

STATE CAPTURE INQUIRY
PARKTOWN, JOHANNESBURG

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DAY 10

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Session 1

CHAIRPERSON: Good morning everybody. This morning we will deal with applications for leave to cross-examine that have been brought by various implicated persons but before we start with that, I just want to deal with one issue and make some remarks in regard to something else. The one issue is the issue of Mr Zwanele Manyi. I have been furnished with an affidavit by him in which he explains the text message that he sent to Ms Williams on the day that Ms Williams or second day that Ms Williams was giving evidence or was it the first day and it would appear to me that it is arguable that he may not have intended anything wrong but that may have to be dealt with in due course so I
10 think from the Commission's legal team I want to ask Mr Maleka whether you have any suggestions of when we should deal with that or whether you might wish to have more time as the legal team to reflect and then let me know in due course.

ADV VINCENT MALEKA SC: Judge, I would not want to express my own individual view without conferring with my fellow colleagues as this is our leader Mr Pretorius but I can indicate to you the provisional view we expressed in the corridors is that since Mr Manyi has undertaken to appear before you, that issue should be dealt with together with the entirety of this evidence as the one he presented before you. If things do change, I will let you know.

CHAIRPERSON: Yes okay, shall we then say the legal team will reflect further on the
20 issue and when we resume next time, they can just indicate whether that provisional view stands or whether there is another suggestion.

ADV VINCENT MALEKA SC: Thank you Judge, we will then confirm our position finally on record later on.

CHAIRPERSON: Thank you, thank you. And then the other issue or remarks that I just want to make, relate to two things. One is that earlier this week there were some news reports that suggested that as Chairperson, I had said that implicated persons who have applied for leave to cross-examine witnesses, will have to undertake to give evidence in the Commission if they want to be granted leave. I caused a correction to be sent out to media houses I think, two days ago, to say that I had never said that and to indicate what had happened which may have led some people to think that the Commission had said that namely that a member of the legal team had previously indicated that that would be the stance of the legal team in regard to the applications but that I had not myself said
10 that. But, I haven't seen in the media or heard anything to suggest that the media statement that was issued to make that correction was published so I thought I must just make that clear that I have not said that and I have not made any decision on that. It is a matter that will still be argued and I would hear all sides and at the right time make a decision.

The other remarks I want to make relate to the call that I have been making to people in our country who have or may have knowledge of the allegations that we are investigating to come forward and in particular I have addressed the issue of past and present members of the Executive who may know something as well as past and present Directors General, Deputy Directors General, Chief Directors and any employees officials
20 of Government to come forward. In the Sunday Times this past Sunday, I did see an article indicating that former Minister of Communications, Mr Sipiwe Nyanda and some past officials in the Intelligence or and the Secret Service, Mr Njenje and Mr Shaik, according to the article, knows something and they said they, according to the article, they would be prepared to give evidence in the Commission if called upon to do so. I just want to take this opportunity to commend them for their decision to come forward and

make themselves available. I have asked the legal team and the investigation team to please waste no time in contacting them so that they can be interviewed to see whether they have any knowledge of matters that we are investigating that they can come and testify about. We hope that more and more people in the Executive and others who may know something about what we are investigating will make a decision that they will help the country to know exactly what happened and that they will not keep quiet with important material information. Thank you, those are the remarks I wanted to make.

At this stage therefore, in terms of the arrangement that we have agreed upon with Counsel on all side, we are going to start with the applications for leave to cross-examine
10 that I have indicated, seem to require serious debate and Mr Hellens will be the first one to come forward and move his clients application. Mr Hellens?

ADV MICHAEL HELLENS SC: Thank you Chair. Mr Chairman, I represent Mr Ajay Gupta in his application to cross-examine Ms Mentor and Mr Maseko. Just to sketch by way of background for the benefit of all concerned. I'll commence with the procedural framework against which this application is brought so that we all fall squarely in focus as to what it is that you have to exercise your discretion about. And I commence in my written submissions in paragraph 1:

The Rules governing proceedings of this Commission of Inquiry provide in Rule 3.3 thereof that, if the Commission's legal team intends to present to the Commission a
20 witness whose evidence implicates or may implicate another person, it must through the Secretary of the Commission, notify that implicated person in writing within a reasonable time the witness gives evidence. That he or she is or may be implicated by the witness's evidence in what way he or she is or may be implicated and furnish him or her with the witness's statement or relevant portions of the statement and then further of the day

when and the venue where the witness will give evidence, that he or she may attend the hearing at which the witness gives evidence, that he or she may be assisted by a legal representative when the witness gives evidence.

Then we made this submission that is of central significance to the issue to be argued before this Commission, is the provision contained in Rule 3.3.6 which provides that if he or she (a witness) wishes to give evidence himself or herself to call any witness to give evidence on his or her behalf or to cross-examine the witness and the word is "or" and between those, he or she must within two weeks from the date of notice, supply in writing to the Commission for leave to do so and that the Chairperson will decide the application.

10 Now, it is precisely against that framework that I now move you to exercise the discretion and it's a discretion undoubtedly that you have and nothing I say detracts from the fact that we would be asking you to exercise your discretion in our favour.

Now in terms of the provisions of Rule 3.4 [intervene]

CHAIRPERSON: I am sorry Mr Hellens, I am sorry to interrupt you, I just need to get my Registrar to get me something. I am sorry Mr Hellens for that, yes you may proceed now.

ADV MICHAEL HELLENS SC: Yes, my learned friend Mr Malema just pointed out to me that, Maleka, sorry, I am not unfamiliar with the name Malema. Where I said witness in paragraph 2 of my heads, I meant implicated party, so if an implicated party wishes to give evidence himself.

20 Now I was pausing to say, a la 3.3.7 of the Rules, that there is undoubtedly, because of the nature of these proceedings not being a Court of Law, either Civil or Criminal, that the decision to allow cross-examination and to allow the leading of evidence is your discretion, unfettered as I will submit later, save for such imperatives that come with your

having to apply a fair process under our Administrative Law but turning back to the heads.

In terms of the provisions of Rule 3.4, an application in terms of the above Rule must be submitted in writing to the Commission and it must be accompanied by a statement of 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's statement or disputed or denied and the grounds upon which those parts are disputed or denied.

Then, Mr Chair, those essentially are the rules now to be applied in considering in this instance whether Mr Ajay Gupta should be given permission to cross-examine Ms Mentor
10 and Mr Maseko obviously through Counsel. Now, if I might just flick from the heads to your bundle D3, you perhaps don't have to go there but I am indicating that an application in terms of Rule 3.4 accompanied by an affidavit, both in regard to Ms Mentor and Mr Maseko, have been filed by Mr Ajay Gupta and that notice reads as follows:

Take notice that the applicant hereby makes application to the Commission for leave to cross-examine the witness, Mr Themba Mveli James Maseko and the same notice is given, I won't read that, for Ms Mentor. In relation to the whole of the contents of his affidavit the respects in which the witness's statement is disputed, denied and the grounds for the disputes and denial is evident from the annexed statement of Mr Ajay Gupta and there is such a statement filed with the Commission both in respect of Mr
20 Maseko and Ms Mentor. In considering this request to cross-examine the witness, the Commission is asked to consider the following.

The function of the Commission is to establish the truth in relation to the areas of inquiry referred to in the terms of reference. Although the Commission's work is that of an inquiry and the process of the Commission is not the same as a Civil or Criminal trial, it is

nevertheless so that cross-examination has historically been shown to be the best mechanism for testing the reliability and veracity of the evidence tendered by a witness. Without cross-examination and more particularly adequate and effective cross-examination of contentious evidence, the Commission would be deprived of this essential tool for the testing of the reliability and veracity of the evidence. The statement of Mr Ajay Gupta raises clear disputes of fact underpinned by his own evidence and demonstrating the need to test the reliability of the witness that is giving the evidence before the Commission. In addition to the request to cross-examine the witness, it is strongly argued that the witness should not be consulted with on the contents of the sworn statement by

10 Mr Gupta by the evidence leaders and that cross-examination should take place without the witness being precognised as I corrected it the other day, precognised, as this has the potential to enable the witness to adjust the witness's evidence in anticipation of cross-examination, thus substantially weakening the power and effectiveness of the cross-examination.

Now those are the grounds for the application. I turn now to my heads where we argue why that should be so. I do undertake to be as brief as possible to save the time but as full as is necessary.

CHAIRPERSON: Yes.

ADV MICHAEL HELLENS SC: Now, under the heading: "The principle behind a right to

20 cross-examine", we state that the Terms of Reference of the Commission shall not be repeated herein as they are well-known to the Commission. Suffice it to say that the Commission is enjoined to investigate the matters of public and national interest concerning allegations of state capture, corruption and fraud. In so doing, the Commission is enjoined to inquire into make findings, report on and make

recommendations concerning a list of issues which could be extended in the future but which issues are set out in paragraphs 1.1. to 1.9 of the Terms of Reference. Extensive reference will be made if necessary, Mr Chair, because we have given you all the references in footnotes and perhaps leading and reading some aspects of the Law where they have been quoted to you might not be fully necessary but we say extensive reference will be made to the Law in relation to Commissions of Inquiry and in particular as set out under Commissions by DW Friedman in LAWSA and we give you the reference. Now, before turning to that Law, that which we submit the Commission must for squarly face is that it has been appointed, not only to investigate the matter but inquire
10 into, make findings, report on and make recommendations concerning the various paragraphs of the Terms of Reference and we submit that it is axiomatic that the Commission is required and must and does see its duty as being to conduct an objective inquiry leading to objectively justifiable findings, reports and recommendations. It is not the function of the Commission, nor does the Commission purport to see it as its function to receive into evidence and into the body of information in the wider sense, that it is prepared to take into account evidence or information which is either not objectively reliable or not credible or untested by some method or another. In other words, we submit in order to fulfil its mandate, the Commission has to make findings, report and make recommendations which are justifiable and objectively sustainable in their import and in
20 their conclusion. We recognise that a Commission of Inquiry is not a Court of Law and neither of a Civil or Criminal nature and that the Commission is entitled to take into account a variety of sources of information. However, when the evidence of a witness is placed under oath before the Commission and that evidence is capable of being tested, both for reliability, accuracy and indeed veracity, this Commission should find it inconsistent with any principle of natural justice that a party affected or implicated in

quotes by the evidence, should not be entitled to cross-examine. The Commission should find it and we make this submission firmly, the Commission should find it nearly impossible to conclude that a valid finding, report or recommendation could ever be made by it based in part or in whole on evidence which has not been tested or has been untested.

Cross-examination has throughout the history of the Law been demonstrated to be the most reliable mechanism available to human beings for the testing of the veracity, reliability and accuracy of the evidence of any witness. We submit that the starting point of the decision, whether to allow cross-examination of any witness but in this instance of
10 the witnesses, Ms Mentor and Mr Maseko, should be that the natural inclination that is in accordance with the principles of natural justice which this Commission to enjoined to apply, is that cross-examination should be allowed. The Commission should reluctantly consider a reason why cross-examination should not be allowed. In other words, we would submit that as you exercise your discretion, the principles of natural justice should compell you to say Sir, I should allow cross-examination, why should I not and the why should I not reasons must be compelling indeed before you allow yourself to take into account, evidence that has not been tested by dare I say it, humbly, able cross-examiners, skilled at getting at the bottom of a story and routing out the truth. You would deprive yourself of that tool.

20 Now, "The facts in the instant case", is the next heading. The Commission has heard the evidence of Ms Mentor and Mr Maseko. It has been provided with a detailed statement in respect of the evidence of each of the witnesses. The material difference between the evidence of Ms Mentor and the evidence of Mr Gupta, as well as the differences between the evidence of Mr Maseko and Mr Gupta are quite clearly evident from a comparison of the contents of the two statements as the detailed differences will not be addressed in

these written submissions as these written submissions are to be made in an open session of the Commission and for the reasons more fully set out later in this argument, it suggested that neither witness nor any witness in general should be precognised as to the nature and extent or content of cross-examination before that cross-examination takes place and therefore not precognised as to the evidence adverse to the witness's version prior to cross-examination.

Now, what I mean by that, you Sir, Mr Chair, understands but let me just adumbrate on that very briefly, the witness has given evidence, the witness presumably does not know what version Mr Gupta has as to the events or non events contained in that evidence and
10 in the ordinary course would be cross-examined and if there are flaws or difficulties in the witness's evidence, those would be routed out in cross-examination. In the normal course and in a Civil trial of course or a Criminal trial, there would be opportunity for re-examination where those areas where the witness may be set to have had difficulty or may indeed have had difficulty, are canvassed with the person who has produced that evidence. Now we know this a Commission of Inquiry and that it is not a Civil trial or a Criminal trial but nevertheless but if you allow precognition prior to cross-examination, there is the danger of the effectiveness of cross-examination being blunted by an opportunity to rethink and adjust and I will deal that more fully but just to explain what we mean by precognition.

20 We made a submission Sir that in ordinary Civil and Criminal litigation, the power of the unexpected question of even the power of surprise in the questioning is well-known and accepted. The reaction of a witness to either aversion put to him or her or a question which is fundamentally difficult for him or her to answer is an essential feature for the tryer of fact that has to be observed in the moment that it takes place. The milk of human kindness, if I could use that phrase, may want to extend to protecting a witness from that

which might appear to be harsh cross-examination or unexpected questioning where the witness is, so to speak, put on the spot but it is the very essence of the power of cross-examination that that examination be made with its power and effectiveness, not having being watered down by the witness being precognised as to the likely questioning to be expected. On a theoretical basis for example, if the evidence leaders or the legal advisors of particular witnesses are entitled to apprise the witnesses of the contents of Mr Gupta's evidence in this instance and to consult with him on these issues and to precognise them of the points of difference, the witnesses may well be tempted to adapt their evidence, his or her evidence in advance of cross-examination. Now I make this submission with

10 absolutely no aspersion being cast on the *bona fides* of evidence leaders or the legal representatives of witnesses. They are all honourable men and professional men and women. It is simply a fact that the temptation exists with advanced notice of likely topics of questioning for a witness to adapt the evidence on the part of the witness to accommodate the otherwise unexplainable and that is a danger we say should be avoided. It is therefore submitted that precognition by anyone of the contents of the answer given in evidence of Mr Gupta to the two witnesses should not be allowed. It is also submitted that the evidence should be capable of being cross-examined without time limit or artificial constraint such as constraint as to topic or length or breadth of cross-examination. Experience shows that cross-examination is only effective if the cross-

20 examiner is able to build that cross-examination concept by concept, question by question to reach a point where the veracity or the reliability of a witness is adequately tested. It cannot be reduced to so a low threshold as the mere putting of a version of this instance Mr Gupta to the witness and awaiting the answer thereto. The cross-examination must comprise the full gambit of the tools of cross-examination available to the cross-examiner question by question as a point is built up and brought to a head.

Now, what I am about to in the next paragraph or so explain is perhaps the art of cross-examination or the real power of cross-examination and we say it is necessary in the instant case. So we say for example, it is often so that in cross-examination, disparate questions on disparate issues can be asked which had no apparent inter connection until the jigsaw puzzle of the evidence is drawn together by further questioning being put to the witness which draw the picture in culmination of the cross-examination neatly together.

CHAIRPERSON: Well Mr Hellens, is your submission that the Commission's legal team, once they have as they now do, an affidavit from your clients setting up their version are
10 not entitled before you cross-examine, let us say Mr Jonas, I have to try and remember?

ADV MICHAEL HELLENS SC: No, I don't appear in the Jonas case. Make the example for Mr Maseko or Ms Mentor.

CHAIRPERSON: Mr Maseko or Ms Mentor. Are you submitting that the legal team of the Commission should not before you get the opportunity to cross-examine, call Mr Maseko or Ms Williams and say, this is what you told us in your statement and we have now got Mr Ajay Gupta's version. What do you say about this and that and that that he says because he denies what you said about him and this is how he substantiates his denial and hear what she has to say.

ADV MICHAEL HELLENS SC: Let me answer that in a two-fold manner. I am not sure
20 whether the question you ask Mr Commissioner is one or the other. What you ask is are the evidence leaders not entitled to put, let's make Mr Maseko the example and stick with him without picking on him. Mr Maseko cannot be asked by the evidence leaders questions in continuance so to speak of the evidence placed before the Commission or are you putting to me that they should not be able to consult with him beforehand about

all of the issues and then in full Commission deal in the way that you suggest with his evidence in the light of consultation?

CHAIRPERSON: Oh yes, it's both, it's both.

ADV MICHAEL HELLENS SC: Both. Well we would be for squarely against that for the reason signalled earlier and all what I have to say here, I won't say it again, the professionals in the legal team are entirely honourable people but if the witness is not caught unawares, if the witness is not put under cross-examination in the normal way, then the witness has time to debate the implications of the differences, to reconsider her evidence maybe to the astonishment of her evidence leaders change her version but she
10 has the full luxury of adjusting her evidence if it so happens to deal with the contrary version. Now why would you be served better by such a process and then by a process which operates as follows. Her evidence has been completed in the sense that all of the evidence that the evidence leaders wanted to place before you has been placed. The duty of cross-examination is two-fold as you are aware. It is to by means of questioning test the accuracy and the adequacy and the reliability of the evidence and also to put a version. Cross-examination is nothing without a version. We would have to put the version of Mr Gupta to the witness during or as part of the cross-examination but coming only once a witness has been thoroughly tested and in the context of being thoroughly tested on her evidence. What would then follow would be the full right of the evidence
20 leaders, not on behalf of a witness who is their client because we know the witness is not their client but on behalf of the Commission to deal with the issues raised in cross-examination, the version of Mr Gupta, in precisely the same way as they would have done before cross-examination but the difficulty would be that the effectiveness of cross-examination by the method that you pose with both precognition and preleading before cross-examination would blunt the very sharpness of the tool of cross-examination.

CHAIRPERSON: Well Mr Hellens, of course you are aware as all lawyers here that in our legal system we have Motion Court proceedings in our Courts and where in terms of which a person wants to bring proceedings, has to do so by way of affidavit and the respondents must file affidavits and the applicant must file a replying affidavit. In that case all parties put before the Court their full versions and you are aware as all lawyers here are aware that there may be disputes of fact that arise at Motion proceedings and then that in such a case the Court may refer certain issues of dispute to oral evidence and when oral evidence happens, cross-examination happens and as far as I know, everybody accepts that, that's fine. So in that case if you appear for the respondent you

10 will be cross-examining an applicant who has come to Court to give evidence knowing fully what your client's version is and we accept that as fine so why should it in principle be problematic if it's Commission of Inquiry, if a witness is to know the full version of the person's that he or she implicates before he or she is cross-examined.

ADV MICHAEL HELLENS SC: The answer in a nutshell is this Mr Chairman and I won't spend any time on it at all but on this initial aspect, we are all aware and the public should be aware that Motion proceedings are designed to be brought where there are no material disputes of fact and then ultimately the decision is really, the Law applied to the facts which are not materially in dispute which is why the mechanism of opposed Motion proceedings precisely in the way that you suggest, is designed for the speedy resolution

20 of disputes. It is so that where disputes of fact are foreseeable, etc., an application will be simply dismissed and the reason for that is that the primary way of resolving disputes of fact, is more by trial with cross-examination in the context of the inquiry by evidence with cross-examination and possible re-examination with not such heavy lables to them but generally that format. The reason why an application will be dismissed because of foreseeable disputes of fact, is because the preferred method of testing evidence, namely

by trial, was attempted to by design or by error to be avoided and the lesser mechanism, I stress and this is the heart of my answer, the lesser mechanism, the less preferred mechanism of resolving the disputes of fact is by referring a Motion proceedings to trial or to evidence. Why is it lesser preferred? Because the real method is the described method in a trial so what you and your exercise of your discretion have to determine is, would you choose the lesser mechanism, the less desirable mechanism because let me say this. In an opposed Motion referred to trial or referred to evidence, the dangers of which I speak would be present and therefore it is the less preferred method of getting the number of a dispute to be determined by the trier of fact in a satisfactory manner and I ask of you, 10 what advantage would there be for you to choose, I ask it rhetorically of course, to choose the less preferred method rather than the age old preferred method?

