

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

25 NOVEMBER 2019

DAY 192

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PROCEEDINGS RESUME ON 25 NOVEMBER 2019

CHAIRPERSON: Mr Moyane had acted maliciously. It was not clear to me whether Mr Gordhan intended to allege or alleged in his affidavit that Mr Moyane had acted maliciously in laying those charges against him.

I stated in that judgment that in due course I would issue directions on the way forward. The Chairperson's directions.

Subsequent to the delivery of my judgment I issued directions with regard to the outstanding issue. The relevant parts of the
10 directions read and I quote.

1. Mr Gordhan must deliver to the commission and serve on Mr
Monyane on or before Wednesday 15 May 2019 a short
clarificatory affidavit in which he clarifies whether in stating in
his statement of 11 October 2018 that Mr Monyane acted
malicious in laying charges against him and others. He meant –
he meant that:

- a. In laying charges against Mr Gordhan and others Mr Moyane
was motivated wholly or in part by or he sought to advance
the objectives of state capture or he was abusing a legal
20 process for his own personal goals that had either nothing or
little to do with a legitimate complaint relating to an alleged
crime.

2. To the extent that 1a above may not correctly reflect what Mr
Gordhan meant. He must succinctly state what he meant when
he stated that Mr Moyane had acted maliciously in laying the

charges against him and others.”

Mr Gordhan’s clarificatory affidavit. In due course Mr Gordhan delivered a clarificatory affidavit. In that affidavit he among other things said:

- a. He had never said that Mr Moyane had acted maliciously when he laid charges against him.
- b. It was Mr Moyane who had said in his affidavit that Mr Gordhan had implied that he had acted maliciously in laying the criminal complaint against him.
- 10 c. He did not know Mr Moyane’s state of mind when Mr Moyane laid the criminal complaint against him.
- d. Mr Moyane’s motive in laying the charges against him was irrelevant.
- e. He disagreed with Mr Moyane’s explanation that in laying the criminal complaint against him Mr Moyane had acted as any reasonable commission of SARS in his position would have acted.
- f. He personally believed that Mr Moyane - I am sorry I am going to repeat that. He personally believed that: “Mr Moyane did abuse
20 legal processes for reasons already explained in his evidence.”
“In my evidence.”
- g. His belief that Mr Moyane had abused legal processes was and I quote: “Based on my experience of his defiant attitude and vilification of me following my reappointment as Minister of Finance which was aimed at forcing me to resign from that

position so that the capture of National Treasury could proceed under a different Minister.”

- h. “To use the words of the Chairperson’s directions I therefore do mean that Mr Moyane: ‘was motivated wholly or in part by or he sought to advance the objectives of state capture’ and that ‘he was abusing a legal process for his own personal goals that had either nothing or little to do with a legitimate complaint relating to an alleged crime.’”

This statement by Mr Gordhan appears to be linked to that part of the
10 directions which required him to say whether he meant that in laying the charges against him Mr Moyane “was motivated wholly or in part by or he sought to advance the objectives of state capture.”

I “he believes that Mr Gordhan that Mr Moyane’s personal goals while he was SARS Commissioner included the advancement of the state capture project.”

- j. His belief that Mr Moyane’s personal goals ‘while he was Commissioner of SARS “included the advancement of the state capture project” is founded on what “is founded on what we all now know about how ‘the failure of integrity and governance at
20 SARS soundly evidenced by the change over four years has certainly compromised the performance of its core function of collecting tax to the detriment of the country at large’ as found by Justice Nugent in the Commission of Inquiry into tax administration and governance by SARS [The Nugent Inquiry page 477 paragraph 19 of The Final Report of the Nugent

Inquiry]’”

Did Mr Gordhan ever allege malice on Mr Moyane’s part?

5. The directions of 6 May 2019 were issued on the basis that Mr Gordhan had alleged in his statement of 11 October 2018 to this commission that Mr Moyane had acted maliciously in laying the charges that he had laid against him. In his clarificatory affidavit Mr Gordhan says he never made such an allegation.

Here is why it was stated in the directions that Mr Gordhan had alleged that Mr Moyane had acted maliciously in laying the charges that he had

10 laid against him.

a. In the sentence – in the last sentence of paragraph 104 of Mr Gordhan’s statement of 11 October 2018 Mr Gordhan said and I quote: “Charges against me relating to that unit had been filed by Mr Moyane on 15 May 2015 [SAPS Brooklyn Case Number 427/05/15]”.

b. In paragraph 113 of the same statement Mr Gordhan states and I quote: “This set of events combined with what is set out below was the beginning of what appeared to be a campaign to force me to resign as Minister of Finance and continue the efforts to capture the National Treasury thereafter.” The set of events referred to at the beginning of paragraph 113 seems to include the event of filing – of the filing of the charges by Mr Moyane against Mr Gordhan mentioned in paragraph 104 of Mr Gordhan’s statement.

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c. In paragraph 130 of his October 2018 statement Mr Gordhan said

that “the orchestrated campaign against me and other leaders of National Treasury raged within cabinet, the institutions of state and on certain media and social media platforms.” He then says that that campaign “shifted to yet another front later in the year when I became the target of malicious and seemingly politically motivated criminal charges.” The charges which Mr Gordhan describes in this quotation as “malicious and politically motivated criminal charges” are the charges “that he says I paragraph 104 of his statement were filed by Mr Moyane against him.”

- 10 I think it is what Mr Gordhan says in paragraphs 104, 113 and 130 of his statement and possibly elsewhere as well that suggests that Mr Gordhan meant that Mr Moyane had acted maliciously in laying the charges against him.

Mr Moyane says in his affidavit in the application for Leave to Cross-examine Mr Gordhan that Mr Gordhan implied such allegation in his statement.

Council for Mr Moyane submits that whether Mr Gordhan made the allegation expressly or by implication is neither here nor there as what is important is that it was made.

- 20 7. Bearing in mind that earlier in his statement Mr Gordhan had talked of Mr Moyane having laid criminal – charges against him it would have been difficult to think that when Mr Gordhan said he became the target of malicious and seemingly politically motivated criminal charges he did not also intend to mean that the person who laid those charges against him also acted maliciously in laying them.

Mr Gordhan's reliance on the findings of Justice Nugent.

8. Mr Gordhan also highlights certain findings by Justice Nugent which he says form and I quote – double quotes “the basis for my belief that Mr Moyane's actions as SARS Commissioner were part or the State Capture Project.”

Mr Gordhan then deals with these findings in paragraphs 23 to 33 of his affidavit where after comes the last paragraph of the affidavit.

9. Mr Gordhan refers to paragraphs 35 to 50 of Justice Nugent's interim report. He states that is those paragraphs Justice
10 Nugent set out “the extraordinary turmoil at SARS and for its senior management in particular that followed Mr Moyane's appointment.”

He then says in the following paragraph that “this included the filing of his criminal complaint against me in circumstances that Justice Nugent found ‘unclear’ and which were later withdrawn. This turmoil saw the removal of many senior SARS officials creating the opportunity for Mr Moyane to appoint senior management at SARS who failed to show the same integrity, skill, commitment – or commitment to its critical functions.”

10. Mr Gordhan goes on to state that in his statement to this
20 commission dated 11 October 2018 specifically in paragraphs 104, 127 and 127.4 he “recorded numerous examples of the acrimonious nature of Mr Moyane's rejection of my oversight while I was Minister of Finance and his insulting attacks on me following my reappointment as Minister of Finance in December 2015.”

Mr Gordhan then says in the next paragraph “this provides the

context to and the basis for my belief that Mr Moyane's laying of a complaint against me was something other than the actions of a reasonable commissioner of SARS."

The reference to this "at the beginning of this passage includes what Mr Gordhan said in paragraph 26 of the clarificatory affidavit."

11. Mr Gordhan then refers to a finding made by Justice Nugent and quoted the following passage from Justice Nugent's final report.

10 "The effective functioning of SARS caused for close
collaboration between SARS and other institutions.
It is to be expected that the Commissioner of SARS
will liaise closely with the Minister of Finance but
while Mr Gordhan held that position there was active
defiance. When Mr Gordhan became concerned at
the steps being taken to change the operating model
he asked for it to be suspended but that was ignored.
When he disapproved the – the extent of bonuses to
be paid Mr Moyane again defied him bringing him
20 into conflict with the Auditor General. According to
Treasury officials the relationship between Treasury
and Mr Moyane has all been broken down."

12. Mr Gordhan also states "considering my interactions with Mr Moyane over this period and the subsequent findings of the Nugent Inquiry my personal belief remains that Mr Moyane abused his position

as the former SARS Commissioner to institute criminal proceedings against me and others under SAPS Brooklyn Case Number 427/05/15 since there was no reasonable basis for him to do so.”

13. Mr Gordhan goes on to state that he viewed Mr Moyane’s conduct “in filing the charges against me as yet another expression of the defiant attitude he exhibited towards me as found by Justice Nugent.”

I pause here to make the point that this allegedly defiant attitude by Mr Moyane towards Mr Gordhan of which Mr Gordhan says
10 the laying of the criminal charge or complaint was another expression is said by Mr Gordhan elsewhere in his clarificatory affidavit to have been part of a campaign aimed at putting pressure on him to resign as Minister of Finance so as to capture National Treasury under a different Minister.

Mr Gordhan added that Mr Moyane’s conduct in “filing the charges” “against me” “also served the political purpose of attempting to pressure me and others to resign thereby advancing state capture and the capture of National Treasury in particular.”

14. The last paragraph in Mr Gordhan’s clarificatory affidavit
20 is to the effect that Mr Gordhan stands by his contention that is [indistinct] the nation by Mr Moyane’s legal representatives regarding Mr Moyane’s “personal goals, personal motive for filing the complaint that led to criminal charges being brought against me and my personal belief that those charges were part of the campaign to force my resignation from the position of Minister of Finance so as to facilitate

the capture of National Treasury is unlikely to assist the important and urgent work of the commission given its time and resource constraints.”

15. Mr Gordhan also states that his statement that Mr Moyane abused legal processes when he laid a complaint against is based on his experience of Mr Moyane’s [defiant] attitude and vilification of me following my reappointment as Minister of Finance.” Mr Gordhan states – then states that he believes that Mr Moyane’s “defiant attitude” and vilification “were aimed at forcing or pressuring me to resign from that position so that the capture of National Treasury could proceed under a
10 different Minister.”

Mr Moyane’s response to the clarificatory affidavit.

16. Mr Moyane did not deliver an affidavit in response to Mr Gordhan’s clarificatory affidavit. He delivered written submissions. This was not inconsistent with the directions issued on 6 May 2019. In the written submissions council for Mr Moyane appointed that the reason why Mr Moyane did not deliver an affidavit was that “Mr Gordhan’s affidavit actually confirms the allegations of malice on the part of Mr Moyane.” In support of this council for Mr Moyane referred to among others Mr Gordhan’s statements quoted in 3b and I above.
20 Mr Moyane’s council submitted that Mr Moyane had already said that in laying the criminal complaint against Mr Gordhan he did not act maliciously but acted in good faith and reasonably.

The merits.

17. While Mr Gordhan states he never alleged that Mr Moyane acted malicious in laying the criminal complaint he laid against him he

states that as SARS Commissioner Mr Moyane had adopted a defiant attitude towards him and had vilified him with the aim of forcing or pressuring him into resigning as Minister of Finance so the capture of National Treasury could proceed under a different Minister. Mr Gordhan also states that Mr Moyane “was motivated wholly or in part by or he sought to advance the objects of state capture.” Thereafter he states that he believes that while Mr Moyane was SARS Commissioner his personal goals included the advancement of the State Capture Project.

10 18. There can be doubt that if Mr Moyane’s defiant attitude towards and vilification of Mr Gordhan were aimed at forcing or pressuring the latter into resigning as Minister of Finance so that the capture of the National Treasury could proceed under a different Minister of Finance it would general speaking be in the interest of the work of the commission to grant Mr Moyane Leave to Cross-examine Mr Gordhan. Equally there can be no doubt that if in laying the criminal complaint against Mr Gordhan Mr Moyane was “motivated wholly or in part by or he sought to advance the objectives of state capture it would generally speaking be in the interest of the work of this commission

20 that I grant Mr Moyane Leave to Cross-examine Mr Gordhan.

19. Mr Gordhan did not in his statement of 11 October 2018 expressly say that he believed that in adopting the defiant attitude that he says Mr Moyane adopted towards him after his reappointment as Minister of Finance and in vilifying him as he says Mr Moyane did Mr Moyane sought to force him or to put pressure on him to resign from his

position as Minister of Finance so that the capture of National Treasury could proceed under a different Minister. Nor did Mr Gordhan say in that statement that his position is that in laying the complaint against him Mr Moyane was motivated wholly or in part by or he sought to advance the objectives of state capture.

20. Mr Gordhan also did not say in that statement that Mr Moyane's personal goals while he was SARS Commissioner included the advancement of the State Capture Project. However Mr Gordhan seems to explain this when he says in his clarificatory affidavit that

10 relevant findings made by Justice Nugent form the basis of certain relevant findings made by Justice Nugent form the basis of his belief that Mr Moyane's personal goals while he was SARS Commissioner included the advancement of the State Capture Project. It would seem that since those findings had not been made as yet when Mr Gordhan made his statement in October 2018 Mr Gordhan could not have formed that belief at the time. Hence the absence of such allegations in that statement. Mr Gordhan's belief seems to be a belief that he formed after Justice Nugent had made the findings to which Mr Gordhan refers in his clarificatory affidavit.

20 21. In the directions I issued on 6 May 2019 it was stated that the directions were not intended to invite Mr Gordhan or Mr Moyane to furnish new facts which were not contained in their respective affidavits that had already been delivered to the commission but that only clarification was sought. Those directions were also to the effect that should Mr Moyane wish to comment on Mr Gordhan's clarificatory

affidavit he must deliver to the acting secretary of the commission and serve on Mr Gordhan a short affidavit on or before 21 May 2019.”

As already indicated above Mr Moyane elected not to comment by way of an affidavit on Mr Gordhan’s clarificatory affidavit. The result is that Mr Moyane has not responded by way of an affidavit or affirmed declaration to Mr Gordhan’s clarificatory affidavit to the effect that he does mean that Mr Moyane was motivated in whole or in part by or he sought to advance the objective of state capture or that Mr Gordhan believes in the light of certain findings made by Justice
10 Nugent in his reports that Mr Moyane’s personal goals while he was SARS Commissioner included the advancement of the State Capture Project.

Indeed he has not therefore given his version to this evidence.

23. Ordinarily I would not grant an applicant Leave to Cross-examine a witness if he has not given his version to the allegations or evidence implicating him. Indeed this is what happened I considered Mr Moyane’s application for Leave to Cross-examine Mr Gordhan in respect of other issues. However this time Mr Moyane previously did not consider it necessary to deliver an affidavit to deal with the
20 allegations or evidence in Mr Gordhan’s clarificatory affidavit. The directions I had issued did not oblige him to do so.

24. The day before the hearing of argument on whether I should grant Mr Moyane Leave to Cross-examine Mr Gordhan on the outstanding issue I caused a letter to be sent to Messrs Gordhan’s and Moyane’s legal representatives in which I indicated that my prima facie

view was that I should grant Mr Moyane Leave to Cross-examine Mr Gordhan but that should I grant such leave it could be necessary that I direct Mr Moyane to deliver an affidavit or affirmed declaration in which he would set out his version. In response to the letter Mr Moyane's legal representatives furnished the commission with a letter which was to the effect that Mr Moyane's primary contention was that I should grant him Leave to Cross-examine Mr Gordhan without any precondition. The letter was also to the effect that the other options were for me to either grant Mr Moyane Leave to Cross-Examine Mr

10 Gordhan but direct him to provide his version first as a precondition or direct Mr Moyane to first deliver his affidavit or affirmed declaration setting out his version and only grant him Leave to Cross-examine Mr Gordhan thereafter. Mr Moyane's council confirmed this position during the hearing of argument. If I grant Mr Moyane Leave to Cross-examine Mr Gordhan I will have to direct him to give his version.

25. On behalf of Mr Moyane it was submitted that the prima facie view I had expressed with regard to granting Mr Moyane Leave to Cross-examine Mr Gordhan was justified and correct and that I should grant Mr Moyane's application. On behalf of Mr Gordhan it was

20 submitted that I should dismiss Mr Moyane's application because Mr Gordhan had never said that in laying the complaint that Mr Moyane laid against Mr Gordhan he had acted maliciously. The difficulty that arises from this submission on behalf of Mr Gordhan is that although Mr Gordhan does not or does say that he never alleged that Mr Moyane acted maliciously in laying the complaint he laid against him. He says

elsewhere in his clarificatory affidavit that the laying of the complaint by Mr Moyane had little or nothing to do with the legitimate complaint relating to an alleged crime.

He also says that Mr Moyane abused a legal process by laying the complaint that he laid against him. I also understand his evidence to be to the effect that in laying the criminal complaint that he laid against him Mr Moyane sought to advance the objects of state capture.

26. A question that may be asked is whether by requiring
10 Mr Moyane to give his version to this Commission on the issues raised in Mr Gordhan's clarificatory affidavit this Commission is not repeating the work that has already been done by the SARS Commission. This Commission does not wish to repeat the work of the SARS Commission.

However two or three observations need to be made in this regard. The first is that the terms of reference of the SARS Commission did not include an investigation into allegations of State Capture. Secondly, this Commission cannot make findings against Mr Moyane or anyone for that matter - I am going to repeat that.

Secondly, this Commission cannot make findings that
20 Mr Moyane or anyone for that matter performed their duties in order to advance the State Capture Project or the objects of State Capture without giving such a person the opportunity to be heard. It is necessary for this Commission to hear Mr Moyane's version or side of the story and if it is in the interest of the work of this Commission that he be granted leave to cross-examine Mr - Minister Gordhan.

Grant him such leave. An allegation that someone performed his or her duties in order to advance the State Capture Project is a serious allegation and those facing such an allegation should be given an opportunity to defend themselves against it.

27. I consider that subject to one condition - it is in the interest of the work of the Commission to grant Mr Moyane leave to cross-examine Mr Gordhan.

Before this Commission it must rank as the most serious allegation or statement for it to be said that you performed your official
10 duties in order to advance the objectives of State Capture and speaking generally. Such a person should be granted leave to cross-examine with - it is in the interest of the work of this Commission to do so.

The condition is that Mr Moyane will have to deliver an affidavit or affirmed declaration in response to Mr Gordhan's clarificatory affidavit. So as to give this Commission his version on issues raised in Mr Gordhan's affidavit. I will therefore grant Mr Moyane the required leave subject to that condition.

In the result my decision is the following: one, subject to two below Mr Moyane is hereby granted leave to cross-examine Mr Gordhan
20 on a, whether in laying the criminal complaint or charges against Mr Gordhan Mr Moyane acted maliciously. B, whether in laying the criminal complaint against Mr Gordhan Mr Moyane was motivated wholly or in part by or he sought to advance the objectives of State Capture.

C, whether in laying the criminal complaint against

Mr Gordhan Mr Moyane was abusing a legal process for his own personal goals that had nothing to - nothing or little to do with a legitimate complaint relating to an alleged crime? D, whether as Commissioner of SARS Mr Moyane sought to advance the State Capture Project.

E, whether Mr Moyane's personal goals while he was SARS Commissioner included the advancement of the State Capture Project. Two, Mr Moyane is directed to deliver to the Acting Secretary or Secretary of the Commission on or before 15 January 2020 and
10 affidavit or affirmed declaration in which - in which he responds to the clarificatory affidavit delivered by Mr Gordhan.

Three, Mr Moyane's affidavit or affirmed declaration must make it clear which averments or allegations or statements in Mr Gordhan's affidavit he admits or denies. What the basis are for denying or disputing those he denies or disputes and give Mr Moyane's full version in regard to the allegations or comments.

Four, the amount of time that will be granted to Mr Moyane to cross-examine Mr - to Mr Moyane's counsel to cross-examine Mr Gordhan will be determined at a later date. That is my decision.

20 **ADV PRETORIUS:** Noted. Thank you Chair.

CHAIRPERSON: I think we will take a short break and then resume to hear the evidence of today's witness.

ADV PRETORIUS: Yes Chair.

CHAIRPERSON: Is that in order?

ADV PRETORIUS: We need to just put some more documents in your

witness file.

CHAIRPERSON: Okay.

ADV PRETORIUS: Relating to certain matters that will be raised by the first witness. If we may do so.

CHAIRPERSON: Okay. So how much time do you think we should - 10/15 minutes?

ADV PRETORIUS: 15 minutes.

CHAIRPERSON: 15 minutes?

ADV PRETORIUS: Yes. Yes.

10 **CHAIRPERSON**: Okay. Well let us make it - it is about 13 minutes past 10. Let us make it half past 10.

ADV PRETORIUS: Thank you Chair.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes Mr Pretorius are you ready?

20 **ADV PRETORIUS**: Thank you Chair. The first witness today is Mr Rieaz Shaik, better known as Mo Shaik. Before he takes the affirmation may I just point out that on your desk or on your bench Chair is a new bundle, PP1 to PP4. PP1 contains the statement of Mr Shaik and PP4 contains certain documents relevant to that statement, PP2 and PP3 are the statements of further witnesses to testify today and tomorrow.

CHAIRPERSON: Why is PP4 not part of PP1?

ADV PRETORIUS: PP4 is in that bundle, it has just been put in there.

CHAIRPERSON: Yes, but you say those it consists of additional documents that relate to PP1?

ADV PRETORIUS: PP1 is the statement of Mr Shaik.

CHAIRPERSON: Yes.

ADV PRETORIUS: PP2 and PP3 are the statements of the further witnesses to testify today and tomorrow.

CHAIRPERSON: Yes, yes.

ADV PRETORIUS: PP4 contains certain additional documents relevant
10 to PP1 that have just been placed in the file.

CHAIRPERSON: Well why are they not made part of PP1, that's my question.

ADV PRETORIUS: They could be, they could by, but ...[intervenes]

CHAIRPERSON: Because they are only relevant to PP1?

ADV PRETORIUS: Yes it is just an administrative issue that had to be dealt with because the documents were paginated, PP1 to PP3 were paginated so when PP4 came along the pagination required them to be placed at the end. That is the reason.

CHAIRPERSON: Is it possible to change that or is that ...[intervenes]

20 **ADV PRETORIUS:** We can change it, it is not a problem Chair, we can – it is just the page number that is ...[intervenes]

CHAIRPERSON: It may be that since it's been done it might be difficult, I am just having a look whether it would – all that would be needed is to change the pagination, maybe if the last page of Mr Shaik's statement is for example page 20 then those other documents

could come after page 20 and be marked 20A, 20B and so on.

ADV PRETORIUS: That could be done, and we can do that Chair.

CHAIRPERSON: Yes, yes.

ADV PRETORIUS: There is one other qualification in that the documents in PP4 are relevant to all the witnesses because all the witnesses deal with the same subject matter for these proceedings at least.

CHAIRPERSON: Oh they are not relevant only to Mr Shaik's statement?

10 **ADV PRETORIUS:** Not only.

CHAIRPERSON: Because that is what I understood you to say. Maybe – and they are not referred to in his statement?

ADV PRETORIUS: No.

CHAIRPERSON: Okay, then maybe it's fine, we can leave them as they are, I think it's simply because you said or I understood you to say they are – they belong to Mr Shaik's statement but if they are relevant for all the witnesses then they can stay as PP4.

ADV PRETORIUS: Yes Chair, just by way of clarification further these statements were taken and recorded some time ago, since then it was
20 felt by the Legal Team that further matters should be dealt with, of a general nature and of a specific nature, because the subject matter relates to all three witnesses, the fourth section of the bundle would rally logically apply to all of them.

CHAIRPERSON: Okay no that's fine.

ADV PRETORIUS: Thank you Chair.

CHAIRPERSON: The file containing the statements of Mr Rieaz Shaik, Mr Njenje and Mr Maqetuka will be admitted as EXHIBIT PP and Mr Shaik's statement will be admitted as PP1, Mr Njenje's statement as PP2, Mr Maqetuka's statement as PP3 and certain additional documents at the end of the bundle as PP4. Yes?

ADV PRETORIUS: Thank you Chair, may I just by way of introduction refer to a few matters relevant to the evidence of the witness. The three witnesses to give evidence today and tomorrow will deal with the activities of security officials.

10 **CHAIRPERSON:** Before we do that I don't know whether counsel on a watch and brief would like to go on record or he is fine without going on record.

ADV PRETORIUS: Perhaps he should.

CHAIRPERSON: Ja, okay. Let him place himself on record.

ADV LAMOLA: Thank you very much Chairperson. My name is Madimetja Lamola, I am here on a watch and brief on behalf of Dr Siyabonga Cwele.

CHAIRPERSON: Thank you, the former Minister of – I get confused about security and intelligence ...[intervenes]

20 **ADV LAMOLA:** Minister of Intelligence.

CHAIRPERSON: Ja, okay, alright, thank you.

ADV LAMOLA: Thank you very much.

CHAIRPERSON: Thank you.

ADV PRETORIUS: As I was saying Chair the witnesses who will testify today and tomorrow will deal with the activities of certain

security officials, relevant to the terms of reference of the Commission.

The first witness as we have stated is Mr Shaik.

CHAIRPERSON: Yes.

ADV PRETORIUS: But in addition by virtue of the knowledge and experience of Mr Shaik in the security intelligence field he is able to assist the Commission firstly to understand the various constitutional structures which deal with the intelligence function dictated by the Constitution and the relationship between them. He is also able to assist the Commission to highlight and explain the relevant
10 Constitutional provisions, obviously not to interpret and apply them, that is clearly the function of the Court and to the extent that you need to do so Chair yourself, but to explain generally the standards of conduct required by the Constitution of security entities and operatives about which there will be substantive – substantial evidence in addition in 2020 and that will be the first part of the Mr Shaik's evidence.

CHAIRPERSON: Yes.

ADV PRETORIUS: 33 Notices have been issued, the statements as I have said ...[intervenes]

CHAIRPERSON: I guess a long time ago?

20 **ADV PRETORIUS:** Yes, acceptably Chair.

CHAIRPERSON: Yes.

ADV PRETORIUS: The 33 Notices have been issued, the statements as you will have noted are very brief and it will be necessary to expand on them but not in a way which detracts from the procedural requirements.

CHAIRPERSON: Okay.

ADV PRETORIUS: May the witness take the affirmation?

CHAIRPERSON: Thank you.

REGISTRAR: Please state your full names for the record.

MR RIEAZ SHAIK: Rieaz Shaik.

REGISTRAR: Do you have any objection in making the prescribed affirmation?

MR SHAIK: No.

REGISTRAR: Do you solemnly affirm that the evidence you give shall
10 be the truth, the whole truth and nothing but the truth, if so please
raise your right hand and say I truly affirm.

MR RIEAZ SHAIK: I truly affirm.

CHAIRPERSON: Thank you very much Mr Shaik, before we proceed I
just want to say that I appreciate the fact that you have made yourself
available to come and share what you know with the Commission, as
you probably know from last year I have been calling for former DG's
and current DG's, former DDG's and senior officials in various
government departments and in municipalities senior officials to come
forward if they know matters that fall within the terms of reference of
20 the Commission and there have been times when I have expressed the
view that although a number of them have come forward and we
appreciate that I do feel that there must be many out there who know
quite a lot who haven't come forward.

Indeed when the Reverend Chikane was here giving evidence
last week we had a discussion about that and he gave me his

perspective but I want you to know that we appreciate when senior officials who were – who have knowledge of some of the things that really are important for the Commission come forward to help the Commission understand what was happening, so I just want you to know that we appreciate that you came.

