the applicant was to comply with but he had failed to comply with that requirement and, until he had complied with that requirement, the State Security Agency, according to the State Attorney, could not do much about his request for documents. The agreement that the State Security Agency and State Attorney was referring to in the letter must be the agreement that had been reached between the applicant and the State Security Agency in the proceedings of the Commission on the 14th April 2021.

39. In paragraph 8 of the State Attorney's letter referred to above, the State Attorney said the following, among others:

"Lastly, we considered it apposite to emphasise that it is our client's view that Mr Fraser as a former Director-General of the Agency, is well aware of what the provisions of the said regulations entail, including the importance of compliance therewith. It is, therefore, inconceivable that the delay in holding the said meeting could ever be a stumbling block in the submission of Mr Fraser's request for information in accordance with the correct procedure as stipulated in the Regulations. The Applicant's action in failing to comply with the Regulations, is considered strange as, in a letter to the Commission dated 13 April 2021, the Applicant through his attorneys, expressly stated that he was in agreement with our client's submission as contained in the answering affidavit which *inter alia* emphasised the need for the applicant to comply with the regulations. A copy of the letter from the application's attorney in this regard is attached hereto marked Annexure "C". (underlining supplied).

40. The applicant has been afforded an opportunity by the Commission to deal with the contents of the letter from the State Attorney and share with the Commission his version on what happened after 14 April 2021 with regard to the purpose for which his application relating to documents had been adjourned but he has not placed anything before me that shows that he acted diligently to try and secure from the State Security Agency the documents that he had said he needed in order to complete his statement before the Commission.
41. The applicant has been afforded the opportunity by the Commission to explain why he has not complied with the Regulations with which he knows he needs to comply if he seeks to be furnished by the State Security Agency with the documents that he seeks in order to complete his statement.
42. On what is before me the reason why the applicant has not been furnished with the documents that he said he wanted from the State Security Agency is that he has failed to comply with the Regulations that he had agreed to comply with and he has failed to

do what is necessary for him to do in order to obtain the documents. He has not acted on the agreement that was reached between him and the State Security Agency when he, in his replying affidavit, said that he accepted the offer contained in paragraphs 14, 15 and 16 of Mr Msimanga's affidavit. He has also not explained why he did not do so.

43. Furthermore, the applicant has never come back to the Commission to report on the outcome of a process that was agreed upon in the Commission on 14 April 2021. He has left the Commission unsure of what is going on. The applicant has done this in circumstances where he knew that on the 14th of April 2021 when his application came before the Commission he was told that because of how late he had brought his application for an order compelling the State Security Agency to give him the documents he wanted, there was no guarantee that, if and when he got those documents, the Commission would be able to hear oral evidence.
44. One would have thought that anyone who was genuine about giving evidence or about being able to get a date or dates to cross-examine witnesses who had implicated him in wrongdoing would do everything in his or her power to expedite the matter and to keep the Commission informed of how the process of obtaining the documents was progressing. Not the applicant. By the end of May 2021, the applicant had not told the Commission anything. By mid-June the applicant had still not told the Commission anything. When the Commission wrote to him via his attorney, he did not respond. Only the State Attorney responded. By the end of July 2021, the applicant had still not told the Commission what was happening. Indeed, even now the applicant has not told the Commission what happened with the execution of the agreement that he and the State Security Agency had reached as recorded in his replying affidavit in response to the answering affidavit by Mr Msimanga.

45. The State Security Agency has said the applicant was obliged to comply with Chapter XXIV of the Regulations but has not complied. The applicant has not said that he has complied with that requirement. So, the position must be that the applicant stopped seeking the documents he had said he needed but has not told the Commission why he stopped and how his version would now be complete without the documents when he had said that it would not be complete without the documents. Why the applicant did not cooperate with the State Security Agency, as he had agreed to in order to obtain the documents he had said he needed, is another unanswered question in the applicant's application.
46. With that background it is necessary to then look at the rules of the Commission that govern proceedings or applications for leave to cross-examine a witness. Regulation 15 of the Regulations of the Commission provides that the Commission may prescribe its own processes.
47. Rule 3 of the Rules of the Commission governs witnesses who are presented to the Chairperson by the Commission's Legal Team and the implicated persons in their evidence. Rule 3.3 of the Rules of the Commission makes it clear that, if an implicated person wishes to give evidence himself or herself or to call a witness to give evidence on his or her behalf or to cross-examine a witness, he or she must, within two weeks from the date of notice, apply in writing to the Commission for leave to do so and the Chairperson will decide the application.
48. Rule 3.4 is also very important. It reads:

"An application in terms of Rule 3.3.6 above must be submitted in writing to the Secretary of the Commission within fourteen calendar days from the date of the notice referred to in Rule 3.3. The application must be accompanied by a statement from the implicated person responding to the witness's statement in so far as it implicates him or her. The statement must make it clear what parts of the witness

statement are disputed or denied and the grounds upon which those parts are disputed or denied." (underlining supplied).

49. I draw attention to that part of Rule 3.4 which requires an implicated person who applies for leave to cross-examine a witness to ensure that his or her application is "accompanied by a statement from the implicated person responding to the witness' statement in so far as it relates to him or her". I also draw attention to the sentence that follows that sentence. It obliges the implicated person who makes an application for leave to cross-examine to ensure that his or her application "make(s) it clear what parts of the witness' statement are disputed or denied and the grounds upon which those parts are disputed or denied".
50. I have made it clear in previous rulings that Rule 3.4 requires an applicant for leave to cross-examine to furnish his or her full version in regard to incidents or matters dealt with in a witness's statement or affidavit.⁴ In other words, the principle is that an

⁴ In a ruling delivered on 16 April 2019 on Mr T Moyane's application for leave to cross-examine Minister Pravin Gordhan I said the following at paragraphs 15 – 16: "This sentence requires the implicated person's statement to make it clear what parts of the witness' statement are denied or disputed and the grounds upon which those parts are disputed or denied. The purpose of the second and the third sentences of Rule 3.4 is to ensure that an implicated person does not simply provide a bare denial to a witness' statement that implicates him or her or to a part of a witness' statement that implicates him or her. Read together these two sentences require or oblige an implicated person to do three things namely: (a) identify the parts of the witness' statement that he or she accepts implicate him or her. (b) Respond to the parts of the witness' statement that implicate him or her by stating whether he or she admits or denies them and setting out his or version in regard to the incident or event or allegations and (c) ensure that his or her response or statement or affidavit provides the basis or grounds upon which he or she disputes or denies the version or allegation or evidence implicating him or her as reflected in the witness's statement or evidence". . . . At paragraph 21 I said: "If an applicant for leave to cross-examine succeeds in showing that he or she is implicated in the statement or evidence of the witness then he or she must state in accordance with the second and third sentences of Rule 3.4 what he or she admits in the witness's statement or evidence and what he or she denies or disputes, set out his or her full version of the incident or to the allegation and state what the grounds are for denying or disputing the witness statement or part or parts thereof". . . . At paragraph 24 I said: "A principle that is not expressly articulated or covered by the rules but is of obvious application is that an applicant for leave to cross-examine must take the commission into his or her confidence and disclose his or her true and full version in regard to any allegation made or evidence given by the witness that implicates him or her. Obviously, an applicant for leave to cross-examine who fails to take the Commission into

implicated person cannot be expected to be granted leave to cross-examine a witness who has implicated him or her unless he or she makes a full disclosure of what his or her version is on the matters or incidents in issue. The reason for this is clear. In proceedings of a body such as a Commission of Inquiry like this one an implicated person cannot be allowed to use cross-examination without taking the Commission into his or her confidence and telling it what he or she knows about matters which it is investigating of which he or she has knowledge.

51. Another reason why this rule obliges an applicant for leave to cross-examine to make full disclosure of his or her version is to enable me as the Chairperson of the Commission to determine how much is in dispute between the version of the witness and the version of the implicated person, how important the points of dispute between them are to the matters being investigated by the Commission and how much time needs to be set aside for the cross-examination of the witness if leave to cross-examine is granted. This is important because, if I know where the points of dispute are between the implicated person and the witness, I would be able to direct that cross-examination should focus on the points in dispute between the two versions. That would ensure that time is not wasted by the implicated person or his or her lawyer, putting questions to the witness that relate to points that are not in dispute.