CHAIRPERSON: Well, what you have said in response to my question such as to me understood in the context of the question, that even in an adversarial process such as litigation is, there are situations where cross-examination is permitted to take place after the witness has had sight of the full version of the other side. That's what emerges from that and the question then that I put to you is, if that is acceptable in an adversarial scenario, why should it be unacceptable in an inquisitorial scenario such as the one we have in the Commission?

ADV MICHAEL HELLENS SC: My answer is two-fold. Firstly, it is acceptable as a 20 second class option in the discretion of the Judge who has found himself in a position where something that should have been brought by way of trial, has been brought by way of Motion and our Law is full of cases which tell the Judge that he should dismiss the application, refuse to send it to trial or to evidence because the less desirable method has been chosen but it is so that in relatively rare circumstances that does happen as you correctly point out but it is the exception rather than the rule. Why is it the exception

rather than the rule because the best mechanism for testing the veracity and reliability of a witness is the trial situation. That's the first part of the answer to your question. The second part of my answer is this. You are the pursuer of truth incarnate. You should choose the most effective mechanism by which you get to the truth. Now the precognition consequence of the opposed Motion referred to evidence example that you give, is a second class method. It blunts cross-examination, it has the potential for the imagination of the witness to embellish, to disembellish, to change stance, to change emphasis and to serve you less well. Now I assure you, for the most part, hopefully for the whole part, there would be competent cross-examiners before you who will not dilly dally and ask
10 questions like maybe Counsel might do just for the sake of being a rabbit in headlights and not knowing what to ask. They will be entrenched in cross-examination to the issue in question and as you sit back in your judicial chair and consider the evidence, either post precognition a la post Motion referred to trial or as you sit back in your judicial chair after watching the live cross-examination with no precognition, noticing the surprise of the witness at being caught in the light to put it very prosaically or the ready and quick answer to that which looked like a on paper as massive problem with the honest witness say, but you misunderstand, it's this and you know in your judicial soul, this person didn't even know the question could be coming, I believe him, I believe her or whoa, look at that, the blush, the turn, the hesitation, the gulp of water, all those demeanour things. The
20 effectiveness of you observing those things first-hand, were they precognition scenario versus what I am calling the live scenario, you would deprive yourself of that very benefit and you would wonder in the rearview mirror of your decision whether you might not have best been aided without precognition, that is my answer.

CHAIRPERSON: It may well be that you are right but obviously other factors also need to be taken into account. Certainly where one deals with a witness who is honest but maybe

mistaken in regard to certain things. If that witness, prior to cross-examination, is confronted or is shown the version of the implicated person that he or she has implicated in his or her statement or evidence, there is a possibility that that witness might say for example, a member of the Commission's legal team, you know what, I think I was terribly mistaken in regard to this and that and that. Now that I see what Mr Ajay Gupta is saying, I think I was mistaken. Now, let's assume that we are dealing here with a witness who had implicated a particular implicated person in about 40% of his or her evidence but once the version of the implicated person is shown to him or her and is an honest witness and is able to say for example, now actually 20% of this 40% is based on a *bona fide* mistake on my part. Now if that were to happen, when that witness is then called, for example, either you having been told by a member of the Commission's legal team or a member of the legal team putting questions to that witness before you cross-examine, might well say, actually there is a concession that this and that and that and that, the witness was mistaken. The only issues on which she or he insists are A,B,C, so in that way, the time to be taken by cross-examination is curtailed seriously and the time of the Commission is the saving the time, the saving of costs are all very important matters as well. So it may be that in the case of a dishonest witness, maybe that won't happen but in the case of an honest witness, would you not concede that that is possible, it can happen and therefore that consultation by the Commission's legal team with a witness to look at the version of the implicated person could help and in this case, maybe I should just say this. My understanding of the position of the Commission's legal team and they so themselves and I think correctly so, is that they are not here to prove any allegations of state capture or corruption and fraud. They do not represent the witnesses they bring here are not their clients, they are here to help the Commission to get all the relevant evidence, whether the evidence tends to show that there was no state capture, there was

no corruption, there was no fraud or whether it tends to show that there was corruption, there was state capture, that they want to put that before the Commission and I think the Rules say they will ask questions on witnesses including witnesses who are not implicated, witnesses who come here to give evidence that implicates implicated persons, they will ask them questions aimed at establishing what the truth is and so, in other words, they will ask them tough questions where necessary. So against that background and with the example that I have put to you, what would you say?

ADV MICHAEL HELLENS SC: Well, I would say the following. In your own life you are a judge of the Constitutional Court and in your entire judicial exposure up to that lofty position, you have been involved with human nature in its base and lofty forms. The presumption of honesty of a witness you just use as an example but it's not a platform from which you can begin to make a decision with regard to cross-examination because it puts the cart before the horse as us a presumption of dishonesty on the part of a witness and what I say therefore, is that this forum is in that regard no different to the previous fora where you have had judicial experience in trying questions of fact. There is no special magic about this forum that would lead a witness who has made errors to concede that they are errors, to make a witness who has made dishonest statements to suddenly become honest, there is no special magic in the witnesses here, they are human beings like all other witnesses. I am not going to go into the sharp differences between the evidence of Ms Mentor and that of Mr Gupta or the evidence of Mr Maseko and that of Mr Gupta, but you have been exposed to the differences and one knows that these witnesses have been on television as I am now, in the public forum, giving interviews to the media afterwards, exposing their cause and their call that they are witnesses to what might be described as state capture. I ask again rhetorically, why on earth would you expect such witnesses to suddenly recant in the calm, professional,

quiet, non-accusatory consultation with the evidence leaders and come clean as opposed to be facing the direct effective cross-examination with an element of surprise that will demonstrate to you their reaction. Why choose the different option? And if it is a question and it's only a more minor point that you make of course of convenience, cost and length of time, you must weigh that convenience, saving, cost and length of time versus that which you deprive yourself of by in effect blunting the power of cross-examination in the manner that I have described. Thank you.

Much of what we have just debated is covered so I will move, yes, but if I could resume, just to find my space at paragraph 23, we submit that the Commission should be allowed
10 to the effect that in the fullness of time, recommendation...[intervene]

CHAIRPERSON: I am sorry again Mr Hellens. I forgot to put one question to you and you may or may not wish to be brief on it but let me put it. In the ordinary cause, a Commission such as this one entails that there will be a team of investigators who would have interviewed witnesses long before those witnesses came to give evidence here and in the course of that investigation, after obtaining a statement from one witness they would need to go and see what the persons implicated in that statement have to say about this otherwise the investigation might not give them a true picture. Doesn't that entail or mean that the nature of the function of the Commission has inherit in it a situation that the version of all parties might be known before there is a hearing. Leave
20 out how it happened in this case but generally?

ADV MICHAEL HELLENS SC: Well, that would be a function of how the Commission chooses to set its investigators to their work. We would submit that if the investigators follow up on the evidence of Mr Gupta with regard to Mr Maseko for example, and come with evidence either against Mr Gupta's version or in support of Mr Gupta's version and in

substantial or significant clash or watering down of Mr Maseko's evidence for example, then that can be dealt with after Mr Maseko has been given evidence, taking both examples. I cross-examine Mr Maseko and I say, X was not the position on date Y and that's the platform for all your evidence. The evidence leaders lead him or other witnesses before the Commission that says X was precisely a fact on date Y. I would have stuck my neck out in cross-examination or Mr Gupta's neck out and we would have been caught in a lie or an inaccuracy.

The other example, I confront Mr Maseko, X was not a fact on date Y and that's the basis for all of your evidence, he crumbles and he says, yes that's correct but, and he gives
 10 some explanation. The evidence leaders can lead evidence or put to Mr Maseko after cross-examination. We follow that up and X in fact was not a fact on date Y. Why would it be necessary to expose Mr Maseko to the entire version at all if the investigation could be done without exposing Mr Maseko to that version?

CHAIRPERSON: Well you see, if the investigators were to have interviewed a particular witness and who implicates other people and they never went to those people to check what their version is and then that witness and his or her version were brought up and here she is to give evidence here which takes two or three days or whatever. If later on you then come or somebody comes with their client's version that is put to the witness, then it turns out that actually had they, that is the investigators, taken the trouble to
 20 interview those other people, they would have realised that this witness should not be called but now they would have wasted everybody's time because they didn't check his or her evidence against other people.

ADV MICHAEL HELLENS SC: No, that would not be the right conclusion for anyone involved in the Commission to reach because on the example we have and I am not now

making Mr Maseko or Ms Mentor, this is this notional witness. They come here and they give unreliable evidence and by definition unreliable evidence on your thesis implicating somebody wrongly, the position would not be that that witness should not have been called. The position would be that that witness should have been called only to be exposed as a witness wrongly implicating a person in order to aid you in your pursuit of the truth to see not only whether there is so-called state capture, but where the persons are actually wrongly coming forward to propose a thesis and support a thesis of state capture when none exists so forgive my use of your judicial armchair but when you lean back and say that notional witness Smith who came and told me this implicated a story of

10 Mr Ajay Gupta in relation to topic X which suggested state capture, it was all a fabrication. What does that lead you to conclude. A, I can't rely on the evidence of Mr Smith, yes of course. B, and it will be the focus of cross-examination if it's allowed in the cases that I am dealing with. B, if it's a fabrication, why was there a fabrication? Why did ostensibly proper evidence be led to me leading me to a conclusion just on the face of it in favour of state capture only for it to be shown, not that it should not have been led but that it is so untrue that there must be a motif behind the giving of such false evidence. That evidence of Mr Smith must have been given to give you the other side of the picture that might exist.

CHAIRPERSON: Thank you, we have covered that part, the part that you still have to go

20 through is we should need about how much time?

ADV MICHAEL HELLENS SC: Pardon?

CHAIRPERSON: The part that you must still deal with, how much time would you still need for it?

ADV MICHAEL HELLENS SC: I will try to do it in 20 minutes, 20, 25 minutes.

CHAIRPERSON: No that's fine. I think maybe we should take the short adjournment now.

ADV MICHAEL HELLENS SC: As the Court pleases.

CHAIRPERSON: And then we will resume at half past 11. We adjourn.

Session 2

ADV VINCENT MALEKA SC: Chair, before Mr Hellens resumes, may I ask for your indulgence to ask for your direction?

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: We had previously indicated to you, that we would introduce a witness from Treasury today. He is here and he is unlikely to testify today, given the trend of argument. May we ask you to excuse him, hopefully until tomorrow and if we are able to accommodate his evidence tomorrow, then we would do so.

CHAIRPERSON: My understanding was that tomorrow was vacant and because of that,
10 certain other arrangements were made, so there might be difficulty with tomorrow.

ADV VINCENT MALEKA SC: We will then explore other options with him and convey them to your registrar.

CHAIRPERSON: Yes, that was my understanding as of yesterday, either yesterday or the day before yesterday, but then we could have him as soon as possible next week, I don't know what everyone's availability is on Monday or Tuesday. You don't know whether he could make Monday or Tuesday?

ADV VINCENT MALEKA SC: I have not explored that option with him.

CHAIRPERSON: Maybe I should continue with Mr Hellens and when Mr Hellens finished then we can deal with that, if that would be fine?

20 **ADV VINCENT MALEKA SC:** Thank you Chair.

CHAIRPERSON: Okay thank you. Mr Hellens I will tell you what I'm really interested in that we haven't dealt with, is the fact that your client Mr Ajay Gupta, I can't remember

now whether also Mr Rajesh Gupta adopts the same stance, namely that they are not prepared to come back to South Africa, they are I think in Dubai and they are not prepared to come to South Africa. Is my understanding of the affidavit correct?

ADV MICHAEL HELLENS SC: Yes Mr Chair, I was going to complete that last part of my address, quote something to you that is not in my heads and deal directly with that. Could I just do that?

CHAIRPERSON: Yes do that.

ADV MICHAEL HELLENS SC: I was at Paragraph 23 and 24 of my heads and let me round off by saying that our submission is that by the end of the Commission's work, the
10 Commission needs to be entirely satisfied that the evidence and information upon which it has reached its findings and conclusions, is reliable and tested, no other approach surely could be adopted.

Now the quotation that I would like to give you and I will show the book and everything for the actual reference to the evidence leaders, but I quote from Dr J.P. Pretorius's book on cross-examination in South African law. It is not very long and it's the latter part that is very important. Under the heading cross-examination in a commission, the learned author states the following

20 *Cross-examination by the commission may create the wrong impression. It is therefore recommended that the commission should appoint its own legal counsel to cross-examine on behalf of the commission. The purpose of cross-examination and chief examination differ, to such an extent that both functions cannot be carried out by one person. As far as is practical and possible, there is thus a*

case to be made for witnesses to be represented, so that the commission's legal counsel, confine himself to the cross-examination of witnesses.

I add to the leading of witnesses. Then there is a reference in the footnote, to the author Middleton, who says

It is however awkward to lead a witness sympathetically.

And we have seen that and there is nothing wrong with that so far and then all of a sudden

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(By stealth as it were, to change your attitude to that of the hostile cross-examiner, very often a relationship of trust is needed between counsel for the commission and the community in order for witnesses to come forward, legal representation for all interested parties is desirable so that "biased cross-examination can take place".

There lies the rub really, it's Page 107 and my learned friend will have the reference.

CHAIRPERSON: Can I ask that you make available a copy of the relevant pages, so I am not taking down the quotations?

ADV MICHAEL HELLENS SC: Yes we will. Then the next part of my heads, I won't deal with at all, the Commission to determine its own procedure, its straightforward legal submissions. In a nutshell, you have to produce a fair and reasonable hearing in accordance with the principles of natural justice, but it is a discretion objectively determined or should you which you won't do, err outside of a fair and reasonable

20

procedure, but nevertheless, of your own determination within those broad parameters the issue that you raise with me.

CHAIRPERSON: Let me complete the issue that I'm raising, but firstly I wanted you to confirm that my understanding of their affidavits, of what they say in the affidavit is correct, namely that they are not willing or prepared to come back to South Africa and I think as they say, as I understand the affidavits, because the Hawks and the police I think they say, are incompetent.

ADV MICHAEL HELLENS SC: Reckless incompetence and a national embarrassment are their submissions.

10 **CHAIRPERSON**: So as I understood the affidavits, they didn't seem to go one step further to say they are incompetent and therefore what, unless I missed something, but I assumed that maybe it's in connection with your clients fearing that maybe the Hawks or police could arrest them, I don't know and do what. Is my understanding of what they say correct?

ADV MICHAEL HELLENS SC: Yes let me explain the position that I am instructed to put before you. Their attitude is, I will, give, their, attitude and then I will give their reasons. Their attitude is that they will not come to South Africa to appear in this forum at this place in South Africa at all. Their attitude however is, that they will appear in person before the Commission at another place which can be agreed upon with the Commission,
20 live in person before you with the evidence leaders to cross-examine them and they undertake to give evidence there at that place. Alternatively, by such video link as you deem appropriate with them being not here and the Commission being here and whatever scenario is adopted, would include obviously – let us assume that the proceedings take place with you present and the evidence leaders present at another

place outside of South Africa, the tender is that those proceedings would be broadcast back to this venue or wherever you so choose, so that everyone who would see this Commission's operation as they do at this moment, would see the Commission operating in respect of the Gupta's evidence and cross-examination, so it's at another place to be agreed upon, or together with video link back to this venue if you so wish, or of them being in another place via video link, or such combination of those things, but I think I have expressed all of the combinations as might be acceptable.

The reasons are two-fold. Firstly, it is going to be argued to you that they are fugitives from justice and I have in a supplementary heads of argument, put forward that we have
10 the following in regard to the Gupta's. One, that there is a warrant out for their arrest, or a warrant out for the arrest of Mr Ajay Gupta, but no one has seen the warrant.-

CHAIRPERSON: Maybe before you deal with the contention that they are fugitives from justice, if you could just tell me what their reasons are for not wanting to come here?

ADV MICHAEL HELLENS SC: Well first of all, they have no clarity whether or not they are fugitives from justice, but secondly and their main thrust, you have summarised it in brief, let me put it in full, it is in the papers, there are three examples given to you in these papers with judgements of two judges of the High Court in Bloemfontein and one judgement from a magistrate in Bloemfontein. Let me summarise them extremely briefly.

With much fanfare in February, various people were arrested including one of the Gupta
20 nephews Mr Varun Gupta and various persons who worked for various of the companies that operated in South Africa that were called, let's call them Gupta companies and serious allegations of fraud and corruption were made against them.

Flowing from, or as part and parcel of those criminal prosecutions, two separate ex-parte applications, two separate ex-parte applications were brought by the National

Prosecuting Authorities Asset Forfeiture Unit. One in terms of Chapter 6 of the Prevention of Organised Crime Act and one in terms of Chapter 5. Now, Chapter 6 is a procedure where you get a preservation order preserving goods and assets and monies, pending the outcome of a civil forfeiture application in which the proceeds of crime are sought to be declared forfeit to the state.

Chapter 5 is what is called a restraint order where the assets of an accused person or a person to be accused, are placed under restraint in the hands of a curator who holds them as a curator, *abonis* pending the outcome of a criminal trial, in which criminal trial a *prima facie* case has to be made out, that there is reasonable cause to believe that there might be a confiscation order. A confiscation order is something that is made if you are shown to have benefited from a crime. In order to show that you have benefited from a crime, you have to show that there might be a conviction, so in the Chapter 5, the High Court was asked on the papers before them, in the *ex parte* papers brought before them, the High Court was asked to decide might there be a conviction.

In the preservation application, the question was need these assets be preserved because might there be a civil forfeiture order. On both scores, once the *ex parte* orders were heard on an anticipated return day, the High Court discharged those orders, finding that the test by the State, by the Asset Forfeiture Unit, by the National Prosecuting Authority, had failed dismally. As we point out in the quoted extracts from the judgement, both learned judges showed that the National Prosecuting Authority's Asset Forfeiture Unit, did not understand banking, they did not understand the flow of money and the accusations made to the various individuals and companies, were wholly unjustified on their own case.

Now, the attitude of the Gupta's and for example, with Mr Varun Gupta, I am not going to be, more, lengthy than the point needs, but I will make the point as concisely as possible. Mr Varun Gupta was a director of a company and he wanted permission for his bail conditions to be changed so he could travel overseas and he said look, I never played any executive role in this company Oakbay Investments (Pty) Limited, so in so far as you ascribe any wrongdoing to the company, I was a non-executive director, I simply never did anything.

The state in opposing his application to travel, trumped that argument with a card which doesn't exist in a pack of cards and that is but you were the chief executive officer of
10 Oakbay Resources Limited, an entirely different company where there was no connection between the two at all, certainly from the board of directors. They showed themselves incapable of exercising their prosecutorial discretion, their functions to oppose bail, not to oppose bail, to even see the difference between two entirely different legal entities.

Mr Commissioner, the papers in the bail application and in the Chapter 5 and Chapter 6 applications, were so abysmal, were so lacking in foundation, that my clients take the attitude that they are facing the Hawks who are incompetent in their investigating powers as demonstrated in those two cases and the judgements and a National Prosecuting Authority that wielded its power with reckless incompetence, charging people who should never been charged and having their case exposed in their asset forfeiture applications
20 as being wholly unfounded. Their attitude, I am instructed to inform you is, they will not expose themselves to the attentions of the Hawks who wield such unbridled power and the NPA who wield such power when they do so with such reckless incompetence. So they will not come to expose themselves to bodies that behave in that manner.

