

COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD AT
CITY OF JOHANNESBURG OLD COUNCIL CHAMBER
158 CIVIC BOULEVARD, BRAAMFONTEIN

21 JULY 2020

DAY 236



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 21 JULY 2020

CHAIRPERSON: Good morning Mr Notshe, good morning everybody.

ADV NOTSHE SC: Good morning Chair.

UNKNOWN PERSON: Morning Chair.

CHAIRPERSON: Yes. Thank you.

ADV NOTSHE SC: Chair the – today's hearings are in respect of the evidence of Mr Desmond Nair and Mr Linda Mti. Chair there are – we are having discussions with
10 representatives of both witnesses. Can we ask for time just to discuss with them and then approach you in chambers and then we can then if we reach an agreement and then perhaps put the agreements on record?

CHAIRPERSON: Let – let us have Counsel for Mr Nair as well as for Mr Mti place themselves on record. You can just do it from where you are you switch on the microphone yes.

ADV DORFLING SC: Good morning Chair Danie Dorfling is the name. I represent Mr Nair on instruction of Sias Ulrich Roux and Associates.

20 **CHAIRPERSON:** Thank you. Thank you.

ADV VAN DER MERWE: Chair my name is [indistinct] Van der Merwe from [not speaking into the microphone].

CHAIRPERSON: Thank you very much. Okay I will grant you an opportunity to have discussions with the – with the legal representatives of both Mr Nair and Mr Mti and then I

can be approached in chambers as to the way forward. So maybe – we may be looking at about 30 minutes?

ADV NOTSHE SC: 30 Minutes I think would be sufficient.

CHAIRPERSON: About 30 minutes. Okay we will adjourn then and then you will let me know once you are ready.

ADV NOTSHE SC: Thank you Chair.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

CHAIRPERSON: Yes, Mr Notshe have you had a chance to
10 discuss with your colleagues?

ADV NOTSHE SC: Yes.

CHAIRPERSON: Representing Mr Mti and Mr Nair.

ADV NOTSHE SC: Yes Chair we have discussed and we have reached agreements.

CHAIRPERSON: Hm.

ADV NOTSHE SC: Insofar as Mr Mti's matter is concerned
the – we will provide Mr Mti with all the evidence – all the
evidence that implicates him and it will be in the form of the
link to the website of the commission where the evidence is
20 housed and also although the notices in terms Regulation
3.3 have been sent we will again give them the statements
that we attach to those notices. This will be done before
the end of business on Friday the 24th. And then two weeks
thereafter Mr Mti will then...

CHAIRPERSON: I am sorry I think you starting the matter –

you are not starting where it should start. As I understand Mr Mti is not here today.

ADV NOTSHE SC: Mr Mti.

CHAIRPERSON: And the reason for that.

ADV NOTSHE SC: Yes. Mr Mti is not here today and Mr Van der Merwe is here representing Mr Mti.

CHAIRPERSON: Yes. Maybe – maybe then we should start with Mr Van der Merwe just saying something about that and then he can also talk about what has been agreed and you
10 can confirm. Mr Van der Merwe you can speak from where you are if you just switch it on – the microphone on. Yes.

ADV VAN DER MERWE: Thank you Mr Chair. I confirm my appearance on behalf of Mr Mti.

CHAIRPERSON: Yes. If you are comfortable to move – remove your mask just for purposes of speaking feel free to do so.

ADV VAN DER MERWE: Indebted thank you Mr Chair. I confirm that my office has received a Notice of Set down six working days prior to today's date.

20 **CHAIRPERSON:** Hm.

ADV VAN DER MERWE: I have informed Mr Mti but unfortunately the notice was short. Being an officer of the court, I thought it prudent to be present and not simply ignore the notice and we have reached certain agreements relating to the Provision of Evidential Material and the

response thereto in as far as it may be necessary for Mr Mti.

CHAIRPERSON: Okay. Thank you. So it looks like Mr Mti his lawyers received the notice late.

ADV NOTSHE SC: Yes.

CHAIRPERSON: You do not know why – what brought that about do you?

ADV NOTSHE SC: No Chair I do not know but Chair what is also is important to note is that up to now we had not
10 received the – a response to the 10.6 Notice that Mr Mti had been given. That is – he has not provided an affidavit yet. But despite that a notice had been – a Notice of Set down had been served on him I think it is on the 10 July. And I do not know why it was served late.

CHAIRPERSON: Well as I understand from the discussion in chambers the position is that the notice notifying Mr Mti that today he is supposed to appear before the commission was received recently and Mr Van der Merwe says about 10.6 or six working days.