52. Rules 3.5, 3.6 and 3.7 are also important. They read as follows:

"3.5. If an implicated person believes that the Commission's Legal Team did not give him or her the notice referred to in Rule 3.3 within a reasonable time before the witness could or was to give evidence and that this may be prejudicial to him or her, he or she may apply to the Commission for such order as will ensure that he or she is not seriously prejudiced.

his or her confidence and disclose his or her true version of matters risks having his or her application refused."

3.6. In deciding an application contemplated in Rule 3.3.6, the Chairperson may, in his discretion and on such terms and conditions as he may deem appropriate, grant leave to an implicated person: (a) to give evidence; (b) to call a witness to give evidence on his behalf and/or (c) to cross-examine the witness implicating him or her.

3.7. In accordance with Regulations 8(3), there is no right to cross-examine a witness before the Commission but the Chairperson may permit cross-examination should he deem it necessary and in the best interests of the work of the Commission to do so."

53. Rule 3.5 seeks to provide a remedy to an implicated person who complains that he or she was not given a Rule 3.3 notice timeously and that this would prejudice him. The applicant in this case did not invoke this rule to ask for any remedy. Rule 3.6 and Rule 3.7 provide that I have a discretion to grant leave to cross-examine and that I may grant it if I deem it in the interests of the work of the Commission to do so.

54. With that discussion of the rules out of the way, it is important then to have regard to the applicant's application. As I have indicated earlier, the applicant's application for leave to cross-examine consisted of a notice of motion and the founding affidavit as well as two unsigned statements and the applicant's own application relating to documents that I have referred to earlier which was launched on the 9th of March 2021. That application was an annexure to one of the unsigned statements. The statements that I have said were unsigned were also not under oath. The applicant indicated in his affidavit that they were not signed because he was waiting for the documents that he had asked for and he would then complete his statement once the documents had been received.

55. I have referred earlier to the names of witnesses that the applicant sought leave to cross-examine. In his affidavit that he furnished to the Commission in support of his application, the applicant dealt with four of those witnesses and he said in the same paragraphs that they had implicated him in four broad areas. The four witnesses are

Ambassador Maquetuka, Mr Shaik, Mr Njenje and Dr Mufamadi. He set out in paragraphs 15, 16 and onwards various areas where he said that they had implicated him in their affidavits or evidence but he did not specify in which parts of their respective affidavits, they had implicated him. In paragraph 16, he simply said that the four broad areas were the following:

1. The 2006 National Intelligence Agency (NIA),

2. Principal Agent Network (PAN) Programme was a corruption scheme.

56. He said that is what they had implicated him in. He said they also implicated him in the centralisation of power in relation to the 2006 NIA/PAN and Strategic Development Plan Vision 2035 (SDP). He said they also implicated him in governance matters of the SSA during his time. He said they implicated him also in a doctrinal shift away from what was conceived in 1994, resulting in the unlawful repurposing of the SSA. He said another issue raised by Ambassador Maquetuka and others which directly or indirectly affected him was the investigations that were conducted into the affairs and operations of the 2006 NIA/PAN Programme. In paragraph 19 he said:

"At the outset I refute these allegations as utterly without any merits."

He continued:

"I refer the Commission to the version set out in Annexure AF1 and AF2 wherein I deal with the testimony of Maqethuka and others as I demonstrate below my version of the legislative framework is contrary to that given by the 2009 State Security Agency's top 3 officials (Maquetuka, Shaik and Njenje) and Dr Mufamadi in their testimonies."

57. What the applicant did not do in his affidavit in relation to this application for leave to cross-examine these four witnesses is that he did not take each one's affidavit, tell the Commission in which paragraph that witness implicated him and by what statements or

evidence and then deal with that. That is what would be required and that is what is well known among all legal practitioners you do when you respond to an affidavit. You identify the paragraphs that are important or that you dispute or the paragraphs on which you have something to say, particularly those you dispute and you say what parts of those paragraphs you dispute completely, what parts you admit, what parts you qualify or what parts require context.