MR SHAIK: Thank you Sir.

CHAIRPERSON: Thank you.

ADV PRETORIUS: Mr Shaik you have in front of you a bundle marked PP1, in that bundle at pages 1 to 15 is an affidavit, is that your
10 affidavit?

MR SHAIK: That's correct.

ADV PRETORIUS: At page 15 whose signature appears there?

MR SHAIK: It is my signatory.

ADV PRETORIUS: And are you satisfied that the contents of this affidavit are true and correct?

MR SHAIK: I am indeed.

ADV PRETORIUS: At page 1 from paragraphs 1 to 9 you tell the Commission some of the matters related to your knowledge and experience and your personal background, would you just go through
20 those and tell the Chair of your own background please?

MR SHAIK: Chair I – in paragraphs 1 to 9 I outline my history in respect to intelligence matters, which essentially started as a result of my detention, which led to a intelligence breakthrough for the ANC and in that capacity I received training in East Germany. I then returned illegally into the country to set up an intelligence structure and I

worked directly under the supervision and command of former President Jacob Zuma and as a result of the knowledge I accrued in the so-called underground days of intelligence I was included into the negotiation process, so I was a delegate to CODESA 1, CODESA 2, the multi-party talks I was nominated to serve on the Sub-Council of Intelligence, I was the Chair of the Amalgamation Committee that amalgamated the various statutory and non-statutory intelligence services in the 1991 to 1994 period. I was very much part together with my colleagues in passing the three pieces of legislation that governs the Intelligence Services and I am proud to say that I was also contributor to the Chapter 11 on the Constitution which is a remarkable first in the world where matters of intelligence were in the constitution of the country.

Since then and I then left the Intelligence Services in 1997, I joined the Department of Foreign Affairs, it was then called Department of Foreign Affairs, I served as Consul General in Hamburg, I returned, I was then appointed by President Mandela as the Ambassador to Algeria. I then returned, served as the Special Advisor to Minister Dlamini-Zuma. Then I left government again and I returned to government in 2009 in my capacity as Director General of South African Secret Service.

ADV PRETORIUS: During the period from – or prior to 1994 and during the period up to 2009 did you have occasion to work with the former President Zuma?

MR SHAIK: Very much so.

ADV PRETORIUS: And we will deal with some facts in relation to

evidence that the former President has given in due course. In paragraph 10 you describe the fact that you were reappointed into the security establishment, together with two other persons who are to give evidence today and tomorrow, tell the Chair about that please?

MR SHAIK: That is correct Chair. Some point in 2009 ...[intervenes]

CHAIRPERSON: Just one second Mr Shaik, I wonder if you can bring the mic just a little bit closer, ja, that's better.

MR SHAIK: At some point in 2009, I think it was in May 2009 if I may be mistaken, I received a phone call, there was a lot of speculation
10 before that in the media that my colleagues and I may be returning to the Intelligent Services and we then received a phone call from the Minister's office, from Minister Cwele's office to avail ourselves for a meeting.

When we arrived at this meeting ...[intervenes]

CHAIRPERSON: Minister Cwele at that time was already Minister of Intelligence.

MR SHAIK: He was already the Minister of Intelligence, yes.

CHAIRPERSON: Yes, it is just as I said I get confused about Intelligence and Internal Security, so Intelligence is the right title?

20 **MR SHAIK:** Correct, I would try assist the Chair in making that understanding of the difference between Intelligence and State Security Agency.

CHAIRPERSON: Yes, it is just that I think at a certain time certain terms were used.

MR SHAIK: Correct.

CHAIRPERSON: Then at another time they got changed.

MR SHAIK: Correct.

CHAIRPERSON: And I don't know whether at some stage there was some kind of splitting of parts of the same, what was the same before.

MR SHAIK: Absolutely correct.

CHAIRPERSON: So that is why sometimes it is ...[intervenes]

ADV PRETORIUS: We hope to deal with that satisfactorily in a moment.

CHAIRPERSON: That is why sometimes those of us who are not very
10 familiar with those operations get confused. Yes thank you.

MR SHAIK: So it will be safe to say sir that at the beginning of the Fifth Administration in 2009 the appointment of Minister Cwele was appointed as the Minister of State Security, all other Ministers prior to 2009 were Ministers of Intelligence, so in 2009 when the former President announced his cabinet he appointed Minister Cwele as the Minister of State Security.

CHAIRPERSON: Yes, that is interesting, ja.

MR SHAIK: So then at this meeting at Minister Cwele's office the three of us Mr Njenje, Ambassador Maqetuka and myself met, we were
20 in a holding room, and this is the first time we have spoken in a long time and we were all okay why are we here, and very shortly then we were led into a press conference in which it was announced that Ambassador Maqetuka is the Director General of SSA, Mr Gibson would be the head of the domestic branch of the SSA and I was appointed as the head of the foreign branch of the SSA.

ADV PRETORIUS: Yes, thank you.

CHAIRPERSON: I am sorry, I must have missed something, you don't mean that you were sitting in the holding room and then led to a press conference and that was announced without any discussion as yet? I must have missed something.

MR SHAIK: It was a very strange and odd situation for me myself this is the first time I was hearing that I would be now appointed as the Head of the Foreign Branch, but of course in the holding room we did discuss and I think the Minister did make a brief appearance to tell us
10 that we are now assuming the responsibility of the management of the Intelligence Services, but that is the way I recall it.

CHAIRPERSON: Oh, so it was just a brief ...[intervenes]

MR SHAIK: A very brief thing, and then we were led to the press conference, yes.

CHAIRPERSON: Yes, okay, okay, thank you.

ADV PRETORIUS: If we may take a step out of your statement or affidavit for the moment and go to EXHIBIT PP4 and Tab 5 contains certain diagrams and an extract from the Constitution.

CHAIRPERSON: I'm sorry, I'm sorry Mr Pretorius. I think you need to
20 explain something with regard to the pagination, I just realised at least with regard to P4 that it seems that its paginated is a kind of a standalone pagination and not sequential from the beginning, we normally have pagination that goes from the first page to the last in the bundle, but if this is different I think it is necessary to explain that into the record, but also so that I understand.

ADV PRETORIUS: If I may then Chair just note for the record that EXHIBIT PP4 which contains certain documents relevant to the evidence to be given is paginated from page 1 to page 47. I do note too that the initials RS appear from page 39 onwards, but perhaps it would be better Chair if the initials RS were excluded from references and from the final copy to be corrected.

CHAIRPERSON: Well PP4 it says, it starts from page 1 to whatever, but there's a page – oh that's just an index that comes before that, so that's so from page 1 up to – what is the last page?

10 **ADV PRETORIUS:** 47 Chair.

CHAIRPERSON: Yes, okay. I think deal with the others as well, page – so PP1 has its own pagination, PP1 starts from page 1 to page 15.

ADV PRETORIUS: Page 16 Chair.

CHAIRPERSON: Is it 16?

ADV PRETORIUS: Yes. 16 is just the stamp of the Commissioner of Oaths.

CHAIRPERSON: Well I don't have 16, and I don't have the stamp, but it's not – there's not supposed to be a stamp of the Commissioner of Oaths because it's not an affidavit so how come you have

20 ...[intervenes]

ADV PRETORIUS: No it is an affidavit Chair and if your file has not been updated I apologise, the statement has been replaced by an affidavit.

CHAIRPERSON: Oh, well that compounds my problem because the witness didn't do an oath this morning, he didn't take an oath it was an

affirmation so when I looked at this and said it is a statement, not an affidavit that was – that accorded with him not taking an oath and doing an affirmation.

ADV PRETORIUS: Well Chair the fact is that the statement or affidavit before you was sworn before a Commissioner of Oaths, I am not sure whether it was affirmed at all.

CHAIRPERSON: Well all I'm saying is – well not all, but part of what I am saying is certainly what I have for Mr Shaik is reflected on page 1 as his statement, statement of Rieaz Shaik and at the beginning it does
10 not say as affidavits normally do "I hereby make oath and say", it starts the story "I was an anti-apartheid student activist" and at the end of the – that statement goes up to page 15 and there is no Commissioner of Oaths certificate as one would have, so I do not mind being given what is to be used, I just want to make sure we have the same things, I do not know whether he has an affidavit or he has a statement like I do, but we must have all the same thing.

ADV PRETORIUS: Can I explain Chair?

CHAIRPERSON: Yes.

ADV PRETORIUS: As I explained to you earlier the statements were
20 taken some time ago, as a precaution I asked the investigators to have it sworn, which was done. My understanding is that you have the statement in your file, so your problem does not exist yet, it is only when the affidavit is filed, so perhaps we will just leave it as that.

CHAIRPERSON: Well if you are happy that we use a statement I am happy I just want to make sure we have the same thing.

ADV PRETORIUS: Yes, they are identical documents.

CHAIRPERSON: Yes.

ADV PRETORIUS: So for the purposes of the evidence which is given under affirmation any way perhaps we can proceed on the basis of the document in your file.

CHAIRPERSON: Yes, so that the transcript does not talk about an affidavit and then here it is a statement.

ADV PRETORIUS: Yes I will talk about a statement.

CHAIRPERSON: *Ja*, okay, alright.

10 **ADV PRETORIUS:** Happy Mr Shaik?

CHAIRPERSON: Mr Shaik do you understand what's going on?

MR SHAIK: Yes if I can just add a little clarification sir.

CHAIRPERSON: *Ja*.

MR SHAIK: It is correct what you would have because the statement was given a year ago, and then in consultation with the legal team it was agreed to turn it into an affidavit.

CHAIRPERSON: Yes okay.

MR SHAIK: I must say in the affidavit that I had before me there are some changes, they are either I neatened it up in terms of instead of
20 long history I kept it more precise.

CHAIRPERSON: Yes, yes, okay.

MR SHAIK: And there were some typo's that you will find and which may irritate you when you see it, has been changed.

CHAIRPERSON: So if both of you have affidavits, maybe if there is a spare affidavit I should just have an affidavit then we all have the same

thing. I assume the numbering is the same?

ADV PRETORIUS: The numbering is the same as I understand it.

CHAIRPERSON: *Ja.*

ADV PRETORIUS: Well perhaps you could put this in your file please Chair.

CHAIRPERSON: Yes, it does not have to be stapled because it will just go in here as is. Thank you.

ADV PRETORIUS: And I will now refer to the paragraphs in the affidavit that you have in front of you.

10 **CHAIRPERSON:** Yes okay, thank you.

ADV PRETORIUS: That is what Mr Shaik has and that is what I have, and I apologise for the fact that it should have been on your file. Just by way of introduction to the documents after Tab 5 in EXHIBIT PP4 Mr Shaik you have told the Chair that you were involved in the drafting of Chapter 11 of the Constitution.

MR SHAIK: That is correct.

ADV PRETORIUS: And you will obviously understand that once the drafter has released the written section or chapter for promulgation that is the end of the story as far as the drafters are concerned, thereafter
20 it is up to the Courts to apply and interpret.

MR SHAIK: Correct.

ADV PRETORIUS: Nevertheless you can assist us by pointing out not only the various structures to which the DCJ has referred, but you can also highlight some portions of the Constitution and explain the thinking at least behind them, subject to the fact that you cannot

interpret.

MR SHAIK: Correct.

ADV PRETORIUS: If you go please to ...[intervenes]

CHAIRPERSON: I guess it will be necessary for me to have a copy of the constitution.

ADV PRETORIUS: Yes, you have in PP4 ...[intervenes]

CHAIRPERSON: Or the relevant portions.

ADV PRETORIUS: Chapter 11 yes.

CHAIRPERSON: Oh okay, no that's fine.

10 **ADV PRETORIUS**: Page 42 and following.

CHAIRPERSON: Okay.

ADV PRETORIUS: There is an organogram at EXHIBIT PP4, page 39, do you see it?

MR SHAIK: Yes, yes I do.

ADV PRETORIUS: That is followed by an unnumbered A3 version of that page which is easier to refer to. That I understand it is the organogram that applies to the Intelligent Services under the constitution for the period 1994 to 1997.

MR SHAIK: That is correct.

20 **CHAIRPERSON**: I am sorry Mr Pretorius – oh you are at 39 of PP4

ADV PRETORIUS: Yes 39

CHAIRPERSON: Okay.

ADV PRETORIUS: It is followed by a larger copy.

CHAIRPERSON: Ja okay.

ADV PRETORIUS: Which is easier to – to read Chair so I – I would

suggest that you go to the page after page 39 and you will see an A3 version of page 39. Chair it is intended to put these up on the screen but in the meanwhile we can deal with the organogram.

CHAIRPERSON: Yes.

ADV PRETORIUS: At page 39.

CHAIRPERSON: Hm.

ADV PRETORIUS: In red along the bottom of the diagram are certain entities dealing with intelligence, what are they?

MR SHAIK: These red blocks represent the different organisations that
10 were created by the National Strategic Intelligence Act and they are the National Intelligence Agency, the NIA which was responsible for domestic intelligence.

ADV PRETORIUS: If you would pause there a moment. Is the Act the Intelligence Services Act 38 of 1994?

MR SHAIK: The Act that defined the – the mandate of the various intelligence component is the National Strategic Intelligence Act 39 of 1994.

ADV PRETORIUS: And that is the Act referred to on the right hand side of those four blocks?

20 **MR SHAIK:** That is correct.

ADV PRETORIUS: Right. That created four entities, what are those entities if you could just go through them again please?

MR SHAIK: The National Intelligence Agency responsible for the collection of domestic intelligence.

ADV PRETORIUS: Right.

MR SHAIK: And also had the counter intelligence function.

ADV PRETORIUS: Okay. The next one?

MR SHAIK: The next one is the South African Secret Service and the South African Secret Service was responsible for the collection of intelligence outside the borders of South Africa. Foreign intelligence so to speak.

ADV PRETORIUS: And then the next is Crime Intelligence?

MR SHAIK: The next is Crime Intelligence and that refers to the intelligence gathered by the police in respect of prosecuting domestic
10 crime or international crime.

ADV PRETORIUS: And the final one is Military Intelligence?

MR SHAIK: And Military Intelligence is intelligence required by the military for the deployment of troops and for their state of readiness.

ADV PRETORIUS: Right. You will see that above the National Intelligence Agency which you say deals with domestic intelligence and counter intelligence and the South African Secret Service which deals with foreign intelligence a reporting line to the National Intelligence Coordinating Committee, what is that?

CHAIRPERSON: Well Mr – Mr Pretorius before we get there I just want
20 to make sure that I understand the differences in functions of the different units or agencies. National Intelligence Agency you say that deals with what?

MR SHAIK: That deals with the domestic intelligence. So in other words intelligence inside of the country that where the bulk of the issues relates to domestic issues whether they are political unrest,

whether it is the reasons why we have unrest in the country, the crime networks, the cartels etcetera.

CHAIRPERSON: Hm.

MR SHAIK: So it is – and others could be on how government is perceived, how it is – the domestic component of intelligence is what we call the NIA's function.

CHAIRPERSON: Hm. Hm.

MR SHAIK: And included that they would have the function of counterintelligence.

10 **CHAIRPERSON:** Hm.

MR SHAIK: So in other words any threat directed towards the state, organs of state, individuals of the state that would be the function of the NIA to be able to count – firstly identify the threat and then counter that threat and broadly we refer to that as counterintelligence.

CHAIRPERSON: So counterintelligence would be what the NIA does to deal with for example people planning to overthrow the government?

MR SHAIK: Yes.

CHAIRPERSON: Yes that kind of thing.

MR SHAIK: Yes.

20 **CHAIRPERSON:** But unless – unless...

MR SHAIK: And we would know it also as...

CHAIRPERSON: Serious. They would be less serious things that they would deal with as well?

MR SHAIK: Correct. They are the serious things and the less serious things.

CHAIRPERSON: Ja. Ja. Ja. But I mean part of what they would look – part of what they would be concerned with be crime and how would they – how would their function differ from Crime Intelligence?

MR SHAIK: Yes. The – yes there is a measure of overlap.

CHAIRPERSON: Hm.

MR SHAIK: To the extent that the criminal network becomes sophisticated and a good example will be the drug cartels.

CHAIRPERSON: Hm.

MR SHAIK: The movement of drugs and a very good example is and I
10 hope I get it right.

CHAIRPERSON: Hm.

MR SHAIK: The drug Nyaope.

CHAIRPERSON: Hm.

MR SHAIK: Which is decimating our townships.

CHAIRPERSON: Hm.

MR SHAIK: And our cities.

CHAIRPERSON: Hm.

MR SHAIK: Etcetera.

CHAIRPERSON: Hm.

20 **MR SHAIK:** And Nyaope is a heroine based drug.

CHAIRPERSON: Hm.

MR SHAIK: And heroine is a product of a plant grown in Afghanistan, Pakistan etcetera.

CHAIRPERSON: Hm.

MR SHAIK: And that is that part of the world.

CHAIRPERSON: Hm.

MR SHAIK: We are here in – in Africa.

CHAIRPERSON: Hm.

MR SHAIK: The – that drug has to come from Afghanistan, Pakistan.

CHAIRPERSON: Hm.

MR SHAIK: Through here and most times it enters the East Coast.

CHAIRPERSON: Hm

MR SHAIK: Of the Indian Ocean.

CHAIRPERSON: Hm.

10 **MR SHAIK:** And then through various countries smuggled in – into South Africa.

CHAIRPERSON: Hm.

MR SHAIK: So you can see just in that example.

CHAIRPERSON: Hm.

MR SHAIK: How foreign intelligence would be used to monitor the flow of these drugs.

CHAIRPERSON: Hm.

MR SHAIK: And when it enters the country here it enters a distribution network.

20 **CHAIRPERSON:** Hm.

MR SHAIK: So you can see now how the – the domestic intelligence will get involved in the distribution network.

CHAIRPERSON: Hm.

MR SHAIK: To understand the distribution network.

CHAIRPERSON: Hm.

MR SHAIK: And then eventually when the drugs are sold and the monies flow.

CHAIRPERSON: Hm.

MR SHAIK: Because monies will also flow in the reverse process.

CHAIRPERSON: Hm.

MR SHAIK: You will get the Financial Intelligence Centre getting involved. You will get the NIA getting involved in respect of that.

CHAIRPERSON: Hm.

MR SHAIK: And when it is now prosecuted as a crime.

10 **CHAIRPERSON:** Hm.

MR SHAIK: That is when Crime Intelligence gets involved.

CHAIRPERSON: So – so the – the South African Secret Service which I think you said deals with International or Foreign side of Intelligence – so they could be involved in monitoring the movement of Nyaope from Afghanistan or wherever and for example get to know that it is destined for our shores.

MR SHAIK: Yes.

CHAIRPERSON: And then they could then share that information with the NIA so that when it lands on our shores the NIA is ready to deal
20 with it?

MR SHAIK: Absolutely correct.

CHAIRPERSON: Yes. And then when the NIA deals with it it could end up with Crime Intelligence and ultimately with SAPS and – in the courts?

MR SHAIK: Yes. That is correct Sir.

CHAIRPERSON: Yes.

MR SHAIK: That was the – the way it was designed.

CHAIRPERSON: Yes.

MR SHAIK: And then if you look at the red line and maybe I am just getting ahead of the evidence leader.

CHAIRPERSON: Yes, yes. But...

MR SHAIK: But if you look at the ...

CHAIRPERSON: But I just want to understand ja.

MR SHAIK: The red structures and above that is the National
10 Intelligence Coordinating Committee.

CHAIRPERSON: Yes. Yes.

MR SHAIK: And that is a – the committee that was designed to share this kind of intelligence.

CHAIRPERSON: The information.

MR SHAIK: Both tactical intelligence.

CHAIRPERSON: Yes.

MR SHAIK: And at a strategic level.

CHAIRPERSON: Yes. Okay. Okay. Okay so – so Crime Intelligence I think I understand this other Secret Service from what the examples
20 that we have just used.

MR SHAIK: Yes.

CHAIRPERSON: But Crime Intelligence from what you say it looks like in the examples that we have used would – would not – would only get involved after NIA had been involved. In terms of those examples. But in terms of other crimes it could act as an intelligence unit or first

instance if you – if you understand what I mean?

MR SHAIK: Absolutely correct.

CHAIRPERSON: Yes.

MR SHAIK: And let us just take another example in the case of ATM.

CHAIRPERSON: Hm bombings.

MR SHAIK: ATM bombs.

CHAIRPERSON: Ja.

MR SHAIK: Ja.

CHAIRPERSON: Yes.

10 **MR SHAIK:** There the Crime Intelligence.

CHAIRPERSON: Yes.

MR SHAIK: Would deploy its resources.

CHAIRPERSON: Yes.

MR SHAIK: To get to know who are behind that etcetera.

CHAIRPERSON: Hm.

MR SHAIK: And they would then request.

CHAIRPERSON: Hm.

MR SHAIK: To the – the – the Civilian Intelligence Community.

CHAIRPERSON: Hm.

20 **MR SHAIK:** Technological Support.

CHAIRPERSON: Hm.

MR SHAIK: Which is then given to – to Crime Intelligence when they are leading the investigation.

CHAIRPERSON: Hm. Hm. And the Military Intelligence really would relate to who – who wants to attack us or as a country or what?

MR SHAIK: Yes. So you will recall that in our awful history of apartheid.

CHAIRPERSON: Hm.

MR SHAIK: We had structures created under Military Intelligence.

CHAIRPERSON: Hm.

MR SHAIK: And a good example would be the CCB.

CHAIRPERSON: Hm.

MR SHAIK: Which engaged in extra judicial killings in the country.

CHAIRPERSON: Hm.

10 **MR SHAIK:** So one of the ...

ADV PRETORIUS: That was a civil cooperation bureau?

MR SHAIK: That is the civil cooperation bureau.

CHAIRPERSON: Hm.

MR SHAIK: So one of the key principles that emerged during the negotiations was that the military will not be able to conduct intelligence inside of the country.

CHAIRPERSON: Hm. Hm.

MR SHAIK: And this was a – a – and it still remains a fascinating discussion.

20 **CHAIRPERSON:** Hm.

MR SHAIK: Because any institution that when it deploys has to rely on its own intelligence.

CHAIRPERSON: Hm.

MR SHAIK: It does not invariably rely on other people's intelligence when it is deploying.

CHAIRPERSON: Hm.

MR SHAIK: So it is easy in the case of the military when they are involved in operations outside of the country. Military Intelligence will inform the terrain, the gathering, the persons that informs the deployment of the military outside the country. Of course the difficulty will arise and – and we would have such a situation in the call to deploy the military inside the country. Then the question will remain, what intelligence will the military rely on when it deploys inside the country? But at the time we did not envisage that contradiction and we
10 believed that through the mechanism of NICOC the coordinating mechanism that we would be able to best resolve that issue if and when it arose.

ADV PRETORIUS: Okay.

CHAIRPERSON: Well I know that I – I just said that I take it that Military Intelligence is about intelligence relating to who wants to attack us.

MR SHAIK: Yes that is it.

CHAIRPERSON: But – which is rather from outside the borders of the country. But now if we want to know – or the President wants to know
20 whether within the country there is a group of people who are planning to go to the headquarters of the SANDF and kidnap the general ...

MR SHAIK: Shoke.

CHAIRPERSON: Ja and other senior military leaders and go on radio and television and say, we have taken over the government of South Africa. If he wants to know whether there are people within the country

who would be expected to pick up that kind of intelligence or is it all of them? Or would the Military Intelligence be expected to pick that up themselves?

MR SHAIK: No. The – in the main Sir that will be the function perhaps of the counterintelligence of the NIA and to some extent Crime Intelligence. But let me just assure you firstly that I do not think there is anyone willing to attack South Africa. And secondly those who want to take over the headquarters must first know where the headquarters is.

10 **CHAIRPERSON:** Yes.

MR SHAIK: And we get that wrong sometimes.

CHAIRPERSON: Yes. Okay, no that – that is alright. So – so the Military Intelligence is outward looking?

MR SHAIK: Correct.

CHAIRPERSON: And the – the NIA is inward looking?

MR SHAIK: Correct.

CHAIRPERSON: South African Secret Service outward looking and Crime Intelligence inward looking too.

MR SHAIK: And it may have a combination inward and outward.

20 **CHAIRPERSON:** Inward and outward.

MR SHAIK: ja.

CHAIRPERSON: And military outward looking.

MR SHAIK: Yes.

CHAIRPERSON: Okay. Thank you very much. I think I understand better now.

ADV PRETORIUS: Thank you.

CHAIRPERSON: Thank you.

ADV PRETORIUS: We will deal with the reporting lines.

CHAIRPERSON: Yes.

ADV PRETORIUS: And oversight.

CHAIRPERSON: Yes.

ADV PRETORIUS: In addition.

CHAIRPERSON: Okay.

ADV PRETORIUS: Chair. But before we do that these four entities
10 that you have referred to share joint services as I understand it
including technological services like interception, monitoring and the
like?

MR SHAIK: In the – in the case of Crime Intelligence and Military
Intelligence there is a capacity by the Civilian Intelligence that has
intercept capacities and a structure was created for request from the
Military Intelligence and Crime Intelligence to this structure to intercept
on behalf of Crime Intelligence and Military Intelligence.

ADV PRETORIUS: Okay. And those and other joint services such as
training and the like, internal security in other words the security of the
20 operatives and the entities are to an extent as you have explained
shared services?

MR SHAIK: The joint services pertained to the National Intelligence
Agency and the South African Secret Service. The – the Crime
Intelligence was a division of the South African Police Service and they
have their own organisational culture, training etcetera. To the extent

that sometimes there is cooperation yes but these joint services in this diagram represents the – the joint services that were prevalent in 1994 between the NIA and the South African Secret Service.

ADV PRETORIUS: Alright. And you have explained that Crime Intelligence and Military Intelligence may request certain...

MR SHAIK: That is correct.

ADV PRETORIUS: Technological assistance from National Intelligence Agency and the South African Secret Service?

MR SHAIK: That is correct.

- 10 **ADV PRETORIUS:** Alright. You have told the Chair that these entities report for coordination and cooperation to the National Intelligence Coordinating Committee.

MR SHAIK: That is correct.

ADV PRETORIUS: And it seems from the diagram that you explained that that committee reports to an intelligence coordinator who in turn reports to the President?

MR SHAIK: Yes. I must – I must point out Sir that this was all applicable in the 1994/1997 period.

ADV PRETORIUS: Yes.

- 20 **MR SHAIK:** Things have changed since then.

ADV PRETORIUS: Yes sure.

MR SHAIK: Yes.

ADV PRETORIUS: Okay. The Crime Intelligence resorts under the South African Police Service reporting in turn to the Minister of Police?

MR SHAIK: Correct.

ADV PRETORIUS: And Military Intelligence resorts under the South African National Defence Force under the direction of the Minister of Defence?

MR SHAIK: That is correct.

ADV PRETORIUS: Alright. For oversight purposes in other words oversight over the...

CHAIRPERSON: I am sorry.

ADV PRETORIUS: Activities...

CHAIRPERSON: I am sorry Mr Pretorius. Am I missing something on
10 this organogram because I do not seem to see the Minister of Intelligence? I see Minister of Justice, Minister of Police, Minister of Defence, Intelligence Coordinator reporting directly to the President.

ADV PRETORIUS: Yes.

CHAIRPERSON: Have I –

MR SHAIK: No it is correct.

CHAIRPERSON: I am not missing anything?

MR SHAIK: No you are not.