20 **ADV NOTSHE SC:** Yes.

CHAIRPERSON: Ago that is probably about ten normal days. It should have been sent off much earlier.

ADV NOTSHE SC: Yes.

CHAIRPERSON: So that is 1.

2. So Mr Mti is not here so we cannot proceed with regard

to his evidence because he is not here. But as I understand the position the legal representatives both the side of the commission and Mr Mti have reached an agreement in terms of which even if Mr Mti may have received previous statements a full set of the statements of witnesses who implicate him and the evidence will be identified to his lawyers and they can then reach that access that on the website of the commission.

ADV NOTSHE SC: Yes.

10 **CHAIRPERSON:** So they will be notified of the all the names of the witnesses who implicate him within a few days.

ADV NOTSHE SC: Yes we have given an undertaking that that will happen before Friday the 24th.

CHAIRPERSON: And Mr Mti has through his lawyers undertaken to furnish an affidavit in regard to the evidence that has been led against him.

ADV NOTSHE SC: Yes.

20 **CHAIRPERSON:** Even though he may reserve his rights in regard to disclosing his defence, in regard to the criminal matter. Is that so?

ADV NOTSHE SC: That is so Chair that will happen within fourteen days.

CHAIRPERSON: Ja.

ADV NOTSHE SC: After receipt of our notice.

CHAIRPERSON: Of your notification.

ADV NOTSHE SC: Of our notification yes.

CHAIRPERSON: Yes. Mr Van der Merwe you confirm that that is the arrangement?

ADV VAN DER MERWE: Mr Chair I confirm the arrangement. I specifically confirm.

CHAIRPERSON: Yes.

ADV VAN DER MERWE: That Mr Mti's right to not to disclose his defence.

10 **CHAIRPERSON:** Yes.

ADV VAN DER MERWE: Will be protected in his affidavit.

CHAIRPERSON: Yes okay.

ADV VAN DER MERWE: And in fact, may not deal with the facts specifically save to make statement that it may lead to unfair criminal trial which is currently being run in Pretoria.

CHAIRPERSON: Ja okay alright. Thank you. So that will be the arrangement in regard to Mr Mti.

ADV NOTSHE SC: Yes.

20 **CHAIRPERSON:** Then and once he has filed his affidavit then a decision will be taken whether it is necessary to fix another date for him to appear.

ADV NOTSHE SC: Yes.

CHAIRPERSON: Okay. In regard to Mr Nair.

ADV NOTSHE SC: In regard to Mr Nair Chair the

1. There is an application by Mr Nair to cross-examine Mr

Richard Le Roux and then

2. There are two outstanding affidavits. They are statements for now they have to be affidavits that have to be commissioned and made available to Mr Nair.

We have a problem with one deponent. He – apparently, he – he has a virus – he has tested positive for the virus but we hoping that we think seven days from now he should be available to have the statement commissioned. The arrangement we have reached is that we get a – we are
10 unable to proceed today because in fairness Mr Nair would – should see those statements so that when he testifies, he testifies after he has seen the statements. So the arrangement is that by next week the 31 July he – the statements will be served on them and then – and then decide what – whether they want to respond to those statements and if they do, they will do so within fourteen days of the statements. And then they will then consider their position and then depending on a ruling regarding the issue of cross-examination of Le Roux and they may also
20 after they have seen the statements apply to cross-examine the other – the other two witnesses – potential witnesses as well.

CHAIRPERSON: Counsel for Mr Nair are you able to confirm the arrangement?

ADV DORFLING: Thank you Mr Chair yes. Perhaps I could

just at the outset just place certain facts on record?

CHAIRPERSON: I am sorry. I am sorry. If you do not mind if you move the mask a bit, I think I will hear better but if there is a problem you can just raise your voice.

ADV DORFLING: I will try and just raise my voice.

CHAIRPERSON: Yes.

ADV DORFLING: Is that suitable? Could you hear me Mr Chairman?

CHAIRPERSON: Ja. Ja.