Now the full detail of how poorly are those cases are made out and pleaded, those non-existent cases are pleaded, is in the body of the papers before the court and the judgements that we have placed before you. So they take the stand that they won't come and expose themselves to such authorities.

CHAIRPERSON: Before you go on, I would have thought that if your opponent is incompetent, you would know that if they try and do anything to you with an independent judiciary that found in their favour in those matters, that you have nothing to fear because in no time, the independent judiciary will come to your rescue.

ADV MICHAEL HELLENS SC: Well I accept that the company Oakbay and Ero Haven
10 and West Dawn and Mr Varun Gupta and other persons remain accused persons, subject to the arrest by such incompetent people who haven't worked out their case, so much so that recently as a few weeks ago, the state asked for a further postponement and now under Section 342 (a) of the Criminal Procedure Act, are on time limits to produce a case or not produce a case by the end of November, failing which the matter will be struck from the roll on the 4th of December.

Now before you Mr Commissioner say well that's my point Mr Hellens, the judicial system has operated in their favour all along, the answer to that, is no, because once before you can vindicate yourself before a judicial officer, you do get subject to all of these awesome powers of the police and of the NPA before you get to the other end and in light of that
20 reckless incompetence, they declined to be put through that mill.

CHAIRPERSON: Well I assume that really, what they are saying is, we fear that we will be arrested by the Hawks.

ADV MICHAEL HELLENS SC: Incompetent police at the instance of incompetent prosecutors.

CHAIRPERSON: Well what they are, fearing, is being arrested. Now if you get arrested, isn't the position that you have a remedy if there no grounds for you to be arrested. If you are arrested and detained, you can approach the courts on an urgent basis and if there are no grounds for you to be arrested, there is no reasonable grounds serving as a basis for the arrest and the detention, any judge in this country will grant you a remedy and that remedy can be granted on an urgent basis and we all know that urgent basis can mean within 24 hours, within 48 hours, within a few days, you can be out if you are arrested or detained.

Now, if you have an incompetent Hawks as your client says, I am not saying it, if you
10 have incompetent police, incompetent NPA, doesn't logic say then you have very good prospects that they will mess up and if they will mess up, then you will get an order from a judge within hours, so you won't stay a long time in prison.

ADV MICHAEL HELLENS SC: No it's not as simple as that at all.

CHAIRPERSON: But it ought to be that in terms of logic. You are arrested by incompetent police, they don't know what they are doing, they have messed up, you should not be arrested, you go to a judge, you show that these people don't know what they are doing and they have no grounds to arrest me, there are no reasonable grounds, protect me, get me released and the judge will give that order.

ADV MICHAEL HELLENS SC: No you don't get the docket until the crime is completely
20 investigated. In the case pending in Bloemfontein, in order to try to get bail conditions adjusted, we tried to get access to the docket to show that there is no case and we were refused access to the docket. What happens is and if you look at the judgements, it's not only recklessness, there is a lack of integrity in the application of the mind of the National Prosecuting Authority and the Hawks, because no one could have reached the

conclusion that those people should be charged on the basis of certainly what was in the Asset Forfeiture Application, but in the docket, in the crime scenario, you can't challenge the decision to arrest and the decision to prosecute until you can have insight into the docket to show that there is no content in the docket and that you only get when the investigation is complete. These people, by way of example, were arrested in February and they are postponed to the 4th of December, that's a year later and we know that in the background, the case must be that which is the Asset Forfeiture applications because there is only one National Prosecuting Authority, but in the context of the criminal crime, we don't have the docket in order to show that.

10 **CHAIRPERSON**: Thank you and then, another related question is this, if they seek to give evidence via a video link, that would mean that they are effectively outside the jurisdiction of the Commission and the regulation and the Act for example, I think make provision for certain things, such as I have the power to order a witness I think to answer a certain question that the witness might not have wanted to answer. He may be summoned and so on, so if they are giving evidence by way of video link, if I order them to answer certain questions, what can I do if they say we refuse?

ADV MICHAEL HELLENS SC: Well, your cohesive powers for someone within the jurisdiction, would be absent, but it would bode very badly for them in terms of the subject matter of your terms of reference if and I presume it would be on a matter of crucial
20 importance or substantial importance, or even of importance, to your determination of the truth if they decline to answer a particular question, that complete inference would be that their declining to answer that question, means they can't answer the question in a way which was anything else but incriminating on a topic under the terms of reference.

So you would be aided in your pursuit of the truth by the inference that you draw that they won't answer questions on crucial issues and that inference would be drawn against them.

CHAIRPERSON: But why should I expose the Commission to that situation where it can be told do whatever you like, I am not answering that question?

ADV MICHAEL HELLENS SC: Well, imagine the witness in the country, you might exercise such powers of compulsion or if you go so far as contempt of the Commission and an arrest, but you would still not be getting an answer and the same conclusion would be drawn.

10 **CHAIRPERSON**: But the risk or the knowledge that the Commission can do something if a witness refuses to give evidence, that is a witness who is before the Commission here physically, that knowledge may serve as a deterrent to the witness to just refuse without any reason, but a witness who is thousands of kilometres away, is not deterred by anything other than what you have just said which also applies to the witness who is physically present. He is not deterred by anything other than that from saying, you can do whatever you like, I am not answering that question.

ADV MICHAEL HELLENS SC: Mr Commissioner to be frank, there is merit in the point that you make and I say it with the deepest of respect, but what you have to do, is weigh the loss of the evidence of Mr Ajay Gupta whom I represent and his exposure to the
20 cross-examination which he tenders by the evidence leaders or whomsoever and the speculative possibility that that situation may arise, so what you have to do is this – justice incarnate pursuer of the truth, there is a disadvantage to taking this evidence outside of my powers as you have described within the country, but if I proceed without that evidence which is tendered and full cross-examination is tendered and I merely think

that something like I have just suggested, might happen, I don't know that it will happen and I will be making a finding, a recommendation all based on findings of fact having deprived myself of let us face it, the very objective of this inquiry. This inquiry for the most part, focuses on Mr Ajay Gupta and maybe the other two brothers to some extent.

I must say there seems to be an easy confusion between the Gupta Brothers Ajay Gupta, I assure you there are three people there, so that is a weighing up mechanism that you must make, so when one day we hear and we stand in awe of your finding and you make finding A B C and D, if you are bereft of their evidence and their cross-examined evidence, then will you have the confidence to say, my finding is the best finding that I could have made, so I acknowledge the one defect, but I say the overriding consideration for justice as you must do it, is to favour their request.

CHAIRPERSON: Let us assume that for whatever reasons, I refuse to grant them leave to cross-examine, it may well be that even in that situation, such evidence as the Commission's legal team already has in terms of his version and such evidence as he may be prepared to give even though there may be no cross-examination, may well need to be put to witnesses. In other words, it may well be, the mere fact for example, leave to cross-examine is refused, might not necessarily mean that whatever his version may be, that may be placed before the Commission's legal team, should not be put to witnesses, so that the witnesses are tested against it. Obviously it might not be –maybe I shouldn't say obviously because I am not in a court of law, it may well be that you would say, it won't be the same as if you had been granted leave to cross-examine those witnesses, but it might not mean that their version in so much as it is known, should be disregarded. What do you say about that?

ADV MICHAEL HELLENS SC: That's a second class citizen to good evidence and how you would get past the quote from Middleton which I don't say is the be all and end all, but it resonates with wisdom, that an evidence leader such as Mr Maleka for example, would lead a witness such as Mr Maseko and then on turn on him and say but fact X on date Y did not happen and Mr Maseko would be startled. How do you achieve that effective cross-examination unless it is done by someone such as a counsel briefed by the Gupta's. Let me add, that going forward therefore, on another topic and we know that there are many tranches of investigation, the Commission would write to us, notice in terms of 3.3, we are raising with you this issue about Transnet or Estina which we know
10 very well. Then the Gupta's would say well, we know what the ruling is, we give our evidence, it is dealt with by commissioners that have no deep understanding of our version, we put down a version, but they have not met us, there is no instinctive to cross-examine.

You should remember that the statements that we have put, are as full as we could make them for the purpose of what was required to show the difference, but when you have consulted with a witness as the evidence leaders have consulted say with Ms Mentor or with Mr Maseko, you know much more about the background, you have a feel for the matter, so that when you cross-examine and challenge, you do so from the depth of consultation, appreciating the picture as given to you by your client and cross-examining
20 on much more than just the words on paper, so the function of testing the evidence, would not be well served even by hard working honest evidence leaders and so, what would a person such as Mr Ajay Gupta do? He would say well I have already been told that I can't cross-examine, I must put my version on paper as best I can, some person who hasn't met me and doesn't understand the full picture, will take the words on paper

and work with them and try to achieve a demonstration of the truth before the Commissioner. Why participate in such a failing or a second rate approach to evidence?

CHAIRPERSON: But he would have to be told Mr Hellens, you are responsible for the decision to take yourself out of the jurisdiction of the Commission, you are responsible for the situation where the Commission's legal team can't interview you, actually if you had come back to South Africa, you may well have been granted leave to cross-examine and you would have been able one, to put before the Commission, as much as you could and challenge as much as you could, to clear your name, if one wants to put it like that and to assist the Commission to find the truth, but you decided to take yourself out of the
10 jurisdiction of the Commission.

ADV MICHAEL HELLENS SC: Well ultimately, the decision is yours, but that decision encompasses, I the pursuer of truth, must decide whether to deprive myself of a very useful fountain of information which information can be tested or be it subject to the limping basis if I could call it that you have described, if you do so, I would submit you would never have the confidence that you had really got to the truth.

CHAIRPERSON: Just lastly before you say whatever you may have on the issue of fugitive from justice, is it your submission that your clients have a lawful reason not to come back to South Africa and if so, what are the grounds for saying they have a lawful reason?

20 **ADV MICHAEL HELLENS SC**: They have, I am instructed to put before you, that they have a reasonable apprehension that the South African police in the form of the Hawks, with their powers of arrest and investigation, coupled with the National Prosecuting Authority's power to decide to arrest, has been demonstrably recklessly wielded against

their companies and against individuals that represented the companies and they have no confidence that the same would not happen to them, that is their justification.

CHAIRPERSON: Thank you.

ADV MICHAEL HELLENS SC: Then I have filed very briefly with your leave, supplementary written submissions which I won't go through, but I would ask you to address yourself to. Just on the question of fugitive from justice, it is in Paragraph 10 of my supplementary heads, first of all 10.1, it's a point I have already made, he shows the correspondence with the South African police where they don't give any clarity as to whether there is a warrant or not. Clearly, he didn't flee the country knowing of a warrant
10 it has just come up lately. The Commission argues that one or more of the Gupta's are fugitives of justice and we don't know what that means, whether it is one or more and if so, which one.

The press say that the police say there is a warrant for Mr Gupta, but there is nothing before you to say that there is actually a warrant for Mr Gupta, so this whole question of whether there is a warrant, is completely up in the air, in particular my learned friend's submission that there is a warrant for one or more, I don't know what that means, so we say there is nothing before you to say that there is a warrant and we say that his attitude is the one that I have expressed with his experience in the Estina prosecution.

CHAIRPERSON: If he or they are fugitives from justice, it may well be that that
20 disqualifies them from participating in these proceedings. It may well be that it doesn't necessarily disqualify them from participating in these proceedings, but nevertheless, it is an important factor that I must take into account in the exercise of my discretion whether to grant them leave or not.

ADV MICHAEL HELLENS SC: I will make two points in that regard if I may. We raise in our heads, the same case as my learned friend raised, Polanski, who was a fugitive and the court and the Commission is a wider body than a court, looked at all of the factors of which the fact that he was a fugitive from the Californian jurisdiction was a factor, so it is a factor you must take into account and it decided in its favour. Then there is the New Zealand or the Australian tax authority case which went the other way. We have also given you recent authority South African authority within the context of high court proceedings where evidence by video link, is very much an acceptable way in justifiable circumstances, where a court can take evidence from overseas if it's justified. We live in a
10 global village now, so the fact that it's and this is not quite answering your point, but the fact that its video link etcetera, it makes the evidence no less real, no less cross-examinable, so it's absolutely as good as being here.

So you have that factor and if you like, the theoretical or the in-principle fact that you may find that he is a fugitive from justice. I must say there is no clarity on that issue here. Those are two factors that you will weigh and that you are entitled to weigh. It is not irregular for you to weigh them from an administrative point of view, you can name them as factors, but you must look at the balance and that is that you will get the evidence, it will be cross-examined, it will emerge whether they refuse to answer questions or not and all the benefits that flow from that.

20 If the courts will allow video conference facilities, restricted or constricted as they are in their procedure with a discretion to allow it, then on the wider beam of the powers of the Commission, you should be more favourably inclined.

CHAIRPERSON: Thank you, I am sure you have had a look at the decision referred to by the Commission's legal team the decision of the Constitutional Court in Hansman

where as I understand it, once the court came to the conclusion that the applicant there was a fugitive from justice, it decided that it would not entertain the application as I understand the decision.

ADV MICHAEL HELLENS SC: The difference there if I might Mr Chair, the difference there is that Hansman within the legal system, was approaching the Constitutional Court for leave to appeal, both trying to use the legal system to enforce his rights and both denying the legal system its right to have imprisoned him and he absconded. That is a very different position from this position.

CHAIRPERSON: How so?

10 **ADV MICHAEL HELLENS SC**: You are enjoined to make an inquiry into the topics covered by the terms of reference. An important source of information that would be useful to your decision making is the evidence of the Gupta's. They are not trying to conduct the inquiry or run a process. Their evidence is something that you will naturally come across in the many phases of the progress of this Commission and where you ask them if they want to participate and give evidence and/or cross-examined, they make a tender to participate with a qualification and it's not the same as seeking to demand from a court, participation in a process as opposed to being a ready source of information for the Commission's functioning.

20 **CHAIRPERSON**: Well but what remains, is that such participation as they tender, is one that is in their terms. They say we will participate but on our terms. We will be outside of this country and you either come to us as a Commission, or we go to whatever venue you like, but outside South Africa or through a video link, so they want participation to be on their terms.

ADV MICHAEL HELLENS SC: Well, it could be phrased like that and that might be a pejorative way, but given the reasons that they have given, they nevertheless tender a participation and if the pursuit of truth is to be aided by their participation albeit on the terms that they have suggested, it remains a value judgement whether you wish to conduct an inquiry unaided by their evidence or aided by their evidence even with some rebellion in your judicial sole as to whether you should accommodate such a request. It's a balancing act and it is one that you have to achieve.

CHAIRPERSON: Thank you very much Mr Hellens. If I were to grant them leave, the next question would be, the duration because I think I have indicated that I do intend
10 putting some time limits on cross-examination. As I see it, I probably would initially say to you or any counsel, I think I will give you for arguments sake, an hour. Obviously I wouldn't be rigid about that, but I would if you are going to be too long winded, that might count against me giving you more, but if I can see that the hour comes to an end, you still have quite something to ask the witness and you really have been asking relevant pertinent questions, I am more inclined to give you a little more, so in other words, I could initially put a certain timeframe and then see how things go and then towards the end, maybe give you more. In the end, I have said before that this process will be a fair process, but a fair process doesn't necessarily mean that everyone gets what they want. It is going to be a fair process in the sense that as far as possible, the rights of all people
20 would be looked at, they would be considered against other people's rights, against the interests of the public, against taxpayer's money that is used for the Commission, but I would try to be as fair as possible, but there would be times when I am sure I make certain decisions and somebody thinks that I am unfair but I will simply be doing the best I can and one of the things I don't want, I don't want the Commission's proceedings to drag on for too long. So I have to balance that against other considerations to make sure that I

strike a fair balance, as fair a balance as possible between not wanting the proceedings to drag on for too long and not wanting to be unfair to other role players.

So I am not sure whether you have anything to say in terms of timeframes? Of course timelines can only be in relation to a particular witness. In regard to another witness, you might need less time than in regard to another.

ADV MICHAEL HELLENS SC: Yes, let me say, on a note that you're not asking me about, as a cross-examiner, I am very to the point so I am unfazed by such a restriction. In principle though, the sense of say what Mr Maseko said versus what the cross-examination might be, I can readily see that the cross-examination of Mr Maseko might
10 be substantially shorter than the cross-examination of Ms Mentor and not to delve into the facts of that case, there will be many scenarios where there will be more or less time.

If the cross-examiner knows that an indication of one hour is the ballpark, the cross-examiner should and will, I would, keep myself to that hour as far as possible and to the extent that you run over, it will be palpable from what's happening as to why it is justifiable. So I would not kick against such an approach at all.

CHAIRPERSON: Okay thank you very much Mr Hellens. Is it Mr Joubert who is next? Part of the reason why Mr Joubert allowed the debate/discussion between myself and Mr Hellens to be as exhaustive as I think it was, was to give everybody who is still going to come up and argue the benefits of what's going on in my mind, but also hearing
20 arguments advanced by Mr Hellens on certain issues, so that to the extent that same issues arise, if a particular counsel is happy with the argument put forward by Mr Hellens, or they might say on the following points, A B C D, I associate myself with what Mr Hellens has argued and have nothing to add on those points, or I only have a limited

input to make and you make that so that we don't effectively repeat the same thing, obviously if you have different arguments, that I would understand.

ADV DAWIE JOUBERT SC: Mr Chairman I have dealt I believe in sufficient particularity with all the aspects, more specifically with the rules of natural justice, in so far as they overlap with the argument and the responses advanced by Mr Hellens, I obviously align myself with that and I am not going to repeat it.

Perhaps I should only address the different issue Mr Chairman you know what my instructions are with regards to both Mr Ajay Gupta and Mr Rajesh Gupta on the meeting of the 23rd of October 2015 and what their versions are with reference to their affidavits. I
10 also represent Mr Duduzane Zuma. Now I have dealt on Page 26 Paragraph 5 with the issue that he stands on a somewhat different footing. We have explained that in terms of the proclamation dated 20 March 2018, no answer given by any witness in these proceedings will be admissible against him in any subsequent criminal proceedings, but there is no exoneration and to the extent that he is required to make an election under legal duress which he is currently faced with, either to give an undertaking to you Mr Chairman that he is prepared to come and give evidence before this Commission and currently, facing criminal charges forming the same subject matter. As you know, it is set out in Paragraph 6, that when he arrived back in South Africa to face a culpable homicide on the 12th of July this year, he was arrested on the 9th of July with regard to the exact
20 same subject matter which is the subject of the evidence of Mr Jonas, which would have occurred apparently during that meeting on that specific afternoon.

Now, as set out in Paragraph 7 on Page 27 of my heads, at the time of his arrest, he was entitled to be informed number one, whether there was a warrant for his arrest and number two, what is the affidavit, a copy of the affidavit in support of that warrant to arrest

him for these specific charges. The submission is and with reference to your earlier questions to Mr Hellens, but if somebody gets arrested unlawfully, maliciously prosecuted, he can simply sue the State for damages-

CHAIRPERSON: Well he can approach the court and get an order that he be released on bail.

ADV DAWIE JOUBERT SC: And then he has to go through a prosecution and face that prosecution to show eventually he was maliciously prosecuted only on a theoretical basis. But to put it in the correct context Mr Commissioner with respect, it shouldn't happen like that, because the point of departure is, we either live in a constitutional State, or we don't.