CHAIRPERSON: Oh.

ADV PRETORIUS: Mr Shaik will explain that.

20 **CHAIRPERSON:** Will explain okay, alright? Well that – that came from the fact that I thought the Minister would report to the President but then there is a coordinator. Okay, alright, thank you.

ADV PRETORIUS: Chair I see it is eleven twenty I am not sure when you want to take the short adjournment?

CHAIRPERSON: We can take the short adjournment now or we can

take it half past ten- half past eleven. We did start at half past eleven.

In terms of what you want to cover does it matter?

ADV PRETORIUS: Well it will take some time to go through these because there are two more diagrams to go through.

CHAIRPERSON: Oh. So it is...

ADV PRETORIUS: This is the situation to 1997. It changed in 1997.

CHAIRPERSON: Yes.

ADV PRETORIUS: And changed once again in 2009.

CHAIRPERSON: Yes.

10 **ADV PRETORIUS:** It is very confusing.

CHAIRPERSON: Yes.

ADV PRETORIUS: So it is quite important to.

CHAIRPERSON: So maybe it is better that we adjourn – take the tea adjournment and then continue.

ADV PRETORIUS: Yes.

CHAIRPERSON: After that. Okay alright. We will take the tea adjournment now it is twenty past eleven we will resume at twenty five to twelve.

ADV PRETORIUS: Thank you Chair.

20 **CHAIRPERSON:** We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes. Let us proceed.

ADV PRETORIUS: Thank you Chair. Mr Shaik we will see in the

diagrams to follow that indeed there is a Minister responsible for Intelligence - two different designations over time, but would you explain to the Chair please why on this organogram - 1994 to 1997 - there is no Minister that appears to be directly related to Intelligence.

MR SHAIK: Chair, the - the issue arose during the negotiation process how best should the Intelligence Services be managed a controlled and during the negotiation process that led to the sub council of Intelligence. A set of principles were agreed upon and these principles then were reflected in the Constitution and in the Legislation.

10 It was never envisaged that we would have a fully-fledged Minister and if I draw your attention to the various sections in the Constitution. In - in respect of defence ... (intervenes).

ADV PRETORIUS: We will get there.

MR SHAIK: Oh. We will get there. Okay.

CHAIRPERSON: Hm.

ADV PRETORIUS: Yes.

MR SHAIK: So there was never envisaged that there would be a dedicated Minister of Intelligence and in 1994 under the then President Mandela the Minister of Justice assumed the administrative
20 responsibility for the Intelligence Services not the direction and the control in terms of the substance of their work, but in respect of the administrative matters.

The budget matters. The appointment matters. The regulation matters, but not the control of the Intelligence process itself.

CHAIRPERSON: Well Mr Pretorius I think it is - it is convenient that

before we proceed I - I see the structure in the Interim Constitution to the extent that what you say is how it was reflected in the Constitution. Obviously the administrative power of the Minister of Justice maybe might not be ...

ADV PRETORIUS: Hm.

CHAIRPERSON: In the Constitution, but I would like to see that and then see how even the final Constitution is structured before we proceed, because then I think I will understand some of the explanations that you give better.

10 **ADV PRETORIUS:** Yes Chair. We had intended to go through Chapter 11 in some detail. So if we may do that ...

CHAIRPERSON: Hm.

ADV PRETORIUS: And some of the concerns or questions you have raised will be answered in that process.

CHAIRPERSON: Hm.

ADV PRETORIUS: Then we can go back to the diagrams.

20 **CHAIRPERSON:** Yes. No. That is fine. Let us - let us do that. Even if we just look at simply the structure to say look at this. Here are the main features. This is not there. This is there. This is what this might mean ...

ADV PRETORIUS: Yes.

CHAIRPERSON: And then later on we can go back if necessary. Do we also have in here relevant parts of the Interim Constitution or not?

ADV PRETORIUS: We do not. We just deal with the - chapter 11 of the ...

CHAIRPERSON: The final?

ADV PRETORIUS: Final Constitution.

CHAIRPERSON: Ja, but there was no difference. Do you know?

ADV PRETORIUS: The - the principles to which the ...

CHAIRPERSON: Were the same? Final Constitutional

ADV PRETORIUS: Witness now refers are in the Final Constitution.

CHAIRPERSON: Oh. Okay. Alright. So where do I find the relevant parts of the Constitution ... (intervenes)?

ADV PRETORIUS: Page 42.

10 **CHAIRPERSON:** Page 42?

ADV PRETORIUS: Of PP4.

CHAIRPERSON: Yes.

ADV PRETORIUS: I would like to deal with the governing principles because in 198D there is important provision in relation to the structures.

CHAIRPERSON: And just for the record what we are looking at now is Chapter 11 of the Final Constitution?

ADV PRETORIUS: Yes.

CHAIRPERSON: Okay.

20 **ADV PRETORIUS:** There are certain governing principles that were established in the Constitution in relation to Chapter 11 Security Services. What are those provisions and I would like to put all those on record through you Mr Shaik particularly 198D?

MR SHAIK: "The following principles govern National Security in The Republic: A, National Security must

reflect or resolve of South Africans as individuals and as a nation to live as equals, to live in peace and harmony, to be free from fear and want to seek a better life. B, the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict nationally or internationally except as provided for in terms of the Constitution or National Legislation. Three or C, National Security must be pursued in compliance with the law including international law and D, National Security is subject to the authority of Parliament and the National Executive.”

The important thing in A was a major shift in the paradigm that we adopted in this Constitution. Essentially A refers to what we call human security. Where the National Security of the country is pursued through human security. The security of the citizens free from fear, free from want.

It is remarkably distinct from State Security which is the purview or the paradigm that governed apartheid. Where people were uprising in the country because of apartheid policies. The intelligence paradigm of that time was concerned with the security of the State.

ADV PRETORIUS: Or a particular Government?

MR SHAIK: Or a particular Government.

ADV PRETORIUS: Or particular officials within Government?

MR SHAIK: Exactly. Exactly and whereas here is a fundamental

constitutional shift where the Constitution puts an obligation to pursue National Security through human security of South African citizens.

CHAIRPERSON: The reference to the State as opposed to the reference to a particular Government of the day?

MR SHAIK: Yes.

CHAIRPERSON: Might - might - would it be pursuing the security of the State as opposed to the security of a particular Government of the day. To what extent would it be different from human security insofar if it is done properly?

10 **MR SHAIK:** Yes. That is a very interesting distinction, sir.

CHAIRPERSON: Hm.

MR SHAIK: The - the understanding of human security is that we would address the concerns and the fears and the wants of - of your citizens. Let - let me give you an example. We have incredible public service delivery protests and public service delivery protest is a direct result of the lack of poor services.

The solution to that is not to look at those who are agitating for the protest. The solution to that is to address the issues of the poor public service delivery and that is a classic distinction between
20 human security and what we will call State Security where you are protecting. Of course the police would have to protect the institutions.

For example when our trains get burnt. There is a fair amount intelligence that is required to prevent that, but ultimately the - the solution to that problem rests in insuring that there is efficient trained services and efficient and able and capable and affordable

trained services.

So if you put too much emphasis on the protection of the State's assets or the Government's assets you are forgetting the most fundamental thing. What is the reason why this is happening?

CHAIRPERSON: I - I kind of qualify my question by saying if those who are supposed - who are responsible for State Security do their job properly. What I had in mind is there would be no State without people?

MR SHAIK: Correct.

10 **CHAIRPERSON:** And the State must look after its people?

MR SHAIK: Yes.

CHAIRPERSON: And therefore whether one cannot say even if you speak of State Security if the understanding is the correct understanding would it not lead to those people looking after the citizens properly as well?

MR SHAIK: Absolutely correct.

CHAIRPERSON: Yes.

MR SHAIK: Absolutely correct.

CHAIRPERSON: Okay. Thank you.

20 **MR SHAIK:** It goes to how you understand ...

CHAIRPERSON: Yes.

MR SHAIK: The function of security

CHAIRPERSON: Yes. Yes.

MR SHAIK: And hear what - what the founders of the Constitution felt that it was important to put the correct perspective.

CHAIRPERSON: Yes.

MR SHAIK: On how National ...

CHAIRPERSON: Yes.

MR SHAIK: Security should be viewed.

CHAIRPERSON: Yes and - and I guess - I guess that it may have been necessary to put it that way. Even if it was an option to put it as State Security on the understanding that after 1994 State Security would be seen as including the security of the people.

MR SHAIK: Yes.

10 **CHAIRPERSON:** It may have been necessary to put it that way in order to emphasise what was not emphasised before.

MR SHAIK: Correct.

CHAIRPERSON: Yes. Okay.

MR SHAIK: Correct.

CHAIRPERSON: Thank you.

ADV PRETORIUS: 198B Mr Shaik deals with the issue of armed conflict both within the borders and internationally.

MR SHAIK: Yes.

20 **ADV PRETORIUS:** The principle in relation to what one may term extra or constitutional armed force. What does this principle say about that?

MR SHAIK: The - and again this is influenced by historical context. Much of the - the paradigm to keep apartheid alive meant destabilising countries outside of South Africa where it was envisaged that liberation forces had military basis and a classical example you will know that in Mozambique you had tremendous amount of funding going from the

then South African Defence Force to forces and I just do not want to name them.

Perhaps I could. Say went to Renamo which was a counter insurgency outfit in Mozambique that was engaging in the destabilisation of the national party. The Frelimo Party that took party in 1997 in Mozambique or 1994 - 1974.

CHAIRPERSON: 1974. Yes.

MR SHAIK: 1974. Yes.

CHAIRPERSON: Hm.

- 10 **MR SHAIK:** So we then had a situation where South Africans were engaged in armed conflict outside of South Africa and they were considered to be mercenaries and what we wanted in our Constitution is to avoid South Africans getting involved in international conflict where they are selling their services as mercenaries.

So as a result of that a - a law was passed that prohibited that in the main and there were certain conditions that had - you had to apply before you engage in that kind of activity.

- ADV PRETORIUS:** And what does the section say for president purposes - for present purposes in relation to the employment of armed
20 conflict within South Africa.

MR SHAIK: Armed conflict in South Africa?

ADV PRETORIUS: Yes.

MR SHAIK: The ...

ADV PRETORIUS: For example. The arming of certain groups in order to attain certain objects within South Africa.

MR SHAIK: It is absolutely forbidden and illegal ...

ADV PRETORIUS: Yes.

MR SHAIK: And should be prosecuted.

ADV PRETORIUS: Then C and D in particular perhaps you could explain 198D in relation to the oversight responsibilities in relation to the operations and perhaps to expenditure in relation to security entities.

MR SHAIK: Again - again sir that the Intelligence and security in - in the apartheid era had certain features which was unacceptable for us
10 as we entered the - as we wanted to construct a new paradigm. For example Intelligence or security could not be a law unto itself and the Nuremburg doctrine of I just followed an order or I just followed a command.

We wanted to make sure that that none of that applies in our democracy. So we then said that National Security must be subject to the authority of Parliament. So Parliament should be fully involved in the affairs of Intelligence. In the affairs of security. So that Parliament is kept abreast of what is happening including the budget.

Including money allocations. Including operations and we
20 came up with a particular formula in which for that to happen and you will notice that we - we created under the National Strategic - the Intelligence Oversight Act. We created for the first time in South Africa two important institutions.

The first is the institution of a Joint Standing Committee of Intelligence which was then called the JC - JSCI. It is a multiparty

committee that has full access to all that Intelligence does and has full access to the records of the Intelligence Community, the budget etcetera and so through a Joint Standing Committee and Parliamentary Intelligence and we found creative mechanisms to get around some of the - the obligations of democracy and balancing transparency and accountability.

I think those members are vetted - in Parliament are vetted. They go through a process. They go through an induction on how to deal with the secret information. So that is the - the first. The second
 10 mechanism was the appointment of the Inspector-General of Intelligence.

Now we saw the Inspector-General of Intelligence as a kind of Intelligence Ombud that - where the public - where the public who feels aggrieved by any misconduct of the intelligence service would have an office or an instrument to be able to raise matters and we so felt that the founders of the Constitution felt it such an important institution that it put an obligation that it was put in the Constitution and under Section 2.10 of the Constitution it reads that:

“2(10)(b), Civilian monitoring of the activities of
 20 those services by an Inspector-General appointed by the President as Head of the National Executive and approve by resolution adopted by the National Assembly with a supporting vote of at least two-thirds of its members.”

Now the two-third barrier was a very high barrier to set. It

was not by simple majority. It is not by 60 percent. By two-thirds, because again the founder of the Intelligence or the founders of the Constitution wanted to ensure that it is accepted by almost all of - of Parliament in the choice of the person in the Inspector-Generals Office.

So those were the two institutions of oversight and the Act was the Intelligence Services Oversight Act that was passed.

ADV PRETORIUS: There may be further questions when we revert to the diagram ...

MR SHAIK: Yes.

- 10 **ADV PRETORIUS:** In relation to detail of the structure, but for the moment would you please deal with Section 1-9-9 of the Final Constitution which deals with the establishment structuring and conduct of Security Services.

MR SHAIK: So under the - the establishment we defined under Section 1-9-9-(1):

“The Security Services of The Republic consist of a single Defence Force, a single Police Service and any Intelligence Services established in terms of the Constitution.”

- 20 So no Intelligence Service could borne if unless established by the Constitution and there is a particular power that is given to the President to do so and there is a condition that limits the power of the President in establishing of such a service. I would do - I would come to that later.

ADV PRETORIUS: Yes.

MR SHAIK: Okay.

CHAIRPERSON: I see that the Constitution is emphatic that in terms of the Defence Force it is a single Defence Force. In terms of the Police it is a single Police Service, but it does not have that emphasis for Intelligence Service. Is that - is that in accordance with what the ...

MR SHAIK: Yes. It is ...

CHAIRPERSON: Discussions were?

MR SHAIK: It is in accordance with the discussions ...

CHAIRPERSON: Yes.

- 10 **MR SHAIK:** And it was envisaged that - that Intelligence will be a National capability. So there was going to be no - no province is going to establish an own Intelligence Service and therefore it was insisted that only by the Constitution and of course this is a clever way to write it, because if you look at the - the President's power.

Only the President can establish an Intelligence Service and only in keeping with National Legislation, but we will get - get to that later. *Ja*.

CHAIRPERSON: Okay. Thank you.

ADV PRETORIUS: And then from 1-9-9-(2) onwards.

- 20 **MR SHAIK:** So 1-9-9-(2) onwards. Again it establishes:

"A Defence Force's only lawful military force in The Republic. Other than the Security Services established in terms of the Constitution. Armed organisational services may be established only in terms of National Legislation. The security services

must be structured and regulated by National Legislation. The Security Services must act and must teach and require their members to act in accordance with the Constitution and Law including Customary International Law and International Agreements binding on the Republic. No member of the Security Services may obey a manifestly illegal order. ... (Intervenes).”

ADV PRETORIUS: And I understand that subsections 1-9-9-(5) and
10 1-9-9-(6) are informed again by our history?

MR SHAIK: Yes. Informed by our history and we wanted - we wanted to remove completely the ignorance of the law. So no Intelligence Service Member must be able to say I did not know the law and therefore the obligation was placed on the Intelligence or the Security Services which the Intelligence Services are part of.

To teach and train its members not only on the Constitution, but also in terms of International Law and other - other law. So it was a requirement to ensure that our new Intelligence Services or the new Security Services were going to act in - in the spirit of the Constitution
20 and to uphold the Constitution in its entirety.

CHAIRPERSON: Well was there actually a slight qualification in - in the reason for it. Namely not - not that you did not want any member of the Security Services to say I did not know the law, because that might be fine when it cannot be said that you must have known this was illegal.

MR SHAIK: Yes.

CHAIRPERSON: So in other words on the probabilities that what you wanted to do is to prevent people from carrying out manifestly illegal orders, because even when they saw - realised that this order is illegal. They could say well if I am instructed by the Commander ...

MR SHAIK: Hm.

CHAIRPERSON: If I am instructed by somebody occupying that position ...

MR SHAIK: Yes.

10 **CHAIRPERSON:** What can I do?

MR SHAIK: Yes.

CHAIRPERSON: So they know it is illegal, but because of where the order comes from they might say I had no choice.

MR SHAIK: Yes.

CHAIRPERSON: You wanted them to - you wanted to say once the order is manifestly illegal you cannot say because it came from somebody in a particular position.

MR SHAIK: Yes.

CHAIRPERSON: You could not do it ...

20 **MR SHAIK:** Yes.

CHAIRPERSON: But where you in good faith did not think there was anything illegal with the order then you stand in a different place all together ...

MR SHAIK: Correct.

CHAIRPERSON: But where it is manifestly legal. That is what you

wanted to deal with.

MR SHAIK: Correct.

CHAIRPERSON: Ja. Okay.

MR SHAIK: And - and you are absolutely right, sir and that is why it is in both cases where it is not manifestly illegal. Then our teachings of our members of the law should equip them to make the right decision ...

CHAIRPERSON: Yes. Yes.

MR SHAIK: And where it is manifestly illegal they have a constitutional obligation not to obey that. So we felt very strongly about it.

10 **CHAIRPERSON:** Yes.

MR SHAIK: So you are absolutely correct.

CHAIRPERSON: No. Thank you.

ADV PRETORIUS: Chair if I may just say at this stage this detail as you appreciate obviously is important, because it informs the constitutional standard against which the conduct which will be given in evidence or testified to in evidence over a period of time in the Commission must be judged. Subsection 1-9-9-(7) is also instructive.

MR SHAIK: It is indeed and I ...

ADV PRETORIUS: Can you explain that please?

20 **MR SHAIK:** It reads:

“Neither the Security Services nor any of their members may in the performance of their function a, prejudice a political party’s interest. That is legitimate in terms of the Constitution or b, further in a partisan manner any interest of a political

party.”

Now again these were important principles that informed the negotiations and there was given our past we wanted to bring the Intelligence Services and the Security Services out of the realm of politics and the political machinations and we thought it was so important that it must be put in the Constitution.

Where you can neither further an interest in - in a negative way nor further it even in a positive way and this placed tremendous obligation on all of the members of the services in the 1994 period, 10 because we all came from a political history. I for one came from the ANC, but it means that henceforth once I joined the service my conduct in regard to an Intelligence Officer had to be incredibly distinct from my conduct as a member of the ANC and I could not in any way through my Intelligence Services work favour or prejudice the ANC or any other political party and this has given rise to a - a huge debate at least in my mind on the very concept of what is called political intelligence.

When it comes to political parties and whether in - in the developed world it is considered illegal and unethical to monitor political parties and what is going on in political parties. That is the 20 subject of politics and democracy which Intelligence Services should not get involved in. Including - including if there are members in - of a political party that wishes through its own reasoning wanting to - to replace a sitting President of the - that party and as long as they do it legally and as long as they do it within the structures of democracy Intelligence Services have no basis to monitor even that.

CHAIRPERSON: I guess that the provisions of Section 1-9-9-(7)-(a) and (b) well they talk about a party, but you just referred to a situation where some people in a party might ...

ADV PRETORIUS:

MR SHAIK: Yes.

CHAIRPERSON: Be wanting to unsit the President of that party and as you - you say as long as they do - do it legally and constitutionally you know Intelligence Services should have no business to be involved there.

10 **MR SHAIK:** Correct.

CHAIRPERSON: So this provides a basis does it not for any member of the Intelligence Services who would engage in any conduct to advance the interest of any particular political party that he or she would be acting in breach of this and possibly the relevant legislation as well.

That - that should be none of their business as long as it is done within the principles of democracy and within the confines of the law.

MR SHAIK: That is correct sir.

20 **CHAIRPERSON:** Yes and if it happens it's just a breach of these constitutional provisions and whatever may be in legislation.

MR SHAIK: That is correct sir.

CHAIRPERSON: This talks about a party and doesn't talk about an individual, maybe when we go to the legislation there might be individuals as well, I'm not sure. So if I am the head of Military

Intelligence or maybe I'm not the head of Military Intelligence, if I am a possible candidate for head of Military Intelligence and I want to be appointed as head of Military Intelligence can I say to the President, I assume Mr President who appoints the head of Military Intelligence, is that so?

MR SHAIK: No.

CHAIRPERSON: No, okay maybe it's a wrong...[intervenes].

MR SHAIK: Then use the NIA example.

CHAIRPERSON: Oh okay maybe NIA, if I say to the President you
10 know if I get appointed as head of NIA I will look after you or anything like that or I will make sure that A, B, C, D does happen which will be in your favour, that's clearly wrong.

MR SHAIK: Clearly wrong.

CHAIRPERSON: And clearly in breach of some legislation.

MR SHAIK: Indeed it is.

CHAIRPERSON: Yes okay.

MR SHAIK: And let me just touch on a very important point in respect of that sir. The – different people perceive intelligence remarkably different. Some people see intelligence as you know the dark arts, you
20 are there to keep them in power by predicting the future etcetera and that is a really antiquated concept of intelligence and those who believe in that concept of intelligence invariably get things awfully wrong but that is a subject matter for another time.

CHAIRPERSON: Well I'm hoping that as we continue at some stage we will talk more about those things because you know it's often said

about our country that it's got the right constitution, it's got the right legislation, it's got the right policies but things go horribly wrong with implementation and one of the things that I have publically said many times before that I believe should be looked at by this Commission is the question of whether, as a member of parliament who belongs to a particular political party when you are supposed to perform your duties there, including duties that may relate to votes of no confidence and impeachment and so on, can your party say to you irrespective of what you think is right or wrong, this is how you must vote and what do you

10 do if your party says – let's say your party says vote in this way but you believe that, that's not in accordance with the constitution you believe that holding the executive accountable means that you must vote differently but it is your party that has sent your name to parliament what do you do. It raises the same question in a certain way that you have touched on to say when you are in intelligence you are not supposed to be advancing the interests of any political party you are supposed to be just doing your job. You, in accordance with the constitution, and the law but there may be expectations. Take yourself as – with your background in the ANC and struggle there may be

20 expectations from certain people, your comrades who were in the trenches with you who think, okay now that we have got him there so he will have to remember that he comes from us, he's one of us he must remember even maybe that we put him there and therefore they might have certain expectations which might not accord with what the constitution says and what the law says and to what extent do these

situations which give rise to these challenges, to what extent have they had a role to play in putting our country where it is now in relation to levels of corruption, in relation to allegations of State Capture and so on. So it becomes important because maybe in certain circumstances people feel torn between acting in a certain way and acting in a certain way and it may be that some of those things need to be looked at. So I just give you that context so that you may understand why I'm saying in regard to what you said, we might need later on to deal with it and let me have the benefit of your views on it.

10 **MR SHAIK:** Thank you I will sir thank you.

CHAIRPERSON: Thank you.

ADV PRETORIUS: Mr Shaik section 1998 importantly deals with principles of transparency and particularly for the evidence to be led in due course before the Commission, accountability. What has section 1998 provided, what was the thinking behind it?

MR SHAIK: The – do I need to read it into ...[intervenes].

ADV PRETORIUS: Please I think it's important.

MR SHAIK: So 1998,

20 "To give effect to the principles of transparency and accountability multi-party parliamentary committees must have oversight of all security services in a manner determined by National legislation of the rules and orders of parliament".

ADV PRETORIUS: Yes if I may just emphasise the must it's not optional.

MR SHAIK: It's not optional you are absolutely correct sir it is not an option it's a must and again the reason being that we wanted, in our young democracy at the time for all parties to have a level of comfort that the workings of the Intelligence Services or the Security Services are in keeping with the values enshrined in the constitution and that we are consistent with the code of conduct expected of the Security Services given the history of our past. So there was no attempt to hide the Security Services away from parliament in fact, a lot went into the thinking by ensuring that parliament plays a proper role of oversight
10 over the Security Services and that was the thinking.

ADV PRETORIUS: Yes and that would include oversight over expenditure?

MR SHAIK: Oversight over expenditure as well, correct. So to the best of my understanding, in the case of the Police, the Military and the Intelligence Services these oversight committees do exist and these oversight committees have access to the budgets and are required to make an input prior to budget allocations.

ADV PRETORIUS: Before we go to section 209 and to section 210 which deal specifically with Intelligence, you will recall earlier this
20 morning the issue of a responsible Cabinet Minister or a responsible President arose in relation to the Defence Force Police and Intelligence Services and in that respect you were about to refer to section 2011 in relation to Defence and 2061 in relation to Policing.

MR SHAIK: Yes, if we look at section 2011 under the title Political Responsibility a member of Cabinet must be responsible for defence

that is 201 and I'll quickly read out 2061 again under police under the section Political Responsibility, 2016 says,

“A member of the Cabinet must be responsible for policing and must determine National Policing Policy after consulting the provincial governments and take into account the Policing needs and priorities of the provinces as determined by the provincial Executives”,

So in both the case of the defence and the police the constitution stipulates that there must a member of Cabinet responsible
10 for that.

ADV PRETORIUS: Perhaps it's appropriate to go to 2091 to highlight the differences.

CHAIRPERSON: Before that and maybe what you are referring to is an answer. I haven't looked at the constitution before the President, after elections, announces his or her Cabinet all the Executive power is – rests in him or her.

MR SHAIK: Yes.

CHAIRPERSON: And then when he or she has announced the Cabinet – members of the Cabinet then effectively he gives powers to various
20 Ministers to deal with various things because there is legislation that says what the Minister of this and that will do but what I'm not sure about is the reference here to a member of the Cabinet is supposed to exclude the President because, otherwise normally I would imagine that the Cabinet – the President is part of the Cabinet but he is the one who puts it together but I may be mistaken in that regard maybe the

Cabinet are the Ministers and he is simply referred to as President, is that something that you have applied your mind to? I'm raising it simply because the reference to a member of the Cabinet, immediately suggests they are talking about a Minister but if the President is also a member of the Cabinet then technically it might not have the significance that I may have thought it has because if the President is a member of the Cabinet then there's always a member of the Cabinet who is responsible for all of these – you might or might not be able to say something, I'm just asking...[intervenes].

- 10 **MR SHAIK:** It's a fascinating interpretation I must say but let me give you the interpretation I understood at the time or the reasoning not the interpretation the reasoning. We wanted to avoid a situation where the President assumes the responsibility as Minister of Police or the President assumes responsibility as a Minister of Defence as is in the case of certain countries where the President is also the Minister of Defence. In the South African situation and especially through the negotiations we specifically wanted to avoid the Presidential assumption of the Military and Police power and therefore wrote it in this way, that a member of Cabinet must be responsible for Defence
- 20 understanding that it is a member other than the President.

CHAIRPERSON: I guess what is possible is that in the constitution – I think in the constitution there is a section which says who the Cabinet is and I suspect it includes the President but what the difference – what may be important is that whenever the constitution intends to refer to the President maybe it uses President and therefor maybe – whenever

it says member of Cabinet it refers to a Minister maybe – I don't know whether also Deputy President but Deputy Ministers are not members of Cabinet as I understand the position. So maybe whenever it says member of Cabinet it means a Minister.

MR SHAIK: Correct.

CHAIRPERSON: When it intends to refer to the President maybe it always says President, I don't know if Mr Pretorius has found something...[intervenes].

ADV PRETORIUS: Chair chapter five deals with the President and
10 National Executive, Section 84 deals with certain powers and functions of the President in his capacity as President or her capacity as President and Section 85 deals with the Executive Authority of the Republic which is also vested in the President but exercised together with other members of Cabinet. Now that is at a high and general level and may not answer specific questions directly but those are the two sections.

