

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

19 JULY 2019

DAY 136

20

PROCEEDINGS ON 19 JULY 2019

CHAIRPERSON: Good morning Mr Pretorius, good morning Mr Zuma, good morning everybody.

ADV PAUL JOSEPH PRETORIUS SC: Good morning Chair.

CHAIRPERSON: I just want to say before we proceed that as at this stage I do not know what is going to happen as yet. Last evening I saw that in one of the TV channels in the news at six o'clock they announced that the former President would continue to give evidence this morning and they indicated that this was coming from the
10 commission. I did not know anything about that as at that stage. I have asked for a report as to where that came because I had not been informed of anything as to where the discussions that may have taken place yesterday were. About five minutes ago I have been – I was given some correspondence that was exchanged between the commission's legal team through the acting secretary and the former President's attorney. I have read those but as to what is going to happen I am still going to hear. I got very little time to read so I hope I did not miss anything in the correspondence because we needed to start. But I did not pick up anything that was clear as to what is going
20 to happen. So I just thought before we proceed I needed to make clear what I know and what I do not know at this stage. Mr Pretorius.

ADV PAUL JOSEPH PRETORIUS SC: Chair we have determined as a legal team that we are ready to proceed. There has been no agreement to deviate or derogate from any of the rules. We are quite happy to proceed in terms of the rules subject to your directions. The

correspondence received from the other side yesterday pursuant to the notice that you gave of an engagement between the various teams from the – Mr Mantsha the former President’s attorneys is marked private and confidential but I am happy to place on record what the attitude of the legal team is in relation to discussions held yesterday.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: And in relation to its own deliberations.

CHAIRPERSON: Yes.

10 **ADV PAUL JOSEPH PRETORIUS SC:** The first point is that the commission’s legal team has and will continue to exercise all the powers and perform all the duties of the commission as delegated to them contemplated by the act, the regulations and the rules.

The second point is that we would like to place on record that you as Chair of the commission have the discretion to call witness to give oral evidence before the commission and that former President Zuma responded to an invitation from the Chairperson to appear.

20 Regulation 8.1 of our regulations provides that no person appearing before the commission may refuse to answer any question on any grounds other than those contemplated in Section 34 of the Commissions Act.

Rule 3.2 the rules governing the commission allows a member of the commission’s legal team to put questions to a witness which include questions aimed at assisting the commission in assessing the truthfulness of the evidence of a witness.

Indeed that forms part of the duties of the legal team apart from any entitlement to that effect.

The commission's legal team wishes to place on record that it has not made and does not intend to make any concessions in that regard. In other words in relation to the rules and the fair application of those rules.

All witnesses are equally entitled to fair procedures and to fairness in the application of procedures. We wish to point out to that former President Zuma has not yet been cross-examined and I use that
10 term advisedly because I may revert to it in a moment.

He is still in the process of being asked questions to illicit his full response in detail in respect of the matters raised by the nine witnesses whose statements implicating him have been furnished to him for the purposes of this weeks' hearings.

The process will necessarily at a later stage have to be continued well beyond the scope of the matters raised by those particular witnesses because there are other witnesses who have dealt with matters directly concerning the former President.

Cross-examination and the need for cross-examination will be
20 addressed in terms of the rules when it arises.

We do not believe and we deny that Mr Zuma's procedural objections, complaints and reservations are valid. His rights and the integrity of the commission will be fully safeguarded by continued adherence to the Commissions Act, regulations and rules and there is no proposal that the legal team would make to deviate from those

provisions. Indeed we cannot deviate from the act, the regulations and the rules. And accordingly the legal team's intention is to proceed with the hearing subject of course Chair to your direction.

We are quite willing to undertake as we have done it does not need an undertaking because it goes without saying that we will follow the rules. We are obliged to follow the rules. We cannot enter into any arrangement which will derogate or deviate from those rules.

And importantly we will seek to enforce, follow and apply the rules particularly Rule 3.2 which allows us to ask questions to assist
10 you Chair to evaluate the truthfulness of any answer given by any witness. We will continue to do so under your direction and that direction in the commission not outside of the commission.

Thank you Chair.

CHAIRPERSON: Counsel for the former President.

ADV MUZI SIKHAKHANE: Chair thank you for the opportunity. I am – I am glad that the Chair – well I am puzzled that the Chairperson only got the correspondence this morning. I am puzzled because the Chairperson you will recall that the letters I am going to show you I took comfort in the fact that the Chairperson said “all letters that come
20 to us from the secretariat are from the Chairperson.” That is what the Chairperson said.

CHAIRPERSON: Yes in regard to the ones we were talking about certainly.

ADV MUZI SIKHAKHANE: Yes.

CHAIRPERSON: Ja.

ADV MUZI SIKHAKHANE: Well Chairperson.

CHAIRPERSON: Yes.

ADV MUZI SIKHAKHANE: We – we – I – I suppose you would be with me that we correct to assume or to have assume that what we received given what the Chairperson said to us on the record whatever the reasons were at the time but we correct to assume or to have assumed that the letters come from you. And so the attitude today that we are going to tell you is that we assume that what we have got comes from you.

10 **CHAIRPERSON:** Yes maybe I must just say certainly the correspondence relating to arrangements for Mr Zuma to appear today those come from me.

ADV MUZI SIKHAKHANE: Thank you.

CHAIRPERSON: And those I think one or two relating to the request I had made for him to submit an affidavit those come from me.

ADV MUZI SIKHAKHANE: Yes.

CHAIRPERSON: The – anyone of the one or I think there is only one in the correspondence I have seen today does not come from me.

ADV MUZI SIKHAKHANE: Thank you Chair.

20 **CHAIRPERSON:** Ja.

ADV MUZI SIKHAKHANE: Well Chair I hope you can give me some time to state – I do not know whether to start at the end or at the beginning.

CHAIRPERSON: Yes.

ADV MUZI SIKHAKHANE: Maybe let me start at the end.