10 Nobody should be subjected to an unlawful arrest and an unlawful malicious prosecution if there is no basis for it. For instance, if I may just put his arrest in context, because we were given information as to how did his arrest come about on this specific charge. We know now from Mr Jonas that he claims that at the meeting, on the 23rd of October 2015, a certain topic was discussed. He kept quiet about that topic that apparently was discussed between the people who he claims to be there up until the 16th of March 2016, when in a media statement by the ANC, it was stated the following and one has to look at the words he used.

He said members of the Gupta family made him an offer. Now there in that statement, he implicated more than one person. Subsequently thereto, on the 11th of August 2016,
20 before the public protector, he gave evidence under oath and when one reads that, that you will find in Exhibit A Page 27, when one reads that, he came there before the public protector and he says look, I don't know who I really met because that person didn't introduce himself to me, he may be the one or the other and then by way of a leading question, it was put to him that it must be Mr Ajay Gupta.

Then subsequently thereto, in an affidavit on 16 February 2017, he makes, I am just giving the short abbreviation just to explain the unfair process, he says well the person I met, was Mr Ajay Gupta.

CHAIRPERSON: But what I'm keen to understand in order to understand what you are telling me here, is what, is, the point you are making about this context? What is the argument that you are putting forward as a foundation for?

ADV DAWIE JOUBERT SC: The point is the following Mr Commissioner, from the evidence of Mr Jonas, it appears that he hasn't laid a criminal complaint or a charge officially against anybody with the police, yet Mr Duduzane Zuma gets arrested. On what
10 evidence? It is clear that no one can get arrested if there is no official evidence under oath, which implicates you in an offence.

CHAIRPERSON: I understand what you are saying, but in the context of his application for leave to cross-examine in circumstances where he says I will not give evidence before the Commission because of the pending charges, what is the relevance of that? What's the point you want to make about the fact that he was arrested in circumstances where Mr Jonas as he puts it, says he didn't lay any charge?

ADV DAWIE JOUBERT SC: Because he is currently facing a parallel criminal charge in the specialised commercial crimes court. He prefers, if he needs to make an election under legal duress rather than not to give evidence before this Commission and take his
20 chances and will deal with the matter in the criminal charge he is facing.

CHAIRPERSON: But I don't understand this stance that he takes of saying, he won't give evidence here because he is facing a criminal charge in respect of the same allegation. Normally, a person would take that stance on the basis that they don't want to effectively incriminate themselves, they don't want to give their version first before the

criminal proceedings are completed, but hasn't he given his version already in an affidavit?

ADV DAWIE JOUBERT SC: Yes he has.

CHAIRPERSON: So why does he not want to come and testify?

ADV DAWIE JOUBERT SC: Well my instructions are that he prefers not to and he is not prepared to give you an unconditional undertaking that he is prepared to give evidence before this Commission at this stage whilst he is facing criminal charges which he believes in the circumstances where he could never have been arrested in the first place.

CHAIRPERSON: I just struggle to understand. If he had not given a version, maybe it
10 might have been different and obviously the rules of the Commission require that if you are implicated, you must give your version. He has given a version, we know it. If he has already implicated himself, he has and it's an affidavit that is a public document. Is that a lawful reason? As I said when we were meeting in chambers, in his affidavit, he hasn't said he would refuse to come and testify if he is called upon to do so. Maybe he simply said he does not undertake to give evidence. Maybe I must ask you the question if you do have instructions, whether his position is that if I call upon him to give evidence in terms of the powers vested in me, whether his stance is that he will refuse?

ADV DANIE JOUBERT SC: At this stage, my instruction Mr Chairman is that he needs to make an election, he prefers not to give evidence. Maybe if he gets a subpoena by the
20 Commission, he may reverse his stance, but currently as we stand here and in so far as he may be under legal duress to make an election, that is his election, because the reasons he advanced, is that he is currently facing parallel criminal charges and on his assessment of the events, it only shows the conclusion he reached, was that he was not

given fair treatment under the constitution like any other ordinary citizen, because if there is no criminal charge by the main witness, how can he ever be arrested?

CHAIRPERSON: But there are many people in the country, citizens and non-citizens, who get arrested, get charged in circumstances where they should not have been arrested and they should not have been charged and all of those people subject themselves to the legal system and try and get protection by using the legal system. Now, he has told us his version and all that would remain is that he may be asked to say okay, help this Commission to establish the truth, there are these allegations against you, you have denied them, the witnesses who make allegations against you, have taken the
10 stand, they have subjected themselves to cross-examination, taken the stand as well, subject yourself to cross-examination like them and he says, no, at least as of now, he is not undertaking to and we don't know whether if he was served with the requisite process, we don't know whether he would refuse or he would not as you say. I am just concerned whether in these circumstances, he would have a lawful reason to refuse if he were to be summoned to appear before the Commission and of course, if he were to be advised that for example, there is no lawful reason he might well decide that if the Commission asks him to come, he won't wait to be summoned, he will make himself available and say I will come in and give evidence if the Commission asks me to do so.

ADV DANIE JOUBERT SC: As I say Mr Commissioner, my instructions as I stand here,
20 he hasn't given leave to cross-examine yet. He explains to you why he is so disappointed in being treated in the way he was. Clearly, unfair treatment, unlawful arrest shouldn't be countenance by anybody or any court and it shouldn't happen in the first place. It's improper to say well it happens and then you have your remedies. We can't live in a state like that. It should be done correctly in the first place.

CHAIRPERSON: Well, Mr Joubert, I am sure you have represented many clients who have gone through that and they have found protection or at least justice. We as a country, we can't have a police force, a police service, that is perfect. No other country has such a police force that is perfect. There will be weaknesses. We have in our constitutional democracy, checks and balances. If the police arrest you without good grounds, the courts are there to declare that that is unlawful, they must release you. Those are the checks and balances which every citizen makes use of. Why should there be some people who don't seem to want to let what happens to everybody, happen to themselves as well, subject themselves to the same rules of the country that everybody gets subjected to?

ADV DANIE JOUBERT SC: Well probably, Mr Commissioner, once a ruling is made and the ruling is that he will be granted leave to cross-examine on the pre-condition that he must come and testify and he will get a subpoena, once that event has occurred, I will get instructions and then come to the evidence leaders and your good self.

CHAIRPERSON: Yes that is fine. Just one last question in regard to his stance, do you not concede that leaving out the issue that he has disclosed his version, leaving that out for the time being, do you not concede that if this Commission were to make a ruling to the effect that if an implicated person is facing criminal charges, he is entitled not to testify even in this Commission, even if called upon to do so by the Commission? Do you not concede that that would mean that the life of this Commission would be extended for a very long time? In his case, as I understand the position, his next appearance is early next year?

ADV DANIE JOUBERT SC: On the criminal charges, it is the 24th of January 2019 which is a provisional date.

CHAIRPERSON: Provisional date, so not even the trial, so the trial could take quite some time and apart from that, there could be other people who in due course come before this court and say, I am an implicated person, but I am facing a criminal trial, criminal charge, so I am also refusing to testify now until my trial has been finalised and another one comes and says that, so we will go into 5 years and more. Is it a tenable position for this Commission to uphold the position that despite the amended regulation 8.2, an implicated person who is facing criminal charges, is entitled not to be summoned to give evidence, or is entitled to refuse to give evidence?

10 **ADV DANIE JOUBERT SC**: Well, faced with the position I am now, there may be many eventualities. Depending on what happened, they may withdraw the charges because they say, or they may come to the conclusion that he didn't take any part number one, but number two, in my view, every witness who is facing criminal charges and is called upon to come and give evidence after being subpoenaed must either adhere to it and if he doesn't adhere to it, he will have to advance reasons why he doesn't comply, or elect not to comply with the evidence and deprived the Commission of his version.

CHAIRPERSON: But you can see what the possible or even likely effect would be on extending the life of the Commission if the ruling was to say any implicated person who is facing criminal charges, is entitled to refuse to give evidence before the Commission.

20 **ADV DANIE JOUBERT SC**: Well one has to deal with that reality once you are faced with it.

CHAIRPERSON: Okay and is your position on timeframes for cross-examination if I grant it, the same as Mr Hellens?

ADV DANIE JOUBERT SC: Indeed so.

CHAIRPERSON: Okay thank you very much. Which counsel comes next?

ADV HENRY COWLEY: Thank you Mr Chairman on behalf of Ms Kaunda's application.

CHAIRPERSON: In your case, Ms Kaunda wants to come and evidence if I recall correctly?

ADV HENRY COWLEY: No Mr Chairman.

CHAIRPERSON: Oh I thought she wants to come and give evidence in terms of her evidence?

ADV HENRY COWLEY: No she takes the position and says I made an election in terms of Rule 336 not to testify, not to call witnesses, but I want to cross-examine Ms Mentor on a very narrow aspect and why we submit-

10 **CHAIRPERSON**: Okay let me just get this clear, it's one thing to decide whether you want to undertake to give evidence, it may be another thing to take a position that says even if the Commission calls upon me to give evidence and I will not comply, do you know which of the two positions her stance is?

ADV HENRY COWLEY: In so far as the latter is concerned, that is within your prerogative Mr Chairman, you can decide to summons her and then she has no choice but to appear and she must comply and she must respond.

CHAIRPERSON: Okay then I understand, so it is not a situation where she doesn't want necessarily to give evidence, she might just be thinking after cross-examination, there might be no need, or I might say after this cross-examination, there is no way that the
20 Commission could take the witness's version even if I don't give evidence.

ADV HENRY COWLEY: With respect Mr Chairman, that is exactly our approach.

CHAIRPERSON: So it's not a question of any hostile attitude towards the Commission?

ADV HENRY COWLEY: Absolutely not and my client definitely understands her own position as well as that of the Commission and where she fits into this.

CHAIRPERSON: Okay, my inclination in regard to her, is the following one, I was thinking that the point of difference between herself and Ms Mentor is so narrow, I was wondering whether she feels really strongly that she wants to cross-examine or whether in the light of her version, the Commission's legal team can basically take care of putting questions to the witness and bearing in mind, certain things that were said by the witness. I think the witness said that she is confident or sure that it was her who called her, but I think there was a question of not knowing the number that had been used and so on.

10 **ADV HENRY COWLEY**: May I address you on that particular aspect? What we have been trying to ascertain from the legal team over the past few days, after the evidence of Ms Mentor, was that we want the telephone numbers which she referred to in her evidence in chief. We have managed to acquire one of those telephone numbers. We are in possession of Ms Kaunda's cell phone records for October. If we have the numbers, we can compare them with her cell phone records, that can be presented to the legal team and they can then make an objective observation to see whether there had been any telephonic communication.

We wanted to supplement Ms Kaunda's application, but the fact that the numbers were not forthcoming, that prevented us from getting finality on the issue, so once we are
20 there, then we can get to a point where maybe a concession is made and that was our approach right from the onset.

CHAIRPERSON: That's fine, if that is the approach, maybe what we should do is, allow you to try and see if you can find whatever information you are looking for. As I see it, it is quite possible that you might be quite comfortable and the legal team of the Commission

would be comfortable to say look, we have got Ms Kaunda's version, we've got this and that, we will put to the witness, but if it is thought that that might be unfair to her, I would be inclined to grant leave to cross-examine. It is just that it is such a narrow issue, if one could, one would like to do without having to have too many people coming in just to cross-examine on that. So I would be inclined to grant the leave. I would restrict cross-examination to a very short amount of time seeing that it is a very narrow issue, so I suggest that maybe what we should do is, maybe leave this pending and let you continue talking and once on any of the days arrangements can be made where once you have reached agreement, you both let me know, yourself and the Commission's legal team,
10 but that is my inclination in terms of Ms Kaunda.

ADV HENRY COWLEY: Thank you Mr Chairman, I take leave.

CHAIRPERSON: Thank you. Who is next? I would prefer Mr Labela's one to be the last one, because is it not a little different compared to the others? If I could deal with the others first, or am I changing the rules that we agreed upon in chambers? I said maybe after the counsel who would deal with the substantial, with the matters that required substantial debate are done then I would let the legal team for the Commission respond before I go to the other ones. Mr Labela's one should be last, but it may well be that the other ones that are left, might be more or less – might not be difficult to handle. Maybe we should deal with those ones, maybe we might be able to dispose of them in some way
20 in the next 10 minutes or so, so that after lunch, then we can just have full argument from the Commission's legal team, because otherwise Mr Maleka I would interrupt you for the lunch break in 10 minutes time.

ADV VINCENT MALEKA SC: Chair if I may assist, the remaining applications, are of persons who undertake to testify and we have made it quite clear in our submissions, that

we do not oppose those applications, so that we should hold them to their undertaking to testify after cross-examination. In the event that they do not live up to that undertaking, we would simply approach you for a subpoena and force that undertaking, so I don't think there is a debate between us and the rest of the applications.

CHAIRPERSON: Yes but what I was meaning is, that might mean that before lunch, I could dispose of those, because if I say you must start, I will interrupt you at 1:00 anyway, so if I dispose of those, then counsel who are involved if they don't wish to come back after lunch, then they are free and then we resume after lunch, then you take the stand.

ADV VINCENT MALEKA SC: Indeed Chair.

10 **CHAIRPERSON**: Okay thank you. Let me allow Mr Hellens to be the leader there?

ADV VINCENT MALEKA SC: I appear for Mnonopi and Mtolo.

CHAIRPERSON: Mr Maleka has just said that all those who remain, undertake to give evidence. I thought that that was the position earlier, but I am under the impression that I read something recently that might reflect a different position in regard to one or both of your clients?

ADV VINCENT MALEKA SC: That's correct Chair.

CHAIRPERSON: Is there a change?

ADV VINCENT MALEKA SC: There is a change with regards to both parties and by seniority I will start with Major-General Mnonopi's application. There we state Chair that
20 upon receipt of the notice-

CHAIRPERSON: Well let's go straight to the issues that are really important. Is there any one of them who is not prepared to testify even if called upon to do so?

ADV VINCENT MALEKA SC: Not really, not only to testify Chair, but also to cross-examine, so my instruction is that I withdraw the entire application.

CHAIRPERSON: In regard to both of them?

ADV VINCENT MALEKA SC: In regard to both of them. The reason being, what transpired in the peripherals of this inquiry, if we proceed with this application, it might severely prejudice the General, so therefore, I have been instructed-

CHAIRPERSON: Of both of them or just the General?

ADV VINCENT MALEKA SC: Only the General, I am still coming to-

CHAIRPERSON: Is it a General, I understand these titles can be very different, it is
10 Major-General and General are different things and brigadiers.

ADV VINCENT MALEKA SC: Thank you Chair for your guidance. Major-General
Mnonopi-

CHAIRPERSON: That is lower than General isn't it?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay so you say your instructions are to withdraw the applications of
Mnonopi and Mtolo for leave to cross-examine?

ADV VINCENT MALEKA SC: No not Mtolo, only Major-General Mnonopi.

CHAIRPERSON: Okay thank you. I hope she appreciates that that doesn't mean that
she might not be called upon in any event to come and give evidence if I consider that
20 she should be called upon in terms of the regulations, but I assume she knows.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay so that one is withdrawn and then it's Mtolo? What is his position about giving evidence?

ADV VINCENT MALEKA SC: His position is that we have a special application Chair. I don't know if Chair had a glimpse of our supplementary affidavit and if so, I would humbly and respectfully refer Chair to Paragraph 3 thereof, where he just confirms under oath that he has in his possession and control, recordings of the interview between himself and Ms Mentor. I have canvassed this with the legal team.

CHAIRPERSON: Well my question is, what is his position in undertaking to give evidence?

10 **ADV VINCENT MALEKA SC**: He wants the Chair to make a ruling on the admissibility of this tape first before the next step may be considered.

CHAIRPERSON: But he has brought an application for leave to cross-examine. He places before me, information and I must decide that application and now he wants to say please don't decide the application yet, first tell me whether this recording will be admissible? Here the Commission is investigating certain allegations and certain things have been said about him, he knows whether they are true or not true, he has put up a version and I would have thought that if he has a recording, he would act on the basis of what he is advised by his legal advisors about whether that recording can help or not.

20 **ADV VINCENT MALEKA SC**: That is why in this instance, we need your unquestionable guidance Chair.

CHAIRPERSON: Well I want to rule on the whole application. If you make your submissions on whether he can use that evidence of the recording, you can make those submissions, but I will rule on everything at the same time, I won't rule piece meal.

ADV VINCENT MALEKA SC: In that instance, we still stand and abide by our humble submission as clearly and explicitly set out on our supplementary affidavit.

CHAIRPERSON: But then I don't have an answer as to whether he undertakes to give evidence as of now?

ADV VINCENT MALEKA SC: That goes without saying.

CHAIRPERSON: He undertakes?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay if there is no problem with regard to that, I would be inclined to grant him leave, but I would suggest that if he has a recording of a certain conversation, it might be helpful if you might wish to consider whether it would not be helpful if you were to share that recording with the Commission's legal team, because it may well be that for example, if that recording is shown to relate to the witness concerned and if she says certain things there and there is no problem with the authenticity, it may well be that some of the things might be resolved, I am not sure, so I am just thinking if there is a recording, there may or may not be a chance of curtailing whatever cross-examination might end up happening. So I would suggest that you have further discussions with the Commission's legal team on the understanding that I would be inclined to grant you leave and then what would remain, is how much time I would give you to cross-examine, but it may be possible that further engagement with the Commission's legal team, might curtail the length of the cross-examination.

ADV VINCENT MALEKA SC: That's correct, as I pointed out earlier Chair that I have already canvassed this with Mr Mabunda. He only stated that as long as we will comply with all the rules regarding the handing in, there will not be a problem.

CHAIRPERSON: Yes but what I'm saying, is speak to the legal team that is next to you, so talk to them to counsel and see what is possible and what's not possible and in due course, a report back would be made to me in open court and then, we will do the formalities when you are supposed to cross-examine in terms of the formalities. So that is my inclination but see if that cannot be sorted out.

ADV VINCENT MALEKA SC: Thanks Chair that is my submission at this stage.

CHAIRPERSON: Thank you. Is there another one before Mr Labala? Oh okay Mr Labala?

ADV SIMMY LABALA SC: Esteemed Commissioner we come on a different complete
10 point and we will edify it for the benefit of assisting out learned friends, the evidence
leaders. Mr Hellens did not deal with a very important aspect that is borne by Rule 3.3,
Rule 3.3.1 and Rule 3.3.2.

CHAIRPERSON: I am sorry Mr Labala, how much time do you think you might need for this application subject obviously to my questions. I did have a look at your client's application earlier, but I don't think that I saw, I think you said that it's updated or it's supplemented, or is it still the very one that was filed?

ADV SIMMY LABALA SC: It's the same Chair, the one that you should look at now, it's signed, the difference is that it is signed.

CHAIRPERSON: Oh the difference is that it is signed okay. I did have a look at it some
20 time back, but from the discussions we had when all counsel met me, one of the days,
there was the issue of whether your client is at this stage, is implicated and a lot would then depend on that.

ADV SIMMY LABALA SC: Indeed.

CHAIRPERSON: You are here to argue that she is implicated and if that proposition is accepted, then you would move an application for leave to cross-examine?

ADV SIMMY LABALA SC: Indeed Chair and we contend that the answer is not in the tacit assumption of the interpretation of the rules by the evidence leaders. Rule 3.3 3.3.1 and 3.3.2, talks about a person who may be implicated. Ms Brown is a very unique witness.

CHAIRPERSON: No I'm sorry, when I was asking how long you might be, I wanted to see whether to deal with this now or to deal with it after lunch. How long do you think you might be?

10 **ADV SIMMY LABALA SC**: Chair 15 minutes subject to the questions.