10 **ADV DORFLING:** Thank you. Chair could I just raise one or two matters that concerns us and that we had some discomfort on the side of Mr Nair. We did receive the notice for today's hearing on the 10 July in the same way as Mr Mti. Mr Nair is here, we are ready, we prepared. Mr Nair is happy – was happy to give his evidence. We were this morning informed that two further statements might be forthcoming that of Mr Bejoo and that of Mr Van der Merwe. We were also subsequently informed that there is a potential further and third statement from Mr Le Roux that
20 might be forthcoming. Mr Le Roux deposed to a first statement on the 28 January 2019. He gave evidence on the 31 January 2019. We did not receive a Rule 3.3 Notice forewarning Mr Nair of that and alerting him to the rights that he have in terms of Rule 3 of the Commission which caused some prejudice. It is water under the bridge. We

need to deal with what we have and we are more than willing to cooperate with the commission. The discomfort we have Chair is the fact that we are being confronted as we go along with new and further facts that needs to be dealt with. It is not a fair process for an implicated person to be confronted with evidence preparing himself to respond and then be confronted with further evidence. We want to do and we propose that it be done in one go. That everything gets presented to Mr Nair. That he deals with it

10 sensibly, consider it all and make his election on the way forward. So I would urge Mr Chair to appeal to my learned friend Mr Notshe leading the evidence to ensure that we have the body of evidence that they want to present as agreed by next week Friday that would be Mr Bejoo, Mr Van der Merwe and if potentially the evidence of Mr Le Roux a further affidavit of him. We are happy to commit to then making our election and responding to that within fourteen days. Next week Friday would be the 31 July we would then make our election and respond appropriately by the 14

20 August. There may be an application or further applications to cross-examine the further witnesses. There is pending before you Mr Chair an application to cross-examine Mr Le Roux which will be entertained after Mr Le Roux's input has been obtained and secured and been placed in your possession. The same would then apply to the other further

witnesses if there were such applications to cross-examine them. In the circumstances we are therefore happy to agree to the terms and those conditions of moving forward and we believe that once all that is done the commission would be ready to then look at allocating a specific date to deal with all of these issues and ideally we want to appeal to the leader of evidence and to the commission for us to try and resolve this on a singular day when we can come and deal with it and bring the matter to finality. As it
10 pleases.

ADV NOTSHE SC: Chair can I just...

CHAIRPERSON: No thank you.

ADV NOTSHE SC: Can I just deal with just one issue?

CHAIRPERSON: Hm.

ADV NOTSHE SC: It is not in response it is – just on record. The – Mr Bejoo has not tested positive for Covid but he has self-quarantined.

CHAIRPERSON: Hm.

ADV NOTSHE SC: And he has given – I am just – I have
20 just been shown a note from him saying that he expects to be out of it by end of this week. So I just – I gave incorrect information to say.

CHAIRPERSON: Yes.

ADV NOTSHE SC: He has tested positive.

CHAIRPERSON: Yes.

ADV NOTSHE SC: He is self-quarantined.

CHAIRPERSON: Okay alright. So the – we are not going to proceed with the evidence of Mr Nair then today on the basis that another date will be arranged once all the affidavits that are still to be exchanged between the commission’s legal team and Mr Nair’s legal team have been exchanged. And obviously I will get to know once that point has been reached and then I will also at that point deal with the application for Leave to Cross-examine or
10 applications for Leave to Cross-examine if another one will be forthcoming. And then after that a date will then be arranged and it – the aim will be to have all of these matters – all of the issues dealt with on the same day and finalised. So no thank you very much I think I would just say I appreciate that there has been a lot of cooperation between the commission’s legal team and both teams one representing Mr Mti and one representing Mr Nair this morning for the agreement to be reached. So we will adjourn then on that basis.

20 As for tomorrow Mr Notshe what is the position with regard to Mr Gillingham have they indicated what their position is?

ADV NOTSHE SC: Still the – the position is that the Notice of Set down was sent to Mr Gillingham. He has no legal representative at this stage. It was sent to him to an email

that had been used to communicate with him. There is no response from the email. He was – they tried to communicate with him by cell phone. There is no response. An SMS was sent to the cell phone but both the cell phone and the emails are the emails he had been using and the cell phone he has been using but there is no response so far. So we are not certain what the position is. But the matter is set down for tomorrow

CHAIRPERSON: Ja.

10 **ADV NOTSHE SC:** For him and we are not certain whether he – what the position is.

CHAIRPERSON: Ja.

ADV NOTSHE SC: But the – his bundles are ready and we will also indicate electronically to the email where he can access the bundles so that if he comes, he has got the bundles available.

CHAIRPERSON: Yes.

ADV NOTSHE SC: But we are not certain whether – what the position is.

20 **CHAIRPERSON:** Yes.

ADV NOTSHE SC: But as we stand the date of the hearing has no changes for tomorrow.

CHAIRPERSON: Yes okay alright. The hearing of the evidence of Mr Nair and the evidence of Mr Mti is adjourned sine die and another date – other dates will be arranged.

We adjourn.

ADV NOTSHE SC: Thank you Chair.

REGISTRAR: All rise.