CHAIRPERSON: Yes.

ADV MUZI SIKHAKHANE: And you will understand that our attitude was informed by the fact that when we saw the statement in the media of what the commission had decided we were correct to assume that the commission had decided. And so what we came to tell the Chair – okay Chair let me allow you.

CHAIRPERSON: Yes, no, no I was not intending to interrupt you but I think that part of the reason why I wanted a report as to where this thing was coming from to say the commission has said – had said that
10 the former President would continue today – part of the reason why I have called for a report is precisely because it had nothing to do with the me. I was still waiting to be informed.

ADV MUZI SIKHAKHANE: Yes.

CHAIRPERSON: As to the outcome of the discussions between the two legal teams. I had not been informed and as I say this morning my office phoned me to say there were some letters that had arrived and I said well they are too late. I was about to come to the commission and when I arrived here I was given copies of correspondence that seems to have been exchanged. I have not looked at the dates. I think probably
20 from yesterday and maybe today I am not sure but between the two legal teams. But other than that I know nothing.

ADV MUZI SIKHAKHANE: Thank you Chair. And Chair can – maybe this will make better sense if I proceed. But I am going to start at the end.

CHAIRPERSON: Yes, yes.

ADV MUZI SIKHAKHANE: Because it is important for me to be honest with you.

CHAIRPERSON: Yes.

ADV MUZI SIKHAKHANE: And state right

CHAIRPERSON: Yes.

ADV MUZI SIKHAKHANE: Assuming what we assumed why we are here today.

CHAIRPERSON: Yes, yes.

ADV MUZI SIKHAKHANE: Chair we are here today to tell you that we
10 will take no further part in these proceedings. That is what we have
come here to tell you. But let me go back to tell you why. You will
recall that on Monday I expressed my reservations that a commission
which is a creature of statute which has set out ground rules, writes a
letter on the 7 April I think – of June to say, we are calling your client
in terms of no rules.

We expressed our reservations because this commission at all
times has to comply with its ground rules in order to secure – I mean to
protect its own integrity but the integrity of witnesses. And we had our
own reservations about a creature of statute saying I am calling you but
20 in terms of no rules, just come. Because we were anticipating an
impasse like this.

Now of course my learned friend has stood up now when we
were called in terms of no rules to invoke rules – to invoke rules.

Well let me start with the letter yesterday. I did not know that
you were not appraised. You will – you will appreciate this Chair. This

commission and its evidence leaders you are the custodians of the proceeding, of what can happen. So we did the reasonable thing yesterday. I had a call with Mr Pretorius but I will not talk about the call. And I said to him we going to give you a letter and the letter I would like to read this letters at tedious at this is going to be because it is important for us to know that a crisis has been created here because of not really knowing what the evidence – what rules the evidence leaders are following or what the commission is following.

We wrote to the legal team and we said to them:

10 “As directed by the Chairperson we have indeed considered our client’s position in respect of his engagement with and participation in the further proceedings of the commission. We therefore address this letter to you to record our client’s position which is informed by his own experience of the commission having presented him at the commission’s invitation which was described by the commission as a courtesy. Our client’s misgivings about how the commission approached him are

20 recorded in the correspondence exchanged between the commission and ourselves. Despite the reservations set out in our correspondence our client out of respect for the citizens of this country and the commission felt it was necessary to honour the invitation. These reservations were repeated by our

counsel during the proceedings on 15 July 2019 when our client appeared before the commission. On the second day our client personally and through his – through our counsel raised several objections to the manner in which he was invited and treated. In fact his reservations were fortified when he was subjected to relentless cross-examination. This was despite the undertaking that he would not be cross-examined. We hold a strong view that it is the commission that must assure our client that it is still capable of curing what we view as serious procedural deficiencies. Kindly revert to us with a proposal on how our client’s serious complaints and reservations can still be remedied to safeguard the rights of our client and the integrity of the commission.”

10

Chair I called this letter reasonable because we – we understood that it is not us at that point who could have said, do this, do that, do that because the commission came to us. We were expecting a letter that sets out how this could be done as directed by the Chairperson.

20

And of course we get a letter which is I must describe it as cheeky. But it is fine. This is – this is some sort of quasi litigation. We accept that. And it says it is the first response to our letter.

“We acknowledge receipt of your letter of today 18 July 2019. The commission’s legal team continues to

assert all the powers of the commission contemplated by the Commissions Act, the regulations and the rules. We back to the rules. The Chairperson of the commission has the discretion to call witnesses to give oral evidence before the commission. Former President Zuma responded to an invitation from the Chairperson to appear. Regulation 8.1 provides that no person appearing before the commission may refuse to answer any question on any grounds other than those contemplated in Section 34 of the Commissions Act. Rule 3.2 allows a member of the commission's legal team to put questions to a witness which include questioned aimed at assisting the commission in assessing the truthfulness of the evidence of a witness. Indeed that forms part of the duties of the legal team. The commission's legal team has not made and does not intend to make any concessions in this regard. All witnesses are equally entitled to fair procedures and to fairness in the application of procedures. Former President Zuma has not yet been cross-examined. He is still in the process of being asked questions to illicit his full response in detail in respect of the matters. All the matters raised by the nine witnesses."

I am emphasising nine because I am going to come back to this nine witnesses because there is another letter which shows that the left hand does not know what the right hand is doing.

10 “Raised by nine witnesses whose statements implicating him have been furnished to him for purposes of this weeks’ hearing. The process will necessarily have to be continued well beyond the scope of the matters raised by these particular witnesses. The need for cross-examination will be addressed in terms of rules when it arises. It is denied that Mr Zuma’s procedural objections, complaints and reservations are valid. His rights and the integrity of the commission will be fully safeguarded by the continued adherence to the Commissions Act, Regulations and Rules. No proposal to deviate from these provisions will be forthcoming. Accordingly the legal team’s intention is to proceed with the hearing tomorrow.”