CHAIRPERSON: I think let's adjourn for lunch and then during the lunch, I will just refresh my memory on that application and then when we start at 2:00, we will deal with your application and hopefully we can finish it within 15 or so minutes and then I will hear Mr Maleka or whoever from the Commission's legal team, will present argument on what Mr Hellens argued earlier this morning. Thank you, we will then adjourn until 2:00.

Session 3

CHAIRPERSON: Ms. Hofmeyer, are you Mr. Labala now?

ADV KATE HOFMEYER: I am not Mr. Labala, I have chatted to him about the... just to address you on our witness, Chair.

CHAIRPERSON: Yes.

ADV KATE HOFMEYER: And then Mr. Maleka asked me just to convey to the Chair that our witness is available generally next week.

CHAIRPERSON: Yes.

ADV KATE HOFMEYER: So, he could come to give his evidence on Monday or
10 Tuesday.

CHAIRPERSON: Okay.

ADV KATE HOFMEYER: And we just seek direction from you...

CHAIRPERSON: Yes.

ADV KATE HOFMEYER: As to when we should ask him to return.

CHAIRPERSON: Okay, no that is fine. I think that will be finalised later this afternoon or tomorrow morning.

ADV KATE HOFMEYER: Certainly. Thank you, Chair.

CHAIRPERSON: Okay, thank you. Mr. Labala, I have had the opportunity of refreshing my memory on your client's application. Your client relies on a statement, she says, was
20 made by Mr. Jonas that either Mr. Ajay Gupta or the Gupta Brothers said that or said something to the effect that they control or protect certain people and they mentioned her

name. Is my understanding correct? At least that is one of the things, pieces of evidence that forms the basis of her application for leave to cross-examine Mr. Jonas.

ADV LABALA: Thank you, Chair.

CHAIRPERSON: Yes. There is another one, it is not just that one. What does the other one say?

ADV LABALA: Indeed, Chair, indeed.

CHAIRPERSON: Yes. There is another one, what is the other one?

ADV LABALA: The other one is by deductive way of reasoning by looking at the terms of reference.

10 **CHAIRPERSON:** Mm.

ADV LABALA: We are simply saying, Chair, our client does not have a right to demand to be implicated, that's not our position. Actually, it multiplies problems for her and our position. All that we are saying is that, the manner in which she was implicated without having been notified, was very glaring. If you look at the terms of reference, and this is the point that we want to make ...intervened.

CHAIRPERSON: Hang on one second. You see, in so far as the terms of reference are concerned, it may well be that you are right that she is one of the people on whom there is some focus in terms of the terms of reference by virtue of the position she held for some time as Minister of Public Enterprises. That until there is a statement by a witness,
20 there is evidence by a witness, there is no need for her to apply for leave to cross-examine. Because if there is no statement, no evidence by any witness implicating her in regard to a particular part of the terms of reference, then there is nobody to cross-examine. Where she says this is what Mr. Jonas has said about or said was said about

me by somebody, we can deal with that in due course. But, where there isn't any witness as yet who has said anything about her, she needs to wait until there is a witness who says something and then that is the witness she would want to cross-examine. So, as I see it, what you should be looking at or what she should be looking at is, in principle, applying for leave to cross-examine witnesses who have or a witness who has given evidence that she contends implicates her.

ADV LABALA: May I interpose, Chair?

CHAIRPERSON: Yes.

ADV LABALA: As a challenge to that reasoning, (inaudible) as it sound... Remember, 10 the processes of the Commission started with openings. Then we are in a stage where you are gathering evidence, you are inquiring into, so that you should report on to make recommendations.

CHAIRPERSON: Mm.

ADV LABALA: There is going to come a stage where there will be closing submissions.

CHAIRPERSON: Mm.

ADV LABALA: I don't know what is on the mind of this competent team of the evidence leaders. Pose yourself this question, and I am forced to give you if, what if they say Mr. Jonas came and testified and said that the Guptas mentioned that they work with certain people and those people are protected and amongst them is Ms. Lynne Brown? Firstly, 20 they will say, if you don't join issue on cross-examining on this issue, and I assure you that we may even ask two questions or three questions to Mr. Jonas.

CHAIRPERSON: I think in so far, she relies on what a witness has come before the Commission has said, that stands on a different footing, we can deal with that. I am

simply saying, what I was saying earlier on is simply that, to the extend that you talk about what the terms of reference say in circumstances where there isn't any witness who has talked about that part of the terms of reference, there is no need for her to apply for leave to cross-examine now, because there is no witness to cross-examine. But, to the extend that she is saying, here is a witness who has come before the Commission, who has said a, b, c, about me, I would like to cross-examine, that we can look at.

ADV LABALA: Indeed, Chair.

CHAIRPERSON: Are we on the same page?

ADV LABALA: Indeed. But, may we add in parenthesis about something which the
10 evidence leader should take note of?

CHAIRPERSON: Mm.

ADV LABALA: They consult witnesses. They analyse what witnesses say. They prepare witnesses. Now, if you look at rule 3.3 and the sub-rule 3.3.1 and 3.3.2, the rules mention of a person who may be implicated – this is a leverage that the evidence leaders enjoy. When we look at the terms of reference... let's look at the terms of reference during this phase of the hearing.

CHAIRPERSON: Mm.

ADV LABALA: Terms of reference one to three, 1.6. Now, those term of reference informs one about witnesses who may be implicated, even if they haven't prepared
20 statements. The question to be posed is, should a witness or should a person wait to be implicated or wait to be notified before they come before the Commission. Now, no one is better qualified to provide an answer to this and we saw it happening and this is the issue of Ms. Brown, she says, Mr. Jonas mentions her name, directly implicates her. But

Mr. Jonas goes further that there has been deliberations and unfairness in as far as the manner in which Treasury has been treated. And she says that point may implicate her further.

CHAIRPERSON: No, I am quite happy for us to deal with the question of, with her application in so far as she relies on what Mr. Jonas testified, we can deal with that. I understood you to be wanting to also rely on what I thought would be certain parts of the terms of reference to say they implicate her ...intervened.

ADV LABALA: Not at all.

CHAIRPERSON: Even before there is a witness. That is not what you want to do.

10 **ADV LABALA:** Not at all, Chair.

CHAIRPERSON: Okay, no, that's fine.

ADV LABALA: We are saying, no one is better qualified to analyse this terms of reference to appreciate what rule 3.3.1 and 3.3.2 says than this competent team. If you look at those terms of reference, they already tell this competent team of evidence leaders, who may be implicated by nature of the term of reference. Whether that person or that individual has already filed a notice to appear, whether that person has already made a statement. And, Chair, with respect, the worse way of avoiding prejudice is not to deal with it when it has occurred. In the case of Ms. Brown, we contend the following, that if it happens in the future, she hasn't joined issue, she hasn't filed a statement here,
20 she hasn't given a notice, she has not been given a notice, and she gets implicated, we would like to be notified. And no one is better qualified than our colleagues.

CHAIRPERSON: Yes.

ADV LABALA: Because they read this terms of reference.

CHAIRPERSON: Yes.

ADV LABALA: They prepare... and like we mention in parenthesis, Chair, the terms of reference that has been dealt with during this phase, by implication directly or indirectly, should have informed them that there are certain persons who will be implicated. I am not saying Ms. Brown should be implicated, she is not demanding that right. For instance, let's take term of reference 1.1 ...intervened.

CHAIRPERSON: Maybe before you do that, it might not be necessary to do that. Maybe your... the stance that she takes is based on a certain understanding of the provision and the rules that talks about an implicated persons or person who may be implicated. As I
10 understand it, that may be implicated, is not talking about somebody who may be implicated in the future. It is talking about, as I understand it, it seeks to deal with a situation where the Commission's legal team looks at a statement, somebody says she is implicated, somebody else says she is not implicated, they are not sure, then they are supposed to air on the side of caution and say, we are not saying necessarily you are implicated. But it may be that it may be argued that you are. So, we are giving you a copy of this statement, obviously you will take your own view, you know, and then take it from there. So, as I understand it, that is the intention. It is not to say it is somebody who may be implicated in the future. So, and the rules are clear that the Commission's legal
20 team, when they have taken a statement from a witness, they must look for people who may be implicated or who are implicated and make sure that those are notified and furnished with something that tells them in what way they are implicated or may be implicated in the statement or a copy of the relevant portions of the statement or the whole statement. And in regard to persons who might not be implicated when a statement is taken from a certain witness, but get implicated when a witness gives evidence in the Commission, I have already announced last week that in regard to those,

the Commission's legal team will make sure that persons who may not have been implicated in a witness statement, but who get implicated during the giving of evidence, will be notified. So, if and when in the future, any witness comes up here and implicates your client and that witness' statement before the giving of evidence did not implicate her, she will be notified. So, it seems to me that we must just talk about whether you should be granted to cross-examine Mr. Jonas in regard to the aspects of his evidence to which reference is made in your client's affidavit.

ADV LABALA: Thank you, Chair. But before I part ways with this aspect, this will be the last point that we would like to make.

10 **CHAIRPERSON:** Mm.

ADV LABALA: Chair, your interpretation of may be implicated is under inclusive. The answer is in the (inaudible) and proper preparation of the evidence leaders. As they prepare, assisted by the terms of reference, they've got to prepare this witness, they sit with this witness, there is no one who does it better than them. The defence team and other interest groups and parties do not know. The question is, are they (inaudible) and that is not what we are saying. Could they anticipate that this witness in the stand may implicate someone? The question is it is likely, no one knows it better than them ...intervened.

20 **CHAIRPERSON:** Ja, but where the statement, as I have just said, doesn't seem to implicate a particular person, if that witness subsequently, when he/she gives evidence, implicates somebody that they didn't think was implicated, they would notify the person. So, where is the problem?

ADV LABALA: I could respond to this answer by what we are dealing with, let's come nearer home.

CHAIRPERSON: What is it that you want the Commission's legal team to do, which they have not done? Leave out the fact that you say they didn't give you Mr. Jonas' statement, because, I don't know whether even as we speak they haven't given you, but I would think that they have by now. In terms of the rules it is clear that if your client was implicated, they should have given the statement. They may have taken the view that your client was not implicated and that may be a bona fide view and they may be right, they may be wrong, your client might take a different view. And to the extent that Mr. Jonas or any witness in the witness stand implicated your client, that is what we can talk about in terms of whether you should be granted leave or not. And I am inclined to say,
10 why we don't just get to that, namely where there is a witness, who you submit, implicated your client and we talk about that. Or is there some submission you still wanted to do outside of that?

ADV LABALA: No, we will close by saying ...intervened.

CHAIRPERSON: We are not closing any door to your client. The attitude is simply that as and when there is a witness that your client believes implicates her, you can come forward and apply for leave to cross-examine that witness. In other words, the leave to cross-examine is not just granted in general, it is granted in respect of specific witness and specific evidence.

ADV LABALA: Chair, we close by saying the following into the future, the terms of
20 reference do guide our colleagues. I think their fairness instincts and judicial training would inform them that dealing with this term of reference, there are high probabilities that Members of the Executive will be implicated. A Member of the Executive who was responsible for these state-owned entities, would be implicated. But the answer is not even on the defence team or Members of the National Executive why may be implicated,

it is in the training of our colleagues. They are better qualified to use those instincts to say, this terms of reference brings to the fore this particular department on the spot and the person who headed it. Now, the answer is ...intervened.

CHAIRPERSON: And what should they do at that stage, if there is no witness who implicated them in a statement?

ADV LABALA: I am addressing, Chair, what has occurred.

CHAIRPERSON: What has occurred?

ADV LABALA: I am confining myself to what has occurred in the case of Ms. Brown.

CHAIRPERSON: Yes. As I understand it, she didn't get served with Mr. Jonas' statement originally. I don't know whether subsequently she has, is that right?

ADV LABALA: Up till now she hasn't.

CHAIRPERSON: Okay.

ADV LABALA: We have requested that, Chair.

CHAIRPERSON: And that might be because the legal team might have taken the view that Mr. Jonas' statement doesn't implicate her, that's a possibility. Now, you maintain that she is implicated. I am sure the legal team can give you that statement and then you move your application. I am just concerned that we are getting detained on something that really shouldn't detain us, because you can get the statement, if you haven't got it. If they take the view that your client is not implicated and you take the view that she is implicated, you make submissions to me, I listen, I take a view, I make a decision, we move on.

ADV LABALA: Thanks, Chair. Wouldn't the answer be – I am just about to part ways and leave, extricate myself from this podium, wouldn't the answer also be the following – the evidence leader could say, you are implicating this particular person, this person is not here, shall we stop. And not with a view to delay the proceedings to go and notify that person. Now, I am bringing this point nearer home about what has happened to Ms. Brown. As to what happens subsequent thereto, Chair, it will take its own course.

CHAIRPERSON: Well, the rules make provision for the chairperson to make an order or a decision that we will try and make sure that an implicated person who didn't get notice in time, is not materially prejudiced. And in effect that simply means we could continue
10 with the evidence of that witness and allow in due course that implicated person to apply for leave to cross-examine and they can cross-examine and to give evidence as well. That is what everybody, there are a number of implicated persons who were faced with that situation without even them hearing that that was my approach that I intended adopting, they said on their own they thought that that approach would ensure that there was no prejudice.

ADV LABALA: Chair, we part by saying the uniqueness of the position of Ms. Brown, qualified by the terms of reference and what occurred, proves the contrary. We will address and confer with the evidence leaders if such an instance happens in the next occasion, Chair.

20 **CHAIRPERSON:** Well, maybe what should happen is, I mean with regard to, for example Mr. Jonas, you say that he said Mr. Gupta, Ajay Gupta or the Gupta Brothers, I can't remember which exactly, is attributed to Mr. Jonas having said or said something that included Ms. Brown's name like we protect them or we control them, I can't remember. Now, if you want leave to cross-examine, I mean I take it that Ms. Brown

wasn't there, Mr. Jonas is just going to say that is what was said. I am not saying it is so, that is what was said.

ADV LABALA: Let alone that the context in which we work with her is qualified, the content, what does he mean... those things never came out. And that is where the issue comes, Chair, when we say the evidence leaders have a greater duty to service this Commission. They will do it, Chair, and I have got no doubt that they attempt to do it. For instance, there were incremental questions that could have been asked in relation to that allegation. Perhaps it could have assured us and qualified whether is she implicated or not now. The question becomes the following in dealing with this aspect, who is better
10 qualified to determine whether she is implicated or not? Who has to wait? How far should it go? (Inaudible) beyond what Mr. Jonas said Mr. Gupta said. Now, all these questions bring the difficulty that we have as to, our colleagues, the evidence leaders, are they better qualified to tacitly assume that the interpretation whether Ms. Brown is implicated or not, is flawless.

CHAIRPERSON: Let's bring finality on this for now. Do you want to let me decide the application before you can see Mr. Jonas' statement? Or do you want me to defer the application until your client has seen Mr. Jonas' statement and decide whether the application must be decided as it stands or you want to supplement or what?

ADV LABALA: We'll wait to see the statement, Chair. And I don't want to waste the
20 Commission's time. We do have the version, we looked at the transcript and it is standing before the Commission.

CHAIRPERSON: Ja.

ADV LABALA: I could read it to you, but as at this stage I don't think it is necessary, Chair.

CHAIRPERSON: Okay, no that's fine. So, we will defer the application and then in due course I will hear, at some stage, what your client's final decision is, whether to pursue the application as it stands or to supplement or what to do.

ADV LABALA: Thank you, Chair.

CHAIRPERSON: Okay, thank you. This application will then be deferred. In regard to the applications of Ms. Cohunda (spelling), applications of Mr. Mtolo, and well Ms. Mnonopi's (spelling) one was withdrawn... what was the... I leave out Mr. Ajay Gupta, Mr. Rajesh Gupta, Mr. Duduzane Gupta, those three... I am sorry, what did I say? Mr. Duduzane Zuma, okay. Well, I am sorry if I said anything different. I don't know if I am
10 leaving out anybody. Well, I have just dealt with Ms. Brown's one. Mr. Maleka, am I leaving out anyone?

ADV VINCENT MALEKA SC: Yes, Chair. There is the application of Mr. Hlongwane which has not yet been mentioned.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: You will recall that he is being represented by Mr. Cilliers who made it clear earlier on that he will not be here today.

CHAIRPERSON: Oh, yes.

ADV VINCENT MALEKA SC: We were going to mention that application.

CHAIRPERSON: Yes, yes.

20 **ADV VINCENT MALEKA SC:** And draw your attention to some of its useful features.

CHAIRPERSON: Well, basically if I recall correctly, he wants to testify.

ADV VINCENT MALEKA SC: Indeed, Chair, yes.

CHAIRPERSON: So, I will be inclined to grant that one too.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: So, let me just say, in regard to Mr. Hlongwane's application, I grant leave to cross-examine the witness or witnesses referred to in his application. In regard to Ms. Cohunda (spelling), I grant leave to cross-examine Ms. Mentor. But in regard to that one, I emphasise what I said when counsel was on his feet to say, if at all possible, there is a chance that through discussions with the Commission's legal team that can be dealt with without adding on the numbers of people who would come up, that would be great. But if that is not felt to be fair, it's fine, the leave is granted. And in regard to all the
10 applications where I grant leave, the actual timeframe I will grant just before cross-examination begins as to how much time I am allocating. In regard to Mr. Mtolo, I was informed that Mr. Mtolo is prepared to give evidence. His counsel, I think, is no longer here, but I think that is what I was told.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: So, I would grant leave in that case as well.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: I think I have covered all of them.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And then in regard to the three, Mr. Ajay Gupta, Mr. Rajesh Gupta, Mr.
20 Duduzane Zuma, in regard to those, I reserve judgement. And once I am ready to hand down the decision, I would let everybody know. Oh, you had not argued hey. I am sorry, you had not argued, we took too much time, you said you are not opposing the others.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: But with these three, you don't oppose the granting of cross-examination, you rather want certain conditions to be attached.

ADV VINCENT MALEKA SC: Indeed, Chair.

CHAIRPERSON: Yes, I am sorry. So, I will let you present your argument in regard to the conditions that you want to attach.

ADV VINCENT MALEKA SC: Yes. Chair, I hope not to be long.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: May I make sure that you have the material that we will navigate through in order to assist you on whether it is appropriate in the exercise of your
10 discretion to impose the condition or the conditions that we contend for.

CHAIRPERSON: Mm.

ADV VINCENT MALEKA SC: The first bundle that you should have, Chair, is the updated Exhibit D3.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: It contains all of the applications that have been made for leave to cross-examine, without the accompanying undertaking to testify, except for Mr. Ajay Gupta and Rajesh Gupta, who want to testify on their own rules of engagement.

CHAIRPERSON: Mm.

ADV VINCENT MALEKA SC: That is the first set of material. The second, Chair, would
20 be the bundle of updated heads of argument. That bundle begins from page 1 and it runs up to page 241, as I have it. And, Chair, you have ...intervened.

CHAIRPERSON: What is that bundle written?

ADV VINCENT MALEKA SC: It is the bundle indexed heads of argument.

CHAIRPERSON: Oh, I may be having them as separate.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: I think at some stage they were all put in one bundle, but I prefer them separate.

ADV VINCENT MALEKA SC: Yes. Chair, I hope that the separate set that you have, has been indexed. I can indicate to you that our submissions begin from page 191.

CHAIRPERSON: I have got your heads of argument, but I don't think that I have got the supplement...

10 **ADV VINCENT MALEKA SC:** Chair, I believe there is an extra bundle of the indexed set of heads, which may be of assistance to you as we make the submissions.

CHAIRPERSON: Yes, please, yes. And those that I had, the original ones, you can take it that I had the opportunity to read them.

ADV VINCENT MALEKA SC: To read them, yes.

CHAIRPERSON: Carefully, ja.

