

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

24 JULY 2020

DAY 237



Gauteng Transcribers
Recording & Transcriptions

22 Woodlands Drive
Irene Woods, Centurion
TEL: 012 941 0587 FAX: 086 742 7088
MOBILE: 066 513 1757
info@gautengtranscribers.co.za

CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that, *in as far as it is audible*, the foregoing is a **VERBATIM** transcription from the soundtrack of proceedings, as was ordered to be transcribed by Gauteng Transcribers and which had been recorded by the client

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

DATE OF HEARING:

24 JULY 2020

TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



Gauteng Transcribers
Recording & Transcriptions

PROCEEDINGS RESUME ON 24 JULY 2020

CHAIRPERSON: Good morning Mr Soni, good morning everybody. Yes are we ready? Well I must just say that we starting late because I arrived here in time but I had forgotten my mask and I had to go back to fetch one so that is why we are starting a little late. Yes. Yes. Please put on your microphone. Ja.

ADV SONI SC: Chairperson we had reserved today for the evidence of Judge Makhubele as you will know Chairperson
10 there are three witnesses who have already testified about complaints relating to the way she dealt with the matter.

I understand that she is now appointed Legal Representatives and they which to move an application. I have indicated they have – informed me about it yesterday DCJ an application for a postponement. I indicated that I would oppose it on behalf of the commission. But before I set out the basis of the opposition perhaps my learned friend Mr Shakoane who is her Counsel should address you.

CHAIRPERSON: Okay let him come forward and then
20 somebody can sanitise or is it going to be more – okay I think let him come forward or whoever is going to move the application on behalf of Judge Makhubele. If we hear you with the mask on it is going to be fine to speak with it on but we might struggle in which case you might wish to move it – shift it a bit or take it off for the time being.

ADV SHAKOANE SC: Thank you Chair.

CHAIRPERSON: Please just give me – just place yourself on record properly first.

ADV SHAKOANE SC: My initial is G, my surname is Shakoane, S-h-a-k-o-a-n-e.

CHAIRPERSON: No, I think the mask is interfering.

ADV SHAKOANE SC: Okay.

CHAIRPERSON: Ja. Your initial is G?

ADV SHAKOANE SC: Initial is G, surname Shakoane, S-h-

10 a

CHAIRPERSON: S-h-a

ADV SHAKOANE SC: K-o

CHAIRPERSON: Ah ha.

ADV SHAKOANE SC: A-n-e.

CHAIRPERSON: A-n-e.

ADV SHAKOANE SC: Yes Senior Counsel.

CHAIRPERSON: Okay. Yes Mr Shakoane.

ADV SHAKOANE SC: Yes. I am with Advocate M Mathaphuna.

20 **CHAIRPERSON:** What is his – just give me the name again.

ADV SHAKOANE SC: Initial is M.

CHAIRPERSON: M.

ADV SHAKOANE SC: The surname is Mathaphuna, M-a

CHAIRPERSON: M-a.

JUDGE MAKHUBELE: T-h-u sorry t-h-a

CHAIRPERSON: T-h-a

ADV SHAKOANE SC: P-h-u-n-a

CHAIRPERSON: M-a-t-h-a

ADV SHAKOANE SC: P-h-u

CHAIRPERSON: P-h-u?

ADV SHAKOANE SC: Yes. N-a.

CHAIRPERSON: N-a.

ADV SHAKOANE SC: Yes.

10 **CHAIRPERSON:** Okay thank you.

ADV SHAKOANE SC: Chair I stand here to...

CHAIRPERSON: And you will just have to raise your voice I think you have a soft voice.

ADV SHAKOANE SC: Eish yes I will.

CHAIRPERSON: Ja.

ADV SHAKOANE SC: I stand here to ask for a postponement of the hearing of the evidence of Judge Makhubele. The reasons we already set out in a letter which my learned friend Mr Soni had been favoured with. If

20 I may beg leave to hand it up to you Mr Chair.

CHAIRPERSON: Yes.

ADV SHAKOANE SC: Then I can address it.

CHAIRPERSON: Yes no that is fine.

ADV SHAKOANE SC: The position Mr Chair is that basically the Judge was informed of the need for her to give

evidence in terms of initially it was a communication after the first.

CHAIRPERSON: You will have to really raise your voice. You – I cannot hear you properly.

ADV SHAKOANE SC: I must raise my voice. I will try to raise the voice.

CHAIRPERSON: Ja.

ADV SHAKOANE SC: The first two witnesses who testified who was Dingiswayo and Ms Ngoye and she was informed
10 of the fact that she would have to testify or give affidavit. Then on the 23rd of last month there was a written communication where she indicated she would be attending to give evidence. But there had not been any consultation or meeting between her as yet and the evidence team. So...

CHAIRPERSON: One second. Where is the file with the rules and regulations? Yes continue.

ADV SHAKOANE SC: Yes. Now on the 25th of last month there was then a telephone communication between her and the evidence leader where she was asked to come to a
20 meeting for a consultation on the 9th of this month. And then on – on the 9th the meeting did take place but before then I should mention that there was a further communication on Saturday the 27 June where she was informed that there would be a further witness, Advocate Botes SC who was to testify and she had requested that she

be notified and be present to – when that evidence is tendered so that she could have the opportunity to listen to the evidence and cross-examine to the extent that it would be necessary.

However, on the 29th she – she then – sorry she did not – was informed that – not on the 29th. In fact, the communication if I may put it to you it is in paragraph 6. The communication was that on the 27th with the evidence leader where she was informed that when checking the
10 schedules for the 29th of last month it was realised that Advocate Botes SC would be testifying as a witness.

But then she requested the notice that she be present when he testified. Unfortunately, that was not done and she learnt later that Advocate Botes SC came on the 1st of this month and testified. She could not be there to listen or challenge his evidence.

So then on the – sorry – on the 29th an email was sent advising that she would then require to change the –
20 opposition as she communicated on the 23 of June in view of the developments that took place.

Now she needed to be able to address the evidence involved and she had been of the mind that she might need to have her own legal representatives.

And then she did not get a response. The evidence of the 1 July went through by Advocates Botes and then on

the 6 of July she received the Notice of Set Down for the 24th and which was three days before the date on which she had consult with the evidence team.

Then on the 9 July this month the meeting with the evidence team took place. During that meeting and owing to the discussions that took place and the approach I believe to her evidence she formed the view conclusively that she would need her own legal representative to prepare for her evidence and presentation which she communicated
10 to the evidence team.

Now on the – subsequent to that she had then approached the attorneys on record now to be her legal representatives. A consultation took place on the 15th of this month and after that consultation she was then advised by the attorneys that she would need to secure the services of counsel.

We were then contacted on the 20th in the afternoon and on being informed on the dates that it is an urgent matter the indication to them was that our available date to
20 consult would have been today. But obviously during the telephone call we were not aware that it is a matter about this commission. But later when the instructions were delivered in terms of brief – a brief on the 22nd in the afternoon we then fully got to know that the matter is for appearance at this commission and that already a date of

set down for today has been communicated which meant then that the consultation would not take place we had to prepare for this appearance today.

I am aware of the fact that in the rules the – the requirement is that if there is a substantive application that sought to be made it has to be done seven days before. But in these circumstances, it could not be feasible because of the state of affairs as I explained.

Then when we got to know as I mentioned the first
10 initiative that was suggested was that we have communication with the evidence leader to see if we could probably find each other or there could be some way of accommodating the Judge. But the indication when I spoke to my learned friend Mr Soni was that he would not be in a position to agree at that point and that we would then have to make a request before the – before you Mr Chair.

At the same time the leader of the evidence team Advocate Pretorius SC was also made aware of the situation who then suggested that probably if there could be
20 further discussions with my learned friend Mr Soni they could continue but at the same time we needed to notify the Secretariat as well. Which was done through this letter to indicate the predicament and initially on the 21st as you may see Mr Chair on the paragraph 13 there was communication to the Secretariat by email from the attorneys' office

indicating that the Judge would be requesting the postponement.

But then it was not agreed to at that time. That was made known by a reply from the Secretariat on the 22nd indicating that it is not agreed to. Then – which led to the events of yesterday in paragraph 14 there and 15.

Now in these circumstances Mr Chair the situation as I observe it from this fact is that effectively up until the 9th of this month there had not been preparations as yet
10 insofar as the presentation of the Judge's evidence is concerned.

They met on the 9th and before then she could not come to any firm conclusion whether indeed it would be necessary for her to have legal representation or not. And it only happened on the 9th when the meeting took place which there and then she made it known and she indicated the notice that had been given would be short notice.

But for reasons that have not been clear to me to this stage is whether there were any reasons or what the
20 discussions actually there were which led to that request not being addressed at that point. To say if you say it is short notice then what is the suggestion, how much more time could be allowed for you to prepare? That all seems to have been missed.

Then secondly the observation I make also is that

when one looking at that from the time when she obtained the services of the attorneys of record to the 15th there would be no more than five days after that meeting of the 9 July and having consulted on the 15th and then made the decision that she would have to acquire the services of counsel one had only the week of the 13th – I am sorry the week of the 20th which is last week and the communication was made first with Counsel on the 20th and which then led to the indications. Because one could not be available
10 immediately even to prior arrangement which had been ensuing.

So in these circumstances Mr Chair I am aware that in terms Rule 11 good cause has to be shown if a postponement had to be allowed.