20 Chair we approached the commission as directed by you, the legal team. We say you the custodians please tell us how we – cure how we came here, how we being treated and how we can move forward and this is what we get. But I am going to take this when I said nine witnesses Chair those nine witnesses in terms of which my client has been brought here. Chair I am like you I may be getting correspondence I did not know. No it is not. It is not. Let me read

those nine witnesses to you in terms of which he was invited, in terms of no rules as a courtesy.

It is Themba Maseko, it is Ms Vytjie Mentor, It is Mr Nhlanhla Nene, it is Mr Pravin Gordhan, it is Ms Barbara Hogan, It is Mr Ngoako Ramathlodi, it is Advocate Sam Muofhe, Mr Fikele Mbalula, Mr Angelo Agrizzi. Right I want to focus on Mr Angelo Agrizzi.

To demonstrate Chair when I said I was not being disrespectful. We may have expressed this to you that basically our client from the beginning was treated as someone who must come and answer from the beginning as someone who is accused. And we even asked well you surround you get witnesses as we – I do not think it is a – I think it is a public secret now that everyone who came, who was selected from government has a grievance against him literally. Had something to say about him and he is a head of state. We said to you Chair and Mr Pretorius our client sat waiting to be treated just like you treated Mr Gordhan. Just like you treated Mr Nene. Just like all of those witnesses because you have not decided who is wrong and who is – who is at fault because this animal called corruption is a morphis. We do not know who is actually corrupt we are investigating it. And in order for the commission to avoid being part of what I think would be the biggest or well in manipulation by assuming there are people who are innocent and others who are guilty before you investigate. We proposed that witnesses must be called accorded the same respect right at the beginning and maybe as you speak to them you get the facts that direct you – that well we spoke to them at the beginning but

this one is a scum. Or this one is implicated. This one is guilty. Well here is another letter. While we are dealing my client must deal with Mr Agrizzi here as he is standing here. While we talking to you Chair on Wednesday trying to find a solution you write this letter to us or the commission writes this letter to us on the 17 July Wednesday as we are trying to find the solution. I am going to read it.

10 “Dear Mr Zuma. You were implicated during the testimony of Mr Angelo Agrizzi before the Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state. A notice in terms of Rule 3.3 of the Rules of the Commission was subsequently sent to you. We have not received an application from you to cross-examine Mr Agrizzi or your response to the allegations made by Mr Agrizzi which implicates you. Therefore we require to meet with you. He is already sitting here. We require to meet with you with the purpose to obtain your written explanation in a statement form in response to the

20 allegations against you. Lastly you may provide us with your own written statement under oath which may be made with the assistance of your legal advisor if any. Alternatively we will assist you with compiling your statement at a time and place convenient to you.”

Chair quite frankly this is a joke. That a witness is called and placed here in terms of a particular regime which is no rules we just a courtesy. Put yourself in his shoes. He is going to be asked about Mr Agrizzi in terms of your invitation sitting here. He is going to engage in this exercise which we have submitted should have been the approach to each and every witness because this commission Chair, this commission – forget the journalists, forget everyone outside this commission does not know who is guilty. It is trying to find out. And I raised this on Monday that a legal process must be cleansed of

10 prejudices that comes from outside. Because witnesses must have faith in our law and our judges and our systems that when they come here they have come here to assist the process but not to be persecuted the same way they are persecuted outside. We therefore Chair submit to you that there is something irrational about a parallel approach to the witness about the same – well the same witness that he must deal with. Therefore we can Chair – I am at the end where I started because we assume as you told us that these letters come from you and we assume that you had made this ruling and nothing was done behind your back. We have come to tell you Chair that because of this

20 and the reservations we have raised and our experience in this rule that Mr – my client has instructed me that he will take no further part in these proceedings. He respected you, he still does, he respects this commission but the commission does not seem to know its ground rules and for that reason we came here to tell you that we want to explore the option of going to our courts to challenge what we think is your

decision but you have told us it is not. In any event I have an ethical duty myself. I believe that a client, a witness like any witness must be treated fairly and at this point I am not certain that I will be doing my ethical duties if I proceeded in these proceedings. I think Chair I am imploring you I think there is something wrong not with you, not with any particular person. I am pleading with you Sir to really, really check whether your process has not become a political process where the left hand does not know what the right hand is doing.

Chair can I just finalise this point?

10 **CHAIRPERSON**: Yes.

ADV MUZI SIKHAKHANE: Is that I think I must make this point delicately and I have made it to you in chambers that whatever people say – are going to say about why my client came here, it was his decision and we agreed with it. He thought and he still respects judges and he thought it would be proper to come here whatever his reservations because he did not want a situation where his conduct is seen as conduct that is defying the Chair. But Chair as you know you are a human being this process is a process of human beings. It is not infallible. It is not personal when I say to you we are now at the point
20 where we want to take the conduct of this commission in respect of our client and what we think are irreparable damages to how he – he can conduct himself here and it has serious implications for him and I cannot bring a client here when this commission and the world believe I must just walk him into Kgosi Mampuru prison without a process. Thank you.

CHAIRPERSON: You are done?

ADV MUZI SIKHAKHANE: I am done Sir.

CHAIRPERSON: Yes. I am going to let Mr Pretorius respond and then I take it from there. Thank you Mr Sikhakhane.

ADV MUZI SIKHAKHANE: Thank you Chair.

ADV PAUL JOSEPH PRETORIUS SC: Thank you Chair. The first issue raised was the correspondence and the letter sent on behalf of the legal team to the representatives of the former President yesterday. It was clear from both the text of the letter that the sentiments therein expressed were not your Chair were subject to your direction ultimately
10 but were the sentiments and views of the legal team.

Secondly they were part of the engagement announced by you when we adjourned on Wednesday. So it is clear in the context of an engagement between the two legal teams that that letter both in process and in its context and in its wording came from the legal team. But leave that aside not much turns on that ultimately.