ADV VINCENT MALEKA SC: And it is for that reason, Chair, that our submissions would not involve the reading of what we had said to you earlier on in writing.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** We merely focus on three key areas of concern that have emerged in the course of your debate with Mr. Hellens and those who support their cause.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And as we understand those areas, whether it is appropriate in the circumstances of the present case, to allow the Gupta Brothers, who are abroad, to testify at a venue of their own convenience and comfort outside the jurisdiction both of our Law Enforcement Agents and the Commission. It is the first issue that we will address. The second issue that we will address, Chair, is whether it is appropriate in the circumstances of the evidence you have heard thus far, to impose a restriction that witnesses who are about to be cross-examined, should not have the latitude of seeing the versions of implicated parties before the actual cross-examination begins. You will recall it is the theory of recognition so usefully described by our learned
10 friend, Mr. Hellens, supported by our learned friend, Mr. Joubert. The third issue we will address is a matter of uniqueness relating to the application of Mr. Duduzane Zuma, in respect of his attitude that because of the pending criminal proceedings, he has elected not to testify, and yet you should grant him leave to cross-examine. Those are the three areas, Chair, that we would like to address.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: I have to mention to you, Chair, that on those three matters, I would not be the only one who would speak, but that the representative of Mr. Jonas would like to make some additional submissions ...intervened.

CHAIRPERSON: Okay.

20 **ADV VINCENT MALEKA SC:** Without repeating the arguments I will advance.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Let me also mention, Chair, that if you go to page 223 of the indexed bundle of the heads, you will find the letter written on behalf of Mr. Maseko, which records the position that he takes in relation to the present arguments on those

matters. I do not wish to repeat what they say. Mr. Maseko is presently represented by his attorney before you today. And what he makes it clear is that, they will be guided by the arguments we make. And against that background, Chair, may I start with the first issue, whether you should allow testimony from abroad through video link of some sort?

CHAIRPERSON: Mm.

ADV VINCENT MALEKA SC: The first point that we would like to make, Chair, is that the issue arises for the first time not in the application made by any of the Gupta Brothers. The issue arises for the first time in the heads of argument.

CHAIRPERSON: Mm.

10 **ADV VINCENT MALEKA SC:** And the issue is conveyed to you not under oath. The issue is conveyed to you through the mouth of the legal representatives. We direct attention to that matter because there is a fundamental significance to it. And the significance, Chair, arises from the utility of that form of testimony in circumstances where you don't have the power to compel. Classical example is this, if we take what the lawyers have conveyed to you on face value and in good faith we arrange video testimony and Mr. Ajay Gupta and his brothers are willing to testify, what if, in the course of testimony, they commit perjury? You will be left at the mercy of their own evidence. You will have no power to compel them. And we know from the recent Constitutional Court case of the Premier of the Western Cape versus the Minister of Police, which we
20 reference in our heads. That a Commission without the power of compulsion is not worthy of investigating the mandate entrusted upon it. You will recall that in that case the issue was whether or not the Commission established by the then Premier of Western Cape – oh she is still there – to investigate allegations of Police neglect on law enforcement duties in Khayelitsha, would have the power to subpoena and compel Police and other

members of Law Enforcement Agent, to appear before the Commission, and the Police took a different view. But the Constitutional Court had to remind the Police that a Commission of that kind had the power to compel. It is for that reason, Chair, that we place ...intervened.

CHAIRPERSON: And I was part of that judgement.

ADV VINCENT MALEKA SC: Indeed, Chair. So that the wisdom of the judgement ought not to escape you in the context of the current controversy. We would submit, Chair, that the type of undertaking made through the heads of argument by the Gupta Brothers is not worth the promise it is made of, it is not worth the paper. Because they
10 may wake up one day and decide that they are not going to participate in the Commission's inquiry. My learned friend, Mr. Phillip, who has been designated to cross-examine them, may well put tough questions on them and in the course of that engagement, they may choose to disengage, you have no powers to compel them, Chair. Fundamentally because your powers of compulsion are limited by the principle of extra territoriality. You cannot engage compulsive compulsion outside the jurisdiction of this country. So, for that reason, we treat with scepticism that type of undertaking. It means nothing. So, there are also practical concerns that we have in regard to that undertaking, Chair. The first is, our law as we understand it, it provides for court processes to procure
20 evidence abroad through commissions. And the overarching principle is that it must be convenient not to a party in litigation, but also to the court and the court processes, Chair. And convenience in this case is vital, given the overarching credibility of the Commission. It will of course be convenient to Mr. Ajay Gupta and his brother that they should testify from abroad. But it will not be convenient for the Commission, let alone the public. On the matter of convenience, we would simply raise the spectra of the cost implication of that exercise. You are not dealing with persons who say, we undertake to bear the

extraordinary costs of taking evidence from abroad at a place of our convenience. They don't even give us an appreciation of what is the cost application of that exercise. They don't even tell us how the public interest would be served by such process, because we know the proceedings of this Commission ought to be public and the public must hear the evidence. And we would think that that type of process, Chair, does not conduce to public interest.

CHAIRPERSON: A point that occurs to me now, which didn't occur to me earlier when Mr. Hellens was on his feet is this that as we speak now, leave is being sought, they seek leave to cross-examine the witnesses who have given evidence that implicates them.

10 Having regard to the terms of reference, the wide terms of reference of the Commission, it is not beyond imagination that in the future there may be other witnesses who may implicate them in regard to other aspects of the investigation of this Commission. And the question would arise, if one was thinking of acceding to their request to go overseas to hear their evidence, to say does it mean until the Commission finishes, would the Commission have to undertake a number of trips whenever there is a witness that implicates them.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Of course, maybe an alternative might be that all witnesses, they might have to wait until all witnesses who may implicate them, have given evidence before the
20 Commission were to then go overseas and listen to their evidence. But if that were to happen, it would have to be quite a huge operation, I would imagine, because it would mean that this Commission would have to sit in another country for quite some extended period and those witnesses who have given evidence here, would have to be taken overseas as well to be cross-examined, if we were to use that route.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: If it is video link, we would have to keep on having the video links over some time.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: I am just mentioning a thought that comes to my mind.

ADV VINCENT MALEKA SC: Chair, it is in the dramatic effect of the examples that you have put to me, that therein lies the difficulty of the undertaking by the Gupta Brothers. That the spectra of those possible difficulties, illustrate that the undertaking they make is worth nothing and that we should not place any faith on it. Chair, of course, our learned
10 friends may respond and say, but there is no evidence that they would not cooperate with you. Well, the difficulty, they have not come under oath to say so. But even if we take that proposition on the face value of the heads, we know that those who have had longer lives than us and therefore the wisdom of prudence, have always cautioned us that the road to hell is paved with good intentions – and we don't want to risk that road.

CHAIRPERSON: So, at least the... well, I don't know what course one talks about in terms of a video link. But certainly, in terms of the option of the Commission travelling to sit outside of South Africa for their, to give effect to their undertaking, it could involve huge cost of taxpayers in terms of taking the Commission and whoever else over there.

ADV VINCENT MALEKA SC: Yes. And, Chair, we know that resources have become
20 scarce, especially financial resources. Can you imagine the public outcry that you as the Chairperson would have to face that you are now going to seek additional financial support from the Executive to fund a trip to Dubai to go and hear evidence? I will leave that issue, Chair. But there are two additional points that I would like to make on that undertaking by the Gupta Brothers. The first is the implication of their status, as we call

them, fugitives of justice. On the proposition of our learned friend, Mr. Hellens, no one has ever told them that they are a fugitive of justice. But let's deal with the issue on the face of what they have conveyed to you in the heads of argument, that they have no faith in our law enforcement processes because of the incompetence and the full might they might bring to bear on the Gupta Brothers because of that incompetence. The situation is even worse on their approach, because on their approach they don't trust our law enforcement processes and the trust doesn't end there. They don't trust that the judiciary would come to their assistance in case there is an abuse of law enforcement processes. And I do recall, Chair, that after we had debated the Minister of Finance, Standard Bank and other banks versus Ogbay (spelling) case in Pretoria. The Ogbay Group of Companies represented by the Gupta Brothers won that case and the profusely proclaimed publicly that they have faith in the South African judicial system. What has changed since then? One cannot allow individuals who adopt these two inconsistent positions to render the processes of the Commission useless.

CHAIRPERSON: Well, of course one is bound to also ask the question, can you on the one hand run away or flee from a legal system and its institutions, but at the same time want the benefits that that legal system confers on those who participate in it? Can you do both? Can you say on the one hand I don't like the system for whatever reason and you flee, but you say, actually it's got some benefits, I would like to get those benefits, it allows cross-examination, I want to get that benefit even if I am not participating in it, because physically they are not participating.

ADV VINCENT MALEKA SC: Yes, and Chair, that is the second last point which creates serious intractable difficulties for our learned friends, because the purpose of the cross-examination they want to pursue, it is to discredit the evidence of the witnesses. The purpose of their undertaking to testify abroad, is to give evidence to show that they are

not implicated, it is an (inaudible) exercise. Taking the two together, they would simply want to make use of the Commission's processes to proclaim and advance their innocence. We test it his way, what if, after that whole exercise, you do find evidence of corrupt, fraudulent or state capture behaviour and you recommend prosecution... they are beyond the reaches of the Commission.

CHAIRPERSON: Well, I am sure somebody in the public could say, they would just laugh at me.

ADV VINCENT MALEKA SC: Yes. And that is the abuse that we warn against, Chair, because it means that we shall in good faith have gone through this rigmarole and exercise, at the end of it we can't give effect to the recommendations that you make. And the key question is ...intervened.

CHAIRPERSON: Their refusal to come back into the country, and if I understood the affidavit or the... whether this was in the affidavit or in the written submissions correctly, their idea is to never come back into the country.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Does it not seek to defeat one of the purposes of, or at least one or more of the purposes of this Commission?

ADV VINCENT MALEKA SC: Indeed, Chair.

CHAIRPERSON: Because, one of the purposes is that, if the Commission finds that there were or may have been crimes committed by certain people, it should recommend prosecution.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: But if those people have deliberately fled from South Africa and there are no instruments between South Africa and the country where they are, in terms of which they can be forced back into South Africa, then whatever recommendation the Commission could make against them, if the Commission found that they were involved in state capture corruption, would not be worth anything.

ADV VINCENT MALEKA SC: Yes. And, Chair, it would have made a mockery of the evidence of Mr. Jonas to the extent that we uphold it. It would have made mockery of the evidence of Mr. Maseko. All of that expensive exercise would become meaningless in so far as they are concerned, because they are beyond the reaches of the Commission's

10 processes. Chair, the last two short points that I would like to make on this issue – the first is that our learned friends rely on the Polanski judgement that they and us have referenced in our heads. No doubt you recall the state of Mr. Polanski and how he sought to evade the justice of the Californian State Courts, Criminal Courts that is, being a French person. And how he sought to utilise the legal processes of England to advance a claim for defamation. There is a minority judgement and a majority judgement that differ on the outcome. But all of them accept that one of the fundamental rules of authorising video link testimony, is that it must be in the best interest of the administration of justice – that principle cuts across the majority and the minority judgement. We don't find that interest of justice in this case. One can understand if you

20 have a fugitive from justice or someone who says I don't trust your Law Enforcement Agents and I won't come to the country. But who says I have evidence that will help you as a Commission, for instance a whistle blower whose evidence is so vitally important to advance the terms of reference that you would say in that case the evidence of that individual is in the best interest of the Commission – nothing of that sort arises in this case. And therefore, the contention of our learned friends doesn't go past base one of

the rules of the Commission, the terms of reference and the Commission's regulations, which always say that a witness' testimony must be in the best interest of the Commission – nothing of that sort here. Finally, Chair, the Gupta Brothers want to have a selective treatment of the law. Mr. Duduzane Zuma had the courage of facing those incompetent Law Enforcement Agents by coming back into the country. What is so different to his business partners? Any suggestion that Mr. Duduzane Zuma must be subjected to your powers of compulsion and not the Gupta Brothers, arising from the allegations of state capture and/or fraud and/or corruption, would be an unfair treatment of the law to parties who are similarly situated on the course of investigation and we would discourage that sort of unfair treatment, Chair.

10

CHAIRPERSON: I asked Mr. Hellens, when he was addressing me, whether it was his submission that Mr. Ajay Gupta and Mr. Rajesh Gupta have a lawful reason not to come back to South Africa in relation to the business of this Commission. And his answer was, he gave me what he said were his instructions. What are your submissions on that question?

ADV VINCENT MALEKA SC: Chair, firstly, there is no lawful reason. All of us, all the time, face a prospect of law enforcement processes. If those prospects are well-founded, then we are subjected to the might of the law. If those processes are not well-founded, then we have a judiciary to protect us.

20 **CHAIRPERSON:** If I conclude that they have not advanced any lawful reason for refusing to come back to South Africa and give evidence in this Commission, is there really any room for me to consider their application or to consider any of the suggestions that they have made?

ADV VINCENT MALEKA SC: Chair, our suggestion would be that you reject that undertaking and then you would reject their application for the reason that... we would reject their application for cross-examination, because their cross-examination would not be in the best interest of the Commission. It doesn't help you, because the idea behind that cross-examination is to exculpate (?) themselves and not to go to the truth of the allegations. And by the way, at the end of day, Chairperson, it may well be that you can get better evidence relating to whether they are innocent of the allegations or guilty of the allegations from other sources and therefore their evidence is not so fundamentally important. We know their version, Chair, and we have analysed that version. They make
 10 eight matters of common cause with Mr. Maseko, at least Mr. Ajay Gupta. They make nine points of difference with Mr. Maseko's version. All of those nine points, Chair, are just bear denials. Are we going to go to Dubai to listen to evidence that seeks to support bear denials? We would submit that that is not in the best interest of the Commission, Chair. And so, finally, we would submit that, Chair, you would be free and entitled in the exercise of your discretion, to reject the undertaking they offer. You will be free to dismiss the application because it is not in the best interest of the Commission's work.

CHAIRPERSON: Mm.

ADV VINCENT MALEKA SC: Chair, I then turn to the issue of recognition. We have said a little more in our heads of our argument on that issue. I would like to make two
 20 more additional points, Chair, in relation to that issue. The first is, it is based on the proposition which works unfairness on both sides of the testimony that you are entitled to receive. The one side of the testimony is through witnesses who developed the courage to come and tell you what they know about the terms of your mandate and, Chair, risk their own career, implicate the people who are the all power and mighty in our country. Those people do so, Chair, by disclosing their statements to the implicated parties. We

have done, as far as we could, in the pursuit of fairness to give even those implicated parties, the bundle of the evidence that the witnesses would canvas. You have afforded them the latitude to sit here and listen to that evidence so that they know the entire gumwood of the evidence that implicates them. And for some reason that rule of fairness ought not to apply on the other side of receiving evidence, because they want to place restrictions on the witnesses. Chair, you have been at pains to point out to our learned friends that you are dealing with an inquisitorial system. You have been at pains to show our learned friends that in fact, their approach is not conducive to the proper working of the Commission's processes. You gave chapters and verse of examples which show that

10 their approach is not appropriate. You have given the example of a motion court process, there is no answer to it. May we add the following practical considerations, Chair? If Mr. Maseko is going to learn for the first time about the version of the Gupta Brothers when he gets cross-examined, practically he will be entitled to say but I want to see that version, I want to have a look at it. His lawyers, or ourselves, will say in fairness you can't cross-examine without giving the witness that fair latitude of knowing the entirety of the version. That is not conducive to the practical smooth working of the Commission's processes. Fairness requires that that witness should know that version throughout and throughout. But the more important part of fairness is this, Chair, that we are working with limited resources in order to make sure that you complete your mandate within the

20 shortest possible time and avoid the costly exercise of business as usual. You have bene at pains to say the parties must identify points of common cause and only ventilate by way of oral evidence and cross-examination before you those areas where there is a dispute. The best and the most effective form of making sure that cross-examination takes place on matters that are of dispute and not those that are common cause, is to say to the witness in advance, this is the version of an implicated party, look at it, do you still

stand by this or that. And we would responsibly come back to you and say that these are the areas which have now been curtailed for proper oral ventilation before you through the forensic skills of examination and cross-examination, but their approach is not conducive to that, Chair. Lastly, Chair, the inquisitorial process before you has an end to it and the end is not to trick witnesses by cross-examination. The end to it, it is not to scare witnesses to come before you because there is this high and mighty cross-examination. The end to it is to get to the bottom of the truth. My learned friend, Mr. Cockrell (?), will give you an example of corridor talk, how this type of ambush cross-examination may well prejudice the working of the Commission.

10 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: We know, Chair, that there are more witnesses to come. Some were reluctant because they did not have faith and trust to the work of the Commission. Others were scared because they did not know how they were going to be treated before the Commission. Now, if a witness is going to be exposed to this type of ambush cross-examination, we would be depriving the Commission of evidence which it would otherwise have had from well-meaning members of our community who want to help you come to the bottom of the truth, Chair.

CHAIRPERSON: Mm.

20 **ADV VINCENT MALEKA SC:** And, Chair, in addition to the submissions we made in writing on that score, we would submit that the type of restrictions our learned friends pose, are really going to make your work far more difficult than easier. They don't even conduce to the discovery of the truth. They are designed to (inaudible) witnesses and therefore discourage many others to come before you. Chair, I then move to the question of the pending criminal case. Oh, Chair, I have been asked to inform you that Mr.

Hazaban for Mr. Maseko is here and he would like to make one or two points at the end of my submissions. He represents Mr. Maseko, as you recall.

CHAIRPERSON: Oh okay.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Chair, on that issue, and let me confess and apologise to you that we did not deal with that issue in our heads.

CHAIRPERSON: Yes, but you didn't know that the point would be taken.

ADV VINCENT MALEKA SC: We did not know.

10 **CHAIRPERSON**: Ja.

ADV VINCENT MALEKA SC: Because it, like the undertaking of the Gupta Brothers, arises for the first time in the heads of argument. It is not part and parcel of the application, that issue becomes important because it is not a procedural advantage we seek to gain before you. It is important, Chair, because our law, as you know, does at some point provide for the court's intervention in regard to a witness who may be facing multilateral processes. And I'll reference the recent judgement of the Supreme Court of Appeal which we gained yesterday evening in the course of our research, which settled the different decisions of the High Court and laid down the rule there. But the principle is that our courts do come to the assistance of a person who would be compelled to testify
20 in a civil and/or disciplinary proceedings when there is a pending criminal case, purely in order to protect the fair right or fair trial for that person. But the fundamental basis of intervention by the court is that there has to be demonstratable prejudice. You don't intervene, you don't come to the assistance of the affected litigant or witness for the sake

of it. You do so in order to make sure that that witness is not exposed to irreversible prejudice in subsequent criminal proceedings. There is nothing in the heads of argument which come close to explain any prejudice by Mr. Duduzane Zuma for his refusal or election not to testify before you. And I emphasise, Chair, it is his own decision, it is an election. And because he made that election, there are consequences to it, I will come to the question of the consequences flowing from that election. But at this stage there is no prejudice, Chair. May I at this stage give you the ...intervened.

CHAIRPERSON: The citation.

ADV VINCENT MALEKA SC: The citation of the judgement.

10 **CHAIRPERSON:** Ja.