Now on the facts and on the observations as I...

CHAIRPERSON: Well Mr Shakoane.

ADV SHAKOANE SC: Yes.

CHAIRPERSON: What is the real reason why your client wants a postponement?

20 **ADV SHAKOANE SC:** She needs to have a consultation with the legal team Mr Chair and then be able to ...

CHAIRPERSON: Why has she not had a full and proper consultation with her legal team from the time she at least knew that the matter would be coming up today? Your – the letter you have handed up says she received the notice of

set down as it were on the 6 July 2020.

ADV SHAKOANE SC: That was – yes.

CHAIRPERSON: And we do know that three days later on the 9 July she had a consultation with Mr Soni the legal team which was at her request. She had requested that she at a consultation with the evidence leaders. She indicated in correspondence that she was making herself available.

ADV SHAKOANE SC: Yes.

CHAIRPERSON: And why – why was a consultation with
10 her legal team not held within five days after the 6 July or within five days after the 9 July after she decided she – that she would need her own lawyer?

ADV SHAKOANE SC: Basically, it will be the 9 July Mr Chair and as I...

CHAIRPERSON: And remember we are – we are not talking here about a lay person.

ADV SHAKOANE SC: Yes true.

CHAIRPERSON: We are now not even talking about an attorney or advocate we are talking about a Judge.

20 **ADV SHAKOANE SC:** Yes true. True. But

CHAIRPERSON: So when – when were the attorneys instructed? What was the date when the attorneys were instructed?

ADV SHAKOANE SC: It is not specified here in the letter but I can...

CHAIRPERSON: It is not clear here.

ADV SHAKOANE SC: I can establish. If I may just have a moment Mr Chair?

CHAIRPERSON: Ja. But you see I am surprised even by the fact that this basic information is not at hand because when you apply for a postponement one of things you have to satisfy the forum with is that you have acted diligently to try and avoid a postponement.

ADV SHAKOANE SC: Yes.

10 **CHAIRPERSON:** So this is information that should have been ready. So when – when were the attorneys instructed?

ADV SHAKOANE SC: I am informed it is on the 15th when the – when the consultation actually also took place. Now which – which reasonably will be within the range of more or less the five days.

CHAIRPERSON: Yes. Now I – the letter I think it is the same letter that you have handed up here.

ADV SHAKOANE SC: Yes.

20 **CHAIRPERSON:** Was made available to me this morning through the commission and I asked my Registrar to ask the acting Secretary of the commission to phone the lawyers or Judge Makhubele and to pass on the message to her that any application for a postponement must be made at the hearing and that she must be present at the hearing so that

if the application is refused we can go on. I was informed that that message was passed on to her lawyers and they indicated that they would talk to her and talk to Counsel. I assume it was the attorney who was phoned and I was subsequently given a report back that the lawyers – her lawyers said

1. They were going to be at the hearing but she would not be at the hearing.

Will you confirm that that is so?

10 **ADV SHAKOANE SC:** Yes let me just confirm that? Mr Chair I was telephoned as well in – this morning more or less the same time that the evidence – the Secretariat will have contacted them. I just wanted to confirm certain things because when I was contacted the question, I asked was whether she is available because yesterday I got the understanding that she was not around.

Now the – I was then informed the following which is what I just have to convey now. That she had been at Mokopane and when she was travelling through to – to
20 come to Pretoria he had a – a puncture – a tyre puncture and the vehicle lost control. But she is not injured it is just trauma. And they had to ask family members to go – come fetch where she was and they only travelling down to Pretoria with her this morning.

So that was what was also when I discussed with the

attorney conveyed to the Secretariat.

CHAIRPERSON: Let me understand that. She had a tyre puncture some time yesterday.

ADV SHAKOANE SC: Yes, that is – I think it was yesterday – it must have been in the late afternoon.

CHAIRPERSON: Later afternoon.

ADV SHAKOANE SC: When they were supposed to come down to this thing.

CHAIRPERSON: Was she on her way from Polokwane to
10 Pretoria?

ADV SHAKOANE SC: From Mokopane.

CHAIRPERSON: Sorry?

ADV SHAKOANE SC: From Mokopane.

CHAIRPERSON: Oh okay.

ADV SHAKOANE SC: Yes.

CHAIRPERSON: And – and then what happened? Is that – is that connected with her not being here or what is the position?

ADV SHAKOANE SC: I – I – when I asked if she could be
20 available to come – when they informed me that that happened and the trauma that she might have suffered and the fact that she is only arriving in Pretoria this morning the sense I gained is that she probably would need to consult a doctor or so because that is usually what happens. But I did not get the full details in respect of that Mr Chair.

CHAIRPERSON: Before we proceed.

ADV SHAKOANE SC: Yes.

CHAIRPERSON: I am going to ask you to contact your client.

ADV SHAKOANE SC: Yes.

CHAIRPERSON: So that we – we know what the position is.

ADV SHAKOANE SC: I will – I will Mr Chair.

CHAIRPERSON: For – I wanted her to be here because we
10 do not know what the outcome of the application for a
postponement is going to be.

ADV SHAKOANE SC: Hm.

CHAIRPERSON: So that if it is refused, she is available
and we can proceed. I know that she is not working today.

ADV SHAKOANE SC: Hm.

CHAIRPERSON: Because I did speak to the Judge
President to her Judge President some weeks back once we
knew the date to say to the Judge President this is the date
that has been set aside for your Judge to appear before the
20 commission so please do not give her any work on that day.

ADV SHAKOANE SC: Yes.

CHAIRPERSON: And the Judge President told me that
today falls within the court recess. So – but he also said he
would make sure that he did not give her any recess duty to
clash with today. He even said he could... he would keep

her out of duty for Monday just in case we do not finish today and we need her, which I appreciate. So I know that she is certainly not on duty.

And up to now, the basis for the application for a postponement is not that she is sick. So I would like you to make contact with her.

Firstly, because I may need her to explain some of the things in regard to the application for a postponement under oath.

10 There are certain gaps in the letter, you know. You.. there is no affidavit in support of her application for a postponement and there are things that may need to be clarified.

And it may well be that I would need her to take the witness stand for purposes of answering, giving clarification of certain issues relating to her application for a postponement.

20 But also apart from that. In case the application is refused, to be able to be available. But let us... I think we need to take an adjournment to enable you to be in touch with her and then we can resume and then I can... we can take it from there.

ADV SHAKOANE: Yes, Mr Chair.

CHAIRPERSON: Okay. So we are going to adjourn for fifteen minutes. On my watch, that will take us to five to

eleven.

ADV SHAKOANE: Yes.

CHAIRPERSON: We adjourn.

ADV SHAKOANE: So is the Chair... if...

CHAIRPERSON: H'm? Yes?

ADV SHAKOANE: I just want to clarify ...[intervenes]

CHAIRPERSON: Ja.

ADV SHAKOANE: ...if there are any specific matters, I must establish from her?

10 **CHAIRPERSON:** No, not apart from just finding out... well, I want you to find out her situation about coming here.

ADV SHAKOANE: Yes.

CHAIRPERSON: Whether she can come here because one, I would like her to be here so that whatever I might need to have clarified under oath, she would be available to support her application for the postponement.

But also, if her application is refused, I would like to be able to proceed. So find out what her position is. But that is what I would like to do.

20 **ADV SHAKOANE:** Thank you, Chair.

CHAIRPERSON: Okay. Alright. We adjourn.

INQUIRY ADJOURNS:

INQUIRY RESUMES:

CHAIRPERSON: Ja, just switch on your mic.

ADV SHAKOANE: Thank you, Mr Chair. I... sorry. I have

made contact with Judge Makhubele and on the first question, she informs me the accident occurred at about 19:30 in the evening. Yes.

CHAIRPERSON: So was it an accident or the tyre... the accident she refers to is the tyre puncture?

ADV SHAKOANE: To me it... I have been shown the pictures.

CHAIRPERSON: Ja?

ADV SHAKOANE: To me it looks like it resulted in an
10 accident because of the damage that I see.

CHAIRPERSON: H'm. Okay. H'm.

ADV SHAKOANE: But the attorney says he could forward to the secretariat the pictures ...[intervenes]

CHAIRPERSON: Yes.

ADV SHAKOANE: ...if necessary.

CHAIRPERSON: I think that should be done.

ADV SHAKOANE: Yes. Now, then the puncture Mr Chair, is that arising from this incident, she is not emotionally in a state to be able to attend or to testify as of today as we sit
20 here.

CHAIRPERSON: So... but just to get the facts right. In terms of what she told you ...[intervenes]

ADV SHAKOANE: Yes?

CHAIRPERSON: ...there was a tyre puncture. She had a tyre puncture ...[intervenes]

ADV SHAKOANE: Yes.

CHAIRPERSON: ...around half-past seven last evening. Is that right?

ADV SHAKOANE: Yes, I think the... probably the best way, it would be a tyre burst, probably.

CHAIRPERSON: Sorry?

ADV SHAKOANE: I am saying as I think and looking at the pictures, the proper wording would be a tyre burst.

CHAIRPERSON: A tyre burst?

10 **ADV SHAKOANE:** Yes.

CHAIRPERSON: Okay.

ADV SHAKOANE: H'm.

CHAIRPERSON: And from what she told you - I am leaving out the pictures - from what she told you, did the car get out of the road or anything like that as a result of that?

ADV SHAKOANE: Yes, it sounds so because she says even the suspension collapsed.