CHAIRPERSON: Okay, no that's fine. Probably the answer may well be that when issues intended to include the President in a particular function the constitution refers to the President and when it intends to
20 – intends Minister it says member of Cabinet responsible for Police or for Health and that kind of thing. It might not be particularly significant but I just noted it in the context of Mr Shaik's evidence.

ADV PRETORIUS: Yes what is instructive to is Section 91 which deals with the Cabinet and affords the President the power to appoint and assign powers and functions to Ministers but it gives – 91(1), 2 and 3

but what is instructive about the sections to which Mr Shaik is now referring is that there is a specific provision in the constitution in relation to Police and in relation to Defence which stipulates that there must be a Minister and stipulates their powers at a constitutional level rather than at a level of the discretion of the President.

MR SHAIK: That's correct.

CHAIRPERSON: Oh okay so there's specific provision.

ADV PRETORIUS: Yes and I think that is the point he was making.

MR SHAIK: That is correct.

- 10 **CHAIRPERSON:** Yes well I just see in Section 91(1) in the constitution that actually the President is part of the Cabinet because it says,

“The Cabinet consists of the President as head of the Cabinet, deputy President and Ministers”.

So it seems that Cabinet includes the President but maybe that the answer lies in what I said earlier on that maybe when specific provisions or functions are allocated to the President, maybe it refers to the President but at least the one thing we know is that Cabinet does include the President.

- 20 **MR SHAIK:** Yes.

CHAIRPERSON: Okay.

ADV PRETORIUS: And importantly Mr Shaik in contrast to those two sections to which you've just referred dealing with the member of Cabinet being responsible for Defence and a member of Cabinet being responsible for Policing together with certain other obligations, do you

have Section 209(1) and (2) which differ fundamentally in principle from those two sections in relation to the powers of the President as concerns Intelligence Services. Perhaps you could just read 209 (1) and (2) and then explain please?

MR SHAIK: So under Section 209 (1),

“Any Intelligence Service other than any Intelligence Division of the Defence Force or Police Service may be established only by the President as the head of the National Executive and only in terms of National Legislation. (2) The President as the head of the National Executive must appoint a woman or a man as the head of each Intelligence Service established in terms of sub-section (1) and must either assume political responsibility for the control and the direction of any of those services or designate a member of the Cabinet to assume that responsibility”,

So the first part is that the President – only the President can establish an Intelligence Service and only in terms of National legislation. National legislation should come first be debated by Parliament and then the President can establish it in terms of that National legislation. So there’s a link, so the President’s power to establish Intelligence Services is limited in my opinion. Second, the President unlike the constitutional provisioning that says in the case of the Defence they must be a member of Cabinet in the case of Police they must be a member of Cabinet and the Intelligence, it places the obligation on the President to assume the responsibility of the

Intelligence Services or designate a member of the Cabinet to assume that function. Now...[intervenes].

CHAIRPERSON: So he has a choice or discretion in relation to Security Secret Services or Intelligence.

MR SHAIK: Yes the President...[intervenes].

CHAIRPERSON: But he has no choice on Police and Defence.

MR SHAIK: Absolutely correct and there's a slight preference and the slight preference is, he's got to assume the responsibility right, so the default is that he assumes it or he can designate it to a member of the
10 Cabinet. Now I'm not going to seek an interpretation of the word of the Cabinet but my understanding is that it is a member of the Cabinet already.

CHAIRPERSON: Ja so you have two diametrically opposed approaches, the one approach in relation to the Police and the Defence is that in effect the President must never take – assume responsibility of either of those in regard to Intelligence Services – if I say Secret Services is that still fine?

MR SHAIK: Yes.

CHAIRPERSON: Okay in regard to that there is a preference as you
20 put it for the President to be the one who takes that responsibility but there's an acknowledgement that he has a lot of responsibilities and he might prefer that a member of – somebody else must be responsible, then in that case he's directed to designate a member of Cabinet to take that responsibility?

MR SHAIK: That's correct sir.

CHAIRPERSON: Okay thank you, yes Mr Pretorius?

MR SHAIK: And perhaps then we will then come back to the diagram to see why there was a Minister of Justice.

ADV PRETORIUS: Yes we're about to do so but perhaps for the sake of completeness we should just deal briefly with oversight provided for in Section 210, you've already referred to Section 210 but let's deal with it nevertheless.

MR SHAIK: Okay so under the powers and functions and monitoring,
10 "Section 210 National legislation must regulate the objects,
powers and the functions of the Intelligence Services
including any Intelligence division of the Defence Force or
the Police Service and must provide for a) the coordination of
all Intelligence Services and b) civilian monitoring of the
activities of those services by an inspector appointed by the
President as the head of the National Executive and provide
by resolution adopted by the National Assembly with the
supporting vote of at least two thirds of it's members".

ADV PRETORIUS: And approved by resolution.

MR SHAIK: And approved ja correct.

20 **ADV PRETORIUS:** So whatever Presidential and Ministerial powers
exist in the constitution it is quite clear that there must be
parliamentary oversight.

MR SHAIK: Absolutely.

ADV PRETORIUS: Through specific mechanisms provided for by
parliament.

MR SHAIK: That is correct.

ADV PRETORIUS: Could we go back to the diagrams, unless there's any further questions you want to raise Chair?

CHAIRPERSON: The provisions of the constitution that we have been looking at are those of the final constitution. Earlier on we had some discussion, I was asking about the interim constitution and as I understood the position it was that the principles in the final constitution were the same as those in the interim constitution. I'm wondering whether that is correct now, now that here it does

10 contemplate the possibility that a member of Cabinet may be responsible for Intelligence or whether what was meant was, under the interim constitution it was the same principles but the President at that time had elected not to designate a Minister for Intelligence despite the fact that constitutionally he could have done so but what may have happened since then is that the successive Presidents have elected to always designate a Minister for Intelligence that is why, therefore, between 1994 and 1997 the organogram didn't reflect any Minister responsible for Intelligence Services but if you look at any organogram that might be applicable from a certain year till now you will always

20 see that there is a Minister. So in other words, what I'm looking at is whether the interim constitution also gave the President the same choice because this one does and the only reason why there was no Minister – there's no Minister in that organogram for 1994 to 1997 responsible for Intelligence is that the President at the time had elected not to assign a Minister for Intelligence whereas after that,

various Presidents assigned a Minister. Am I causing you any confusion?

MR SHAIK: No.

ADV PRETORIUS: It does – the question is obviously one that is reflected in the diagrams but not explained in the diagrams and I'm sure Mr Shaik can deal with it now.

MR SHAIK: To the best of my recollection the interim constitution did not express a view either which way on Intelligence matters I think it governed a whole range of other issues but nothing turns on that simply
10 because President Mandela, in appointing his Cabinet in 1994 appointed the Minister of Justice to be the person responsible for dealing with administrative matters of things. So he was the Minister of Justice and remember – and that was 1994. The final constitution again to the best of my memory was adopted in 1996. So in 1996 the final constitution made provisions for how this matter should be dealt with but that came after but in 1994 President Mandela did appoint the Minister of Justice the then – the late Minister Dullah Omar as the Minister of Intelligence and a Deputy Minister of Intelligence. So he appointed a Deputy Minister but I'm sure the evidence leader is going
20 to lead us to that matter of the coordinate of Intelligence.

CHAIRPERSON: Yes, no that's fine, I think what was important for me is to just go back to the question which I had asked, whether the interim constitution and the final constitution was the same on this issue and I think you are saying to the best of your knowledge it may have been the same.

MR SHAIK: Yes.

CHAIRPERSON: But we'll need to check just so that one is sure about it. It may be that in the end it's neither here nor there but I think it's important to appreciate whatever differences there may have been over the years in relation to Intelligence particularly when there may be suspicions and allegations of Intelligence Services being misused and abused.

ADV PRETORIUS: Yes indeed Chair. The only observation for the present is that as I understand the interim Constitution it dealt with
10 these matters in very general terms whereas the final Constitution is far more specific in relation to powers and duties.

CHAIRPERSON: I just ask that you ask your members of the legal team who are assisting you if they can get me the relevant portion of the interim Constitution during the lunch break.

ADV PRETORIUS: And we could print it and put it up too.

CHAIRPERSON: Ja we could ja.

ADV PRETORIUS: Is that being done?

CHAIRPERSON: Yes okay.

ADV PRETORIUS: Thank you Chair. Can we go back then to the first
20 organogram dealing with the period 1994 to 1997 and would you just deal please with the reporting lines to the President through the National Intelligence Coordinating Committee on the one hand and the oversight duties of Parliament, the Inspector General of Intelligence and the Intelligence Oversight Committee on the left hand side of that diagram please? So two issues, reporting through to the President and

Parliamentary Oversight.

MR SHAIK: So in 1994 once the – the various pieces of legislation was passed the President appointed a coordinate of intelligence and that coordinate of the intelligence was at the time sitting member of Parliament Joe Nhlanhla and – so he was appointed as the coordinator of intelligence and he was also assumed the function of the Deputy Minister of Intelligence. And Coordinate Nhlanhla reported directly to the President as envisaged by the Legislation and coordinated the work of the Intelligence Services which is the section that we have been
 10 through in the block. So he had direct access. He was not a member of the cabinet but the cabinet consisted of a Cabinet Security Committee in which President Mandela chaired. No which Deputy President De Klerk chaired and President Mandela was in attendance together with Deputy President Mbeki. And it was a function of Joe Nhlanhla and his team to make presentations to the cabinet on matters of intelligence and have direct access to the President in respect of other matters of intelligence. That is the first lot.

ADV PRETORIUS: And then oversight please?

MR SHAIK: The oversight is again because we were in that incredibly
 20 honeymoon period all the different parties worked together and the – the Intelligence Joint Standing Committee and Intelligence Oversight was formed. It was a multi-party body. They were resourced to have their own offices. Protection was put in for them to have safe document keeping etcetera. But that was a multi-party committee and it functioned very well over the Intelligence Services and then the

process began for the appointment of the Inspector General and if my memory serves me well I think the first Inspector General was Doctor Randera. He was appointed as the Inspector General.

CHAIRPERSON: Was Doctor?

MR SHAIK: Randera, Fazel Randera.

CHAIRPERSON: Oh okay.

MR SHAIK: If my memory serves me well.

CHAIRPERSON: Yes there was also the then Advocate Skweyiya I wanted...

10 **MR SHAIK:** Yes Advocate Skweyiya.

CHAIRPERSON: Yes.

MR SHAIK: I think was the first.

CHAIRPERSON: Yes.

MR SHAIK: Right Advocate Skweyiya was the first and then Doctor Randera. The office of the Inspector General had considerable power so to speak, the power of subpoena, the power of getting whatever document from the Intelligence Services and the Intelligence Services at that time was imbued with the spirit of democratic accountability. So there was a much more forthcoming engagement with the office of the
20 Inspector General then I would say it is now but that will be my comment.

ADV PRETORIUS: Then if we can go RS40 or not RS40 but page 40 of Exhibit PP4. We have an Intelligence organogram for the period 1997 to 2009. What changed and how was that change brought about?

MR SHAIK: So – so you will recall that I said that the – a sitting

member of Parliament late Joe Mhlanhla was appointed as the coordinator. This gave incredible anxiety to the then democratic party who then also in the spirit of reconciliation and cooperative governance raised the issue with President Mandela's office that you could not have a sitting member of Parliament being considered as the coordinator of Intelligence which was envisaged to be a – a non-political party position in keeping with the – the sections that we read earlier.

ADV PRETORIUS: In addition Parliament had oversight functions.

- 10 **MR SHAIK:** Yes. And in addition Parliament had an oversight function. Right. So he had – so there was this conflict that was there. It was then decided that the law be amended. So the law was amended having just passed it in 1994 it was then amended and what then emerged was the – the diagram that you see before you here. With the powers of the coordinator in the main were then housed under the Ministers of Intelligence Services and a Minister of Intelligence Services was established. The National Intelligence Committee became now under the supervision of the Minister. And this is the beginning of the Ministry of Intelligence and the development of a
- 20 Minister of Intelligence as opposed to the reporting lines directly to the President.

ADV PRETORIUS: The oversight functions of Parliament remained?

MR SHAIK: The oversight functions of Parliament remained except if my – again my memory serve me correct that the Minister or the – the Inspector General's office became dependent on – or reported directly

now to the Minister and increasingly became dependent on the Minister Budget wise, staffing wise etcetera. So that was the other significant change.

CHAIRPERSON: I am sorry the Intelligence Oversight Committee mentioned there.

MR SHAIK: Remained the same.

CHAIRPERSON: Was that the Parliamentary?

MR SHAIK: That is the Parliamentary.

CHAIRPERSON: Oh.

10 **MR SHAIK:** Yes.

CHAIRPERSON: Because I have just written here Parliamentary to make sure it is clear that it is Parliament – a committee of Parliament.

MR SHAIK: It is a committee of Parliament Chair.

CHAIRPERSON: Yes.

MR SHAIK: That is correct.

CHAIRPERSON: And then the National Intelligence Coordinating Committee was not a Parliamentary Committee?

MR SHAIK: It was not a ...

CHAIRPERSON: Yes. So...

20 **MR SHAIK:** Bureaucratic.

CHAIRPERSON: So I think that is why because they are on – more on the same level what I see here but there is – there are certainly different colours.

MR SHAIK: Correct.

CHAIRPERSON: And Intelligence Oversight Committee reports to

Parliament and the Inspector General reports to Parliament. So – but I have just put in Parliamentary Intelligence Oversight Committee for my own purposes just to understand that – that is a committee of Parliament. Okay.

ADV PRETORIUS: Yes thank you Chair. Perhaps blue is the wrong colour for Parliament. At the – at the...

CHAIRPERSON: I will say nothing.

ADV PRETORIUS: At the bottom of the page you have in red just to be fair Chair a number of other bodies. It seems that there were some
10 organisational change at the time.

MR SHAIK: That is correct. You would...

ADV PRETORIUS: Could you just please briefly describe the various entities that had developed administratively or organisationally at that time?

CHAIRPERSON: Maybe before you do that Mr Shaik. Under this organogram or maybe as would be the case subsequently. Effectively the various units under Secret Services that we looked at when we were looking at the first organogram those – all of those units effectively now are represented under those red boxes at the bottom of
20 this one – all reporting to the Minister?

MR SHAIK: Yes.

CHAIRPERSON: Okay. Okay.

MR SHAIK: That is correct. So what happened was the process establish the National Intelligence Agency as a standalone organisation. The Secret Services as a standalone organisation and

then certain functions that were previously in the NIA were not created as standalone entities. And those entities are indeed the National Academy of Training. So it was called – A Training Academy that trained both members of the – the National Intelligence Agency and members of the South African Secret Service and offered training to other departments if so requested. The National Communications Centre is the – is the centre that has the technological capacity to engage in technological intelligence interception and that is called the NCC. The electronic communication of CONCEC was a – an entity
10 created to deal with internal communications of government so that government could communicate to each other in a more secure – secure way than it currently or it was doing at the time. And lastly the office of the Interception Centre was a – again a authority created whereby the Police and the Military and the Civilian Intelligence could address its request for particular interception. And again it had to follow a particular protocol. The office of the interception would have to get judicial approval for this. The judge will stipulate the period for how long and under what conditions etcetera and it was the office, the
20 IOC obligation to ensure that the regulations or the stipulations were indeed adhered to.

ADV PRETORIUS: And then on page 41 of Exhibit PP4 you have yet another series of structures and reporting lines. Again please if you would explain to the Chair what changed and how was that change brought about? And you mention particularly your thoughts about a proclamation being used.

MR SHAIK: Yes. So under the – the Intelligence Organogram entitled 2010 to 2019 there was now a – a reversal so to speak. Right and the reversal was the proclamation created a new entity called the SSA the South African – the

ADV PRETORIUS: State Security.

CHAIRPERSON: State Security.

MR SHAIK: I cannot even get the name. State Security Agency and the NIA was converted into the domestic branch of the SSA and the South African Secret Service was converted into the foreign branch of
10 the SSA. And all of this was done by proclamation.

ADV PRETORIUS: Under the auspices of a Director General?

MR SHAIK: And all of this would have been under the auspices of the Director General. I was made or Mr Gibson Nganga was made the Head of the domestic branch. I was made the head of the foreign branch and because it was an interim period we assumed our functions as Director Generals of those previous services. And it was considered this is be an interim period as the new paradigm was evolving. I say that it was made by proclamation and it did create some anxiety for us and in particular for me because I was not too sure whether a
20 proclamation is in keeping with the words that the President for any intelligence service other than the intelligence division of the Defence or Police Service may be established only by the President. Yes the President did establish by proclamation as the Head of the National Executive. Yes he did so in his capacity as Head of the National Executive and only in terms of National Legislation. I was not – I was

not of the view that proclamation represents National Legislation.

CHAIRPERSON: Can we go back to the Provision of the Constitution that makes the point that only in terms of National Legislation – what was that section?

MR SHAIK: It is Section 209[1].

CHAIRPERSON: 209[1]. Well I think the ordinary understanding is that National Legislation means legislation passed by Parliament.

MR SHAIK: Exactly.

CHAIRPERSON: And if that understanding is correct then the
10 establishment of any such service in – by way of anything other than
National Legislation passed by Parliament then – unless there is
something that you and I do not know then it would appear that it might
not have been in line with this. Okay, alright.

MR SHAIK: Ja and that precisely was our concern.

CHAIRPERSON: Yes.

MR SHAIK: And I must say it is a concern of Ambassador Maqetuka.

CHAIRPERSON: Yes.

MR SHAIK: Concern of Director General Gibson and myself.

CHAIRPERSON: Yes.

20 **MR SHAIK:** Because we had the experience and the knowledge of the
way – what was intended?

CHAIRPERSON: Yes.

MR SHAIK: By the Constitution. What was intended in the Legislation
and when we saw it in proclamation we were a little confused on is this
usurping the – the authority of Parliament because if you remember

earlier on we – it says that National Security must be subject to the authority of the executive and Parliament.

CHAIRPERSON: Hm.

MR SHAIK: And this was a structure of a National Security being born.

CHAIRPERSON: Hm.

MR SHAIK: Through proclamation where Parliament has – had not yet the benefit.

CHAIRPERSON: Hm.

MR SHAIK: Of debating the proclamation.

10 **CHAIRPERSON:** Hm.

MR SHAIK: Or the National Legislation.

CHAIRPERSON: Hm. Hm. Hm. And of course the – there would have been a particular rationale behind that kind of provision to say, only by way of National Legislation. There is an emphasis you cannot do it in any other way. It must only be the President and it can only be – even if it is him but it can only be in terms of National Legislation.

MR SHAIK: That is correct.

CHAIRPERSON: And that is...

MR SHAIK: And the intent was very clear.

20 **CHAIRPERSON:** It – it – in other words maybe the rationale might have been and you can talk more about at some stage if it is necessary but the idea must have been that if it is legislation if it is established in terms of National Legislation that has been passed by Parliament then it will be acceptable to Parliament which is the representatives of the people of South Africa. It would be acceptable to them but also then

the issue of oversight I guess comes in? Okay. Thank you.

MR SHAIK: That is correct.

ADV PRETORIUS: And as you have pointed out Chair fundamental to this issue which we will research just to see that we have not missed something along the way is the Constitutional role of Parliament and its fulfilment of that role.

CHAIRPERSON: Yes.

ADV PRETORIUS: And perhaps even the usurping of that role but that is subject to our researches.

10 **CHAIRPERSON:** Ja okay.

ADV PRETORIUS: Mr Shaik if you look at this diagram dealing with the period 2010 to 2019 it does not reflect the Military situation but I presume that is the same? It goes through the Minister of Defence?

MR SHAIK: Yes.

ADV PRETORIUS: With the Intelligence function?

MR SHAIK: Correct.

ADV PRETORIUS: What is important to perhaps to emphasise is the ongoing accountability of Crime Intelligence under the auspices of the South African Police Services still subject to the oversight of the
20 Inspector General of Intelligence and indeed Parliament?

MR SHAIK: Correct.

ADV PRETORIUS: And then if one goes to the National Intelligence Coordinating Committee and the Intelligence Coordinator that remains the same but now reporting.

MR SHAIK: Yes.

ADV PRETORIUS: To the Minister of State Security as he is now named or she is now named?

MR SHAIK: Correct.

ADV PRETORIUS: But what you have emphasised is that a single organisational entity the State Security Agency was formed with its two branches domestic and foreign?

MR SHAIK: That is correct. If I may just add one more point that – that in the manner in which all this has been arrived at the principle and which I am very passionate about – the principle of coordination in
10 my view has been undermined. So now we have gone back to a situation where each intelligence agency – I mean each intelligence services whether it is the security, the Civilian Intelligence Service or the Police or the Military because they have been – there have been bad coverage about all of them you can see that you are starting to see the breakdown of the coordination which is what the Constitution intended. So in a period of – from the time these changes were made you effectively have no coordination.

CHAIRPERSON: And that cannot really be good because there should be a sharing of information and...nd that cannot really be good because
20 there should be a sharing of information and...

MR SHAIK: Correct.

CHAIRPERSON: And so on.

MR SHAIK: Ja.

ADV PRETORIUS: And it does not allow any particular intelligence agency or part of an intelligence agency to go off on a frolic of its own

as it were.

MR SHAIK: Correct in the absence of coordination you would have frolics of your own. You would have in the intelligence world everyone recruiting the same source and in my opinion has given rise to the entrenchment of a phenomenon not unique to South Africa. The phenomenon of disinformation, information pedlars and bogus informants which is a phenomenon that features regularly in South Africa's lexicon and language.

ADV PRETORIUS: So you will touch on that later in your evidence.

10 **MR SHAIK:** Later on. Yes.

ADV PRETORIUS: But the two important principles as I understand you have emphasised are 1 coordination and 2 oversight and control.

MR SHAIK: Correct.

ADV PRETORIUS: Chair it is one o'clock is it convenient to take the long adjournment?

CHAIRPERSON: Yes let us take the lunch adjournment. We will resume at two o'clock.

ADV PRETORIUS: Thank you.

CHAIRPERSON: We adjourn.

20 **REGISTRAR:** All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay. Let us proceed.

ADV PRETORIUS: Thank you Chair. Over the long adjournment we had occasion to obtain relevant portions of the Interim Constitution and

although it needs to be checked I am able to say at the moment that it deals very sparsely and in very general terms with Internal Security which is a function in the Interim Constitution under the South African Police Service and then in the constitutional principles deals with Security Forces being:

“Required to perform their functions and powers in the national interest and shall be prohibited from furthering or prejudice - prejudicing party political interest.”

10 But subject to a check that those seem to be the only two or three sections of the Constitution and constitutional principles that might be relevant. So the - the simple answer is that there is no detail ...

CHAIRPERSON: Hm.

ADV PRETORIUS: Certainly of the nature in the Final Constitution.

CHAIRPERSON: Yes.

ADV PRETORIUS: If - if you ...

CHAIRPERSON: Ja.

ADV PRETORIUS: Would like a copy now ...

20 **CHAIRPERSON:** Let me have a copy.

ADV PRETORIUS: Of the relevant sections. We have not copied all of it ...

CHAIRPERSON: Yes.

ADV PRETORIUS: But we will do so after checking.

CHAIRPERSON: Okay. So we could replace this maybe tomorrow

morning with one that ...

ADV PRETORIUS: Yes. It will be replaced tomorrow morning.

CHAIRPERSON: Ja. Okay.

ADV PRETORIUS: Properly paginated.

CHAIRPERSON: Ja. Okay. Thank you.

ADV PRETORIUS: Mr Shaik at paragraph 10 of your statement on page 3 of the bundle - PP1. You refer as you referred earlier to your appointment and the appointment of your two colleagues?

MR SHAIK: That is correct.

10 **ADV PRETORIUS:** And you say in paragraph 11:

“Collectively we were acquired to form the new organisation the State Security Agency.”

And you have alluded to that in your explanations of the changes in the structures earlier today?

MR SHAIK: That is correct.

ADV PRETORIUS: You refer in paragraph 11 to different organisational structures. What are those? That is before the change.

MR SHAIK: Yes. These were the - the structures before the change. They were the structures that resulted first on the founding Legislation
20 in 1994 and the Amended Legislation in 1997 and they are the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence.

ADV PRETORIUS: It was for training?

MR SHAIK: The training. The National Communication Centre which is the infrastructure for the interceptions. The Office of the Interception

Centres which is the facilitating office of the Regulatory Office and the Electronic Communications System. Otherwise known as COMSEC. As the Communication System to be put in place between an amongst Government departments.

ADV PRETORIUS: Yes. Then Mr Shaik you refer to briefly and in passing this morning to a significant principle in the changes. It seems that prior to 2009 to 2011 the various Intelligence structures were separated organisationally?

MR SHAIK: That is - that is correct.

10 **ADV PRETORIUS:** And after the changes in 2009 to 2011 as in the past they had become consolidated once more. Is that correct?

MR SHAIK: That is correct.

ADV PRETORIUS: Is there anything significant in that?

MR SHAIK: Yes indeed. The - the white paper that informed the laws that were passed in 1994 had a very rational basis to why we wanted to have the dispensation that we negotiated for about four years and one of the central principles was to ensure that we do not have excessive concentration of power in one organisation which is what in fact occurred under the previous dispensation - the apartheid dispensation.

20 Where you had for example the National Intelligence Service that housed both the domestic operation and its foreign operation. So one of the principles of the new dispensation was to separate these powers and ... (intervenes).

ADV PRETORIUS: And coordinate. Separate but coordinate?

MR SHAIK: Separate and coordinate.

ADV PRETORIUS: Yes.

MR SHAIK: So that is why coordination became a - a principle and the separation of powers became a principle.

ADV PRETORIUS: Yes. I am sorry for interrupting. Yes you were saying.

MR SHAIK: Yes. So that was the - the rationale that informed the democratic dispensation of Intelligence and it would appear to me that by the proclamation we were now going back to a pre-democratic era where we were consolidating everything into one organisation again.

10 With the unintended or intended consequence of excessive power in one organisation.

CHAIRPERSON: Had you been part of the discussions that led to the proclamation or did that - did those discussions happen while you were out of Government service and you came in when those had either advanced too far or had been completed?

MR SHAIK: I was not party to those discussions. They happened prior to our coming ...

CHAIRPERSON: Yes.

20 **MR SHAIK:** And subsequent when we tried to have those discussions that was not forthcoming either.

CHAIRPERSON: Thank you.

ADV PRETORIUS: You were tasked however with the implementation of the outcome of those discussions as I understand it.

MR SHAIK: That is correct. Under the leadership of the Director-General Ambassador Maqetuka.

ADV PRETORIUS: *Ja* and then in paragraph 12 you express as you have expressed earlier your doubts about the constitutionality of this new arrangement that you were mandated to give effect to.

MR SHAIK: That is correct.

ADV PRETORIUS: What were those doubts?

MR SHAIK: Well my - my first doubt with - was that it was not - the President could establish an Intelligence Service, but had to do so in keeping with National Legislation. It seemed to me that we were establishing an Intelligence Service by proclamation rather with in
10 keeping with National Legislation.

So Parliament was as we mentioned before did not have the benefit of discussing that National Legislation. So that is the first objection I had. The second was in the name and I know nothing much turns on the name, but State Security Agency seemed to me at least from a semantic point of view having moved away from human security which was the principle outlined in the - the Constitution, but and this is why when choosing the names originally in 1994 there was no reference to State Security in 1994.

It was the National Intelligence Agency and the South African
20 Secret Service and it was avoiding in the sense the use for the words "State Security".