ADV VINCENT MALEKA SC: It is Law Society of the Cape of Good Hope versus Randell (R a n d e l l). It is reported in 2013 volume 3 South African Law Reports. The judgement begins at page 437 and is a judgement of the Supreme Court of Appeal. Justice Mtiyane (spelling), then acting as a Deputy President of that Court, wrote the judgement for the Court. And the point that he made, Chair, is that prejudice is vital, absent prejudice then you can't come to the assistance. And in this case there is no prejudice. But in case, Chair, you come to the conclusion that we take a strict view of what might be some possible adverse prospects for Mr. Zuma when he goes to the Criminal Court, the rules of fair play set out in the regulations and also in the rules of the

20 Commission, do cater on how you could deal with the possible prejudice by Mr. Zuma if he comes before you pending the criminal trial. The rules make it quite clear, I think it is Regulation 8.2 in its amended form, that whatever evidence he would present before you, would not be used against him in subsequent criminal trial and therefore there is no prejudice that that evidence may be used to procure a conviction against him. And the

basis of that rule of fair play in the regulations applicable before you, it is so obvious, because one of the rules of fair play in criminal trial processes is that no one should be exposed to self-incriminatory evidence in order to procure conviction. So, there is a rule here at play to protect the possible or considerable prejudice which we don't see.

CHAIRPERSON: And if I recall correctly that amended Regulation 8.2 was not criticised on his behalf today.

ADV VINCENT MALEKA SC: Indeed. In fact, it was quoted in the heads.

CHAIRPERSON: Yes, so there was no argument to say they would still be prejudiced despite that regulation.

10 **ADV VINCENT MALEKA SC:** Indeed, Chair, indeed. So, there is a rule of fair play that you may use to intervene or the Criminal Court will be forced to use to intervene on his behalf.

CHAIRPERSON: Of course, they are the one, simply that he has put up the version.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: And it may well be that one doesn't even have to get to the regulation.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: And that one needs to get to the regulation in regard to somebody who has not put up a version.

ADV VINCENT MALEKA SC: Yes.

20 **CHAIRPERSON:** Or it may well be that one looks at the one and in the alternative looks at the other.

ADV VINCENT MALEKA SC: Yes. And we listen quite carefully for an answer from our learned friend, Mr. Joubert, to the very ringing concern that you raised with him, but here the man has put up a version. Where is the prejudice there? Where is the prospect of self-incrimination? The version goes the other way, it is ex culpatri (spelling). And so, we would submit, Chair, that even before we get to rule 82, as you rightly point to us, we think there is no prospects of unfairness in subsequent criminal trial. The last point that we would like to make here, Chair, is that this issue of this kind raised by Mr. Zuma is not new or unique to you. It has been raised before in other commissions of inquiry. And we thought it wise to present before you a ruling by Commissioner Gomrey who was tasked

10 by the Canadian Judgement to investigate allegations relating to advertisement and sponsorship in a commission established by, can you believe it, the Governor General in Counsel of the Government of Canada.

CHAIRPERSON: Well, if you look at this country's commissions act, you will find that it also still refers to the Governor General of The Union of South Africa.

ADV VINCENT MALEKA SC: Chair, it is a relic which has inappropriately escaped the legal advisors of the Ministry of Justice for so long, but I keep quiet about it.

CHAIRPERSON: And it says if you are guilty of one of, I think, two or so criminal offences that it creates... if a witness is guilty of one or two of those offences, they may be sentenced to imprisonment, I don't know whether for six months, alternatively a certain

20 amount of Pounds.

ADV VINCENT MALEKA SC: Yes, Chair.

CHAIRPERSON: I don't know whether that sentence is capable of being carried out in South Africa.

ADV VINCENT MALEKA SC: Chair, it awaits a very inventive constitutional challenge at some point. I wanted to conclude Chair by handing a copy of this ruling by the governor who made the following ruling in order to cater for the problems raised by persons such as Mr. Zuma. And he says, 'at the same time I must continually bear in mind the importance of completing this inquiry as expeditiously as is reasonably possible particularly in the light of paragraph 1 of the terms of reference which directs me to submit my report on an urgent basis. In the past, some public inquiries have suffered from diminished credibility because of undue delay. I intend to act so as to avoid delay. Repetition and presentation of irrelevant or unhelpful evidence which will not assist me in

10 making the finding called for by my mandate. I read this in the context of the problem that you put to Mr. [Inaudible] about the delay. What if the criminal trial does not proceed expeditiously? You will be caught in the delays workings of a criminal trial. One of the principles which will govern the conduct of this inquiry is that of transparency and openness. However, some prospective witnesses are facing criminal charges relating to the subject matter of the inquiry. And it may be necessary to hear all or parts of their evidence in camera or subject to an order of non-publication in order to assure their right to a fair trial. The rest is there Chair. We would therefore appeal to you to consider these guiding rulings in order to protect whatever conceivable prejudice that Mr. Zuma may suffer going forward.

20 **CHAIRPERSON**: Thank you.

ADV VINCENT MALEKA SC: Chair, those would be, Chair I believe that Ms. Nicole Lewis representing Ms. Mentor, she would like to make some submissions. For our part, we would ask you to refuse the applications for cross-examinations by all of these persons. To the extent that we may be mistaken and you may come to the assistance, especially the assistance of Mr. Zuma, we would like to ask you to impose some

conditions. It is up to him to live up to that undertaking of condition, if not, we will certainly come to you for a subpoena to compel him to live up to that condition.

CHAIRPERSON: I was wanting to ask the question, in regard to anybody who is within the country, even if they don't give an undertaking, they can be summoned and called upon to appear here.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And in that event, they are obliged to come. I wonder whether in regards to those – how critical it is to require an undertaking because in any event they can be compelled.

10 **ADV VINCENT MALEKA SC**: Chair, we thought about it and we thought the difficulties that would arise are the following: and let me deal with the last part of the concern. And we thought about it, and I express the common consent and collective commitment of my colleagues because we have discussed that issue. If we were to be left to the mercy of the subpoena. We will go through the court processes to authenticate the subpoena. And that may be 5 years down the line instead of the Commission completing its work. But here we have this advantage that they have elected to participate via cross-examination. It is that privilege of cross-examination which is the lever that the Commission has to impose a condition. So that if they start there, they can no longer claim that they are no longer going to participate by testifying because that is a condition of their right to cross-
20 examination. At that level Chair, we are no longer left to the mercy of the subpoena.

CHAIRPERSON: Part of the difference between the 2 is that, and I guess that is the point that you are making. Is that, if there is an undertaking, then we are assured that we are not going to be subjected to lengthy delays while somebody who wants the benefit of cross-examination from the Commission challenging a subpoena in the courts over and

appealing for whatever number of years. The question that may arise is whether constitutionally, it would be appropriate to attach a condition, the effect of which is to say; you may grant, I am granting you leave to cross-examine, but that is subject to you waiving your constitutional right to challenge any summons or subpoena that may be issued or order that you must come and give evidence. What do you say about that?

ADV VINCENT MALEKA SC: Chair, certainly we will cross the more complex questions of constitutionality when we get there. but the 1st and obvious principle is where it is quite clear that there is a constitutional claim, you are entitled to privately to you as an individual, and they you waive it in circumstances were you are not compelled to waive it.

10 It will become difficult in a litigious round to claim that you have a constitutional right that you want to assert in the light of the choice that you have made. I don't want to make unfounded propositions, but I foresee that the Commission will have such arguable case in those circumstances.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Those are our submissions Chair.

CHAIRPERSON: Thank you, Mr. Cockrell.

ADV ALFRED COCKRELL: Thank you, Chairman.

CHAIRPERSON: Yes, in the light of the hour, I am inclined to let's agree to how much time you will take.

20 **ADV ALFRED COCKRELL:** Mr. Chairman I am going to ask you if I may for 10 minutes.

CHAIRPERSON: That's fine. Thank you.

ADV ALFRED COCKRELL: As you know, I act for Mr. Jonas. And what I would like to do in those 10 minutes is to make some submissions focused specifically on the position of

Mr. Jonas. I am not going to repeat what has been said by my learned friend Mr. Maleka. But what I would like to do Mr. Chairman is to approach the matters in a slightly different way if I may?

CHAIRPERSON: Yes.

ADV ALFRED COCKRELL: And may I start with were our learned friend, Mr Hellens began this morning. He said that you have a discretion to allow cross-examination, and he said your discretion was untrammelled. Well, Chair, the 1st part of that submission is correct, the 2nd part is incorrect. It is correct, you do have a discretion, but the suggestion that your discretion is untrammelled by principle is simply incorrect. What I would like to do Chair in my 10 minutes is to suggest 3 principles that should guide you when you come to exercise that discretion.

May I begin with the 1st which is possibly the least contentious. The 1st principle if the threshold requirement Chair, that if you go to rule 3.4., you will know the person must be an implicated person and then he or she must file a statement in which she responds to the statement implicating him or her in his or her response. The only reason I draw attention to that is; when you in due course come to the position of Ms. Brown, what you will discover is that Ms. Brown was not a person who was implicated by Mr. Jonas' testimony. Chair, with respect, the proposition you put to Mr. Lebane is entirely incorrect. What Mr. Jonas said is, I attended a meeting in Saxonwold with one of the Guptas, and they referred to Ms. Brown. So, what could Ms. Brown's Counsel possibly say to cross-examine my client in relation to that. She wasn't at the meeting, and she has no way of disputing what was said. So, with respect, there is no implication of Ms. Brown, we understand that our earned friend, Mr. Lebelo has stood down his application, will consider it in due course. And all we ask you Chair in due course, when you consider this

to have regard to the fact that she is not an implicated person. And may we said Chair, our learned friend says he hasn't seen the statement of my client, Mr. Jonas. With respect Chair, I am told it is on the website of the Commission and has been for some time. So, that is the 1st principle Chair. A relatively non-contentious one.

May I come to the 2nd principle that we submit should guide you in the exercise of your discretion., I am going to call it the principle of symmetry. And by symmetry, I mean, my client Mr. Jonas should be similarly positioned to the implicated persons who wish to cross-examine him.

CHAIRPERSON: Of the 2, namely the witness and the implicated persons who may be
10 having divergent versions of what happened, who said to who, who said what to who? You are saying, they must be placed on an equal footing in terms of – that's what you mean by the symmetry principle?

ADV ALFRED COCKRELL: Symmetry means they must be placed on an equal footing regarding their perceived rights. You will in due course decide Chair in your hypothetical example of who is telling the truth or not, the only point we make, when it comes to thrashing out who is telling the truth, the one party cannot be placed in a privileged position, vis a vie the other party. And that Chair, that leads into 2 requirements if I can address them separately.

CHAIRPERSON: Before you go to them, what you mean might include this that to the
20 extent that there may be case law such as the one the case that Mr. Hellens referred to which I haven't read, he read out an extract. To the effect that there may be cases which in relation to the right to cross-examine, we have discussed that right and may imply that it is fine, that the witness should be – should not have seen the version of the cross-examiner's client's version. That might be so in a criminal case where the cross-examiner

defends council for example where his or her client may be facing something very serious because in case he or she is found guilty. So, maybe to the extent that in that context, the witness and the accused might not be placed on the same equal footing, that might be the explanation that may be absent in an inquiry such as this were no finding made here will lead here being imprisoned. Any finding made here might help the police and prosecuting authorities to make certain decisions, but they will still be other processes like criminal trials where findings could be made like imprisonment.

ADV ALFRED COCKRELL: You are entirely correct Chair. My learned friend says that's the 1st price when it comes to fleshing out or ascertaining who is telling the truth. He says, 10 the method that we are proposing is the 2nd price. But with respect, I don't want to say which is the 1st and which is the 2nd price. But, what I do say is that this Commission is tasked with the responsibility of conducting its processes efficiently, and it will be inefficient to run it in the way our learned friend Mr. Hellen says. Perhaps as you put it to me Chair, that could be appropriate in a different context where there is a criminal charge or something of that sort. But not in this context where your job is to investigate the facts and to make a report to the President, with respect. That is why the principles our learned friend referred to are not appropriate.

Chair, if I can elaborate briefly then on the requirement of symmetry. It has 2 components from Jonas' perspective. The 1st is this, it is to do with the precognition that our learned 20 friend Mr. Hellens refers to and he says that; my client Mr. Jonas must complete his evidence in chief and must then face cross-examination at a time when Mr. Jonas has not seen the witness statement of the implicated parties, and does not know what their version is. Chair, can I ask you to put yourself in the position of the impicator parties? What do they know about Mr. Jonas, when they begin their cross-examination? They have read his witness statements, they have attended his evidence in chief, if they

haven't, they have read the transcript. And they have seen every document that Mr. Jonas relies on. And the asymmetry with respect is extraordinary. They want my client, Mr. Jonas, to have none of those benefits at the time he commences or undergoes his cross-examination. With respect Chair, there is no merit in the submission and our respectful submission, my client, Mr. Jonas, should not be situated behind a veil of ignorance when the impicator party is not situated behind any veil of ignorance. On the contrary, the implicated party has full insight into every aspect of my client's evidence. So, Chair that will be the 1st aspect of the symmetrical requirement that we would with respect advocate to you.

10 The 2nd is the one that has been ventilated before you. Well, my client, Mr. Jonas, volunteers, he comes, he gives evidence. With respect, a party who seeks the leave of you to cross-examine Mr. Jonas must similarly subject himself or herself to the giving of evidence and must undertake to do so. And Chair, I am not going to repeat what our learned friend Mr. Maleka has said, we make common cause with it. May I simply indicate where it goes in relation to the implicated parties who have moved their applications before you. When it comes to Mr. Duduzane Zuma, he has indicated that he will not give evidence before this Commission, and we therefore that he be refused leave to cross-examine my client, Mr. Jonas.

As regards the Gupta brothers, they say they will give evidence, but not before this
20 Commission and not within the borders of South Africa. We associate ourselves with our learned friend Mr. Maleka, we ask that they be refused leave to cross-examine my client in circumstances where they will not subject themselves to the giving of evidence before you in South Africa.

And Chair, it brings me to the -

CHAIRPERSON: Of course, one approach is to refuse leave on the basis that, that is the stance that they have taken. Namely, they will not give evidence. Another one is to say leave is granted, but on condition you change your decision or something to that effect.

ADV ALFRED COCKRELL: Yes, Chair. with respect, you are entirely correct. There are separate ways to get to the same point. We have no preference one way or another Chair, may I then come to -

CHAIRPERSON: The advantage of the one of course is that if they change the decision then they don't have to renew the application so to speak. Or, in case they are summoned and they comply and they come and give evidence at that stage, then maybe
10 the condition might fall away.

ADV ALFRED COCKRELL: You are correct Chair, there are those differences in the modalities. Chair, thirdly, may I deal with the 3rd principle that we would respectfully urge upon you when you exercise your discretion. It is one that hasn't received much air time today, and I would like to spend a few minutes on it. We call it the principle of efficiency simply for the sake of a shorthand. And efficiency means this Chair, it means that the cross-examination must be conducted in a manner that is efficient. Not just in respect of Mr. Jonas, my client. But also in respect of the way in which this committee will conduct its process and it will conclude its report timeously to submit to the President. And Chair, this is a broader consideration, but it is clearly recognized by your rule 3.7. which says that
20 cross-examination will be permitted when it is in the best interests of the work of the Commission. In other words Chair, one of the questions you will ask yourself is – will allowing cross-examination result in an outcome that is in the best interests of the work of the Commission and that will may well lead to a slightly broader consideration in the interests of Mr. Jonas or any other witness. And what that means Chair is this, and I am

going to repeat briefly what my learned friends have said. It means that the time for cross-examination must be limited because if you don't limit it, if there is no guillotine, in all likelihood, it will go on well beyond 6 months, well beyond 2 years, possibly much longer than that.

CHAIRPERSON: My understanding is that everybody seems so far to accept that limitation.

ADV ALFRED COCKRELL: You are entirely correct, Chair. When were at the heads of the argument from our learned friends, we thought that they were objecting, but they did make the concession this morning. May I just add this Chair; it is not quite the same as a guillotine point. If you give one hour to every cross-examiner, each of them could then repeat the same cross-examination, let me focus on my client Mr. Jonas. With respect, that could also be unfair. You will know in the high court; the rule is only one counsel can cross-examine. In other words, one party can't say I have got 3 counsel, each will cross-examine in order to tire the witness out. A very similar principle applies here. If different -

CHAIRPERSON: There certainly can be no doubt anybody the doing it that way. One of the reasons why there is the requirement that an implicated person must put up his or her full version is to enable me if I grant leave to cross-examine, to take a view about how much time I should grant them because I have to look at the divergence in the versions. So, that is part of the reason why it is necessary. But there are other reasons as well.

ADV ALFRED COCKRELL: As it pleases Chair. Chair, may I make this final submission still under the heading of the requirement of efficiency. It is this, unless this Commission with respect, disciplines the process of cross-examination by timing and other devices, there is in our submission a real risk that future potential witnesses anything refuse to come forward. And this was alluded to by my learned friend, Mr. Maleka. My client, I am

instructed has spoken to potential witnesses who have seen him give evidence. He was the 1st witness before this Commission. And have indicated they may reconsider their willingness to come forward in the future if they are going to be subjected to days and days of cross-examination. And so, the submission we make is this. The way in which this Commission regulates the process of cross-examination is not just important to my client, Mr. Jonas, when he undergoes cross-examination, it is of tremendous importance to the workings of this Commission because Chair, when we started today, the 1st thing you said is, you extended again your invitation to parties who have something to say to come and give evidence. The only submission we make is those parties in considering
10 whether to step forward voluntarily or not will be watching what happens the cross-examination of people such as my client, Mr. Jonas. And so Chair, were all of that goes is we will commend those 3 principles to you when you exercise your discretion. And what they mean for the only implicated parties who are still relevant, what they mean is this – my client opposes the application by Lynn Brown to cross-examine him because she is not an implicated person. My client, Mr. Jonas, opposes the application by the Gupta for leave to cross-examine him since they will not undertake or commit to give evidence in South Africa. My client, Mr. Jonas, opposes the application for leave by Mr. Duduzane Zuma to cross-examine him since he has indicated that he will not give any evidence at all. My client, Mr. Jonas, opposes the contention of our learned friends that he should
20 complete his evidence in chief without having at any sight of their version, of their statement. And finally Chair, we oppose any objection that the process of cross-examination of my client or anyone else should not be subject to the rigour and the discipline that this Commission may decide to impose upon it. Chair, that is the position of client, Mr. Jonas. Chair, if I can abuse the podium briefly to indicate there are 2 of my learned friends that have indicated that they wish to make submissions for their clients.

The one is Ms. Nicole Lewis who wishes to make very brief submissions for Ms. Mentor. And then Chair, my learned friend Mr. Bhar arrived after lunch. As I understand his handwritten note, he wishes to make 2 brief submissions to you on behalf of Mr. Masego. I hope I have read his handwriting correct.

CHAIRPERSON: Thank you.

ADV ALFRED COCKRELL: Thank you, Chair.

CHAIRPERSON: Ms. Lewis, are you coming?

ADV NICOLE LEWIS: Thank you. Mr. Chair, I am aware that I come towards the tail end of a relatively long day. and I don't propose to repeat any of the submissions that my
10 learned friends have made. I would just like to deal first briefly with the submissions that have been made by Mr. Hellens.

CHAIRPERSON: I am sorry; you are for Ms. Mentor.

ADV NICOLE LEWIS: I am for Ms. Mentor.

CHAIRPERSON: Okay.

ADV NICOLE LEWIS: The submissions to the unlimited nature of cross-examination. I understand that the issue of time has now been dealt with. I understand that issue to be resolved. But Chair, there is further issue that arises from Mr. Gupta's submissions. And that is to the issue of topics that an implicated party may canvas in his or her cross-examination. And we understand Mr. Hellens' submission to be that there should also be
20 no limitations with regards to that. Mr. Chair, our success is that, that will be inconsistent with rule 3.4. of the Commission rules which provide in relevant part that the application of an implicated party must be accompanied by a statement responding to the witness' statement in so far as it implicates him or her. And 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. And so, Mr. Chair we submit that it is clear from that rule that implicated parties are limited to the issues that implicate them in the witness' testimony.