We note the statement that the former President will take no further part in the proceedings but we need to clarify a number of issues in response to the reasons given by my learned friend for that.
20 When you as Chair said that you invited the former President to come to the Commission the topics on which the invitation was based and the invitation to give evidence was detailed in those letters.

There was no lack of clarity as to the purpose of the invitation and the implications for the topics which would form the basis of questioning. That was made very clear. It is on record Chair. What

you did make very clear is that you were not using the powers in the Rules to compel the President but that does not mean to say you have no power to invite.

In fact obviously you do and you did and that invitation was accepted. So there can be no quarrel about but once a person appears before the Commission whether by virtue of an agreement or whether by virtue of the compulsory powers that the Commission may exercise and you in particular Chair may exercise. Certain obligations arise and I may just refer for example to Regulation 8.1 which says that:

10 “No person appearing before the Commission ...”

And the former President is appearing before the Commission.

“...may refuse to answer any question on any grounds other than those contemplated in Section 2.4 of the Commissions Act.”

That relates to the well-known ground of privilege. Chair obviously that must be read in terms of the constitutional rights that a person appearing before the Commission must have but that is another matter. So once a person comes before the Commission however that may happen compulsion or response to an invitation and voluntarily
20 which is the case here certain duties and obligations arise.

One of those is the duty of the legal team to perform its functions in terms of its mandate. Its mandate is created by the Act, the Regulation, the Rules and the Terms of Reference. That is the legal framework which binds the Commission. We cannot enter into any arrangement to favour and this is what is being asked for Mr Zuma and

his legal team are in effect asking to be excused from the application of the Rules and Rule 3.2 here is significant.

It is not only incumbent upon us to ask questions to assist you to establish the truthfulness of any evidence. It is part of the mandate. We have the power to do so and we have the duty to do so and we cannot derogate from that in any private arrangement to soften what happens here and if the questions are detailed and if the questions are difficult and if the questions involve trying to remember events some time ago so be it.

10 Not one of the questions that we have asked have gone beyond the Terms of Reference, have gone beyond the bounds of the limits placed in the correspondence, the invitation and acceptance and have gone beyond what was – what is enjoined upon us in terms of the Rules. Chair I want to say just something about the so called promise or undertaking not to cross-examine but before I get there I must just highlight something that appears from the correspondence.

The premise of the letter which I can now refer to because the confidentiality has been lifted the premise is that and I refer to paragraph 6:

20 “On the second day our client ...”

That is the former President.

“...personally and throughout counsel raised several objections to the manner in which he was invited and treated. In fact his reservations were too fortified when he was subjected to relentless

cross-examination.”

I am not sure I understand what that term means. It is not specified. No particular question is referred to nor any particular line of questioning. It goes onto say:

“This was despite the undertaking that he would not be cross-examined. We hold a strong view that it is the Commission that must assure our client that it is still capable of curing what we view as serious procedural difficulties.”

10 The premise then of the complaint raised is firstly that there has been a breach of the Rules procedural deficiencies. Now it is not up to a party *ex parte* to determine that there has been a breach of Rules and then see that as a final determination of the issues at stake. The Rules are always subject to your decision Chair and then the decision of the Court.

 A person cannot stand on a platform outside here and say the Rules have been breached therefore we are entitled to do something. That is not the way our law works. Our response – well the second premise is that there has been relentless cross-examination. Neither of
20 those premises is correct. Our response however is we will follow the Act and the Rules to the letter and that Chair we invite you as you will no doubt you do not need our invitation and that has been clear from the proceedings today you will enforce the Rules.

 You will interpret and apply and you will do so fairly and you enforce the Rules. So insofar as the former President and the legal

representatives require an undertaking from us. We do not need to give an undertaking but we are bound by the Rules and we will follow the Rules. An undertaking is completely superfluous but if they want an undertaking they can have it.

The invitation could not be accepted to find any solution which would derogate from the strict letter of the Rules. Firstly because that would be a concession that we have not abided by the Rules and we have and secondly, it would indicate a willingness to depart from the letter of the Regulations and Rules which we cannot do
10 and which we will not do.

In relation to the particular issue of so called cross-examination. It needs a little detailed response here I am afraid Chair. In regard to that we are quite happy to abide by the Rules. Should there be an objection to any particular question that can come before you and you can make your determination. Rule 3.2 is clearly designed to allow and oblige the evidence leaders to comply with the investigative and inquisitorial mandate.

We are not here to prove a case and I will come to that in a moment in a sense of a pleaded civil suit or a criminal charge. That is
20 not our job. What we are here to do is to investigate in an inquisitorial fashion and to ask questions in relation to topics of which the former President has been made aware to ask questions which will assist you at the end of the day to determine what is true and what is not true.

The fact that those questions maybe question canvassing a long period of time that they are questions of detail does not preclude

us nor does it relieve us of the obligation to ask questions which may otherwise be regarded as difficult questions. The so called undertaking not to cross-examine must be placed in its proper context. There has never been an undertaking not to ask questions to determine the truthfulness of evidence. You yourself in your opening Chair on 15 July said:

10 “It is important to emphasise that the evidence
 leaders are mandated to seek to establish what the
 facts are through questions that they ask and not to
 prove any particular allegation against anybody but
 they are required to assist me as the Chairperson
 of the Commission by asking questions including
 those that will seek to establish what the truth is.”

 And those – that has guided us and that will continue to guide
us. Again we are not only entitled but obliged as part of inquisitorial
mandate to ask those questions and we will continue to do so for all
witnesses. The question of cross-examination is with respect a term
that has been used quite loosely and incorrectly by my learned friends
to describe all manner of questions that might be difficult to answer and
20 so in response to your opening Chair it was said on record the first
point is that - by myself as part of the legal team – the first point is that
this Commission is at this stage at least investigating matters covered
by the Terms of Reference.