CHAIRPERSON: H'm.

ADV SHAKOANE: Yes.

20 **CHAIRPERSON:** And there are pictures available of the car?

ADV SHAKOANE: There are pictures.

CHAIRPERSON: Oh.

ADV SHAKOANE: Yes.

CHAIRPERSON: Are they in a position to be handed up or

not?

ADV SHAKOANE: He says he can forward them. I am sure he can show them on the phone as well.

CHAIRPERSON: Well, they can send to Mr Soni because he must see them first and then maybe arrangements can be made to immediately print while we continue.

ADV SHAKOANE: Thank you, Mr Chair.

CHAIRPERSON: Ja, I think her lawyers must be in touch with Ms Rangata who can give them the information as to
10 what number to send the pictures to and then she will try and see, while we continue, whether she can have them print and then they can be handed up to me in printed form.

ADV SHAKOANE: Thank you, Mr Chair.

CHAIRPERSON: Okay. Alright. So she says as a result of what happened yesterday when there was a tyre puncture or a tyre burst, she is not emotionally in a position to be here?

ADV SHAKOANE: Yes.

CHAIRPERSON: Today?

ADV SHAKOANE: Yes.

20 **CHAIRPERSON:** But does she indicate when she feels she might be emotionally fine to appear?

ADV SHAKOANE: I did not ...[intervenes]

CHAIRPERSON: You did not ...[intervenes]

ADV SHAKOANE: ...ask her specifically ...[intervenes]

CHAIRPERSON: Okay. No, that is fine.

ADV SHAKOANE: Yes.

CHAIRPERSON: Did she indicate whether she did have to go to a doctor or not?

ADV SHAKOANE: I did not ask that question but ...[intervenes]

CHAIRPERSON: Yes, yes.

ADV SHAKOANE: ...if I understand the position. I can only guess ...[intervenes]

CHAIRPERSON: Ja.

10 **ADV SHAKOANE:** ...that as a person, and for that matter, a lady that gets involved in such an accident in the evening, even if they may not have gone to a doctor, it traumatised them enough for them not be in a state.

CHAIRPERSON: Ja-no, what I wanted. I just wanted to get the facts right, whether she felt so traumatised that she did go to a doctor or she might not have gone to a doctor. But nevertheless, she feels traumatised.

ADV SHAKOANE: Yes.

20 **CHAIRPERSON:** From what you have been told, nothing has been said about going to the doctor?

ADV SHAKOANE: No, I do not think as yet she has been to a doctor.

CHAIRPERSON: Yes.

ADV SHAKOANE: Yes.

CHAIRPERSON: Yes. Okay. Let us talk about this matter.

You see - I am going to leave out the issue of what happened yesterday, because the application was not based on that but that has now come to ...[intervenes]

ADV SHAKOANE: It is intervening.

CHAIRPERSON: ...our attention.

ADV SHAKOANE: Yes.

CHAIRPERSON: It is just that one would have expected that she would have informed her lawyers as soon as possible that: “I know you are going to move an application for the
10 postponement of my hearing but apart from or in addition to whatever reasons you have given here to as what has happened, emotionally I would not be able to come”. So that it could have been one of the reasons given ...[intervenes]

ADV SHAKOANE: Yes.

CHAIRPERSON: ...right from the start.

ADV SHAKOANE: Indeed, yes.

CHAIRPERSON: Ja, ja. Now you see, and I will hear what Mr Soni has to say. I think Judge Makhubele has known that the Commission would want her to come and give evidence
20 for at least a number of months. Ms Martha Ngoye from PRASA gave evidence, I think early in March. It might have been the first week.

ADV SHAKOANE: Yes.

CHAIRPERSON: I am not sure but early in March.

ADV SHAKOANE: I understand so.

CHAIRPERSON: Sometime before that, in terms of the rules, she... Judge Makhubele would have been served with a notice in terms of Rule 3(3) of the Rules of the Commission ...[intervenes]

ADV SHAKOANE: H'm.

CHAIRPERSON: ...which would have given her Ms Ngoye's affidavit or the portions that relate to her ...[intervenes]

ADV SHAKOANE: Yes.

CHAIRPERSON: ...to implicate her ...[intervenes]

10 **ADV SHAKOANE:** Yes.

CHAIRPERSON: ...to say, "Here is a witness who implicates you in some wrongdoing". And in terms of Rule 3(3), that notice would have explained her rights to Judge Makhubele.

And those rights include that if she wanted to dispute the evidence of Ms Ngoye, she could apply for leave to adduce evidence.

Also, if she wanted to cross-examine Ms Ngoye, she had a right to apply for leave to cross-examine her and that notice would have told her that she was required to do those
20 things within 14-days.

ADV SHAKOANE: H'm.

CHAIRPERSON: As far as I know, she did not elect to make any such application in terms of the rules. She was in correspondence with the Commission but as far as I know she certainly did not apply for leave to cross-examine Ms

Ngoye or to adduce evidence in order to challenge her evidence. [coughing] Excuse me.

The same procedure would have happened with regard to the affidavit of Mr Dingiswayo from PRASA. And it may well be that miss... Judge Makhubele was given those affidavits of Ms Ngoye and Mr Dingiswayo at the same time. I do not know, but certainly she would have been served with that affidavit as well.

And that would have been also in February or latest
10 early March and she would have also report the same submission about her rights.

And then, I think, she would have received the same kind of notice in regard to Mr Achmat who has not testified but his affidavit was submitted. It was intended that he would testify at a certain stage.

ADV SHAKOANE: Yes.

CHAIRPERSON: And it may well be that he might still testify but... and of course, there was the affidavit of Advocate Botes SC and there was the affidavit of Mr Mogashoa.

20 **ADV SHAKOANE:** Mr Mogashoa, yes.

CHAIRPERSON: The attorney. And all of those affidavits were served to her. And I believe that - and Mr Soni can help you - I believe that at some stage, maybe in February or maybe in March or even after, there was communication from the legal team to her, asking her to furnish the

Commission with an affidavit, responding to these allegations, these affidavits.

And as far as I remember, subject to one qualification, I do not think that she has furnished any affidavit in response to such a request.

Now, I am saying subject to one qualification because I think at some stage, early... or at some stage in June or early July, she did correspond with the Commission and there was an affidavit, I think if I am not mistaken, which
10 dealt with certain issues.

One of which was what Mr Botes had said about her but I think she mentions... she made mention... she maybe mentioning certain other things relating to Ms Ngoye and Mr Dingiswayo in that affidavit.

So she must have heard... she has known that it was likely that she would be asked to come and give evidence. It was a question of when.

ADV SHAKOANE: H'm.

CHAIRPERSON: She has known what they would... in
20 what... she has known which the witnesses are who seem to implicate her in some things. She has heard their affidavits and if she wanted to even see the transcript of the evidence, she would have been given that.

Now, according to this letter that you have handed up, she became aware on the 6th of July that the date that had

been determined for her to appear is today.

Now, she had a consultation on the 9th of July with the Commission's legal team. She never brought any application until today for the postponement of the date of her hearing and it seems to me or that if she only...

If she instructed her attorneys on the 15th of July, she allowed a whole week to lapse after she had become aware of the date and she knew that the date was not far.

And then from the 15th of July to, I think before the
10 21st of July, there was no indication that there would be an application for a postponement.

If I am not mistaken, your letter makes some indication. It is either the 21st of the 22nd when...[intervenes]

ADV SHAKOANE: It is the 21st.

CHAIRPERSON: 21st?

ADV SHAKOANE: Yes.

CHAIRPERSON: Ja, the first letter was indicated. One would have thought that the time would have been used even to put the application as a substantive application on
20 affidavit, which has not happened.

And of course, as I said earlier on, we are not dealing here with just a lay person. We are not dealing with a president or an advocate. We are dealing with a high court judge.

ADV SHAKOANE: Yes.

CHAIRPERSON: She knows how important it is to act quickly if you are expected to appear in court or in a tribunal, in a forum. How important it is to act quickly if you are not going to be able to appear. If you are seeking a postponement application.

She also knows also the importance of looking for counsel who is available on that day. She knows of the importance of getting counsel early, you know?

ADV SHAKOANE: Yes.

10 **CHAIRPERSON:** And getting counsel who is available, you know. And not getting counsel who is not available. I will hear what Mr Soni says, but I want to make this remarks to you so that you can address them if you wish to because they cause me serious concern about her and her application.

ADV SHAKOANE: Yes.

CHAIRPERSON: That when she has had as much time as she has had, several months, she comes at the last minute and ask to postpone the hearing of her evidence. Ask for a
20 postponement of the hearing of her evidence and therefore... which would therefore mean that this Commission... or for this Commission this whole day is wasted.

ADV SHAKOANE: Yes.

CHAIRPERSON: We do not have a lot of time and I think about everybody in the country knows that. We are

operating under a court order that says we must finish our work within a certain time.

And as I say, she has known from probably February, early March that the Commission is likely to want her to come here at some stage.

She has been furnished with all the affidavits, as far as I understand the position. And she has had the opportunity to respond to those affidavits and put her side of the story.

And subject to the one qualification I said about this
10 other affidavit, she has not dealt with the affidavits in the manner that one would have expected despite having all the time.

And as I understand the position. She has been in recess because it has been court recess for a number of weeks. I think the court recess is coming to an end. Maybe on Monday. Maybe they are resuming on Monday.