CHAIRPERSON: Well you - you indicate that the name might not be important, but we - we do know that in certain circumstances the label might not be important, but in others it can be important. The name can be important, because it is part of what is conveyed to people who

have conduct or get to know about that institution or that office and if the name or the label does not represent what is intended.

It could give a wrong perception about what the - the institution or the office is about. So - so maybe you should not be too apologetic about pointing the significance as far as you are concerned of the difference between what was intended in 1994 and what is represented - what is represented by the proclamation in the change of the name of this institution.

MR SHAIK: Thank you, sir.

10 **CHAIRPERSON:** Okay.

ADV PRETORIUS: Yes and you have referred to the structural implications of the changes as well?

MR SHAIK: Correct.

ADV PRETORIUS: You deal in paragraph 13 with the reporting lines that you were obliged to follow on your appointed.

CHAIRPERSON: I am sorry Mr Pretorius. You know Mr Shaik what you are saying about the change could well be very important. Maybe when one or if one gets to understand from those who - who were involved in the discussions and who - who can articulate the rationale. Maybe it is
20 not so important.

I am not sure, but you - I see that in your statement paragraph 12 you say that you were never able to determine the motive or rationale for - I think - the change.

MR SHAIK: Yes.

CHAIRPERSON: You know and yet I would have expected that because

of the seniority of the position you held yourself and particularly because of your prior involvement in the discussions leading to 1994 in regard to Intelligence. I would have expected that you would know because if you ask you would be told what was the rationale, but am I to read that whatever attempts you may have made to try and find out why is that - is there a departure from what we envisage that you - you were not giving any clear answer.

MR SHAIK: Yes.

CHAIRPERSON: Am I to understand that that is the position?

10 **MR SHAIK:** That is - that is correct, sir.

CHAIRPERSON: Hm.

MR SHAIK: The - and remember that the State Security Agency was under the leadership of the Director-General Ambassador Maqetuka and I know that he is to give evidence and under his leadership we have tried on numerous occasions ...

CHAIRPERSON: Hm.

MR SHAIK: To get an understanding of the rationale.

CHAIRPERSON: Huh-uh.

ADV PRETORIUS:

20 **MR SHAIK:** So that we could believe ...

CHAIRPERSON: Hm.

MR SHAIK: In ...

CHAIRPERSON: Hm.

MR SHAIK: What it is that we were ...

CHAIRPERSON: Hm.

MR SHAIK: Were having to do ...

CHAIRPERSON: Hm.

MR SHAIK: And you were right ...

CHAIRPERSON: Hm.

MR SHAIK: In the sense that yes all three of us had the knowledge of the negotiation process, the passage through the 1994 Parliament. So there was in a sense a disquiet amongst us about knowing the rationale for why we had separated things and not knowing the rationale now for why we are amalgamating things all together, but then we - we never
10 survived that long to get to that point.

CHAIRPERSON: Well it is just important for a number of reasons, but part of what some of us - some of us - the people wonder about. Is sometimes where it is the same Government - it might have a different President at a particular time, but it is the Government of the same ruling party and one Minister goes another one comes in and there are so many changes.

That it is as if it is a Minister from a new - a different party who has come in and sometimes not easy to understand. Why? You know, because you would have thought that the policies and certain
20 things and principles that are being followed are the same, but sometimes that happens.

I mean you may or may not know I - I am hearing evidence in regard to the digital migration as well and I was part of the panel in the Constitutional Court which had that case and over a number of years stretching over 10 years you could see there was no real progress

being made on these desk - these ...

MR SHAIK: Set top.

CHAIRPERSON: *Ja.* Set top boxes. Set top boxes and a new Minister would come and he would say this is the way we are going and then later on another one would come and say this is the way we are going and at the same time you would be having reports in the media that the policy position of the ruling party is different from what the Minister is - is doing. So - so that is why I am ...

MR SHAIK: *Ja.*

10 **CHAIRPERSON:** Saying one would have expected that somebody as senior as yourself ...

MR SHAIK: Hm.

CHAIRPERSON: Would have been given information as to what is the rationale for a change from what had been what - what all of you had been comfortable with from 1994.

MR SHAIK: Sure.

CHAIRPERSON: *Ja.* Okay.

MR SHAIK: Sir, I - I think it speaks to the very concept of coherence in - in Government and - and perhaps that we have not all fully
20 understood the importance of coherence and continuity and etcetera and I have discovered this problem throughout the continent and elsewhere.

CHAIRPERSON: Hm.

MR SHAIK: Where this constant changing and the bureaucratic dysfunctionality it produces.

CHAIRPERSON: Thank you.

ADV PRETORIUS: Mr Shaik throughout the sittings of the Commission the Chair has expressed an interest in the views and opinions of various people who have had the knowledge and experience that you have ...

MR SHAIK: Hm.

ADV PRETORIUS: That you have and you have had. He is obviously not bound by that, but what you have pointed out here is the factual basis for misgivings you had at the time?

10 **MR SHAIK:** Correct.

ADV PRETORIUS: And these misgivings led you to I presume ask questions in your own mind and of others. With hindsight are you able to say what was happening here or even to give a view? DCJ is not going to be bound by it, but I think he may want to know.

MR SHAIK: In - in my ...

CHAIRPERSON: I - I just like hearing different perspectives, because whether I agree with them or not they may be beneficial in knowing about them.

20 **MR SHAIK:** In - in my generous interpretation of the hindsight. I would say that there was a lack of experience in understanding the complexities of Intelligence and why we designed what was designed at the time and with the dropping of my sugar levels I will say that it could be in my view a very narcissistic approach of the consolidation of power, because power is an attractive thing, but without assuming the obligations that come with the consolidation of that power.

So it could be either of the two and in particular I would say that in - in the conduct of very senior officials and I must - and I must say that if you take Ambassador Maqetuka as a much senior person than I am and so is Mr Njenje who have perhaps a longer history in the Intelligence Services.

We were not accorded the kind of respect that should normally accrue to persons with that experience and to allow that experience to shape the policies that was unfolding and that was rather unfortunate and it led to a situation which just became untenable. So
10 in my view it was a combination of inexperience in the Intelligence affairs and driven by a narcissistic consolidation of power.

CHAIRPERSON: Well you know one - one might not be able to be categorical, but if you are asking me about something and I am confident that it - it is the right thing to do and I do not have a reason to mistrust you. It is something that I can - I should - I can tell you and I believe it is a sound basis for my decisions.

I would think that the normal thing is if you are ask, tell you. This is why we have changed. This is our experience. You might agree or you might not agree, but I - I will not hide from you ...

20 **MR SHAIK:** Hm.

CHAIRPERSON: What the reasoning behind it is, but of course if I know that the reason - the real reason behind it is not a legitimate one. I might not want to be transparent to you about it. Ja. Okay.

ADV PRETORIUS: You mention power. Let me explore your less generous version. Power in relation to Intelligence Services. Where

does that lead or where can it lead?

MR SHAIK: Well ...

ADV PRETORIUS: In relation to how Intelligence Services are used and to what end.

MR SHAIK: Sure. The - it - it will go to a definition of intelligence. That I would say that I accept and is generally accepted. Intelligence is a profession of actionable wisdom. Where wisdom is derived from the transformation of data to information. Information into knowledge. Knowledge into insight.

10 Insight into wisdom which is designed either to predict events or influence events and in both cases either in the prediction or influencing of events intelligence represents an enormous amount of power under that concept. A - a knowing what is to happen and knowing things that are unfolding allows one to be able to - to inference the - the direction of what is unfolding.

 Let me give you a very simple example. So if I know that you are going to be appointed the next Minister of - of Finance. Sitting here and I know this appointment will take place in a few days' time. I would also assess how the market will interpret your appointment and I
20 will be able to make a prediction.

 A hedging of - of the currency against your appointment. I could hedge the currency so that when that appointment does happen I would be able to get a windfall on it and of course I am assuming that you are a man and you are indeed a man of great respect in - in international communities.

Therefore I would be able to hedge the - the currency. So you could see how knowing events beforehand is - is such a - an important thing and that power.

CHAIRPERSON: Of course another example where it might be if you know that I am going to be appointed Minister of Finance. You know it in advance. Even if you do not know it as certain. Maybe you know it as a probability and you do not want that to happen. You can use whatever information you have maybe to discredit me before the decision is made.

10 **MR SHAIK:** Indeed. That is the dark ... (intervenes).

CHAIRPERSON: Is that right as well?

MR SHAIK: Yes.

CHAIRPERSON: That is what can happen?

MR SHAIK: Correct.

CHAIRPERSON: Ja. Thank you.

ADV PRETORIUS: And you have referred to the use of disinformation?

MR SHAIK: Correct.

ADV PRETORIUS: You say in paragraph 13 that you reported to Minister Cwele together with your two colleagues who were appointed
20 at the same time?

MR SHAIK: That is correct.

ADV PRETORIUS: How did you regard this duty to report to the Minister?

MR SHAIK: I for - I for one - this felt somewhat uncomfortable for me and I know this is a very career limiting thin, but reaching the age that I

have I could say it. That I never truly believed in the - the role of a Minister in Intelligence. I always felt it to be an oddity and I can explain why I believe it is an oddity and I do not believe that the Constitution - the Constitution preferred that this be a Presidential responsibility rather than a Ministerial responsibility.

However having now to report to a Minister in my own mind I knew it will - it will provide the basis of conflict. Does a Minister direct Intelligence Operations? My understanding is the Minister should not direct Intelligence Operations and a range of these issues made me
10 feel uncomfortable about having to report to a Minister and the preference is that it - you would go the President and it is - it is an expression or let me just say a derivative of maturity.

That if everyone understands that there are matters in which a - a Head of the Intelligence Service or in this case the Head of the - the State Security Agency should have unfettered access to the President to go and discuss with the President matters of National importance.

An example of which could be if there was Intelligence picked up about the very Minister of Intelligence. What would the Director-
20 General do? Will the Director-General take that Intelligence to the subject of the Intelligence or should the - the Director-General be able to take this matter directly to the President and then the Minister should have the majority or the comfort to accept that in the event that such matters are taken directly to the President without his or her knowledge.

That that is an acceptable practice of Intelligence. Whereas if you only had one single route through a Minister you have a - you would be presented at some point in time with some difficulties. Secondly, and this is again my issues and I know my colleagues may share it to various degrees.

When you appoint a Minister of Intelligence in a Cabinet you are in effectively making him first amongst peers or her first among peers, because that Minister by the very portfolio that he or she occupies will come to know information about other Ministers for which
10 he or she would have information about and it just seems that it - it is - it is an unpreferred situation and it should go directly to the President, but like I am saying the Constitution make provision for the delegation.

The law makes - established a Minister. I just felt it was - and this is a globally contested debated issue. I always favoured the notion that the Intelligence should report directly to the President and not via a Minister and if you do have a Minister stipulate quite clearly what the Minister is entitled to do not entitled to do.

What should the Director-General do and what the Director-General should not do. So that there is no conflict in - in situations
20 when it does arise.

CHAIRPERSON: Two things. One, of course even when you report directly to the President and there is no intervening Minister there may be occasions when the Intelligence you pick points to the President himself.

MR SHAIK: Sure.

CHAIRPERSON: In certain circumstances.

MR SHAIK: Sure.

CHAIRPERSON: Maybe - you might know better. Maybe it is not something usual with Presidents around the world. Maybe it is something that does happen, but - but of course the point you are making is you want to reduce to the absolute minimum ...

MR SHAIK: Correct.

CHAIRPERSON: Situations of conflict.

MR SHAIK: Yes.

- 10 **CHAIRPERSON:** So you want to go to the ultimate office, but you also made the point that the Minister does not direct the operations of Intelligence. Now when you say that how differently - how different is that from other portfolios with regard to the Minister and their DGs. Normally one understands that Ministers will not get involved in operational matters.

- The - they will be dealing with policies and then the DG will be dealing with operational matters, but I guess there may be many cases where maybe the distinction is difficult to identify, but I just want to understand whether when you say that. Namely the Minister of
20 Intelligence would not or should not be dealing with direct - should not be directing the operations.

Whether you are simply reflecting what is something that this - that applies to other departments as well or you are articulating something that is peculiar to Intelligence?

MR SHAIK: I am - I am saying it is peculiar to Intelligence and there

are various reasons for that. In some countries the infiltration of some countries by your Intelligence Services is an event that could lead to those people coming under serious harm. In the event that they are detected etcetera.

So one has to apply incredible caution and the Director General and the law stipulates that the Director General is obliged to keep methods, sources, intelligence in such a way as to protect his or her members and the law makes no distinction from who it must be protected from but in my view it includes protecting it from the Minister,
 10 so that the Minister should not know that so and so may possibly be working for the service or this is how the service is going to do certain things in order to protect the Minister, but also to protect the people involved in such operations, and because of the particular nature of intelligence due consideration must be given to what information is shared outside of the service and to who, and this is why the relationship of trust between the Head of the Service and the President is sacrosanct in Intelligence and the moment you feel that the Head of the Service feels that he lost, or she has lost the trust of the President the decent thing to do is to tender our resignation and to leave because
 20 outside of that trust no relationship in intelligence can work.

CHAIRPERSON: Is your evidence therefore to the effect that even in a case where there is no intervening Minister, there is no Minister of Intelligence and the Head of Intelligence reports directly to the President is your evidence to the effect that in that situation the directing of the operations resides with the Head of the Intelligence and

not the President?

MR SHAIK: Correct.

CHAIRPERSON: Yes, so that is how it should be and that is how at least maybe it was at a certain stage in South Africa.

MR SHAIK: Correct.

CHAIRPERSON: Yes, okay, alright.

MR SHAIK: And that is the way it should be, and that is why you have got to see the three pieces of legislation together. The Director General is responsible for the operation of the Intelligence Services, 10 you have an Inspector General in cases of abuses, you have the Parliamentary oversight committee in the cases to oversee budget etcetera, so a very elaborate system of checks and balances were put into place to ensure that there is no abuse, but it was premised on the understanding that the Intelligence Services and in particular the Director General will be professional, will conduct themselves – we have stipulated all of that in the Constitution that it will do things by the law etcetera, and it required for this entire architecture to work together and I must say for the first three or four years in my view and then I left it was working together and there was much maturation 20 taking place.

CHAIRPERSON: You are now talking about ...[intervenes]

MR SHAIK: The 1994 ...[intervenes]

CHAIRPERSON: The Nineties, okay, okay, *ja*, thank you.

ADV PRETORIUS: Thank you, and of course in relation to the separate functions of the Executive and the Minister and the

operational functions of the Intelligence Services you later illustrate an example of a clash?

MR SHAIK: Yes.

ADV PRETORIUS: The relationship between yourself at least and Minister Cwele was strained, we know that. What was the first indication of such strain. Chair we are at paragraph 14.

CHAIRPERSON: Maybe before – I am sorry again Mr Pretorius, maybe before that let me ask this question. You have told me how you – in your view this situation should be in terms of reporting and what – how
10 it was originally after 94, and you did say the Minister of Justice was given the possibility of administrative matters in relation to Intelligence and not directing operations. Once there was a Minister of Intelligence, as you understood the structure that is now even before we talk about what happened in reality, was your understanding with the Minister being – with that being a Minister of Intelligence he or she might involved in directing operations by virtue as being there as opposed to the President or it wouldn't necessarily mean that he or she would be involved with directing operations that could still be left to the director, to the head, but it would just depend maybe on the person, on
20 the incumbent?

MR SHAIK: Yes in this particular case I – it is my evidence that the Minister attempted to direct an operation, which I found to be unlawful and we will come to that and I would give you examples and you can look again at various examples, but let me just give you one, and it is really unfortunate that the example I was going to use that has been

raised by the previous, by the former President Zuma.

Former President Zuma made reference to spies in his evidence before the Commission. Now spies is the work of the Intelligence Service. You can imagine a situation where a Director General who is in charge of the Intelligence Service and Counter Intelligence and is now instructed by a Minister to please provide him or her the name of spies in the country and this is now given to a Minister. That Minister because of changes in politics leaves a – the government service, does that Minister forget about who the spies were
 10 or not, or do they retain it in their head and what risk does that present to those spies in the country.

So that is one example where it is very dangerous for a Minister to demand operational knowledge about matters, but the President, when a President is no longer the President there are certain protocols that go into effect to still keep that President as if he were in a previous, as if he still was a President. This is why the Presidential protocols are so intense, so ex President Mbeki, ex President Motlanthe, all still have to a certain degree protection and the use of State in order to keep them, and one of the reasons is, is
 20 that they would have in their capacity as Presidents come across very sensitive information of the State.

A Minister is not accorded that protection, a Minister is not accorded that protocol and God forbid I am not suggesting that ex Ministers of Intelligence are given this kind of protocol, I am just saying don't appoint them in the first place Chair.

CHAIRPERSON: But are you therefore saying that you could have a Minister of Intelligence without necessarily implying that he or she would direct operations?

MR SHAIK: Correct, you could.

CHAIRPERSON: *Ja*, so in principle you could have the Minister ...[intervenes]

MR SHAIK: In principal you could yes.

CHAIRPERSON: But when it comes to operational matters he or she could not be involved there.

10 **MR SHAIK:** That is correct, and that is why I would argue sir that it is a member of cabinet, not a member to cabinet.

CHAIRPERSON: Yes, yes.

MR SHAIK: If you get that subtle distinction.

CHAIRPERSON: Okay thank you.

ADV PRETORIUS: You were going to tell the Chair of the first incident which the relationship between yourself and others and the Minister, paragraph 14.

MR SHAIK: In paragraph 14 ...[intervenes]

20 **CHAIRPERSON:** Mr Pretorius we are taking long on this but I think it is very important for the understanding, you know I certainly appreciate all the explanations that I am getting in terms of intelligence.

ADV PRETORIUS: Yes, if I may just say Chair there is a substantial amount of evidence to be given and this background is very important in order to evaluate that ...[intervenes]

CHAIRPERSON: Yes that evidence *ja*.

ADV PRETORIUS: I mean it is essential.

CHAIRPERSON: *Ja.*

MR SHAIK: Chair you would recall that in 2009 the – during 2009 there was the Minister Cwele's wife was subject to a drug trafficking offence and this matter related to the kind of protection or the kind of services that the SSA and particularly the domestic branch of the SSA was giving to Ms Cwele. We discussed this matter and in particular it was a level of discomfort for Director Njenje and he raised this matter with the DG Maqetuka and myself and we had a forum of meetings
10 where we all three would decide on a particular way and a dissention would mean we keep debating until we have consensus.

We discussed this matter, we debated it through all ends and concluded that we, the SSA, again under the leadership of Ambassador Maqetuka will inform the Minister that we will no longer be providing these protection services to Ms Cwele, the Minister's wife. Of course this did create ...[intervenes]

CHAIRPERSON: Just articulate what the form of the form of the protection was, maybe I missed that, just – I know I think it's in your statement.

20 **MR SHAIK:** I am also mindful sir of not giving the evidence of my colleagues, who are here.

CHAIRPERSON: Oh please, please, remember I am not – so where we ask you questions that might compromise those things please just remind me.

MR SHAIK: Okay.

CHAIRPERSON: We are not too used to those things but too used to transparency so if ever I ask you anything question and you feel that it might require you to give information that you shouldn't give because of the – because it belongs to Intelligence please feel free to let me know, so if you – if it is not something you can indicate, I was just thinking maybe police officers who – and so on, but I leave it to you to ...[intervenes]

MR SHAIK: No we are not far off, my understanding is that the domestic branch of the State Security Agency provided a kind of
10 logistical support in terms of transporting Ms Cwele from the home to the court, from the court back home, and all of these things incur expense and that expense has to accrue to a particular operation and Director Njenje had to sign off on it. I think it is his uncomfortableness about continually signing off these matters made him to initiate the discussion amongst the three of us with all three of us agreeing to – that this service should be terminated.

Of course the second and related issue is that we were management, the senior management of Intelligence Service providing services to a person who was convicted for drug trafficking offences
20 and this is not ...[intervenes]

CHAIRPERSON: So this is now post the conviction?

MR SHAIK: This is – no during the trial.

CHAIRPERSON: Oh during the trial.

MR SHAIK: During the trial.

CHAIRPERSON: Ja.

MR SHAIK: And with the presumption of innocence it was creating a sense of awkwardness to us in the sense of our own morality so to speak, so this discussion had to happen with the Minister and Director General Maqetuka led that discussion, supported by Director Njenje.

CHAIRPERSON: Yes, you may continue.

ADV PRETORIUS: Mr Shaik in paragraph 15 you deal with certain changes made to the cabinet by former President Zuma around – in and around October 2010.

MR SHAIK: That is correct.

10 **CHAIRPERSON:** I'm sorry again Mr Pretorius. What you have not said, and I don't know whether that's because of anything connected with Intelligence, what you haven't said is what was the response of Mr Cwele to the news that you had decided to terminate this support. Is that something you can say?

MR SHAIK: That conversation, I do not have that direct information.

CHAIRPERSON: Okay, okay one of the other witnesses might have.

MR SHAIK: I am sure that it is coming via Maqetuka and Gibson.

CHAIRPERSON: Okay, okay.

20 **ADV PRETORIUS:** You refer in paragraph 15 of your statement Mr Shaik to a cabinet reshuffle in and around October 2010 at the hands of the former President Zuma.

MR SHAIK: That is correct.

ADV PRETORIUS: There is one particular appointment there that is relevant to our evidence, what was that?

MR SHAIK: That was the – I mean I was saddened by the replacement

by Minister Siphwe Nyanda by Mr Padayachie but that just saddened me but the one that concerned me is the replace of Fikile or the appointment of Minister Fikile Mbalula.

ADV PRETORIUS: There was a press report to which you refer in paragraph 16 in relation to the appointment, what was that?

MR SHAIK: So some time in 2011 was a press report that dealt with an NEC meeting of the ANC in which it was alleged in that report that Minister Mbalula raised his appointment or been informed about his appointments by the Guptas being called and informed about that
10 appointment, and we had again under the leadership of Ambassador Maqetuka we established what we call the Monday morning forum with the three of us under his leadership, Maqetuka, Gibson and I would meet every Monday morning to discuss things that occurred in the weekend or in the past week and it was a brainstorming session between the three of us, and the midday we would invite our deputies for lunch and others and have a kind of management meeting that will end sometime often late into the night, and this is the way we operated.

So on this particular, this was a Sunday, on the Monday we met and we discussed this report and we were taken aback by the
20 issues that were in that report.

ADV PRETORIUS: Was the decision in relation to the matters that ought to be investigated, I will ask you ...[indistinct –mic off]

MR SHAIK: So as you will recall sir that what was alleged in that report that there was an NEC meeting, and in this meeting Minister Mbalula raised the point that his appointment, he was notified of his

appointment by one of the Gupta brothers but generally for the purpose of this discussion the Gupta Brothers.

Our concern was (a) this is either a breach of national security occurring in the office of the President, so there was a leak from the Office of the President, two, this is possible because the Guptas overheard this discussion while the President was in consultation with someone and they obtained this information and were now peddling this information for whatever benefit they wanted, or thirdly that they in fact actually suggested this appointment which makes this even more
 10 serious because then as foreign nationals they are suggesting who should be in the National Cabinet of another country.

All three of these matters fall in the realm of National Security by my understanding. A leak upon the President's Office, information peddling if they have overheard this information and three if they suggested the name and this is a matter of counter-intelligence where a foreign national is influencing the appointment of cabinet ministers of another government, all three issues needed to be investigated.

ADV PRETORIUS: Did you discuss the intended approach with anyone else, for example your Deputy Directors General?

20 **MR SHAIK:** Yes, so following the – following our morning meeting we had lunch with our Deputy Director Generals and others and we informed them of our decision that an investigation into the Gupta's should now occur based on the rationale that we have given, and I must say that an Intelligence investigation is an Intelligence investigation. It will involved technological intelligence, it will involve surveillance, it

will penetration, it will involve having a full understanding of the whole picture to answer those three questions primarily because it pertains to national security and a breach at the highest level of the government.

ADV PRETORIUS: There was a related issue pertaining to the investigation.

CHAIRPERSON: I am sorry Mr Pretorius, well to those who are not close to Intelligence and Secret Services, those of us who are not close to those, to Intelligence it might not have been as apparent as it now seems to me and others who are listening to your evidence what this
10 could mean if it meant that the Gupta Brothers or one of them was able to overhear sensitive information emanating from somebody in the Presidency or from the President, because today it might have been about the appointment of so and so as a Minister but tomorrow it might have been information about something that really goes to the security of the country.

MR SHAIK: Yes.

CHAIRPERSON: So it was quite something, quite serious even from that angle leaving out the others?

MR SHAIK: It is very serious sir, if – and let me tell you of the three
20 scenarios the overhearing the discussion is the least of the dangerous ones, right, because if they have overheard it and if we have investigated and were allowed to investigate this we would have been able to make certain recommendations as Intelligence normally do, we will make recommendations in terms of how to avoid this situation in future, so that didn't happen, but the second option, the option that if

the appointment occurred at the suggestion of the Gupta's and that is a significantly serious matter because it meant that there's real possibility that a foreign government was making appointments.

CHAIRPERSON: Hmm, hmm, hmm, no I think that scenario is the one that has been dealt with quite extensively in the public domain.

MR SHAIK: Yes.

CHAIRPERSON: Of course the – any President who gets an inappropriate suggestion like that would respond in the only way that is appropriate for this situation but of course you could have various
10 people you know who may innocuously at one stage or another say to the President you know what Mr Shaik would be good for the police you know, you know maybe next time you think about reshuffling the Cabinet think about him, you know, here is his track record, as long as the President doesn't feel bound to do that I would imagine that that's not a problem, is that right?

MR SHAIK: Correct, that's absolutely correct and in fact it does occur in our media where editors or journalists would make certain suggestions that in order to fix this and this department up appoint so and so to that department, and that is considered democratic lobbying,
20 which is not necessarily a counter intelligence matter, but it is done openly, it is done transparently and it is done –also it may even happen behind closed doors, that too is not a problem.

The problem here in my opinion was the fact that the people who were making this suggestion, if they indeed made this suggestion, found it necessary to inform the person who was appointed before he

was appointed that he was going to be appointed, so the benefit was not a contribution towards good governance, the benefit was to demonstrate that they had knowledge of the appointment before the appointment occurs.

CHAIRPERSON: Well that's quite important, but maybe your – you use in your evidence the word suggestion, maybe it should be something much more than suggestion because a suggestion implies that it's just an idea you know but maybe if it became something more than a suggestion maybe even an instruction you know that maybe that's
10 where the problem becomes even ...[intervenes]

MR SHAIK: Correct.

CHAIRPERSON: ...more difficult because my friends might make suggestions about certain things in my company or in my department as minister but you know as long as they are just suggestions and nothing more I don't feel bound and those people don't think that they can dictate to me what I do that might be fine. The problem might be where the suggestion is no longer a suggestion, it is an instruction or where the President, whoever it may be in that situation may feel bound to give effect to the suggestion because of whatever.

20 **MR SHAIK:** Correct yes.

CHAIRPERSON: But part of the importance of what you say about what you think the rationale must have been for them to then go to the person to be appointed to demonstrate that they had the knowledge.

MR SHAIK: Yes.