 It is an investigation. That means it is not a trial where we
seek to prove a predetermined or pleaded or charged case and for that

reason there is no cross-examination. Cross-examination can in any event only take place by prior permission granted and it is not likely that is all that was said that we will ask for such. Our mandate is to investigate various matters.

So Chair that by way of background as to what was said later on the point was made clearer where I addressed you Chair in relation to an objection that had been raised. I said:

10 “I do not want to enter into a long debate as to what questioning is and what cross-examination is safe to say that there is no pleaded case or charge sheet which we are seeking to validate or sections of which we were seeking to prove through your questioning – through our questioning and insofar as it maybe alleged that we are seeking to question to prove a particular pleaded case in a civil matter or a particular criminal as represented by a charge sheet is simply not correct. What we are doing is affording Mr Zuma a full opportunity to deal with all the factual evidence that Mr Maseko led and indeed
20 the implications of that evidence.”

Always Chair that was subject to the reliance by the legal team and the injunction by yourself Chair that 3.2 was important. So in response to one of the objections raised you said on 17 July Chair:

“I just want to say and I think in regard to that I want to point out that it is important to draw

attention to in terms of the role of the legal team to draw attention to Rule 3.2 of the Rules of the Commission and I draw this just so there is no confusion.”

You made it very clear on more than one occasion Chair.

10 “A member of the Commission’s legal team may put questions to a witness whose evidence is presented to the Commission by the Commission’s legal team including questions aimed at assisting the Commission and assessing the truthfulness of the evidence of a witness subject to the directions to the Chairperson the Commission’s legal team may ask leading questions.”

We have never strayed beyond that boundary Chair and we will not but we must use that power in order to fulfil the inquisitorial duties of the Commission. May I just say there maybe debate about what is meant by cross-examination. It is mentioned elsewhere in the Rules. Cross-examination is not a type of question. Cross-examination is a step in the procedure where the representative of a particular
20 opposing party questions a witness for various reasons and on various grounds who has been led by another party.

So you get examination in chief and then you get cross-examination. Cross-examination may include various questions. It may include various approaches. It may include questions to confirm what the witness has said. It may include questions to obtain more

facts from the witness in support of a case but the essential nature of that step in the process is to secure evidence in support of a particular case and to question or challenge evidence that is not in support of a particular case.

Here we are not doing that Chair. So we are not cross-examining that sense. Here one of the types of questions that maybe asked under cross-examination is the type of question that would challenge or assert that a witness is not being truthful and that duty and that right is expressly preserved under Rule 3.2. So what is
10 preserved under Rule 3.2 the truthfulness inquiry or the truthfulness investigation to assist you to make a decision Chair is but one of the various types of questions that maybe used in the process or step of cross-examination by another party.

In short and in summary Chair we have complied by the Rules. We will continue to comply with the Rules subject to your rulings given in Commission of course and we must by law and in accordance with our mandate as counsel for the Commission pursue that mandate. What we cannot do in discussions with colleagues representing a witness or implicated person where a complaint is laid
20 not in respect of a particular question but by general approach derogate from our own duties or limit our own powers.

We must investigate and we must question and we must continue to do so. It is our mandate Chair. Thank you.

CHAIRPERSON: Well before you sit down what – what is the story about the letter that Mr Sikhakane read that he says was written on

Wednesday to Mr Zuma relating to Mr Agrizzi? I do not know anything about it but of course I do not have to ...

ADV PAUL JOSEPH PRETORIUS SC: It was written on Wednesday Chair?

CHAIRPERSON: I do not have to know all the letters that different people write from the Commission but do you know anything about that letter?

ADV PAUL JOSEPH PRETORIUS SC: I – I do not. It – it may have come from the investigators. It certainly did not come via me in the
10 legal team.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: But I am not

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Trying to derogate from ...

CHAIRPERSON: You – you will investigate?

ADV PAUL JOSEPH PRETORIUS SC: Reliance. I will look at it and respond.

CHAIRPERSON: You will – you will investigate to find out what – where it comes from, *ja*.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Yes I will investigate it and – and see ...

CHAIRPERSON: *Ja*.

ADV PAUL JOSEPH PRETORIUS SC: Why but it certainly not a letter from myself ...

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Nor I understand from others but I will check.

CHAIRPERSON: Okay, alright thank you. Let me – let me say a few things now and maybe later I will say more. One, I am disappointed that yesterday a situation was allowed to happen where I went to bed without knowing how the discussions between the Commission's legal team and the former President's legal team were going.

I had hoped and I may have indicated to both teams in chambers that I would need to be informed and I had in mind that if by
10 a certain time I – I had hoped to be informed in the later afternoon or early evening but I had in mind that if I was informed at a certain stage and I took the view that there were challenges in reaching agreement and I thought that there may have been room for me to contribute to the resolution of the impasse I would have considered meeting with both teams. That is the one point.

The second point I want to make is that when we adjourned on Wednesday and I expressed confidence that both teams would find and I said there were reasonable prospects in my view that both teams would find common ground I did not say that simply without any basis.
20 I had a basis which gave me confidence that the two teams could find each other.

Of course there was no guarantee. In any discussions you never have a guarantee. So – but I had confidence. I have heard what Mr Sikhakane has said are his instructions from his client which his client is entitled to give him. That he does not intend to participate

anymore. I do intend nevertheless before we reach finality on this matter I do intend and would like to have a session with counsel for the former President and counsel for the legal team in my chambers.

I may not need to be told what transpired between them yesterday that made them not reach agreement but I do have my - ideas of my own that I would like to discuss with them to see whether we cannot find a situation where the concerns raised by the former President can be accommodated without compromising the job that the legal team of the Commission has to do and the job that I have to do as
10 well as the job that his legal team has to do.

I emphasised already on Wednesday at some stage that nobody is being asked to compromise their own rights or obligations but even when nobody compromises their rights, their positions there may be room for some understanding and agreement where we might be able to take care of concerns without anybody compromising their own obligations and rights.