And if I still recall correctly, the court recess in the high court in winter is about a month or maybe three weeks. I am not sure.

20 So she has had a lot of time, you know. It is concerning. That is what I want to say but you may wish to address any of these concerns I am raising before I allow Mr Soni.

ADV SHAKOANE: Yes. Obviously, Mr Chair with the limitations under which we came in to assist, one is entered in addressing this.

CHAIRPERSON: Yes.

ADV SHAKOANE: But to start with. From the little that I gained, especially through a telephone consult yesterday, is that there had been counsel and attorneys who had been assisting before and the current attorneys had not been involved at that stage.

CHAIRPERSON: Well, I am under the impression that they were involved unless there are ...[intervenes]

ADV SHAKOANE: They ...[intervenes]

10 **CHAIRPERSON:** ...two law firms with the same name.

ADV SHAKOANE: That is the next words which I wanted to mention. They got...[intervenes]

CHAIRPERSON: Yes, yes.

ADV SHAKOANE: ...they got terminated at some point.

CHAIRPERSON: Yes, it was terminated at some point.

ADV SHAKOANE: Yes.

CHAIRPERSON: Yes.

20 **ADV SHAKOANE:** So there were attorney who were then involved with counsel, Lebala SC, but then it came to path that he was said to be conflicted because he is also counsel for PRASA. So he then had to withdraw.

And the attempts to find alternative counsel were not successful because one counsel was found in Pretoria who later decided should not be able to continue with the mandate.

Hence, the fall back to the current attorneys. And I am told some communication initially happened around the 7th. It would have been telephonic or so with one of the attorneys but then they had to say, “We are available for a proper consultation with you on the 15th so that we can really have a picture what is happening and what had happened at the Commission where you were consulted with the Evidence Team and then we can make out whether we can straight away assist or we need to engage counsel”.

10 That meeting then occurred on the 15th and that is where the advice was given to say, “We would need to engage counsel in this matter”.

But of the counsel that they were contacting, there was not one readily available to come onboard as between... from between the 15th and the time when they contacted us which is understandable under the circumstances where everybody is under lockdown virtually and then people are working from home and so on.

20 But the long and short of it is that they were not able to obtain alternative counsel until the time when they contacted us and we said we could be available to consult there but we need to find out. It is actually the hearing date.

Then the other point I made mention there. I... it is so that the other incident are of April or March, but there is the added element of the... Advocate Botes having come on the

1st.

Obviously, that would have been addressed in between had the counsel not... I mean, had the legal representatives not withdrawn. One believes they would have addressed it in between.

So the question is, to what extent she could be to blame under those circumstances? I appreciate the fact that she is a judge in a high court and one cannot look at her like any other ordinary.

10 But Mr Chair, at the same time, one would, with respect, remember the principle or the same by plateau that it is best for one to have legal representation than themselves them presenting their own case.

CHAIRPERSON: No ...[intervenes]

ADV SHAKOANE: So in these circumstances...[intervenes]

CHAIRPERSON: H'm?

ADV SHAKOANE: ...I would say it is my submission that on the face of what is there, some steps almost proactively appeared to have been taken except for the limitations of the
20 availability of those that she went to for assistance.

CHAIRPERSON: Well, what certainly appears to be the case is that to the extent that she might not have had enough time with her lawyers, with her counsel to prepare for today is because she decided to instruct them late.

ADV SHAKOANE: H'm.

CHAIRPERSON: And that was her decision.

ADV SHAKOANE: Well, we could say late if we... under these circumstances we had the precise date when they withdrew, the other attorneys and the counsel indicated the conflict.

CHAIRPERSON: Yes, I mean she knew for quite some time she would be required to appear here. She could have ensured that her lawyers were fully briefed and ready and waiting for the date. If she did not do that before knowing
10 the date, as soon as she knew the date, she could do that.

Well, she might have decided that she no longer needed to be represented by her own lawyers, because I think that is the suggestion in her correspondence prior to the 9th of July and she was happy to consult with the evidence leaders of the Commission.

A consultation was arranged and it took place on the 9th of July but she did not seem... she does not seem to thereafter act with urgency when the next time she instructs attorneys is on the 15th when the matter is quite urgent. The
20 date is not far.

And then of course, about six days thereafter lapsed before the Commission is informed of any difficulties that may be there to her appearing and as things stand there does not appear to be any proper explanation from her for why she did not act with diligence in regard to – between

the 6th or at least the 9th up to 21st when the first letter was sent.

ADV SHAKOANE SC: Yes, but ...[intervenes]

CHAIRPERSON: It may be that there is much not much you can say other than what you have already said.

ADV SHAKOANE SC: Save to point out the following that on the contents of the letter she had already indicated as the 27th, 28th, when she was contacted to say that Adv Botes will be testifying, that then the notice she has been
10 given would be short notice. But also, the fact that she did not indicate to the team as in paragraph 8 that she would have wanted to be given a Rule 3(3) notice in respect of Adv Botes evidence and if she had had that notice then one understands that probably that part of Adv Botes evidence would have been addressed at the time when he testified and ...[intervenes]

CHAIRPERSON: Well, she would have been given Adv Botes' affidavit.

ADV SHAKOANE SC: Yes.

20 **CHAIRPERSON:** Ahead of the date of the hearing and that notice would have told her that she could attend the hearing when Mr Botes gives evidence but if she was not available, one, the affidavit, she would be having it already. Two, if she wanted a transcript of Mr Botes' evidence she knew she could ask for it, she is a judge, she

knows these things, evidence gets transcribed, she could have got that. It does not seem to prejudice her in any way as long as in the end she can see the evidence that was given and she can given and she can decide if she wants to cross-examine him in which case she must make an application for leave to do that but that has time limits within which it must be done and – ja, so – and the rules make provision that if you were not given a notice timeously for – about a witness who is going to implicate
10 you, you can make an application to the Chairperson for an appropriate order. So most people, since the Commission started, do not seem – do not take it as a problem because they know they can still get the transcript, they can still apply for leave to cross-examine the witness and if they are granted leave, then they will challenge and cross-examine the witness. Okay?

I think I have heard what you have had to say, I need to hear Mr Soni. Is there some last minute instruction that you have just got?

20 **ADV SHAKOANE SC:** Yes, I am trying to communicate something to... I am made to understand from this, Mr Chair, that there was a – I am sure it arose from what the consultations she has had with the evidence team. There was a supplementary affidavit of Botes SC which was promised to be supplied to her but has still not been

provided to her which, in my understanding, would probably be forming part of the entire evidence that was given Botes SC to which she must comment.

CHAIRPERSON: Ja, well I will hear what Mr Soni has to say about that but I am sure it is probably something very minor and she has known about what Mr Botes' version is about her for quite some time because she lodged a complaint with the Bar Council against him, there was an exchange of affidavits, as I understand the position, but let
10 me hear what Mr Soni has to say. I will decide the application in due course but while Mr Soni is addressing me, if possible it would be good if somebody from your team would find out from the judge whether if we postpone today, subject to the Commission's legal team's availability, whether she would be available to give evidence tomorrow, on Saturday. We have sat on a Saturday before, where we sit on Saturday, if necessary. I can indicate that next week will be problematic. I saw that there was a request for a month. I can tell you
20 immediately, I am not going to – if I grant a postponement, it is not going to be for a month. That I can tell you. I have spoken to her Judge President this morning and I asked him whether, should I be persuaded to grant a postponement, if I grant a postponement to a date that is close but which happens to be a day when she is supposed

to be in court, would he be able to release her and the Judge President said he would be able to make a plan at least as long as he gets something like two days notice he would be able to make a plan if I postpone the hearing today to another date that happens to be a court date. So alright, so let me hear what Mr Soni has to say, but maybe somebody in your team could in the meantime try and get that information from her.

ADV SHAKOANE SC: Thank you.

10 **CHAIRPERSON:** Mr Soni, I think they might need to sanitise before you take the stand. And then the Commission staff can check in the meantime from the municipality whether if we were to sit tomorrow there would be any problem with the venue or not. Maybe let me start with that, Mr Soni. Should I grant the postponement? How is your availability tomorrow.

ADV SHAKOANE SC: We are available tomorrow and Sunday.

CHAIRPERSON: And Sunday?

20 **ADV SHAKOANE SC:** Yes, Chair.

CHAIRPERSON: Okay, thank you.

ADV SONI SC: Chairperson, I do not wish to traverse factual disputes, and there are factual disputes. My learned friend handed you today a letter explaining or purporting to explain the sequence of events. Now,

Chairperson, there are two letters that I would beg leave to hand up to you and they were both sent to Judge Makhubele relating to how things were to progress. The first is the 13 July which is after the consultation with her and then, Chairperson, on the 22 July to the attorneys when they placed themselves on record. And ...[intervenues]

CHAIRPERSON: Before you proceed let me say that it may be necessary for the record for you to go through the
10 history of what has happened since – particularly in regard to when were Rule 3(3) notices sent to Judge Makhubele relating to Ms Ngoye and Mr Dingiswayo and the other witnesses so that we get all of that on record.

ADV SONI SC: As you please Chair.

CHAIRPERSON: If you need to read certain things onto the record you may do so.

ADV SONI SC: Yes. Chairperson, we normally at the Commission have a tracking record of all the 3(3) notices and that has never been in dispute. I will hand this up but
20 I will tell what it says, Chairperson. In regard to Ms Ngoye's affidavit, this was served on Judge Makhubele on the 21 February 2020. Mr Dingiswayo's affidavit was also served on the 21 February.