CHAIRPERSON: May well link with what Mr Ramathlodi said in this

Commission when he gave evidence about, and expressed his views about the Waterkloof landing because, and I remember it because last week I dealt with when Minister Nkoana-Mashabane was here was that he was saying that landing as far as he was concerned wasn't just a landing of that aircraft, it was the Gupta family showing the whole country and the world that they might not be President but they land where Presidents land, in other words they were in charge. I hope I am not misrepresenting but that's how I understood Mr Ramathlodi's evidence to be to say they were telling everybody we are in charge, so

10 when you then say if they get knowledge by whatever means that the President intends to appoint so and so as Minister and then they go to that person to share that information it may be that you are right that the motive is a very wrong one.

MR SHAIK: Yes, sir intelligence we make use of the word called created dependencies.

CHAIRPERSON: What's the word?

MR SHAIK: Created dependencies.

CHAIRPERSON: Yes.

MR SHAIK: I am absolutely convinced that the need for the Gupta

20 brothers to tell Minister Fikile Mbalula that he was going to be the Minister of Sport was to determine a created dependency. That created dependency was to extract value from him being the Minister of Sport and of course if one looks at the business investment of the Gupta's there were in cricket, in sport stadiums. So the benefit was to extract value. If he was made the Minister of Water you know well I do not

know but you know they are – if he was made the Minister of Water I do not think they would have informed him. The Portfolio of sport is related to their business interest and they needed to create dependency of him onto them so that when they do come back on the value that he would felt obliged to respond because of the created dependency and please do not get me wrong Sir I am not saying that it happened. I am saying the mechanism by which we from Intelligence would have seen it.

CHAIRPERSON: Well that is quite important but I am looking at other
 10 evidence and that part of the – what I have got to do is not look at evidence in isolation. I have got to look at all the evidence and where there are links. You know – link – link them. I have heard evidence where – of course I mean the public knows about the evidence of Mr Jonas which was to the effect that he was taken to a meeting at the Gupta residence and that the – Mr Duduzane Zuma was there when a Gupta brother, one of the Gupta brothers said they wanted to make him Minister of Finance and said Minister Nene would be – would be dropped from cabinet or dismissed whatever the term was that they used and that he was – they wanted him to be the new Minister. And it
 20 seems that you would be talking about the same thing to say maybe they wanted – if he accepted they wanted to make sure that when he became Minister of Finance he would remember that...

MR SHAIK: Yes.

CHAIRPERSON: They made him Minister of Finance.

MR SHAIK: Correct.

CHAIRPERSON: And therefore he would feel some loyalty towards them.

MR SHAIK: Yes.

CHAIRPERSON: And there would be some dependence because if they made him Minister they could unmake him Minister. They could have him dismissed.

MR SHAIK: Correct.

CHAIRPERSON: So – so one has that and then of course you have other situations where somebody who is in a certain position like Mr
10 Saloojee of Denel at a certain stage was brought I think by Mr Essa I am not sure to a meeting I think at the Gupta residence and at one of the meetings Minister Gigaba who was Minister of Public Enterprises I think was there. He was brought at the time but according to the evidence not much happened but apparently he did say something like I hope you people can work well, or something like that I cannot remember. But also you have an occasion when Mr Saloojee was brought into a meeting at the Gupta residence and Mr Duduzane Zuma was – was present but there is not much according to the evidence that he said but he was present.

20 **MR SHAIK:** Ys.

CHAIRPERSON: And then you have Mr Dukwana former MEC in the Free State Government who was taken to the Gupta residence and according to him at least on one of the occasions Mr Duduzane Zuma was there but not much – he did not say much there. So one does not know whether even the presence of Mr Duduzane Zuma at some of

these meetings where certain people are brought in was meant to convey the message – a certain message to the people. So I was just mentioning.

MR SHAIK: I understand.

CHAIRPERSON: Because I thought what you said might be linked to those – to those scenarios.

MR SHAIK: Thank you.

ADV PRETORIUS: Perhaps Chair Mr Shaik was being polite in the way he expressed his views earlier on. But I am sure you have disabused
10 him of the need.

CHAIRPERSON: Ja. Yes thank you.

ADV PRETORIUS: Mr Shaik there was another reason for the investigation which you relate in paragraphs 20 and 21. Please tell the Chair about that?

MR SHAIK: Chair you will recall that at the particular time in – in multilateral affairs the US administration under then President Barak Obama was engaging with negotiations in respect of Iran to lift the sanctions that was in place on Iran because of the attempts with the Iranian government to build its nuclear facilities outside of the
20 regulatory proceedings. I was approached...

CHAIRPERSON: I am sorry Mr Shaik. Just to close off the issue relating to the newspaper article.

MR SHAIK: Yes.

CHAIRPERSON: Which talked about Mr Mbalula having been informed of his pending appointment by the Gupta brothers.

MR SHAIK: Yes.

CHAIRPERSON: You – you have not told me – you said you decided to investigate but you have not told me about what happened. Is that because it is a sensitive – it is an intelligence matter because otherwise we lawyers want to close all gaps. We want to hear the whole story So I say somebody reading the transcript would say, he said they investigated, the decided to investigate and what happened and nobody asked what happened?

MR SHAIK: Sir the – you will recall that after our Monday morning
10 foreign meetings we had lunch with our Deputy Director Generals.

CHAIRPERSON: Yes.

MR SHAIK: We agreed on the investigation. It was supported by our Director – Deputy Director Generals and related to that investigation is another aspect which – which I am ...

CHAIRPERSON: To which you will come.

MR SHAIK: Yes correct.

CHAIRPERSON: Okay so at some stage you will be able to either tell me what happened to that investigation.

MR SHAIK: Correct.

20 **CHAIRPERSON:** Or to tell me.

MR SHAIK: Yes

CHAIRPERSON: For certain intelligence reasons.

MR SHAIK: Correct.

CHAIRPERSON: You might not be able to tell me.

MR SHAIK: Correct.

ADV PRETORIUS: Or to tell you what did not happen.

CHAIRPERSON: Yes.

MR SHAIK: So in relation I was approached by the then US Ambassador stationed in Pretoria that the state department is concerned about the possible funding of Shiva Uranium which is a Gupta owned mine and they had reason to believe that such financing may be coming from Iran. And they are concerned. This is – when I say they I mean the United States is concerned because it is a very sensitive time in the negotiations with Iran in regard to the – the
10 discussions about lifting of the sanctions and coming up with a new approach to Iran and if this is the case then they did not know whether to interpret this as Iran going rogue or what – what is the situation and could we determine whether Iranian funding is in fact behind Shiva Uranium?

ADV PRETORIUS: What were the consequences for South Africa be if this scenario were correct?

MR SHAIK: The consequence for South Africa would have been enormous.

1. We would have been seen to be going rogue in violation of
20 multinational multilateral agreements and such violations would have consequences. And of course it would be an enormous financial consequence to the country if sanctions were then by necessarily extended to South Africa.

So it was another aspect of intelligence that needed to be dealt with. And this is a very good example of how intelligence services work.

Although in this case the approach was from the state department to me via the Ambassador and – and in my evidence I also point and I am sure it is going to be led by Director Ngange that they too were approached directly by the American Intelligence to – to determine the source of this funding on the Uranium mines.

ADV PRETORIUS: Right. You say in paragraph 21 that you did discuss this concern with the President at the time?

MR SHAIK: That is correct.

ADV PRETORIUS: And you were given certain reassurances?

10 **MR SHAIK:** That is correct.

ADV PRETORIUS: To the effect of...

MR SHAIK: The – I was...

MR SHAIK: That the – that the Iranians are not behind Shiva Uranium funding.

ADV PRETORIUS: Right so as I understand it.

CHAIRPERSON: I am...

ADV PRETORIUS: The decision was made for more than one reason to conduct an investigation?

MR SHAIK: That is correct.

20 **ADV PRETORIUS:** You say in paragraph 23 that shortly after this decision was made certain things happened. What happened?

MR SHAIK: Yes. The – I – I cannot recall whether it happened on the same day or the day after but a few days after that meeting that we took to investigate the Gupta family Mr Maqetuka informed both Ms Ngange and I that we are required to fly urgently to Cape Town where

the Minister has summoned a meeting of us in Cape Town. So we flew to Cape Town that evening and we arrived there at night for a meeting with the Minister.

ADV PRETORIUS: Yes. Before you get to the contents of the meeting Mr Shaik there are two issues that perhaps you should inform the Chair of. The first is how frequently would a Minister take steps to call to account operational executives in operational matters? Was this a common occurrence?

MR SHAIK: Well this is the first that it has happened to me but during
10 the period in which I was the Head of the Secret Service or the Foreign Branch of the SSA I was never called to explain an operation. So this the first operation that Minister Cwele deemed it necessary for me or for us to come explain.

ADV PRETORIUS: And the second point is,

CHAIRPERSON: Now which year was this? I do not think your statement specifies.

MR SHAIK: It is 2011.

CHAIRPERSON: 2011? Okay. You would not remember what month and so on or [indistinct].

20 **MR SHAIK:** Oh I think these are now in the latter months of 2011.

CHAIRPERSON: Ja okay.

MR SHAIK: Because by 2012 I was history.

CHAIRPERSON: Okay. Okay.

ADV PRETORIUS: Mr Shaik would you comment then on the basis of your own knowledge and experience in relation to intelligence matters

on the appropriateness or otherwise of a Minister becoming involved in operational matters.

MR SHAIK: The – Chair I found it – I found it inappropriate. I would go so far as to say illegal but then I would have required the courage to go and prove that illegality in a court and it was just going to be a messy affair. But it is – it is not done like that. The – the better way would have to been to await the outcome of the investigation and then dealt with the issues of the investigation. Dealt with the recommendations of the investigation. But making known your view of
10 an investigation on a matter of National Security when you are the Minister of National Security is an indictment also on your understanding of National Security.

CHAIRPERSON: We – that is before we get to the actual content of the discussion ne?

ADV PRETORIUS: Yes I am coming there now.

CHAIRPERSON: Yes. Okay.

ADV PRETORIUS: It is just a matter of general principle.

CHAIRPERSON: No, no that is fine I will ...

ADV PRETORIUS: Mr Shaik what was the tone of the meeting?

20 **MR SHAIK**: Well the meeting was extremely confrontational – extremely confrontational. The – you know the Minister...

CHAIRPERSON: I just want to say I know it happened a long time ago but the more you are able to tell me about the details of the discussion and the tone the better so I get as good a picture of how the meeting was as you have.

MR SHAIK: Okay. So the – when we arrived – so the Minister has a holding room. We were in the holding room and the Minister then I think there was a meal provided for us and from there we went into the – the Minister’s meeting room. The Minister attended that meeting with two people. One was appropriately now Ambassador Zlomo who is South Africa’s Ambassador to Algeria who at the time was a special advisor to the Minister. And he attended – he also attended the meeting by Mr is it Doctor Kaw Mabangu – Kaw – there was a gentleman by the name of Doctor Kaw and I just – the surname just
10 escapes me but I will get it.

CHAIRPERSON: Mabanga or Mabanga? I am just...

MR SHAIK: No, no ..

CHAIRPERSON: I am just thinking of surnames along those lines.

MR SHAIK: Mavungo but I will check and I will give.

CHAIRPERSON: You will check ja okay.

MR SHAIK: I will confirm the surname.

CHAIRPERSON: Yes.

MR SHAIK: But there was Doctore Kaw and...

CHAIRPERSON: And what was his position?

20 **MR SHAIK:** He is a member – he was – he was the Head of the Ministerial Services and a member of the service. And in particular a member of the Foreign Service. When we ...

CHAIRPERSON: Which fell under you? Which fell under you for instance?

MR SHAIK: Yes which fell under me.

CHAIRPERSON: Yes.

MR SHAIK: So when we started the meeting we objected to his presence on the basis that he is a junior official. We are going to be discussing – because the Minister indicated that he wanted to discuss the Gupta matter. I will – our Gupta investigation and I am not too sure whether it is the Director General who insisted or I insisted that – that Doctor Kaw please leave the room on the basis that he is an official from the service and we would not want to have that discussion. Insofar as Ambassador Zlomo was concerned Ambassador Zlomo just
10 returned from a – a posting at a multilateral – intelligence multilateral institution and we found it acceptable for him to present in the meeting insofar as him being an advisor to the Minister. But with no participation rights.

CHAIRPERSON: But the other did agree to leave?

MR SHAIK: Yes he did agree to leave.

CHAIRPERSON: ja.

MR SHAIK: He agreed to leave ja. So the Minister wanted to hear from Ambassador Maqetuka what the reasons behind the investigation were. Ambassador Maqetuka took him through or thinking.

20 **CHAIRPERSON:** How – how did he know about it – about the decision to investigate had Ambassador Maqetuka told him or how had that – because you said you had just made the decision before. Or is me showing my ignorance about intelligence.

MR SHAIK: No, no you are showing your – you are showing your – your – you are showing your intelligence about intelligence matters.

The Minister was informed.

CHAIRPERSON: Yes.

MR SHAIK: We have not yet...

CHAIRPERSON: Officially?

MR SHAIK: No.

CHAIRPERSON: Oh.

MR SHAIK: The Minister was informed by someone present at the meeting. We were unable to determine who informed the Minister but it was clear that the Minister was informed from a participant in the
10 meeting.

CHAIRPERSON: Okay. So he asked – he wanted to be told.

MR SHAIK: Yes.

CHAIRPERSON: About this decision?

MR SHAIK: Correct.

CHAIRPERSON: And you saying Ambassador Maqetuka took him through.

MR SHAIK: So Ambassador Maqetuka led the – the argument and essentially which was the arguments that we have covered to now.

CHAIRPERSON: Hm

20 **MR SHAIK:** National security and I think in that meeting and again Ambassador Maqetuka will go into it. But there were other noises around the – the Gupta family.

CHAIRPERSON: Hm.

MR SHAIK: This matter needed to be investigated. It was ultimately in the interest of the President that this investigation happens. Because

either the investigation is going to find that there is nothing to this story. And if there is nothing to the story then the President is in a sense cleared by the Intelligence Services. If there was something to the story then there were corrective action that could be taken. But I must confess Chair that the Minister was having none of it. Reason left the room when we entered and we could not find each other. In fact it deteriorated where the Minister made this matter incredibly personal. He argued that the reason why we doing this investigation is because we want to pursue or further the business objectives of Mr Njenje. We

10 all at this time in fairness to Mr Njenje I have never seen him more angry than I have seen him in that meeting. Ambassador Maqetuka denied that. I denied that. We were not furthering the business interest of Director Njenje. In fact when we had our early morning discussion it was Director Njenje who placed on record his conflict and what his involvement or – and I will not say involvement – his interaction with how it came to be that he interacted with the Gupta's and what was behind it etcetera. And we were very satisfied with his explanation. And if anything in deference to him he wanted us to ensure that that does not feature in the investigation. So if anything it

20 was completely the opposite to what the Minister was alleging. Again we tried to explain to the Minister and the again the Minister did not listen. It seemed to me that the Minister did not want this investigation to happen. For reasons that I am sure the Minister would explain. I can only but speculate but he did not want this investigation to happen and the meeting was incredibly tense.

CHAIRPERSON: Well if somebody – if you – if you come to know that the police or any official agency of the state is conducting some investigation and you may be the subject of the investigation and you know that they will find nothing. I wonder why you would say stop the investigation. You may or may not be able to comment on this but I am trying to understand why if the senior – [indistinct] senior management of intelligence take a decision such as this on the face of it in good faith to do their job why anybody could say, stop it if as far as they know the investigation will find that nobody did anything wrong or
10 particular people did not do anything wrong. Because if you say it must be stopped you leave a question mark about the – the person or persons who were to be investigated. But if you allow it to continue and he finds out that it clears them then the whole thing is buried.

MR SHAIK: Correct.

CHAIRPERSON: But you – you might be able to say something? You have done a lot of investigations I am sure.

MR SHAIK: I am – I am – for me and again I will speculate I think it goes again to one of the reasons why you should not have a Minister of Intelligence. Because a Minister serves at the favour or behest of a
20 President and therefore would seek to either ingratiate themselves or would seek to get favour from a President. The Director General of an Intelligence Services serves the national interest of the country and often those two things the National – serving the national interest versus serving the favours of a President may not be ...

CHAIRPERSON: They might no coincide

MR SHAIK: They may not coincide. And I think this is a – a classical example where the national interest was undermined in order for favour.

CHAIRPERSON: Yes. Continue.

ADV PRETORIUS: How long did this meeting last?

MR SHAIK: To best of my understanding I think it could have been a hour to about two hours.

CHAIRPERSON: Right.

MR SHAIK: An hour to two hours.

10 **ADV PRETORIUS:** Right.

CHAIRPERSON: So was the only reason that the Minister advanced for saying that the investigation should be stopped that it was an investigation intended to benefit Mr Njenje or it was driven by him whatever he said? Is that the only reason he gave or are there other reasons that you – that he gave because I would like to know if there were other reasons and hear and be able to assess their validity.

MR SHAIK: I think he also gave the reason that he did not deem it necessary that in terms of the media scoping etcetera he did not see that the scoping exercise that we did in respect of you know this is
20 what is being said in the media, he did not see it threatening National Security. He did not see it as we seen it. The – and he was I think willing to say that these are matters that have – political matters that the report in the paper – political matters which should not require attention. And he – I actually got the sense that the Minister did not believe that which was being alleged was in fact turned out to be true.

So I do not think he believed the allegation. And therefore he was dismissive of it. Whereas we on the other hand did not take a view about whether the allegations in the media was to be believed or not believed. We took the view that the matter should be investigated so that we could arrived at an objective understanding of what in fact occurred.

CHAIRPERSON: Of course if he did not believe what was being alleged and now investigation was done and it turned out that he was wrong in not believing what was alleged the consequences could –
 10 could be and could have been disastrous. So is the position not that he ought to have sought to air on the side of caution and say, well I do not believe it but if these three senior people who have experience a lot of experience in intelligence believe there should be an investigation I should leave it to them. Because if they find out that there is no problem then it is fine.

MR SHAIK: Absolutely correct and again not - not to take any perverse pleasure from this. It did turn out to be correct. It was a disaster and as a result I am sitting before you on a matter of State Capture and I think in - in fairness if we were allowed to do the investigation. We
 20 maybe - we may - I am not saying it would necessarily be the case. We may be talking about different things now.

CHAIRPERSON: Well that is - that is quite important Mr Shaik and it goes back to an issue I raised with you much earlier. Well I mentioned to you. Namely - you must tell me if I think I mentioned, but I did not mention it. Namely I talked about I think the role of parliamentary -

Parliament in terms of its oversight obligations, but I did not refer to oversight obligations, but what I was about ...

MR SHAIK: Hm.

CHAIRPERSON: Is part of oversight. Namely about the votes of no confidence and so and so on.

MR SHAIK: Hm.

CHAIRPERSON: So one of the things that I believe I will have to look into if I come to the conclusion that yes there was State Capture or something that should not have happened and - and that happened. I
10 may have to say how did it happen. Who are the possible role players who could have prevented it from happening and what mechanisms were in place that could have been used to prevent it from happening?

Were those mechanisms used effectively and hence one could look at Parliament's performance of its oversight obligations in regard to when did they start suspecting State Capture. What did they do about it? The same thing when it comes to the levels of corruption in the country and all of that. What did they do?

What are they doing when they - what do they do when they execute their oversight obligations. So you - you say here. Here we
20 were from the Intelligence Community being Senior Managers having a meeting with the Minister. We had made a decision that this could pose a National Security issue and should be investigated.

We decided to investigate it, but here is a Minister of Intelligence to whom we - we report who says no. It should not happen ...

MR SHAIK: Yes.

CHAIRPERSON: And you say - with the benefit of hindsight you say well looking at what subsequently happened ...

MR SHAIK: Hm.

CHAIRPERSON: Indeed ...

MR SHAIK: Hm.

CHAIRPERSON: There is a chance that - if we had been allowed to conduct our investigations there is chance that maybe we could have come up with recommendations or that could have prevented it from
10 happening or even if it did not prevent it completely, but maybe it might have been limited and not as - have gone as far ...

MR SHAIK: Yes.

CHAIRPERSON: As it did. So - so I am just saying that what you are saying is quite important, because it throws ...

MR SHAIK: Yes.

CHAIRPERSON: Also on that, because to the extent that there - there was State Capture and so on. We need to know where did we go wrong. Who was supposed to do what? Who did not do their job and if they had done their job could we have been here ...

20 **MR SHAIK:** Hm.

CHAIRPERSON: And so on. So that is quite important.

MR SHAIK: Chair, I - I just want to sad that and in this case I would - I would be as direct as I could be. The - I think it - it does constitute a dereliction of duty on the part of the Minister having assumed the function of the Minister and intervening in the way he did. He - he did

cause grievous harm to the wellbeing of the State, because immediately after this incident was of course the Waterkloof landing incident.

Now I wonder - I mean the Waterkloof landing incident for me which is also of - of deep concern, because it was a - it is a - a military air force. It is not a normal air force. It is a military air force in which - you know. To enter a military air force its airspace etcetera. Requires a phenomenal amount of intervention.

I think that was again a - an incredible narcissistic demonstration of power. Unnecessary and it should not have
10 happened. It was a violation of National Security and if we were allowed to have done our investigation the - I do not think you would have at least for sure you would have had the Watergate affair.

I mean the Waterkloof affair. I am also - I must say on - on record sir, because and I know I am stretching it here. That is common practice of Ministers to assume the power and responsibility and the perks that come with the jobs of being Ministers, but then are the first to - to cry that they did not know when there are problems.

How could you not know that an aeroplane was landing at a military airbase? How could you not know and now I accept that
20 Ambassador Bruce Koloane and I know him and he is a - a - he was a great Ambassador. He was a very effective Ambassador. He was a very effective officer of protocol, but I think in one of your recommendations if you do indeed make recommendations DJ.

That this notion where officials take the fall for the errors of their politicians. I think we should bring that to an end. We should

bring that to an end. Do not become a politician if you do not want to take responsibility. Take the credit. Take the risk, but also take the responsibility and the obligations that come with your office.

Do not pass that obligation or do not pass the blame onto officials when you know that - you know - essentially you are - you - you are not owning up to your own responsibilities as Ministers and I think in both those cases these are classic examples where Ministers do not own up to the responsibility of their office.

CHAIRPERSON: Well that is - that is quite important, but it touches
 10 upon something that I raised with Minister Maite Nkoana-Mashabane last week who was here to give her side of the story to say why she recommended to the then President that Mr - Mr Koloane be made Ambassador after what had happened and his role in the Waterkloof landing.

Being known insofar as he had confessed to certain things and made certain admissions. Of course as we all know there is the question of whether the President at the time knew about this or did not know about it. Of course Mr Koloane had told certain officials in Waterkloof that - that in effect the President knew or that he had been
 20 told by one or other Minister that he knew and wanted this to happen.

Of course later on he said no that - that was just him lying and so on and so on. So - but we are dealing with the matter on the - on the basis that assuming that the President did not know and assume that Mr Koloane was right. That this was his whole idea ...

MR SHAIK: Hm.

CHAIRPERSON: But how could you then get the same guy promoted ...

MR SHAIK: Hm.

CHAIRPERSON: And you yourself say the appointment as an Ambassador is an honour and you say yourself that you knew before you made the recommendation that this person had admitted to lying about this. Something as important as this and you accept that the person did not have integrity. You accept that to be an Ambassador you must have integrity. How could you ...

MR SHAIK: Hm.

- 10 **CHAIRPERSON:** Then go to the President and recommend that the same person should be made President. That is what we were discussing and I raised the issue about values. You know. You say - you know - Minister have got to take responsibility. I mean you would know that you know some people would take responsibility and will say leave - leave my junior staff and whatever. I made this decision. I take responsibility. I accept whatever criticism.

MR SHAIK: Correct.

CHAIRPERSON: As opposed to those who want to come in only when there is credit ...

- 20 **MR SHAIK:** Hm.

CHAIRPERSON: And shift out of line.

MR SHAIK: Hm.

CHAIRPERSON: Move out of line when there are problems and then push junior officials forward to say they must take responsibility. So I - I certainly believe that accountability is critical in our democracy and

that it starts with being able to stand up for what you believe is right and if you believe what you stand for is right.

You say this is what I believe. If you get persuaded differently. Then you say now I have changed my mind, because I have been persuaded otherwise, but the question - the question of senior leaders hiding behind junior officials. I think is unfortunate. So I understand what you mean and ...

MR SHAIK: Thank you, sir.

CHAIRPERSON: I think people must take responsibility for their own
10 roles in whatever. Mr Pretorius.

ADV PRETORIUS: Thank you Chair. You will recall a few minutes ago Mr Shaik that you gave evidence in general terms about the principles which adhere to the relationship between a Minister on the one hand and the Operational Executives on the other. At this meeting in Cape Town did the Minister say anything about his authority and whether investigations could or could not be conducted without his authority?

MR SHAIK: Yes. There was a - a debate about that, but by that time the meeting deteriorated. With the Minister saying I am instructing you not to continue with this investigation and I think at that point we
20 became uncharacteristically in the event - in the case of my two colleagues uncharacteristically equally impolite.

Saying we are going to investigate and we could not move past that point and then I think it was Ambassador Maqetuka who then made the suggestion that we would rather prefer to discuss this with the President directly.

ADV PRETORIUS: In a sense that the meeting in Cape Town resulted or did not result in any agreed way forward was this - was the issue between yourselves on the one hand and the Minister on the other resolved?

MR SHAIK: No. The matter was not resolved. The - we did not accept not to - we did not - we did not accept to stop the investigation. We did get the opportunity to get a meeting with the President and the Minister undertook to arrange that meeting with the President. So the matter was so to speak pushed up the - the ranks for a discussion with the
10 President.

ADV PRETORIUS: Right. Have you any idea from that meeting or elsewhere where the Minister would have received information about the business interests of Director Njenje?

MR SHAIK: Well I can only but assume that he may have received that information from the Guptas themselves.

ADV PRETORIUS: Have you any idea of what the Intelligence capabilities of the Gupta family were?

MR SHAIK: The - the Gupta family at that time was deploying a large amount of security personnel and - and often the security personnel
20 also engaged in information gathering. Not of a very quality. Mainly speculation and rumour mongering etcetera and I did pick up that the Gupta family had a kind of intelligence operation going, but I did not put much reliance on it and I must say I should have.

Much to my detriment, but I did not put any much reliance on it and in fact subsequently I found out that it was done that intelligence

capability that informed the President that there is a possible grouping of people who want to - to topple him. In fact I too was accused of being one of the people who was planning to topple President Zuma.

CHAIRPERSON: Is this - is this now around 2011?

MR SHAIK: It is around 2011. *Ja*.

CHAIRPERSON: Yes.

MR SHAIK: 2011.

CHAIRPERSON: Yes.

MR SHAIK: Late 2011. *Ja*.

10 **CHAIRPERSON:** Yes. Okay.

ADV PRETORIUS: In relation to whether or not the Minister had the authority either to instruct or to stop an investigation and in relation to the issue as to whether Operational Executives were entitled to conduct an investigation without the authority of the Minister. What was the position put by yourself and your two colleagues?

MR SHAIK: The - the position to the best of my recall is that the Minister does not have that authority. We will continue with this investigation subject to a discussion with the President.

ADV PRETORIUS: How did the meeting end?

20 **MR SHAIK:** Coldly.

CHAIRPERSON: Just repeat.

MR SHAIK: Coldly. I think we all got up and none of us said our goodbyes in a very polite manner and we just left.

CHAIRPERSON: I - I thought at some stage during the meeting the way you are describing it. There must have been quite some heat in

the meeting. So later on it was cold.

MR SHAIK: Later it was cold.

CHAIRPERSON: Hm.

ADV PRETORIUS: No, no. I am ...

CHAIRPERSON: Are you done with the meeting or if you are still ...?