I also want to just say two other things. Later on if need be I might have to say more. I just want to repeat what I said I think either on Wednesday or on Tuesday. The decision to ask the former President
20 to appear before the Commission this – this week was my decision and my decision alone. I therefore do not want Mr Pretorius or the Commission's legal team to be criticised for a decision that they did not make.

I made that decision and I made it alone. I believed it was the correct decision. I still believe it is the correct decision. In this

entire room I am the only person who ultimately must make decisions in regard to the evidence that I am hearing. I am the only one who must make findings about witnesses who come here and give evidence about other people and about State Capture and about corruption.

I and I alone must make those decisions. I believe that as far as it is possible and practicable I must hear all sides. I must not hear one side and therefore it is in that context that I make the decision that I would like to hear the former President's side of the story. That was made clear in correspondence that was sent to his attorney that there
10 were two purposes for which his appearance was required.

The first purpose was to give him an opportunity to tell his side of the story. The second purpose was to enable an evidence leader and myself to put questions to him. I made those decisions and it is was made clear that his side of the story and the questions that we would put – that would be put to him would relate to the statements or evidence that had been given by certain specified witnesses.

Their names were given. It was said that those statements had previously been given to him. Later on it was discovered that one or two apparently by mistake had not been sent to him. At that stage it
20 was said that there was no need to send him those statements again. At a certain stage there was an indication from his attorneys that they might not have received all of them.

So a decision was then taken again by me that all the statements that would be used to ask questions and relevant annexures should be put in lever arch files and be given to his attorneys. So that

when he came here if there was one or two other statements that he might not have received there would have been at least two weeks before the 15th when he would have had a chance to look at those statements together with his attorneys or counsel.

Now you all heard I think on Monday or Tuesday I am not sure. I think Monday that it was acknowledged that those two lever arch files were received by Mr Zuma's attorneys. There was some perspectives about certain aspects but it was accepted that they were received. It was stated that the questions that would be asked would
10 fall within matters or issues that are covered by those statements.

A request was made for specific questions to be given in advance to him. I made the decision that the question the actual questions would not be given because I believed that if he knew the statements of witnesses from whom - from which the questions would come and he knew that the issues and the incidence or events about which he would be asked questions were only those covered in the statements and nowhere else that ought to be enough.

Now part of the reason why I am explaining this is that I heard a few days ago one of the journalists explaining what has happened
20 both in radio – on radio and TV and it seemed that he did not understand correctly what had happened, and I believe in good faith may have put the Commission in a negative light but it must have been out of misunderstanding of what the position is. So the statements – on Monday it was explained to that, I think one or two statements had, by mistake not been sent to him prior to the beginning of July but

otherwise all the statements had been sent before and the lever arch files were simply a precaution to make sure that when he came here there wasn't an argument about statements not having been received. Now I also just want to say, the regulations that apply to the Commission say that the Commission will adopt any procedure that it determines and the rules that have been published that the Commission is using are rules that are – were promulgated in terms of that provision.

10 The rules do not provide for everything, there are – there are two ways in which a person is secured to appear before a Commission or a Court. One is simply by way of arrangement you talk to the person who is to be called to give evidence and if that person agrees to come and give evidence that person comes, it's normal. If that person refuses to come you have an option to issue a subpoena or a summons to force that person to come. There are many witnesses who have come before this Commission who came, not because they were compelled to come to this Commission because they were talked to, to say, are you willing to come and they said yes I'm willing and they came. There are others who came because summonses were issued
20 against them, some of them were unwilling to come to the Commission and the Commission, therefore had to use its power to issue a summons and compel them to come. Others were willing to come but they preferred that they should be issued with a summons and that was done.

If I wanted the former President or when I wanted the Former

President to appear before the Commission and give his side of the story and enable the Commission and the evidence leaders to ask questions I had two options, either to make an arrangement, find out if he's willing to come as has been done with regard to some other witnesses or get the secretary of the Commission to issue a summons to compel him. Now Mr Sikhakhane, when he appeared in the Commission on Monday, one of the first things he told – he reminded me of is that when he appeared before this Commission last year, he made it clear that the former President would cooperate with the

10 Commission. If I had decided that a summons should be issued against the former President and a summons had been issued, I'm sure that what I would be asked is, why do you issue a summons against somebody who said they would cooperate with the Commission, why you doing that? This person has made it clear that he will cooperate with the Commission, so why you issuing a summons against him, why do you seek to compel him? I decided not to do that, I set aside certain dates and a letter was written to ask him whether he would give an undertaking that he would come because if he gave that undertaking there would be no problem, there would be no reason to compel or to

20 do anything. In accordance with what I've been told I expected that he would cooperate, which he did by agreeing to come. I'm explaining this because, once again, I am saying I'm the Chairperson of the Commission, although I don't get to do everything and there are different sections of the Commission, different people do different things, when it comes to the appearance of the former President before

the Commission, I make the decision and if that decision is to be criticised it's my decision and people can criticise me for it, it is fine, it is fine, I believe it was the right decision.

When, on Wednesday the former – or on Monday, the former President asked to be given a chance before any questions could be put to him, that he be given a chance to make a statement, I allowed it and I didn't put a timeframe, I didn't say I'm giving you only fifteen minutes for that statement, I'm in a rush for us to ask you questions. I didn't say I'm giving you 30 minutes, I didn't say I'm giving you an hour, I allowed him to have his say and he had his say until he was the one who said, what I've said is enough for now, I may come back to some issues later on. I did not even limit him as to the time within which he had to make that statement. During that time, I believe I interrupted him only once because I wanted clarity on something he had just said, other than that, he was interrupted, he was allowed to have his full say to tell his side of the story which was stated in the letter as one of the purposes why he was asked to come, so that he could tell his side of the story

So I just thought I must just explain some of these things so that they are understood and it should be quite clear that, as far as his decision is concerned if anybody wants to blame anybody they can blame me and I want to make it clear that there are only two purposes why I asked and they were stated in that letter to allow him to give his version to his side of the story and to allow for questions to be asked. Having said that, I indicated earlier in the week that I was encouraged

by the spirit of respect and courtesy and cooperation that was shown by the former President, by his counsel, by the legal team and all of that had informed my confidence that a solution would be found to his concerns and therefore I would like to have a session in chambers with counsel on both sides so that we can see whether the matter should – will remain where the former President’s counsel said they stand at the moment or whether there may be room with my intervention to find a way, thank you. Mr Pretorius I intend adjourning but I don’t know whether Mr Sikhakhane wants to say something now or whether we
10 should rather have our session in chambers.