Then there are three other affidavits, Chairperson, the affidavit of Mr Zackie Achmat was served on the 20

February 2020. Mr Mogashoa's affidavit was served on the 26 May 2020 and Mr Botes' affidavit was served on the 26 May as well.

CHAIRPERSON: So Ms Ngoye's affidavit was served on Judge Makhubele on 21 February 2020. Mr Dingiswayo's affidavit was served on her on the same date.

ADV SONI SC: Yes, sir.

CHAIRPERSON: Mr Achmat's affidavit was served on the 20 February. Mr Mogashoa's affidavit was served on the 26 May. Mr Botes' affidavit was served on the 26 May.

ADV SONI SC: That is so.

CHAIRPERSON: So in regard to Ms Ngoye's affidavit and Mr Dingiswayo's affidavit, Judge Makhubele has had those as well as Mr Achmat's affidavit from 21 February. She has had those affidavits for about six months.

ADV SONI SC: Six months, yes, Chair.

CHAIRPERSON: During which she has not filed any affidavit responding to them.

ADV SONI SC: No.

CHAIRPERSON: With regard to Mr Mogashoa's affidavit, that was served on her on the 26 May 2020 and Mr Botes' affidavit was served on her on the same date and with regard to those two affidavits, she has had about two months.

ADV SONI SC: That is...

CHAIRPERSON: And apart from the affidavit that she filed sometime – was it early July?

ADV SONI SC: 1 July.

CHAIRPERSON: 1 July, which dealt, to a large extent, with Mr Botes. Apart from that, there is no other affidavit that she has filed. Ja. Yes and then talk about the supplementary affidavit that Mr Shakoane talked about.

ADV SONI SC: Chairperson, at the consultation of the 9 July, Judge Makhubele said that she was ready only to
10 discuss Mr Botes' affidavit and I recorded in the letter of the 13 July what happened at that consultation. She has never responded to say what I recorded was incorrect but to answer the question, Chairperson, I then indicated to her that I was more than happy to do a supplementary affidavit because she said she had not covered certain aspects in particular messages exchanged between her and Mr Botes. I then sent that affidavit to her on the 13th and I heard my learned friend say that that had not been done. It in fact has been done and I will submit to you,
20 Chairperson, a letter – I mean, an SMS from Ms Ratanga to Judge Makhubele attaching the affidavit in question.

On that issue, Chairperson, and I do not wish – because I place on record now that I will raise some of these matters with Judge Makhubele whenever she comes to testify, Chairperson, and the reason I do that is, after I

submitted the affidavit to her I phoned her. She did not answer the phone, her daughter answered the phone and I said to her daughter please ask her to phone me. That was on the 13 July. I have not heard a response since.

I took the trouble over that weekend to go through all the correspondence and assist in that process and now to be accused of not doing what I had indicated is, we submit, quite cheeky, Chairperson, to say the least. But those are in fact the facts. But there is something that
10 my learned friend has tried to explain ...[intervenes]

CHAIRPERSON: Well, you might wish to highlight certain things in the letter that you sent or that was sent.

ADV SONI SC: Yes, please.

CHAIRPERSON: So that there is a clear picture of where the legal team of the Commission stands with regard to some of these – I leave it to you what to place on record.

ADV SONI SC: Yes.

CHAIRPERSON: Whether to read any part into the record.

ADV SONI SC: Chairperson, in the letter of the 13 July
20 the first three paragraphs indicate the past history, as it were. From the outset, after the time that Judge Makhubele received the affidavits of Ms Ngoye and Mr Dingiswayo and Mr Achmat, she adopted legalistic approach about she had not been advised about this, that and the other and there was an exchange of

correspondence but for present purposes one need not deal with that because then she wrote to Commission and say I have changed my mind, I am not having independent lawyers, I would like to consult and it is as a result of that, that the consultation of the 9 July was arranged, Chairperson, and it was arranged for the 9 July because we were hearing the evidence of the witnesses in the week before and it was from the 29 June to the 2 July we heard the evidence of Ms Ngoye and Mr Dingiswayo and Mr Botes
10 in relation to Judge Makhubele. So that is why one could not consult.

What I want to say, Chairperson, is she at no stage indicated that she was unhappy with the hearing, I had many telephonic communications with her and in fairness to Judge Makhubele, the conversations were always cordial and very respectful on both sides. And it is in that context that the consultation on the 9 July came about and Judge Makhubele, to the best of my knowledge must have been aware because the purpose was so that she could have an
20 affidavit which reflects her version in answer to the five affidavits.

To our surprise, at the consultation – and it was a five hour consultation, Chairperson, she said she was prepared only to deal with the affidavit of Mr Botes. And the importance of that, Chairperson, is twofold. One is,

she had had the previous affidavits, as you rightly point out, by that time, six months previous – five months previous.

With Mr Mogashoa she made it clear to me because – and this is in most of the affidavits, a lot of it is correspondence that is attached, reports that were there. So it is not as if there was a dispute of fact, it is simply what does this mean, why did you respond this way? It is not the type of consultation that you need hours and hours
10 for. Did you receive this, did you say this? And that is why we thought, just to spend five hours only on Mr Botes and then we do not even have the supplementary affidavit back is really ...[intervenes]

CHAIRPERSON: What it means is that you had made yourself available for, I mean, five hours, like the whole working day to consult with her on all matters on which she was going to have to testify.

ADV SONI SC: That is so.

CHAIRPERSON: But she was the one who said she was
20 only prepared to consult on Mr Botes' evidence.

ADV SONI SC: Yes, so the emphasis was she had come prepared only to consult.

CHAIRPERSON: Yes, she had come prepared only in regard to Mr Botes.

ADV SONI SC: Yes.

CHAIRPERSON: She had not come prepared to deal with all the witnesses.

ADV SONI SC: Because during that consultation I put to her certain things, for example, that Ms Ngoye had said in her affidavit or Mr Dingiswayo and it is at that stage she says no, I had not come prepared for...

CHAIRPERSON: And prior to when the arrangement was made for that appointment was there any discussion that the consultation would be – that she needed to prepare
10 herself only in regard to Mr Botes?

ADV SONI SC: Not at all, Chair.

CHAIRPERSON: Yes.

ADV SONI SC: We would never have done that because the – we had already by that stage on the 1 July had her affidavit on Botes. So we would have – in fact I had not even thought that Mr Botes' affidavit would be an issue.

CHAIRPERSON: Yes.

ADV SONI SC: But she then raised that there were certain messages that she would like to be attached.

20 **CHAIRPERSON:** Yes, yes. So she had had Ms Ngoye's affidavit and Mr Dingiswayo's affidavit at that time for maybe about five months.

ADV SONI SC: That is so.

CHAIRPERSON: She asked for a consultation with the legal team of the Commission, she was granted one.

ADV SONI SC: Yes.

CHAIRPERSON: Which was an opportunity for – to canvass all the evidence and for her to deal with all the affidavits of all these witnesses but she said she had prepared herself only for Mr Botes.

ADV SONI SC: That is so.

CHAIRPERSON: And you were there, you were available to deal with all of them.

ADV SONI SC: With all of them and, in fact, I had
10 prepared for the consultation on that basis.

CHAIRPERSON: Yes.

ADV SONI SC: And saying to her well, look, you perhaps need to answer this, you need to answer this, do you agree that this was said, is at that stage that she indicated that she would rather not ...[intervenes]

CHAIRPERSON: Did she give any reason why she had not prepared to deal with all of them?

ADV SONI SC: She said she felt that she only needed to deal with Mr Botes.

20 **CHAIRPERSON:** Yes.

ADV SONI SC: Now, Mr Chairperson, in view of the fact that I will be cross-examining here, it would not be unfair for me to impute things to her.

CHAIRPERSON: Okay, ja.

ADV SONI SC: But what I do want to say is that once she

indicated a reluctance, I did not want to create the impression that she is forced to do so.

CHAIRPERSON: Yes.

ADV SONI SC: And she, being a judge, I indicated it to her well, will you prepare the affidavit? At that stage, Chairperson, I need to indicate she did not say to us that she would need legal assistance, she only indicated that to Ms Ratanga in the lift when they were going down.

CHAIRPERSON: Ja.

10 **ADV SONI SC:** And on the following day I phoned her and I said look, I understand you may want legal representation. This is the 10th, that is exactly two weeks ago, Chairperson, and she said yes, I am thinking about it. And I said well, please ensure that we have the affidavit in time. And this was her response, Chairperson, I am driving with people, I am not in a position to talk and I say well, if you want, we can talk over the weekend and she says I am going to busy all weekend.

CHAIRPERSON: Okay, okay. No, that is fine.

20 **ADV SONI SC:** Chairperson, can I then go to this – I have been informed, Chairperson, that the venue is available over the weekend.

CHAIRPERSON: Okay, thank you.

ADV SONI SC: All of these facts are recorded in this letter and if one has regard to paragraph 6, Chairperson,

we say exactly what happened at the consultation and then that she had told Ms Ratanga that she – at paragraph 7 that she wanted her own lawyer and then on the 10th I phoned her. So all of that is recorded and for no other reason but just to make sure that a dispute like this does not arise, we ensured that it was sent to her. We have not had a response to this saying that there was anything amiss with what had been recorded there.