ADV PRETORIUS: No. Not entirely.

CHAIRPERSON: Okay.

ADV PRETORIUS: Just one more question.

CHAIRPERSON: Ja. No. That is fine.

- 10 **ADV PRETORIUS:** In relation to whether the investigations should continue or should be stopped. I think you have told the Chair that no agreement was reached ...

MR SHAIK: Hm.

ADV PRETORIUS: In that regard.

MR SHAIK: That is correct.

ADV PRETORIUS: What was the position of yourself and your two colleagues in that regard?

- MR SHAIK:** We were of the opinion that we will continue with the investigation. That the justification that we had was - was legitimate
20 and that the justification for the - the investigation was legitimate and warranted the investigation and that we should get the investigation going.

However we wanted to meet with the President, because by making the - the position that the Minister does not have authority over the - the direct operations and who does. Of course the President does

and we therefore wanted to raise this matter directly with the President to continue this - this operation.

CHAIRPERSON: That was the outstanding question?

ADV PRETORIUS: Yes. I have - I - I just want to put ...

CHAIRPERSON: *Ja.*

ADV PRETORIUS: The version of Ambassador Maqetuka ...

CHAIRPERSON: *Ja.* Do that, because that is what I ...

ADV PRETORIUS: Right.

CHAIRPERSON: I had in mind. *Ja.*

10 **ADV PRETORIUS:** As you have told the Chair there will be further in relation to the evidence in relation to this meeting and I would just like to put to you the version of that meeting as testified Ambassador Maqetuka.

CHAIRPERSON: As contained in his statement.

ADV PRETORIUS: Yes and I will give - give you a copy of his statement.

MR SHAIK: Okay.

ADV PRETORIUS: Now.

CHAIRPERSON: You - you said as testified to.

20 **ADV PRETORIUS:** In his statement. Yes. I apologise.

CHAIRPERSON: *Ja.*

ADV PRETORIUS: As to be testified perhaps.

CHAIRPERSON: Hm. Well did you put a question or you are still looking for ...?

ADV PRETORIUS: I would like him to have the benefit of the ...

CHAIRPERSON: Oh. Okay.

ADV PRETORIUS: Copy in case he wishes to comment.

CHAIRPERSON: *Ja. Ja.* Okay. Somebody must (indistinct). Both counsel are sitting this side. One of them must sit this side. So you can help. One of you must be that side. So you can help with - if - if the witness needs to be assisted. It is much better if there is somebody this side.

ADV PRETORIUS: I understand. My authority does not always extend that far.

10 **CHAIRPERSON**: I - I thought - I thought ...

ADV PRETORIUS: Accept in operational matters.

CHAIRPERSON: I thought the lead - the leader of the - of the team can direct how the members of the team - where the members sit.

ADV PRETORIUS: Yes. I - I will take note of that. Encourage from that Chair.

CHAIRPERSON: Chair.

ADV PRETORIUS: In regard to the meeting ...

CHAIRPERSON: Well he might need a few minutes to have a look if he has not seen it before.

20 **MR SHAIK**: No. I have not seen it.

CHAIRPERSON: *Ja.* Just - just have a look.

ADV PRETORIUS: Would you just look at paragraphs 6 and seven. That is all you need to look at.

MR SHAIK: Okay.

ADV PRETORIUS: For the moment at any rate.

MR SHAIK: Yes. Good.

ADV PRETORIUS: Okay. Paragraph 6 the following statement is made:

“I informed the team ...”

That is yourself and Mr Njenje.

“...that while the investigation was still ongoing the then Minister for Intelligence Services Siyabonga Cwele apparently got wind of the investigation and summoned us to a meeting in Cape Town.”

10

That is consistent with what you have said?

MR SHAIK: That is correct.

ADV PRETORIUS: He - he says the meeting started in the early evening and went on till about midnight. I do not think much turns on that. The next sentence he says:

“The Minister ...”

CHAIRPERSON: Well I am - I am sorry. That might be important because you thought it took about an hour or so.

MR SHAIK: No, no. I said at least two hours.

20 **ADV PRETORIUS:** An hour or two you said.

MR SHAIK: Ja.

CHAIRPERSON: Yes.

MR SHAIK: And there was dinner and so forth. So - ja.

CHAIRPERSON: Oh, after the meeting?

MR SHAIK: Yes.

CHAIRPERSON: Oh.

MR SHAIK: No, no. There was dinner before the meeting.
(Intervenes).

CHAIRPERSON: Oh, before the meeting.

MR SHAIK: So it went on quite late.

CHAIRPERSON: Oh. So ...

MR SHAIK: *Ja*.

CHAIRPERSON: So from the time you arrived ...

ADV PRETORIUS:

10 **MR SHAIK:** Correct.

CHAIRPERSON: To the time you left it might have been beyond midnight whatever.

MR SHAIK: That is correct. *Ja*.

CHAIRPERSON: But the actual discussion may have been about an hour or so?

MR SHAIK: About two hours.

CHAIRPERSON: About two hours?

MR SHAIK: *Ja*.

CHAIRPERSON: Okay.

20 **ADV PRETORIUS:** The statement continues in paragraph 6:

“The Minister introduces the reason why he had called us as the fact that Njenje was undertaking an investigation of the relationship between President J G Zuma and the Guptas and that Njenje was conducting this investigation for his own

business interest.”

Your comment in that regard.

MR SHAIK: That is correct.

ADV PRETORIUS: That is correct you say. Paragraph 7:

“I insisted to the Minister that this was not Njenje’s investigation, but that of the SSA in terms of its mandate.”

MR SHAIK: Correct.

ADV PRETORIUS: “The Minister continued - the Minister ...”

10 Sorry. My apologies.

“This the Minister ignored and he continued with his line of addressing the issues on Njenje.”

MR SHAIK: That is correct.

ADV PRETORIUS: “The meeting ended without resolving the matter.”

So far ...

MR SHAIK: We ...

ADV PRETORIUS: It seems that you are in broad agreement ...

MR SHAIK: *Ja.*

20 **ADV PRETORIUS:** At least.

“Later we learnt from the media that the Minister had instructed us to stop the investigation. I have to say that I do not recall him having given such an instruction. Let alone that a Minister for Intelligence would have no mandate to stop an

investigation where the organisation had assessed
the need to so investigate.”

It seems that there is some difference between your
recollection and the recollection of Ambassador Maqetuka.

MR SHAIK: No. I - I do not see a substantially different.

ADV PRETORIUS: Well he says he does not recall such an instruction
being given ...

MR SHAIK: The - the ...

ADV PRETORIUS: To stop the investigation.

10 **MR SHAIK:** Well the Minister was insisting that we do not continue
with the investigation. That is ...

ADV PRETORIUS: So your recollection is clear.

MR SHAIK: That is what I was recalling. Yes.

ADV PRETORIUS: Yes.

MR SHAIK: *Ja.*

CHAIRPERSON: Hm.

MR SHAIK: And he was giving reasons ...

CHAIRPERSON: *Ja.*

20 **MR SHAIK:** That the investigation is related to the business interests
of Director Njenje and we were arguing that it is the National Security
imperative that is driving the investigation or the need for the
investigation.

CHAIRPERSON: Well the - there might be significance in establishing
whether he was giving an instruction or he was saying this must stop.
With a view to giving instructions or whether he was simply expressing

a view that was contrary to the view of the three of you and saying he thought there was no need for it for whatever reason.

So I do not know whether Ambassador Maqetuka may be seeking to make a distinction when he says he does not remember or recall the Minister gave an instruction. Whether he means whatever he may have said he did not view as an instruction ...

MR SHAIK: Yes.

CHAIRPERSON: But he may have expressed his views which were to the effect that he was against you continuing with the investigation, but
10 maybe he views them - he viewed them as nothing than - more than the Minister's views. So I do not know whether that is the - that is the angle, but I emphasise it to you for purposes of you being able to say whether as far as you - your recollection is concerned you are quite clear that the Minister was saying stop this thing. As opposing to just giving ...

MR SHAIK: Yes.

CHAIRPERSON: His own views or whether he was giving his - his views and nothing more.

MR SHAIK: Correct. I mean I am - and also I must say that as the
20 Head of the Foreign Branch I was not directly in the firing line so to speak. I was there in the support line and the - the Minister would if he was going to instruct. The Minister could have written this in a letter to say.

I hereby instruct you not to engage in this investigation and I - best of my recollection I do not think that happened, but what I

understood from the forcefulness from which the Minister was debating with us the manner of the debate. The - the level of his questioning. He in no uncertain term expressed an incredible unhappiness about our wanting to investigate and I read from that that he wanted us not to investigate and I - I viewed that as an instruction not to investigate.

CHAIRPERSON: So to the extent that there might be a debate about whether what he said amounted to an instruction - verbal instruction ...

MR SHAIK: Huh-uh.

CHAIRPERSON: As opposed to a written instruction to the extent that
10 there might be a debate about that. Maybe in terms of your version and Ambassador Maqetuka's version is it possible that what you - what there should be no debate about as far as you are concerned among the three of you is that the Minister sought to put a lot of pressure on the three of you to stop the investigation.

MR SHAIK: Sure.

CHAIRPERSON: There should be no debate about that?

MR SHAIK: There is no debate about that.

CHAIRPERSON: There should be no debate about that?

MR SHAIK: No, no, no. At least from my point of view.

20 **CHAIRPERSON:** Yes. Yes.

MR SHAIK: No debate about that.

CHAIRPERSON: Ja. Throughout it was quite clear he was putting a lot of pressure?

MR SHAIK: Correct.

CHAIRPERSON: Yes. Whether you say that amounted to an

instruction or not.

MR SHAIK: Yes. Correct.

CHAIRPERSON: It might be another thing, but he was putting a lot of pressure and all three of you should - should probably agree on that?

MR SHAIK: Correct.

CHAIRPERSON: Okay. Thank you.

ADV PRETORIUS: By way of summary then we have a meeting that took place for up to two hours or more than two hours. What was the essential point of difference between the three Executives and the
10 Minister?

MR SHAIK: We believe that the - as a result of the analysis of open source information that we had and other information that there was a justifiably warranted investigation that should be conducted by the Intelligence Services with its full capacity into the Guptas. The Minister's position was that he did not think that the evidence warranted an investigation and he expressed his unhappiness to us in - in no uncertain terms about our desire to continue with that investigation.

ADV PRETORIUS: You have given evidence that the meeting was to
20 say the least confrontation and adversarial?

MR SHAIK: That is correct.

ADV PRETORIUS: Strong views were expressed?

MR SHAIK: That is correct.

ADV PRETORIUS: Did you ever take a position which showed that you had been persuaded by the Minister's views?

MR SHAIK: I am sorry, sir.

ADV PRETORIUS: Did - did you agree at any stage with the Minister's stance?

MR SHAIK: Oh no. Oh no. Not - not ...

ADV PRETORIUS: Did he at any stage agree with the stance that you had taken, that is the three of you?

MR SHAIK: I thought at one moment in the discussion that the way we put our argument was compelling and that he would have to agree to do this, but the – he opened the door slightly that yes this may warrant a
10 look into it, but then he closed that door immediately and focused again on Njenje, so at that point we were lost.

ADV PRETORIUS: So over the period of the meeting in quite confrontational circumstances ...[intervenes]

MR SHAIK: Yes.

ADV PRETORIUS: ...and confrontationally expressed is it your evidence then that the Minister persisted in his view that the investigation should not take place and you persisted in your views that it should take place.

MR SHAIK: That is correct.

20 **CHAIRPERSON:** Well to the extent that you might not have given me the details I am going to ask for I would like them because it may be difficult to make a determination between putting pressure in a meeting putting pressure to stop the investigation and expressing view which were contrary to the three of you but doing so firmly, so you said that the meeting was confrontational and there's some things that you can

remember that so and so said this or did this, you know you might not have the bending of the table or anything like that, but I just want to get that picture if you are able to remember you know somebody, how this was, how the confrontational condition, the atmosphere of the meeting manifested itself in terms of the discussion, in terms of the interaction.

MR SHAIK: One example that comes to mind is that when the Minister started to give reasons but it is Mr Njenje's business interests that's driving this investigation, and not the National Security imperative,
 10 Minister – I mean Ambassador Maqetuka countered by saying but Director Njenje explained fully and fully disclosed this to us and we are convinced that it has nothing to do with his business interests at all.

The, I think Director Njenje entered the discussion as well and tried to convince the Minister that this is absolutely not the case and the Minister was having none of it so at some point the Minister said no, no, no, you know you are conflicted on this matter you know and the debate went around and around whether there was a conflict or was there no conflict, whether the business interest was driving the investigation or not but the Minister did not want to listen to the fact
 20 that we needed to investigate the Guptas, did not want, did not.

CHAIRPERSON: And in the course of the discussion did he mention, if you are able to remember, that this investigation should be stopped or anything like that, I think effectively that's what you he his stance was but I am wondering what terminology he was using.

MR SHAIK: Ja, at the level of the discussion I am trying to now just to

a memory recall, the level of the interaction between us as Director Generals and him as Minister often there is a language that is spoken amongst you know the – if I express my unhappiness on a matter I am literally telling you you are not going to proceed any further, and I on the other hand will tell you no I am going to proceed further.

CHAIRPERSON: Yes, yes.

MR SHAIK: You now pushed it to the barrel where the next step is the written word, the “I instruct you not to do this”. I think we were becoming close to the written word.

10 **CHAIRPERSON:** Yes.

MR SHAIK: But the disagreement was tactfully around a very important mandate, do you Minister have the authority to instruct on an operation or not, and we were you know you can say what you want to say but we are going to continue this and the only person who can tell us not to do this is the President, because he is responsible for the direction of the Intelligence Services so we avoided an overt confrontation with the Minister or an absolute breakdown where it now has to go to the passage of letters and I up to stage do not know whether letters did cross the table.

20 **CHAIRPERSON:** Yes.

MR SHAIK: And our way out was with the meeting with the President.

CHAIRPERSON: So, but the issue that the Minister did not have the authority to stop the investigation that you raised as the three, you raised with him.

MR SHAIK: Yes, yes correct.

CHAIRPERSON: Yes and either says that you wouldn't raise it unless you believed he was trying to stop the investigation?

MR SHAIK: Correct, that is so.

CHAIRPERSON: Yes, yes.

MR SHAIK: That is correct sir.

CHAIRPERSON: Okay, thank you.

MR SHAIK: And again I would repeat in my understanding interpretation language the culture of Intelligence the Minister was unambiguous in his unhappiness about the investigation and as a result
10 the view that we were left with was that he does not want this investigation to continue.

CHAIRPERSON: Yes, *ja*.

MR SHAIK: There is no doubt about that.

CHAIRPERSON: There is no doubt about that.

MR SHAIK: None whatsoever.

CHAIRPERSON: *Ja*. Mr Pretorius I see we are at nine minutes past four, from my side if it is fine with everybody we can continue and try and finish with him, I don't know what your situation is, I don't know what Mr Shaik's situation is. How long do you think we need for him to
20 finish? In the end we must do justice to the matter, so that is important, but – well while you are looking maybe Mr Shaik if we continue for another 30, 40, 45 minutes, maybe up to an hour to finish would that suit you?

MR SHAIK: That will be fine.

CHAIRPERSON: That will be fine from your side.

ADV PRETORIUS: We still have to consult with Ambassador Maqetuka but ...[intervenes]

CHAIRPERSON: Yes, no I am – if the arrangement was that if we don't finish he is available tomorrow we can continue tomorrow that is fine, but I just thought that since we have got two other witnesses it may be that it is better to finish with his evidence today, but I am not rigid.

ADV PRETORIUS: Chair can I suggest compromise, because there is a substantial amount of evidence still to come.

CHAIRPERSON: *Ja*.

10 **ADV PRETORIUS:** The statement is in parts quote terse and I would also like to canvas with Mr Shaik certain issues arising out of the evidence of the former President, which might fall peculiarly within his knowledge, so that is in addition to the statement, so it is not just a matter of remaining parts of the statement, but there are issues on which I would ask leave to ask further questions.

CHAIRPERSON: *Ja*, no that is fine.

ADV PRETORIUS: And one set of questions that is not contained in the statement, so may I suggest five o'clock.

CHAIRPERSON: I am easy, that is fine, I didn't expect we would go
20 beyond five o'clock but as you say you know more than I do now there may be other matters that you want to raise. I am quite happy that we go up to five o'clock and then if we don't finish then subject to his availability tomorrow he can ...[intervenes]

ADV PRETORIUS: I hope that accords with the availability.

CHAIRPERSON: If we don't finish by five o'clock would you be

available tomorrow morning to finish?

MR SHAIK: Sure I will make arrangements

CHAIRPERSON: You would make arrangements?

MR SHAIK: Ja.

ADV PRETORIUS: That is all subject to the absolute unreliability of counsel's predictions in relation to time.

CHAIRPERSON: Yes okay alright, let us continue then. Or maybe we should take a little bit of – a ten minutes break.

ADV PRETORIUS: As you please.

10 **CHAIRPERSON:** And then – is ten minutes fine?

ADV PRETORIUS: Yes.

CHAIRPERSON: Okay, let's – well it is about twelve minutes past. I will just say let us come back at twenty five past.

ADV PRETORIUS: Thank you Chair.

MR SHAIK: Twenty five past?

CHAIRPERSON: Ja ,twenty five past. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

20 **CHAIRPERSON:** Okay let us proceed.

ADV PRETORIUS: Thank you Chair. Mr Shaik just one question on the meeting with the Minister to which you have testified. The issue of Mr Njenje's business interests was that the only reason given for a discontinuation or suggested discontinuation of the investigation?

MR SHAIK: Yes to the best of recall yes and of course it was now that

I look back on it the Minister was drawing extensions from – from an investigation into the Gupta's that may extend to possibly investigation into the President. My – my recall and I think the – the argument that we made is that that is not necessarily the case. We are investigating the Gupta's in – and whatever ramifications will come of it will come out of it. And of course it is then up to the – the President or the Minister how to then deal with the recommendations that will be made. The – the fear that the investigation may extend to the President again was unwarranted. But the Minister was not clear in the reason why he did not want this investigation to stop. He just – it seemed to me at least that he was of the view that he is going to come, provide a meal, have a discussion with us that this is going to end and it was going to end like that. So I think he was also taken aback by the – the belief that we had that this is a National Security issue.

CHAIRPERSON: Well earlier on I wondered whether there was something in the choice of the word fear. Why should it be a fear but you are – you are actually expressing.

MR SHAIK: Yes.

CHAIRPERSON: What you understood to be his position.

20 **MR SHAIK:** Correct.

CHAIRPERSON: Minister ja. Okay.

ADV PRETORIUS: Just as a matter of principle even if one of the three executives has a conflict of interest would that have affected the in principle decision to investigate where there was a need to investigate'

MR SHAIK: Absolutely not. The – and in fact a proper investigation

would allude to the conflict of interest to the extent that it needed to be placed on record. The – so even that was – was not a reason to stop the investigation.

CHAIRPERSON: Would there not have been a way if there was any legitimate concern about a possible conflict of interest attaching to Mr Njenje? Would it not have been possible for the investigation to be continued without Mr Njenje being involved himself in the investigation? Or was the problem that he was head of the very branch or unit that would do the investigation?

10 **MR SHAIK:** Yes now Sir the – the Mr Njenje would not be directly involved in the investigation.

CHAIRPERSON: Yes.

MR SHAIK: His personnel, his people and the entire service in terms of the required components would.

CHAIRPERSON: Hm.

MR SHAIK: So there would have been a measure as it should always be [indistinct] intelligence investigation a measure of objectivity. So even to that extent I felt the – the Minister's concerns were – were somewhat irrational to put it – put it mildly. There was no case to stop
20 it. Even if you looked at the methodology nothing in the methodology would have led to the investigation being compromised or prejudiced or biased in any way.

CHAIRPERSON: Yes. Thank you.

ADV PRETORIUS: Did a meeting with the President follow?

MR SHAIK: It – it did indeed. The...

ADV PRETORIUS: How long after the meeting with the Minister?

MR SHAIK: To the best of my understanding again memory is a faulty thing I believe that meeting occurred the next day or the day after. But we did not return to Pretoria we stayed in Cape Town and then attended the meeting the next day.

ADV PRETORIUS: Where did you meet with the President?

MR SHAIK: We met at the President's residence in Cape Town.

ADV PRETORIUS: Who was present at the meeting?

MR SHAIK: At the meeting was the – we waited first for the President.
10 So at that meeting was Ambassador Maqetuka. Was Director Njenje and myself and then we were joined by the President.

ADV PRETORIUS: And what happened at the meeting? If you could just describe to the Chair principally the exchange between yourselves on the one hand and the President on the other?

MR SHAIK: Yes. The – the President welcomed us. We were all seated. I did get a sense that he was briefed about why we were there and obviously he knew that it was about the matter of the Gupta investigation. But the President started off with a discussion on essentially what is called the – I got to get this pronunciation right –
20 the Richard Mdluli Report. There was a...

CHAIRPERSON: Did you say Richard Mdluli Report?

MR SHAIK: Yes.

CHAIRPERSON: Okay.

MR SHAIK: The – that report and I do not know whether evidence of that was led before the commission yet?

CHAIRPERSON: Well I – I am not – I do not think I have heard of a Richard Mdluli Report.

MR SHAIK: Okay.

CHAIRPERSON: So – yes.

MR SHAIK: The report essentially was a report conducted by Police Crime Intelligence when Mr Mdluli was the head of Crime Intelligence and it eluded to a – a possible gathering of ANC people who were planning in New Castle to topple the – the President Zuma. And we –

CHAIRPERSON: Oh I remember that part from the media.

10 **MR SHAIK:** Yes.

CHAIRPERSON: But not from the – yes.

MR SHAIK: Correct. So

CHAIRPERSON: Yes ja.

MR SHAIK: It is that report I am referring to.

CHAIRPERSON: Yes.

MR SHAIK: The Director General under the – the leadership of the Director General an investigation into that report was conducted by the SSA.

CHAIRPERSON: That is now Ambassador Maqetuka when you...

20 **MR SHAIK:** Yes by Ambassador Maqetuka.

CHAIRPERSON: He initiated the investigation.

MR SHAIK: He initiated a report because again and I do not want to – to lead his evidence but he was called by the – the Judge in charge of interception who raised a certain concern about the number of interceptions that are occurring in the police and there seems to be

something not right in the police service. Ambassador Maqetuka in his capacity as a DG of SSA subjected the – the Ndluli Report to a veracity test to see how truthful this report is. Is there anything in this report that is correct or accepted?

CHAIRPERSON: So – I am sorry. So there is what the public would have read in the newspapers?

MR SHAIK: Yes. Correct.

CHAIRPERSON: About a gathering of some ANC people in New Castle.

MR SHAIK: In New Castle that is correct.

10 **CHAIRPERSON:** Or Escort I cannot remember.

MR SHAIK: Yes, ja. Correct.

CHAIRPERSON: Plotting to unseat – I do not know whether the former President or – but plotting some things.

MR SHAIK: Correct.

CHAIRPERSON: You say that – those media articles were based on what you refer to as the Mdluli Report

MR SHAIK: No.

CHAIRPERSON: Oh, oh.

20 **MR SHAIK:** The Mdluli Report is the report that spoke of that meeting in New Castle, Escort.

CHAIRPERSON: Oh. But where the newspapers got their stories you do not know?

MR SHAIK: Yes. We do not know where the newspapers got it.

CHAIRPERSON: Ja but there was Mdluli Report that talked about that meeting.

MR SHAIK: That is correct.

CHAIRPERSON: And that report was directed to whom?

MR SHAIK: To the President.

CHAIRPERSON: To the President.

MR SHAIK: And to the – and to the Minister of Intelligence. The Minister of State Security as I understand it.

CHAIRPERSON: Yes.

MR SHAIK: Yes.

CHAIRPERSON: Okay, okay ja you may continue.

10 **MR SHAIK:** So we – so Ambassador Maqetuka subject to that report to a veracity test to see whether elements of that report is truthful or not truthful. And the conclusion...

CHAIRPERSON: Sorry just to make sure we are on the same page. What was the gist of that report as you – as you?

MR SHAIK: That a grouping of people came together Ministers, non-Ministers came together in either New Castle or Escort and they had a meeting about how to topple President Zuma.

CHAIRPERSON: Zuma. Okay alright.

MR SHAIK: Yes.

20 **CHAIRPERSON:** Continue.

MR SHAIK: So that report – our report or the domestic branch's report on that report was submitted via the office of Ambassador Maqetuka to the Minister and then from the Minister to the President.

CHAIRPERSON: Okay I know I was interrupting you. So Ambassador Maqetuka initiated an investigation to establish the veracity of the

Mdluli Report?

MR SHAIK: Of the claims within the Mdluli Report correct.

CHAIRPERSON: Ja claims in the Mdluli Report and the result of that investigation was a report from yourself – from your – from Intelligence?

MR SHAIK: The SSA yes.

CHAIRPERSON: Which was then submitted to the Minister – Minister of Intelligence and ultimately to the President.

MR SHAIK: That is correct yes.

10 **CHAIRPERSON:** Yes okay continue.

MR SHAIK: Right. So the President starts with our report on the Mdluli Report in the meeting that we now have. And he says that he has read our report unfortunately he believes the Mdluli Report.

CHAIRPERSON: Yes.

MR SHAIK: And so too does the Minister believe the Mdluli Report.

CHAIRPERSON: Yes.

MR SHAIK: And he finds that our report not to be standing the test of time. The – so in other words he was rejecting our report.

CHAIRPERSON: Yes.

20 **MR SHAIK:** And accepting the Mdluli Report.

CHAIRPERSON: So from what you said it appears that your report must have – must have been critical of the claims made in the Mdluli Report?

MR SHAIK: Indeed it was.

CHAIRPERSON: Yes. And the President was then saying he and the

Minister of Intelligence were persuaded by the Mdluli Report rather than by your report?

MR SHAIK: Correct.

CHAIRPERSON: Okay.

MR SHAIK: Correct.

CHAIRPERSON: Thank you.

MR SHAIK: Correct.

ADV PRETORIUS: Did the former President give any factual basis for rejecting what his security operatives have told him?

- 10 **MR SHAIK**: No. To the best of my recall he did not. He pronounced that he believes the Mdluli Report. And of course that set the tone of our meeting because essentially our report that rejected the Mdluli Report was now being rejected by the President who we are directly responsible to providing intelligence to.

CHAIRPERSON: And all three of you and you must tell me if this is not something you can say? All three of you were agreed that your report was the correct report?

MR SHAIK: Correct.

CHAIRPERSON: Yes okay.

- 20 **ADV PRETORIUS**: And your report was the product I take it of your own investigations?

MR SHAIK: And analysis.

ADV PRETORIUS: And analysis.

CHAIRPERSON: So – so it must have been quite something is it not for – to have a situation where the – the President rejects a report that

three of the most senior people in the intelligence accept to the correct report. It must have been quite something to the three of you or not really?

MR SHAIK: No in the intelligence world that is considered a – again I am trying to find the polite word. It is considered to be a lack of confidence.

CHAIRPERSON: Yes.

MR SHAIK: The – that when a President who is ultimately responsible it is different the President saying is – I do not accept your position or I
10 do not accept your view about a particular matter. But when you have written a report and in which you say that the allegations contained by that element within government – and if you remember it is Crime Intelligence and he says, no he agrees with the Crime Intelligence Report he is just – it is a vote of no confidence in your capacity. So we were all taken aback. I was taken aback because as I have said I have a long history with President Zuma especially in matters of intelligence. And on matters of intelligence he would know that you know all of us have a long history, all of us have a long working history with him and that if our views are rejected it is a tough one to deal with.