ADV PAUL JOSEPH PRETORIUS SC: Perhaps we should meet in Chambers Chair.

CHAIRPERSON: Okay I think Mr Sikhakhane wants to say something now, let me allow him.

ADV MUZI SIKHAKHANE: Chair thank you so much. We’re indebted to your endeavours, wasn’t to state that there is no lack of appreciation from the former President’s side and ourselves about your genuine endeavours to find ways, we’re not even here to cast aspersions in your direction, that’s not what we’re doing at all, but Chair let me come back
20 to Mr Pretorius because he gives us a lecture that we don’t need. He gives us a lecture about what cross-examination is as if we don’t know, how patronising, he actually doesn’t know it, he says, we don’t determine cross-examination by knowing the type of question, just as a side. Go to any first year advocate they will tell you, we object as advocates, when we stand up – when we stand up to object, it’s

because the type of questions determines whether it's cross-examination or not, so he's wrong there, he's just wrong. So he doesn't need to give us a lecture. Secondly I appreciate your powers Chair and I respect them and my client respects them and I appreciate Mr Pretorius' mandate and powers and I have no – there is no interference with them but I want to say this to both of you, is that above both of you and all of us here, is the constitution of the country. So this lecture about the powers is fine, it's well and good, it tells me something I appreciate but we both – we all in this room have to know

10 that in exercising all of those powers he seems to boast about, he seems to have found his courage about them, they have to be exercised within the prescripts of the constitutional rights of people who come here.

Mr Pretorius doesn't understand, he sits here like me, we – the people we put there have their lives at stake, all of them, from Gordhan to Mr Zuma, all of them must be treated fairly because we don't know, we are lawyers, we come here paid hefty fees but the people who sit there have their lives at stakes. This Commission has implications for their lives and so to simply come here and tell us about, we will do

20 anything we like because we have this power. I have stated here that, Chair, these powers must be exercised within the prescripts of the constitution and it is our view that the manner – and I'm not criticising your decision because we responded to it because we respect you and we respect your bone fides. I am criticising what – I'm stating what I stated on Monday, that it is – when ground rules are not followed that

mistakes of this nature happen where we can't find each other. So Chair when I say we went our Courts to determine this it is because we felt, well if our rights, if our client's rights are not respected then what choice have we got. Mr Pretorius – Chair let me say this, because when I talked about the right hand and the left hand, let's say you are the right hand I think, Chair, there are two possibilities here why no-one knows who wrote this letter and o-one knows who failed to give us notices, there are two possibilities about this and I want you to consider them very, very carefully when you get a report and
10 investigate this further. One is that your team is incompetent in how it raises things to us.

CHAIRPERSON: Please let us not clap hands I said on, I think Tuesday and Wednesday everybody has been very courteous and respectful and everybody who is attending has been very disciplined please let us continue in that way, thank you.

ADV MUZI SIKHAKHANE: Sure, Chair maybe let me withdraw the word, because I meant inefficient, in the sense that when this team you have does not know who wrote us a letter, there are two possibilities Chair. It's either you as the right hand trying your best are dealing
20 with the left hand that's either inefficient or is doing what you were not meant to do and I'm not saying it as a statement, I'm saying it as something that I think the Chair must investigate whether you're not – I called it (indistinct) manipulation, not of the Chair but I said, Chair it's important that as the right hand of this place the Judge, the second most senior Judge in this country to know whether your left hand is

acting in good faith without political influence and whether these things they are doing are a mistake or by design and Chair when you get that report from them, I'm asking you to truly investigate whether this treatment of witnesses that you did not design, it just happens is intended or is a mistake and I want you – I'm pleading with you sir, to investigate it because I trust your bone fides and I think everything you've said to us, the former President sent us here on Monday and said he wanted to come, precisely because that's how he sees you, thank you Chair.

10 **CHAIRPERSON**: Thank you, thank you very much.

ADV PAUL JOSEPH PRETORIUS SC: Chair as we've...(intervention).

CHAIRPERSON: At some stage I must put a stop to this.

ADV PAUL JOSEPH PRETORIUS SC: No I understand but we've been called to account as...(intervention).

CHAIRPERSON: One minute.

ADV PAUL JOSEPH PRETORIUS SC: Thank you, the letter of which my learned friend complains is one of a category of nearly 700 people who have been implicated where the secretariat is seeking to enquire whether there is any response to a 33 notice that has been sent to an implicated person and asking for a response. It simply says, a notice was sent to you in relation to particular evidence, we haven't got a reply, please let us know what your intentions are, that's the nub of it.

20 **CHAIRPERSON**: But my understanding is that previous letters were sent to Mr Zuma's attorney and not to him, what Mr Sikhakhane read seemed to be a letter addressed to Mr Zuma directly.

ADV PAUL JOSEPH PRETORIUS SC: No it says former President Zuma care of Mantsha Attorneys and it was emailed to Mantsha Attorneys.