Then, Mr Chairperson, we received a letter from
10 Bokwa Attorneys on the 21 July – when I say we, the Commission, and what they say is:

“We have taken notice because we, on the 21st sent a reminder notice of today’s hearing.”

And the response was from the attorneys, so:

“We confirm we have been reinstructed by Judge Makhubele to act on her behalf in the proceedings before the State Capture Commission. We will be furnishing yourself with a letter stating our client’s position before the end of business tomorrow.”

20 So this notion that we were told there was going to – on the 21st that there was going to be an application for a postponement simply does not exist. Not on what we have received.

CHAIRPERSON: So as at the 21 July, from what one can – you can see in that letter, the attorneys were saying they

were still going to write to the Commission.

ADV SONI SC: Yes.

CHAIRPERSON: To indicate what their client's position was.

ADV SONI SC: Yes.

CHAIRPERSON: Okay.

ADV SONI SC: Then, Mr Chairperson, in anticipation that they needed to know what our position was, I have given you a letter, Chairperson, of the 26 July which we sent to
10 Bokwa Attorneys and we copied ...[intervenes]

CHAIRPERSON: Did you say 26?

ADV SONI SC: 22 July, sorry.

CHAIRPERSON: 22nd, oh. Yes?

ADV SONI SC: And we copied Judge Makhubele on that letter and we copied Judge President Mlambo and the reason Chairperson is because Judge Makhubele has insisted right from the outset that in any matter relating to her appearance at the Commission ...[intervenes]

CHAIRPERSON: The Judge President be informed.

20 **ADV SONI SC:** ...Judge President Mlambo needs to be informed.

CHAIRPERSON: Yes.

ADV SONI SC: And on – in that letter Chairperson we indicated again our position setting out more or less what had been set out in the letter of the 13th of July and

...[intervenes]

CHAIRPERSON: I think you must read into the record that letter, ja.

ADV SONI SC: As you please. What on behalf of the Legal Team the following was placed on record, this is in paragraph 2 Chairperson.

“On the 6th of July a notice of set-down was served on Judge Makhubele confirming that she will be testifying before the Commission on the 24th of July. Judge Makhubele indicated that the date suited her as it fell during Court recess.”

And Chairperson I may make that point that that is exactly what she told us when the date was set.

CHAIRPERSON: Yes, that is 2.2?

ADV SONI SC: When the date was set?

CHAIRPERSON: Yes, that is 2.2?

ADV SONI SC: 2.2 Chairperson. Then at 2.3 we recorded Judge Makhubele’s request that consultation was held with her on the 9th of July with the view to preparing an affidavit in which Judge Makhubele would respond to the allegations made in the affidavit of Mr Dingiswayo, Ms Ngoye, Mr Botes and Mr Mogashoa.

It is recorded that the first three persons have already testified. Then 2.4:

“That affidavit could not be prepared as Ms

Makhubele's said she had prepared to deal only with the allegations made by Mr Botes. Judge Makhubele later informed the legal team that she would be engaging an attorney to prepare an affidavit in response to the allegations that had been made in the affidavits reports witnesses. She was informed of the need to do so, the need for this to be submitted long before the 24th so that it, the affidavit, could be served on the deponents timeously. In a subsequent letter Judge Makhubele was informed that the Commission's position was as follows; Judge Makhubele is required to appear at the Commission on the 24th of July ..."

10

And Chairperson I keep emphasizing, she is required to attend, because she has received a notice and it does not lie in anybody's hands to defy that sort of notice unless a prior application is made, and none has been done.

As indicated in that notice she will be required to deal with the allegations by all the deponents and Judge Makhubele is expected to file timeously the affidavit or sworn statement dealing with the allegations against her and Chairperson I want to emphasize this, in paragraph 2.8 what was also said on behalf of the legal team is what is set out above is still the Commission's position with this rider, whether or not an affidavit is submitted timeously or

20

at all at her appearance on the 24th of July Judge Makhubele will be questioned on the allegations made against her.

We were making it quite clear Chairperson that it was the answers that she is going to give to the Commission and she could not avoid her appearance here by not submitting an affidavit.

Then Mr Chairperson from my perspective the next issue that arose is my learned friend for Judge Makhubele,
10 phoned me yesterday at quarter past one and asked me if I – and I say that because he has said something about what transpired. I said to him Chairperson that it was not in my hands but I want to formally place on record the two letters or what had been recorded in the two letters and that I would strongly oppose any application or a postponement to that, but of course that application could be brought because Chairperson it is not my decision, it is with respect your decision Chairperson, but I made my position quite clear.

20 As I understand it from this letter, and it was never communicated to me, my learned friend then spoke to the legal – the leader of the Commission's legal team's Mr Paul Pretorius, to try and arrange for postponement. I do not know what transpired in that, but I only heard about it in that letter.

We then got a letter, this letter Chairperson that has been handed to you by my learned friend, to say that an application for a postponement would be made.

So that's the first I became aware that Judge Makhubele – well that she would – that an application for a postponement would be made.

At midnight I called Ms Ratanga and I said to her she must indicate to the – Ms Makhubele's legal members, and the reason I didn't respond Chairperson is the letter
10 was not directed at me, you will see it is directed at Ms Ratanga for her attention to say that this application would be made and keeping that protocol I said to her Ms – Judge Makhubele must be told that there would be this opposition and that she is required to be here.

So that Chairperson are the facts, and I place them on record because in a sense what is recorded in the letter that was sent does not accord with what has been we submit the agreed facts as up to yesterday and which are borne out by all the exchanges between us, so to the
20 extent that what is contained in the letter is in – the letter by Judge Makhubele's attorneys is at variance with what we have put up Chairperson we would ask that what we have set out be regarded as the correct set of facts on which the application should be adjudicated.

Chairperson for me this really is the issue, the

dispute, and all the disputes relating to this matter, are contained in documents, it does not require days and days of consultations to work out what the disputes are. I give one example Chairperson, there is a report that is given by Mr Mogashoa ...[intervenes]

CHAIRPERSON: Well Mr Soni I don't even think you need to give examples. Judge Makhubele has had – the main affidavits are those of Ms Ngoye and Mr Dingiswayo. She has had them for six months.

10 **ADV SONI SC:** Absolutely.

CHAIRPERSON: She has not prepared any affidavit during that six months to respond to those affidavits. As far as Mr Achmad is concerned, she has also had six months to prepare an affidavit to respond to. As far as Mogashoa and Botes, but take Mogashoa she has had about two months, and she has not done anything.

ADV SONI SC: Indeed, no.

CHAIRPERSON: In terms of the rules everybody is given two weeks, or ten days, she has had more than enough,
20 she has done absolutely nothing to deal with those allegations by way of affidavit. She has had ample opportunity. No explanation seems to be given why over these six months she could not have prepared those affidavits, I got counsel to prepare those affidavits for her to respond to this, and with regard to Mr Botes she has

known Mr Botes version about the – about what he has to say about here I think for quite a long time because of the complaint that she lodged with the Bar Council, so there is no doubt that she has had more than ample time.

ADV SONI SC: That is so.

CHAIRPERSON: To prepare affidavits. Yes, so what – is there anything else you want to say?

ADV SONI SC: Chairperson there is one further matter. The approach adopted by Judge Makhubele, 10 notwithstanding the fact that we tried to consult – well we consulted with her and urged her to file the affidavit has made preparation for her appearance are a major task and I'm not complaining about that but what the purpose of this is, to say, I accept the following set of facts, you need only question me on the following but the preparation now has been to check with every fact because there isn't that affidavit and it just, in a sense, Chairperson, makes me the leading of the evidence a very untidy affair as it were because you need to go through the allegation first and 20 then have response to it and Judge Makhubele must know that, that is not how disputes in a Commission like this are resolved.

CHAIRPERSON: Okay is there anything else you want to say?

ADV SONI SC: Chairperson I know I should formerly say

what our position is with regard to the respondent, the difficulty is that there is this non-appearance and I'd rather not comment on it but I'd rather challenge whatever Judge Makhubele says when she comes to give evidence on that but I would just say this, Chairperson, *prime facie* it is highly disrespectful of the Commission and even more highly disrespectful of you, Chairperson. Given the fact that you're the Chairperson of the Commission also given the fact, Chairperson, with respect you are the Deputy
10 Chief Justice of the country and when a notice is served in your name, virtually, to appear and to adopt this cavalier attitude is something that must be found.

CHAIRPERSON: Yes, thank you, Mr Shakoane? Do you accept, Mr Shakoane, that no explanation has been presented to me as to why Judge Makhubele has not, over this long period, since February prepared affidavits that respond to the allegations made against her by Ms Ngoye, Mr Dingiswayo and Mr Achmat and also why over the past two months or so she hasn't prepared an affidavit
20 responding to Mr Mogashoa's affidavit, do you accept that, there is nothing that – that has been placed before me that gives me an explanation for that?

ADV SHAKOANE SC: Sorry Chair, you say no explanation, I...[intervenes].

CHAIRPERSON: You may draw my attention to an

explanation if you say there is?

ADV SHAKOANE SC: I'm not sure if the letter of 23 June by her is before you Mr Chair, it seems to be correspondence she explained – or the...[intervenes].

CHAIRPERSON: Yes, you have to raise your voice again Mr Shakoane, I think the mask is preventing you from being heard.

ADV SHAKOANE SC: I was saying the letter of 23 June which she wrote to the evidence team is ...[intervenes].