58. What the applicant has done is simply to say that: these are the broad areas in which these witnesses have implicated me and I refute the allegations they gave against me as without any merit. He has something to say in terms of some of the points that he says, or areas, in which he says they implicated him and then, as I have indicated, he also says his version is contained in Annexure AF1 and AF2. Those are the unsigned statements that I talked about earlier which, by his own admission, do not contain his complete version. They should have been signed and they should have been under oath but they are not.
59. The applicant deals in his affidavit with certain topics such as the 2006 National Intelligence Agency, Principal Agent Network (PAN) Programme. Intelligence and its role in society in relation to National Security is another topic that he deals with in his affidavit. The politisation of SSA is another topic that he deals with and governance matters that he deals with as well as the Strategic Development Vision 2035.
60. It would appear that the applicant did address those topics in relation to the four witnesses that I have identified, namely, Ambassador Maquetuka, Mr Njenje and Mr Shaik and Dr Mufamadi. He also indicated that he sought leave to cross-examine Mr Jafta, the former Acting Director-General of SSA. In paragraph 41 of his affidavit he says:

"Although I did not receive a Rule 3.3 Notice in respect of Jafta's testimony, I have considered his statement and testimony before the Commission. In his statement he implicates me by alleging the following:

- 41.1. In paragraph 11 of his statement he falsely accuses me of centralisation and overconcentration of my power in my office.
- 41.2. He further alleges that I systematically subverted the law and systems of control within the agency by unlawfully putting in place new systems that did not comply with the legal requirements.
- 41.3. He also claims that I irregularly approved funding for ulterior purposes and undermined reporting procedures of the agency.
- 41.4. More seriously, he alleges that a sum of R 125 million was unaccounted for and emanates from operations in the Office of the Director General during my tenure.
- 41.5. Confirming the report of the high-level review panel on the SSA and the testimony of Dr Mufamadi, he claims that an amount of R 9 billion in relation to assets was unaccounted for."

61. I pause here to say that the reference to R 9 billion was clarified in the Commission and it was accepted, as I recall, even by Mr Jafta that that amount was incorrect. The applicant then says in paragraph 42:

"The above claims are false and reveal a misunderstanding of the applicable legislative framework and internal procedures. My version, as reflected in "AF1" and "AF2" and in my affidavit to the SAPS under Hillbrow CAS2/02/2021, a copy of which is hereto attached as "AF4", demonstrates that the above claims are without merit."

62. Except for the reference to paragraph 11 of Mr Jafta's affidavit, it is not indicated anywhere else where all these allegations are made in Mr Jafta's affidavit that the applicant says implicate him. That refers to the allegations on which he wants to cross-examine Mr Jafta. He says in paragraph 43:

"Accordingly, I wish to cross-examine him [that is Mr Jafta] on the following themes.

- 43.1. The correct legislative framework in respect of the powers of the Director General as the Accounting Officer.
- 43.2. His claims that large sums of money were utilised by me in conflict of the applicable procedures and mandates.
- 43.3. His claim that during my tenure that I abused my powers in the manner in which I dealt with resources and staff.
- 43.4. Issues related to governance.”

63. With regard to Mr Y. The applicant says he received a Rule 3.3 Notice in respect of Mr Y on 8 January 2021 and was advised of the broad areas in which Mr Y implicated him. He then goes on to set out those areas as he understands them in paragraphs 44.1 and 44.5. He then says that his own version is reflected in Annexures “AF1”, “AF2” and “AF4”. I emphasise that these Annexures, “AF1” and “AF2”, are lengthy statements. What it means is that the applicant requires me to go to those lengthy statements and try and look for paragraphs where the particular witness makes allegations against him and look back at his affidavit and see whether that is the one that he is talking about in his application, try and understand what his version is and whether he disputes the whole paragraph or parts of the paragraph or he explains some of the context which the witness might not have given.
64. That is not how affidavits, when you respond to an affidavit, are supposed to be done. You are supposed to take each paragraph that you want to challenge in the affidavit of the person who implicates you in wrongdoing and deal with it clearly so that it is clear what parts of the affidavit and what parts of each paragraph you admit or which parts you dispute. The applicant has not done that.
65. The applicant has also referred to the Rule 3.3 Notice that he received in respect of Dr Dintwe and he says that Dr Dintwe implicates him in the following:

- "46.1. He [that is now Dr Dintwe] alleges that during my tenure as Director General of the State Security Agency I lacked the requisite understanding of the powers of my office vis-a-vis that of the Office of the Inspector General of Intelligence.
- 46.2. He alleges further that I exhibit a contentious and recalcitrant attitude towards the OIGI and that I undermined its work.
- 46.3. He further alleges that I assisted the then Minister of State Security, Mr Bongani Bongo, to reduce the powers of the Inspector General of Intelligence and to remove him from office.
- 46.4. Lastly, he alleges that the manner in which I dealt with vetting, was contrary to the provisions of the requisite legal instruments and legislative framework."