CHAIRPERSON: Okay, alright we are five minutes into the short break, I'm going to take an adjournment, I think we'll take an adjournment of 15 minutes to have tea and then at the end of that 15 minutes, I would like counsel on both sides to see me in my chambers. It's now twenty minutes past eleven, so the fifteen minutes would go up to twenty to twelve, so let us say they can see me at quarter to twelve, I don't want
10 to specify what time we are going to come back because I don't know but I think maybe I should say, the one option is that we could come back at half past twelve, maybe I should – ja give it about 45 minutes, if at half past twelve we are not done, we will at least come back at 1 o'clock to indicate what is happening. So initially half past twelve but if we don't come back then it will be just before 1 o'clock maybe five to one to indicate what is happening. As I say, I meant it when I said on Wednesday and on Tuesday I was encouraged by the cooperation, respect and courtesy from all sides and that I was of the view that the
20 legal team for the former President and the legal team for the Commission were capable of having the matter resolved. I am confident that given some space we might be able to find a way, either for – well Mr Zuma we have been talking and you have been – but you have been following the discussions, you understand, so thank you. We are going to adjourn then and either half past twelve or about five to one, 1 o'clock we will know what is happening, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: I see that we managed to be back in time for the second timeframe that I'd given, five to one, I have had a discussion with counsel for the former President and counsel for the – from the Commission's legal team in regard to the issue and that they were supposed to deal with yesterday and that we talked about this morning, it was a very fruitful discussion. Again characterised by respect, courtesy and a high level of professionalism on both sides of the teams
10 and I think a commitment to try and look at any suggestion put on the table to try and find a way forward. The discussions have resulted in an agreement that, one, the decision that the former President would no longer participate in the proceedings is withdrawn and that the former President, I've been told, has indicated that he wishes to continue to cooperate with this Commission and his legal team also wish to continue to work with this Commission.

It has been agreed that the way in which the former President's concerns may be taken care of is that the Commission's legal team will indicate to his legal team what the Commission's areas
20 of interest are in each witnesses statement or affidavit on which the Commission or they would like the former President to testify and that thereafter the former President will then provide, thorough his legal team, statements that indicate what he has to say on the incidents or areas of interest that will have been pointed out by the Commission's legal team in regard to each witnesses statement or affidavit. This

helps because sometimes in one statement, a witness deals with a number of things, some of which may have nothing to do with the former President but there may be areas where the Commission's legal team wishes to hear what he knows, or what he has to say.

The agreement is that counsel, certainly the lead counsel but counsel for the former President will meet within the next – before the end of the next two weeks with a view to the Commission's legal team, making available to the former President's counsel a document that indicates exactly which areas in the various affidavits of witnesses they
10 would like the former President to give information about. The two teams, counsel will agree the timeframes – the timeframe within which the former President's counsel will provide the former President's statements in regard to the specific areas of interest that will have been indicated in regard to the specific affidavits of the witnesses concerned. If the two sides are not able to agree on the timeframe, they will approach me and I will hear both sides and make a decision on the timeframe.

It is contemplated within this agreement that at a certain stage – that at a certain stage the former President will come back and give
20 evidence and it is contemplated that with the process that has been agreed to by all sides, it may well be that the time that he will need to testify might be shorter, might be shortened because of the exchange of information that will have happened including statements, affidavits from the former President.

Therefore – we are therefore at a stage where we are not

going to proceed today with the hearing of the former President's evidence so that this can be done and then he will come back later on and I want to take this opportunity, once again, to express my appreciation to both legal teams for the constructive discussion that we have had in chambers which have resulted in this agreement but I also want to express my appreciation to the former President for his decision to agree to give the processes of this Commission a chance and to agree that he will continue to cooperate and he will come back and testify after these processes have been finalised which are aimed
10 at facilitating everything. I think that it is quite important that this be acknowledged. The – I am - I have been – I am going to give the former President an opportunity to say something because I've been asked that he would like to say something but before I allow him, I would wish Mr Pretorius and Mr Sikhakhane to indicate whether they confirm that what I have said is in accordance with the agreement that has been reached.

ADV PAUL JOSEPH PRETORIUS SC: Yes Chair, thank you.

CHAIRPERSON: Thank you.

ADV MUZI SIKHAKHANE: I do confirm sir.

20 **CHAIRPERSON:** I therefore would like to allow the former President to say something, thank you.

MR JACOB GEDLEYIHLEKISA ZUMA: Well thank you very much Chair I must thank you for the intervention you made that made the situation to be looked at and arrived at some common point in terms of continuing with the process as it were. I think it is the right of anyone

to raise concerns if there are concerns and the concerns should be looked at and I appreciate that you were able to meet the two teams and found the way forward because I think it is in the interest of all of us to address issues that face this country in whatever form and also the clarity of the way forward as it has been indicated by (indistinct) work done to allow a smooth process to take place in this Commission.

I think no-one should have the wrong impression that the raising of the concerns was just done in order to disrupt or whatever, the processes. These were genuine concerns that needed to be looked
10 at, so I'm happy that we have found a solution that this Commission will be able to move to it's finalities with our contributions, I'm sure that adds the confidence we have on you as a Chair, that the task before you, you will be doing it with all honesty with an aim to find the solutions in the end. So I just wanted to say thank you very much for your intervention that has helped us, at least to find a way forward, that's all I wanted to say Chair, thank you very much.

CHAIRPERSON: Thank you very much Mr Zuma, I wanted to mention earlier on and I just mention now that we may have taken – you might think we took quite some time before we came back but reaching
20 agreement in principle didn't take longer than ten minutes after we started talking. There is a willingness to try and find solutions, the rest of the time what was left was to refine and make sure there was no misunderstanding. There was really no great difficulty in finding a solution once I met with both teams and counsel for the former President, came and indicated that the former President was not

opposed at all to us finding a way and it was clear to me that he would like a way to be found to move forward which, his remarks now, have confirmed. So once again thank you to both teams, thank you to the former President and thank you to everybody for the high level of discipline and thank you. We'll adjourn for the day and the former President will come back at another time that will be arranged. The Commission will adjourn for today but on Monday we'll continue, we'll start at 10 o'clock to look at matters relating to Estina, thank you very much once again, we adjourn.

10 **INQUIRY ADJOURNS TO 22 JULY 2019**