10 **CHAIRPERSON:** It's not before me right now isn't it? You didn't place that before me did you?

ADV SHAKOANE SC: Well it's in the...[intervenes].

CHAIRPERSON: Are you talking about the letter from the Commission's legal team to her?

ADV SHAKOANE SC: No, the letter from her, 23 June 2020.

CHAIRPERSON: Well you didn't hand up such a letter.

ADV SHAKOANE SC: I'm not sure if there's an extra copy that I can hand up.

20 **CHAIRPERSON:** What does it say, does it provide an explanation?

ADV SHAKOANE SC: It says, amongst other things, she says there that she is going to be dealing with the evidence of ...[intervenes].

CHAIRPERSON: I can't hear you Mr Shakoane.

ADV SHAKOANE SC: Sorry the evidence – may I perhaps read it, read the letter?

CHAIRPERSON: But does it – are you submitting that it does provide an explanation or not? I don't want to take time to read it if it doesn't have.

ADV SHAKOANE SC: What I can submit, Mr Chair, is that, in there she is informing the evidence team what she would be able to deal with at the meeting and then she says, also, that she is ready to provide a sworn statement
10 or affidavit in respect of the previous Rule 33
Notices...[intervenes].

CHAIRPERSON: Where are you reading from, what paragraph?

ADV SHAKOANE SC: The first part starts from paragraph One to four but what I was reading now is in paragraph six.

CHAIRPERSON: Yes.

ADV SHAKOANE SC: From one to four that's where she mentions that – for example in paragraph ...[intervenes].

CHAIRPERSON: Well in paragraph six she says, and I
20 read,

“I therefore advise, further, that I'm ready to provide a sworn statement/affidavit in respect of the various Rule 33 Notices issued in relation to the evidence of a) Mr Mfanimpela Moses Dingiswayo, b) Ms Onica Martha Ngoye and c) Mr Abdulrazak Zakir

Achmat and then seven kindly advise the legal team and forensic investigators to get in touch with me as soon as possible”.

So she was saying – this was 23 June, she was saying she was ready to provide a sworn statement or affidavit in relation to the evidence of these three witnesses whose affidavits she received in February last year but according to Mr Soni and the correspondence that she addressed to – that he addressed to her, subsequent
10 to the 9th of July – on the 9th of July when she came to consult with him, with the legal team of the Commission, she said she was – she had only prepared to deal with the affidavit of Mr Botes, contrary to what she had said in this letter, that she was ready to provide a sworn statement/affidavit in regard to all of them and there’s nothing that has been placed before me to say why it is that if she was ready about a month ago, 23 June 2020 to provide an affidavit or sworn statement in regard to these witnesses, why as we speak today, there is no affidavit that
20 she has provided and again, this is not a lay person who might not know how to prepare an affidavit. Even without a lawyer, she can prepare the affidavits herself.

ADV SHAKOANE SC: Well that is so M’Lord – sorry as mentioned earlier the preferable position would be that one is represented...[intervenes].

CHAIRPERSON: No, no that we accept and you put it correctly, to say, preferable, maybe it's more than preferable but there's a limit – there's a limit, you are a Judge, you are experienced, you know these matter, there's nothing complex about this, these matters don't involve any complex legal issues and you know you want to provide an affidavit, you say you are ready to provide and affidavit to answers these allegations of three witnesses and you come to a consultation that has been arranged at
10 your request, you say you are only prepared to deal with one and up to know we don't know why she was not prepared to deal with the others and you come to apply for a postponement application, you are not even able to say, in the meantime I have completed the affidavits, here they are.

ADV SHAKOANE SC: Yes, but perhaps Mr Chair...[intervenes].

CHAIRPERSON: That can't be acceptable from a Judge.

ADV SHAKOANE SC: Whereas, Mr Chair, before that kind
20 of conclusion could be reached or one firms that criticism against her, the best approach, perhaps, in my – perhaps in my respectful suggestion to the Chair is, maybe what you mentioned earlier in the beginning of – or in the course of my address could be the approach that is adopted i.e. where you said that you offer her an opportunity to explain

those gaps even if it's by way of an affidavit under oath. I submit that would be the – most probably the fair way of dealing with it so that she can – because what ...[intervenes].

CHAIRPERSON: I mean you're talking about an affidavit to explain what?

ADV SHAKOANE SC: When I earlier addressed you, Mr Chair, and you raised the question, one, that I should telephone her to find out about what happened in the
10 accident. The second part of that, was when you said that you might want her to explain under oath.

CHAIRPERSON: Yes.

ADV SHAKOANE SC: By way of an affidavit...[intervenes].

CHAIRPERSON: Yes, well I didn't say affidavit I said I wanted her here on the witness stand.

ADV SHAKOANE SC: Oh, under oath?

CHAIRPERSON: Yes.

ADV SHAKOANE SC: Yes, I ...[intervenes].

CHAIRPERSON: To support her own application for a
20 postponement.

ADV SHAKOANE SC: Yes, I would probably say, that would have been the – given the circumstances and my limited position, having been instructed under these circumstances, the best way would be for her to be given that opportunity...[intervenes].

CHAIRPERSON: I kind of sympathise with you Mr Shakoane, all of us who have practiced know that sometimes you get put in a difficult position by a client where you are instructed late and it becomes difficult because you can't deal with certain things, you know, because you simply haven't been given enough time but...[intervenes].

ADV SHAKOANE SC: But in this instance, perhaps, Mr Chair, I was actually taking advantage of that suggestion
10 that came from you to say – because it arose in the course of addressing what is stated in the letter.

CHAIRPERSON: But you see, you see part of the problem is, you have already moved the application.

ADV SHAKOANE SC: Yes.

CHAIRPERSON: Those are matters that should have been addressed even in an application and an affidavit before we are here now and I was hoping that when we took a break earlier she would be able to say yes I can be there in an hour's time and I've made myself available to be
20 questioned by the Chairperson about my application for a postponement and we would stand down she would come, she would take the stand and I could ask some of the questions to see if her answers would satisfy me that I should grant her the postponement. As things stand, I'm disinclined to do so and I was thinking that she would be –

she would come here and maybe her explanation would persuade me otherwise. So I'm still going to hear what you say but my inclination is that the application has got no merit but I want to hear because you are still responding to Mr Soni, in case there is something that persuades me otherwise.

ADV SHAKOANE SC: Yes.

CHAIRPERSON: Ja.

ADV SHAKOANE SC: But perhaps that could be, Mr
10 Chair, where you do not have an intervening impossibility as of the sort that we have. If it was only the scenario as painted by my learned friend, Mr Soni, I would say the comment right now, from the Chair, to say with all that's there the Chair will be disinclined to allow that opportunity but now you have an intervening impossibility which is not of the making of her own and in...[intervenes].

CHAIRPERSON: Well you see, as things stand, the thing about – I haven't seen the pictures I hope they're available now I should see them as soon as possible. Except for
20 that issue, because you said you saw the pictures of the car which gave you the impression that this was an accident, I think that's what you said, except for that part, my inclination, my *prime facie* view is that there is no merit in this application for a postponement and if she was here I would be inclined to dismiss it and say, let's start but there

is a reality that she is not here now and it may be that when I see the pictures of the car, also, I may take the view that, well maybe, what happened may have caused her some emotional trauma. So – but maybe I think the next thing that we should talk about is, have you received instructions whether, if we were to postpone to tomorrow she would make herself available?

ADV SHAKOANE SC: I just wanted to get the clear...[intervenes].

10 **CHAIRPERSON:** The response.

ADV SHAKOANE SC: The clear response from the attorney.

CHAIRPERSON: Okay.

ADV SHAKOANE SC: Maybe if I'm given a minute.

CHAIRPERSON: Ja, no that's fine. Do you need us to adjourn for five minutes, it looks like you may – you are given very detailed instructions or are you about to be ready?

ADV SHAKOANE SC: Yes maybe, five minutes Chair.

20 **CHAIRPERSON:** Okay, we'll take a short adjournment, I'll give you about nine minutes we'll resume at a quarter to one.

INQUIRY ADJOURNS

INQUIRY RESUMES

INQUIRY RESUMES

CHAIRPERSON: ...that is sought to be made. I see a side of a car. It appears that the tyre is flat and just above the tyre it looks like the car may have scratched something and then – and the other picture it is also shows the tyre that shows parts thereof that are torn and there is – it looks like the car may have scratched some surface or something. And then the third picture I do not know what it shows. I see somebody's finger or thumb but I do not know – I am not sure what it shows. What do you say the point is about the
10 pictures? What do they show?

ADV SHAKOANE SC: It just shows the – from there it shows the tyre that had suffered the – that has been affected by the bursting and the extent of it. And then there is the – what Mr Chair you describe as a scratch – a scratched part of the vehicle on the side.

CHAIRPERSON: Hm.

ADV SHAKOANE SC: But the third picture.

CHAIRPERSON: Hm.

ADV SHAKOANE SC: I am not able to really make out what
20 it is.

CHAIRPERSON: Yes.

ADV SHAKOANE SC: From that picture.

CHAIRPERSON: Hm. But would it be correct to say you have not been told that she was injured?

ADV SHAKOANE SC: No.

CHAIRPERSON: Ja.

ADV SHAKOANE SC: Yes. That is – that is correct.

CHAIRPERSON: And obviously if she was injured, she would have told you.