20 **CHAIRPERSON:** And I guess – I guess it is one thing if it is a report by one person.

MR SHAIK: Yes.

CHAIRPERSON: One of you. I think the – the one thing that makes it worse is that it is – as far as you are concerned all three of you say this is the right position.

MR SHAIK: Correct.

CHAIRPERSON: And for that to be rejected by the President would be quite something.

MR SHAIK: Correct.

CHAIRPERSON: Ja okay.

ADV PRETORIUS: Did the matter then turn or did the discussion then turn to the issues of the Gupta investigation?

MR SHAIK: That is correct.

ADV PRETORIUS: What transpired?

- 10 **MR SHAIK:** The – to my recall Ambassador Maqetuka outlined our investigation, the reasons for our investigation. He had a document with him outlining the scan for the reason the investigation. He took the President through the discussion that we have had with the Minister. The acrimonious discussion with the Minister and said to the President that we are here to say that we should conduct this investigation into the Gupta family. The President and I must say with all due respect to the President he did not go off the handle, he did not scream or shout, he said fine he hears us. But he would like to explain the Gupta family to us. And the President went into a rather long
- 20 explanation about the Gupta family of how he first met them. Of how they were of assistance to Duduzane Zuma when no-one was going to employ Duduzane. How they have helped him in certain of his own trials and tribulations. And he – they are simply a – a business family and that they were in fact introduced to the ANC and to people in government rather by people associated with President Mbeki and it is

– you know – so they are not a – a creation of his own making but this is a continuation of a – a relationship that existed through the passage of time starting with the Mbeki administration. So he had a very long – he was very calm – he was very clear, very pointed in – in all of the issues leaving and saying to us that he did not think that there was an issue to be investigated. You know because he understands all the matters connected to the Gupta family. We listened very painfully – patiently. I cannot recall whether we pushed back but it was clear to me that and later when I checked with the others that President Zuma in no
 10 uncertain terms expressed his preference for no investigation to continue.

ADV PRETORIUS: Did he say anything about foreign capital and the purchase of the Uranium Mine?

MR SHAIK: No that – that matter was discussed previously with him and I. He may have alluded to it in this meeting but that was a previously – he may alluded to it. That is a lot of speculation and rumours about the Gupta's but you know this is not the case. They are very good business people etcetera. And that there are a lot of rumours around them. And of course it was associated to the – and
 20 part of a victimisation narrative. A victimisation narrative and meaning that – and this is what hurt me more that investigation into the Gupta's is because people wanting to get to him as the President. So he saw it as a part of a victimisation narrative and of course what was surprising and I say hurtful to me because I have had a long personal history with President Zuma and so did Maqetuka and so did Gibson and we were

speaking to him in his capacity as President but not unmindful of his own long history in intelligence. And as an intelligence officer he should have understood what we were saying that you know this is a matter of National Security and if you could simply put your own feeling aside for the moment and see it as National Security we would then be able after the investigation to deal with the issues insofar as it pertains to him. But I got a sense by the time President Zuma was very much wedded to the narrative that there are people trying to topple him. There are – you know spies around every corner who is trying to set
10 him up and – and it is not really about the Gupta's at the end of the day it is about him. So it was – as he continued to speak it became a very uncomfortable discussion for us because I could not – I could not categorically say in my own mind that he was actually saying that we are part of those who want to topple him. But I – I was left with that feeling and it did make me for the first time uncomfortable. And this is a – a – a relationship of many decades with President Zuma and myself and I never imagined that I would ever be in that position where I would have to doubt whether he actually trusts me or not. So it felt odd and awkward for me personally. And I am sure it must have felt like that for
20 the others as well.

ADV PRETORIUS: Did he specify how the Gupta family had helped him with his son Duduzane?

MR SHAIK: Yes if I recall he mentioned that Duduzane at some point went to India for studies and then stayed with the Gupta family or got to know the Gupta family there. And then when he came back they

continued that relationship. And he elaborated that this was a relationship that you know did not begin today, did not begin when he was a President and begun a long time ago. And perhaps it even reached its height at the time where he was most in despair and it is not related to him being President. The – so I got – I got firmly he – and of course I have heard this before and he repeated it. But this time he repeated it in the narrative of people wanting to topple him and etcetera.

ADV PRETORIUS: Assume for a moment that the narrative about the
 10 Gupta's and their relationship with the President was being used as part of a conspiracy to harm or dethrone President Zuma. Would that have been any reason to stop the investigation?

MR SHAIK: No. The – the basis for the investigation was simple. It was in our opinion a breach at the highest level of the land. And the breach again is either it was information peddling on their part. A leak from the President's office or a suggestion by them for the appointment of a Minister. And in our understanding of intelligence it was clear in at least my mind that they were attempting to engage in created – creating dependency and often you create dependency to extract value.

20 **ADV PRETORIUS:** And was this perhaps not in the exact terms you have expressed now but were these sentiments conveyed to the former President?

MR SHAIK: Yes they were conveyed to the former President.

ADV PRETORIUS: You say in your statement in relation to what you recall and do not recall about a specific instruction from the President.

Well what do you say now about whether he instructed you or not expressly to stop the investigation?

MR SHAIK: The President in no uncertain terms expressed his positive sentiment towards the Gupta's and in the context of the narrative that he outlined that the – that there were attempts to topple him that – I can only but read into the matter that it was the non-verbal way of instructing us not to continue with the investigation. And I – I left – I left the meeting with no uncertain terms that this investigation should not continue. Not because it was necessitated but because this is the
10 wish of the President that it should not happen.

ADV PRETORIUS: Right. So do I understand from that answer that there was no express instruction?

MR SHAIK: Correct.

ADV PRETORIUS: In as many words, stop the investigation.

MR SHAIK: Yes he did not say, stop this investigation

ADV PRETORIUS: You were left with a certain impression at the conclusion of the meeting which you have now expressed to the Chair.

MR SHAIK: Correct.

ADV PRETORIUS: Did you act on your conclusion?

20 **MR SHAIK:** Shamefully I would have to say something rather shameful here that I think we left the meeting with the view that the investigation should not continue. And if it does continue it is going to continue at the cost of our jobs. But of course we also left the meeting with the view that our relationship with the Minister had broken down. Now our relationship with the President has broken down and in – in not so

polite language stuff was going to hit the fan rather soon. So we – we – I do not know whether the – the domestic branch is going to continue the investigation or not but I think we were of the view that we will not continue the investigation.

ADV PRETORIUS: On reflection how did you regard the attitude of the President in relation to security matters in general and this matter in particular?

MR SHAIK: I think the – the President was – he disregarded his own experience in this matter. He disregarded the collective professional
10 advice of three of the top senior Directors and Director Generals of the intelligence community that was advising that there is a legitimate and warranted basis for investigation. And I think in that regard he did not properly apply his mind to – to his obligation to – to provide effective and efficient direction of the Intelligence Services. And I think – I think the country has paid the price as a result thereof.

ADV PRETORIUS: How did you feel as a senior security official after the meeting had concluded?

MR SHAIK: Well I think the – to have the President reject your advise is – is – when you are the – in the top echelons of the intelligence
20 services a very difficult thing to deal with. Because like I have said it is – it is – you are appointed as a Head of an Intelligence Services because you believe that you have certain qualities and one of the important qualities of an intelligence head is the ability not only to lead a service but to able to manage information discreetly with discretion, with analysis and when a Head of an Intelligence Service and when

three of them say to you that Sir we think this investigation is warranted and for the President to say, in not so many words, no it is not. It is – it is a – it is a big thing in the intelligence world. It is a put down that you would spend lots of hours reflecting on. Because it is a fundamental breach of the trust relationship between you and the President.

CHAIRPERSON: Well I do not know how Crime Intelligence ranks when compared to the Intelligence branches that the three of you were dealing with or is two and then the Head.

10 **MR SHAIK**: The Crime Intelligence.

CHAIRPERSON: Two - two units. You, Mr Maqetuka and Mr Njenje.

MR SHAIK: Yes.

CHAIRPERSON: I am just trying to remember whether there were three units. No. I think there were two units.

MR SHAIK: Two units.

CHAIRPERSON: The internal and the external?

MR SHAIK: Correct.

CHAIRPERSON: And then Mr Maqetuka was the Head of a combination of the two?

20 **MR SHAIK**: That is correct.

CHAIRPERSON: Ja. I - I take it that Crime Intelligence was quite important. Maybe might not have been at the same level as the Intelligence or Secret - State Security Department that Mr Maqetuka was heading.

MR SHAIK: That is correct.

CHAIRPERSON: Those were two ...

MR SHAIK: Yes.

CHAIRPERSON: Different.

MR SHAIK: And - and what was unique in our situation that Mr Maqetuka or Ambassador Maqetuka had the full authority of a Director-General in SSA.

CHAIRPERSON: Yes. Yes.

MR SHAIK: He is the Accounting Officer.

CHAIRPERSON: Yes.

- 10 **MR SHAIK:** Director Njenje at the time was a Director - appointed at the level of a Director-General.

CHAIRPERSON: Yes.

MR SHAIK: An Accounting Officer ...

CHAIRPERSON: Yes.

MR SHAIK: And so to was I an Accounting Officer.

CHAIRPERSON: Yes. Yes.

MR SHAIK: Whereas the Crime Intelligence Division ...

CHAIRPERSON: Hm.

MR SHAIK: Is a Division ...

- 20 **CHAIRPERSON:** Hm.

MR SHAIK: Of a large organisation in which there are many ...

CHAIRPERSON: SAPS?

MR SHAIK: SAPS in which there are many divisions. So ...

CHAIRPERSON: Hm.

MR SHAIK: Again it is the level of the Director-General's is much

higher than the level of a divisional head.

CHAIRPERSON: Hm and - and of course there is not just one ...

MR SHAIK: Yes.

CHAIRPERSON: Person at the level of Director-General. It is three ...

MR SHAIK: It is three.

CHAIRPERSON: Senior officials.

MR SHAIK: Yes.

CHAIRPERSON: Who are at that level as ...

MR SHAIK: Correct.

10 **CHAIRPERSON:** As well and the department that Ambassador Maqetuka was heading and the department from which all three of you came or the department you were serving different units - two different units. Was the one that effectively specialises on Intelligence?

MR SHAIK: Correct.

CHAIRPERSON: Crime Intelligence is just part of Intelligence generally. So - so this was not just a case of the President not agreeing with your report, but also it was a question of him not agreeing with your report in preference to what - what other report?

20 **MR SHAIK:** Correct.

CHAIRPERSON: So - so if it was - your report was standing along maybe it might have been one thing, but it was a comparison.

MR SHAIK: Correct.

CHAIRPERSON: So I can imagine that you must have felt - all three of you must have being - felt quite bad.

MR SHAIK: We did. We did, sir.

CHAIRPERSON: Yes.

MR SHAIK: The - and of course the - added to the matter is the long histories that we have with the - with President Zuma.

CHAIRPERSON: Yes.

MR SHAIK: We have advised him through many parts of his life. When he was the Head of Intelligence. When ...

CHAIRPERSON: In the ANC?

MR SHAIK: Yes and when - in the ANC.

10 **CHAIRPERSON:** Hm.

MR SHAIK: And when he had certain difficulties ...

CHAIRPERSON: Hm.

MR SHAIK: And now that he was the President. So ...

CHAIRPERSON: Hm.

MR SHAIK: You - you may not be happy on the way I presented ...

CHAIRPERSON: Hm.

MR SHAIK: My - my advice ...

CHAIRPERSON: Hm.

MR SHAIK: But what you would have to accept is that ...

20 **CHAIRPERSON:** Hm.

MR SHAIK: The sincerity of my advice ...

CHAIRPERSON: Hm.

MR SHAIK: Cannot be ...

CHAIRPERSON: Questioned?

MR SHAIK: Questioned ...

CHAIRPERSON: Hm.

MR SHAIK: And I think we felt that he questioned the sincerity ...

CHAIRPERSON: Hm.

MR SHAIK: Of our advice and that made - made us feel ...

CHAIRPERSON: Hm.

MR SHAIK: Uncomfortable ...

CHAIRPERSON: Hm.

MR SHAIK: And in the - in the world of New Age and the world which we should live in. In the world of empathy it was difficult to deal with.

10 **CHAIRPERSON:** Just going back to the meeting with him. Am I right to understand that there was a big difference between the atmosphere under which your meeting with the President was conducted compared to the atmosphere which prevailed at the meeting you had with the Minister.

The one with the Minister having been very confrontational and the one with the President seemingly from what you say having been very civil and polite. Am I right?

MR SHAIK: That is correct. It was very civil. Very polite ...

CHAIRPERSON: Yes.

20 **MR SHAIK:** And I would add one more. It was prescriptive.

CHAIRPERSON: Yes.

MR SHAIK: Yes. In the sense that the President was speaking.

CHAIRPERSON: Yes.

MR SHAIK: Giving his views. We were listening.

CHAIRPERSON: Yes.

MR SHAIK: Where we could push back we pushed back ...[intervenes]

CHAIRPERSON: Yes.

MR SHAIK: But ...[intervenes]

CHAIRPERSON: Yes. Yes.

MR SHAIK: The more he spoke the more we retreated.

CHAIRPERSON: Yes.

MR SHAIK: Into the position of ...[intervenes]

CHAIRPERSON: So - so would it be correct to say it was a meeting where both sides were listening to each other? They might not have
10 agreed, but they were listening to each other - to each other's points of view or is that not a proper description?

MR SHAIK: It would - it would be a proper description.

CHAIRPERSON: Yes.

MR SHAIK: To the extent that we were listening more.

CHAIRPERSON: Ja.

MR SHAIK: As the - President Zuma spoke more ...[intervenes]

CHAIRPERSON: Yes. Yes.

MR SHAIK: But I think he understood ...[intervenes]

CHAIRPERSON: Hm.

20 **MR SHAIK:** The reason why we were arguing that there should be an investigation.

CHAIRPERSON: Hm. Hm.

MR SHAIK: That I - I was left with no uncertain at least in my mind and for a couple of reasons. One is that we were articulate. The second, the reasons we gave were compelling and thirdly that given his own

experience in Intelligence that he knew what we were talking about.

CHAIRPERSON: Did he raise this issue of Mr Njenje's conflict of interest or business interest that ...

MR SHAIK: No. He did not.

CHAIRPERSON: The Minister had raised?

MR SHAIK: No.

CHAIRPERSON: He did not raise that issue?

MR SHAIK: No. He did not.

CHAIRPERSON: So was the position that as far as you could see he
10 gave you this long explanation that he gave you, because he wanted
you to be persuaded that there was no need for - for the investigation.
Is that how - how you would see it?

MR SHAIK: That is - that is the way I - I saw it.

CHAIRPERSON: How you saw - you said you saw it.

MR SHAIK: That he was giving this long explanation so that we could
be persuaded to the believe that no - no investigation ...

CHAIRPERSON: Yes.

MR SHAIK: Was necessary.

CHAIRPERSON: Yes. Yes.

20 **MR SHAIK:** Of course he added it in the context of the narratives to
dispose him and the victimisation ...

CHAIRPERSON: Hm.

MR SHAIK: Narrative.

CHAIRPERSON: Hm. Hm.

MR SHAIK: Which - which made it difficult for us to push back on ...

CHAIRPERSON: Hm. Hm.

MR SHAIK: Because here is a President telling you that people are trying to topple me. I am giving you an explanation that my relationship with this family is - is untoward and if you are pushing back on reason why we - we need to investigate the family. It is - it is as if he is saying that, but you are the guys who want to topple me.

CHAIRPERSON: So - so the one thing you are clear about. He did not say stop the investigation?

MR SHAIK: He did not say stop.

10 **CHAIRPERSON:** *Ja*. The second thing you are clear about. He took time to explain his relationship with the Guptas and so on and so on and three, it was quite clear that he was against the continuation of the investigation.

MR SHAIK: That is the correct ... (intervenes).

CHAIRPERSON: His view was against it?

MR SHAIK: Yes. His view was against it.

CHAIRPERSON: It was against it. *Ja*.

MR SHAIK: Or put better he did not think it necessary.

CHAIRPERSON: *Ja*. Did not think it was.

20 **MR SHAIK:** Given the fact that he was providing the ...

CHAIRPERSON: Yes.

MR SHAIK: The background to ... (intervenes).

CHAIRPERSON: And what he knew.

MR SHAIK: Yes.

CHAIRPERSON: Yes and then you say he then put in this bid that as I

understand it. You must tell me if I am not understanding your evidence correctly. He then put in this little bit that was too the effect that there are people who - there were people who wanted to topple him.

Was - was your impression from the discussion and from what he was saying that if the three of you were to push and say - assuming you could - were to push and say we want to continue. You - he might see you as part of people who wanted to topple him or what.

MR SHAIK: Yes. That - that did occur to me in all ...

10 **CHAIRPERSON:** Yes.

MR SHAIK: Honesty.

CHAIRPERSON: Yes, but you also said the discussion was such that although he did not say you three were a part of that, but you felt some ...[intervenes]

MR SHAIK: No. He did not say that.

CHAIRPERSON: You felt some impression that he might not have been sure that you are not of it or something like that.

MR SHAIK: Yes and do not forget sir that we are - we are Intelligence Officers in our own right.

20 **CHAIRPERSON:** Yes.

MR SHAIK: And joining the dots ...

CHAIRPERSON: Hm.

MR SHAIK: Is not a difficult exercise.

CHAIRPERSON: Yes. Yes. Yes.

MR SHAIK: At that - that level.

CHAIRPERSON: Yes. Yes.

MR SHAIK: So one of the dots that was joined in my mind ...

CHAIRPERSON: *Ja*.

MR SHAIK: And I am not speaking on behalf of anyone else.

CHAIRPERSON: Yes.

MR SHAIK: In my mind that pushing this investigation further ...

CHAIRPERSON: *Ja*.

MR SHAIK: Was going to lead in my view ...

CHAIRPERSON: *Ja*.

10 **MR SHAIK:** To the President concluding ...

CHAIRPERSON: *Ja*.

MR SHAIK: That we are part of those now ...

CHAIRPERSON: Of whatever agenda.

MR SHAIK: *Ja*. The fictional or non-fictional and - and I must say ...

CHAIRPERSON: Yes.

MR SHAIK: That it is fictional ...

CHAIRPERSON: *Ja*.

MR SHAIK: But it was going to lead ...

CHAIRPERSON: Yes.

20 **MR SHAIK:** To that. Yes.

CHAIRPERSON: Okay. Going back to the issue of who directs the operations of ...

MR SHAIK: Yes.

CHAIRPERSON: Intelligence. You said that the Minister should not ...

MR SHAIK: Yes.

CHAIRPERSON: Be doing that. At some stage we talked about the Head of the Intelligence being the one doing that, but at some stage maybe - maybe two times or so you talked about - you talked in a manner that made me believe that it would be within the prerogative of the President to direct operations ...

MR SHAIK: Correct.

CHAIRPERSON: Of - of Intelligence. Is that correct?

MR SHAIK: Correct. I mean the - the Constitutional states it. The - quite categorically under Section 2-0-9-(2).

10 **CHAIRPERSON:** Yes.

MR SHAIK: “The President is the Head of the National Executive. Must appoint a woman or a man as the Head of each Intelligence Service established in terms of subsection 1 and must either assume political responsibility for the control and direction ...”

CHAIRPERSON: Hm.

MR SHAIK:

20 “...direction of any of the services or designate a Member of Cabinet to do so.”

CHAIRPERSON: Yes.

MR SHAIK: So the President does have - he does have the power ...

CHAIRPERSON: Yes.

MR SHAIK: To direct ...

CHAIRPERSON: Yes.

MR SHAIK: And of course and this is perhaps something that arising out of your - your own report sir would be to tease out this definition of political responsibility. What does political responsibility mean, but that is - is an issue that we should park for - for your report, but in my view the President has the power to direct the Intelligence Services.

CHAIRPERSON: So - no that is - that is fine. I think that people like you who have experience and knowledge of the Intelligence need to show sufficient interest in the work of the Commission and the recommendations that the Commission could make, because you being
10 the experts in the area.

It would be important that when the Commission looks at recommendations or invites - I mean submissions that some - some of the people who have expertise and experience. Could make some submissions to say the Commission should consider the following possible recommendations that could assist in the future with regard to Intelligence.

So - so - but going back to your meeting with the President. So - so your understanding would therefore be that once the President - once it is clear from what the President says that he is not approving
20 the pursuit of a certain investigation. Since ultimately the power to direct the operations of Intelligence verse in him. You - you would have no choice but to accept that situation?

MR SHAIK: Correct.

CHAIRPERSON: Okay. Thank you.

ADV PRETORIUS: And ultimately I understand you did accept that

situation?

MR SHAIK: Correct.

ADV PRETORIUS: So to summarise at the point that you departed from the Minister - in the meeting with the Minister I understand your evidence and correct me if I am wrong to be that the three senior Executives were determined to continue with this investigation subject to a discussion with the President?

MR SHAIK: Correct.

ADV PRETORIUS: You went to a meeting with the President where to
10 your knowledge he exercised his constitutional powers and influence?

MR SHAIK: Correct.

ADV PRETORIUS: The result of that intervention was that the investigation was terminated?

MR SHAIK: Correct.

ADV PRETORIUS: Chair it is past 5 o' clock. We have a way to go ...

CHAIRPERSON: Yes.

ADV PRETORIUS: And ...

CHAIRPERSON: No.

ADV PRETORIUS: There is much to be done before tomorrow.

20 **CHAIRPERSON:** Yes. Should we start a little earlier tomorrow?
Maybe.

ADV PRETORIUS: Because we have to consult ...

CHAIRPERSON: Because Wednesday is another witness.

ADV PRETORIUS: I would prefer if we started at the normal time ...

CHAIRPERSON: At 10.

ADV PRETORIUS: And attempt to finish ...

CHAIRPERSON: *Ja.*

ADV PRETORIUS: Tomorrow.

CHAIRPERSON: *Ja* and - and you think you will manage or you say you will cross the bridge when you come to it?

ADV PRETORIUS: Chair one is reluctant, because - because much of this evidence forms the background to evidence that will come later. One is reluctant to ...

CHAIRPERSON: Not to do justice.

10 **ADV PRETORIUS:** Divest oneself of the advantage of hearing ...

CHAIRPERSON: *Ja.*

ADV PRETORIUS: Senior officials in the investigations, because the question of accountability, the question of controls, the question of financial accountability and supervision all are central to evidence that is to come. In other words to answer the question did you pose. How did it happen?

CHAIRPERSON: Yes. Yes. So okay. We will - we will start at 10 tomorrow and then see how it goes, but before we adjourn I just want to put this question and maybe you do not have an answer to it. Do - do
20 you know from the point of you - of Intelligence what should happen when the Intelligence branch has got information that needs to be - that has got an issue that needs to be investigated or people that need - need to be investigated, but the Head of the Intelligence or the Minister of Intelligence or the President is conflicted. Well I am - I am asking all three because ...

MR SHAIK: Hm.

CHAIRPERSON: It could be different. Do you know what the position would be with the - at that time Ambassador Maqetuka if there was something and maybe a friend of his seems to be investigated. What would he - would he deal with that situation? Would he take part in making any decisions or would he disclose or would he not be part of it and then ...

MR SHAIK: Sir ...

CHAIRPERSON: You can deal with the Minister as well. Although you
10 might have dealt with and then I come to the President.

MR SHAIK: In - in the matter of governance in relation to all of this with Ambassador Maqetuka it is easy. You can go above to the Minister ...

CHAIRPERSON: Yes.

MR SHAIK: And - and then convince the Minister that that investigation needs to happen etcetera. If - and if there was no Minister you can go to the President and justify an investigation or an official or another Minister, because in effect that is what happens on Counter Intelligence investigations, but when it comes to a matter pertaining to the
20 President himself where - that is where the Constitution the law is also silent, because it was never a situation envisaged and even if it was envisaged the way to deal with the matter I have no other - no - I cannot think of any other way.

I can think about whistleblowing. I can think about providing this kind of information to - to the Joint Standing Committee of

Intelligence, but all of them would come up with the same problem and this beggars the question that has always been the case. Who guards the guardians and that is the essence you are dealing with here.

CHAIRPERSON: Well - well there is enough time for us to ponder over the issue to the extent that it is relevant, but there - I think there is a provision in the Constitution which if I recall correctly is along the lines that when the President is conflicted. I do not know whether it simply says he is not available to - to perform a certain duty the Deputy President should perform the duty.

10 Now it maybe that I do not know if it is around 2-0-9 or 190. It may be that there might be debates if it says not available. There might be debates about whether or not that would encompass a situation. No. It is not 2-0-9. Maybe 190. Whether it would encompass a situation where physically the President is available, but maybe legally he is not available to perform the duty, because he should not do so, because he is conflicted.

ADV PRETORIUS: Section 90(1).

CHAIRPERSON: Is it Section 90?

MR SHAIK: 91.

20 **ADV PRETORIUS:** 90(1).

CHAIRPERSON: Yes. Do you want to read it Mr Pretorius?

ADV PRETORIUS: It reads under the heading Acting President:

CHAIRPERSON: Yes.

ADV PRETORIUS: "When the President is absent from the
Republic or otherwise unable to fulfil the duties of

President or during a vacancy in the Office of the President an Officer Bearer in the Order below acts as President.”

And then it lists:

“A, the Deputy President.”

CHAIRPERSON: Yes.

ADV PRETORIUS: “B, a Minister designated by the President. C, a Minister designated by the other Members of the Cabinet. D, the Speaker until the
10 National Assembly designates one of its other members.”

And then two:

“An Acting President has the responsibilities, powers and functions of the President.”

CHAIRPERSON: Yes. I think - I think that is the one I had in mind. So one of the scenarios is where it says where the President is otherwise unable to fulfil the duties. There may be an argument that it caters for a situation where he is physically available ...

MR SHAIK: Yes.

20 **CHAIRPERSON:** But ...

MR SHAIK: But conflicted.

CHAIRPERSON: For some reason ...

MR SHAIK: Ja.

CHAIRPERSON: Unavailable.

MR SHAIK: Yes.

CHAIRPERSON: Maybe because he is conflicted. Maybe because of some other reason there maybe, but also I think the ethics - Executive Ethics Act if I am not mistaken maybe having something about ...

MR SHAIK: Yes.

CHAIRPERSON: Or maybe even the Constitution maybe having something to say Members of the Executive should not act in circumstances where they are conflicted, but we do not need to look at it now. So I - I was just thinking whether in that kind of situation whether he should have dealt with the matter himself or he should have
10 let somebody else deal with it, but ...

MR SHAIK: Yes.

CHAIRPERSON: We - we might look at it closer to the time of the recommendations and the debates and submissions.

ADV PRETORIUS: Section 96(2) ...

CHAIRPERSON: Hm.

ADV PRETORIUS: And 96(1) also refer to the Code of Ethics to which you referred.

CHAIRPERSON: Yes.

ADV PRETORIUS: "Members of the Cabinet and Deputy
20 Ministers must act in accordance with the Code of Ethics prescribed by National Legislation. Members of the Cabinet and Deputy Ministers may not undertake any other paid work, act in a way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict

between their official responsibilities and private interests or use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.”

CHAIRPERSON: Okay. No. Thank you. Thank - thank you very much.

We will adjourn for today and we will start at normal time tomorrow - 10 am. So we leave it at that. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 26 NOVEMBER 2019