In paragraph 47 he then says:

- 47. "I hereby apply to cross-examine him on the above stated aspects and to put to him the version contained in "AF1" to the extent that Dintwe ventures into the legislative framework and alleges that I misunderstood my powers, my version may be summarised as follows:
 - 47.1. The legislation states that the Director General of the SSA is empowered in law to issue the security clearance of the Inspector General of Intelligence (IGI). Consequently, the Director General is also empowered to withdraw the security clearance of the IGI.
 - 47.2. The IGI is required to comply with all security requirements applicable to all the employees of the SSA. In fact, the IGI previously abandoned the litigation in which he attempted to make similar inaccurate and spurious allegations.
 - 47.3. There is no reference in Dintwe's claim to any fact supporting his claim that I abused my powers in any way whatsoever. Instead, revealed in his allegations his own misconception of the applicable legislation."

Then he concludes his application.

- 66. Counsel for the applicant submitted in his written submissions that the applicant had complied with the requirements of Rule 3.3 and 3.4, the rules relating to applications for

leave to cross-examine witnesses. I did consider the written submissions that he submitted but, as I have indicated, I am satisfied that the applicant did not comply with the requirements of the rule in the way in which I have indicated.

67. The applicant needed to have identified exactly what parts of the affidavits of the witnesses implicated him and which ones he disputed and which ones he did not dispute and he needed to have given a full version of his side of the story in regard to all the allegations.
68. I indicated earlier on that I have made rulings before in relation to applications for leave to cross-examine in which I have indicated that the rules require that an applicant for leave to cross-examine a witness is required to furnish the Commission with his full version or account of the events in which he is implicated.
69. In this case, one, the applicant has not complied with the rule in relation to identifying in the affidavits of the witnesses exactly the paragraphs and parts of paragraphs that he disputes which implicate him and what his version is in regard to that but, two, he has, on his own admission, said that his version is incomplete without the documents that he sought to obtain from the Security State Agency.
70. The Commission adjourned his application on the 14th of April in order to give him and the State Security Agency an opportunity to discuss and reach agreement on the documents that would be made available to him because, quite clearly, the State Security Agency was prepared to give him documents if they were relevant to the scope of the work of the Commission or relevant to the allegations that had been made against him in the Commission, and, if it could do so, without being in breach of the law.
71. It is quite clear that they agreed as to what should happen and that included compliance with Chapter XXIV of the Regulations promulgated under the Intelligence Services Act

of 2002. The State Security Agency says the applicant has not complied with that Regulation in order to get the documents that he contends he is entitled to get. He has not explained why he has not done so in circumstances where he told this Commission on affidavit that those documents that he sought were very important in order for him to complete his statement and to give this Commission a complete picture.


72. In those circumstances, I can see no reason why it can be said that it is in the interests of the work of the Commission to grant the applicant leave to cross-examine any of these witnesses in the circumstances that I have set out in relation to non-compliance with the rules of the Commission

73. There is no explanation as to why:

- (a) having said that his statement would not be complete without the documents that he asked for from the State Security Agency, and
- (b) the Commission having given him time to ensure that he secured such documents, and
- (c) the State Security Agency having undertaken to give him such documents,

the applicant has not pursued the issue of obtaining the documents he wanted from the State Security Agency and why he no longer seeks to place those documents before the Commission so that his statement before the Commission is complete.

74. In all of these circumstances, I have concluded that the applicant's application falls to be dismissed and it is so dismissed.


Zondo ACJ
Chairperson of the Commission

Date of delivery of ruling: 1 December 2021
Date of release of typed ruling: 8 December 2021