ADV SHAKOANE SC: That is correct – yes.

CHAIRPERSON: She would have said that ja. What you have been told is that as a result of what happened she does not feel emotionally fine to appear.

ADV SHAKOANE SC: Hm.

10 **CHAIRPERSON:** Ja. I think you may have used – I do not know if you used traumatised earlier on?

ADV SHAKOANE SC: Yes that – I also used that term ja.

CHAIRPERSON: Ja. Is that the term that came from her or that was your understanding?

ADV SHAKOANE SC: No from me.

CHAIRPERSON: You understanding ja

ADV SHAKOANE SC: Yes.

CHAIRPERSON: Okay but she said she emotionally she does not feel.

20 **ADV SHAKOANE SC:** Yes.

CHAIRPERSON: Good enough to appear. And she says she does not feel that tomorrow she would still be – she would be fine.

ADV SHAKOANE SC: She would have recovered.

CHAIRPERSON: To appear.

ADV SHAKOANE SC: From that yes.

CHAIRPERSON: You – well I do not know if there is anything further you are going to say.

ADV SHAKOANE SC: Just to

CHAIRPERSON: Yes.

ADV SHAKOANE SC: Sorry – sorry Mr Chair.

CHAIRPERSON: Ja I was saying I do not know if you have anything further to say. I think I must give you a chance to say whatever else you wanted to say.

10 **ADV SHAKOANE SC:** Yes.

CHAIRPERSON: In respect of ...

ADV SHAKOANE SC: The – what I wanted to say Mr Chair is also the following. The – the information I have is that the statement that on the 13 July she did not answer nor respond to a call from my learned friend Mr Soni is incorrect. She – when that call came my understanding is that she was at court and she had actually returned the call.

CHAIRPERSON: Hm.

20 **ADV SHAKOANE SC:** And secondly which is what she – she would deal with in the event if she had had the opportunity to do the affidavit. Secondly it is the – the matter relating to the consultation of nine [indistinct] she says it is not correct that it went well and she would have had to explain also what made it not to go well and to fail with her having to go the route she opted.

CHAIRPERSON: Your voice goes down from time to time.

ADV SHAKOANE SC: Sorry.

CHAIRPERSON: Mr Shakoane and then I cannot hear you.

ADV SHAKOANE SC: Yes she says it is not correct that that consultation went well and she would be – she would had to explain what made it not to go well.

CHAIRPERSON: Hm.

ADV SHAKOANE SC: But as a final submission on my part and on her behalf Mr Chair I want to believe that the – if the
10 communication – this is the first part. If the communication had on 27 of June in respect of the – Mr Botes and then he testifies on the 1st it is only reasonable that she would have had to make the request she did and in my submission if one looks at what is contained for example at paragraph 6 it could not have been that he has not responded to under those circumstances which would have afforded her the opportunity that she – that he sought in order to deal with the matter at the time.

Secondly and lastly it – under these circumstances
20 you may not Mr Chair in the interest of fairness ignore the fact of this intervening incident of last night.

CHAIRPERSON: One that as I said earlier on one would have thought that if it was an important factor for the postponement would have been given to you either last night or early this morning to say something else has happened

which is not – you are not going to rely on to move the application. This is what has happened irrespective of what the grounds that may have been there for a postponement application here is what has happened that makes it impossible for me to appear. And of course, I – I have no doubt that in all probability when you stood up to address me you would have wanted to raise that quite up front. To say whatever happens here is the situation that has happened. But I had to ask why is she not here because I said she
10 should be told that I want her to be here so that if her application for a postponement is not successful, we can proceed. It was only then that I was told by you and I do not know whether you were hearing for the first time or you had heard it but I was told about this incident of yesterday. So I am simply saying there is that concern.

ADV SHAKOANE SC: Mr Chair the – perhaps I should start here and it is what I sometimes even say in – in a court address. The – and I may say this. When I addressed you in response to that I did indicate that at the time when this
20 call came from the Secretariat that day to say she should also be present I was informed and my question was, is she in a position to be available? And I was then informed of that accident. In the plan of which is what I preface by saying I normally say it even in court address. In the line-up of my address to you the last part would have been to

mention that aspect because I had to still verify certain aspects of the attorney.

CHAIRPERSON: Yes. Okay. Okay.

ADV SHAKOANE SC: So it was still going to be mentioned.

CHAIRPERSON: Yes. Okay.

ADV SHAKOANE SC: But it so happens that in court the – from the bench there is intervention.

CHAIRPERSON: Ja.

ADV SHAKOANE SC: Then it pre-empts something that you
10 still going to deal with it.

CHAIRPERSON: Yes. No, no that is fine. I take it you are done now.

ADV SHAKOANE SC: Yes. So what she would also request in the face of this would be that you could have her affidavit filed by the end of next week which is 31 July 2020 if you can meet Mr Chair that [indistinct].

CHAIRPERSON: Okay. Okay alright thank you Mr Shakoane.

ADV SHAKOANE SC: Thank you Chair.

20 **CHAIRPERSON**: I am going – I am not going to give detailed reasons but if they are required, they can be given in due course. Save for the issue of what may have happened to her yesterday, last evening about which there is not much information placed before me in terms of a tyre burst or tyre puncture everything that – the application that

Judge Makhubele has brought for the postponement of the hearing of her evidence does not reveal any good cause for a postponement and actually everything else on which the letters – the letters that were put up reading of those letters reveals that the grounds of the application as reflected in those letters have no merit whatsoever.

With regard to the issue of the – how she may have been affected by the incident when as I understand the position, she had a tyre puncture last night not enough
10 information is placed before me to reach a firm conclusion but the fact of the matter is that she is not here now.

It may or may not be that in due course when all the facts are placed before me in regard to that incident, I may form the view that indeed that was a good ground. That maybe I would come to the conclusion that it was no good ground for a postponement. But faced with the situation that we are faced with I have to postpone the hearing because she is not here and I am told that as a result of the incident yesterday she is not in an emotional state that would allow
20 her to be here to give evidence.

This has caused the commission a lot of inconvenience. This date was set aside for her to give evidence. As Mr Soni indicated according to correspondence, she had indicated that she was available for today. Of course, she would not have known what was

going to happen yesterday but the application for a postponement had been decided upon before the incident of yesterday. So she had intended to apply for the postponement of the hearing of her evidence and as I say all the grounds that she relied on in the correspondence which are the grounds that preceded the incident of yesterday do not reveal any merit whatsoever.

This commission is working under very serious time constraints. It has got to finish its work within a certain time
10 that has been laid down by the court and it cannot afford to have postponements which can be avoided.

But as I have said I will postpone the hearing of Judge Makhubele's evidence because of the reality that the commission is faced with. I am going to postpone it to a specific date. There was an indication in the correspondence from her lawyers that she was asking for a month – a postponement of about a month. I am not going to postpone the hearing of her evidence for a month. I am going to postpone it for a week.

20 She has had ample time to do what needs to be done. Her Counsel has said she has offered to file her affidavits by end of next week. I am going to direct that she should file her affidavits by close of business on Wednesday next week and I am going to postpone the hearing of her evidence to Monday the 3 August 2020 at ten o'clock.

Now in order to do that the commission will have to move – change its plans for that Monday because there was other evidence that I was going to hear on that Monday. So the commission will have to move that evidence to the following day and this will cause some inconvenience to other people.

But I am determined that we must hear – I must hear her evidence and it must not take long before I hear her evidence.

10 Furthermore, unfortunately I am – I find it necessary that I issue a directive that she must appear before this commission on that day. I would not normally do that against a Judge because if as Chairman of the commission I request that a Judge appears before the commission I expect that that would be enough. It has been enough in regard to many other people who are not judges. When they get a request from the commission that I would like them to file affidavits or to appear they have willingly agreed to appear and to file affidavits without having to be compelled.

20 And with regard to the filing of the affidavits by Judge Makhubele I am also going to make a directive.

The directive that I issue is a directive provided for in Regulation 10(6) of the Regulations of this commission.

That sub regulation reads as follows and I quote:

“For the purposes of conducting an investigation the

Chairperson may direct any person to submit an affidavit or affirm declaration or to appear before the commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated and may examine such person.”

Therefore, this is the order/directive:

1. The hearing of the evidence of Judge Makhubele is postponed to Monday the 3 August 2020 in this venue.
- 10 2. In terms of Regulation 10(6) of the Regulations of this commission I direct Judge Makhubele to deliver to the commission on or before Wednesday – what is the date on Wednesday? 29. On Wednesday – is it 29? Ja. On or before Wednesday 29 July 2020 an affidavit or affirmed declaration or affidavits or affirmed declarations responding to the affidavits of Ms Ngoye, Martha Ngoye, Mr Dingiswayo, Mr Mogashoa, Mr Achmat and Mr Botes insofar as each one of those affidavits may relate to her or implicate her or mention
20 or have some allegation about her.
3. Judge Makhubele is directed in terms of Regulation 10(6) of the Regulations of this commission to appear in person before this commission at ten o'clock on Monday the 3 August 2020 for the purpose of giving evidence and to be questioned with regard to various

allegations made in the affidavits of the persons to whom I have referred in this directive.

That is the directive. We will then now adjourn. The proceedings are then adjourned and on Monday the commission will hear evidence from the former Minister of Police Mr Nkosi Nathi Nhleko and during the week other witnesses also in the Law Enforcement sector. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 27 JULY 2020