CHAIRPERSON: Ja, I doubt whether Mr. Helens meant anything that goes against that rule. He nods, I think he understands.

ADV NICOLE LEWIS: Thank you, Chair.

CHAIRPERSON: Thank you.

ADV NICOLE LEWIS: and then Chair, I propose to deal very briefly with the issue of precognition and the issues of testifying via video link. But I propose to do that under the prism of section 9 1 of the constitution. Chair, I just want to make it pretty clear at the outset that we support the submissions that have been made by my learned friends, Mr. Maleka and Mr. Cockerell as to famous inefficiencies. But there is a further consideration here Chair which we would submit is really determinants of the issue. And that is Section 9 1 of the constitution which provides that all persons are equal before the law and in particular the manner in which the constitutional court applied that principle to litigants on the [Inaudible] judgement. And Chair, the relevant reference there is the South African law reports 2009 6 at page 232 and the paragraph is paragraph 17. And Chair, in that paragraph, what the constitutional court said is that when parties set their rights before a court, they must be approached impartially by a court and they must be accorded equal status. The court stated that one party should not be treated advantageously or disadvantageously in relation to any other party. And Chair, we submit that, that principle is applicable here and it is applicable to the issues of precognition firstly, as my learned friend have pointed out. The implicated parties have had the advantage of witness statements given well in advance, of listening to oral testimony, of having the transcripts,

and of having any document that have been put to the witnesses. It would be in those circumstances, it would be inconsistent with Section 9 1 of the constitution to allow for cross-examination in circumstances were the witnesses have not even heard sight of the implicated party's [Inaudible]. And so that is to the issue of precognition.

And then similarly Mr. Chair in relation to the issue of testifying via video link. The witnesses have taken the risk and the inconvenience and everything that comes with it. You heard my client, Mentor, as to the very real concerns she has to her safety. Despite that Chair, she has come here to assist this Commission with its extremely important mandate. And it would be in those circumstances absent, it will be strictly necessary in
 10 the interests of justice for one of the implicated parties to testify outside the borders of South Africa and video link. We would submit that it would be inconsistent with and it is a violation of Section 9 1 of the constitution for the implicated parties to be allowed to testify in that situation. In other words, without presenting themselves before this Commission, and subjecting themselves to its authority with all of the safeguards that floe from that. And we would make common cause with our learned friends with both the Commission and for Mr. Jonas that the reasons that have been advanced by the implicated parties simply do not constitute sufficient basis for that privilege to be granted. Those are our submissions Chair.

CHAIRPERSON: Thank you very much, Ms. Lewis.

20 **ADV AHAR BHAM**: Thank you Mr. Commissioner, Mr. Commissioner, I am not going to be more than 5 minutes. I am going to make 2 points and I am going to make these 2 point specifically on behalf of Mr. Maseko in the context of what he has said already and what he has done. Mr. Commissioner, on the 1st point regarding testifying outside of the country, the point being dealt with. As I understand it, the point is based on a suggestion

that Mr. Gupta does not want to come to South Africa because he does not trust or is disparaging of law enforcement agencies. Of course the implication of finding in favour of him is far reaching because if the Commission were to find in favour of him on that basis, the Commission effectively buys in terms of that criticism of the law enforcement agencies. Now, raises in the context of Mr. Maseko because you will recall his evidence when he said, at the end of the day you will agree with him, disagree with him, but as it stands at the moment where he said; he turned down Mr. Gupta because of the irregularity and unlawfulness of the conduct. Assuming you were to find that he was right in his characterization, you can hardly then refer the matter to the very law enforcement agencies whose disparagement you have bought into on this application. And what hope does anybody else who hopes for a positive outcome other than a glossy report, a positive outcome through prosecution were necessary have the law enforcement agencies will give effect to that have been tainted with a brush that Mr. Ajay Gupta wants this Commission to [Inaudible].

CHAIRPERSON: That goes to the issue that I raised with Mr. Hellens and I mentioned to Mr. Maleka isn't it, oh, you might not have been here. I said, I asked whether it culture be said in law, the Gupta brother, Mr. Ajay Gupta and Mr. Rajesh Gupta have a lawful reason to come back to come back to South Africa and give evidence like every witness before me here. And you might have heard when, you might have been here when I mentioned to Mr. Maleka what Mr. Hellens' answer was.

ADV AHAR BHAM: All I am saying is, it goes a step further. Because, not only does it bear the question of the unlawfulness of their reason, but they want you and if you put it in a nutshell, and I am going to be as blunt as I understand Mr. Hellens was, they want you to categorize the law enforcement agencies and by extension the court system because that is a safety mechanism as unreliable and incompetent and whatever other

fortunate words were used to describe them. The moment you do that, you might as well give up the Commission now, because you can never refer matters which require further actions to those very same law enforcement agencies. It becomes absurd.

The 2nd matter I want to deal with is, don't give him my version. And this is in relation to Mr. Maseko. I will give it to him for the 1st time when he is being cross-examined. And there is a point of departure which is simply incorrect. And that point of departure is that if somehow Mr. Maseko done use the work pre-recognized, it is just wrong. Even if Mr. Maseko is properly put in a place to prepare for cross-examination, somehow, that is going to undermine the efficacy of cross-examination. I put it to you Chairperson that you
10 just have to utter the proposition to appreciate the absurdity of that. This is not about taking people by surprise. It is a phrase that I have used time to time previously, cross-examination I circumstances such as his is not a game. It is about uncovering facts, and you don't uncover facts by testing somebody's memory under surprise in cross-examination. You do so in circumstances were the person has had the opportunity to prepare, and then you test the person fairly. Now, I say this again in the context that Mr. Maseko has said. Mr. Maseko's starting point was a refusal of an offer, an offer he could refuse and he did refuse. But thereafter, he was the 1st and only to respond to the call by Mr. Manthashe. He then responded to the Public protector. He went with other DGs public, he spoke openly to the SIU, and he played his cards openly and he put them on
20 the table for all to see. He was asked during his examination by Mr. Maleka whether to the best of his knowledge, there was any substantive response to what he had to say. And his answer was no. in other words, to this day, nobody has said you are lying, what you are said was wrong. There [Inaudible] because they make no sense, they don't go anywhere. And in those circumstances, they still want the surprise factor to creep into his cross-examination. There is something remarkably wrong with that. And I say what is

remarkably wrong with it is the point of departure that if he is pre-recognized that somehow that will give him the opportunity to prepare and change his version. It assumes a potentially dishonest witness who will change his version simply he has been presented with another version. There is no basis of that.

CHAIRPERSON: Well, you were not here in the morning.

ADV AHAR BHAM: I am terribly sorry about that.

CHAIRPERSON: I kind of put that proposition to you Mr. Hellens to say if a witness is honest really you know, what's wrong if he hears or she hears what the version of the implicated person is, because that witness may well be able to say now I see, I think I
10 was mistaken with regard to this response, here I am sure I am right. You know.

ADV AHAR BHAM: And my difficulty with that submission in that response is that *prima facie* assumes that Mr. Maseko could be dishonest. You can't make that finding, you can't convey to Mr. Maseko that you accept Mr. Hellens' submission that perhaps you will temper with this evidence. That suggests to him that you might be dishonest. That is just something fundamentally flawed with that. So, on the 2 issues, the suggestion from us in relation to the 1st issue is not to dismiss the application on account of the testimony outside of the country issue because that would suggest that you are closing the door. It would be to grant him leave to cross-examination on the basis that he is present in the country. In other words, if he then does not make use of the opportunity it will be out of a
20 limitation that he imposed on himself.

In relation to the 2nd issue –

CHAIRPERSON: Excuse me, that may be more or less like what I put to Mr. Cockrell that there might be different ways of formulating the same thing. Because even with Ajay Gupta and Mr. Rajesh Gupta, if they – if I refuse them leave to cross-examine now on the

basis of the stand they have taken now, if they were later on to change their stance and come back to South Africa while there was still time, there may well be time to grant them time when they say we are here. So, if one says one is refusing it, one might formulate it on the understanding that the only reason why it is refused is because of this. But if this falls away, you may be allowed. But there may be 2 situations, theoretically at least, scenarios in which they could be back in South Africa. One could be if they change their minds on this issue, which from what I have read seems highly unlikely. Another one could be if at some stage while this Commission is going on, they could be found that instruments are created that allows them to be brought back against their will.

10 **ADV AHAR BHAM**: I only suggest that there is a different reason why you should formulate it in the manner that you suggested it to Mr Cockrell, and that is because you are not closing the door on anybody. What you are saying to them on that formulation is that, to the extent that you have a contrary version, I have no difficulty with you cross-examining. But you are going to be cross-examining and be treated like any other witness is being treated. In other words, it is a positive invitation to them to come and testify and to cross-examine and to the extent that they place the limitation, they are placing a limitation on their own right that you are giving to them. And it seems to me that, that's probably better captures around the point.

20 **CHAIRPERSON**: Well, it may be that there are some positive things or fissures about formulating it that way to – even though in effect it might be the same even if you kind of refused on the understanding that if the situation changed, then you would allow them. What does – even if you say you refuse, what does remain is, they are the ones who on their own version, have taken themselves outside of this process. If they don't get granted leave to cross-examine, it is because of their own decisions, decisions to leave the country, decision to say we are not coming back because we have got no faith in the

legal system of South Africa despite the fact that they themselves are able to say, look at the judiciary of South Africa, we have won some cases before the judges of South Africa. But we are not going back there, we will never go back to South Africa if I understand what they are saying in their recent submissions of their counsel correctly.

ADV AHAR BHAM: Both achieved the same end, just speaking from my and let me put it bluntly, speaking for my client. He has put his version on record time and time again. He has been through a harrowing experience. He would love it for them to come and test him on that version. And that is why he would love for them to be told – please come, we welcome you coming, if you don't want to come, that's your choice.

10 **CHAIRPERSON**: I can tell you that, I mean, I have already indicated in regard to some of the implicated persons that I will grant them, I have granted them leave to cross-examine. And Mr. Ajay Gupta and Mr. Rajesh Gupta, but definitely Mr. Ajay Gupta is very seriously implicated. And therefore, I would want to grant him leave to be able to cross-examine and to come and give evidence and be cross-examined himself. But that is, if having regard to all the circumstances I find that I ought to exercise my discretion in his favour, and as things stand and anyone who was listening to argument this morning would know that I am quite concerned about the stance that they have taken of saying, well one, getting themselves out of the country, two, deciding that they will not return to South Africa to take part in these proceedings, or for any reasons as I understand their position
20 and that is because they don't trust the Hawks and the NPA and whatever other institution. Those are factors that are seriously, are matters that I have to look at very carefully in making my decision. But they are matters that are of serious concern to me to say, how can you want to enjoy the benefits of a legal system of an institution of this legal system, benefits of cross-examination, but you say you don't have faith in that legal system, you are not prepared to subject yourself to the authority of the courts and

institutions of that legal system. How can you tell a body such as this that you want to participate, but you want to participate in this process on your own terms.

ADV AHAR BHAM: Just to summarize then, and I state this with the authority and on behalf of my client, Mr. Maseko, he would welcome anything challenge to his testimony by Mr. Ajay Gupta, provided Mr. Gupta subjects himself to the same rules, regulations and sit as all the other witness. In relation to the version of Mr. Gupta, Mr. Maseko awaits with [Inaudible] breathe for that version to be supplied to him. There is no reason to cast even the slightest doubt on whether he will tailor his evidence accordingly thereafter. And he is ready to receive the witness statement, and subject to what he said relating to the
10 1st point, to be cross-examined on that. Mr. Maseko has made it clear time and again by cooperating with every possible, body, person or institution who has called for people to come out openly. I think he may well be the only person who has been open and forthcoming at every turn. Thank you, Mr. Chairman.

CHAIRPERSON: Thank you Mr. Bham. Well, we have reached the, I hope there is nobody else left, I think there isn't. I think we have reached the end of today. Mr. Maleka, we are going – oh, I am sorry. Before you do that, now I remember I just said to have reached the end, but Mr. Hellens and others may or may not want to respond. Mr. Hellens, I don't know whether you would like to respond. Probably you would. I am sorry, it's been a long day.

20 **ADV HELLENS**: Yes, I would like to respond. I see it is 16:00, but I would like to respond.

CHAIRPERSON: Ja, of course you have heard some of the questions that I have put to Mr. Maleka and so on. you can deal with all of them.

ADV HELLENS: Look, all of these arguments about symmetry and fairness are wonderful arguments, and they sound very attractive. But at the end of the day, learner transport us

take Ms. Mentor's evidence, she said she was offered a position of Minister of State by Mr. Gupta. He has a contrary version and a very strong contrary version powerfully put before you, and it won't be tested. And who are we inquiring it to? Oh, yes. State Capture. There is no evidence that it was state capture. It won't be cross-examined. Mr. Maseko, it is [Inaudible], but it is a fundamental difference. Not simply a deny, deny, deny. There is an essence to it which is fundamental. It won't be tested. You sir, you will one day have to decided, was this state capture? Those fundamental witnesses will not have been cross-examined and you will not have heard the evidence of the Guptas. Now, what value will that finding be? It will be much diminished in value, and much diminished in use to
10 investigating authorities later and possible prosecution authorities later either positively or negatively because it may be that, that evidence is shown to be substantially incorrect. And that therefore there will not be a prosecution later.

Now, it is not so that to set conditions as it is put to fly in the face of the way the judiciary operates. The examples I am instructed to give, however, insulting those examples might be found to be by certain people, they are what the Guptas experienced and what they are experiencing at the moment. Mr. Commissioner not jokingly do you say that if they are being prosecuted by incompetent people, what a glorious situation, you will just be acquitted. The converse is the position here. If the people are incompetent and they reach a conclusion that they should prosecute that th3ey should not have so reached,
20 you are in the throe. And you are in the throe from the moment of arrest, through bail proceedings until one day there is a completed docket. And that court can be approached to set aside a decision to prosecute by way of review. Otherwise, if you don't even have the material with which they have made that decision. So, those are the experiences of my clients and I wish them to be conveyed to you.

With regard to the caravan of this Commission traipsing to wherever, Dubai, we never said Dubai, but that possibly could be a venue, that's not necessarily so. It could simply be with one person travelling over there to ensure that the videos, conferencing set-up is set-up. This entire Commission can operate with that video camera trained on that equivalent of that witness box in whatever venue and with cross-examination and leading of evidence by yourself taking place as if that witness box were actually there, but it is actually somewhere else. It is not convoluted at all.

So, with regard to the undertaking to participate in the manner in which we have suggested, not being on oath, it is not a point. That is the undertaking. If the
10 Commissioner is wanting an oath, we can file a supplementary statement saying exactly what the heads of arguments state. If there is non-cooperation in cross-examination, well, the Commission and the evidence leaders will be armed with the argument. Well, there is an inference to be drawn now. Not merely from the absence of non-cooperation which presence and cooperation is tended in the form that they have tended it, but there would be a person saying I am not answering that question, when in all right the question is properly asked and unless the question is answered, it clearly indicates guilt. So, you would deprive yourself and you will not demean the justice system in this country by not allowing that process.

My learned friend, Mr. Maleka speaks of the public interest being served and the interests
20 of justice being served. Why would the public interest and the interests of justice not be served if under controlled circumstances you heard the evidence and then the integrity of your findings not based on inferences and absence of cross-examination, an absence of evidence would be not subject to scrutiny or criticism. Let me say this with the deepest respect, you culture only work with the evidence and the cross-examination of the evidence that comes before you, if the Guptas are not before you by your own decision

and perhaps your decision blaming them for their decision, they are still absent. And you will have a limping conclusion of finding or recommendation based on inference or absence, not o exposure to evidence.

So, we have dealt with whether they are fugitive from justice. My learned friends and you sir have a straight choice. Get to the bottom of it, find out the truth in unwatered down, interrogative, investigatory and Commission of Inquiry fashion. The best interests are served by the [Inaudible] of pursuing the truth. The true north for this Commission and an accommodation made in very difficult and different circumstances is a price that this Commission needs to pay in order to follow the [Inaudible] which will lead it to the truth.

10 On precognition, various phases are used. Browbeating the witness, symmetry, etc. But we know that the power of cross-examination lies in an element of surprise. There is the power of re-examination, there is enough fluidity, balance and direction from this Commission to offset all of those things. We simply say on the later issue of precognition that the cutting-edge tool of cross-examination is best achieved without precognition. I don't retreat from that stance, I emphatically insist that it is correct.

CHAIRPERSON: So, Mr. Hellens you say for cross-examination to be effective, there must be some element of arm-bush?

ADV HELLENS: People chuckle and you use the word arm-bush, but it is not really arm-bush. It is what we experience in our courts. I go back, I think our learned friend, maybe
20 he made a mistake or I misheard him, he said I never answered your question about motions proceedings referring to evidence or to trial.

CHAIRPERSON: No, you did answer. You did give a certain answer. He might or might not agree with it, but you did give an answer.

ADV HELLENS: I did answer, and the answer what that it is a 2nd rate option. The 1st rate option is the option that we choose in trial, and especially in these contentious issues, you sir are aware of the difference for example between Mr. Ajay Gupta and Ms. Mentor. Think about it, I am not going to mention it. Think of the annexures, think of the direct difference, and then think of a consultation where she is exposed to all of this. Think of the witness herself. Let me not pre-judge her performance, but it wasn't stellar. And then think of the testing mechanism of cross-examination without precognition. It's not an arm-bush, it is the ultimate test for veracity and reliability. But let me end because – I think I have been quite quick actually. And by the way, a fine in palms would be unconstitutional,
10 not for the reasons that occur to you, but it would be cruel and unusual punishment. The lodestone is the truth sir, and that is what you must pursue.

CHAIRPERSON: Thank you very much Mr. Hellens. Can I take it that all other counsel who had said they associated themselves with Mr. Hellens' main address on certain issues he has responded on, can I take it that they associate themselves with his reply as well, and they do not wish to add anything in reply?

ADV HELLENS: Indeed so, Mr. Chair. I have got nothing to add.

CHAIRPERSON: You have got nothing. Mr.

ADV HELLENS: Copy that.

CHAIRPERSON: Thank you, who else? No, his one is different. Okay, all right. It looks
20 like everybody concerned associates themselves with that. Mr. Maleka?

ADV VINCENT MALEKA SC: Chair, just about the way forward. As I have it, the next witness will testify on Monday. Which means the Commission will not seat tomorrow. Unless, if the members of your legal team have got other work to do in the best interest of the Commission.

CHAIRPERSON: Alright, are we going to have one witness on Monday?

ADV VINCENT MALEKA SC: As far as I have it Chair, but I can clear that with Mr. Pretorius.

CHAIRPERSON: Okay, all right. Let us say therefore that we will adjourn until 10:00 on Monday. There might be, I might advise that we should start 30 minutes later if certain commitment on Monday morning connected to the work of the Commission happens. But I will indicate in due course if that were to happen. If I don't indicate, then we will start at 10:00.

ADV VINCENT MALEKA SC: Thank you Chair.

10 **CHAIRPERSON**: Thank you very much to all counsel for all your submissions in regard to those applications in respect of which I have not given a decision. I will reserve decision and in due course, you will be advised. I am hoping that early next week, I could indicate when next week I could give the decision. The aspect of precognition and showing the version to the witness of course would apply to any one of the applications who may have a problem with that. But my understanding is that their ability to or their position to say they will give evidence didn't seem to indicate that there will be a problem. But, whatever ruling I make in that regard will apply to all of them. Thank you. Okay, we adjourn.

